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Sonargaon University

Research Monograph

On

Concept of Basic Structure of the Constitution: Safeguarding Constitutional Identity

This Research paper is submitted in partial fulfillment of the requirements of the degree of LLB (Honors) under Sonargaon University.

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At first, thanks to almighty, who has been kind enough to let me complete this Research Monograph in right time.

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From beginning of my research, I am personally indebted to some book writers for their kind and valuable writings. Thanks to all from the bottom of my heart.

CERTIFICATION BY THE RESEARCH ADVISOR

This is hereby certified that the research Monograph on the topic **''Concept of Basic Structure of The Constitution: Safeguarding Constitutional Identity"** submitted by student Md. Tamim Rahman, ID: LLB-1903018020 Batch: 18th in fulfillment of the requirements for LLB (hon's) from Sonargaon University, under my active supervision and guidance and that no part of this paper has been submitted any place earlier, as far as I know.

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DECLARATION

Md. Tamim Rahman, ID: LLB-1903018020 Batch: 18th of LL.B program of Department of Law of Sonargaon University, do hereby declare that the Research Monograph Titled **‘‘Concept of Basic Structure of The Constitution: Safeguarding Constitutional Identity”** an original work. The assigned work has done by me for partial requirement of my LLB degree, as a part of academic curriculum. I certify that this thesis does not incorporate without acknowledgment any material previously submitted for a degree or diploma in any university; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person except where dereference is made in the text.

I also declare that the presented work does not breach any existing copyright and no portion of this research monograph has been copied entirely from any work done earlier for a degree or otherwise.

Signature:
Date:

LETTER OF TRANSMITTAL

To,
MD.Deedarul Islam Bhuiyan
Head and Assistant Professor
Department of Law
Sonargaon University, Dhaka.

Subject: For the submission of research Monograph titled ‘‘Concept of Basic Structure of the Constitution: Safeguarding Constitutional Identity”

Dear Sir,

This is a matter of joy for me to submit the research monograph on the title **‘‘Concept of Basic Structure of the Constitution: Safeguarding Constitutional Identity”** While doing this research monograph, I have tried my level best to keep the required standard. I Hope, this dissertation will fulfill your expectation. I hope that you would be kind enough to go through this dissertation for your kind evaluation. I am always available for any clarification or any other necessity of any part of this research Monograph at your convenience.

Yours obediently

Md. Tamim Rahman
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ABBREVIATIONS

AD : Appellate Division

HCD : High Court Division

DLR : Dhaka Law Reports

BLD : Bangladesh Legal Digest

AIR : All India Reporter

SC : Supreme Court

PLD : Pakistan Legal Digest

BLT : Bangladesh Law Times

SCC : Supreme Court Cases

BLC : Bangladesh Law Chronicles

Abstract:

The basic structure doctrine is the judge-made rule that some features of the Constitution of India are beyond the limit of the powers of amendment of the Indian parliament. The doctrine was first expressed in 'Kesavananda Bharati v. The State of Kerala' reflects judicial distress at the perceived danger to the moderate constitutional order caused by the Indian National Congress, in particular under Indira Gandhi. The basic structure doctrine is only applicable to the constitutionality of amendments and not to ordinary Acts of Parliament, which must match to the whole of the constitution and not just to its basic structure.

On April 24, 1973, the Supreme Court ruled in Kesavananda that even though the Twenty-fifth Amendment of 1971 was suitable, the court still kept back for itself the judgment to reject any constitutional amendments passed by Parliament by asserting that the amendments cannot modify the constitution's "basic structure".

The case of Anwar Hussain.Vs. Bangladesh widely known as 8th Amendment case is a famous judgment in the constitutional record of independence Bangladesh. This is the earliest judgment whereby the Supreme Court of Bangladesh as salient down an amendment to the constitution ready by the parliament. By two court order appeal the amended Art 100 & the notification of the Chief Justice were confronted as mega vires. A division bench of the HCD discharged the appeal instantly. Leave was established by the Appellate Division by a majority of 3 to 1 striking down the amendment **8th** The standard argument of the judgment is that, the constitution rests on some fundamental main beliefs which are its structural supports which the parliament cannot amend by its amending power for; if these supports are discharged or damaged then the entire constitutional configuration will lose its validity.

CHAPTER -1

Introductory Part

1.1 Introduction:

Constitution is the main directive instrument in every democratic country. It gives the various fundamental rights to its citizens and also contains the provisions in relation to state policy. The Constitution of Bangladesh is Supreme over the legislations in Bangladesh. It represents Bangladeshis a democratic republic nation where all the power is in the hands of Bangladeshi people and characterizes basic political principles of the state and stands for the fundamental rights of citizens. It was approved by the Assembly of Bangladesh on November 4, 1972; it was exercised from December16, 1972. The constitution stands as the most powerful evidence to state Bangladesh as a unitary, independent and Republic, founded on a struggle for national liberation, and that is how we achieve the People's Republic of Bangladesh. It lays a strong foundation of nationalism, secularity, democracy and socialism as the essential ethics that stands for the Republic and declares the quest of a society that gives its citizens- the rule of law, fundamental civil rights and independence as well as fairness and even handedness, political, economic and social.1 Firstly, we have to know that, what the basic structure of the constitution is. This doctrine is not a settled principle of constitutional law. It is growing principle of Constitutional Jurisprudence. The basic structure doctrine.

1.2 Aims and Objectives

The aim and objectives of the research is to analyze the desirability of application of doctrine of the basic structure in Bangladesh and the judicial responses and to find its impacts on the constitutional development in Bangladesh. Following objectives will be carried out in the study,

- To assess whether there exists, really, the concept of basic structure in the field of constitutional jurisprudence or not.

- To examine the development of the concept of basic structure in a nutshell.

- To weigh up whether the amending power of the constitution is a constituent power or lies under some limitations.

- To ponder its necessity of application of the concept of basic structure in the field of constitutional jurisprudence in Bangladesh.

- To scrutinize the recent view of courts and the international, regional and national judicial responses, covering from statutory law to up-to-date judicial decisions, towards the concept of basic structure in adjudicating cases filing before it.

- To analyses what would be the privileges and shortcomings of the doctrine of basic structure if applied in the constitutional jurisprudence in Bangladesh.

1.3 Importance of the Study

Since the political leaders of our country are by and large corrupt and they amend the constitution in favour of them to retain the power for good in Bangladesh, there should have some fundamental main beliefs, as a safeguard of constitution, which are its structural supports which the parliament cannot amend by its amending power.

In this sense, there should have the application of the Concept of Basic Structure in the Constitution of Bangladesh. On the other hand, judges are becoming politically biased and courts structure is becoming weaker because of political interference in adjudicating any cases in Bangladesh in recent years. Therefore, there has great chance to be abused, by the judiciary, this doctrine in our country and accordingly some past judgment, in fact, intensify this possibility. Hence, there has great controversy on the point of the application of the Concept of Basic Structure in the Constitutional jurisprudence in Bangladesh.

The application of the Basic Structure is desirable or not is the great concern in recent years. This study mainly focuses on this big issue to examine the existence and desirability of application of the Concept of Basic Structure in the Constitution of Bangladesh. Therefore, this study has enormous importance considering the present situation of the Constitutional jurisprudence in Bangladesh.

1.4 Scope and Limitations of the Research

The scope of my study is to check the desirability of the application of the doctrine of basic structure in Bangladesh. This research does not find out the specific causes behind the individual and community behavior pattern whereas the main focus area of this research is mainly the legal responses. For that reason, many domestic and Indian case references have been discussed here for better understanding. In my research I have faced some limitations also.

- Since the research topic is vast, actually, I have, comparatively, very limited time to meet and take some interviews of constitutional experts. Therefore, I have used here secondary materials only, such as: on books, internet, and various journals.

- As the focus area of this research is mainly on desirability and judicial responses in Bangladesh, based on landmark cases, I could not refer any data from internet for not being Bangladeshi references available here.

- In my research the views and expressions are exclusively mine accordingly any off beam enclosing in this research paper I will be accountable for that.

1.5 Methodology

The methodology of this research paper is basically analytical not empirical and by and large based on secondary materials though to some extent I have used primary data also. The secondary sources of information are Books, E-Books, DLR, BLD, BLT, AIR, PLD, online case reports, journals, websites and newspapers. In doing so, obviously, much more emphasis has been given on the Constitution by frequently referring and quoting the 5th, 7th, 8th, and 13th Amendment cases, especially on Anwar Hossain Chowdhury vs. Bangladesh popularly known as 8th amendment case by which the concept of basic structure has been recognized in Bangladesh. There are also given some Indian case references like Kesavananda case, Golak Nath's case and Indira Nehru Gandhi .Vs. Raj Narayan known as election case as these cases have momentous contribution in establishing the concept of Basic Structure in this subcontinent.

Chapter-2

The Basic structure of the constitution of Bangladesh: Bangladesh perspectives

The Doctrine of Basic Structure of the Constitution can be found in the sub-continent, as Dr. Kamal Hossain submitted in the 8th amendment case in a decision of the Dhaka High Court. This decision was first upheld by the Pakistan Supreme Court in *Fazlul Quder Chowdhury Vs Abdul Hague* case.

In *Anwar Hussain Vs Bangladesh* case, the principal argument of the judgment is that-"The Constitution stands on certain fundamental principles which are its structural pillars which the parliament can't amend by its amending power for; if their pillars are dismissed or damaged then the whole Constitutional structure will be down."

Article 7(B) of the Bangladesh Constitution also refers to the basic structure of the constitution which can't be amended. In Addition to this,

Justice B.H. Chowdhury states 21 basic structures

Justice Shahabuddin states 7 basic structure and

Justice M.H. Rahman states preamble is the Basic structure.

2.1 The Basic structure of the constitution of Bangladesh:

The constitution shall be the supreme law of the land for all times. Nothing can be done which is brings about a violation of the constitution and its basic features. That means the constitution of Bangladesh beings the embodiment of the WILL of the republic of Bangladesh which mentioned in Article 7 of the Bangladesh constitution. In the case of ANWARHOSSAIN Vs. Bangladesh[1], this case is also known as the eighth amendment case. Here Article 7 was prevailed. This is the first case whereby the Supreme Court of Bangladesh as striking down an amendment to the constitution made by the parliament. By two writ petition the amended article 100 and the notification of the chief justice were challenged Ultra vires. A division bench of

[1] ANWAR HOSSAIN Vs. Bangladesh

the High Court Division (HCD) dismissed the petition summarily. Leave was granted by the Appellate Division (AD) by a majority of 3 to 1 striking down the 8th amendment.

The principle argument of the judgment is that-the constitution stands on certain fundamental principles which are the structural pillars.

2.2 These basic features are:

1). Supremacy of the constitution which states in article 7 of the constitution.

2). Democracy which states in the preamble.

3) Republican government which states in the article 1 of the constitution.

4) Independence of judiciary which states in article 22 of the constitution.

5) Unitary state which is mentioned in article 9 of the constitution.

6). Separation of powers which is mentioned in article 22 of the constitution[2].

7) Fundamental rights which is mentioned in from article 26 to 47A of the constitution. These structural pillars of the constitution stand beyond any change by amendatory process.

A one party political system has been introduced instead of party political system. A new part "PART VI A " with new articles inserted for this purpose. Under new arrangement, the creation of the National party was left with the subjective satisfaction of the president. It was provided that in order to give full effect to any of the fundamental principles of state policy set out in part-2 of the constitution, the president could direct that there shall be only one political party in the state. Once the president made an order for one party under article 117A which states-all political parties of the state would stand dissolved. The president would take all necessary steps for the formation of National party. In accordance with article 117A of the constitution the president was declared the national party for the country under the name of "BAKSAL" on

[2] article 22 of the constitution of Bangladesh

24th February 1975. As a result, all existing political parties instantly stood dissolved. Bangladesh became the one party political state.

The judiciary lost its absolute independence. According to article 95, the appointment procedure of the Apex court, the chief justice would be appointed by the president and the other judges would be appointed after the consultation with chief justice. But in 4th Amendment Act- the word consultation with chief justice was deleted. In relation to security of tenure according to the article 96(2) of the original constitution -"a judge could not be removed unless parliament passed a resolution supported by majority of not less than two third of the total number of MPs on the ground of proved misbehavior or incapacity. But in 4th amendment Act deleted this provision of impeachment through parliament. Instead that the president could remove a judge including the chief justice simply by an order on the ground of misbehavior. Such misbehavior need not to be proved. It was just president's desire and wish.

The 4th amendment was direct attack on the press freedom. In June 1975, the government promulgated the newspaper (Annulment of declaration) ordinance which allowed only 4 newspaper(Dainik Bangla, Bangladesh Observr, Ittefaq and Bangladesh times [3]in fact owned and managed by the state) to continue their publication and rest of the newspaper was banned. In the case of IMDADUL HUQ CHOWDHURY Vs. BANGLADESH9, The HCD observed that by the 4th amendment the basic and essential feature of the constitution were altered and destroyed. In the same case the AD observed that "the first 3 amendments do not appear to have altered the basic structure of the constitution but the 4th amendment clearly altered the basic structure of the constitution.

2.3 Elements of Basic structure:

The doctrine of basic structure though is not exactly defined but through its contents which have been provided by the judicature clarifies a scope defining the frame or the structure of the constitution. From time-to-time basic structure is enhanced with some new contents and hence the Supreme Court is yet to define the exact basic structure of the constitution.

[3] 4 newspaper (Dainik Bangla,Bangladesh Observr, Ittefaq and Bangladesh times)

- Supremacy of the constitution
- Rule of law
- Sovereignty, liberty and republic nature of Indian polity.
- Judicial review
- Harmony and Balance between fundamental rights and directive principles.
- Separation of power.
- Federal character.
- Parliamentary system.
- Rule of equality.
- Unity and integrity of the nation.
- Free and fair elections. o Powers of SC under Article 32,136,142,147
- Power of HC under Article 226 and 227.
- Limited power of parliament to amend the constitution.
- Welfare state.
- Freedom and dignity of an individual.
- The Basic Structure concept got highlighted in various judgments of Supreme Court such as Indira Nehru Gandhi, Minerva Mills, Waman Rao and I.R.Coelho etc.

2.4 significance of Basic Structure:

- The basic structure doctrine is a testimony to the theory of Constitutionalism to prevent the damage to essence of COI by brute majority of the ruling majority.
- The basic doctrine saved the Indian democracy as it acts as a limitation of constituent power or else unlimited power of parliament might have turned India into a totalitarian
- It helps us to retain the basic tenets of our constitution so meticulously framed by the founding fathers of our Constitution.
- It strengthens our democracy by delineating a true separation of power where Judiciary is independent of other two organs. It has also given immense untold unbridled power to Supreme Court and made it the most powerful court in the world
- By restraining the amending powers of legislative organ of State, it provided basic Rights to Citizens which no organ of State can overrule.

- Being dynamic in nature, it is more progressive and open to changes in time unlike the rigid nature of earlier judgements.

2.5 Main criticisms of Basic Structure:

- The common criticism is that the doctrine has no basis in the Constitution's language. The doctrine does not have a textual basis. There is no provision stipulating that this Constitution has a basic structure and that this structure is beyond the competence of amending power
- Its detractors also believe the doctrine accords the judiciary a power to impose its philosophy over a democratically formed government
- There is no definite elucidation on what exactly constitutes basic structure, thereby, making the doctrine ambiguous
- In recent times, the doctrine has been invoked in cases that has been regarded as examples of judicial overreach. Ex: NJAC bill was declared null and void by the SC by relying on this doctrine

2.6 Some important terminologies:

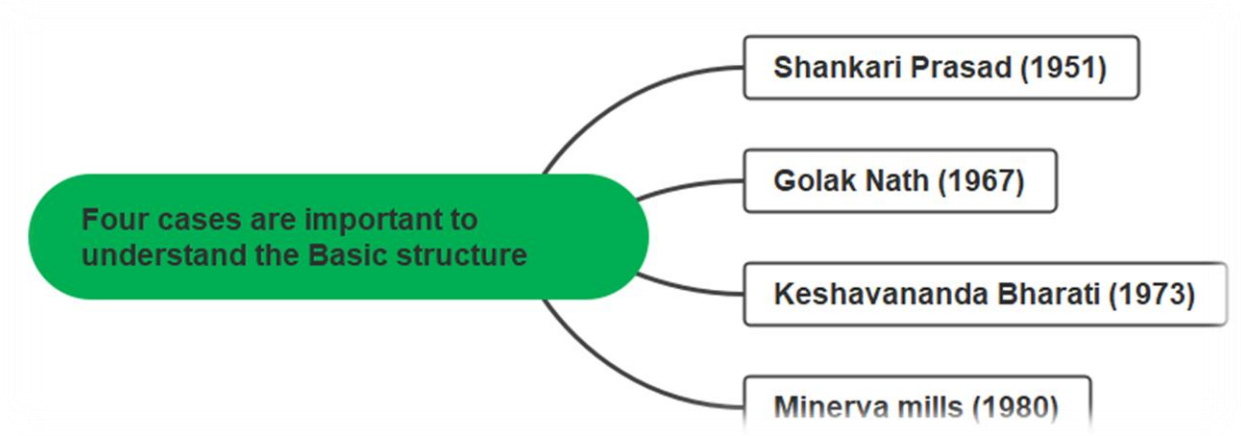
Judicial activism	• *Judicial activism is a judicial philosophy holding that the courts can and should go beyond the applicable law to consider broader societal implications of its decisions.* • Examples: Keshavananda Bharati case, Maneka Gandhi case • PIL has become the major tool for giving effect to judicial activism in recent times
Judicial overreach	• *Using judicial powers to interfere with the proper functioning of executive and legislature.* • Examples: Banning firecracker, regulations related to allowing bars near highways

Judicial review	• Judicial review is the power of courts to decide the validity of acts of the legislative and executive branches of government. • Courts derive powers for their judicial review under Art 13(2), Art 32 and Art 142. Example: Scrapping section 66A of the IT act

Chapter -3

3.1 The origin and Development of the concept of "Basic Structures" of the constitution

The concept of the basic structure of the constitution can be found in the sub-continent in the case of Pakistan Supreme Court in -FAZLIL QUDER CHOWDHURY Vs. ABDUL HAQUE2. It was held that Franchise and form of government are fundamental features of a constitution. The power conferred upon the presidency by the constitution of Pakistan to remove difficulties does not extend to making an allegation in a fundamental feature of the constitution. The development of the Basic structure of the constitution in INDIAN jurisdiction. The first formal judicial formulation of this doctrine came out in the KESEVANANDA'S CASE. Before the Kesevananda's case the issue of the basic structure came to be applied indirectly in GOLAK NATH'S case. In Golak Nath's case the court held that- Parliament had no power to amend fundamental rights as to take away or abridge any of them. C.J Subba Rao said that Fundamental rights are assigned transcendental place under our constitution.



They are kept beyond the reach of parliament. But this judgment gave rise to acute controversy. It was apprehended that the fundamental rights in the constitution would become static creating hindrances in the way of enactment of socio-economic legislation required to meet the needs of a developing society. To get over this problem, Indian parliament passed the 24th constitution Amendment Act,1971 which laid down that, the parliament might in the exercise of its constituent power amend any provision of the constitution be it of fundamental rights or of any other one. The validity of 24th constitution Amendment Act,1971 and the 25th amendment Act which curtailed the power of judicial review was challenged in

KESEVANANDA CASE. By majority the court overruling the GOLAK NATH'S case. It was held that- The parliament had the power to amend any or all the provisions of the constitution including those relating to fundamental rights. But this power of amendment of the constitution was subject to certain implied and inherent limitations. Parliament could not amend those provisions of the constitution which affect the basic structure or framework of the constitution. The Supreme Court of INDIA also apply the principle of Kesevananda's case in the INDIRA GANDHI Vs. RAJ NARAYAN5. In the judgment of INDIRA GANDHI case there was involved the question of the validity of the 39th Amendment Act,1975 of the Indian constitution. It took away the power of any court. The Supreme Court to decide any doubts and disputes arising in connection with the election of the Four high officials of the state, that is: President, vice-president, prime minister and the Speaker.

3.2 Types of Basic Structure:

On the basis of treatment given by the Judges over "Basic Structure" principle in Bangladesh. It would be appropriate to use this doctrine in Two sense .

1.Basic Structure principle in general sense or Numerable sense and
2. Basic Structure principle in real or Substantive sense.

3.3 Basic Structure principle in general sense or Numerable sense:

Most of the judges so far have treated this doctrine from Enumerative point of view. Some Judges says that there are 21 basic structures, some are saying for 6 and some are saying for 3. No unanimity can be found among the judges as to the substance of this doctrine. If this doctrine is meant from this general or numerable sense, then there are some dangers:

Firstly, the judiciary may be applying any provision of the basic structure principle, reduce or narrow down the justifiable scope of amending power of the parliament. The absolute judicial dictation, the whim of judiciary may take the place of constitutional limit in respect of amending power of the constitution.

Secondly, the judiciary may, by applying any provision under the basic feature principle, reduce or narrow down the justifiable scope of amending power of the parliament.

Thirdly, In some cases the judgment of the court will be reduced into nullity, reducing the dignity and institutional value of the judiciary. It has been seen in the judgment of the case of BADRUL HAIDER CHOWDHURY Vs. BANGLADESH in the eighth amendment case

3.4 Basic Structure principle in real or Substantive sense:

In real or substantive sense, the doctrine of the basic structure means those fundamental principles and objectives of the constitution which are its structural pillars. On which the whole edifice of the constitution is erected. If these principles are taken away or destroyed, the constitution will lose its original and inherent identity and character. If it is found that constitution amendment is made by parliament and it has affected or likely to destroy any of the basic features of the constitution, then the amendment should be declared unconstitutional and void 7. D.

CHAPTER -4

4.1 What are Doctrines:

It is a principle or belief or set of beliefs that are well established and backed by logical. In constitutional law, Doctrines holds a very important role even when the doctrines are not mentioned in the constitutional instrument. Often the interpretation of a constitution refers back to the original intent of the creates and analyses what they might have thought during the creation of that constitution and that often helps the people to understand the doctrines behind a constitution.

4.2 The doctrine of Basic Structure:

In every constitution there are some fundamental elements that are considered as a main component of the constitution and if those particular elements are changed or violated than the main purpose of the constitution are hampered, therefore, in most of the constitution there are provisions that are preserved not to amend. These fundamental elements that are specially protected by the constitution itself are considered as the basic structure of the constitution.

In Bangladesh by the fifteenth amendment Article 7A and 7B were inserted in the Constitution in a bid to end takeover of power through extra-constitutional means. Specially Article 7B of Bangladesh constitution referred to Article 142, Part I, II subject to provisions of Part IXA (Emergency provisions) and Part III and other provisions of articles relating to the basic structures of constitution including article 150 of part XI shall not be amendable by way of insertion, modification, substitution, repeal or by any other means.

It is often accepted that the Doctrine of Basic Structure of Bangladesh Constitution was adopted from the Indian constitution and their remarkable judgments. To have a complete Idea we are going to put a shadow on some renowned case laws of the Indian Constitution.

Case: Golaknath v. State Of Punjab [4],Outcome: parliament has no right to amend the fundamental right [on the 24th Amendment their constitution] that was, "With the executive and constitutional power government can amend any provision of the constitution"

[4] Golaknath v. State Of Punjab (1967 AIR 1643, 1967 SCR (2) 762),

That was challenged by a subsequent case: Kasabanka Bharati vs State of Kerala [5]Outcome: Parliament can amend any provision including fundamental rights of the constitution but parliament cannot amend the provisions of the constitution which strikes the basic structure.

After that judgment another amendment was issued, (Amendment 39) Which articulated that "Court shall not able to raise any question in relation to any election of President, Vice-Precedent, Prime Minister, Speaker etc."

That was followed by another case; Indira Nehru Vs Raj Narayan [6]in its judgment the court said that "The amendment was a violation of the basic structure of The Indian constitution and cancelled the 39th Amendment of Indian Constitution.

Then Comes the 42nd Amendment (1976) of Indian constitution relating the same issue, it should be mentioned that that amendment took place during an emergency period which basically said "No constitutional amendment including fundamental rights can be called in question in court" but the game is not over yet.

Another case followed that amendment, Case: Minerva mills ltd. Vs. Union of India and that case declared the previous (42) amendment fully unconstitutional with reference back to Kasabanka Bharati vs State of Kerala.

In the 8th amendment, the legislative among other changes changed Article 100 of Bangladesh constitution by which it decentralized the judiciary by setting up six permanent benches of the High Court Division outside Dhaka. That amendment was challenged by Mr Anwar Hussain by a Writ petition (Case; Anwar Hossain Vs Bangladesh) which finally reached to the appellate division of Bangladesh Supreme Court and finally, the court recognized article 100 of the Bangladesh Constitution as part of the Basic Structure of the constitution so that cannot be amended.

[5] Kesavananda Bharati ... vs State Of Kerala And Anr on 24 April, 1973
[6] Indira Nehru Gandhi vs Shri Raj Narain & Anr on 7 November, 1975

Supreme Court Decisions

Case	Decision by the Supreme Court
Shankari Prasad Vs. Union of India, 1951	The Parliament, under Article 368, has power to amend any part of the constitution
Sajjan Singh Vs. State of Rajasthan, 1965	The Parliament, under Article 368, has power to amend any part of the constitution
Golak Nath Vs. State of Punjab, 1967	The Parliament is not powered to amend the Part III (Fundamental Rights) of the constitution
Kesavananda Bharti Vs. State of Kerala,1971	The Parliament can amend any provision, but can't dilute the basic structure
Indira Gandhi Vs. Raj Narain, 1975	The Supreme Court reaffirmed its concept of basic structure
Minerva Mills Vs. Union of India, 1980	The concept of basic structure was further developed by adding 'judicial review' and the 'balance between Fundamental Rights and Directive Principles' to the basic features
Kihoto hollohan Vs. Zachillhu, 1992	'Free and fair elections' was added to the basic features
Indira Sawhney Vs. Union of India, 1992	'Rule of law, was added to the basic features
S.R Bommai vs Union of India, 1994	Federal structure, unity and integrity of India, secularism, socialism, social justice and judicial review were reiterated as basic features

The basic features of the Constitution are as follows:

1. Supremacy of the constitution
2. Republican and democratic form of government
3. Secular character of the constitution
4. Federal character of the constitution
5. Separation of power

6. Unity and Sovereignty of India
7. Individual freedom

Whether a preamble is an operative part of a constitution or not?

Basically, there are arguments on both side, the relevant landmark cases came from Indian judicial decisions. In the case, *Golaknath v. State Of Punjab* (1967 AIR 1643, 1967 SCR (2) 762) the Indian Supreme court held that parliament cannot curtail any of the Fundamental Rights in the Constitution. In the case preamble is declared as a legitimate aid in the interpretation of the provisions in the constitution but not as an operative part, it was said that preamble of the Constitution stands on the same footing as the Preamble of an Act.[1]

Under English authorities, a preamble cannot be used to restrict or extend the enacting part of the statute when the language, object and scope of the Act are unambiguous and not in doubt. It means that the preamble of an Act cannot control, qualify or restrict the meaning and application of its enacting part if that part is explicit and unambiguous. But, if the enacting part is ambiguous, the Preamble can be used to explain and elucidate it. In Powell v. Kempton Park Racecourse Co. Ltd

The preamble of Bangladesh Constitution; Operative part or not?

The issue that whether the preamble to the constitution of India can be amended or not was raised before the Supreme Court in the famous case Kesavananda Bharati v. the State of Kerala.[3] An interesting argument advanced, in this case, has been noted by Y.V. Chandrachud, J. that the Preamble may be a part of the Constitution but is not a provision of the Constitution and therefore, we cannot amend the Constitution so as to destroy the Preamble. This notion directed that the preamble of a constitution is a basic part of a constitution which cannot be changed like other provisions of the constitution; this is known as the Doctrine of Basic Structure.

It can be defined as follows; "Doctrine of basic structure is a judge-made principle stating that a country's constitution has certain basic features that cannot be amended by its legislative body. The amendment of these features will result in drastic changes to the constitution and render it unrecognizable. Hence, amendments to a constitution must not be in conflict with the

basic structure of the constitution. Alternatively, a country's legislative body, with strong reasons usually related to public safety, is allowed to amend any provisions in the country's constitution, but the amendments cannot change the basic feature of the constitution."

The question of Basic Structure had been a long debate in the case of Anwar Hussain Vs. Bangladesh(8^{th} Amendment Case)

This is the first judgment whereby the Supreme Court of Bangladesh as striking down an amendment to the constitution made by the parliament. By two Writ petition, the amended Art 100 & the notification of the Chief Justice were challenged as ultra vires. A division bench of the HCD dismissed the petition summarily. Leave was granted by the Appellate Division by a majority of 3 to 1 striking down the 8^{th} amendment. The principal argument of the judgment is that the constitution stands on certain fundamental principles which are its structural pillars which the parliament cannot amend by its amending power for; if these pillars are dismissed or damaged then the whole constitutional structure will be down.

Chapter-5

Amendment of the Bangladesh Constitution

5.1 Fifth Amendment of the Bangladesh Constitution:

An unenviable feature of the constitutional development of the Bangladesh that it had to withstand two extra constitutionals (martial law regime). In 2000, through a writ petition (writ petition no-6016 of 2000) the validity of martial law was challenged. In 2005, by a division bench of the HCD declared that the 5th amendment was illegal and unconstitutional. It was declared also illegal and void according to martial law proclamation, including the martial law regulation -7 of 1977.This case was again revived in 2009 and recently the AD has declared the same judgment which is declared by the HCD.

Separation of Judiciary from other organs:

An independence of judiciary depends on

a) A fair appointment procedure,

b) Security of tenure,

c)Adequate remuneration of the judges.

Under article 14 and 16 of the constitution 4th amendment Act 1975, the requirement of consultation with the chief justice was omitted by amending article 95 and 98 of the constitution. From 1991, by the constitutional amendment Act,1991(12th amendment), the president may appoint the chief justice but in appointing the other judges of the supreme court, he or she is not bound to act on advice of the prime minister. There is no constitutional obligation to consult with the chief justice. So ultimately prime minister as the chief Executive of Bangladesh exercise the crucial role in appointing the judges of the Supreme court. Article 94 of the constitution demands independence of the supreme court judges. But in article 116A of the constitution enumerates that the judicial officers including the magistrates have been declared to be independent in the exercise of their judicial functions. Besides this under article 115 and 1167 of the Bangladesh Constitution states that-the president makes the appointment and control of judges in the judicial service or as magistrates exercising the judicial duties

which is conflicting each other. But finally the judiciary is now separated from the Executive by the well-known case of -- MAZDER HOSSAIN CASE

In 1995 by a writ petition number 2424, Mazder Hossain[7] along with 441 judicial officer who were judges in different civil court alleged that--a) Inclusion of judicial service in the name of BCS(Judicial) under the Bangladesh civil service order 1980 is ultra vires the constitution. b) Judges of the subordinate judiciary has already been separated by the constitution. Only the rules under article 115 of the constitution, if necessary, are required to be made for giving full effect to this separation of judiciary.

The court directed its historic judgment with 12 directives points on 7th may 1997. On an extensive examination of the constitutional provisions relating to the Subordinate court (article 114 to 116A) and services of Bangladesh (Article 133 to 136). The AD held that "Judicial service is fundamentally and structurally distinct and separate service from the civil Executive and Administrative service of the Republic with which the judicial service cannot be placed on par on any account and that it cannot be ambulated, abolished, replaced, mixed up and tied together with civil Executive and Administrative service(para 76)'It also directed that, the government for making separate rules relating to posting, promotion ,grant, leave, discipline, pay, allowance, pension and other terms and conditions of the service consistent with article 116 and 116A of the Constitution.

5.2 The judgment of the AD in this case also declared

The judicial service is a service of the Republic within the meaning of the article152(1) of the constitution. Under article 133, law or rules or Executive orders having the face of rules to posting, promotion, grant, leave, discipline, pay, allowance, pension and other terms and conditions of the service consistent with article 116 and 116A of the Constitution, as interpreted by the court, be enacted or formed or made separately for the judicial service and magistrates exercising judicial functions keeping in view of the constitutional status of the said service. The court also declared that to establish a separate judicial service commission. It also declared that in exercising the control of persons employed in the judicial service and magistrates exercising judicial functions under article 116 the views and opinion of the Supreme Court shall have primacy over those Executive.

[7] writ petition number 2424, Mazder Hossain

5.3 Fifteenth Amendment:

In the 15th amendment of the constitution of Bangladesh there are revolutionary changed in the constitution. This amendment abolished the Caretaker government system abolished and Elections to be held under incumbent cabinet. This is not necessary for a Democratic country, I think. But this is not the proper time for amending this provision. Because the opposition political parties would not obey this amendment. The reason is that the political parties in Bangladesh has no minimum level of respect and belief to each other.

Islam as State religion and 'Bismillah-Ar-Rahman-Ar-Rahim' retained above the preamble. But Removal of 'Absolute Faith and Trust in Allah' from the constitution. and Revival of Article 12 to restore Secularism and freedom of religion though the State religion is "ISLAM" and Bismillah-Ar-Rahman-ArRahim' retained in the Preamble[8]. So how can it possible? This is just politics to win in political game by the political parties. It denies recognizing the indigenous people, will be termed as tribal and ethnic minorities. The people of Bangladesh shall be known as "Bengalese" as a nation and citizens of Bangladesh shall be known as "Bangladeshis". But argument is that why we known as "Bengalese" as a nation? Why the tribal are not known as their own status, Tribals in Bangladesh should be known in their own identity that is "tribal" because they are not Bengalese. So I think they(tribal) are deprived by this amendment.

Inserted articles 7A and 7B in the Constitution after Article 7 in a bid to end take-over of power through extra-constitutional means and highest level of punishment would be awarded for those power capturers by extra- constitutional means. In the case of a dissolution Parliament by any reason, election should be held within 90 days of such dissolution. Increasing the number of women reserve seats to 50 from existing 45.

[8] 'Bismillah-Ar-Rahman-Ar-Rahim' retained above the preamble. But Removal of 'Absolute Faith and Trust in Allah' from the constitution. and Revival of Article 12 to restore Secularism and freedom of religion though the State religion is "ISLAM" and Bismillah-Ar-Rahman-ArRahim' retained in the Preamble

5.4. The 8th Amendment Case (1989)

Facts and the judgment

In its epoch-making decision in Anwar Hossain Chowdhury v Bangladesh (1989),[9]31 the Appellate Division entrenched the doctrine of basic-structure when it declared part of the 8th Amendment "unconstitutional". The 8th Amendment established seven permanent benches of the High Court Division (HCD) that was (according to the original article 100) an integrated division of the Supreme Court. The Appellate Division held that parliament's amending power under art. 142 of the Constitution was 'limited' (being a 'derivative' as opposed to an 'original' constituent power) and hence could not be exercised to alter 'basic structures' of the Constitution.

A brief narration of the facts would aid in better appreciating the associated legal arguments. After assuming power in 1982, the second military regime, through various martial law regulations, diffused the HCD into seven permanent benches (each composed of three judges), six being outside of Dhaka. Later, this change was codified by amending original art. 100 via the
Constitution (Eighth Amendment) Act 1988. As a result, instead of one integrated HCD, there emerged 7 permanent benches with administratively defined territories, with pending cases having been transferred to the relevant regional permanent bench.

In the present case, the Commissioner of Affidavit refused to allow the appellant, Mr. Anwar Hossain Chowdhury, to affirm a counter-affidavit because the concerned writ petition stood transferred to the Sylhet Bench of the court pursuant to the Rules framed by the Chief Justice under art. 100(6) as amended by the 8th Amendment.

Mr. Chowdhury then filed a writ petition (No. 1252 of 1988) challenging the vires of the 8th Amendment and the said Rules, arguing that the Amendment materially altered the basic-structure of the Constitution and hence was beyond the parliament's amendment power. The High Court Division, Dhaka Bench, summarily rejected his petition on 15 August 1988, against which Mr. Chowdhury appealed to the Appellate Division.

[9] Anwar Hossain Chowdhury v Bangladesh (1989)

Dr. Kamal Hossain was engaged as the lead counsel of Mr. Chowdhury's appeal. There were two
other proceedings seeking similar remedies, of which one was an appeal33 and the other a civil petition for leave to appeal.34 These two proceedings were heard jointly with Mr. Chowdhury's.

In a 3:1 majority, the Appellate Division adopted the basic-structure doctrine and declared as unconstitutional the 8th Amendment for breaching the unitary character of the Supreme Court, a
basic feature of the Constitution. The Court accepted Dr. Hossain's lead arguments that (i) the HCD's plenary judicial power over the whole Republic was a part of the unamendable basic structure of the Constitution35 and that (ii) a parliament with unlimited amending power would be incompatible with the notion of constitutional supremacy, another basic pillar of the Constitution.

Even the lone dissenting judge, Justice A.T.M. Afzal, agreed that parliament cannot "destroy" the character of the Constitution in the name of amendment.36 For Afzal J, a destruction by an amendment would occur if any of the three organs of the State ("structural pillars") were "destroyed" or "emasculated in such a manner as would make the Constitution unworkable"

Arguments of Dr.Hossain

When the basic-structure doctrine theorizes the unconstitutionality of a constitutional amendment, it points at two types of unconstitutionality, procedural and substantive. When any amendment breaches the amendment rules, it can be said to be procedurally unconstitutional. By contrast, an amendment that is procedurally constitution-compatible can yet be substantively unconstitutional when any basic constitutional feature or fundamental core is demolished. In his arguments,38 Dr. Hossain captured both prongs of the doctrine.

First, on the procedural front, Dr. Hossain argued that the 8th Amendment did not comply with the amendment rule of the Constitution contained in art.142[10], as the long title of the amendment bill did not set out the specific articles that were to be amended. It was argued that this requirement was a vital condition for the exercise of the amending power in the first place.

[10] Dr. Hossain argued that the 8th Amendment did not comply with the amendment rule of the Constitution contained in art.142

As such, while amending art. 100, parliament by implication amended (or derogated from) several other articles and thus committed a fraud on the Constitution. This later argument was a mix of substantive and procedural unamend ability arguments.

On the point of substantive unconstitutionality, the core of Dr. Hossain's arguments was that parliament's amending power is inherently limited. To press his point on the concept of implied limits on amendment power, it was submitted as follows:

The amending power is a power within and under the Constitution and not a power beyond and above the Constitution. It does not empower Parliament to undermine or destroy any fundamental feature or 'structural pillar' of the Constitution Any power of amendment under the Constitution is subject to limitations inherent in the Constitution. The structural pillars or basic structures of the Constitution established by framers of the Constitution cannot be altered by the simple exercise of amending power.
The Parliament's unlimited power of amendment is inconsistent with the concept of supremacy of the Constitution which is expressly embodied in the Preamble and Art. 7 of the Constitution and is undoubtedly a fundamental feature of the Constitution.

Dr. Hossain then went on to focus on specific basic features of the Constitution, which he argued were irreparably damaged by the impugned amended article 100.

First, Dr. Hossain submitted that the unitary character of the Republic was derogated from. Second, he argued that the independence of the judiciary as a basic feature was dismantled. He further argued that the provision of executive notifications under clause (5) of the amended art. 100 as well as the power of the Chief Justice to enact Rules under clause (6), both affecting the "structure, status, jurisdiction, independence and effectiveness of the High Court Division", were tantamount to the delegation of constituent power to the administration and the Chief Justice, and hence incompatible with the basic structure of the Constitution. On the point of destruction of judicial independence, he argued as follows:

One cannot but marvel at the craftsmanship of Dr. Hossain's above arguments, through which he
projected the independence of the judicial organ generally, and the structural integrity of the Supreme Court in particular. The learned counsel also profitably relied on several constitutional

provisions. including arts. 44, 94, 101, 102, 107, 108, 109, 110 and 111, to buttress his arguments

Before proceeding to the next discussion, another aspect of Dr. Hossain's advocacy in the 8th Amendment case merits attention. This is the use of comparative constitutional law to help consolidate and entrench the basic-structure doctrine. As can be gleaned from his submission, he
referred to 23 foreign judicial decisions, 2 Pakistan Supreme Court cases (of 1963 and 1968) and
8 scholarly writings. In order to substantiate his argument that parliament's amending power was
impliedly limited by the Constitution itself, Dr. Hossain cited a 1978 piece by Professor Upendra
Baxi on "the nature of constituent power" and a book by constitutionalist Walter F. Murphy titled Constitutions, constitutionalism, and democracy (1988). At a time when the validity of a constitutional amendment was being adjudicated for the first time in Bangladesh, not only was the basic-structure doctrine a relatively more controversial and nebulous idea than it is today, but it was also a daunting challenge for the court to extend its judicial review to a constitutional amendment, given the country's remarkably underdeveloped constitutional jurisprudence. Therefore, reliance on comparative constitutional material, especially the Indian doctrine of limited amending power of parliament, seemed a strategically profitable method. Although Dr. Hossain relied on the Constitution of Bangladesh in earnest, the borrowing of constitutional reasoning from comparative sources greatly helped him in his efforts to convince the judges to adopt the doctrine.

5.6 The 13th Amendment Case (2011)

The judgment and consequences ,In Abdul Mannan Khan v Bangladesh (2012)[11],42 the Appellate Division by split decision (4 to 3) in May 2011 prospectively invalidated the Constitution (Thirteenth Amendment) Act 1996 that introduced the neutral and apolitical interim Caretaker Government (CtG) system. The CtG was to be in power during the interregnum between two elected governments (i.e., ninety days),

principally to oversee a free and fair national election. Before the system was abolished in 2011,
national elections were held under the CtG on three occasions (1996, 2001 and 2009). In striking
down the 13th Amendment, the Court reasoned that the institution of CtG, being an unelected government and involving retired chief justices in the system, was against "democracy" and "judicial independence," two elements of the basic structure of the Constitution.

Abdul Mannan Khan was an appeal against the HCD's decision in M Saleem Ullah v Bangladesh (2004)[12]. This case was filed as a public interest litigation by a lawyer on grounds that the CtG was incompatible with the Constitution's basic structures. Dismissing the challenge, the HCD held that the CtG system, instead of destroying the democratic character of the polity, helped democracy to consolidate. In regard to the constitutionality of engaging a retired chief justice as head of the CtG, the Court preferred not to interfere with political wisdom, leaving it for parliament to seek a better option. The legality of the CtG had been challenged earlier in another judicial review petition, but the challenge was rejected summarily (25 July 1996) as the Court found "no unconstitutional action" on the part of the "legislature" in enacting the impugned Amendment to provide for the CtG system for a "limited period".

These rationales of the HCD, underpinned by a trait of judicial restraint over structural or political/policy issues, were brushed aside by the Appellate Division. I had earlier argued that the
plurality Court misapplied the basic-structure doctrine in this case. The misapplication of the doctrine resulted from a merely textual interpretation of the Constitution, to the exclusion of

[11] Abdul Mannan Khan v Bangladesh (2012)
[12] M Saleem Ullah v Bangladesh (2004)

the local socio-political context. Further, the majority court implausibly turned down the arguments of six out of eight amici curiae including Dr. Kamal Hossain, who urged the Court to consider the validity of the Amendment in the compelling context of the then political crisis followed by consensus that culminated in the caretaker government formula.

It is not surprising that the Appellate Division's 13th Amendment decision had serious political implications. The decision effectively sharpened the then political crisis over the CtG issue. The
Awami League government that assumed power following the 2009 elections earlier indicated that it would discard the CtG system. Within two months of the Court's "short order" on 10 May 2011, the government enacted the Constitution (Fifteenth Amendment) Act 2011 to eliminate the CtG system. This exclusion of the CtG was done without the concurrence of major political parties, including the main opposition party (the Bangladesh Nationalist Party). The opposition demanded the restoration of the CtG system, ultimately boycotting the January 2014 general election.

Ironically, the unilateral and whimsical exclusion of the CtG system on the plea of its being "undemocratic" resulted in a distorted and illiberal democracy, since the tenth parliament was a
product of effectively a one-party election, with the Awami League once again in power but without any real opposition in parliament. Moreover, candidates in 153 constituencies (out of 300 general seats) were declared "elected" without contestation. It has therefore been a widely held view that the 2014 elections were deficient in constitutional legitimacy

Arguments of Dr. Hossain

In this case, Dr. Kamal Hossain appeared as an amicus curiae. His written submission, a copy of
which I was kindly presented with, represents a classic essay in the law of judicial review of constitutional amendments. Dr. Hossain argued that the 13th Amendment or the system of an election-time caretaker government was not incompatible with the Constitution. His major points
can be summarized as below:

(i) The 13th Amendment was a result of a political consensus and hence not unconstitutional;

(ii) It was not destructive of democracy, a basic feature of the Constitution, but an aiding mechanism to help democracy entrench itself and prosper; and

(iii) The CtG system did not breach the independence of judiciary, as the appointment of a retired Chief Justice as the Chief Adviser was not the only option.

First, Dr. Hossain saw the Constitution as a political process that evolves along the life, experience, and the needs of a society. He aligned this functional/social concept of a constitution with the ability of the court to determine the legality of any amendment. For him, the validity of a constitutional amendment, "which was made based on consensus of major political parties (and sections [of the public] including civil society) and had been acted upon by them in each of the successive elections, should not be the subject matter of a challenge going to the root of its constitutionality". "On a close analysis", he continued, "it appears that the grievances [of the litigants] are in fact about the manner in which the provision has been applied in specific cases/events, in particular, the mode/manner in which the Chief Adviser discharged his responsibility in 2001, and the manner in which the Chief Adviser was appointed and a number of actions taken by him in 2006 have raised questions about his role.

Dr. Hossain drew from the historical evolution of the CtG system, demonstrating how inevitable it was in the context of the tendency in Bangladeshi politics of manipulation and engineering of elections by the party in power. The 13th Amendment was an important constitutional device, since it fulfilled the political demands for a caretaker government to ensure free and fair elections for the sake of the constitutionally mandated democratic political order. it fulfilled the political demands for a caretaker government to ensure free and fair elections for the sake of the constitutionally mandated democratic political order.

Secondly, he asked the Court to adopt an approach of purposive or harmonious constitutional interpretation when defining democracy or adjudicating the vires of a constitutional amendment.

Citing Mahmudul Islam's Constitutional Law of Bangladesh, Dr. Hossain argued that every "constitution is founded on some social and political values and legal rules are incorporated to build a structure of political institutions aimed to realize and effectuate those values. Therefore, the legal rules incorporated in the body of a constitution cannot be interpreted in isolation from those social and political values and the purpose which emerges from the scheme of the constitution".

The approach of the apex court thus ought "to recognize that the Thirteenth Amendment was made in the context of the situation created in 1996"

In the face of the argument that the CtG system was undemocratic, Dr. Hossain contended that the alleged constitutional inconsistency of the Amendment was misconceived. The foundation of

democracy, he went on to say, is article 7 of the Constitution, that provides for popular sovereignty and constitutional supremacy[13]. "The Thirteenth Amendment by seeking to supplement the Election Commission to ensure free and fair elections, thus, contributes to strengthening the electoral/democratic process". To substantiate his argument Dr. Hossain quoted the following from Amartya Sen's The Argumentative Indian:

Public reasoning includes the opportunity for citizens to participate in political discussions and to influence public choice. Balloting can be seen as only one of the ways – albeit a very important way – to make public discussions effective, when the opportunity to vote is combined with the opportunity to speak and listen, without fear. The reach – and effectiveness – of voting depend critically on the opportunity for open public discussion.

To overcome the arguments of the petitioners that the CtG system, by involving the retired chief

justices, breached the principle of independence of judiciary, Dr. Hossain made certain innovative and society-specific arguments. The maintenance of rule of law called for a truly

[13] article 7 of the Constitution, that provides for popular sovereignty and constitutional supremacy

independent judiciary, for which there needed to be a democratic government established by a fair and free election. Thus, the consensus about the retired Chief Justices' involvement in an election-time government ought not to be considered a breach of the principle of judicial independence. Further,it was argued that the "independence of the judiciary itself has to provide checks on the Caretaker Government to ensure that [that] independence is not infringed". Relying on the famous Masdar Hossain Case (2000), in which the Appellate Division observed that they found "no provision in the Constitution which curtail[ed], diminished[d] or otherwise abridge[d] this independence", Dr.Hossain argued that the Court by implication accepted the constitutionality of provisions of the CtG. Another opposing argument was that the incumbent government may seek to appoint and promote judges with the pre-determined objective of gaining undue advantage during elections from any judge so appointed. Dr. Hossain submitted that that would only depend on the integrity and inner strength of the judge concerned.

These arguments portray certain standards which a Court should adhere to when deciding a complex yet purely society-specific constitutional amendment. The most attractive of his arguments is that a constitutional amendment that reflects an overwhelming public demand and is based on sheer political consensus (reflected not necessarily in the voting in parliament) must not be seen as unconstitutional by mundanely looking at certain texts of the Constitution. I take this as having portrayed a 'limited doctrine' of basic-structure. In other words, Dr. Hossain's arguments can also be interpreted as having shown the dangers of abuse of the doctrine. The plurality court in the 13th Amendment Case did not, however, accept his arguments, and the nation has already witnessed unwholesome political consequences of this unwise refusal, as elections in Bangladesh have turned into a ploy at the hands of the incumbent government in power, leading to the boycott of the 2014 elections by all major political parties.

Undeniably, however, Dr. Hossain's arguments achieved remarkable success as three out of seven Justices accepted them. In his powerful dissent, Justice Muhammad Imman Ali, for example, reasoned that "the Thirteenth Amendment was neither illegal nor ultra vires the Constitution and does not destroy any basic structures of the Constitution.[14]" For Justice Ali, the republican and democratic character of the State was no more infringed on or after this

[14] Dr. Hossain's arguments achieved remarkable success as three out of seven Justices accepted them. In his powerful dissent, Justice Muhammad Imman Ali, for example, reasoned that "the Thirteenth Amendment was neither illegal nor ultra vires the Constitution and does not destroy any basic structures of the Constitution.

Amendment than it had been before the care-taker government system was introduced. Ali, further reasoned that in the aftermath of the 1996 political quagmire, the people chose the CtG system as a solution. Accordingly, the solution to the current crisis must come from the representatives of the people and ought to be worked out through dialogue in parliament. The other two dissenting judges, Justice Abdul Wahhab Mia and Madam Justice Nazmun Ara Sultana, also preferred to defer the issue to the people or the future.

5.7 The 16th Amendment Case (2017)

Background and the judgment

On 3 July 2017, the Appellate Division in Bangladesh v Asaduzzaman Siddiqui (2017) invalidated the Sixteenth Amendment of 2014 that restored an original constitutional scheme regarding the parliamentary removal of Supreme Court judges[15]. By this, the Court endorsed the
HCD's 2:1 decision in Asaduzzaman Siddiqui v Bangladesh (2016) Dr. Hossain appeared as an
amicus curiae before both divisions of the Supreme Court, arguing that the Amendment was unconstitutional as it breached the principle of independence of judiciary I have argued elsewhere that the Appellate Division's decision was an inappropriate application of the basic-structure doctrine in as much as the 16th Amendment in effect restored an original constitutional system that the constituent people (by virtue of original constituent power) enacted
in their 1972 Constitution. I have also argued that the 16th Amendment was not a breach of judicial independence, as there remained an option, under clause (3) of art. 96, to introduce by law a peer-review process within the system of parliamentary removal of judges. In this paper, however, I focus on the innovativeness of Dr. Hossain's arguments by which he successfully persuaded the Court that the 16th Amendment was unconstitutional in light of the changed

[15] On 3 July 2017, the Appellate Division in Bangladesh v Asaduzzaman Siddiqui (2017) invalidated the Sixteenth Amendment of 2014 that restored an original constitutional scheme regarding the parliamentary removal of Supreme Court judges

political scenario in the country reflected in, among other things, the lack of independence of members of parliament and absolute parliamentary majority .

Bangladesh's original Constitution (1972) provided, in art. 96(2), for the removal of a Supreme Court judge by an order of the President, pursuant to a resolution of parliament passed by a two-
thirds majority, but only on the ground of proven misbehavior or incapacity of the judge[16]. Before this provision was ever tested, the Fourth Amendment (1975) had completely done away with it, by providing for the removal of judges merely by an order of the President. In August 1975, the Constitution itself was thwarted and a lingering period of extra-constitutional regimes installed. The first military regime extra-constitutionally amended the judicial removal clause to introduce a peer-driven removal process called the Supreme Judicial Council (hereafter 'SJC') composed of the Chief Justice and two other most senior judges.

The system (art. 96) provided that a judge could be removed by order of the President, if the SJC upon a hearing and inquiry recommended his or her removal. This judiciary-led process of SJC was later affirmed by the Fifth Amendment (1979), which was struck down by the Appellate Division in 2010.63 The 5th Amendment decision of the Appellate Division, however, validated the SJC There was indeed no serious opposition to the system of SJC. Rather, the Supreme Court approved and appreciated the SJC. The government nevertheless replaced the SJC with the original scheme of parliamentary removal of Supreme Court judges. At first sight, the 16th Amendment's purpose seems to be honest insofar as it restored the original scheme. If one were to dig deeper into the background, however, the Amendment reveals itself as a product of a predatory and dominating politics. A couple of years before this Amendment was passed, senior ruling party leaders threatened in parliament to restore the power of parliament to remove judges of the Supreme Court. There emerged a tug of war between a particular judge of the HCD and the Speaker of the House of the Nation when the latter commented in the House that the judges were quite prompt in issuing decisions that concerned their own stake. The case centered around a decision of the HCD that involved the release of a government-owned property in favor. of the Supreme Court. The leading judge in the concerned decision countered the Speaker's comments and warned that it might be regarded

[16] Bangladesh's original Constitution (1972) provided, in art. 96(2), for the removal of a Supreme Court judge by an order of the President, pursuant to a resolution of parliament passed by a two-thirds majority, but only on the ground of proven misbehavior or incapacity of the judge

as seditious. This sparked a fierce debate in parliament regarding the alleged breach of 21the Constitution by the judge in question, and following further judicial and parliamentary exchanges, the issue seemingly faded away. It is in this background that the 16th Amendment was enacted.

Arguments of Dr. Hossain

As indicated above, given the nature of originality of the provisions reinstated through the 16th Amendment and the fact that Dr. Hossain was the Chairman of the Constitution Drafting Committee, it was not an easy task for him to develop an argument that the 16th Amendment was unconstitutional. In successfully arguing that the removal of judges by parliament was unconstitutional, Dr. Hossain employed contextual and purposive theories of constitutional interpretation. Based on the ground that the independence of judiciary was an unalterable core, he submitted that the impugned unconstitutionality had to be judged in light of the preamble and,
among others, arts. 7B, 94(4), 96, 116A and 147. Of these articles, art. 7B was enacted into the Constitution via the 15th Amendment, to provide that certain basic provisions of the Constitution
could not be amended. Dr. Hossain's arguments were that the 16th Amendment created an atmosphere of arbitrary exercise of parliament's power to remove a judge. For him, the constitutional principle of independence of judiciary precludes any kind of partisan exercise of power by the legislature in relation to the judiciary, in particular the power to remove judges of
the Supreme Court. As regards the originality of the reinstated art. 96, Dr. Hossain argued as follow n the original 1972 Constitution, removal of judges by impeachment was based on certain
assumptions, which in the light of subsequent amendment[s] would appear to be difficult to sustain. The impeachment power was vested in the Parliament on the premise that the Parliament being constituted by elected representatives of the citizens would exercise their power conscientiously and independently, free from any party directive's:
In other words, in the context of present-day politics in Bangladesh, the removal of judges through a peer-driven process, as was the case with the Supreme Judicial Council, became an unalterable basic structure of the Constitution, and hence unamendable under art. 7B that was

introduced in 2011. This claim represents the crux of his arguments which the Appellate Division accepted as a forceful or meritorious argument Dr. Hossain also argued that the 16th Amendment made the judges "vulnerable" to political force or vengeance and made their tenure "insecure". Hence, the argument went, the Amendment was unconstitutional.

Chapter-6

6.1 Conclusion:

The basic structure doctrine is a common law legal doctrine that the constitution of a sovereign state has certain characteristics that cannot be erased by its legislature. The doctrine is recognised in India, Bangladesh, Malaysia, Pakistan, and Uganda. It was developed by the Supreme Court of India in a series of constitutional law cases in the 1960s and 1970s that culminated in *Kesavananda Bharati v. State of Kerala*, where the doctrine was formally adopted. Bangladesh is perhaps the only legal system in the world which recognizes this doctrine with an expressed, written and rigid constitutional manner through article 7B of its Constitution.

In *Kesavananda*, Justice Hans Raj Khanna propounded that the Constitution of India has certain *basic features* that cannot be altered or destroyed through amendments by the Parliament of India.[1] Key among these "basic features", as expounded by Justice Khanna, are the fundamental rights guaranteed to individuals by the constitution. The doctrine thus forms the basis of the power of the Supreme Court of India to review and strike down constitutional amendments and acts enacted by the Parliament which conflict with or seek to alter this "basic structure" of the Constitution. The basic features of the Constitution have not been explicitly defined by the Judiciary, and the claim of any particular feature of the Constitution to be a "basic" feature is determined by the Court in each case that comes before it.

The Supreme Court's initial position on constitutional amendments had been that any part of the Constitution was amendable and that the Parliament might, by passing a Constitution Amendment Act in compliance with the requirements of article 368, amend any provision of the Constitution, including the Fundamental Rights and article 368.

In 1967, the Supreme Court reversed its earlier decisions in *Golaknath v. State of Punjab*. It held that Fundamental Rights included in Part III of the Constitution are given a "transcendental position" and are beyond the reach of Parliament. It also declared any amendment that "takes away or abridges" a Fundamental Right conferred by Part III as unconstitutional. In 1973, the basic structure doctrine was formally introduced with rigorous legal reasoning in Justice Hans Raj Khanna's decisive judgment in the landmark decision of *Kesavananda Bharati v. State of Kerala*.[4] Previously, the Supreme Court had held that the power of Parliament to amend the

Constitution was unfettered.[1] However, in this landmark ruling, the Court adjudicated that while Parliament has "wide" powers, it did not have the power to destroy or emasculate the basic elements or fundamental features of the constitution.

Although *Kesavananda* was decided by a narrow margin of 7–6, the basic structure doctrine, as propounded in Justice Khanna's judgement, has since gained widespread legal and scholarly acceptance due to a number of subsequent cases and judgments relying heavily upon it to strike down Parliamentary amendments that were held to be violative of the basic structure and therefore unconstitutional. Primary among these was the imposition of a state of emergency by Indira Gandhi in 1975, and her subsequent attempt to suppress her prosecution through the 39th Amendment. When the *Kesavananda* case was decided, the underlying apprehension of the majority bench that elected representatives could not be trusted to act responsibly was perceived as unprecedented. However, the passage of the 39th Amendment by the Indian National Congress' majority in central and state legislatures, proved that in fact such apprehension was well-grounded. In *Indira Nehru Gandhi v. Raj Narain* and *Minerva Mills v. Union of India*, Constitution Benches of the Supreme Court used the basic structure doctrine to strike down the 39th Amendment and parts of the 42nd Amendment respectively, and paved the way for restoration of Indian democracy.

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