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On

“The Basic Structure Doctrine in Bangladesh: Evaluation Constitutional Significance”

Research Monograph Submitted for the partial fulfillment of the award of the degree

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Program: LL.B (Hon’s)

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Submitted To

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Letter of Transmittal

To

Professor Dr. A. S. M. Tariq Iqbal

Professor of Law & Dean

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Sonargaon University

Subject: Submission of Research Monograph on “**The Basic Structure Doctrine in Bangladesh: Evaluation Constitutional Significance**”

Dear Sir,

This is a great pleasure to submit the Research Monograph on “**The Basic Structure Doctrine in Bangladesh: Evaluation Constitutional Significance**” as a partial requirement for the fulfillment of my LL.B course under the Department of Law of the Sonargaon University (SU).

I have given due efforts to make this Research Monograph as fruitful one and to make it as informative as possible. I hope that this paper will not be the formality of academic course completion rather it will be a source of information for other purpose on this topic.

Yours sincerely

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Declaration

I do hereby declare that the Research Monograph Title “**The Basic Structure Doctrine in Bangladesh: Evaluation Constitutional Significance**” prepared solely by me and which has been submitted to the department of Law, Sonargaon University (SU) for achieving the LL.B (Hon’s) Degree. This is an original work of mine. No part of this research, in any way or in form, has been submitted to any University or Institution for any Degree, Diploma or for other similar purposes.

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Supervisor Certificate

This is to certify that the work presented in this dissertation is based on the work, carried out by the author herself under my supervision in Department of Law, Sonargaon University (SU).

It is also certifying that the work presented here is original and suitable for submission as the style and contents, for fulfillment of LL.B. program.

.....
Professor Dr. A. S. M. Tariq Iqbal
Professor of Law & Dean
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Acknowledgement

***In the name of Allah, the Beneficent, the Merciful".** Praise by Allah & thanks to Allah for patronizing me to finish this Research Monograph. I am very happy to finish it. It is a great Research of my life. It is a long cherished hope of my life to become a great lawyer. That's why I have admitted in the Department of Law in Sonargaon University (SU) to fulfill my dream. But through my whole study life in this field, I did not get much more opportunities to examine and show my knowledge and skill in this wide field. Lastly I have got a great chance to make my study meaningful when I got the chance to prepare a Research Monograph on **The Basic Structure Doctrine in Bangladesh: Evaluation Constitutional Significance**

I acknowledge my grateful to respected course teacher **Professor Dr. A. S. M. Tariq Iqbal** for instructing me how to prepare a Research Monograph and his famous Books lectures on this subject help me to complete my task sincerely.

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Tania Islam

ABSTRACT

The Constitution of Bangladesh is the highest law of Bangladesh. It represents Bangladesh as 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 December 16, 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 evenhandedness, political, economic and social. The above mentioned principles are regard as (basic features) part of basic structure of the court. The main object of this paper is to find out the problem of this doctrine and try to develop the doctrine of basic structure in Bangladesh. This research study will also be helped to find out the present position of doctrine of basic structure after 15th Amendment of the constitution of Bangladesh.

Key Words: Basic, Structure, Doctrine, Constitution, Bangladesh, critical, analysis

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Chapter-One

General Introduction

1.1 Introduction:

As the Constitution has been an important national issue in recent times, the term “basic structure” or “moulikkathamo” has been flying around the country raging storms in teacups. The term “basic structure” made its most recent impact when some amendments made by the Fifth Amendment were declared illegal on the basis that they tried to interfere with the basic structure or basic features of the constitution. Now, the doctrine of basic structure is once again about to decide the fact of a Constitution amendment – the Thirteenth Amendment (Caretaker Government) – this time having the potential not only to declare an amendment illegal, but also to add a game changing twist to Bangladeshi politics.

While the general perception is that the basic feature of the Constitution and the un-amendable provisions in it are listed somewhere in the Constitution itself, in fact the contrary is true. The Constitution does not explicitly make any of its Articles “un-amendable”, “unchangeable” and so on; as a matter of fact, Article 142, the Article dealing with amendment, states clearly that “any provision thereof may be amendment by way of addition, alteration, substitution or repeal by Act of parliament” provide that the amendment is passed with a two – thirds majority in Parliament.

So, if the existence of a basic structure of the constitution cannot be pointed out in the Constitution itself. The doctrine or principle that there are basic feature in a constitution which cannot be amended made its official debut in neighboring India in 1973 in the case of Kesavananda Bharati .An amendment made by the Indira Gandhi administration was challenged in court, which led to the Supreme Court developing the idea that the parliaments amending powers were not unlimited, but restricted when it came to certain basic features.

1.2 Statement of the Problem:

There are some problems which are affecting the Doctrine of Basic Structure of the constitution of Bangladesh-

1. In 8th Amendment case of Bangladesh the judges could not come into unanimity as to what constitution “basic structure” of the constitution.
2. No where the specific meaning of the doctrine of the basic structure has been found.
3. The doctrine of basic structure is not a well settled principle of constitutional law.

1.3 Rational of the study:

Every country has a constitution and it have some basic structure. The constitution also has some basic structure which is not amendable. The amendment of the constitution of Bangladesh has been an important national issue in recent times. The study of the doctrine of basic structure of the constitution of Bangladesh is needed for certainty of law. This study also needed for the development of constitutional law. The rationale of the study is to bring out how the basic structure of the constitution of the constitution of Bangladesh can be sustained.

1.4 Objective of the study:

The main objective of the research are-

1. To trace out the historical background of the issue.
2. To classify term basic structure doctrine etc.
3. To find out the problem of the doctrine of basic structure.
4. To find out the development of doctrine of basic structure in Bangladesh.
5. To find out the presence position of doctrine of basic structure after 15th Amendment of the Constitution of Bangladesh.

1.5 Methodology:

The methodology of present research work includes review of available interviews and examination of important principal documents, law books and law journals, law reports and periodicals and judicial precedents. This is a document review type of

study based on available information. It is exploratory in nature and based on both qualitative and quantitative approach. Survey method for collecting data and information are also used in this study. The key information were taken from the representatives of government, representative of Media corporation, representative of human rights, Blogs, website, newspaper and aware people who have expert knowledge about this problem.

Other related work such as browsing web and visiting libraries has been carried out. Basically work would be a combination of comparative study, description and analysis. Further the work would also be a work of both theoretical and operational research.

Therefore, the work would be mainly primary and secondary data based and comparative approach with both qualitative and quantitative method.

1.6 Limitation of study:

The core problem in doing the research is the time factor. I was within limited period to complete the research works. Which really hinder the job to be perfect? I could not gather much information to make the topics more clear though got a lot of article, paper, books, journals, and others I have failed to collect all required information from these in this short period time.

1.7 Literature review:

Although Basic structure doctrine is the introductory statement that sets out the guiding purpose and principles of the Constitution of Bangladesh but I have no remarkable research or works have been done on it. Some writers are discussed about this doctrine but no one give any fundamental concept about this doctrine.

The doctrine was first expressed in '**Kesavananda Bharati v. The State of Kerala**'¹ reflects judicial distress at the perceived danger to the moderate constitutional order caused by the Indian National Congress, in particular under

¹*KesavanandaBharati v. The State of Kerala*(1973) 4 SCC 225

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 asserting that the amendments cannot modify the constitution's "basic structure".

In the case of **M. Nagraj v. Union of India**² the court observed that the amendment should not destroy Constitutional identity and it is the theory of Basic Structure only to judge the validity of Constitutional amendment. Doctrine of equality is the essence of democracy accordingly it was held as a Basic Structure of the Constitution.

In a recent judgment **I. R. Coelho v. State of Tamil Nadu**³ the Supreme Court applied this doctrine and held that:

“All amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19 and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a Constitutional amendment, its provision would be open to attack on the ground that they destroy or damage the Basic Structure if the fundamental right or rights taken away or abrogated pertains or pertain to the Basic Structure.”

According to **American Chief Justice John Marshall**⁴, “A Constitution is framed for ages to come, but its course cannot always be tranquil. “The amending power could not be exercised in such a manner as to destroy or emasculate the basic or

²*M.Nagaraj & Others vs Union Of India & Others* (2006) AIR SC 71

³*I.R.Coelho V. State of Tamil Nadu*(2007)AIR SC 861

⁴JhonMarshall,Encyclopedia Britannica,(1st

October,2016)<<http://global.britannica.com/biography/John-Marshall>>

essential features Article 32 of the Constitution, including the sovereign, democratic and secular character of the polity, rule of law, independence of the judiciary, fundamental rights of citizens etc.

As **Justice Chandrachud**⁵ had exquisitely laid down-

“Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore, you cannot destroy its identity”.

Although I have no remarkable research but we can preliminary says that there has no such exhaustive or exclusive definition of basic structure given by the judiciary. Judicial approach has been on case to case basis to define what basically includes in the doctrine of basic structure.

Justice Mathew in Indira Gandhi case⁶ had perceptively stated

“The concept of basic structure as a brooding omnipresence in the sky apart from specific provisions of the constitution is too vague and indefinite to provide a yardstick for the validity an ordinary law”.

Every country has a constitution and it have some basic structure. The constitution also has some basic structure which is not amendable. The amendment of the constitution of Bangladesh has been an important national issue in recent times. The study of the doctrine of basic structure of the constitution of Bangladesh is needed for certainty of law. This study also needed for the development of constitutional law. The rationale of the study is to bring out how the basic structure of the constitution of the constitution of Bangladesh can be sustained.

⁵Legal Service India, Doctrine of Basic Structure-Constitutional law
(2015)<<http://www.legalserviceindia.com/articles/thyg.htm>>

⁶ *Indira Nehru Gandhi vs. Shri Raj Narain & Anothers* (1976) SCR 347

1.7 Conclusion:

In conclusion, we have no hostility in enacting a new Amendment by the present or upcoming governments, but if and when this is complete, there must be occupied debates and contribution by all the political parties, intelligentsia and apprehensive citizens. Reading the doctrine of basic structure for this research proposes various models by which the doctrine may be identified and evaluated came up. The three molds used to examine the doctrine are basic structure and the theory of originals, Basic Structure acts as balancing tool, and Basic Structure as a tool of growth. The tool is used to examine some of the limitations of the basic structure doctrine in the background of weak societies and proposes a deviating and progressive approach in judicial appliances of constitutional main beliefs.

Chapter - Two

Basic Structure of the Constitution

2.1 The origin 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 Haque*⁷. 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.

2.2 Development of the Basic structure 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 Keshvananda's Case. Before the Keshvananda's case the issue of the basic structure came to be applied indirectly in *Golaknath's case*⁸. 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.

⁷*Fazlil Quder Chowdhury vs. Abdul Haque* (1963)PLD SC 486

⁸*Golak Nath Vs. State of Punjab* (1967) AIR SC 1643

The validity of 24th constitution Amendment Act, 1971 and the 25th amendment Act which curtailed the power of judicial review was challenged in Keshvananda 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 Keshvananda's case in the *Indira Gandhi I Vs. Raj Narayan*⁹. 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.

2.3 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 senses¹⁰

- a) Basic Structure principle in general sense or Numerable sense and
- b) Basic Structure principle in real or substantive sense.

a) Basic Structure principle in general sense:

Most of the judges so far have treated this doctrine from Numerative point of view. Some Judges says that there are 21 basic structures, some are says for 6 and some are says for 3. No unanimity can be found among the judges as to the substance of

⁹*Indira Gandhi I vs. Raj Narayan* (1975) AIR SC 2299

¹⁰Md. Abdul Halim, Constitution, Constitutional Law and Politics, (CCB Book House, 4thed, 2009)434

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 *Anwar Hossain Chowdhury vs. Bangladesh*¹¹ in the eighth amendment case.

b) Basic Structure principles 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 a 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.

2.4 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 brings about a violation of the constitution and its basic features. That means the constitution of Bangladesh being the embodiment of the WILL of the

¹¹ *Anwar Hossain Chowdhury Vs. Bangladesh* (1989) 41 DLR (AD) 165

republic of Bangladesh which mentioned in Article 7¹² of the Bangladesh constitution. In the case of *ANWAR HOSSAIN vs. Bangladesh*¹³, 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 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. 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.
7. Fundamental rights which are mentioned in from article 26 to 47A of the constitution.

These structural pillars of the constitution stand beyond any change by amendatory process. If these principles are curtailed more than one permanent seat of the Supreme Court by exercising the amending power, then it destroying the unitary character of the judiciary. The amended article 100 is *ultra vires* because it has destroyed the essential limb of the judiciary by setting up rival courts to the HCD in the name of permanent Benches conferring full jurisdiction, power and function of the HCD.

¹² The People's Republic of Bangladesh, Article 7

The amended article 100 is inconsistent with article 44,94,101, and 102. It also reduced article 108 to article 111 of the Bangladesh Constitution. It directly violated article 114, this amended is illegal because there is no provision of transfer which is essential requisite for dispensation of justice.

2.5 Delimitation of the Basic Structure:

Former Chief Justice Shahabuddin Ahmed in the landmark verdict on the Constitution Eighth Amendment case found that Bangladesh's Constitution stands on certain fundamental principles, which are its structural pillars and if those pillars are demolished or damaged, the whole constitutional edifice will break down. He listed the following to be the basic structures of the Constitution, namely -- sovereignty belongs to the people, supremacy of the Constitution as the solemn expression of the will of the people, democracy, republican government, unitary state, separation of powers, independence of the judiciary and the fundamental rights.¹⁴

On the question of basic features, Justice BH Chowdhury in the Eighth Amendment case listed 21 'unique features' of the Constitution and held that 'some' (without specifying which) of the said 21 features are the basic features of the Constitution.¹⁵

Justice ABM Khairul Haque in the Fifth Amendment case held that sovereignty of the people, supremacy of the Constitution, rule of law, democracy, republican form of the government, unitary state, separation of powers, independence of judiciary, fundamental rights and secularism are the basis of the Constitution. Haque also stated that the Constitution is the supreme law in Bangladesh, all functionaries of the republic are the creatures of the Constitution and the existence of the country as a republic is dependent on its Constitution.

¹⁴Shakhawat Liton, *Of Chaos, Confusion and our Constitution*, 11th November 2010, The Daily Star, <<http://archive.thedailystar.net/forum/2010/November/chaos.htm> >

¹⁵Supra note - 6

Questions have arisen on many occasions on whether the legislature, in exercise of the power of amendment granted by a constitution, can alter or repeal any basic structure or feature of the Constitution.¹⁶

Justice Shahabuddin Ahmed held that the structural pillars of the Constitution stand beyond any change by amendatory process. Amendment will be subject to the retention of the basic structure. The court, therefore, has power to undo an amendment if it transgresses its limit and alters a basic structure of the Constitution, he asserted. "I think the doctrine of bar to change of basic structure is an effective guarantee against frequent amendments of the Constitution in sectarian or party interest in countries where democracy is not given chance to develop," said Ahmed.¹⁷

Although Justice BH Chowdhury did not specify the basic principles of the Constitution, he stated that they are not amendable by the amending power of Parliament.

In the Eighth Amendment case, Justice ATM Afzal accepted a limited and highly restricted concept of 'basic features.' He held that the word 'amendment' has a built-in limitation in that it does not authorise the abrogation or destruction of the Constitution or any of its three structural pillars -- executive, legislature and judiciary -- which will render the Constitution defunct or unworkable.¹⁸

Mahmudul Islam in his book wrote: The Indian Supreme Court also resolved the same question of whether the legislature, in exercise of the power of amendment granted by a Constitution, can alter any basic feature of the Constitution.¹⁹

¹⁶Supra note - 6

¹⁷Supra note - 6

¹⁸Supra note - 6

¹⁹Supra note - 6

In several cases between 1973 and 1987, the Indian Supreme Court held that Parliament in exercise of the power of amendment cannot alter the basic structure or features of the Constitution²⁰

²⁰Supra note - 6

Chapter - Three

Judicial Review and ‘Basic Structure’ of the Constitution of Bangladesh

3.1 Judicial Review and Basic Structure

The celebrated doctrine of Basic Structure is the most outstanding constitutional „invention“ of the Indian Supreme Court in *Kesavananda Bharati (His Holiness Kesavananda Bharati Sripadagalavaru v State of Kerala and another*²¹ 1973 (4) SCC 225ff). The gist of the dictum is that parliament could not use its amending powers to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the constitution.

Since then the premise of this proposition has become a cause celebre (Hossain and Omar, Coup d' etat) in some newer Commonwealth countries especially in South Asia. In Bangladesh it was given a thriving trial by the Appellate Division in *Anwar Hossain Chowdhury v. Bangladesh*²² 1989 BLD (Spl) 1. A majority of 3:1 of the Appellate Division of the Supreme Court struck down the Constitution (Eighth) Amendment Act, 1988 establishing six permanent Benches of the High Court Division outside Dhaka on the charge of being violative of the basic structure of the Constitution. While scrutinizing the Anwar Hossain case three most striking constitutional implications of it become noticeable.²³

First, the Judiciary has got a free hand in defining basic structure making the concept a fluctuating one and hence bad. Second, the judiciary has got a final say over the power of the parliament to amend the constitution. Third and the most sweeping one is that judiciary will thereby not only trump over the „will of the people“ expressed through an elected legislature, but also the 'absolute will' of the people in case of amendments effected through referendum.

²¹*Kesavananda Bharati Sripadagalavaru v State of Kerala and another*, 1973 (4) SCC 225ff

²²*Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl)

²³Mahmudul Islam, *Constitutional Law of Bangladesh* (Mullick Brothers; 2nd edition 2002) .35

Against this backdrop, even though feeling deeply associated with the platitude that a democracy likes ours is vulnerable to its own representatives due to „excessive adventures with power“ coupled with uncertain political consciousness and illiteracy of the people, this paper argues:

First, that the plea of inherent limitation on the power of amendment is not plausible as it makes certain provisions of the Constitution (which again are to be determined by the court on case to case basis) virtually fixed for ever;

Second, that though mere parliamentary amendments (effected through two thirds majority in the House) may be subjected to judicial oversight, amendment effected through referendum (Article 142 (1A)) must not be; and

Third, the judicial oversight on parliamentary amendment again should be circumscribed by fixing or expanding, if necessary, the list of basic structures in Article 142 (1A) of the Constitution so that the basic structure does not become a matter of continuing uncertainty.

Before the assertions are presented with justifications and replies to possible objections, we start with a brief account of the constitutional provision regulating the amendment procedure.²⁴

3. 2. Amending process of the Constitution:

The Parliament is given the legislative power in Article 65 while the procedure of amending the constitution is prescribed in Article 142 of the Constitution of the People's Republic of Bangladesh. An amendment to the constitution may be made through a Bill passed in the parliament by the votes of not less than two thirds of the total members of the Parliament. There is however, clause (1A) inserted in Article 142 by the Second Proclamation Order No IV of 1978. This clause provided for referendum in excess of two thirds majority in cases where the amending Bill intended to amend the preamble, any of the Articles 8, 48, 56, 58, 80, 92A and 142. The President shall refer the Bill to referendum before his assent is given. This

²⁴ Supra note-15

again was amended by the Act No XXVIII of 1991 which omitted Articles 58, 80 and 92A from the list.²⁵

3.3. Amendment made by the Parliament alone:

While judicial review of laws passed by parliament is marked as a precursor of constitutional supremacy, judicial review of the constitutional amendments is seen with both „reverence and suspicion“. There are arguments disputing the judicial review of parliamentary amendment. First, some argue that Judiciary should protect the Constitution as it is and check that ordinary laws do not violate the Constitution. The Judiciary should not define how the constitution should be which, it is argued, the „basic structure“ purports to ensure. If the Court ventures into this path, that would be tantamount to Judicial Supremacy or 'government by the court'²⁶

Secondly, amendment of the constitution being a political question should remain out of judicial review (Hossain and Omar, Constitutionalism). Thirdly, the amending power of parliament (constituent power) is distinct from its plenary legislative power. The power of amendment is not dealt with in the Part which deals with composition, powers and functions of Parliament and Article 65 is not applicable in case of amendment of the Constitution under Article 142. In exercising its constituent power the Parliament is responsible to electorate only and hence judicial review of constituent action should be barred.²⁷

It is submitted that all the arguments lack strong foundation and are rebuttable.

Firstly, it is one of the salient features of „Constitutional Supremacy“ that amendment of the constitution is particularly rigid and cumbersome. There are many ways to ensure this. Requirement of two thirds majority for constitutional amendment is only one of them. Judiciary as a guardian of the Constitution should

²⁵ Supra note-15

²⁶ Dilara Choudhury, *Constitutional Development in Bangladesh Stresses and Strains* (Bangladesh edition, The University Press Limited, Dhaka, 1995) 65

²⁷ Zakir Hossain & Omar Imtiaz. 'Constitutionalism, parliamentary supremacy, and judicial review' (Mullick Brothers, 2015) 63

have a say in constitutional amendment. This is nothing but another sign of rigidity of the Constitution. Once elected, the parliamentarians do not inherit a blanket power to do everything they wish until they are de-elected in the next election. This argument is extremely relevant. This if not ensured will make the constitution a plaything in the hands of the majority party ridden parliament and thus will give birth to „Parliamentary Supremacy“ which also is surely not contemplated by the framers of the constitution.²⁸

As to the second point, it is not disputed that amendment may be the result of political agenda or policy determination. But is this not the case with almost every law passed by a particular parliament? Does law making by a particular ruling party not reflect its political ideology and convenience? So if political question is not evoked in ordinary legislation why should it be preached only for constitutional amendments? Moreover the doctrine of political question is not applicable at least in parliamentary amendments due to Article 7 which implies the concept of limited government. Nobody can transgress the limit by asserting the doctrine of political question (Islam 311). The Appellate Division in Special Reference no 1 of 1995, 47 DLR (AD) 111²⁹ observed that:

„There is no magic in the phrase „political question“. While maintaining judicial restraint the Court is the ultimate arbiter in deciding whether it is appropriate in a particular case to take upon itself the task of undertaking a pronouncement on an issue which may be dubbed as a political question.“³⁰

Thirdly, the proposition that the parliament“s power of amendment is a constituent power and as such is not subject to judicial review also seems no more to hold the field. In Anwar Hossain case while wrongly conceding the difference between the constituent power and legislative power, the Court wrongly emphasized on „inherent

²⁸Supra note 8, p 15

²⁹Ridwanul Hoque 'Judicial Activism in Bangladesh: A Golden Mean Approach'(Cambridge Scholars Publishing,1st Edition,2011) 32

³⁰Supra note 8, p 25

limitation“ on the power of amendment to hold it to be subject of judicial review. Despite agreeing with the obiter dicta, we submit that the plea of amendment being a constituent power better suits in another place which we address later. That „inherent limitation“ lacks substance is already shown. Rather there is a far better approach to bring parliamentary constitutional amendment under judicial review which was mistakenly rejected in Anwar Hossain.

It was argued in Anwar Hossain case that an Act of Parliament amending the constitution will be „any other law“ within the meaning of Article 7 to attract the operation of the provision „if any other law is inconsistent with this Constitution and other law shall, to the extent of the inconsistency, be void“ (Article 7(2)). This was rejected simply on the ground that an amendment is passed in the exercise of constituent power.

But later in *Kudrat-e-Elahi v. Bangladesh*³¹, 44 DLR (AD) 319 Mustafa Kamal J held to the contrary, “This Constitution taken as a whole is a law, albeit the supreme law and by „any other law“ and „that other law“ the Constitution refers to the definition of Law in Article 152(1), including a Constitutional Amendment (Para 84). Under Article 152 (1)³² "law" means any Act, ordinance, order rule, regulation, bye-law, notification or other legal instrument, and any custom or usage having the force of law in Bangladesh. This was again confirmed in *BIMW Ltd v Government of Bangladesh and Ors*³³ 14 BLT (Special Issue) 2006 widely known as The Moon Cinema case (Page 54). Moreover, if we compare Article 7 with Article 26 it is seen that while the latter was amended by the Third Amendment to mean that it does not hit Article 142, the former was not amended to such effect (Islam 403). So an amendment under Article 142 is very well hit by Article 7.³⁴

³¹*Kudrat-e-Elahi v. Bangladesh*, 44 DLR (AD) 319

³²152 Constitution of People, S Republic Of Bangladesh, Article 152(1)

³³*BIMW Ltd v Government of Bangladesh and Ors*, 14 BLT (SI) 2006

³⁴Ridwanul Hoque, *Judicial Activism in Bangladesh: a golden mean approach* (Cambridge Scholars Publication, 1sted., 2011) 39

In fact judicial review of parliamentary amendments has become a regular practice in Bangladesh. The Tenth Amendment was challenged in *Dr. Ahmed Hossain v. Bangladesh*³⁵ 44 DLR (AD) 109, 110 and *Fazle Rabbi v. Election Commission*³⁶ 44 DLR 14. The Thirteenth Amendment was challenged in *Mashihur Rahman v. Bangladesh*³⁷ 1997 BLD 55. The Fifth Amendment was challenged in The Moon Cinema Case. All the challenges were decided on merit and no question regarding the propriety of judicial review was raised.³⁸

3.4. Amendments made through referendum:

While launching Basic Structure, the Appellate Division did not make any distinction between amendment made by two thirds majority in the House and amendment effected by the House plus referendum. This is very much important in the sense that though the 8th Amendment was not effected through a referendum, the pronouncement of the Court at least theoretically runs the risk of affecting a popular amendment.

Only one of the judges, B H Chowdhury J made reference to the Martial Law Amendment of Article 142³⁹ rendering the Preamble and some other provision unamendable without referendum to the people (Para 256). He made that reference only to establish that the constitution itself recognizes something as „Basic“ over which the majority was pondering. Yet by analogy of the phrase „unamendable without referendum to the people“ we may presume B H Chowdhury J to acknowledge that these „basic principles“ are amendable by the people.

But there is a tendency to camouflage the Article 142 (1A)⁴⁰ as whole in the basic structure talk. It is evident when Mahmudul Islam, a pro basic structure scholar, criticizes even the elusive reference made by B H Chowdhury. To him such a

³⁵*Dr. Ahmed Hossain v. Bangladesh*, 44 DLR (AD) 109, 110

³⁶*Fazle Rabbi v. Election Commission*, 44 DLR 14

³⁷*Mashihur Rahman v. Bangladesh*, 1997 BLD 55

³⁸ Supra note-29

³⁹ Constitution People Republic Of Bangladesh Constitution, Article 142

⁴⁰ Constitution People Republic Of Bangladesh Constitution, Article 141(1A)

reference is misleading. As basic structure is an issue of original dispensation, it cannot depend on the interpretation of an amended provision (Islam 394). But total camouflage of Article 142 (1A) or its spirit in Basic Structure discourse will not be logically correct. A distinct approach to amendments under 142 (1A) procedures is warranted at least on three grounds:

First, even from the perspective of „originalism“ (the „romantic theory“ of literature wherein, the meaning intended by the author of a text is privileged and is placed above all the contesting meanings that are argued) it is well evident that while the concept of limited government in Article 7, upon which Anwar Hossain resides, is intended for the different functionaries of the state, the constitution being the expression of their will, the people“s right to amend any provision of the constitution by way of addition, alteration, substitution or repeal is unlimited. Secondly, the plea of amending power to be a constituent power mentioned in the previous section nicely fits with popular amendment under Article 142 (1A)⁴¹. It is curious to note that while amending the Constitution it is not the Parliament who exercises the constituent power. Article 142 of the constitution merely lays down the amending procedure. It does not confer upon the parliament the power to amend the Constitution. The amending power of parliament arises from other provision of the Constitution (Article 65) ⁴² which gives it the power to make laws i.e., plenary legislative power (*Subba Rao CJ in Golak Nath v. State of Punjab* AIR 1967 SC 1643).⁴³

Rather a plain look on the Preamble of the Constitution will locate the constituent power elsewhere. The Preamble imposes a sacred duty upon the people of Bangladesh to safeguard, protect and defend the constitution and maintain its supremacy „as the embodiment of the will of the people of Bangladesh“ (A.B.M Kahirul Haque J in *Moon Cinema Case* Page 42). The „constituent power“ is here with the people of Bangladesh (Chowdhury 114). The Parliament did not and does

⁴¹Constitution People Republic Of Bangladesh Constitution, Article 141(1A)

⁴²Constitution People Republic Of Bangladesh Constitution, Article 65

⁴³*Subba Rao C J in Golak Nath v. State of Punjab* AIR 1967 SC 1643)

not give us the Constitution. It is we, the People of Bangladesh who „adopt, enact and give to ourselves“ the Constitution. So the constituent power resides exclusively in people. The parliament“s constituent power, if it has any, is merely derivative because „all powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution“ (Article 7(1))⁴⁴. The logical conclusion that follows is that amendment made by referendum, being not hit by Article 7 and being in the exercise of constituent power, is not subject to judicial review; whereas amendment made by Parliament in the exercise of derivative power is subject to judicial review.⁴⁵

Thirdly, distinct approach to popular amendment will answer also to the controversy regarding the Twelfth Amendment. The Appellate Division argued that the past amendments altering the basic structures of our constitution provides no grounds for such amendments to be made in future (Para 213). The Twelfth Amendment turned the Presidential form of government into a Prime Ministerial one. The Presidential form of government was a basic structure of the Constitution then. Though the Prime Ministerial form of government was the result of democratic revolution of the three alliances (Islam 407), it would stand void as per Anwar Hossain. But how far it sounds rational to invalidate the Twelfth Amendment?⁴⁶

3.5. Limitation of Basic Structures:

Accepting the Judicial Review of parliamentary amendment does not relieve us of another important attack on Anwar Hossain. It is the issue of there being innumerable and controversial basic structures. In Anwar Hossain Shahabuddin Ahmed J gave a list of eight basic features of the Constitution (Para 377). Mohammad Habibur Rahman J added another one to the list (Para 443). Badrul Haider Chowdhury J found twenty one unique features out of which some were basic which he did not identify (Kamal 100). In India more than half of the provisions of the Indian Constitution are declared to be basic and the list is still open (Uddin 31).

⁴⁴Constitution People Republic Of Bangladesh Constitution, Article 7(1)

⁴⁵ Supra note-29

⁴⁶ Supra note-29

This never ending and ever expanding list of basic structures is creating nothing but confusion and inconsistent application. Two instances below should suffice to establish the fact.⁴⁷

In the aftermath of the Babri Mosque incident the Indian Supreme Court in *S.R. Bommai v. Union of India* (1994) 3 SCC 1 justified the dismissal of the BJP led governments in Rajasthan, Madhya Pradesh and Himachal Pradesh on the ground of failure to uphold the „secular“ character, which was considered to be a basic feature, of the Indian Constitution and President“s Rule was imposed there. Now, strange result may follow if someone in India approaches the Court for dismissal of a particular government on account of its capitalist policy being opposed to „socialism“, another basic feature of the Indian Constitution.⁴⁸

In the cases of *Zafar Ali Shah v. General Parvez Musharraf* PLD 2000 SC 869⁴⁹ and *Wasim Sajjad v. Pakistan* PLD 2001 SC 233⁵⁰ the Pakistan Supreme Court conceded the Martial Law Administrator“s power to amend the constitution (Islam 393) as if democratic governance was not a basic structure of the Pakistani Constitution. At the same time it held that the Martial Law Administrator couldn“t destroy the basic structures of the Constitution. How curious an application of basic structure! Does there remain anything basic while a usurper makes the constitution subservient to his will?⁵¹

⁴⁷A.K. Brohi, *Fundamental law of Pakistan* (Din Mohammadi Press, 1st ed., 1955) 150

⁴⁸ Indian Constitution

⁴⁹*Zafar Ali Shah v. General Parvez Musharraf* PLD 2000 SC 869

⁵⁰*Wasim Sajjad v. Pakistan* PLD 2001 SC 233

⁵¹Supra note p180

Chapter - Four

The Basic Structure of the Constitution

4.1 The present position of the doctrine of basic structure:

Someone might argue that this doctrine is vague and should be rejected. But S. Ahmed. J. in the Amendment case says that the doctrine of basic structure cannot be rejected if consequence of it, rejection is taken into consideration "Seervai in his constitutional Law of India" rightly observed that the consequence of rejecting the doctrine of basic structure would be so grave and so opposed to the objectives of the constitution that the consequence of uncertainty would be insignificant by comparison.

4.2 Philosophy Underlying the Doctrine of Basic Structure:

There are some sound philosophical rationales, which work behind this doctrine:

1. A constitution like a sacred document is made written with a formal declaration by a democratic assembly especially constituted on behalf of the people for this purpose necessarily with a view to keeping its supremacy as a lofty idealism for a nation. Every written constitution, therefore, has certain fundamental principles and objectives which are its structural pillars and on which the whole edifice of the constitution is erected and if these principles are taken away or destroyed, the constitution will lose its original and inherent identity and character.

2. The parliament being a creature of the constitution must exercise its powers within the constitutional bounds and limits. It, therefore, cannot enlarge its limited power into an absolute power to destroy its basic elements. If parliament had the power to destroy the basic feature of the constitution, it would cease to be a creature of the constitution and become its master. Moreover, a constitution which is formally declared as a sacred document and as the guide for the nation can, in no way, be considered as an object of rapine and plunder at the hand of the parliament. As S Ahmed, J says in 8th Amendment case, "the doctrine of bar to change the basic structure is an effective guarantee against frequent amendments of the constitution in secretarial or party interest in countries where democracy is not given any chance to develop.

3. The declaration of constitutional supremacy as opposed to the parliamentary supremacy in the constitution implicitly presupposes the existence of an independent court or authority to examine the constitutionality of actions done by the executive and legislative. Though the judiciary like parliament is also the creature of the constitution, it is the constitution which at the same time gives somewhere directly and somewhere indirectly, this judiciary the power to play the role of an umpire to see that the executive and legislative are not transgressing their constitutional limits. This is why the judiciary under a written constitution is called the guardian of the constitution.

4.3 Position in Bangladesh:

Relying on the famous case of *Kesavananda Bharati's*⁵² Case, the Supreme Court of Bangladesh, in 1989, adopted the Basic Structure Doctrine in its constitutional structure. While deciding the case of 8th Amendment to the Constitution of Bangladesh, 1972 (hereinafter the “Bangladesh Constitution”), the Supreme Court of Bangladesh upheld the Article 7 of the Bangladesh Constitution. Two writ petitions were filed challenging the amendment in Article 100 of the Bangladesh Constitution, through the Constitution (Eighth Amendment) Act, 1988, and the notification of Chief Justice on the ground that High Court division of the Supreme Court with judicial power over the republic is a basic structure of the Bangladesh Constitution, and therefore cannot be altered or amended. The writ petitions were dismissed by the Division Bench of the High Court. The appeal was allowed by the Appellate Division, which along with the appeals of *Anwar Hussain Chowdhury vs. Bangladesh* 41 DLR (AD) 165. 1989 BLD (SPL) 1⁵³ were filed before the Supreme Court of Bangladesh, and is popularly known as Eighth Amendment Case. While striking down the 8th Amendment, B. H. Chowdhury J. listed down 21 features, to be known as basic features of the Bangladesh Constitution, which are unamendable. Moreover, Shahbuddin J. held that the constituent power, to make the constitution lies wholly with the people, and is adopted by the parliament as a derivative power, and this derivative power cannot immune the amendment from challenge.

⁵² Supra note -13

⁵³ *Anwar Hussain Chowdhury vs. Bangladesh* 41 DLR (AD) 165. 1989 BLD (SPL) 1

As a result, through the case of *Anwar Hussain*⁵⁴, the Supreme Court adopted the basic structure doctrine, and it enshrines in the constitutional structure of independent Bangladesh.

⁵⁴ Supra note-57

Chapter - Five

Constitutional Amendments and basic Structure

5.1 The Fourth Amendment of the Bangladesh Constitution:

This amendment was controversial because it fundamentally changed the nature and character of the constitution. There has no visible discussion or debate public resentment on Fourth amendment. After the independence of Bangladesh, it started a parliamentary form of democracy, but after the 4th amendment of the constitution it's stopped and introduced one party political system with an "all powers fall head of the state is that means to the President" in early 1975, by way of a scandalous amendment to the constitution. Though the 4th amendment Act, 1975, one party dictatorial system was substituted for a responsible parliamentary system which is also *known as "BAKSAL" system*.⁵⁵

Major changes were brought into the constitution by this amendment. This 4th amendment Act⁵⁶, 1975 amended the article 11, 66, 67, 72, 74, 76 80, 88, 95, 98, 109, 116, 117, 119, 122, 123, 141A, 147,148 of the constitution of Bangladesh. Substituted articles are 44, 70, 102, 115, and 124 of the constitution. Altered the third and fourth schedule of the constitution. Extended the term of the first Sang shad. By this amendment Act, 1975, it was made special provision relating to the office of the president and its incumbent and also inserted article 73A ⁵⁷ in the constitution which states that Every minister(Prime Minister and Deputy Minister) shall have the right to speak or vote in the proceedings of the Parliament only in their own ministry Unless he is a member of parliament. So, ultimate power became on the hand of the President.⁵⁸ Major fundamental changes were brought into the constitution by this amendment. These are:

⁵⁵ Dilara Choudhury, *Constitutional Development in Bangladesh Stresses and Strains* (Oxford University Press, 1994 (Bangladesh edition, The University Press Limited, Dhaka, 1995) p. 89

⁵⁶ The Constitution People Republic Of Bangladesh Constitution, 4th amendment Act

⁵⁷ Constitution People Republic Of Bangladesh Constitution, Article 73A

⁵⁸ Supra note, p 90

- In this amendment, there was neither separation of power nor any way for maintaining the check and balance between the three organs (Executive, Legislative and Judiciary) of the state, which is the violation of the article 22⁵⁹ of the constitution of Bangladesh. According to a eminent jurist Mahmudul Islam--"The parliamentary form of government was replaced by a form of government which was a apology a presidential form as the normal checks and balance of the presidential form of government were not incorporated".⁶⁰
- In a presidential form of government a president is directly elected by the voters. But technically Sheikh Mujibur Rahman was made a system to obtain his position as a president for an unlimited period by inserting a special provision in the *4th schedule (b)* which states-"Bangabandhu Sheikh Mujibur Rahman...., shall, as from such commencement hold office as president to Bangladesh as if elected to that office under the constitution as amended by this Act."⁶¹

So, I think it is the violation of the preamble of the constitution that means the democracy. In the preamble of the Bangladesh constitution clearly mention that the Democracy is the main ideal of the constitution. But after the 4th amendment The Democracy system was destroyed because the President became the sovereign body of the state.

- A one party system was introduced in place of the multi party system in Bangladesh. A new part "PART VIA" with new article was created 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

⁵⁹Constitution People Republic Of Bangladesh Constitution, Article 22

⁶⁰ Supra note 22 p 96

⁶¹ Supra note 22 p 96

party under article 117A⁶² 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 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 95⁶³, 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)⁶⁴ 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 president became both the sole appointing and removing authority of the judges. The subordinates judiciary was also made purely executive dependent through the 4th amendment by amending article-115 of the constitution.

- 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 Observer, Ittefaq and Bangladesh times in fact owned and

⁶²Constitution People Republic Of Bangladesh Constitution, Article 117A

⁶³Constitution People Republic Of Bangladesh Constitution, Article 95

⁶⁴Constitution People Republic Of Bangladesh Constitution, Article 96(2)

managed by the state) to continue their publication and rest of the newspaper was banned.

In the case of *Imdadul Huq Chowdhury vs Bangladesh*⁶⁵, 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.

5.2 Fifth Amendment of the Bangladesh Constitution:

An unenviable feature of the constitutional development of the Bangladesh that it had to withstand two extra constitutional (martial law regim). 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 HCD⁶⁶.

5.3 Seventh Amendment of the Bangladesh Constitution:

Martial Law is totally alien a concept to our Constitution and hence, what Dicey commented about it, is squarely applicable to us as well.

A fortiori, usurpation of power by General Mohammad Ershad, flexing his arms, was void ab-initio, as was the autocratic rule by Mushtaque-Zia Duo, before Ershad, and shall remain so through eternity. All martial law instruments were void ab-initio. As a corollary, action purportedly shedding validity through the Constitution (Seventh Amendment) Act 1986 was a stale, moribund attempt, having no effect through the vision of law, and must be cremated without delay.

⁶⁵ 34DLR,381

⁶⁶ Mahmudul Islam, *Constitutional law of Bangladesh* (Mullick Brothers, 3rd ed., 2012) 96

The killing of the Father of the Nation, which was followed by successive military rules, with a few years of intermission, was not an spontaneous act-it resulted from a well intrigued plot, harboured over a long period of time which was aimed not only to kill the Father of the Nation and his family, but also to wipe out the principles on which the Liberation War was fought

During the autocratic rule of Khandaker Mushtaque and General Ziaur Rahman, every effort were made to erase the memory of the Liberation War against Pakistan. Two military regimes, the first being with effect from 15th August, 1975, and the second one being between 24th March 1982, and 10th November 1986, put the country miles backward. Both the martial laws devastated the democratic fabric, as well as the patriotic aspiration of the country. During Ziaur Rahman's martial law, the slogan of the Liberation War, "Joy Bangla" was hacked to death. Many other Bengali words such as Bangladesh Betar, Bangladesh Biman were also erased from our vocabulary. Suhrawarddi Uddyan, which stands as a relic of Pakistani troops' surrender, was converted into a children's park. Top Pakistani collaborator Shah Azizur Rahman was given the second highest political post of the Republic, while other condemned collaborators like Col. Mustafiz, Suleiman etc were installed in Zia's cabinet. Many collaborators, who fled the country towards the end of the Liberation War, were allowed, not only to return to Bangladesh, but were also blessed with safe haven, were deployed in important national positions. Self-confessed killers of Bangabandhu were given immunity from indictment through a notorious piece of purported legislation. They were also assigned with important diplomatic jobs abroad. The original constitution of the Republic of 1972 was mercilessly ravaged by General Ziaur Rahman who erased from it, one of the basic features, "Secularism" and allowed communal politics, proscribed by Bangabandhu, to stage a comeback.⁶⁷

During General Ershad's martial law also democracy suffered devastating havoc. The Constitution was kept in abeyance. Doors of communal politics, wide opened

⁶⁷A.K.M. Shamsul Huda, *The Constitution of Bangladesh* (2 vols.) (Published by Ishtiaq Hasan, 1st ed., 1997) .90

by General Zia, were remained so during his period. Substitution of Bengali Nationalism by communally oriented concept of Bangladeshi Nationalism, was also allowed longevity during Ershad's martial law.⁶⁸

By the judgment in the Fifth Amendment Case all the misdeeds perpetrated by Mushtaque-Zia duo have been eradicated and the Constitution has been restored to its original position as it was, when promulgated in 1972. 8) It is about time that the relics left behind by martial law perpetrators be completely swept away for good.⁶⁹

5.4 Eight Amendment of the Constitution:

The constitution (Eighth Amendment) Act, 1988, was passed amending article 100⁷⁰ of the constitution by setting up permanent Benches of the High Court Division outside the capital city Dhaka and the Supreme Court gripped with that constitutional issue which were challenged by two writ petitions on the ground that High Court division of the Supreme Court with judicial power over the republic is a basic structure of the constitution and that cannot be altered or damaged and therefore the impugned amendment is void. A division Bench of the High Court Division summarily dismissed the said two writ petitions. Leave was granted by the Appellate Division. This appeal along with other two appeals of Anwar Hussain Chowdhury v Bangladesh is popularly known as the constitution (Eighth Amendment) case⁷¹.

The power of amendment of the Constitution of the Republic of Bangladesh under Article 142 is not an unlimited power and that power conflicts with the concept of supremacy of the constitution provided by Article 7 of the Constitution. Article 7 of the Constitution has put an implied limitation on the power of amendment and therefore Article 7 is basic and unalterable. The counter argument was independence of judiciary and separation of powers are basic features of the constitution but the

⁶⁸ Supra note p 96

⁶⁹ Supra note 98

⁷⁰ The Constituion of People Republic Of Bangladesh, Article-100

⁷¹41 DLR (AD) 165

impugned amendment has not affected either of the two. And the power of amendment under article 142 is a constituent power not any ordinary legislative power.

B.H. Chowdhury, J. has listed 21 „unique features“ which are basic features of the constitution and they are not amendable. He finally held the impugned amendment violated the Articles 102 and 44 of the constitution.⁷²

Shabuddin Ahmed, J. further held that „constituent power“ in the sense of power to make a Constitution, belongs to the people alone and to vest the power to the parliament is a „derivative“ one and that derivative constituent power will not automatically make the amendment immune from challenge. And he further held that the impugned amendment has broken the „oneness“ of the High Court Division which is irreconcilable conflict with other Articles of the constitution relating to High Court Division. He listed sovereignty belongs to people, supremacy of the constitution , democracy , unitary state, separation of powers , independence of the Judiciary are the structural pillars of the constitution and they are beyond any alteration or change by amendatory process. And the impugned amendment rendering the High Court Division virtually unworkable in its original form and shape.⁷³

Judgment of A.T. M. Afzal J. rejected the doctrine of basic structures on two grounds that it is unthinkable the makers of the constitution did not leave any option to the future generation but decided on all matters for all people. And secondly the makers of the constitution envisaged the so-called „basic features“ to be „permanent features“ of the constitution. He stressed on saying that sub Article (1A) in article 142⁷⁴ provided the procedure of referendum which is more difficult to amend some provisions of the constitution which manifests that no other provision of the constitution is not basic that a referendum is required to be incorporated in the

⁷² Huda, Above n 7 99

⁷³ Huda, Above n 7 100

⁷⁴Constitution People Republic Of Bangladesh Constitution, Article 142

constitution. He feared that majority judgment in the eighth amendment case may be a „roadblock“ for the future.⁷⁵

Despite that A.T.M. Afzal, J by restricting the basic features holds that the word “amendment” has a built –in limitation in that it does not authorize the abrogation or destruction of the constitution or any of its three structural pillars- executive, legislative and judiciary which will render the constitution unworkable. He also rejects the doctrine of implied limitation to the power of amendment and pursues to say that the limitation in Article 142 relates „only to procedure for amendment and not substantive“ in the sense that no article is beyond the ambit of amendment.

Finally A.T.M. Afzal holds that the impugned amendment has not destroyed the High Court Division and the impugned amendment and notification not to be ultra vires on any grounds alleged.

5.5 Fifteenth Amendment:

In the 15th amendment of the constitution of Bangladesh there are revolutionary changes 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.

- i. 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 12⁷⁶ to restore Secularism and freedom of religion though the State religion is "ISLAM" and Bismillah-Ar-Rahman-Ar-Rahim“ retained in the Preamble. So how can it possible? This is just politics to win in political game by the political parties.

⁷⁵ Supra Note- 10

⁷⁶ Constitution People Republic Of Bangladesh Constitution, Article 12

- ii. It denies recognizing the indigenous people, will be termed as tribal and ethnic minorities.
- iii. 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.
- iv. Inserted articles 7A and 7B in the Constitution after Article 7⁷⁷ 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.

5.6 Comparison before and after 15th Amendment:

An amendment is a selection that is added to a law or rule in order to change it. A constitutional amendment is a formal change to the text of the written constitution of a nation or state. Two-thirds vote is required to amend the constitution. Till today, the constitution of the People's Republic of Bangladesh has been amended fifteen times. The constitution (Fifteenth Amendment) Act 2011 has been passed by the Parliament on 30th June 2011. 291 votes were cast in favors and 1 was against the bill.

5.6.1 Major changes of the 15th Amendment:

1. Islam as State religion, 'Bismillah–Ar–Rahman–Ar–Rahim:

The Bangladesh Supreme Court restored *secularism* as one of the basic tenets of the Constitution^[1] but Islam remained the state religion

2. Revival of Article 12 to restore Secularism and freedom of religion:

Secularism seeks to defend the absolute freedom of religious and other belief, and protect the right to manifest religious belief insofar as it does not impinge disproportionately on the rights and freedoms of others. Secularism ensures that the

⁷⁷Constitution People Republic Of Bangladesh Constitution, Article 7

right of individuals to freedom of religion is always balanced by the right to be free *from* religion.

3. The people of Bangladesh shall be known as Bangalees as a nation and citizens of Bangladesh shall be known as Bangladeshis.

There has a basic difference between Bangalees and Bangladeshis. It is solved after amending the constitution.

4. In the case of a dissolution Parliament by any reason, election should be held within 90 days of such dissolution.

If any situation is created for which the parliament is dissolved then there should be arranged a election within 90days and the new parliament will be formed by this election

5. Increasing the number of seats reserved for women:

Under this constitution, Women are given some privilege by this constitution. Some seats are reserved for them.

6. Appointment of Justices:

The Chief Justice shall be appointed by the President and the other judges shall be appointed by the President after the consultation with Chief Justice.

7. Declaration of Independence:

Incorporation of speech of Sheikh Mujibur Rahman on March 7, 1971, declaration of independence by Mujibur Rahman after midnight of March 25, 1971 and the proclamation of Independence declared at Mujibnagar on April 10, 1971.

5.6.2 Most Dangerous Provision of the 15th Amendment:

1. Article 7A.(1) says, “If any person reacts his confidence and trust in this constitution or takes attempt of doing so or conspire against it, his or her activities will be treated as acts of sedition, and the person concerned will be guilty of sedition”.
2. About punishment, Article 7A.(3) says, “The person convicted under the provision of this article will be awarded the highest punishment prescribed for other offences by the existing laws.

3. This article can close down the path of freedom of expression and the objective, independent, intellectual and constructive criticism of any article of the constitution.
4. The government may take initiative of arresting and putting behind the bars all writers, speakers, editors for critical articles or discussion.

5.6.3 Scope of awarding the highest punishment for this kind of activities:

- a. These articles have played a trick with the citizens. What is given with one hand (7.1.all power belong to people), it takes away with the other (7A).
- b. There is no existence of such an Anti-people provision in the constitution of any democratic country in the world.
- c. The second most dangerous aspect of the 15th Amendment is Article 7B. Article 7B says, “Notwithstanding anything contained in Article 142 of the constitution, the preamble, all articles of Part I, II, III and the provisions of articles relating to the basic structures of the constitution including article 150 of part xl shall not be amendable by way of insertion, modification, substitution, repeal or by any other means.
- d. More than 50 articles of the constitution have been made “beyond amendment”.
- e. Making 50 basic structure of the constitution is totally illogical.
- f. A ridiculous provision forbidding the revision of the structures is absolutely undemocratic and contrary to the basic spirit of democratic State. No constitution in the world has such an instance

5.6.4 Religion Clash with Secularism:

- a. „Bismillah-Ar-Rahman-Ar-Rahim“ retained above the preamble and Removal of 'Absolute Faith and Trust in Allah' from the constitution.
- b. Article 2A Says, The State religion of the Republic is Islam, but the state shall ensure equal status and equal right in the practice of Hindu, Buddhist, Christian and other religions”.
- c. Article 8(1) says, “The principles of nationalism, socialism, democracy and secularism shall constitute the fundamental principles of state policy.

- d. Article 12 define secularism”.
- e. And Article 38 declares the freedom of association. No person shall have the right to form association if it is formed for the purposes of destroying the religious harmony.
- f. Retention of Islam as the State Religion and restoration of Secularism at the same time cannot go together.
- g. The word “equal status” and “equal rights” deserves concentration. The contextual interpretation of constitution suggests that State religion in Bangladesh is not to be taken as State’s Religion.
- h. The 15th Amendment could not satisfy any religious group as well as the believers of the secularism.

5.6.5 Contradictory aspects:

- a. Article 6(2) says, “the people of Bangladesh shall be known as Bengalese as a nation and the citizens of Bangladesh shall be known as Bangladeshis.
- b. Article 10 says, “A socialist economic system shall be established with a view to ensuring the attainment of a just and egalitarian society, free from the exploitation of man by man.
- c. Article 70(1) (1) a person elected as a Member of Parliament in an election at which he was nominated as a candidate by a political party shall vacate his seat if he resigns from that party or votes in Parliament against the party, but shall not thereby be disqualified for subsequent election as a Member of Parliament.
- d. The 15th amendment is very difficult to understand as it contains a number of contradictory provisions.
- e. Article 6(2) created debate among the Bengalese and the tribes of our country.
- f. Most of the people want to get the single identity of our Nation.
- g. The presence of socialism and democracy as the fundamental State principle created a mix type of economy in Bangladesh.
- h. The World has turned from the socialism for many reasons. So insertion of socialism as a fundamental State principle is totally unnecessary.

- i. Restored the original article 70 of the constitution allowing MPs to remain absent from the House if she or he does not want to cast vote on any issue in line with her or his party's decision

5.6.6 Most Controversial Aspects:

1. "We are under a Constitution, but the Constitution is what the judges say it is "Charles Evans Hughes, 11th Chief Justice of the United States".
2. The most controversial aspect of the 15th amendment is its deletion of caretaker government (CTG).
3. The Appellate Division of the Supreme Court, in a verdict on May 10, 2011, declared the system illegal.
4. From the Constitution 58B Non-Party Care-taker Government, shall be omitted. The interim government system inserted.
5. Elections under party governments have never reflected public opinion, nor have they generally offered an opportunity to confer legitimacy on those who wanted to rule. Bangladesh had a very bad and shocking experience of holding general elections under party governments.
6. Abolition of the caretaker government system divided the nation and caused a tense situation in politics.
7. On the caretaker issue, a problem has been created wholly unnecessarily. More than one opinion poll suggests that 90% of the people support a neutral non-party government during the elections. If the ruling party is in doubt it can go for referendum on this issue as is done in mature democracies.

5.6.7 Some Positive Aspects:

1. Article 18A Says, "the State shall endeavor to protect and improve the environment and to preserve and safeguard the natural resources, bio-diversity, wetlands, forests and wildlife for the present and future citizens".
2. Article 19(3) says, "the State shall end endeavor to ensure equality of opportunity and participation of women in all spheres of national life".

3. Article 23A Says, “The State shall take steps to protect and develop the unique local culture and tradition of the tribes, minor races, ethnic sects and communities”.
4. Article 66 says about war criminals:
5. The proposed bill to the environment and biodiversity conservation is a positive aspect of 15th amendment because environment issue is so much important issue in present world.
6. The new Article 23A by the addition of tribes, minor races, ethnic - groups and community preservation, and development is proposed.
7. Convicted war criminals elections Satisfaction by making disqualified the enrollment of the war criminals in the voter list. It said in the case of enrollment in the voter list, if anybody was convicted under the Collaborator (special tribunal) Order 1972, he/she would not become voters.
8. 15th amendment has some positive aspects like partly reflecting the cultural face of our freedom fight.

5.6.8 Some Other Changes:

In the first paragraph in the Preamble, for the words “a historic war for national independence” the words “a historic struggle for national liberation” established.

Through the 15th amendment, the fundamental rights are restricted. So the Democracy in Bangladesh is a “Restricted democracy”.

Article 100 has created more than one permanent seat of the Supreme Court thus destroying the unitary character of the judiciary.

In Article 118 the Chief Election Commissioner and not more than four Election Commissioner establish the Election Commission.

5.6.9 Concluding Remarks:

Understanding of Bangladesh Constitution is like observation of elephant by blind.

The 15th amendment is very difficult to understand as it contains a number of

contradictory provisions, such an amendment could only be made in the interest of a particular political party.

5.6.10. Power of Future Parliament by Present Parliament:

Former attorney general Mahmudul Islam spoke about the ineffectiveness of the Supreme Judicial Council but opposed giving parliament the power to impeach judges.

He said the systems in other countries needs to be followed. He asked if it was possible to enact any law to establish some fundamental rules and to set some criteria and transparency so that none of the judges could be made victims. If the government changes and another party comes to power, it will take action against some others judges. Such a situation cannot be expected. You should consider what to do so that the independence of judges is maintained.”

He also spoke about the stringent restrictions imposed on MPs by Article 70 of the constitution.

The restrictions imposed by the article do not allow MPs to vote independently. They must abide by the party decision, whether right or wrong, since an MP will lose his or her membership of parliament if he or she goes against the party decision in the House.⁷⁸

⁷⁸Mahmudul Islam, „Constitutional law of Bangladesh“ (Mullick Brothers; 2nd edition,2002) 396

Chapter -Six

Recommendations and Conclusions

6.1 Findings:

Now we can say, there is no hard and fast rule for basic feature of the Constitution. Different judge keep different views regarding to theory of basis structure.

- i. They have similar view that parliament has no power to destroy, alter, or emasculate the 'basic structure' or framework of the constitution. ?
- ii. The preamble, the entire scheme of the constitution and the relevant provisions thereof including article 142 are kept in mind then there can be no difficulty to determine what the basic elements are the basic structure of the constitution. These words apply with greater force to doctrine of the basic structure, because, the federal and democratic structure of the constitution, the separation of powers, the secular character of our state are very much more definite than either negligence or natural justice.
- iii. The protection of welfare state, fundamental rights, Unity and integrity of the nation, Sovereign democratic republic and for Liberty of thought, expression, belief, faith and worship, interpretation of judiciary is mandatory. We can say none is above constitution even parliament and judiciary.

6.2 Recommendation:

In my view that above discussion the amendment procedure of the constitution is not easy. However, amendment of constitution is very much necessary because the society change day by day. The Constitution is not set in stone. It is a living document. It must serve its purpose. It has to march with the needs of the time. There are times when it is necessary to amend the Constitution. I give some recommendation such as follows:

- I. If the amendment of the constitution is necessary must be reflect the will of the people of the Bangladesh. Because amendments to Constitutions sometimes have taken place to suit the interests of a particular person or to meet the interests of the party in power.
- II. The referendum is essential in the case of amendment of the important article of the Bangladesh constitution. But basic feature of the constitution cannot be amended or destroyed.
- III. The amendment of the constitution cannot have the effect of destroying abrogating of the basic structure framework of the constitution. That means the basic structure or the essential feature of the constitution cannot destroyed.
- IV. Every provision of the constitution can be amended provided in the result the foundation and the structure of the constitution remains the same. In the other words the basic structure of the constitution cannot be amended.
- V. Expressly mention which is the basic feature of the constitution .and which provision cannot amend. Because sometimes its creates some problems different judges gives different opinion, Likewise in 8th Amendment case of Bangladesh the judges could not come into a unanimity as to what constitute“ basic feature' of the constitution. According to B' H. chowdhury. J', 21, features are basic feature of our constitution. Justice Sahabuddin Ahmed has mentioned six features as basic. In India more than half of the provisions of the Indian Constitution are declared to be basic and the list is still open. This never ending and ever expanding list of basic structures is creating nothing but confusion and inconsistent application.

- VI. If the amendment of the constitution is necessary must be maintain all the procedure which is mention in article 142⁷⁹ of the People's Republic of the Bangladesh constitution.
- VII. If the constitution is amended to be followed such other procedure as the constitution prescribes.
- VIII. Provision of amendment of constitution must be needed in any country because the society changes day by day.

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⁷⁹ The Constitution of People Republic Of Bangladesh, Article 142

6.3 Conclusion

As a conclusion it may be said that the doctrine of basic structure of the Constitution is a great Constitutional concept that has been formally engrafted upon the Constitution by the judiciary through the interpretative processes. The doctrine is well formulated and it has maintained a balance between the rigidity and the flexibility of the Constitution. The basic structure doctrine is the single most important factor that has made the survival of our Constitution possible in its pristine form. It has served us well by effectively foreclosing the possibilities of uncalled for tampering of the Constitution, abrogation of the primordial rights necessary for the development of human personality, weakening the hold of Rule of Law and maintaining balance between different organs of the State. It prevents the parliament from having unconditional power and becoming the master of law itself. It has till date proved to be a very effective tool in deciding the validity of the Constitutional amendments. But whether this doctrine is sufficient to accommodate the change that may be required in future needs to be further debated. Nevertheless, there is no scope in denying the fact that this doctrine has served the country very well during turbulent times when parliament was in a mood to resort to Article 368 recklessly. The Supreme Court has done a great service to the nation by declaring that there are certain basic features of the Constitution which cannot be amended. It has necessarily pointed out to the parliament that Constitution is not any party's manifesto which can be changed at their own will but is a national heritage which can be amended only when a national consensus demands for it. Thus, the doctrine of basic structure may be allowed to operate as the very watchdog of Constitutional governance. There can still be debates about what constitutes basic structure. There is nothing wrong in such debates. We must remember that politics in a democracy is necessarily full of debates and differences. That is a sign of diversity, liveliness and openness. It is seen from the above discussion, that a few Amendments ended at one time under certain forceful situation were consequently detached by another Amendment, and also that numerous of these had a nationwide harmony. But a only some of the Amendments were endorsed without appropriate arguments and thorough discussions concerning all the pledge holders including people adhering to diverse, sometime differing, ideological or opinionated views. Amendments that

were the consequence of unsophisticated thought, lack of esteem for democratic practices or suitability have clearly come under severe disapprovals, sometimes for suitable motives and sometimes for sectarian political ideas.

In conclusion, we have no hostility in enacting a new Amendment by the present or upcoming governments, but if and when this is complete, there must be occupied debates and contribution by all the political parties, intelligentsia and apprehensive citizens.

Reading the doctrine of basic structure for this research proposes various models by which the doctrine may be identified and evaluated came up. The three molds used to examine the doctrine are Basic Structure and the theory of originalism, Basic Structure acts as balancing tool, and Basic Structure as a tool of growth. The tool is used to examine some of the limitations of the basic structure doctrine in the background of weak societies and proposes a deviating and progressive approach in judicial appliances of constitutional main beliefs.

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