

Concept of Basic Structure of the Constitution:

Safeguarding Constitutional Identity

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Dedication

To

My Reverent Supervisor



Md. Deedarul Islam Bhuiyan
Assistant Professor & Head
Department of Law
Sonargaon University (SU)

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সোনারগাঁও ইউনিভার্সিটি (এসইউ)
WE WILL RISE UP
WE WILL SHINE

A Research Monograph

On

Concept of Basic Structure of the Constitution: Safeguarding Constitutional Identity

In the partial fulfillment of the requirements for the degree of Bachelor of Laws (Honours).

Submitted to:

Md. Deedarul Islam Bhuiyan

Assistant Professor & Head
Department of Law
Sonargaon University (SU)

Submitted by:

Md. Mahmudul Hassan

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I would like to express my heartfelt gratitude to my research Supervisor **Md. Deedarul Islam Bhuiyan**, Assistant Professor & Head, Dept. of Law, Sonargaon University, who has assisted and guided with his best guidance and suggestions. Without his instruction and good supervision, it would have not been possible for me to make a research work. So, I am indebted to my research Supervisor.

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Letter of Transmittal

To

Md. Deedarul Islam Bhuiyan
Assistant Professor & Head of the Department
Department of Law
Sonargaon University (SU)

Subject: Submission of Research Monograph on "Concept of Basic Structure of the Constitution: Safeguarding Constitutional Identity".

Dear Sir,

I do hereby please to submit the Research Monograph on the topic "Concept of Basic Structure of the Constitution: Safeguarding Constitutional Identity". It is a great pleasure to work on such important topic. This Research work has been done according to the requirements of the Sonargaon University for the fulfilment of my Bachelor of Laws (Honours) course under the Department of Law.

I respectfully acknowledge your guidance, leadership and help for the preparation of this paper. It is worthwhile to mention that there might be some errors and mistakes in my report due to limited time and knowledge. I am still at learning stage. I shall be grateful and obliged if you kindly accept my research and evaluate it.

Sincerely Yours,

Md. Mahmudul Hassan
ID No: LLB-1903018021
Program: LLB (Hon's)
Department of Law
Sonargaon University (SU)

Certification by the Supervisor

This is to certified that the Research Monograph on **"Concept of Basic Structure of the Constitution: Safeguarding Constitutional Identity"** is prepared by **Md. Mahmudul Hassan**, **ID No: LLB-1903018021** from the Department of Law, Sonargaon University (SU). It also certified that the research work is under my supervision and intensive guidance. The Research Monograph has been carried out under my supervision is a record of the *bona fide* work.

It is to be certified that this research work is original and suitable in its style and contents for submission and fulfillment of his Bachelor of Laws (Honours).

Md. Deedarul Islam Bhuiyan
Assistant Professor & Head
Department of Law
Sonargaon University (SU)

Declaration

I, hereby. declare that this research has been completed with my own efforts and endeavors with the utmost sincerity and honesty on my part. I do affirm that this research has not been submitted as a part for any course at this or any other institution previously. The work is entirely mine own.

Alongside, I agree to deposit this research in the University's open access institutional repository or allow the library to do so on my behalf, subject to the national copyright laws and University regulations and conditions.

I also declares that it contains no writings which were previously published or invented earlier, except where I have made due acknowledgement with proper references.

Sincerely Yours,

Md. Mahmudul Hassan
ID No: LLB-1903018021
Program: LLB (Hon's)
Department of Law
Sonargaon University (SU)

Abbreviations

AD	—	Appellate Division
ADC	—	Appellate Division Cases
ADR	—	Association for Democratic Rights (A Indian NGO)
AIR	—	All India Reports
BLC	—	Bangladesh Law Chronicle
BLD	—	Bangladesh Legal Decisions
BLT	—	Bangladesh Law Times
CTG	—	Caretaker Government
DLR	—	Dhaka Law Reports
EPO	—	Emergency Powers Ordinance
EPR	—	Emergency Powers Rules
FPSP	—	Fundamental Principles of State Policy
FR	—	Fundamental Rights
HCD	—	High Court Division
MP	—	Member of Parliament
PM	—	Prime Minister
SC	—	Supreme Court

Abstract

Constitution is the main requirement or orientation in Bangladesh. The Constitution is the supreme law in Bangladesh. The Constitution of the People's Republic of Bangladesh has supremacy over comprehensive law in Bangladesh. It was passed by the Bangladesh Parliament on 4 November 1972 and has been in effect since December 16, 1972. One of the important constitutional laws of Bangladesh is that its basic structure cannot be changed by the National Assembly. change, even if a referendum cannot be passed. The main advantage of such a doctrine would be to protect the Constitution, the solemn expression of the will of the people, from unwanted encroachment by legislatures that exercise the pluralistic use of force. numbers arbitrarily and erratically. However, although the Bangladesh Constitution is an elaborate written constitution and also one of the greatest in the world, it does not have any specific provisions regarding its basic structure. or say anything about the immutability of the underlying structure. It was only established in 1989 in the famous landmark case of Anwar Hossain against Bangladesh, commonly known as the 8th Amendment case. The Constitution is the most eloquent evidence to affirm Bangladesh as a united republic, independent and based on national liberation struggle, and this is how we came to the People's Republic of Bangladesh. It lays a firm foundation for nationalism, secularism, democracy and socialism as the basic morality representing the Republic and claims to seek a society that gives its citizens the rule of law, the fundamental principles of civil rights and independence as well as fairness and impartiality. political, economic and social.

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Chapter- 1
Introductory Ideas

1.1 Introduction

The concept of the basic structure of the Constitution, focusing on the protection of constitutional identity, is of considerable importance in the context of Bangladesh's constitutional framework. Since gaining independence in 1971, Bangladesh has undergone a series of constitutional changes and amendments to define and preserve its fundamental values, principles and identity. The concept of "fundamental structure" originates from the idea that some basic elements of the Constitution are not modified and supplemented, ensuring the integrity and stability of the fundamental principles of the nation. This essay examines the development of grassroots doctrine in Bangladesh, its role in safeguarding constitutional identity, and its impact on the country's political and legal landscape.

The history of fundamental structuralism dates back to the landmark case of Anwar Hossain Chowdhury v. Bangladesh (1989)[1], where the Supreme Court of Bangladesh first recognized the concept. The Court declared that some basic features of the Constitution, such as democracy, sovereignty, and separation of powers, were beyond the scope of amendment. This landmark ruling laid the foundation for future cases that will shape the doctrine and its implications for the defense of Bangladesh's constitutional identity.

Constitutional identity deals with the fundamental principles and values that define a country and its governance system. In the case of Bangladesh, this identity is rooted in the ideals of democracy, social justice, secularism and fundamental rights. The underlying structural theory acts as a guardian of this identity by establishing a boundary across which modifications cannot violate these basic principles. This ensures that even in times of political change or ideological development, the basic character of the Constitution remains intact.

The principle of constitutional identity becomes especially important in a diverse and pluralistic society like Bangladesh. With a history of linguistic, ethnic and religious diversity, it is paramount to protect the rights and representation of all citizens. The underlying structural doctrine prevents the erosion of these rights and maintains a delicate balance between the

[1] 1989 BLD (Spl) 1

interests of the majority and the few. By defending fundamental principles such as secularism, it protects the nation from potential threats to religious harmony and multicultural structures.

In addition, basic structural theory serves as a check against potential authoritarian tendencies or abuses of government power. By preventing a change in fundamental democratic principles, it acts as a safeguard against any attempt to undermine the democratic process or centralize power in a way that could lead to identity erosion. the constitution of the country. This is particularly relevant to Bangladesh's history of political instability and military intervention.[2]

The development of fundamental structural theory in Bangladesh was not without challenges. The scope and extent of the doctrine has been the subject of debate in the legal community. Some argue that too rigid a doctrinal interpretation may impede a nation's ability to adapt to changing circumstances or to deal with pressing problems. Striking a balance between preserving constitutional identity and allowing needed reforms is a delicate task that requires careful judicial oversight.

In recent years, the judiciary in Bangladesh continues to have difficulty in applying the basic structural theory in various contexts. Cases involving constitutional amendments, changes to the electoral system, and debates over the role of religion in governance have tested the limits of the doctrine. Each decision made by the court contributes to the continued evolution of the doctrine and its relevance in shaping the constitutional identity of the nation.

[2] http://www.cambridge.org/

1.2 Aims & Objective

The purpose of writing this thesis is to trace the history of basic structure and examine the concept of basic structure in the context of constitutional law of Bangladesh. To do so, I must repeat the Eighth Amendment cases to the Constitution. Because the 8th Amendment case is the only body in Bangladesh to deal with the very complex concept of fundamental structure and judgment, it includes a wealth of case references, legal documents, and completeness. Enough arguments. The study aims to analyze basic structural theory in Bangladesh and court responses, and to find out its impact on constitutional development in Bangladesh. The following objectives will be achieved in the study:

- Assess whether a fundamental structural concept really exists in the constitutional jurisdiction.
- Check in a few words about the development of basic structural concepts.
- Assess whether the right to amend the constitution is a constitutive right or if it is subject to certain restrictions.
- Reflects the need to apply the basic structural concepts in the constitutional jurisdiction in Bangladesh.
- Review recent court views and international, regional and national judicial responses, from written law to up-to-date judicial decisions, to the underlying structural concept in handling legal cases. previously reported case.
- Analyze the advantages and disadvantages of basic structural theory if applied in constitutional jurisdiction in Bangladesh.

1.3 Importance of the Study

Since our country's political leaders are corrupt in general and they are changing the constitution in their favor to stay in power for good in Bangladesh, some trust is needed. At its core, as a constitutional defense, are its structural supports. Congress cannot amend through its power to amend. In this sense, the basic structural concept in the Constitution of Bangladesh should be applied.

On the other hand, judges are politically inclined and the court structure is weakening due to political interference in the adjudication of all cases in Bangladesh in recent years. It is therefore more likely that the justice system will abuse this doctrine in our country and as a result some past judgments have, in fact, increased this possibility.

Therefore, there is a great deal of controversy over the point of view of applying the basic concept of structure in constitutional jurisdiction in Bangladesh. The adoption of the underlying structure, desirable or not, has been a major concern in recent years. This study mainly focuses on this big question to examine the existence and relevance of applying the basic concept of structure in the Constitution of Bangladesh. Therefore, this study is of great significance considering the current state of constitutional jurisprudence in Bangladesh.

1.4 Scope and Limitations of the Research

The scope of my research is to verify the effectiveness of applying basic structural theory in Bangladesh. This study does not uncover specific causes behind individual and community behavioral patterns while the main focus area of this research is mainly legal responses. For this reason, many national and Indian case references have been discussed here for better understanding. In my research, I also encountered some limitations. Due to the wide scope of my research, in practice I have very little time to meet and interview constitutional experts. So, I just use sub-documents here, such as: in books, the Internet and various magazines.

• Since the focus of this study is mainly on judicial opportunity and response in Bangladesh, based on landmark cases, I cannot cite any data from the internet because of references of Bangladesh is not here.

• In my research, the views and expressions are my own, so any deviations in this research paper will be my responsibility.

1.5 Methodology

The methodology of this research paper is primarily analytic, non-empirical and largely based on secondary literature, although to some extent I have also used primary data. Secondary sources of information are books, e-books, DLR, BLD, BLT, AIR, PLD, online case reports, journals, websites and newspapers. In doing so, of course, the Constitution was further emphasized by frequently referencing and citing 5th, 7, 8 and 13th Amendment cases, especially Anwar Hossain Chowdhury v Bangladesh, commonly referred to as the 8th Amendment case whereby the concept of fundamental structure has been recognized in Bangladesh. There are also references to Indian cases such as the Kesavananda case, the Golak Nath case and Indira Nehru Gandhi Vs. Raj Narayan is called the electoral case because these cases made an important contribution in establishing the concept of the basic structure in this subcontinent.

Chapter- 2
Origin & Development of Basic Structure

2.1 Doctrine of Basic Structure

In every constitution there are basic elements that are considered the main elements of the constitution. If these elements are altered, contradicted or violated, the primary purpose of the constitution may be thwarted.

So, in most constitutions there are provisions that are not amended and are specially protected by the constitution itself. These provisions are considered the basic structure of the constitution.

In ***Golaknath v. State of Punjab***[3] the Court held that the parliament has no right to amend the fundamental right. The decision was given on the 24th Amendment to their constitution which provides that, "With the executive and constitutional power government can amend any provision of the constitution".

But in ***Kasabanka Bharati vs State of Kerala,*** it was held that "Parliament can amend any provision including fundamental rights of the constitution but it cannot amend the provisions of the constitution which strikes the basic structure."

In Bangladesh, by the 8th amendment, the legislative among other changed Article 100 of the constitution which decentralized the judiciary by setting up six permanent benches of the High Court Division outside Dhaka. This amendment to art 100 of the Constitution resulting establishment of permanent seats of HCD was questioned and challenged in the case of ***Anwar Hossain Vs Bangladesh***[4]. The case finally reached to the appellate division of the Supreme Court of Bangladesh and finally, the court recognized article 100 of the Bangladesh Constitution as part of the Basic Structure and the basic structures of the constitution cannot be amended. This is the first judgment whereby the Supreme Court of Bangladesh stroke down an amendment to the constitution made by the parliament.

Following the decision of ***Anwar Hossain Vs Bangladesh***[5], by the fifteenth amendment in 2011 article 7B was inserted in the Constitution to end the takeover of power through extra-

[3] (AIR 1967 SC 1643)
[4] 41 DLR (AD 130)
[5] 41 DLR (AD 130)

constitutional means. Article 7B of Constitution says that Preamble, 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 provided by article 142 of the constitution of Bangladesh.[6]

Literally, the term Basic Structure means,

Structural pillars or fundamental part of something which is necessary and from which other things develop and cannot be changed easily at any time[7].

In Constitutional Aspect, some crucial parts of the constitution only belong to the people of the state like, Supremacy of the Constitution Democracy, Republican government, Independence of Judiciary, Unitary state and Separation of powers Fundamental rights. These structural Pillars of the constitution are place outside any change by amendatory procedure[8].

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. 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. 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. 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.

In 8th amendment case:

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. These fundamental main beliefs or structural supports are known as Basic Structure of Constitution[9].

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

[6] The People’s Republic of Bangladesh Constitution
[7] Oxford Advanced Learner’s Dictionary
[8] Anwar Hossain Chowdhury vs. Bangladesh2 1989 BLD (Spl)1
[9] Ibid

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. Previously, the Supreme Court had held that the power of Parliament to amend the Constitution was unfettered. 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.[10]

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.[11]

The Supreme Court's position on constitutional amendments laid out in its judgements is that Parliament can amend the Constitution but cannot destroy its "basic structure".

[10] Kesavananda Bharati v. State of Kerala
[11] "Revisiting a verdict" Vol.29, no 1

The basic structure doctrine was rejected by the High Court of Singapore. It was initially also rejected by the Federal Court of Malaysia, but was later accepted by it. Conversely, the doctrine was initially approved in Belize by the Supreme Court.

2.2 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 by a democratic assembly on behalf of people with a view to keeping its supremacy as a lofty idealism for nation which has certain fundamental principles and objectives having structural pillars on which the whole edificeof constitution is erected and if these are taken away, the constitution will lose its originaland inherent identity[12].
2. The parliament being a creature of the constitution must exercise its powers within the constitutional limits. 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 party interest in countries where democracy is not given any chance to develop."
3. Though the judiciary is also the creature of the constitution which has given the judiciary the power to play the role of umpire of the executive and the legislative and is called the guardian of the constitution[13].

[12] Constitution, Constitutional law and Politics; Md. Abdul Halim
[13] The Dhaka University Studies, part- F Vol. xvi (2): 123-154; 2005, the concept of basicstructure: Md. Ekramul Haque.

2.3 Origin and Development of basic Structure

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[14]. 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[15]. Before the Kesevananda's case the issue of the basic structure came to be applied indirectly in GOLAK NATH'S case[16]. 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 NARAYAN[17]. 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

[14] PLD, 1963, SC, 486
[15] AIR, 1973, SC, 1461.
[16] Golak Nath Vs. State of Punjab, AIR 1967, SC, 1643
[17] AIR, 1975, SC, 2299.

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.

In fact, in **Kesavananda case** this doctrine in 1973 was recognized formally for the first time in India. But apart from this case there are also some pre-development and post development of this doctrine through different cases. Therefore, I will prefer to discuss it dividing into the following three phases based on Kesavananda case:

In 1967 with **Golak Nath's**[18] case, which was based on argument of non-amenability of fundamental rights, it was held that fundamental rights as inviolable and beyond the reach of the amending power but not on the ground of basic structure. This decision in fact paved the way to recognize the doctrine of basic structure in future as it somehow restricted the amending power which is at the basis of basic structure theory.

In 1973, in the **Kesavananda**[19] case for the first time the Indian Supreme court recognized the doctrine of basic structure. It was decided by the majority that the parliament's constituent power to amend the Constitution is subject to limitations and the parliament cannot use its amending power so as to damage, emasculate, destroy, abrogate, change, or alter the basic structure or framework of the Constitution. In 1975, The Kesavananda decision was first affirmedin **Indira Nehru**[6] **case** known as election case. In 1980, in the **Minerva Mills**[20] **case** the Supreme Court reiterated the doctrine. The same proposition was again reaffirmed and applied by the Supreme Court in **Waman Rao**[21] case and **A. K. Roy case.**

In Bangladesh, in 1989, the case of **Anwar Hussain Vs. Bangladesh**[22] popularly known as 8th Amendment case for the first time recognizes the concept of basic structure of our Constitution which sets the constitution beyond the purview of the amending power of Parliament.

[18] Golaknath V. State of Panjab, AIR 1967 SC 1643.
[19] Kesavananda .Vs. State of Kerala, AIR 1973 SC 1461.
[20] Kesavananda .Vs. State of Kerala, AIR 1980 SC 1789.
[21] Waman Rao Vs. Union of India, AIR 1981 SC 271.
[22] 1989 BLD (Spl) 1.

Chapter- 3

Conceptual Analysis

3.1The Concept of Basic Structure

The Constitution of Bangladesh is the highest ruling 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 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***. 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.

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 senses[23].

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

[23] Md. Abdul Halim, constitution, constitutional law and politics, pp434

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 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[24].

[24] Md. Abdul Halim, constitution, constitutional law and politics, pp435-436

3.5 Basic structures Elements 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 Anwar Hossain Vs. Bangladesh, 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 writs petition the amended article 100 and the notification of the chief justice were challenged. 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[25]:

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 is 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. The amended article 100 is inconsistent with article 44, 94, 101, and 102.It also reduced article108 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

[25] The People's Republic of Bangladesh Constitution.

essential requisite for dispensation of justice. between constitutional law and ordinary law, and it would then ultimately be parliamentary supremacy.

The following points will help clarifying how the constitutional supremacy is ensured in the constitution of Bangladesh[26]:

1. The Constitution of Bangladesh is a written one. It specifically prescribes the manner how the power and functions of the organs of the government will be exercised.

2. It is a rigid Constitution. Because it can be amended only by two-thirds majority (Art. 142). Again, to amend some provisions like the preamble, the form of government (Articles 48 & 56) and Fundamental Principles of State Policy (Art.8) a more stringent method has been provided for. In these cases, even after the bill has been passed by two-thirds majority, a referendum is essential. This rigidity, therefore, imposes restriction on the power of the parliament on the one hand and ensures distinction between ordinary law and fundamental law on the other hand. 3. It is the Constitution and not the parliament which is supreme under the Constitution of Bangladesh. This is because, firstly, it is stated in the preamble that " it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh."

[26] Shahabuddin Ahmed, J, para 278.

Chapter- 4
Constitutional Supremacy & Doctrine of Basic Structure

4.1 Parliamentary supremacy & Constitutional supremacy

Parliamentary Supremacy

The term constitutional supremacy means that the parliament has supreme power over the Constitution. It is also known as the supremacy of the legislature because the legislature is not a body created by the constitution; the power of the legislature is also not limited by the Constitution; The legislature exercises unlimited and supreme legislative power. Such legislative supremacy is possible only when the Constitution is unwritten and flexible. The British constitutional system has this supreme legislative power. The three intrinsic features of parliamentary supremacy are:

(i) There is no law which parliament cannot change or modify.

(ii) There is no distinction between constitutional law and ordinary law.

(iii) There is no body which can declare the law passed by parliament illegal or unconstitutional.

Constitutional Supremacy

The term constitutional supremacy means that the Constitution has supreme power over the parliament and the parliament can only perform its functions within the limits of the Constitution. Constitutional supremacy is only possible when the Constitution is written and rigid.

The purpose of making the Constitution written and rigid was to limit the powers and functions of the government and the legislature. In most cases of written constitution, a statement is made in the constitution that the constitution will be the basic and supreme law of the country and that no other law can contradict it. U.S. constitutional officials were the first to designate their Constitution as "the supreme law of the country," and this designation led to the doctrine of constitutional supremacy. The founding fathers of American Constitution had the painful experience that even a representative body might be tyrannical and there should be a law superior to the legislature itself and that it was the restraints of this permanent written law that could only save the people from the fear of absolutism and autocracy.

This constitutional supremacy is also called judicial supremacy in the sense that the judiciary i.e., the highest court of the land is supreme over the legislature. Because the judiciary is invested with the power to examine the validity and constitutionality of any legislation made by the parliament and can declare a law void on the ground of inconsistency with the Constitution.

As to the doctrine of constitutional supremacy Professor Wade that 'in a constitutional system which accepts judicial supremacy legislation may be held invalid on variety of grounds: for example, because it conflicts with the separation of powers where this is a feature of the Constitution or infringe human rights i guaranteed by the Constitution or has not been passed in accordance with the procedure laid down in the Constitution[27]. Professor Hood Philips says that 'to say that a constitution is supreme is to describe its relation to the legislature's power to alter the Constitution is either limited or non-existent.' Actually, a constitution with constitutional supremacy not only defines the power of the legislature; it defines and establishes the principal organs of the state; it is the source of their authority. It prescribes the manner in which and within which their functions are to be exercised. The three organs of the state cannot do anything beyond the limits of the constitution. If anybody does anything that violates the limits of the constitution, then the court can declare the action null and void and this supreme power of the court is vested in the Constitution itself. Therefore, the Constitution has divine authority over everything in the kingdom. This is why this position is called constitutional supremacy.

4.2 Characteristics of Constitutional Supremacy

The doctrine of constitutional supremacy as contradistinguished form the parliamentary supremacy has following characteristics:

(i) The Constitution is written.

(ii) The Constitution must be rigid.

(iii) There must be, in the Constitution, either express or implied declaration that this Constitution shall be the supreme law and any other law inconsistent with this Constitution shall be void.

(iv) The parliament is created by the Constitution itself and it exercises its legislative power being within the bounds of the constitutional limitations.

(v) There is distinction between constitutional law and ordinary law.

[27] The Constitution of USA, Art VI.

(vi) There is an independent body (court) created by the constitution to examine the constitutionality of legislation made by the parliament and any action done by the executive.

4.3 How can the Supremacy of the Constitution be maintained

Constitutional supremacy is never a matter of conventional sanction as is the case of parliamentary supremacy in Britain. Constitutional supremacy depends on the fulfillment of the following conditions:

The Constitution must be written: If the Constitution is not written, the distinction between the fundamental law and ordinary law will be impossible; no restriction can be imposed on the parliament's legislative power and as a result constitutional supremacy will not be possible.

The Constitution must be rigid: If the Constitution is flexible then it can easily be amended by ordinary law-making procedure and there will be no distinction between constitutional law and ordinary law, and it would then ultimately be parliamentary supremacy.

An Independent Judiciary: An independent judiciary must be created by the Constitution itself and it must be given the status of a guardian of Constitution and fundamental rights enumerated in the Constitution. Otherwise, the test of constitutionality of any law made by the parliament and any action done by the executive will be impossible leading to the total impossibility of constitutional supremacy.

4.4 How is Constitutional Supremacy ensured in Bangladesh Constitution

The following points will help clarifying how the constitutional supremacy is ensured in the constitution of Bangladesh.

1. The Constitution of Bangladesh is a written one. It specifically prescribes the manner how the power and functions of the organs of the government will be exercised.

2. It is a rigid Constitution. Because it can be amended only by two-thirds majority (Art. 142). Again, to amend some provisions like the preamble, the form of government (Articles 48 & 56) and Fundamental Principles of State Policy (Art.8) a more stringent method has been provided for. In these cases, even after the bill has been passed by two-thirds majority, a referendum is essential. This rigidity, therefore, imposes restriction on the power of the

parliament on the one hand and ensures distinction between ordinary law and fundamental law on the other hand.

3. It is the Constitution and not the parliament which is supreme under the Constitution of Bangladesh. This is because, firstly, it is stated in the preamble that "it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh."

Secondly, (Article 7 states "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. This constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

Thirdly, Article 26 states that "All existing laws inconsistent with the provisions of this part (i.e., fundamental rights) shall, to the extent of such inconsistency, become void on the commencement of this Constitution. The state shall not make any law inconsistent with the provisions of this part, and any law so made shall to the extent of such inconsistency be void.

Fourthly, Article 65 states that the legislative powers of the Republic shall, subject to the provisions of this Constitution, be vested to the parliament.

Thus, it is clear that the Constitution declares itself to the supreme over the parliament.

4. The declaration of Constitutional supremacy in the Constitution implicitly presupposes the existence of an independent authority to examine the constitutionality of actions taken by the legislative and the executive. To that end the Constitution of Bangladesh has ensured in Articles 94 and 95 an independent organ—the Supreme Court. Under article 102 the Supreme Court has been empowered to scrutinize the governmental actions done in violation of fundamental rights. Again, under Articles 7 and 26 the Supreme Court exercises the power of judicial review i.e., to examine the constitutionality of any law passed by the parliament. And a glaring example to this is the historic Eighth Amendment case. In that case the Supreme Court held the Eighth Amendment to the Constitution unconstitutional and invalid.

4.5 Constitutional Supremacy and Judicial Review

The object of making a constitution written is to limit the power of the government. The Constitution prescribes the manner in which and within which its functions are to be exercised. It imposes restriction on executive and legislative. In most cases of written Constitution, a declaration is made in the Constitution that this Constitution shall be the supreme and fundamental law of the land and no other law can he inconsistent with it. And all organs of the government shall exercise their functions being within the limits of the Constitution. But a question naturally arises as to this constitutional supremacy.

The answer to this question has two dimensions. Firstly, the primary responsibility to maintain constitutional supremacy lies with state-men who under solemn oath of office begin their governmental functions. It is their both moral and legal duty to maintain the constitutional supremacy as they are oath-bound to preserve, protect and defend the supremacy of the Constitution. If they violate their oath and the Constitution they can hardly be, the experience teaches, brought under prosecution and in most cases, they are immune, while they are in power, from any proceedings to the court. It is, therefore, their supreme sense of responsibility and moral obligation which can lead them in a right track to maintain the supremacy of the Constitution.

Secondly, the declaration of constitutional supremacy in the Constitution implicitly presupposes the existence of an independent authority to examine the constitutionality of actions done by the executive and legislative. And this independent authority is the judiciary. The Constitution itself creates an independent judiciary and empowers it to test the constitutionality of every action taken by the executive and legislative. This is why the judiciary under a written Constitution is called the guardian of the Constitution. The judiciary maintains the constitutional supremacy by its power of judicial review.

Judicial review means that jurisdiction of the court by which the court declares any law made by the legislative inconsistent with the Constitution or with the provisions of fundamental rights and unconstitutional and void. According to Henry J. Abraham "Judicial review is the ultimate power of any court to declare unconstitutional and hence unenforceable (i) any law, (ii) any official action based upon a law, and (iii) any other action by a public official that it deems to be in conflict with the constitution."

The doctrine of 'judicial review' may, for the convenience of research and study in constitutional and administrative law, be used in two senses:

A. Doctrine of judicial review in the sense of constitutional supremacy; and

B. Doctrine of judicial review in the sense of parliamentary sovereignty.

Chapter- 5
The basic structure of the Constitution of Bangladesh

5.1 Sources of the concept of the basic structure

It is true that the Constitution of Bangladesh does not contain any direct provision regarding the existence of a basic structure or even explicitly limits the right to amend the Constitution, so where does this principle come from? apart from? M. H-. Rahman, J calls the basic structural theory "the development point of constitutional jurisprudence". He added. It has developed in an environment where the executive, having an overwhelming majority in the legislature, pushes for an immediate amendment of the Constitution without a blue or white paper, without stirring up public opinion, did not send the bill to a select committee and did not spend enough time. for members of parliament to discuss the amendment bill.[28]

Later, describing the doctrine as "new", he asserted that it was in fact an extension of the principle of judicial review. Thus, this interpretation has added a new dimension to the basic structural theory to prove its existence in a simpler way. That the Courts already have the power to overturn unconstitutional laws and actions, and that the Basic Structural Theory doctrine simply places broad power in the hands of the judiciary to grant special protections to structures constitutional basis. He therefore attempted to show that the concept was not new in the sense of a radically innovative idea, but rather emerged as a new extended interpretation of an existing principle. it may take some time before the basic structural doctrine is accepted by the high courts of countries where constitutionalism prevails[29].

Inherent in the Constitution: Implied limitation on the amending power is 'deducible from the entire scheme of the Constitution. In fact, limitation on the amending power will justify the existence of nonamenable basic structures. Shahabuddin Ahmed J explains further in the following words that such limitation exists in the Constitution[30] itself:

"There is no dispute that the Constitution stand on certain fundamental principles which are its structural pillars and if those pillars are demolished or damaged the whole constitutional edifice will fall down. It is by construing the constitutional provisions that these pillars are to be

[28] Supra note 38, Summary of submissions, p.42.
[29] 96. Ibid. para 439.
[30] Ibid., per Shahabuddin Ahmed, J, para 278.

identified. Implied limitation on the amending power is also to be gathered from the Constitution itself including its Preamble[31].

Badrul Haider Chowdhury, J thinks that the basic structure can be deduced from the constitutional scheme, if followed carefully. As he says;

Now, some features are basic features of the Constitution and they are not amendable by the amending power of the Parliament. Iri the scheme of Article 7 and therefore of the Constitution the structural pillars of Parliament and Judiciary are basic and fundamental. It is inconceivable that by its amending power the Parliament can deprive itself wholly or partly of the plenary legislative power over the entire Republic... the constitutional scheme if followed carefully reveals that these basic features are unamendable and unalterable[32].

Inherent in the term amendment: The meaning of the term amendment itself shows that it has some limitations and not absolute in its operation. Shahabuddin, J rightly commented that "As to implied limitation on the amending power it is inherent in the word 'amendment' in Art. 142"[33]. Even the dissenting Judge in the 8th Amendment case, A. T. M. Afzal, J said that 'there is a limitation inherent in the word "amend" or "amendment" which may be said to be a built-in limitation'.

However, the Honorable Judges as well as the learned counsels in the Constitution 8th Amendment case have cited extracts from many legal literatures in support of the existence of basic structure, some of them are quoted below:

Shahabuddin Ahmed, J makes the following citations I shall also keep in mind the following observation of Conrad in "Limitation of Amendment Procedure and the Constitutional power" "Any amending body organized within the statutory scheme, however verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority". He has further stated that the amending body may effect changes in detail, adopt the system to the changing condition but "should not touch its foundation". Similar views have been expressed by Carl J. Friedman in "Man and his Govt.", Crawford in his 'Construction of Statutes' and Cooley in his 'Constitutional Limitation'[34].

[31] Ibid. para 376
[32] Ibid. para 255-56.
[33] Ibid. para 378
[34] Ibid. para 5

Dr. Kamal Hossain in his submission quoted:

Power to amend does not extend to destroying the Constitution in any of its structural pillars or basic structure (Ref: Murphy: Constitutions, Constitutionalism and Democracy; Baxi: "Some reflections on the nature of constituent power" in Indian Constitution: Trends and Issues (1978), pp. 123-24).

5.2 The basic structure of the Constitution of Bangladesh

Though it has been decided by 3:1 majority in the 8th Amendment case that the Constitution of Bangladesh has the basic structure which is beyond the purview of the amending power of the Constitution, yet there is no unanimous opinion regarding the number of basic features. The Judges differ on the point of identification of the basic structures of the Constitution of Bangladesh.

Badrul Haider Chowdhury, J gave the following clear and long list of 'unique features' which are 21 in number[35] :

1. It is an autochthonous constitution because it refers to the sacrifice of the people in the war of national independence after having proclaimed independence.
2. The Preamble: It postulates that it is our sacred duty to safeguard, protect, and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh.
3. Fundamental aim of the State is to realize through democratic process a society in which the rule of law, fundamental human rights and freedom, equality, and justice will be secured.
4. Bangladesh is a unitary, independent, sovereign Republic.
5. All powers in the Republic belong to the people. The Constitution is the supreme law of the Republic and if any other law is inconsistent with the Constitution that other law shall be void to the extent of inconsistency. Such article e.g., Article 7 cannot be found in any other Constitution.

[35] Ibid., para 254

6. Article 8 lays down the fundamental principles to the Government of Bangladesh. This article is protected like the Preamble and can only be amended by referendum.
7. Article 44 figures as a fundamental right and sub-article (2) says without prejudice to the powers of the High Court Division under Article 102 Parliament may by law empower any other court, within the local limits of its jurisdiction, to exercise all or any of those powers;
8. Article 48. The President shall be elected by direct election. This is also a protected Article which can only be amended by referendum.
9. The President shall appoint as prime Minister who commands the support of the majority of the members of Parliament. This Article 58 is also protected and can be amended by referendum. This presupposes the existence of parliament within the meaning of Article 65.
10. There shall be Supreme Court for Bangladesh to be known as the supreme Court of Bangladesh comprising the Appellate Division and High Court Division (Article 94). This is given by the Constitution which the people of Bangladesh "do hereby adopt, enact and give to ourselves this Constitution".
11. This Constitution has erected three structural pillars e.g., Executive, Legislature, and Judiciary all these organs are creatures of the Constitution. None can compete with the other.
12. Judges shall be independent in the exercise of their judicial functions (Article 94(4) and 116A).
13. In case of necessity a Judge of the High Court Division can sit as ad-hoc Judge in the Appellate Division-that shows to the oneness of the Court itself. (Article 98).
14. If any question of law of public importance arises the President can refer the question to the Appellate Division although it is the opinion of the Supreme Court (Article 106).
15. In the absence of the Chief Justice the next most Senior Judge of the appellate Division may perform those functions if approved by the president. Such clause cannot be found in any other Constitution. It thus safeguards the independence of judiciary (Article 97) (See Art. 126 and 223of Indian Constitution).
16. The plenary judicial power of the Republic is vested in and exercised by the High Court Division of the Supreme Court (Articles 101,102, 109 and 110) subject to few limitations e.g., in Article 47,47A, 78,81(3) and 125.
17. The power of superintendence of subordinate Courts is exercised by the High Court Division and these courts are subordinate to the Supreme Court (Article 114).

18. If a point of general public importance is involved in a case pending before a subordinate court the High Court Division has the power to transfer the case to itself. This is unique feature of the Constitution because this power is not available to any High Court either India or in Pakistan. Nor such power was available under the Government of India Act, 1935.
19. The plenary judicial power of the republic is not confined within the territories of the Republic but extends to the functionaries and instrumentalities of the Republic beyond the Republic. See Article 102.
20. The declaration and pledges in the preamble have been enacted substantively in Article 7 and 8. while Preamble and Article 8 have been made unamendable, necessarily Article 7 remains as unalterable.
21. Judges cannot be removed except in accordance with provisions of Article 96-that is the Supreme Judicial Council. Sub-article (5) says if after making the inquiry, the Council reports to the President that in its opinion the Judge has ceased to be capable to properly performing the functions of his office or has been guilty of gross misconduct, the President shall, by order remove the Judge from office. This is unique feature because the Judge is tried by his own 'thus there is secured a freedom from political control' (1965 A.C. 190).

It has been erroneously thought by some that he identified above 21 as basic structure. The fact is that he says that some of those features are basic features which are unamendable. After giving the list of 21 he says in the next paragraph clearly that some of the aforesaid features are the basic features of the Constitution and they are not amendable by the amending power of the Parliament. What are those 'some' which are basic structures and as such unamendable? He does not give the list, rather he identifies some of those as basic structure in a scattered manner. However, by an examination of his judgment following appear to be the basic structures according to his opinion:

1. Structural pillars of Parliament and judiciary, as he says that 'In the scheme of Article 7 and therefore of the Constitution the structural pillars of Parliament and judiciary are basic and fundamental'.
2. Articles 48, 58 and 80 of the Constitution are also basic structure which is evident from his following observation;

To illustrate further, the President must be elected by direct election[36]. He must have a council of ministers[37]. He must appoint as Prime Minister the member of Parliament who appears to him to command the support of the majority of the members of Parliament[38]. Both these Articles 48 and 58 are protected and which says every proposal in Parliament for making a law shall be made in the form of a Bill[39]. Hence the constitutional scheme if followed carefully reveals that these basic features are unamendable and unalterable.

However, there are anomalies regarding Articles 48 and 58 as in another place he says that these may be amended by referendum. But this is expressed in para 254 whereas the above has been mentioned in para 256 which is subsequent to this one. In fact, if the above opinion is accepted that even Article 48 constitutes a basic structure which is unamendable then another legal problem arises because this Article 48 has been changed by the Constitution 12th Amendment subsequent to this amendment when the country switched towards parliamentary form of government replacing the presidential form that prevailed at the time of pronouncing this judgment.

3. Preamble, Articles 7 and 8 are basic structures, as he says that 'While Preamble and Article 8 have been made unamendable, necessarily Article 7 remains as unalterable'.

Shahabuddin Ahmed, J identified the following eight features as the basic structures of the constitution:

1. Supremacy of the Constitution as the solemn expression of the will of the people.
2. Democracy.
3. Republican Government.
4. Unitary State
5. Separation of powers.
6. Independence of judiciary.
7. Fundamental Rights
8. One integrated Supreme Court in conformity with the unitary nature of the state.

[36] Article 48 of the Constitution of Bangladesh
[37] Article 58 of the Constitution of Bangladesh
[38] Article 58(3) of the Constitution of Bangladesh
[39] Article 80 of the Constitution of Bangladesh

The recognition of seven out of above eight is found at one place of his judgment that he observes that 'Supremacy of the Constitution as the solemn expression of the will of the people. Democracy, Republican Government, Unitary State, Separation of powers. Independence of judiciary. Fundamental Rights are basic structures of the Constitution and 'there is no dispute about their identity'.'" The eighth one is obvious from his observation that 'High Court Division, as contemplated in the unamended Article is no longer in existence and as such the Supreme Court, one of the basic structures of the Constitution, has been badly damaged, if not destroyed altogether'.

It appears among the three concurring Judges in the 8th Amendment case, only M. H. Rahman, J does not give any clear list of basic structure, in whatsoever form. But it is evident that the 'unitary character' of our Republic, according to him, is a basic structure as he gives his judgment relying on this fact.[40] 'Preamble' and 'Rule of law' are also seemed to be identified by him as basic structures which may be presumed from his following observations:

The provisions contained in Part VI for the Supreme Court are not entrenched provisions and they can be amended by the legislature[41]. but if any amendment causes any serious impairment of the powers and the functions of the Supreme Court, the makers of the Constitution devised as the kingpin for securing the rule of law to all citizens, then the validity of such an amendment will be examined on the touchstone of the Preamble.

I have indicated earlier that one of the fundamental aims of our society is to secure the rule of law for all citizens and in furtherance of that aim Part VI and other provisions were incorporated in the Constitution. Now by the impugned amendment that structure of the rule of law has been badly impaired.

[40] Article 142 of the Constitution of Bangladesh
[41] The Constitution of Bangladesh

Chapter- 6
Judicial Power & Basic structure of Bangladesh Constitution

6.1 The Emergency

The Court reaffirmed and applied the basic structure doctrine in Indira Nehru Gandhi v. Raj Narain, popularly known as Election case. The constitutionality of Article 329A, which had been inserted by the 39th Amendment in 1975 was challenged in this case[42]. Shortly after the imposition of the Emergency, a bench of thirteen judges was hastily assembled to hear the case. Presided over by Chief Justice Ajit Nath Ray, the court had to determine the degree to which amendments were restricted by the basic structure theory. Ray, who was among the dissenters in the Kesavananda Bharati case, had been promoted to Chief Justice of India on 26 April 1973, superseding three senior Judges, Shelat, Grover and Hegde (all in the majority in the same case), which was unprecedented in Indian legal history. On November 10 and 11, the team of civil libertarian barristers, led by Nanabhoy Palkhivala, argued against the Union government's application for reconsideration of the Kesavananda decision. Some of the judges accepted his argument on the very first day, the others on the next; by the end of the second day, the Chief Justice was reduced to a minority of one. On the morning of 12 November, Chief Justice Ray tersely pronounced that the bench was dissolved, and the judges rose.

The 39th Amendment attempted, among other provisions, to legitimize the election of Indira Gandhi in 1971. Article 329A put the elections of the Prime Minister and Lok Sabha Speaker outside the purview of the judiciary and provided for determination of disputes concerning their elections by an authority to be set up by a Parliamentary law. The Supreme Court struck down clauses (4) and (5) of the article 329A, which made the existing election law inapplicable to the Prime Minister's and Speaker's election, and declared the pending proceedings in respect of such elections null and void[43].

[42] Lok Sabha Secretariat. pp. 14–20.

[43] Austin, Granville (1999).

6.2 Development

Constitutional lawyer A.G. Noorani[44] points out that this doctrine now "spreads far beyond national borders," while Dietrich, who put forward the argument in a lecture at the Faculty of Law at Banaras Hindu University. I can't think of a way to attribute it to Mr. Conrad. According to Noorani, the controversy was conceded to M.K. Nambiyar, who read excerpts from it in Goraknath. Implicit Restrictions on Amendment Power: "Perhaps the Supreme Court's position is influenced by the fact that it has yet to face radical constitutional reform." However, it is the lawyer's duty to foresee extreme cases of dispute, and in some cases only an extreme test reveals the essence of a legal concept. So even if I were to propose a conceptual amendment bill for the purpose of legal debate, splitting India in two and getting a two-thirds majority to amend Article 1 would still be difficult under Article 368. What are the actual states of Tamil Nadu and Hindustan? “Could an amendment to the Constitution repeal Article 21 to the extent that a person's life or individual liberty could be immediately deprived without the authorization of the law? If so, would it be possible to amend Article 368 to state that the power to amend it rests with the President acting on the advice of the Prime Minister, using this power to abolish the Constitution and, for example, the Mughal regime? Can the reign of the Imperial Emperor and the British Crown be restored? I don't want a quick answer with such questions. However, I want you all to know that in the Weimar debate, there was at first an academic debate on such issues among German constitutionalists, but that suddenly changed dramatically and dramatically by history. presented in a terrifying way.”

6.3 Evolution of the doctrine

The basic structure doctrine was further clarified in Minerva Mills v. Union of India. The 42nd Amendment had been enacted by the government of Indira Gandhi in response to the Kesavananda Bharati judgment in an effort to reduce the power of the judicial review of constitutional amendments by the Supreme Court. In the Minerva Mills case, Nanabhoy Palkhivala successfully moved the Supreme Court to declare sections 4 and 55 of the 42nd Amendment as unconstitutional[45]. The constitutionality of sections 4 and 55 of the 42nd Amendment was challenged in this case, when Charan Singh was caretaker Prime Minister. Section 4 of the 42nd Amendment, had amended Article 31C of the Constitution to accord precedence to the Directive Principles of State Policy articulated in Part IV of the Constitution

[44] NOORANI, A. G. (Apr 28 – May 11, 2001).

[45] Raghav Sharma (2008-04-16). "Minerva Mills Ltd. & Ors. v. Union of India & Ors.

over the Fundamental Rights of individuals articulated in Part III. Section 55 prevented any constitutional amendment from being "called in question in any Court on any ground". It also declared that there would be no limitation whatever on the constituent power of Parliament to amend by way of definition, variation or repeal the provisions of the Constitution. On 31 July 1980, when Indira Gandhi was back in power, the Supreme Court declared sections 4 & 55 of the 42nd amendment as unconstitutional. It further endorsed and evolved the basic structure doctrine of the Constitution[46]. As had been previously held through the basic structure doctrine in the Kesavananda case, the Court ruled that Parliament could not by amending the constitution convert limited power into an unlimited power (as it had purported to do by the 42nd amendment).

In the judgement on section 55, Chief Justice Yeshwant Vishnu Chandrachud wrote, Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The tone of a limited power cannot by the exercise of that power convert the limited power into an unlimited one[47].

The ruling was widely welcomed in India, and Gandhi did not challenge the verdict[48]. In the judgement on Section 4, Chandrachud wrote:

Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21. Article 31C has removed two sides of that golden triangle which affords to the people of this country an assurance that the promise held forth by the preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual.

[46] "Indian Constitution: Sixty years of our faith".

[47] "Minerva Mills Ltd. & Ors. vs. Union of India & Ors".

[48] "When in doubt, amend". Indian Express. 2009-08-21.

This latter view of Article 31C was questioned, but not overturned, in Sanjeev Coke Manufacturing Co v Bharat Cooking Coal Ltd. (case citation: AIR 1983 SC 239). The concept of basic structure has since been developed by the Supreme Court in subsequent cases, such as Waman Rao v. Union of India (AIR 1981 SC 271), Bhim Singhji v. Union of India (AIR 1981 SC 234), S.P. Gupta v. President of India (AIR 1982 SC 149) (known as Transfer of Judges case), S.P. Sampath Kumar v. Union of India (AIR 1987 SC 386), P. Sambamurthy v. State of Andhra Pradesh (AIR 1987 SC 663), Kihota Hollohon v. Zachilhu and others (1992 1 SCC 309), L. Chandra Kumar v. Union of India and others (AIR 1997 SC 1125), P. V. Narsimha Rao v. State (CBI/SPE) (AIR 1998 SC 2120), I.R. Coelho v. State of Tamil Nadu and others (2007 2 SCC 1), and Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha and others (JT 2007 (2) SC 1) (known as Cash for Query case).

The Supreme Court's position on constitutional amendments laid out in its judgements is that Parliament can amend the Constitution but cannot destroy its "basic structure"[49].

6.4 Recognition

Aside from India, the basic structure doctrine has been adopted in a number of jurisdictions, and rejected in some others.

Bangladesh

The basic structure doctrine was adopted by the Supreme Court of Bangladesh in 1989, by expressly relying on the reasoning in the Kesavananda case, in its ruling on Anwar Hossain Chowdhary v. Bangladesh (41 DLR 1989 App. Div. 165, 1989 BLD (Spl.) 1)[50]. However, Bangladesh is the only legal system to introduce this concept through constitutional provisions. Article 7B of the Constitution of Bangladesh introduced some parts of it as basic provisions of the constitution and referred to some others (which are not properly defined) as basic structure of the constitution and declares all of these as not amendable.

[49] "India - The Constitution". Countrystudies.us. Archived from the original on 2012-10-14.

[50] "Behind the 'basic structure' doctrine".

Belize

The basic structure doctrine was invoked by the Supreme Court of Judicature of Belize in Bowen v Attorney General BZ 2009 SC 2 in rejecting the Belize Constitution (Sixth Amendment) Bill 2008, which had sought to exclude certain deprivation of property rights from judicial review. The court recognized the fundamental rights granted by the constitution, respect for the rule of law and the right to the ownership of private property as basic features of the Belizean constitution, as well as the separation of powers, which Chief Justice Abdulai Conteh noted had been recognized by the Judicial Committee of the Privy Council in Hinds v The Queen [1977] AC 195 (which was not a constitutional amendment case:41)[51] as implicit in Westminster model constitutions in the Caribbean Commonwealth realm[52].

The Supreme Court affirmed the doctrine in British Caribbean Bank Ltd v AG Belize Claim No. 597 of 2011[53]and struck down parts of the Belize Telecommunications (Amendment) Act 2011 and Belize Constitution (Eighth) Amendment Act 2011. The amendments had sought to preclude the court from deciding on whether deprivation of property by the government was for a public purpose[54], and to remove any limits on the National Assembly's power to alter the constitution. This was found to impinge on the separation of powers, which had earlier been identified as part of the basic structure of the Belizean constitution.

Malaysia

In Malaysia, the basic features doctrine was initially found to be inapplicable by the Federal Court in Phang Chin Hock v. Public Prosecutor. The Court remarked that the Indian constitution was drafted by a constituent assembly representative of the Indian people in territorial, racial and community terms[55], and not "ordinary mortals", while the same could not be said for the Malaysian constitution[56], which was enacted by an ordinary legislature.

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[51] "British Caribbean Bank Ltd v AG Belize Claim No. 597 of 2011" (PDF). Supreme Court of Judicature of Belize, 2012.

[52] O'Brien, Derek (2013-05-28). "Derek O'Brien: The Basic Structure Doctrine and the Courts of the Commonwealth Caribbean".

[53] "British Caribbean Bank Limited v. The Government of Belize PCA 2010-18". Permanent Court of Arbitration.

[54] [1980] 1 M.L.J. [Malayan Law Journal] 70.

[55] Evolution of a Revolution: Forty years of the Singapore Constitution, London.

[56] "Phang CHIN HOCK v Public Prosecutor - [1980] - Law LAW224".

The basic structure doctrine was first cited with approval by the Federal Court in obiter dicta in Sivarasa Rasiah v. Badan Peguam Malaysia[57], before ultimately being applied by the same court in Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Ano'r Case[58] and Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & 2 O'rs & 2 Other Cases[59]. In those cases, the Federal Court held that the vesting of the judicial power of the Federation in the civil courts formed part of the basic structure of the Constitution, and could not be removed even by constitutional amendment.

Pakistan

The basic structure doctrine was recognized in Constitution Petition No.12 of 2010[60], etc. by the Supreme Court of Pakistan in 2015. The case was heard by the full 17-member bench, of which a plurality of 8 accepted the basic structure doctrine as a basis for limiting the ability of the Parliament of Pakistan to amend the Constitution, 4 rejected the premise of such limitations, describing the basic structure doctrine as a "vehicle for judicial aggrandizement of power", and 5 accepted that some limitations exist but did not endorse the basic structure doctrine[61]. The judgement identified democracy, federalism and independence of the judiciary as among the characteristics protected by the doctrine[62].

Before this decision, it was unclear whether the basic structure doctrine applied in Pakistan. The doctrine was considered and rejected shortly after the Kesavananda decision, revived in 1997, and rejected again in 1998. The 2015 decision addressed the issue directly and accepted the doctrine.

[57] [2010] 2 M.L.J. 333.

[58] [2017] 3 M.L.J. 561.

[59] Federal Court, 29 January 2018.

[60] "District Bar Association v Federation of Pakistan, 2015.

[61] Sanghi, Sanskriti (2017-01-22). "The Basic Structure doctrine goes global". The Law Blog. Law Matters Centre for

[62] Research, Education, and Social Action. Archived from the original on 2020-08-06.

Singapore

The High Court of Singapore denied the application of the basic features doctrine in Singapore in Teo Soh Lung v. Minister for Home Affairs. Justice Frederick Arthur Chua held that the doctrine was not applicable to the Singapore Constitution: "Considering the differences in the making of the Indian and our Constitution, it cannot be said that our Parliament's power to amend our Constitution is limited in the same way as the Indian Parliament's power to amend the Indian Constitution.[63]"

Uganda

In December 2017, the Ugandan parliament passed a Constitutional Amendment which removed age limit of 75 years for the President and Chairpersons of the Local Council. The President Yoweri Museveni, who has been President of Uganda since 1986, signed the amendment into law in January 2018, aged '74 years' (Unsubstantiated evidence is available that the alleged dictator is in his late 80's). Several opposition leaders and the Uganda Law Society, challenged the constitutionality of the amendment before the Constitutional Court, which (majority) upheld the validity of the amendment. Taking note of the judgments in Kesavananda Bharati v. State of Kerala, AIR 1973 SC and Minerva Mills v. Union of India, AIR 1980 SC 1789, the Supreme Court of Uganda in Mabirizi Kiwanuka & ors. v. Attorney General, [2019] UGSC 6, unanimously upheld the Constitutional Court (majority) finding.

[63] "Isaam Bin Haris: Judicial Review of Constitutional Amendments – Pakistan's Uneasy Subscription to the Basic

Chapter- 7

Problems in Basic Structure Doctrine

7.1 Problems in Basic Structure Doctrine

There are many objections against the doctrine of basic structure that were raised in the Constitution 8th Amendment case; some of them are discussed with their replies. When Constitution makers have imposed no limitation on the amending power of Parliament, the power cannot be limited by some vague doctrines of repugnancy to the natural and unalienable rights and the preamble and state policy. The argument that Parliament cannot change the basic structure of the Constitution is untenable. Shahabuddin, J rejects the claim of 'vague doctrines' altogether saying that the main objection to the doctrine of basic structure is that it is uncertain in nature and is based on unfounded fear.

But in reality, basic structures of the Constitution are clearly identifiable. Badrul Haider Chowdhury, J also refutes the contention made by the Attorney general terming it as a 'clear wrong'. In his words: The Attorney General is clearly wrong.

Article 142(1A) itself says that the Preamble amongst other can only be am ended when in a referendum the majority votes for it otherwise the Bill though passed by the Parliament does not become law. Here is the limitation on legislative competence.

The Attorney general argued that the amending power is a constituent power. It is not a legislative power and therefore the Parliament has unlimited power to amend the Constitution invoking its constituent power. Badrul Haider Chowdhury, J made the following points in giving reply to this contention made by the Attorney General:

He argued this point by keeping an eye on Article 365 of the Constitution of India which says that ‘‘Parliament may in exercise of its constituent power amend”. Our Constitution does not have any such provision. Our Constitution is not only a controlled one but the limitation on legislative capacity of the Parliament is enshrined in such a way that a removal of any plank will bring down the structure itself. The constituent power is here with the people of Bangladesh.

The contention of the Attorney general on the non-obstante clause in Article 142 is bereft of any substance because that clause merely confers enabling power for amendment but by interpretive decision that clause cannot be given the status for swallowing up the constitutional fabric.

Rigidity in the amendment process as it is today if made more rigid by implied limitation, will leave no scope for peaceful change and this may lead to change by violent and unconstitutional means, such as, revolution Shahabuddin Ahmed opposed this argument on the ground that absence of basic structure cannot guard against revolution.

He observes: I would not very much appreciate this argument for, now a days, there is hardly any revolution in the sense of French or Russian revolution for radical change of the socio-economic structure.

What is spoken of as revolution in the third world countries is the m ere seizure of state power by any means fair foul. If a real revolution comes, it cannot be prevented by a constitution however flexible it might be. The Constitution has undergone so many radical changes.

That the doctrine of basic structure merely evokes an amazement why if it is such an important principle of law. H. Rahman says that 'Because the principle was not invoked earlier in the past the Court cannot be precluded from considering it. Some of the past amendments of the Constitution destroyed its basic structures and disrupted it on several occasions' P Then he starts giving a long reply to this contention citing different changes in the constitution in the following words: It is true that such mishaps did take place in the past.

The Constitution Fourth Am Amendment Act, dated 25 January 1975, changed the Constitution beyond recognition in m any respects and in place of democratic Parliamentary form of Government on the basis of multiple party system a Presidential form, of Government authoritarian in character on the basis of a single party was brought about overnight thereby.

Freedom of the press was drastically curtailed; independence of the Judiciary was curbed by making the Judges liable to rem oval at the wish of the chief Executive; appointment, control and discipline of the subordinate Judiciary along with Supreme Court's pow er of superintendence and control of subordinate courts were taken away from the Supreme Court and vested in the Government. The change was so drastic and sudden.

Chapter- 8
Concluding Part

8.1 Recommendation

Without any challenge coming from the executive or the legislature it has been established peacefully in the 8th Amendment case. The Attorney General to establish that the amending power under Article 142 is a constituent power so that the amending power will be unlimited which was denied by the opponents. But, in India we see that Indian Constitution in spite of having an express declaration in Article 368 that the amending power is constituent power doctrine of basic structure has been recognized. Thus, it may be concluded that in fact the term 'amendment' inherently bears the limitation of basic structure and that need not be proved by any other argument. Unlike in India, in Bangladesh there was no repeated tussle between the Parliament and judiciary to establish the concept of basic structure.

Even after pronouncing the 8th Amendment judgment so far, no initiative is taken yet by the Parliament to undo it. Thus, unlike the Indian Parliament, the reaction of the Parliament in Bangladesh towards the doctrine of basic structure curtailing the amending power of the Constitution seems to be more tolerant and patient. However, in spite of the existence of the theory of basic structure in the jurisprudence of constitutional law in Bangladesh, still the actual number of basic structures is uncertain, due to the absence of clear judicial authority in this regard. Obviously, such a situation goes against this theory for lack of its preciseness and clarity, and even if it is argued that it will be settled from time to time what constitutes basic structure that also does not become free from the criticism that such a theory then creates an unknown restriction that will be determined after allegation of its violation is made.

Finally, it seems to be a highly useful doctrine at least in a country like Bangladesh where many laws are passed purely for political purposes. The country where even a democratic government by its majority in the parliament did establish one party political system, curbed the independence of judiciary, banned the newspapers and so on, this doctrine undoubtedly will remain there as an effective check to such drastic autocratic steps to be taken through constitutional process in the future.

8.2 Conclusion

The Constitution of the People`s Republic of Bangladesh has supremacy over comprehensive law in Bangladesh. One of the important constitutional laws of Bangladesh is that its basic structure cannot be changed by the National Assembly. However, although the Bangladesh Constitution is an elaborate written constitution and also one of the greatest in the world, it does not have any specific provisions regarding its basic structure. The Constitution is the most eloquent evidence to affirm Bangladesh as a united republic, independent and based on national liberation struggle, and this is how we came to the People's Republic of Bangladesh. It lays a firm foundation for nationalism, secularism, democracy and socialism as the basic morality representing the Republic. As we have seen in Bangladesh, in the case of the 8th Amendment, that is the Attorney General`s earnest effort to determine that the amendment power under article 142 if constitutive power to the power would be limitless has been rejected by opponents. But in India, we see that the Constitution of India, even though it has a clear text declares in article 368 that the authority to amend is constitutive authority basic structural theory has been recognized. Thus, it can be concluded that the term "modification" is in fact inherently limited structure and need not be proved by other arguments. Unlike India, there is no repeated conflict between the parties in Bangladesh. Parliament and the judiciary to establish the concept of basic structure. Virtually no challenge from the executive or legislative body it was peacefully established in the case of the 8th Amendment. Even after the 8th Amendment ruling so far, no initiative has been taken again by Congress to rescind it. Thus, unlike the Indian National Congress, the National Congress Bangladesh Parliament's response to the doctrine of the structure that restricts the right to amend the Constitution seems to be tolerant and patient. However, despite the existence of basic structural theory in constitutional law cases in Bangladesh, always the actual number of the underlying structure is uncertain, due to the lack of authority on this matter. Clearly, such a circumstance violates theory, is imprecise and unambiguous, and even if it is claimed that such a theory is adjusted over time to form a basic structure, such a theory does not imply that the violation occurred. It cannot escape criticism that it is an undefined constraint created later. After all, this seems to be a very useful doctrine, at least in a country like Bangladesh, where many laws are enacted for purely political reasons. In a country where even governments with Democratic majority in Congress have established one-party dictatorships by restricting the independence of the judiciary, banning the press, etc., this doctrine is a radical dictatorship taken as part of it. It will certainly remain an effective brake against aggressive action. The constitutional process is the future.

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