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Sonargaon University (SU)
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A Research Monograph
On
"Concept of Basic Structure of the Constitution: Safeguarding Constitutional Identity"

Submitted to:

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Letter of Transmittal

To

Md. Deedarul Islam Bhuiyan
Assistant Professor & Head of the Department
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Subject: Submission of the Thesis Paper on "Concept of Basic Structure of the Constitution: Safeguarding Constitutional Identity".

Dear Sir,

It is a great pleasure to submit my thesis on "Concept of Basic Structure of the Constitution: Safeguarding Constitutional Identity". I have given best efforts to finish the thesis with relevant information that I have collected from various sources.

It is worthwhile to mention that there might be some lack and mistakes in my thesis due to limited time and knowledge. I am still learning stage. So, I respect that you will pardon my undesirable mistakes in preparing thesis paper. I shall be grateful and obliged if you kindly accept my thesis and evaluate it.

Sincerely Yours,

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Certification by the Advisor

This is to certified that the Research Monograph on "Concept of Basic Structure of the Constitution: Safeguarding Constitutional Identity" is prepared by Jannatul Ferdausi Tishi, ID No: LLB-1903018024 for partial fulfillment of the requirement of the Program: Bachelor of Laws (Hon's) from Sonargaon University, Dhaka. It also certified that the research work has been carried out under my supervision and intensive guidance.

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 (Hon's).

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Declaration

I hereby, declare that this report entitled "Concept of Basic Structure of the Constitution: Safeguarding Constitutional Identity" is the result of my own work except as cited in the references. The report has not been accepted for any degree and is not currently submitted in candidature of any other degree.

Sincerely Yours,

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Abbreviation

DLR	:	Dhaka Law Reports
FR	:	Fundamental Rights
HCD	:	High Court Division
AD	:	Appellate Division
SC	:	Supreme Court
MP	:	Member of Parliament
PM	:	Prime Minister
ADC	:	Appellate Division Cases
AIR	:	All India Reports
BLD	:	Bangladesh Legal Decisions
CTG	:	Caretaker Government

Abstract:

One of the important constitutional laws of Bangladesh is that the basic structure of the country cannot be changed by parliament and not by referendum. Perhaps the main advantage of such a doctrine is to protect the Constitution, the solemn expression of the will of the people, from unwanted encroachment by legislatures using majority force.

However, although the Constitution of Bangladesh is a complex written constitution and also one of the largest in the world, it does not have any specific provisions regarding the basic structure of the country. The Bangladesh case, commonly known as the 8th Amendment case.

As a result, the basic structure of our Constitution is now outside the authority of the revision authority, and a new interpretation of Section 142 has also been introduced. The judicial consolidation of Anwar Hossain Chowdhury's fundamental structural doctrine against Bangladesh (1981), commonly known as the Eighth Amendment Case (EAC)[1] is regarded as an important milestone in the constitutional history of Bangladesh. By invoking doctrine, parliament is prevented from amending certain fundamental or essential features of the Constitution, even if they are not explicitly named. This article does not question the legitimacy or usefulness of the doctrine, but instead critically examines the EAC's ruling and its application in subsequent decisions that led to its adoption. into constitutional law (Fifteenth Amendment) in 2011.

The article argues that: i) the Supreme Court's questionable position during a time of political and constitutional turmoil reduced the viability of the doctrine in Bangladesh in the first place, ii) the EAC encountered contradictions that made it a good precedent for a Constitutional Court has long been eclipsed by extra-constitutional authority, iii) in subsequent cases it is easy for the Court to accept or subjectively apply the EAC's order, and iv) Parliament, while respecting certain constitutionally immutable features, not only disregards judicial decisions in this matter regarding the basic features, but also disregards the Constitution.

[1] 1989 BLD (Spl) 1

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Chapter-I
Introductory Part

1.1 Introduction

The constitution is the main governing instrument of any democratic country[2]. It provides various basic rights to its citizens and also includes provisions regarding state policy. The Constitution of Bangladesh is supreme over the laws of Bangladesh. It represents Bangladesh as a democratic republic where all power is in the hands of the people of Bangladesh and embodies the basic political principles of the state and upholds the basic rights of its citizens. It was passed by the Parliament of Bangladesh on 4 November 1972; it was made on December 16, 1972. The Constitution is the strongest proof that Bangladesh is a united, independent and struggle-based republic, and this is how we came to the People's Republic of Bangladesh. It establishes a solid foundation of nationalism, secularism, democracy and socialism as the essential characteristic of representing the Republic and claims to seek a society that gives public its people - the rule of law, basic and independent civil rights as well as political, economic and social rights. social justice and even.1 First of all, we need to know what the basic structure of the constitution is. This doctrine is not an established principle of constitutional law. It is a growing principle of constitutional jurisprudence.[3] Structuralism is essentially the magistrate's doctrine that certain features of the constitution go beyond constituting the congressional power to amend. This doctrine also applies only to the constitutionality of amendments and not to ordinary acts of parliament that must endorse the entire constitution.[4]

1.2 Objective

The purpose of writing this thesis is to understand the history of basic structure and to examine the concept of basic structure in the context of constitutional law of Bangladesh. In doing so, of course, more emphasis was placed on the Eighth Amendment to the Constitution by frequently referencing and quoting it. Because the 8th Amendment case is the only body in Bangladesh to deal with the fundamental structural concept and the ruling is so complex that it includes a great deal of case references, legal documents and full arguments. Thus, the

[2] https://www.slideshare.net/mahinishan9/contitution-of-bangladesh
[3] Ibid 2
[4] Ibid 2

study of the basic structural concepts in Bangladesh inevitably also leads to the glorious 8th Amendment case study.[5]

1.3 Importance of the study

Since the political leaders of our country are by and large corrupt and they amend the constitution in favour of them to retain the power for good in Bangladesh, there should have some fundamental main beliefs, as a safeguard of constitution, which are its structural supports which the parliament cannot amend by its amending power. In this sense, there should have the application of the Concept of Basic Structure in the Constitution of Bangladesh. On the other hand, judges are becoming politically biased and court`s structure is becoming weaker because of political interference in adjudicating any cases in Bangladesh in recent years. Hence, there has great controversy on the point of the application of the Concept of Basic Structure in the Constitutional jurisprudence in Bangladesh. The application of the Basic Structure is desirable or not is the great concern in recent years. This study mainly focuses on this big issue to examine the existence and desirability of application of the Concept of Basic Structure in the Constitution of Bangladesh[6].

1.4 Methodology

The methodology of this paper is essentially analytic rather than experimental and relies heavily on secondary data, although to some extent I also use primary data, commonly known as the 8th Amendment business name, where the Basic Structure concept has been recognized in Bangladesh.[7]

There is also mention of Indian cases like Kesavananda's case[8], Golak Nath's case[9] and Indira Nehru Gandhi vs Raj Narayan's case which are called election cases because these cases have great contribution in establishing concept of structural basis in this subcontinent.

[5] Anwar hossain Vs. Bangladesh, 1989 BLD (Spl) 1
[6] The Constitution of the People's Republic of Bangladesh
[7] Anwar hossain Vs. Bangladesh, 1989 BLD (Spl) 1
[8] Kesavananda Bharati Vs. State of Kerala, AIR 1973, SC 1461
[9] I.C. Golaknath Vs. State of Punjab, AIR 1967, SC 1643, at p. 1652

1.5 Limitation

This research does not find out the specific causes behind the individual and community behavior pattern whereas the main focus area of this research is mainly the legal responses. In my research I have faced some limitations also. Since the research topic is vast, actually, I have, comparatively, very limited time to meet and take some interviews of constitutional experts. As the focus area of this research is mainly on desirability and judicial responses in Bangladesh, based on landmark cases, I could not refer any data from internet for not being Bangladeshi references available here.

Chapter-II
Conceptual Framework

2.1 Historical and Constitutional Background

The concept of the Basic Structure of the Constitution is a fundamental principle that aims to safeguard the core values and principles of a nation's constitution from being altered through regular legislative processes.[10] This principle serves as a shield against arbitrary changes that may undermine the foundational principles of the constitution. The origin of this concept can be traced back to India's landmark Kesavananda Bharati case (1973), where the Supreme Court established the doctrine that certain essential features of the constitution cannot be amended by the Parliament. This concept has also influenced other countries, including Bangladesh. In this essay, we will delve into the historical and constitutional background of the Basic Structure of the Constitution in Bangladesh.

Bangladesh's journey towards its own constitution was shaped by its struggle for independence from Pakistan. After a long and arduous liberation war, Bangladesh emerged as a sovereign nation in 1971. The country's founding document, the Constitution of Bangladesh, was adopted in 1972, providing the framework for its governance and institutions. The early years of Bangladesh were marked by political instability and military coups. This turbulence set the stage for the discussion on the concept of Basic Structure.

2.2 The Concept 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[11]. 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.[12] The development of the Basic structure of the constitution in INDIAN jurisdiction. The first formal judicial formulation of this doctrine came out in the

[10] AIR 1981 SC 271
[11] PLD 1963, SC, 486
[12]https://www.academia.edu/32890788/THE_BASIC_STRUCTURES_OF_THE_CONSTITUTION_OF_BANGLADESH

KESEVANANDA'S CASE.[13] Before the Kesevananda's case the issue of the basic structure came to be applied indirectly in GOLAK NATH'S case. In Golak Nath's case the court held that- Parliament had no power to amend fundamental rights as to take away or abridge any of them. C.J Subba Rao said that Fundamental rights are assigned transcendental place under our constitution.

They are kept beyond the reach of parliament. But this judgment gave rise to acute controversy. It was apprehended that the fundamental rights in the constitution would become static creating hindrances in the way of enactment of socio-economic legislation required to meet the needs of a developing society. To get over this problem, Indian parliament passed the 24th constitution Amendment Act,1971 which laid down that, the parliament might in the exercise of its constituent power amend any provision of the constitution be it of fundamental rights or of any other one. The validity of 24th constitution Amendment Act,1971 and the 25th amendment Act which curtailed the power of judicial review was challenged in KESEVANANDA CASE. By majority the court overruling the GOLAK NATH'S[14] 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[15]. 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 Emergence of the Basic Structure Concept:

Amidst the political turmoil, the concept of the Basic Structure of the Constitution started to gain traction in Bangladesh. The judiciary began to play a more active role in interpreting the constitution and safeguarding its fundamental tenets. The 8th Amendment to the Constitution in 1988 provided the President with the power to remove Supreme Court judges, thereby

[13] AIR, 1973, SC, 1461
[14] Golaknath Vs. State of Punjab, AIR 1967, SC 1643, at p. 1652
[15] AIR, 1975, SC, 2299

infringing upon the independence of the judiciary. This move was met with strong resistance from the legal community and civil society, leading to the landmark case of Anwar Hossain Chowdhury v. Bangladesh (1989).

2.4 Types of Basic Structure:

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

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

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.[16]

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

[16] https://www.scribd.com/document/497627588/ASSIGNMENT-on-the-Doctrine-of-Basic-Structure-of-Bangladesh-Constitution

whole edifice of the constitution is erected. If these principles are taken away or destroyed, the constitution will lose its original and inherent identity and character. If it is found that constitution amendment is made by parliament and it has affected or likely to destroy any of the basic features of the constitution, then the amendment should be declared unconstitutional and void 7. D.[17]

2.5 Basic Structure Elements of our Constitution

The Constitution of Bangladesh officially the Constitution of the People's Republic of Bangladesh is the supreme law of Bangladesh. The document provides the framework that demarcates the Bangladeshi republic with a unitary, parliamentary democracy, that enshrines fundamental human rights and freedoms, an independent judiciary, democratic local government and a national bureaucracy.

The four fundamental principles of the Constitution are nationalism, socialism, democracy and secularism. The Constitution endeavors to create a socialist society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, is secured for all its citizens. It commits Bangladesh to "contribute to international peace and co-operation in keeping with the progressive aspirations of mankind".

It invokes constitutional supremacy, as opposed to legislative supremacy since it was created by a constituent assembly not Parliament and was adopted by the people of Bangladesh in its preamble. Parliament cannot quash parts of the Constitution.

Judicial precedent is enshrined in Bangladesh's Constitution under Article 111, which makes Bangladesh an integral part of the common law world. Judicial review is also supported by the Constitution.

It was adopted by the Constituent Assembly of Bangladesh on 4 November 1972 and became effective on 16 December 1972. The Constitution replaced the Proclamation of Independence as the country's fundamental instrument of government. The Constitution became effective on Bangladesh's Victory Day, precisely one year after the signing of the Instrument of Surrender. The constitution has been amended 17 times since its adoption, a two-thirds supermajority is required in the Jatiya Sangsad to secure a constitutional amendment.

[17] https://www.scribd.com/document/497627588/ASSIGNMENT-on-the-Doctrine-of-Basic-Structure-of-Bangladesh-Constitution

Chapter-III

The Doctrine of Basic Stacture

3.1 What are Doctrines?

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

In *Kesavananda*, Justice Hans Raj Khanna propounded that the Constitution of India has certain *basic features* that cannot be altered or destroyed through amendments by the Parliament of India.[18] Key among these "basic features", as expounded by Justice Khanna, are the fundamental rights guaranteed to individuals by the constitution.[(19)(20)]The doctrine thus forms the basis of the power of the Supreme Court of India to review and strike down constitutional amendments and acts enacted by the Parliament which conflict with or seek to alter this "basic structure" of the Constitution. The basic features of the Constitution have not been explicitly defined by the Judiciary, and the claim of any particular feature of the Constitution to be a "basic" feature is determined by the Court in each case that comes before it.

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

In 1967, the Supreme Court reversed its earlier decisions in *Golaknath v. State of Punjab*. It held that Fundamental Rights included in Part III of the Constitution are given a "transcendental position" and are beyond the reach of Parliament. It also declared any amendment that "takes away or abridges" a Fundamental Right conferred by Part III as

[18] Supremacy of the Constitution

[19]Rule of law

[20] The principle of separation of powers

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*.[21] 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.[22]

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.

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".

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.

[21] The objectives specified in the preamble to the Constitution of India
[22] Judicial review

3.2 The Doctrine of Basic Structure

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

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

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

Case: Golaknath v. State Of Punjab [23],Outcome: parliament has no right to amend the fundamental right [on the 24th Amendment their constitution] that was, "With the executive and constitutional power government can amend any provision of the constitution"

That was challenged by a subsequent case: Kasabanka Bharati vs State of Kerala [24]Outcome: Parliament can amend any provision including fundamental rights of the constitution but parliament cannot amend the provisions of the constitution which strikes the basic structure.

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

[23] Golaknath v. State Of Punjab (1967 AIR 1643, 1967 SCR (2) 762),
[24] Kesavananda Bharati ... vs State Of Kerala And Anr on 24 April, 1973

That was followed by another case; Indira Nehru Vs Raj Narayan [25]in its judgment the court said that "The amendment was a violation of the basic structure of The Indian constitution and cancelled the 39th Amendment of Indian Constitution.

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

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

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

3.3 The preamble of Bangladesh Constitution; Operative part or not?

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

It can be defined as follows; "Doctrine of basic structure is a judge-made principle stating that a country's constitution has certain basic features that cannot be amended by its

[25] Indira Nehru Gandhi vs Shri Raj Narain & Anr on 7 November, 1975

legislative body. The amendment of these features will result in drastic changes to the constitution and render it unrecognizable. Hence, amendments to a constitution must not be in conflict with the basic structure of the constitution. Alternatively, a country's legislative body, with strong reasons usually related to public safety, is allowed to amend any provisions in the country's constitution, but the amendments cannot change the basic feature of the constitution."

The question of Basic Structure had been a long debate in the case of Anwar Hussain Vs. Bangladesh (8th Amendment Case)[26]

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

[26] 52 DLR (AD) 82, 1999

Chapter-IV
Origin & Development of Basic Structure of the Constitution

4.1 Bangladesh Constitution and Basic Structural Doctrine

The Constitution of Bangladesh is the highest ruling in Bangladesh. It describes Bangladesh as a democratic republic where all power is in the hands of the people of Bangladesh and describes the basic political principles of the state and upholds the basic rights of its citizens. It was passed by the Parliament of Bangladesh on 4 November 1972; it was implemented on December 16, 1972. The Constitution is the strongest proof that Bangladesh is a united, independent republic based on the struggle for national liberation, and that's how we will achieve the People's Republic of Bangladesh. It laid the firm foundation of nationalism, secularism, democracy and socialism as essential ethics for the defense of the Republic and claimed to seek a society that gave its citizens rule of law, fundamental and independent civil rights as well as fairness and equality. political, economic and social[27].

4.2 Origin and development of the basic structure of the Constitution

Bangladesh became independent on December 16, 1971. After being released from prison in Pakistan on January 8, 1972, Sheikh Mujibur Rahman via London returned to independent Bangladesh on January 10, 1972. The next day, 11 months March 1972, as the President of Bangladesh. The newly independent People's Republic of Bangladesh promulgated the Provisional Constitution of the Ordinance of Bangladesh in 1972.Then, on 23 March 1972, the Ordinance of the Constituent Assembly of Bangladesh was promulgated as provided for in the Provisional Constitution of the 1972 Bangladesh Ordinance. This Ordinance provided for a parliamentary form of government. Preamble to the Ordinance] and constitutes the Constituent Assembly [Clause 7 of the Ordinance] with members of the National Assembly and the East Pakistan Provincial Council elected by the people of East Pakistan, within the framework of the Ordinance. the legal framework of martial law by President Yahiya Khan, in December 1970 and January 1971 for granting the newly independent country a secular democratic constitution. It should be noted that the first text, the Declaration of Independence was proclaimed and adopted on 10 April 1971 with retroactive effect until 26 March 1971, provided for a presidential system of government. He affirmed and decided that "Sheikh Mujibur Rahman will be the President of the Republic". It specifically says: “The President is the Supreme Commander of the Republic and exercises all executive and legislative powers

[27] https://www.lawteacher.net

of the Republic, including the power to pardon. However, the 1972 Bangladesh Provisional Constitutional Ordinance issued by Sheikh Mujibur Rahman provided for a parliamentary form of government. It says: "And considering that the people of Bangladesh clearly desire a functioning parliamentary democracy in Bangladesh". It added: "There will be a Cabinet of Ministers headed by the Prime Minister[28].The State President, when performing all his functions, must follow the advice of the Prime Minister". It seems contradictory. Thus, the establishment of a parliamentary form of government was opposed in the State Supreme Court of Fazlul Hoque[29] as contrary to the Declaration of Independence, but the Supreme Court rejected the challenge when stated that the Declaration of Independence invested in the President having "the legislative power of the Republic" giving him the power to make any statute or legal provision, even of a constitutional nature.

The total number of deputies elected as deputy and deputies in the December 1970 and January 1971 elections was 469 (169 deputies and 300 deputies). Among them, 12 died while waiting before the Constituent Assembly was formed, 2 became Pakistani citizens, 5 were arrested under orders of collaborators, 46 were declared disqualified from membership. member by order of the Constituent Assembly (removal of membership) and one who goes abroad. service. The remaining 403 members form the Constituent Assembly. Among them, 400 members of the Awami League, one (Surenjit Sen Gupta) of the National Awami Party (NAP) and two are independents.The Constituent Assembly held its first meeting on April 10, 1972. The President and Vice President were respectively Mr. Shah Abdul Hamid and Mr. Mohammed Ullah. During this session, a 34-member constitution drafting committee was established under the chairmanship of Dr. Justice. The only female member of the Constitution Drafting Committee is Razia Banu, while the only opposition member is Surenjit Sen Gupta. The Drafting Board held its first meeting on April 17, 1972. During this meeting, a resolution was passed inviting all classes of the population to make proposals. In response to this invitation, 98 memos were received.However, the final report of the Drafting Committee did not specify whether either of these MOUs would be accepted. The Drafting Committee held 74 sessions to draft the Constitution and on June 10, 1972 approved the draft Constitution. To observe the actual working of the parliamentary constitutional system, the chairman of the committee, Dr Kamal Hossain, visited the UK and India. According to reports, a foreign constitution-drafting expert was brought to Dhaka and sought to assist in the drafting of the constitution. In fact, the Bangladesh Constitution was drafted based on the

[28] Article 5 of the Constitution of Bangladesh
[29] 26 DLR (AD)

British Constitution and the Indian Constitution. On 11 October 1972, the last meeting of the Commission was held, and there the final draft of the Constitution was adopted.The 72-page draft Constitution containing 103 articles was presented to the Constituent Assembly at its second session on October 12, 1972. That day, Dr. Kamal Hossain presented the draft Constitution as a bill. The Constituent Assembly held joint discussions for seven days, from October 19, 1972 to November 3, 1972. Cabinet members Syed Nazrul Islam Tajuddin Ahmed, Khodker Mushtaq Ahmed, Monsur Ali, Professor Yousuf Ali, AHM Kamruzzaman, Abdul Malik Ukil and Mizanur Rahman Choudhury participated in the first phase of the joint debate.Sole opposition MP Surenjit Sen Gupta and independent MP Manbendra Narayan Larma also joined the discussion. During this discussion, 163 amendments were proposed. Of these, 84 amendments were adopted, of which 83 were proposed by members of the Awami Federation and one was proposed by Surenjit Sen Gupta. Interestingly, most of the amendments are related to linguistic and grammatical errors in the bill. The third reading of the bill was held on 4 November 1972 and the same day the National Assembly passed the Constitution of Bangladesh. To commemorate this historic day, November 4 is designated as "Constitution Day". It came into force on December 16, 1972, the first anniversary of Bangladesh's "Victory Day".

The original handwritten Constitution had 93 pages. The main drafter of the original Constitution was Mr. Abdur Rouf. The handwritten Constitution was decorated by the famous artist Joynal Abedin. The handwritten constitution, both the original in Bengali and the corresponding translation into English, was signed by the members of the Constituent Assembly on 14 December 1972. The only opposition member at the time currently a member of the Awami League did not sign. Original handwritten Constitution. At the time the Constitution was adopted, the President and Prime Minister were Judges Abu Sayed Chouwdhry and Sheikh Mujibur Rahman respectively.The Constitution has been amended fifteen times as follows:most amendments are made for personal gain and/or partisan politics contrary to the national interest. Fifteen amendments, over a period of 40 years, seems a sizable number compared to constitutional amendments in other similarly democratic countries during the same period.[30]

[30] The Constitution of the People's Republic of Bangladesh

Chapter-V
Constitutional Supremacy & Doctrine of Basic Structure

5.1 Parliamentary supremacy & Constitutional supremacy

Parliamentary Supremacy

The term congressional 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 Land[31]," 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.

[31] The Constitution of USA, Art. VI

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.' 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.

5.2 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 tbisC 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.

(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.

5.3 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.

5.4 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.

Chapter-VI
The Basic Structure of the Constitution of Bangladesh

6.1 Sources of Basic Structure

It is true that the Constitution of Bangladesh does not contain any direct provision regarding the existence of basic structure or even does not restrict the amending power of the Constitution expressly, then from where has this principle been deduced? M. H-. Rahman, J terms the doctrine of basic structure as 'one growing point in the constitutional jurisprudence'.' He adds further –

It has developed in a climate where the executive, commanding an overwhelming majority in the legislature, gets snap amendments of the Constitution passed without a Green Paper or White Paper, without eliciting any public opinion, without sending the Bill to any Select Committee and without giving sufficient time to the members of the Parliament for deliberation on the Bill for amendment.

Then he terming this doctrine as 'a new one' says that this is in fact an extension of the principle of judicial review. Thus, this interpretation has added a new dimension to the basic structure theory to prove its existence through an easier way. That the Court had already the power to set aside the unconstitutional laws and actions, and the doctrine of basic structure theory just gives an extended power in the hands of the judiciary to give special protection to constitutional basic structures. Thus, he tried to portray that this concept is not new in the sense of totally innovative idea, rather it has been emerged as a new extended interpretation from an existing principle.' it may take some time before the doctrine of basic structure gets acceptance from the superior courts of the countries where constitutionalism is prevailing.

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 non-amendable basic structures. Shahabuddin Ahmed J explains further in the following words that such limitation exists in the Constitution 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 identified. Implied limitation on the amending power is also to be gathered from the Constitution itself including its Preamble"[32]

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.

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 conunented that "As to implied limitation on the amending power it is inherent in the word 'amendment' in Art. 142". 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 Honourable 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'.'

Dr. Kamal Hossain in his submission quoted:

[32] Shahabuddin Ahmed, J, Para 278

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). [33]

6.2 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[34]:'

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 realise 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.
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;

[33] Summary of Submisssions, p.27
[34] Ibid para 254

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 pre-supposes 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 fimctions (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 refef 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 limitation 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 in.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 peers, '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 (Article 48). He must have a council of ministers (Article 58). 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 (Article 58(3)). Both these Articles 48 and 58 are protected and so is Article 80 which says every proposal in Parliament for making a law shall be made in the form of a Bill.

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.

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 solenm 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 imamended 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 Amenment 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." '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 under art. 142. 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."[35]

[35] Ibib para 456

Chapter-VII
Judicial Power to uphold Basic Structure of the Constitution

Shankari Prasad Case Facts:

The matter of Shankari Prasad vs. Union of India is referred to as a landmark judgment as it was the very first case that challenged the First Constitutional Amendment Act of 1951. The matter raised doubts about the constitutionality of the Act based upon grounds that it is totally in violation of Part III of the Indian Constitution and thus, shall be proclaimed invalid.

However, the apex court of the country clenched that as per Article 368, the parliament holds the authority to make amendments in any part of the Constitution which includes the Fundamental Rights as well.

Sajjan Singh Vs. State of Rajasthan, 1965

Facts:

- Sajjan Singh was the ruler of the princely state of Ratlam, which was later integrated into the Indian Union.
- In 1949, Sajjan Singh signed an agreement with the Indian government which granted him certain privileges and powers, including the right to receive an annual privy purse.
- In 1954, the Constitution (26th Amendment) Act was passed, which abolished the princely privileges and privy purses of the rulers of the former princely states.
- Sajjan Singh challenged the validity of the 26th Amendment Act in the Supreme Court, arguing that it violated the fundamental rights guaranteed to him under the Indian Constitution.

Issue:

- Whether the 26th Amendment Act, which abolished the princely privileges and privy purses of the rulers of the former princely states, is constitutional or not?

Contentions of the Petitioners:

The petitioner Sajjan Singh contended that the 26th Amendment Act, which abolished the princely privileges and privy purses of the rulers of the former princely states, violated the fundamental rights guaranteed to him under the Indian Constitution. The contentions of the petitioners are as follows:

- Violation of Article 14: The petitioner contended that the 26th Amendment Act violated the fundamental right to equality guaranteed under Article 14 of the Constitution. The petitioner argued that the abolition of the privy purses of the former rulers of the princely states was discriminatory and arbitrary, as it affected only a specific class of individuals.

- Violation of Article 19(1)(f): The petitioner said that the abolition of the privy purses violated the fundamental right to property guaranteed under Article 19(1)(f) of the Constitution. The petitioner argued that the privy purses were a part of the property of the former rulers, and their abolition amounted to deprivation of property without compensation.

- Violation of Article 31: The petitioner claimed that the abolition of the privy purses violated the fundamental right to property guaranteed under Article 31 of the Constitution. The petitioner argued that the privy purses were a part of the property of the former rulers, and their abolition amounted to compulsory acquisition without compensation.

- Non-justiciability of the agreement: The petitioner contended that the agreement signed between the former rulers and the Indian government, which granted them certain privileges and powers, was a valid and enforceable agreement. The petitioner argued that the agreement was not subject to review by the courts, as it was a matter of executive policy.

- Non-justiciability of the constitutional amendment: The petitioner argued that the 26th Amendment Act was not justiciable, as it was a constitutional amendment, and therefore, beyond the scope of judicial review. The petitioner argued that the amendment was a matter of political expediency and policy, and the courts had no jurisdiction to interfere with it.

Contentions of the Respondents:

The state argued that the 26th Amendment Act was constitutional and valid for the following reasons:

- The princely privileges and privy purses were inconsistent with the democratic principles and the Constitution of India. The privileges were based on the birth of the ruler, which was discriminatory and violated the principle of equality before the law.

- The princely privileges and privy purses were granted by virtue of treaties with the British government and not by the Indian Constitution. Hence, the Indian government was not bound to continue these privileges after the integration of the princely states into the Indian Union.

- The abolition of the princely privileges and privy purses was a necessary step for the process of integrating the princely states into the Indian Union. The Indian government had to ensure that all the citizens of the country were treated equally and no one was given special privileges on the basis of their birth.

- The respondent also argued that the abolition of the princely privileges and privy purses did not violate the fundamental rights guaranteed under the Indian Constitution. These privileges were not considered as rights in the first place, and hence their abolition did not violate any fundamental right of the erstwhile rulers of the princely states.

Ratio Decidendi:

In the case the ratio decidendi of the Supreme Court's bench judges was that the 26th Amendment Act, which abolished the princely privileges and privy purses of the rulers of the former princely states, was constitutional and valid.

The Court held that the princely privileges and privy purses were inconsistent with the democratic principles and the Constitution of India, which guarantees equality before law and prohibits discrimination on the basis of birth. The Court also observed that the princely rulers had no special claim to privileges or powers merely on the basis of their birth, and that their privileges and powers were granted by virtue of treaties with the British government.

The Court further held that the Indian government was justified in abolishing the princely privileges and privy purses as a part of the process of integrating the princely states into the Indian Union. The Court also held that the abolition of the princely privileges and privy purses did not violate the fundamental rights guaranteed under the Indian Constitution, as these were not considered as rights in the first place.

Judgment:

In Sajjan Singh vs State of Rajasthan, the Supreme Court of India upheld the validity of the 26th Amendment Act, which abolished the princely privileges and privy purses of the rulers of the former princely states. The Court held that the princely privileges and privy purses were inconsistent with the democratic principles and the Constitution of India, which guarantees equality before law and prohibits discrimination on the basis of birth.

The Court observed that the princely rulers had no special claim to privileges or powers merely on the basis of their birth, and that their privileges and powers were granted by virtue of treaties with the British government. The Court held that the Indian government was justified in abolishing the princely privileges and privy purses as a part of the process of integrating the princely states into the Indian Union.

The Court also held that the abolition of the princely privileges and privy purses did not violate the fundamental rights guaranteed under the Indian Constitution, as these were not considered as rights in the first place. The judgment had far-reaching implications for the process of integration of the princely states into the Indian Union and strengthened the position of the Union government vis-à-vis the erstwhile rulers of the princely states.

Impact:

- Abolition of Princely Privileges and Privy Purses: The Supreme Court's decision upheld the Indian government's decision to abolish the princely privileges and privy purses of the rulers of the former princely states. This decision played a crucial role in the integration of the princely states into the Indian Union and paved the way for a more democratic and egalitarian society.

- Protection of Democratic Principles: The Supreme Court's decision upheld the democratic principles of equality and non-discrimination, establishing the supremacy

of the Constitution over any other laws or agreements. This strengthened the position of the Union government vis-à-vis the erstwhile rulers of the princely states.

- Strengthening of Fundamental Rights: The judgment in the Sajjan Singh case clarified the scope and extent of fundamental rights guaranteed under the Indian Constitution. The Court held that the abolition of the princely privileges and privy purses did not violate any fundamental rights as these were not considered as rights in the first place.

- Historical Significance: The judgment in the Sajjan Singh case was a landmark decision in the history of India's constitutional development. It played a significant role in shaping the relationship between the Union government and the erstwhile rulers of the princely states and helped to establish a more egalitarian and democratic society in India.

Overall, the Sajjan Singh vs State of Rajasthan case had a significant impact on India's constitutional development, strengthening the democratic principles of equality and non-discrimination, and paving the way for a more egalitarian and democratic society.

Golaknath v. State of Punjab, 1967

Golaknath v. State of Punjab is one of the landmark cases in Indian legal history. A number of questions were raised in this case. But the most important issue was whether the parliament had the power to amend the fundamental rights enshrined under Part III of the Constitution of India or not. The petitioners contended that the parliament has no power to amend the fundamental rights whereas the respondents contended that the constitution-makers never wanted our constitution a rigid and Non-flexible one. The court held that the parliament cannot amend Fundamental Rights. This ruling was overturned in Kesavananda Bharati vs Union of India 1973. In this, the court held that the parliament can amend the constitution including fundamental rights but the parliament cannot change the basic structure of the constitution.

Kesavananda Bharati Vs. State of Kerala,1971

Kesavananda Bharati Vs. State of Kerala case is a landmark case for the Indian Constitution. The case was the longest-running case which started in 1970 and finally gave its judgment

after 3 long years on 24th April 1973 by introducing the new principle of Doctrine of Basic Structure by providing more than 800-page long judgment.

Anwar Hussain vs. Bangladesh or 8th Amendment Case:

The case of Anwar Hussain .Vs. Bangladesh widely known as 8th Amendment case is a famous judgment in the constitutional record of independence Bangladesh. This is the earliest judgment whereby the Supreme Court of Bangladesh as salient down an amendment to the constitution ready by the parliament. By two court order appeal the amended Art 100 & the notification of the Chief Justice were confronted as mega vires. A division bench of the HCD discharged the appeal instantly. Leave was established by the Appellate Division by a majority of 3 to 1 striking down the amendment.

Chapter-VIII
Conclusion Part

8.1 Recommendation

As we have seen that in Bangladesh in the 8th Amendment case it was seriously tried by the Attorney General to establish that the amending power under Article 142 ig 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. Almost without any challenge coming from the executive or the legislature it has been established peacefully in the 8th Amendment case. Even after pronouncing the 8th Amendment judgment so far no initiative is taken yet by the Parliament to undo it. Thus, unlike the Indian ParHament, 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 structure 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

In conclusion, the concept of the Basic Structure of the Constitution in Bangladesh has evolved as a result of the country's historical struggles and constitutional developments. It serves as a safeguard against arbitrary changes that could undermine the foundational principles of the constitution. The judiciary's active role in upholding this doctrine has been crucial in preserving the rule of law, separation of powers, and democratic values in the country. While the Basic Structure doctrine ensures the constitution's endurance, it is essential to strike a balance between judicial intervention and the democratic process of constitutional amendments. This principle continues to shape the constitutional landscape of Bangladesh and stands as a testament to the nation's commitment to its core values and principles.

8.3 Bibliography

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