

**The Evaluation and Implications of  
Basic Structure Doctrine in Bangladesh**

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## **Declaration**

I, Sharmin Jahan hereby declare that the work presented here in original work, done by me and has not been submitted elsewhere. The purpose of this research is to fulfill my undergraduate degree. Any literature date or work done by other and sited within this thesis has given the acknowledgement and listed in the reference section.

## **Acknowledgement**

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## **Abstract**

This research work mainly deals with the Doctrine of Basic Structure and how it has been evaluated and implicated in Bangladesh. As the basic structure doctrine is the judge-made rule that some features of the Constitution are beyond the limit of the powers of amendment of parliament and the doctrine was first expressed in '*Kesavananda Bharati v. The State of Kerala*' reflects judicial distress at the perceived danger to the moderate constitutional order caused by the Indian National Congress, in particular under Indira Gandhi. So in this paper I have discussed it. It also showed that the basic structure doctrine is only applicable to the constitutionality of amendments and not to ordinary Acts of Parliament, which must match to the whole of the constitution and not just to its basic structure. In this paper I have discussed about the applicability and implications of basic structure in respect to the amendments of any feature of the constitution.

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# Chapter I

## **Introduction**

The **Basic Structure Doctrine** is a judicial principle which denotes that the Constitution has certain *basic features* that cannot be altered or destroyed through amendments by the parliament.<sup>1</sup> The doctrine thus forms the basis of a power of the Supreme Court 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. Thus it gives extra power to court to review and strike down any constitutional amendments and act enacted by the Parliament. One of the important constitutional laws in Bangladesh is that its basic structure cannot be changed by the Parliament even it cannot be done by referendum. The chief advantage of such a doctrine probably is to secure the Constitution, the solemn expression of the will of the people, from unwanted encroachment to be made by the legislatures exercising their arbitrary and capricious use of the strength of majority. But, though the Constitution of Bangladesh is an elaborate written Constitution which is also one of the largest constitutions in the world it does not contain any specific provision regarding its basic structure or does not say anything regarding unamendability of its basic structure. It has been established only in 1989 in the famous milestone case of *Anwar Hossain V. Bangladesh*<sup>2</sup> popularly known as the 8th Amendment case. Thus, now the basic structure of our Constitution is set beyond the purview of the amending power and a new interpretation of Article 142 has also been given. The object of writing this article is to trace the history of basic structure and examining the concept of basic structure in the context of the constitutional law of Bangladesh. In doing so, obviously, much more emphasis has been given on the Constitution 8th Amendment case by frequently referring and quoting from it. Because, the 8th Amendment case is the only authority in Bangladesh that deals with the concept of basic structure and the judgment is so elaborate that includes so many references of cases, legal literatures and full with arguments. Thus, studying the concept of basic

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<sup>1</sup> "*The basic features*". *The Hindu*. 2004-09-26. Retrieved 2012-07-09.

<sup>2</sup> 1989 BLD (Spl)

structure in Bangladesh necessarily also leads towards the study of the glorious 8th Amendment case.

## **Scopes**

The work is mainly based on the existing provisions regarding the doctrine of basic Structure in Bangladesh and showing some amendability of basic features of the Constitution.

## **Objectives of the study**

1. The objective of this study is to discuss about the doctrine of Basic Structure.
2. To trace the history of basic structure and examining the concept of basic structure in the context of the constitutional law of Bangladesh
3. To show its implementation and evaluation in Bangladesh
4. To show how many amendments has been happened due to doctrine of Basic Structure
5. Enlighten the danger side if follow this doctrine blindly
6. Comparing the implementation and development of this doctrine with other country

## **Methodology**

This research can be said as a descriptive and principle-based research which includes relevant case principles, different opinions of legislation. On the basis of these, I add my own hypotheses or choice of research methods with addressing the questions of why and how. I conduct this research by describing the doctrine of basic structure and its implementation and evaluation. To conduct this research, I mainly use secondary data. The methodology is depending on some secondary sources by searching websites, different blogs, various books, online journals, newspaper and different journal articles. I also collected data from Statute Laws for performing this work.



## Chapter II

### **THE RISE OF THE CONCEPT OF BASIC STRUCTURE**

The "basic features" principle was first introduced in 1964, by Justice J.R. Mudholkar in his dissenting opinion, in the case of *Sajjan Singh v. State of Rajasthan*. He wrote,

It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of Article 368 ?<sup>3</sup>

Supreme Court declared that the basic structure features of the constitution are resting on the basic foundation of the constitution. The basic foundation of the constitution is the dignity and the freedom of its citizens which is of supreme importance and cannot be destroyed by any legislation of the parliament.<sup>4</sup> The basic features of the Constitution have not been explicitly defined by the Judiciary. At least, 20 features have been described as "basic" or "essential" by the Courts in numerous cases, and have been incorporated in the basic structure. Only Judiciary decides the basic features of the Constitution. In *Indira Nehru Gandhi v. Raj Narayan* and also in the *Minerva Mills* case, it was observed that the claim of any particular feature of the Constitution to be a "basic" feature would be determined by the Court in each case that comes before it. Some of the features of the Constitution termed as "basic" are listed below:

1. Supremacy of the Constitution
2. Rule of law
3. The principle of Separation of Powers
4. The objectives specified in the Preamble to the Constitution
5. Judicial Review
6. Federalism

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<sup>3</sup>"India Law Journal".[www.indialawjournal.com](http://www.indialawjournal.com). Retrieved 7 April 2018.

<sup>4</sup>"13 member constitutional bench verdict (refer paras 316 and 317) in *KesavanandaBharati ... vs State Of Kerala And Anron* 24 April,1973". Retrieved 5 December 2014.

7. Secularism
8. The Sovereign, Democratic, Republican structure
9. Freedom and dignity of the individual
10. Unity and integrity of the Nation
11. The principle of equality, not every feature of equality, but the quintessence of equal justice;
12. The "essence" of other Fundamental Rights in Part III
13. The concept of social and economic justice — to build a Welfare State
14. The balance between Fundamental Rights and Directive Principles
15. The Parliamentary system of government
16. The principle of free and fair elections
17. Independence of the Judiciary
18. Effective access to justice
19. Legislation seeking to nullify the awards made in exercise of the judicial power of the State by Arbitration Tribunals constituted under an Act
20. Welfare state

### **Golak Nath Case (1967)**

In 1967, the Supreme Court reversed its earlier decisions in *Golaknath v. State of Punjab*<sup>5</sup>. A bench of eleven judges (the largest ever at the time) of the Supreme Court deliberated as to whether any part of the Fundamental Rights provisions of the constitution could be revoked or limited by amendment of the constitution. The Supreme Court delivered its ruling, by a majority of 6-5 on 27 February 1967. The Court held that an amendment of the Constitution is a legislative process, and that an amendment under article 368 is "law" within the meaning of article 13 of the Constitution and therefore, if an amendment "takes away or abridges" a Fundamental Right conferred by Part III, it is void. Article 13(2) reads, "The State shall not make any law which takes away or abridges the right conferred by this Part III and any law made in contravention of this clause shall, to the extent of contravention, be void." The Court also ruled that Fundamental Rights included in Part III of the Constitution are given a "transcendental

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<sup>5</sup>*I.C. GolakNath and Ors.vs. State of Punjab and Anr. 1967*

position" under the Constitution and are kept beyond the reach of Parliament. The Court also held that the scheme of the Constitution and the nature of the freedoms it granted incapacitated Parliament from modifying, restricting or impairing Fundamental Freedoms in Part III. Parliament passed the 24th Amendment in 1971 to abrogate the Supreme Court ruling in the Golaknath case. It amended the Constitution to provide expressly that Parliament has the power to amend any part of the Constitution including the provisions relating to Fundamental Rights. This was done by amending articles 13 and 368 to exclude amendments made under article 368, from article 13's prohibition of any law abridging or taking away any of the Fundamental Rights.<sup>6</sup> Chief Justice Koka Subba Rao writing for the majority held that:

- A law to amend the constitution is a law for the purposes of Article 13.
- Article 13 prevents the passing of laws which "take away or abridge" the Fundamental Rights provisions.
- Article 368 does not contain a power to amend the constitution but only a procedure.
- The power to amend comes from the normal legislative power of Parliament.
- Therefore, amendments which "take away or abridge" the Fundamental Rights provisions cannot be passed.

### **Kesavananda Bharati Case (1973)**

Six years later in 1973, the largest ever Constitution Bench of 13 Judges, heard arguments in *Kesavananda Bharati v. State of Kerala*<sup>7</sup>. The Supreme Court reviewed the decision in *Golaknath v. State of Punjab*, and considered the validity of the 24th, 25th, 26th and 29th Amendments. The Court held, by a margin of 7-6 that although no part of the constitution, including fundamental rights, was beyond the amending power of Parliament (thus overruling the 1967 case), the "basic structure of the Constitution could not be abrogated even by a constitutional amendment."<sup>8</sup> The decision of the Judges is complex, consisting of multiple opinions taking up one complete volume in the law reporter "Supreme Court Cases". The findings included the following:

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<sup>6</sup>"Constitution Amendment: Nature and Scope of the Amending Process" pp 18-20

<sup>7</sup>AIR 1973 SC 1461).

<sup>8</sup>Austin, Granville (1999). Working a Democratic Constitution - A History of the Indian Experience. New Delhi: Oxford University Press. pp. 258–277.

- All of the Judges held that the 24th, 25th and 29th Amendments Acts are valid.
- Ten judges held that *Golak Nath's* case was wrongly decided and that an amendment to the Constitution was not a "law" for the purposes of Article 13.
- Seven judges held that the power of amendment is plenary and can be used to amend all the articles of the constitution (including the Fundamental Rights).
- Seven judges held (six judges dissenting on this point) that "the power to amend does not include the power to alter the basic structure of the Constitution so as to change its identity".
- Seven judges held (two judges dissenting, one leaving this point open) that "there are no inherent or implied limitations on the power of amendment under Article 368".

The ruling thus established the principle that the basic structure cannot be amended on the grounds that a power to amend is not a power to destroy. The Supreme Court's position on constitutional amendments laid out in its judgments is that Parliament can amend the Constitution but cannot destroy its "basic structure".

### **Implied Limitations of the Amending Power**

"Perhaps the position of the Supreme Court is influenced by the fact that it has not so far been confronted with any extreme type of constitutional amendments. It is the duty of the jurist, though, to anticipate extreme cases of conflict, and sometimes only extreme tests reveal the true nature of a legal concept. So, if for the purpose of legal discussion, I may propose some fictive amendment laws to you, could it still be considered a valid exercise of the amendment power conferred by Article 368 if a two-thirds majority changed Article 1 by dividing India into two States of Tamilnad and Hindustan proper? "Could a constitutional amendment abolish Article 21, to the effect that forthwith a person could be deprived of his life or personal liberty without authorisation by law? Could the ruling party, if it sees its majority shrinking, amend Article 368 to the effect that the amending power rests with the President acting on the advice of the Prime Minister? Could the amending power be used to abolish the Constitution and reintroduce, let us say, the rule of a Moghul emperor or of the Crown of England? I do not want, by posing such questions, to provoke easy answers. But I should like to acquaint you with the discussion which took place on such questions among constitutional lawyers in Germany in the Weimar period -

discussion, seeming academic at first, but suddenly illustrated by history in a drastic and terrible manner."<sup>9</sup>

The note is that in *KesavanandaBharati* the dissenting judge, Justice Khanna approved as "substantially correct" the following observations by Prof. Conrad:

“Any amending body organized within the statutory scheme, howsoever verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority.”<sup>10</sup>

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<sup>9</sup><<http://www.frontline.in/static/html/fl1809/18090950.htm>>Accessed 7June, 2019.

<sup>10</sup>Limitation of Amendment Procedures and the Constituent Power; Indian Year Book of International Affairs, 1966-1967, Madras, pp. 375-430

## Chapter III

### **THE CONCEPT OF BASIC STRUCTURE FROM THE CONSTITUTIONAL PERSPECTIVE OF BANGLADESH**

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 Constitution of Bangladesh was written by international personals and other experienced people. However, amendments during socialist one party and military rule in Bangladesh drastically changed the material and moderate democratic character of the constitution. In August, 2005, the Bangladesh High Court approved a pointer finding that states constitutional amendments in military ruling as unlawful and also unconstitutional, so completely invalid. In January, 2010, after several protest the Bangladesh Supreme Court eventually agreed that the famous judgment of the High Court will be upheld.

#### **Origin of the Doctrine of Basic Structure**

In Bangladesh, the doctrine of basic structure has been introduced in the case of Anwar Hossain V. Bangladesh which is known as 8<sup>th</sup> amendment case. This is the first judgment whereby the Supreme Court of Bangladesh as striking down an amendment to the constitution made by the Parliament. By two writs petition the amended Art. 100 and the notification of the Chief Justice

were challenged as Ultra Vires. A division bench of the HCD dismissed the petition summarily. The principle 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 and if these pillars are dismissed or damaged then the whole constitutional structure will be down.

Therefore, The 8<sup>th</sup> Amendment was partially challenged in *Anwar Hossain Chowdhury v. Bangladesh* whereby the decentralization of High Court Division Benches was declared invalid. Changes regarding the State Religion, however, was not challenged and it escaped judicial attention there. In the celebrated judgment of the case, the Appellate Division based its decision on the doctrine of basic structure to hold that the in the name of amendment the Parliament cannot change the basic structure of the Constitution and hence it cannot decentralize a unitary supreme court under the grab of amendment.

Instead accommodating the concept of Referendum a fresh, the 15<sup>th</sup> Amendment literally adopted the Anwar Hossain version of Basic Structure. It made some provisions of the Constitution including the unidentified basic structures unamendable. A new Article 7B is inserted in the Constitution which is titled as Basic provisions of the Constitution are not amendable. It made the Preamble, all articles of Part I, II and III subject to emergency provisions, Article 150 and the provisions of articles relating to the basic structures of the Constitution unamendable by way of insertion, modification, substitution, repeal or by any other means.<sup>11</sup>

**Inherent in the Constitution:** Implied limitation on the amending power is 'deducible from the entire scheme of the Constitution.<sup>12</sup> 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 stands on certain fundamental principles which are its structural pillars and if those 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.

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<sup>11</sup> The Constitution (15<sup>th</sup> Amendment) Act 2011, Section 42.

<sup>12</sup> *Anwar Hossain Chowdhury v. Bangladesh* 1989 BLD spl 1, Para 378. Summary of submissions, p.42

Implied limitation on the amending power is also to be gathered from the Constitution itself including its Preamble...."<sup>13</sup>

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. In 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.<sup>14</sup>

**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 connected that "As to implied limitation on the amending power it is inherent in the word 'amendment' in Art. 142<sup>15</sup> 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'.<sup>16</sup>

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

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<sup>13</sup> Ibid. para 376

<sup>14</sup> Ibid. para 255-56.

<sup>15</sup> Ibid. para 378

<sup>16</sup> Ibid. para 562



"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'.<sup>17</sup>

Dr. Kamal Hossain in his submission quoted<sup>18</sup>:

Power to amend does not extend to destroying the Constitution in any of its structural pillars or basic structure.<sup>19</sup>

## **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 basic structure or even does not restrict the amending power of the Constitution expressly, and 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.<sup>20</sup>

Then he terming this doctrine as 'a new one' says that this is in fact an extension of the principle of judicial review.<sup>21</sup> 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

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<sup>17</sup>Ibid., para 376.

<sup>18</sup>Murphy: Constitutions, Constitutionalism and Democracy; Baxi: "Some reflections on the nature of constituent power" in Indian Constitution: Trends and Issues (1978), pp. 123-24

<sup>19</sup>Ibid., Summary of submissions, p.27.

<sup>20</sup> Ibid.

<sup>21</sup>Ibid. para 438.

may take some time before the doctrine of basic structure gets acceptance from the superior courts of the countries where constitutionalism is prevailing.<sup>22</sup>

## **What are 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:<sup>23</sup>

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; ...
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

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<sup>22</sup>Ibid, para 439.

<sup>23</sup> *Anwar Hossain v. Bangladesh* , 1989 BLD

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 223 of 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 a 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.'<sup>24</sup> 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'.<sup>25</sup>
2. Articles 48, 58 and 80 of the Constitution are also basic structure which is evident from his following observation;

Hence the constitutional scheme if followed carefully reveals that these basic features are unamendable and unalterable.<sup>26</sup>

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<sup>24</sup>Ibid., para255.

<sup>25</sup>Ibid.,para 255.

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'.<sup>27</sup>

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 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<sup>28</sup>and 'there is no dispute about their identity'.<sup>29</sup>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'.<sup>30</sup>

### **Amending Power and the Basic Structure of the Constitution**

The Constitution does not contain any direct provision regarding the basic structure. So, how can it be deduced from the Constitution? Since the theory of basic structure ultimately restricts the absolute amending power, so the issue of the amending power of the Constitution conferred by it is of great importance in making any discussion about basic structure. Obviously, if there would

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<sup>26</sup>Ibid.,para 256.

<sup>27</sup>Ibid.,para 254, point (20).

<sup>28</sup> Ibid., para 377

<sup>29</sup> ibid.

<sup>30</sup>Ibid.,para 378.

have been any clear provision in the Constitution identifying them as the basic structure and a special provision also would have been there keeping them beyond the reach of amendment, then no such requirement would arise. Thus, in the absence of any clear constitutional provision, in fact, the existence of basic structure is dependent on the nature of the amending power of the Constitution. If the amending power can be exercised absolutely irrespective of the basic structure then nothing remains there as basic structure beyond the reach of amendment. So, to determine the existence of certain provisions as basic structure keeping beyond the reach of amendment procedure is only possible if the nature of the amending power permits it. Article 142 says:

1. "Notwithstanding anything contained in this Constitution—

a) any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of Parliament: Provided that—

ii. no Bill for such amendment shall be allowed to proceed unless the long title thereof expressly states that it will amend a provision of the Constitution:

iii. no such Bill shall be presented to the President for assent unless it is passed by the votes of not less than two-thirds of the total number of members of Parliament;

b) When a Bill passed as aforesaid is presented to the President for his assent he shall, within the period of seven days after the Bill is presented to him assent to the Bill, and if he fails so to do he shall be deemed to have assented to it on the expiration of that period. (IA) Notwithstanding anything contained in clause (1), when a Bill, passed as aforesaid, which provides for the amendment of the Preamble of any provisions of articles 8, 48 or 56 or this article, is presented to the President for assent, the President, shall, within the period of seven days after the bill is presented to him, cause to be referred to a referendum the question whether the Bill should or should not be assented to.

(IB) A referendum under this article shall be conducted by the Election Commission, within such period and in such manner as may be provided by law, amongst the

persons enrolled on the electoral roll prepared for the purpose of election to Parliament

(IC) on the day on which the result of the referendum conducted in relation to a Bill under this article is declared, the President shall be deemed to have—

- a. assented to the Bill, if the majority of the total votes cast are in favour of the Bill being assented to; or
- b. Withheld assent there from, if the majority of total votes cast are in favour of the Bill being assented to.

(ID) Nothing in clause (1C) shall be deemed to be an expression of confidence or no-confidence in the cabinet or parliament.

2. Nothing in article 26 shall apply to any amendment made under this article."

Thus, briefly speaking, above article formulates basically two different modes of amendment of the Constitution:

1. **General process:** By the votes of at least two-thirds of the total number of members of Parliament. Following this process any provision of the Constitution may be amended except its preamble and articles 8, 48, 56 or 142.
2. **Special process:** To amend the Preamble, article 8, 48, 56 or 142, votes of at least two-thirds of the total number of members of Parliament and a referendum also will be required.

Apparently the amending power seems to be an absolute power so as to amend any provision of the Constitution since it says 'notwithstanding anything contained in this Constitution—any provision thereof may be amended'.<sup>31</sup> But there are also many other interpretations of this Article 142. According to those other interpretations this amending power is not an absolute one. The concept of basic structure in fact imposes some restrictions on such amending power.

## **Meaning and Nature of the Amending Power of the Constitution**

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<sup>31</sup>Article 142 of the Constitution of the People's Republic of Bangladesh.

B.H. Chowdhury, J commented that 'the power to frame a Constitution is a primary power whereas a power to amend a rigid constitution is a derivative power derived from the constitution'.<sup>32</sup> Thus the amending power is secondary in nature in comparison with the constituent power. So, if this interpretation is accepted then it appears that by exercising the power of amendment everything which could be done by constituent power that cannot be done. In other words, there must have a difference between primary power and secondary power and then the basic structure is based on that difference. Shahabuddin Ahmed J also expressed the same view that the "constituent power" belongs to the people alone. Even if the "constituent power" is vested in the Parliament the power is derivative one and the mere fact that an amendment has been made in exercise of the derivative constituent power will not automatically make the amendment immune from challenge.<sup>33</sup> He says that the word "amendment" is a change or alteration, for the purpose of bringing in improvement in the statute to make it more effective and meaningful, but it does not mean its abrogation or destruction or a change resulting in the loss of its original identity and character.<sup>34</sup> The term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed.<sup>35</sup> Though A.T. M. Afzal, J, the dissenting Judge in the 8th Amendment case, says that 'The power to amend any provisions of the Constitution by way of addition, alteration, substitution or repeal is found to be plenary and unlimited except as provided in article 142 itself',<sup>36</sup> but ultimately he favours the opinion regarding the existence of basic structure, as he says that 'There is, however, a built-in limitation in the word "amend" which does not authorize the abrogation or destruction of the constitution or any of its there structural pillars which will render the Constitution defunct or unworkable'.<sup>37</sup> Thus, he dissented with the majority judgment on a different ground that the said amendment does not violate the basic structure, not on the ground of non-existence of basic structure or that the amending power is absolute. As he says that 'The impugned amendment of article 100 has neither destroyed the Supreme Court/High Court Division as envisaged in the Constitution nor affected its jurisdiction

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<sup>32</sup>*Anwar Hossain V. Bangladesh*, 1989 BLD

<sup>33</sup> Ibid. para 342

<sup>34</sup> Ibid. para 336

<sup>35</sup> Ibid., para 192, per B. H. Chowdhury, J.

<sup>36</sup> Ibid. para 635

<sup>37</sup> Ibid.



and power in a manner so as to render the Constitution unworkable.<sup>38</sup> It seems that this dissenting Judge has accepted basic structure in a very limited sense and not in the sense the others have taken it. However, throughout the judgment he opposed the existence of basic structure from various angles.

Among the Learned Counsels for the appellants Dr. Kamal Hossain<sup>39</sup> argues that 'the amending power is a power within and under the Constitution and not a power beyond or above the Constitution.'<sup>40</sup> It does not empower Parliament to undermine or destroy any fundamental feature or 'structural pillar' of the Constitution.<sup>41</sup> He explains it further in the following words:

“The amending power under Art. 142 is a power under the Constitution and not above and beyond the Constitution and is not an unlimited power. Any power of amendment under Constitution is subject to limitations inherent in the Constitution. The structural pillars or basic structure of the Constitution established by framers of the Constitution cannot be altered by the simple exercise of amending power. The contention that Parliament has unlimited power of amendment is inconsistent with the concept of supremacy of the Constitution which is expressly embodied in the Preamble and Art. 7 and is undoubtedly a fundamental feature of the Constitution<sup>42</sup>.”<sup>43</sup>

Mr. Asrarul Hossain, another counsel, argued:

The Parliament is a creature of the Constitution and it cannot have unlimited power. Its power of amendment is one within and under the Constitution. Even in the case of unwritten constitution like the British Constitution, the Parliament is not omnipotent and it has its limitations.... The power to amend any provision in Art. 142 does not include the power to replace or destroy the' Constitution and in exercise of that power the basic structures of the Constitution cannot be altered or damaged.<sup>44</sup>

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<sup>38</sup> Ibid

<sup>39</sup> *Mridha's case*, 25 DLR 335 at p.344 on structural pillars

<sup>40</sup> *Anwar Hossain Chowdhury v. Bangladesh* 1989 BLD spl 1, Page 38

<sup>41</sup> Ibid.

<sup>42</sup> *Marbury V. Madison*, 2 L.Ed. 5-8; Cahn; Supreme Court and Supreme Law (1954) p.18

<sup>43</sup> *ibid*.P.27.

<sup>44</sup> *Anwar Hossain Chowdhury v. Bangladesh* 1989 BLD spl 1, Para 378. Summary of submissions, p.42.

The learned Attorney General in the 8th Amendment case has termed the amending power under Article 142 as "constituent power"<sup>45</sup> which has been ultimately rejected by the majority view of the Judges in this case.

## **Scope and Extent of the Amending Power**

About the scope of amending power B.H. Chowdhury, J has made the following points:<sup>46</sup>

1. This derivative power is subject to limitations.<sup>47</sup>
2. Laws and the amendment of a rigid constitution will be ultra vires if they contravene the irritations put on the law making or amending power by the Constitution, for the Constitution is the touchstone of validity of the exercise of the powers conferred by it.<sup>48</sup>
3. The term "amendment" implies such an addition or change within the line of the original instrument as will effect an improvement or better carry out the purpose for which it was framed.<sup>49</sup>
4. Call it by any name basic feature or whatever but that is the fabric of the Constitution which cannot be dismantled by an authority created by the Constitution itself, namely, the Parliament.<sup>50</sup>

Shahabuddin Ahmed, J has made the following comment regarding the scope and extent of the amending power;

Amendment is subject to the retention of the basic structures.<sup>51</sup>By amending the Constitution the Republic cannot be replaced by monarchy, democracy by oligarchy or the Judiciary cannot be abolished, although there is no express bar to the amending power given in the Constitution.<sup>52</sup>

Original Article 142 of our Constitution says that the Constitution 'may be amended or repealed by an Act of Parliament'. But it was amended in 1973 to qualify the term amendment by the

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<sup>45</sup>Ibid.,para 270.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid, para 145

<sup>48</sup> Ibid.

<sup>49</sup> Ibid. para 192

<sup>50</sup> Ibid, para 195

<sup>51</sup> Ibid. para 378

<sup>52</sup> Ibid. para 377

terms 'by way of addition, alteration, substitution'. It may create a confusion that this amended Article has widened the scope of amending power adding the said explanation and the same has made it unlimited. But Shahabuddin Ahmed, J has removed this confusion saying that this amended Article 142 only indicates to the different kinds of amendment.<sup>53</sup> Syed Ishtiaq Ahmed, the learned counsel, in his submission argued that 'Expressions like addition, alteration, substitution or repeal are merely modes of amendment and do not increase the width of the power of amendment. <sup>54</sup>ShahabuddinAhmed, has distinguished between Constitution and its amendment in the following words;

There is... a substantial difference between Constitution and its amendment. Before the amendment becomes a part of the Constitution it shall have to pass through some test, because it is not created by the people through a Constituent Assembly. Test is that the amendment has been made after strictly, complying with the mandatory procedural requirements, that it has not been brought about by practicing any deception or fraud upon statutes and that it is not so repugnant to the existing provision of the Constitution, that its co-existence therewith will render the Constitution unworkable, and that, if the doctrine of bar to change of basic structure is accepted, the amendment has not destroyed any basic structure of the Constitution.<sup>55</sup>

However, the only dissenting Judge in the 8th Amendment case, A. T. M. Afzal, J does not think that there are some provisions in the Constitution which are kept beyond the reach of amending power. He says—

It will be seen, in the first place, that there is no substantive limitation on the power of the Parliament to amend any provision of the Constitution as may be found under Art. V of the Constitution of the USA... The limitation which is provided in Art. 142 related only to procedure for amendment and not substantive in the sense that no article is beyond the purview of amendment.<sup>56</sup>

But the learned Attorney General, M. Nurullah, in the 8th Amendment case rejects the idea of basic structure and portrayed the amending power under article 142 as unlimited. He in fact has relied on the plain and simple meaning of this article 142 instead of deducing any principle from

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<sup>53</sup> ibid

<sup>54</sup> Ibid.

<sup>55</sup>Ibid. para 341

<sup>56</sup> Ibid. para 529

there.<sup>57</sup> He argued 'that Parliament's amending power is unlimited, unrestricted and absolute and it is capable of reaching any Article of the Constitution excepting the Articles specified in clause (1A) of Art.142, which provides for a referendum for amendment'.<sup>58</sup>

Syed Ishtiaq Ahmed argued before the Court that 'Amendment of any provision of the Constitution is the power to bring about changes to make the Constitution more complete, perfect or effective, and repeal is different from amendment'.<sup>59</sup> He continues:

This power is given to the Parliament under the Constitution, and is not a power beyond or above the Constitution. Parliament itself is a creature of the Constitution and is merely done of this limited power which cannot be exercised to alter the basic structure of the Constitution.... Treating amending power as constituent power so as to grant unlimited power of amendment to Parliament except for the express limitation of Art. 142(1A) is to displace the carefully implanted supremacy of the Constitution by supremacy of Parliament.... Concept of unlimited amending power is opposed to Art. 7.<sup>60</sup>

## **An Examination of the Objections against the Doctrine of Basic Structure**

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.

1. 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.<sup>61</sup> The argument that Parliament cannot change the basic structure of the Constitution is untenable.<sup>62</sup>

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.<sup>63</sup>

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<sup>57</sup> *ibid*

<sup>58</sup> *Ibid.* para 270.

<sup>59</sup> *Ibid.*, p.30.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.* para 163, submission of the Attorney General.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.* para 377

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. This is not the case of "vague doctrines of repugnancy". Article 142(1A) itself says that the Preamble amongst other can only be amended when in 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.<sup>64</sup>

2. The Attorney general argued that the amending power is a constituent power.<sup>65</sup> It is not a legislative power and therefore the Parliament has unlimited power to amend the Constitution invoking its constituent power.<sup>66</sup>

Badrul Haider Chowdhury, J made the following points in giving reply to this contention made by the Attorney General:<sup>67</sup>

- i. The argument is not tenable. He argued this point 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.
  - ii. 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.
  - iii. The constituent power is here with the people of Bangladesh. If Article 26 and article 7 are read together the position will be clear.
  - iv. 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.
3. 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<sup>68</sup>

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<sup>64</sup> Ibid. para 164

<sup>65</sup> Ibid. para 165

<sup>66</sup> Ibid.

<sup>67</sup> Ibid. para 167

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 mere 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.<sup>69</sup>

4. The Constitution has undergone so many radical changes... that the doctrine of basic structure merely evokes amazement why if it is such an important principle of law.... It was not invoked earlier in this Court.<sup>70</sup>

M. H. Rahman says that 'Because the principle was not invoked earlier in the past the Court cannot be precluded from considering it'<sup>71</sup>

Shahabuddin Ahmed, J said that the 'trump-card of the learned Atty. Gen. is that some of the past amendments of the Constitution destroyed its basic structures and disrupted it on several occasions'<sup>72</sup> Then he starts giving a long reply to this contention citing different changes in the constitution in the following words:

In spite of all these vital changes from 1975 by destroying some of the basic structures of the Constitution, nobody challenged them in court after revival of the Constitution; consequently, they were accepted by the people, and by their acquiescence have become part of the Constitution.<sup>73</sup>

Thus, Shahabuddin Ahmed, J concluded negating the contention made by the Attorney General saying that 'The fact that basic structures of the Constitution were changed in the past, cannot be, and is not, accepted as a valid ground to answer the challenge to future amendments of this

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<sup>68</sup>Ibid. para 346, submission of the Attorney General.

<sup>69</sup>Ibid.,para 346.

<sup>70</sup>Ibid.,para 442.

<sup>71</sup>Ibid.,para 442.

<sup>72</sup>Ibid.,para 330.

<sup>73</sup> ibid

nature, that is, the impugned amendment may be challenged on the ground that it has altered the basic structure of the Constitution.<sup>74</sup>

5. In the absence of a full catalogue of these basic structures neither the citizens nor the Parliament will know what is the limit of the power of amendment of the Constitution.<sup>75</sup>

Shahabuddin Ahmed, J has rightly rejected this contention made by the Attorney general saying that "There are many concepts which are not capable of precise definition, nevertheless they exist and play important part in law."<sup>76</sup>

However, the dissenting Judge in the 8th Amendment case raised the following objections against the concept of "basic features":

1. It is inconceivable that the makers of the Constitution had decided on all matters for all people of all ages without leaving any option to the future generation.<sup>77</sup>
2. If it is right that they (framers of the Constitution) wanted the so-called "basic features" to be permanent features of the Constitution there was nothing to prevent them from making such a provision in the Constitution itself.<sup>78</sup>
3. The makers placed no limitation whatsoever in the matter of amendment of the Constitution except providing for some special procedure in Art. 142. Further after the incorporation of sub-art. (1 A) providing for a more difficult procedure of referendum in case of amendment of the provisions mentioned therein, the contention as to further 'essential features' becomes all the more difficult to accept.<sup>79</sup>
4. All the provisions of the Constitution are essential and no distinction can be made between essential and non-essential feature from the point of view of amendment unless the makers of the Constitution make it expressly dear in the Constitution itself.<sup>80</sup>
5. If the positive power of amendment of the Constitution in Art. 142 is restricted by raising the wall of essential feature, the clear intention of the Constitution makers will

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<sup>74</sup>Ibid.,para 332 81. Ibid.

<sup>75</sup>Ibid.,para 328, argued by the Attorney General.

<sup>76</sup>Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid

<sup>79</sup> Ibid

<sup>80</sup> Ibid

- be nullified and that would lead to destruction of the Constitution by paving the way for extra constitutional or revolutionary changes.<sup>81</sup>
6. The limitation which is provided in art. 142 relates only to procedure for amendment and not substantive in the sense that no article beyond the purview of amendment.<sup>82</sup>
  7. It is significant that the article (142 of the Constitution of Bangladesh) opens with a Non-obstante Clause. A Non .Obstante Clause is usually used in a provision to indicate that, that provision should prevail despite anything to the contrary in the provision mentioned in such Non Obstante Clause... In the presence of such a clause in art. 142, it is difficult to sustain the contention of the appellants that some provision containing 'basic features' are unamendable or that the amendment of any provision has to stand the test of validity under art.<sup>83</sup>
  8. In our context the doctrine of basic features has indigenous and special difficulties for acceptance. The question naturally will arise "basic features" in relation to which period? What were or could be considered to be 'basic' to our Constitution on its promulgation on 16th December 1972, a reference to the various amendments made up to the (Eighth) Amendment Act will show that they have ceased to be basic any more. The 'basic features' have been varied in such abandon and with such quick succession that the credibility in the viability of the theory of fundamentality is bound to erode. Few examples will be sufficient. There has been repeated reference to art. 44 by all the learned Counsels saying that this article providing for guarantee to move the High court Division for enforcement of fundamental rights is one of the cornerstones of our Constitution. It is well-known that this article was completely substituted by the Fourth Amendment Act (Act 11 of 1975) excluding the Supreme Court entirely. It somewhat ironical that the article has come back to the Constitution by a Proclamation Order. (Second Proclamation Order No. IV of 1976). It has been claimed that art 94 is another cornerstone providing for an integrated Supreme Court with two Divisions. We have the experience of abandoning this Supreme Court and establishing altogether two different Courts, the Supreme Court and the High Court in a unitary state (see Second Proclamation Order no. IV of 1976). And this was again

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<sup>81</sup> Ibid

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.



done away with and the Supreme Court as before was restored by the Second Proclamation Order No. 1 of 1977.<sup>84</sup>

9. The changes made in the basic features within a span of 17 years have been too many and too fundamental and it is not necessary to refer to all of them nor is it my purpose to find fault with any amendment or anybody or any regime for the amendments made in the Constitution... I have only endeavored to show how the organic document, such as a Constitution of the Government is, has developed and grown in our context in fulfillment of the hopes and aspirations of our people during this brief period of 17 years. In view of the experience as noticed above, any doctrinaire approach as to 'basic features', in my opinion, will amount to turning a blind eye to our constitutional evolution and further will not be in the interest of the country. I shall give one example- To-day a basic feature in our constitution is the Presidential form of government. We can take judicial notice that there is a demand by some political parties to restore Parliamentary form of Government as it originally obtained. Why should a road block be created by the Court, if people choose to send the members of those political parties to the Parliament, against amending the Constitution providing for Parliamentary system?<sup>85</sup>

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<sup>84</sup>Ibid.,para 551.

<sup>85</sup>Ibid.,para 553.

## Chapter IV

### **Amendment of Basic Structure**

The celebrated doctrine of basic structure is the most outstanding constitutional invention of the Indian Supreme Court in *Kesavananda Bharati V. State of Kerala and Others* 1973<sup>86</sup>. The substance of the claim is that there are certain structure pillars of the constitution which cannot be dismantled by parliament in the name of amendment. Since then the premise of this proposition has become a *cause celebre*<sup>87</sup> in some newer Commonwealth countries especially in South Asia. In Bangladesh it was given a thriving trial by the Appellate Division in *Anwar Hossain Chowdhury v. Bangladesh* [1989] BLD. A majority of 3:1 of the Appellate Division of the Supreme Court struck down the Constitution Amendment Act, 1988 establishing six permanent benches of the High Court Division outside Dhaka on the charge of being violative of the basic structure of the constitution. It was claimed that the power of parliament to amend the constitution is inherently limited by the basic structure of the constitution.<sup>88</sup>

Some provisions of the constitution are considered to be basic structure while others may be termed as circumstantial. The constitutional lawyers and judges may discern some fundamental structural designs in a constitution as when an architect views a building. Call it basic structures or structural pillars or by whatever name they are there.<sup>89</sup> And the parliament may not use its amending powers to damage, emasculate, destroy, abrogate, change or alter these basic structure or framework of the constitution.

### **Problems of Basic Structure**

While scrutinizing the Anwar Hossain two most striking constitutional implications of basic structure become noticeable.

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<sup>86</sup> 4 SCC 225

<sup>87</sup> Imtiaz Omar and MdZakirHossain, Coup d' etat, constitution and legal continuity, The Daily Star, Law and Our Rights, 17 and 24 Sep. 2005

<sup>88</sup> Dr. M JafarUllahTalukder and M Jashim Ali Chowdhury, Determining the Province of Judicial Review: A Re-evaluation, Metropolitan University Journal, Vol 2 Issue 2, pp 161-170

<sup>89</sup> Justice Mustafa Kamal, *Bangladesh Constitution: Trends and Issues*, University of Dhaka, 1994

First, some of the principles of the constitution become virtually fixed forever.

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

Against this backdrop, it may be argued that the plea of inherent limitation on the power of amendment is not plausible as it makes certain provisions of the constitution which again are to be determined by the court on case to case basis virtually fixed forever. Though a democracy like ours is vulnerable to its own representatives due to excessive adventures with power,<sup>90</sup> this danger inherent in basic structure should not be overlooked.

### **Is There Anything Unamendable?**

In *Anwar Hossain* the court emphasized on the inherent limitation on the power of amendment. It was assumed that amending power is a limited power, by express provisions or necessary implications. Justice Shahabuddin Ahmed made a difference between adoption of a new constitution and the derivative power of amending the constitution and having regard to the term amendment took the view that amendment of the constitution does not mean its abrogation or destruction or a change resulting in the loss of its identity and character.<sup>91</sup> This contention, however, may be disputed at least on three grounds:

First, if the fundamental character of a constitution can never be changed, should it not mean that a particular generation is governing the future from the grave particularly when this constitution does not contain any provision to repeal or replace the constitution?<sup>92</sup>

Secondly, in absence of provision for replacing or repealing the constitution, it is clear that there is no other way to effect change, either trivial or drastic, in the constitution except the Article

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<sup>90</sup>Anuranjan Sethi, Basic Structure Doctrine Some Reflections, p 41 in Social Science Research Network. Available Online: [http://ssrn.com/sol3/papers.cfm?abstract\\_id=835165](http://ssrn.com/sol3/papers.cfm?abstract_id=835165), Accessed 18 June 2019

<sup>91</sup>*Anwar Hossain Chowdhury v. Bangladesh* 1989 BLD spl 1, Para 378.

<sup>92</sup> *Ibid*, Per BH Chowdhury J. Para 256

procedure. There is no provision for establishing a constituent Assembly to overhaul the constitution if necessity arises.

Thirdly, our constitution is the solemn expression of the will of the people. Now think of a situation when the people of Bangladesh think of a completely new version of the constitution with fundamental changes in the philosophy and structure of it. Any such effort will not be tenable under the scheme of basic structure of the present constitution as there are some basic feature are not amendable in any case.<sup>93</sup> Should we construe the intention of the framers of the constitution in this way? An unamendable constitution is the worst tyranny of time. So the argument of inherent limitation is a misnomer. Constitution is particularly hard to amend but not unamendable.

### **Danger of Accepting Basic Structure Blindly**

The concept of Basic Structure has put the Judiciary on the top of the power structure. Now the Judiciary has got supreme say over the contents and nature of the Constitution which is essentially a political document. In Anwar Hossain Shahabuddin Ahmed J. gave a list of eight basic features of the constitution.<sup>94</sup> Mohammad Habibur Rahman J. added another one to the list.<sup>95</sup> Badrul Haider Chowdhury J. found twenty one unique features out of which some were basic which he did not identify.<sup>96</sup> In India more than half of the provisions of the Indian Constitution are declared to be basic and the list is still open.<sup>97</sup> This never ending and ever expanding list of basic structures is creating nothing but confusion and inconsistent application. Two instance below should suffice to establish the fact.

In the aftermath of the Babri Mosque incident the Indian Supreme Court in *S.R. Bommai v. Union of India*<sup>98</sup> justified the dismissal of the BJP led governments in Rajasthan, Madhya Pradesh and Himachal Pradesh on the ground of failure to uphold the secular character, which was considered to be a basic feature, of the Indian Constitution and President's Rule was

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<sup>93</sup>Ibid Para 255

<sup>94</sup> Ibid Para 377

<sup>95</sup> Ibid Para 443

<sup>96</sup> Justice Mustafa Kamal, *Bangladesh Constitution: Trends and Issues*, University of Dhaka, 1994

<sup>97</sup>Md. MoinUddin, 'Debates on Constitutional Amendment and Dilemma of the Doctrine of Basic Structure', *Law Vision*. University of Chittagong, 2004-05, pp 28-31 p 31

<sup>98</sup> 1994, 3 SCC 1

imposed there. Now, strange result may follow if someone in India approaches the Court for dismissal of a particular government on account of its capitalist policy being opposed to socialism another basic feature of the Indian Constitution.

In the cases of *Zafar Ali Shah v. General Parvez Musharraf*<sup>99</sup> and *Wasim Sajjad v. Pakistan*<sup>100</sup> the Pakistan Supreme Court conceded the Martial Law Administrator's power to amend the constitution. At the same time it held that the Martial Law Administrator couldn't destroy the basic structures of the constitution. How curious an application of basic structure? Does there remain anything basic while a usurper makes a democratic constitution subservient to his will?

So it is necessary to ensure certainty in the list of basic structure so that parliament will not be in a fix regarding the scope of amending power.

### **Danger of Ignoring Basic Structure Totally**

While criticizing the basic structure on the above points, we should not overlook the other side of the coin. That is the danger arising out of absence of the doctrine. In countries like ours, the parliamentarians tend to do everything they wish until they are de-elected in the next election. This if not checked will make the constitution a playing in the hands of a majority-ridden parliament. It will give birth to a sort of Parliamentary Supremacy alien to our constitution.

Just consider the 4<sup>th</sup> Amendment to the constitution. Many of us, including me, firmly believe that it was a right but much belated step on the part of Bangabandhu. Yet this 4<sup>th</sup> Amendment has blemished Bangabandhu's glorious patriotism and devotion towards the cause of his countrymen to a considerable extent, we may like it or not. It provided a ready tool in the hands of the anti-liberation force to propagate against in the Patriot. It was a Parliament elected in a multi-party democracy that attempted to introduce a one party system. Theoretically it is always a good question to ask. Had the people mandated the parliament to destroy the very system under which it took birth? Then there was no parliament supremacy in Bangladesh. Given the situation it might have been the wisest on the part of Bangabandhu to seek a fresh mandate from the people on his new political standing starting the second revolution. I'm sure the people of this country would never have turned back on him.

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<sup>99</sup> PLD 2000 SC 869

<sup>100</sup> PLD 2001 SC 233

## A Latent Cure to a Patent Disease

All the problems discussed above- unamendability of certain provisions, judicial overreach arising out of unlimited basic structures and threats of parliamentary majority- may be addressed nicely by resorting to the invalidated and omitted Article 142 1A. in spite of the patent ills in it, looked upon from a different angle, it may reveal a latent cure as well.<sup>101</sup>

The omitted Article 142 1A provided a short list of Articles amendment of which required referendum in addition to a two third majority in the floor. By doing this, Article 142 1A did at least five things-

1. It provided a sort of constitutional recognition to the judicial claim of Basic Structure. While many a people question the existence of any basic structure at all, Article 142 1A itself recognized that there was something basic in the Constitution.<sup>102</sup>
2. It put the basic structures in ink and pen and now there would be no unlimited basic structure. However, this codification shall not foreclose the list of basic for all the time to come. If any new principle emerges in future which might then appear to be basic the Legislature along with the Populace shall have the option to add that in the Constitutional list through referendum.<sup>103</sup>
3. It checked the scope of judicial overreach and the claim of unamendability what is basic for a political entity i.e. the state/ should be determined by the political opinion of the people not by the judges. The people would specifically certify through referendum which are the basic structures of the constitution.
4. By requiring referendum in certain cases, it put a clog on a parliamentary super-majority acting in an unaccountable fashion. It serves a very useful purpose of safeguarding constitutional fabric from the fanaticism of a winner-takes-all politics. Amendment of the constitutionally fixed basic structures would require the Parliament to seek popular approval.

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<sup>101</sup> M. Jashim Ali Chowdhury, Negotiating Article 142, 1A for the 'Basic Structure', The Daily Star, Law and Our Rights, March 6, 2010

<sup>102</sup> *Anwar Hossain Chowdhury v. Bangladesh* 1989 BLD spl 1, Para 378. Per B H Chowdhury J, Para 256

<sup>103</sup> The list provided in Article 142 1A of the Constitution may be amended, if we think the list to be too short, to include some other features like constitutional supremacy Article 7, elected local government – Article 59, no taxation without parliamentary approval- Article 83, judicial review- Article 102, judicial independence- Article 22, independence of the Election Commission- Article 119 in list

5. It solved the dilemma regarding judicial review of constitutional amendments. As is shown in earlier part of this chapter, in regular Parliamentary amendments by two third majority in the House, the Supreme Court shall, if challenged, see whether the particular amendment conforms to the constitutionally fixed basic structures or not. In popular Amendments made through referendum, the court acknowledging the political supremacy of the people, shall simply accept the amendment as it is.

In short, the invalidated Articles cured the iron first immutability of basic structure by saying that basic structures are particularly hard to be amended but not un-amendable. Now inter-generational adaption is reconciled with the need for stability, parliamentary madness as well as judicial overreach is checked.

## Chapter V

### **Conclusion**

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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 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. 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 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 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.

It is seen from the above abstract, that a few Amendments ended at one time under certain forceful situation were consequently detached by another Amendment, and also that numerous of these had a nationwide harmony. But a only some of the Amendments were endorsed without appropriate arguments and thorough discussions concerning all the pledge holders including people adhering to diverse, sometime differing, ideological or opinionated views. Amendments that were the consequence of unsophisticated thought, lack of esteem for democratic practices or suitability have clearly come under severe disapprovals, sometimes for suitable motives and sometimes for sectarian political ideas.<sup>104</sup>

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

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<sup>104</sup><http://www.frontline.in/static/html/fl1809/18090950.htm>>Accessed 2 August, 2019

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