

The Desirability of Application of the Basic Structure Doctrine in Bangladesh: An Introspection of Constitutional Amendments

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Abstract

In Bangladesh, constitutional supremacy prevails by virtue of article 7 and parliament's constitution amending power is restricted by both precedent and constitutional provision i.e. article 7B. Previously the judiciary of Bangladesh affirmed the doctrine of basic structure as a limitation on the parliament's power to amend the constitution. But it has been categorically expressed in article 7B which is incorporated in the constitution after the fifteenth-amendment in 2011 that basic structures of the constitution are inviolable. The desirability to use basic structure as a limitation on the amendment power of the constitution by the parliament is well established in Bangladesh. Bangladesh is perhaps the only country in whose constitution it is categorically stated that the basic structure of the constitution cannot be amended. The basic structure doctrine in Bangladesh is not only a judicial precedent but also a constitutional rule.

Keywords

Basic Structure Doctrine, Bangladesh Constitution, Judicial Review, Power Separation, Amendments to the Constitution

1. Introduction

A Constitution is the supreme law of a country if it has a written constitution. The constitution is not a document of fastidious dialectics but the means of ordering the lives of people. It has its roots in the past. Its continuity is reflected in the present and it is intended for an unknown future (Chaki, 2023). The constitution of a country provides the allocation of power among the branches of the government i.e. legislature, executive and judiciary (Devlin, 1993). The powers

and limitations of every branch are delineated in a written constitution. When every branch of a government works within its limit and does not intrude other branches' arena then it is called constitutionalism (Krotoszynski, 2011). But with the passage of time when everything changes especially human society, like any other law, constitution as a supreme law needs to be changed or amended. Constitution as a law is different from other ordinary laws in terms of the amending procedure. Every written constitution cannot be amended through the amendment procedure of the ordinary law (Ferejohn, 1997). Every written constitution spells out how it could be amended, and it differs from the ordinary law amendment procedure significantly. It is sometimes said that constitution is supreme law as its amendment procedure is rigid and no law can contradict it.

The question might arise now as to who has the power to amend the constitution i.e. judiciary or legislature. Only can the legislature amend the constitution of a country and not the judiciary (Katz, 1995). Legislature is the elected representative of the people and the judicial officers are the selected persons. The legislatures have the power to amend the constitution as they have been given the mandate to do so. The legislature cannot amend the constitution whimsically to gain political objectives and they cannot destroy the basic fabrics of the constitution in the name of amendment (Dixon, 2011). The word amendment per se contains the limitation of the amending power that amendment does not mean destruction of the constitution. Throughout the history, it has been noticed that parliament wanted unlimited power to amend each and every constitution. But the judiciary was the main impediment in this path. The judiciary at last developed a theory that is called "Basic Structure of constitution" which cannot be amended by the parliament and if they were allowed to do so, the constitution would lose its original spirit and objective (Gallagher, 2012).

This doctrine of the basic structure is a limitation on the unlimited power of the parliament that constitution cannot be amended so as to alter the basic structure (Corwin, 1914). This doctrine has evolved in India in a famous case of Keshavananda Bharti case in 1973 (Sharma, 2015). Afterwards this doctrine has been accepted in Bangladesh in the famous eighth amendment case i.e. Anwar Hossain Choudhury vs. Bangladesh. The learned justices including the only dissenting justice had consensus that basic structure of the constitution cannot be amended by the parliament. The justification of the evolution of this basic structure doctrine are three types. First, the fundamental rights cannot be curtailed or abolished by constitutional amendment as evidenced by historical instances, second, to put restriction on the amending power of the parliament in absence of express limitation, third, to make harmonious existence between the amendment procedure provision and with other provisions of the constitution (Choudhuri & Kabra, 2017). The justification could very well be that without some sort of check on this unlimited power to amend the constitution, the constitution could become a plaything in the hands of parliamentarians. Now whatever power i.e. constituent or derivative power the parliamentarians are ex-

exercising, they cannot alter the basic structure of the constitution. There has been considerable amount of debate of vagueness and some reject this on the basis of putting limitation on the unlimited power of parliament in the absence of express provision in the constitution itself and putting this type of unwarranted restriction on the amendment power of the parliament would make the society static in some point and which is not desirable (Hoque, 2023).

In Bangladesh, the basic structure doctrine is a kind of blessing because of the fact that in the past various amendments have been done solely for political purposes to perpetuate power (Billah, 2020). In Bangladesh, the recent fifteenth amendment of the constitution tries to delineate to some extent in article 7B that certain provisions of the constitution cannot be amended. But it has some problem inherent in this amendment. To guard against the arbitrary amendment of the constitution in Bangladesh, a country where going to the power and remaining in power for the political gain is important and to this effect they do not feel unscrupulous to amend the constitution in their way. So, the basic structure doctrine has been accepted in Bangladesh and it is being followed by the learned judiciary.

2. Basic Structure Doctrine in Bangladesh

The debate on the basic structure doctrine started in Bangladesh in the famous case of Anwar Hossain Chowdhury vs. Bangladesh (41 DLR (AD) 165), is popularly known as the constitution eighth amendment case (Bhuiyan, 2017). The main ground on which this amendment was challenged was article 100 of the constitution which gave plenary judicial power of the Republic to the High Court Division of the Supreme Court of Bangladesh whether it was a basic structure of the constitution and whether eighth amendment violated this basic structure. The Appellate Division of the Supreme Court of Bangladesh held that eighth amendment which amended article 100 so as to establish six permanent benches of the High Court Division outside Dhaka violated the basic structure of the constitution as the oneness of the high Court Division is a basic structure of the constitution. In this case Justice B.H. Chowdhury remarked that, “The power to frame a constitution is a primary power whereas as power to amend the constitution is a derivative power from the constitution” (Anwar Hossain Chowdhury vs. Bangladesh 1989 BLD). According to Justice B.H. Chowdhury, the constitution amending power in Bangladesh is different from that of India (Ahmed, 2023). As in Bangladesh, constitution amending power is a derivative and not the constituent power. But exercising this derivative power, parliament cannot change or destroy the basic structure of the constitution. Justice B.H. Chowdhury has listed 21 “Unique Features” of the constitution although he did not specify that those 21 features are the basic structures or features of the constitution. Another justice, Justice Shahabuddin Ahmed held that constituent power only possessed by the people of the country as it has been expressed in the preamble and the constitution amending power is a derivative power and this

power of amendment is within the framework of the constitution. And he held that this derivative power to amend the constitution cannot destroy or damage the basic structure of the constitution. According to Justice Shahabuddin Ahmed, sovereignty belongs to people, supremacy of the constitution as the solemn expression of the will of the people, democracy, Republican government, unitary state, separation of power, independence of the judiciary and fundamental rights are the basic features or structures of the constitution and no parliament can flout these above provisions. Even if the Parliament flouts these basic structures of the constitution, the court, therefore has power to undo an amendment if it transgresses its limit and alter the basic structure of the constitution (Hoque, 2023). So, Justice Shahabuddin Ahmed gave a list of what constitute basic structure of the constitution and held that these features or structures are inviolable. In the eighth-amendment judgement Justice M.H. Rahman held that it was too early to accept the doctrine of basic structure although he held that eighth amendment to the constitution as violating the preamble and basic objective of the constitution. Another judge who held dissenting judgment as to eighth amendment, he also agreed that the word amendment in itself is a restricted word. The word amendment does not mean destruction, damage, or emasculation of the constitution. Justice A.T.M Afzal did not accept the doctrine of basic structure on two grounds, the first is that, 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. Secondly, if it is right that they wanted the so-called basic features to be permanent features of the constitution there was nothing to prevent them from making such provision in the constitution itself (Sarker, 2023). Justice A.T.M Afzal gives, however, some additional reasons as to why the doctrine of basic features has indigenous and special difficulties for acceptance. But at last Justice A.T.M Afzal has come to accept a limited and highly restricted concept of basic features. He holds that the word amendment has a built-in limitation in that it does not authorize the abrogation or the destruction of the constitution or any of its three structural pillars, i.e. executive, judiciary, legislature which render the constitution defunct or unworkable. In his own word, “In exercise of the power under article 142 of the constitution basic features of the constitution cannot be destroyed or abrogated (Talukder & Chowdhury, 2008).” The destruction of the constitution will be the result if any of its “structural pillars” i.e. the three organs of the government, executive, legislative and judiciary is destroyed. So, it is clear from the above propositions that although the dissenting judge did not accede to the doctrine of the basic structure, he accepted that parliament’s amendment power is a limited one. And parliament cannot destroy the three structural pillars of the government. Justice Mostafa Kamal in his book wrote that there is thus noticeable distinction in the approaches of the two learned judges i.e. Justice B.H. Chowdhury and Justice Shahabuddin Ahmed that while the former tried to test the constitutionality of amendment of the constitution in the touchstone of article 7 which is for him

the “Polestar” of the constitution and to later the constitutional amendment is not, in his view, “law” within the meaning of article 7 and the amendment needs to be tested on some other ground. So, two judges agreed that basic structure of the constitution cannot be amended by constitutional amendments.

Now, in Bangladesh, it is established that basic structures of the constitution are inviolable. Although Justice B.H. Chowdhury stated that there are 21 basic features of the constitution which cannot be violated, he refrained from giving a list of this. Justice Shahabuddin stated that the supremacy of the constitution as the solemn expression of the will of the people, democracy, Republican government, unitary state separation of powers, independence of the judiciary, fundamental rights and the one integrated supreme court in conformity with the unitary nature of the state, separation of power. But Justice M.H Rahman did not agree to this list of basic structure in whatsoever form. In Bangladesh, the basic structure doctrine was held by two justices in the eighth amendment case and the dissenting justice also agree that there are some kinds of restrictions on the amending power of the constitution by parliament (Talukder & Chowdhury, 2008).

3. Bangladeshi Constitution and Dire Need of Basic Structure Doctrine

Fifty three years have passed since Bangladesh adopted its constitution on 16th December 1972. Although Bangladesh has celebrated its golden jubilee, its operation has been thwarted for almost two decades of unconstitutional or illegal regimes. After the restoration of democracy in 1990, its operation is somewhat smoothen but not without undemocratic intervention (Rahim & Islam, 2019). This constitution has been amended till this write up seventeen times. Among these seventeen amendments, many of these amendments have strangled the true spirits and aspirations of the people who sacrificed everything for achieving a new country to materialize all their hopes and dreams. Within four years of its adoption, via fourth amendment, the father of the nation suffocated the objective and design of the constitution which envisaged a democratic society where fundamental human rights and freedom would not only be protected and guaranteed but also meaningfully respected (Panday, 2011). It will be shown in this chapter how fourth amendment destroyed the basic structure of the constitution. Most importantly, the Fifth Amendment was adopted by a military ruler, General Ziaur Rahman, who later on became the president of Bangladesh, restored the some of the basic structures demolished by the fourth amendment.

Through the Fifth Amendment, a process of Islamization of the constitution took place scrapping the secularism as the ideal and philosophy, scholars have agreed that no doubt these processes of Islamization of the Constitution were done mainly to gain support of masses to their illegitimate or unconstitutional regime but their aspiration to grab the state power longer was in vain and it permanently damaged the philosophy of making Bangladesh a non-communal and secular state. Various religious political parties have utilized the scope and

enrooted their root in the political arena of sovereign independent Bangladesh during this Islamization process. After all these amendments, eighth amendments to the constitution were carried out by substituting article 100 with a new article 100 which established six permanent benches of the high Court Division outside Dhaka, the capital city. This amendment was challenged on the ground that this amendment in article 100 destroyed the basic structure of the constitution which is a unitary High Court Division with plenary judicial power of the republic. The judgement in this case was comprehensive as it was held that this eighth amendment is a violation of the basic structure of the constitution, although one justice who was in favor of the majority judgement held that these eight amendments violated the true spirit of the preamble and various other provisions. He was disinclined to accept the basic structure doctrine. The dissenting justice, Justice A.T.M Afzal, also did not accept the basic structure but acceded to the limitation on the amending power of the parliament to the constitution. All the justices unanimously held that Bangladesh unlike UK, is a country where supremacy of parliament is not possible where the constitution is a written one and it categorically spells out in article 7 that it is the supreme law of the land and no other law made by parliament or any authority could contradict it (Roznai, 2014).

In 1996, the thirteenth amendment to the constitution was adopted to incorporate a system of non-party care-taker government to hold national election at the end of the five-year period. This thirteenth amendment to the constitution specifying the system of non-party care-taker government to hold free, fair and credible election has been declared void in 2011 and led the country since then to an endless political chaos because no one knew how the national election in 2014 was going to be held and the country after fifteenth amendment which is carried out to comply with the verdict of the Supreme Court in thirteenth amendment case that declared void the thirteenth amendment, plunged into a political instability and the public were scared of whether they could choose their representative without interference or rigging by the ruling party as the ruling party amended the constitution and made the provision of incumbent government going to hold the general election. The reality is that even though non-party care-taker government is a stigma to parliamentary democracy. But no one can deny its applicability and its utility in a country like Bangladesh where ruling party interferes in all the three organs of the government and sets loyal people to important positions.

No credible election of representatives can be held under the incumbent government, where the ruling party fails to gain the trust of the oppositions and most importantly of the electorate in it. Where the mismanagement and influence of the ruling party men are ubiquitous, no alternative is possible without such undemocratic interim system i.e. interim or non-party care-taker government. This thirteenth amendment of 1996 has been discarded on the ground that it is a violation of the republican government and independence of the judiciary

as the chief advisor of the non-party care-taker government used to be the former retired chief justice of Bangladesh. So, the basic structure of the constitution was once again after eighth amendment given primacy (Hakim & Huque, 1995). This desirability of basic structure doctrine in Bangladesh is undeniable. It has been seen that in the absence of such a doctrine, parliament in the past has almost eliminated the basic structure of the constitution especially through the fourth amendment of the constitution. It had changed the nature of constitution before it was undone by the constitution fifth amendment to somewhat. But the irony is that till this write-up, fourth-amendment has not been challenged in the court of law. So far eighth and thirteenth amendment of the constitution have been declared void on the ground of violating basic structure of the constitution. In this article, it will be thoroughly discussed how fourth amendment destroyed the basic structure of constitution at the inception with impunity and later how the higher judiciary in Bangladesh has become vigilant to safeguard the basic structure of the constitution in 1980s. As the judiciary of Bangladesh following the Indian Supreme Court since *Keshavananda Bharti* judgement in 1973 establishing the doctrine of basic structure, vehemently established the basic structure doctrine in Bangladesh.

4. Fourth Amendment and Its Impunity till Now

The fourth-amendment to the constitution had changed the constitution so badly that it lost its original character till some sort of recovery was made by fifth-amendment. About the fourth-amendment Moudud Ahmed, a politician and senior advocate in the supreme court of Bangladesh, said that the parliament passed the bill into an Act with such haste is unprecedented in the history of law making in Bangladesh. With less than an hour the Bill, although of greatest importance, was passed without any discussion or debate. In a sweeping change the country entered into a new constitutional arrangement where none but one political party could exist with a president having supremacy in all executive, legislative and judicial. So, it is clear that parliamentary democracy and separation of power were all gone and the whole edifice of the constitution was broken down. In the original constitution, the executive could be held accountable to the parliament, and fourth-amendment deleted this accountability of executive to parliament. In the original constitution, parliament was sovereign and supreme law-making body and no one could veto to its laws. But fourth-amendment destroyed the supremacy of the parliament by making provision that until the president assents, the law, it could not be said to be law. It was said that the fourth-amendment made the parliament a rubber stamp body only. The fourth-amendment had completely destroyed the sanctity of the judiciary by placing judiciary under executive.

The power, status and function of the Supreme Court were reduced and the jurisdiction of the Supreme Court and the subordinate courts were taken completely in the hand of the president and the president could impeach a judge in-

cluding the chief justice on the ground of misbehavior and incapacity. So, the tenure of the judge depended solely on the whim of the president which is against the principle of independence of the judiciary. The Supreme Court was divested of issuing interim order and jurisdiction of writ. All political parties were banned except one, and the freedom of press which is an important pillar of democracy was thwarted. So, the basic structure of the constitution namely the independence of the judiciary was murdered by making the judiciary subordinate to the executive. The parliament's exclusive law-making power which is also a basic structure of the constitution was brutally murdered when the provision was made that president could veto a law passed by parliament. The matter of regret is that no court held this fourth-amendment as void, illegal and unconstitutional. But the void amendment i.e. fifth-amendment removed the bar created by fourth-amendment. The court held fifth-amendment void but condoned the part that it removed the bar created by fourth-amendment. So. In Bangladesh in the absence of basic structure doctrine, amendment like fourth-amendment could happen in future.

5. Eighth-Amendment and the Selfishness of the Judiciary

The eighth-amendment to the constitution which amended article 100 to create six permanent benches of the High Court Division outside Dhaka, the capital city, was challenged on the ground that it is violative of the basic structure that is the oneness of the High Court Division with plenary judicial power of the republic. The Appellate Division of the Supreme Court held in a judgement that it is a basic structure of the constitution that plenary judicial power of the republic would be vested in the one Supreme Court. The dissenting justice A.T.M Afzal opined that the impugned amendment i.e. eighth-amendment is not unconstitutional because the establishment of six permanent benches of the High Court Division is not barred by the constitution itself (Alam, 1991). Although the impugned amendment i.e. eighth-amendment was held void by majority judgement, it was brought to the constitution with a view to bring justice to the doors of the people. But the judgement has expressed that oneness of the judiciary is a basic structure of the constitution. But many thought that the welfare of the people is in the decentralization of the judiciary so that people can get justice cheaply in their own area. But the court held that it is a violation of the basic structure of the constitution. Some even go on to say that it is a type of judicial tyranny that a just amendment against it could be held void on the ground of basic structure. Some think that it is the selfishness of the judiciary who wants to keep all the judicial power in the republic without any compromise.

6. Thirteenth-Amendment and the Instability in the Whole Country

The thirteenth-amendment was made in 1996 to incorporate a type of non-party care-taker government to hold free, fair and credible election as the ruling party

was thought to be incapable to hold free election. Articles 58A, 58B, 58C, 58D and 58E were incorporated in the constitution. Although this type of interim system is not truly democratic, the existence of such kind of government cannot be denied in a country like Bangladesh. The head of the non-party care-taker government must have been the former retired Chief justice. So, the judiciary is involved in this type temporary government. As soon as the elected representative of the people sworn in, the tenure of the non-party care-taker government used to cease. But the Appellate Division of the Supreme Court in 2011 held the thirteenth-amendment as void. The court held that democracy and independent of the judiciary are basic structures of the constitution.

The system of non-party care-taker government is violation of the basic structure doctrine. In the thirteenth-amendment judgement it was held that if an elected government could rule the country for five years how can it not hold the office for three more months to hold general election. It was held that non-party care-taker government seriously impairs the independence of the judiciary as the retired Chief Justices would hold office of the chief advisor. It was held that for attaining this post the judges might get influenced and hold judgement in favor of the ruling part. So, such kind of judicial involvement in running a state is a violation of the integrity of the independence of the judiciary. All these arguments could have been true if the rulers of this country were committed to their promise and oath of their office. In a country where the cronyism and corruption are rampant, no alternative of such type of non-party care-taker government exists (Khan, 2015). The judiciary could have held that persons from judiciary could not be involved in such kind of government instead of declaring the whole system as void and violating basic structure of the constitution. Since then, the country was led to an abysmal of uncertainty about under what sort of system the general elections are going to be held. The ruling party took this judgement as an advantage to perpetuate their power and to fulfill an ill design to rig the next general elections. The ruling party, as the thirteenth-amendment is declared void adopted the fifteenth-amendment abolishing the system of non-party care-taker government and made provision that general elections would be under the incumbent government. All the opposition and the masses at large erupted as the government failed to gain the trust of the masses in itself. And the country fell under an endless instability.

7. Fifteenth-Amendment and the Political Deception

The fifteenth-amendment to the constitution was brought in 2011 with so much haste as to prove its ill-motive behind it. As the Supreme Court declared that non-party care-taker government is unconstitutional so it became imperative to amend the constitution so as to comply the apex court's judgement. The system of non-party care-taker government to hold general elections was deleted from the constitution and the provisions were inserted as to the general elections to be held under the incumbent government within three months preceding the expi-

ration of the term of five years of the parliament. So many words have been spent on criticizing the deletion of this provision and questions have been asked about the intention and the role of the then Chief Justice of Bangladesh. Opposition parties have called numerous strikes countrywide in demanding the restoration of the non-party care-taker government system. The incumbent government who brought the fifteenth-amendment showed reactions that it only did what was required to be done to comply with the thirteenth-amendment judgement. This has been regarded as excessive committed by the judiciary considering the socio-political background of the country. The judiciary when it declared that thirteenth-amendment void created the scope for unprecedented criticism to the judiciary and the credibility of the judiciary has been questioned by many.

The ruling party took this thirteenth-amendment as an opportunity to materialize what it desired that is to hold the general elections of the parliament under it so as to manipulate the people's mandate. Besides, the fifteenth-amendment brought back the original state principle i.e. secularism deleting the principle of the absolute trust and faith in almighty Allah in article 8. Article 12 has been revived along with the original article 38. But the fifteenth amendment did not repeal article 2A and substituted the existing preamble of the constitution with the original preamble. In addition, they have added in part-I of the constitution articles 7A and 7B. The theme of article 7A is that if anyone who abrogates, suspends and deviates the confidence of the people over the constitution commits an offence of sedition. So, it has put a bar on the scholarly criticism of the constitutional provisions, the constitution of the Islamic Republic of Pakistan has this type provision to thwart the illegal usurpation of power by the military. The article is apparently in conflict with the fundamental human rights of freedom of expression. The utility of this type of provision is superseded by the inherent abusive nature of this type of provision. Article 7B which is very interesting made the express provision that certain provisions of the constitution and the basic structure of the constitution cannot be amended by way of addition, alteration, substitution or abrogation. Article 7B which gave a list of basic provisions including all articles in part one, part two and part three including article 150, as well as basic structure of the constitution are unamenable. But it did not mention what constitute basic structure of the constitution rather it is left with the judiciary to decide what constitute the basic structure of the constitution.

Bangladesh is the only few countries after the Germany and Italy etc. which made exclusive provision in the constitution that what cannot be amended. Now the state religion Islam Cannot be changed by constitutional amendment. Some think that these provisions only to be changed by revolution. Article 7B made the fundamental principles of the state policy in part two and the fundamental rights in part three inviolable. Now the parliament cannot insert right to education in fundamental rights and right to information as fundamental rights by virtue of article 7B. It made the fundamental rights and fundamental principles of state policy static. Article 7B also states that besides these provisions, the basic

structure of the constitution cannot be amended. But the article 7B did not specify what constitute basic structure of the constitution. In eighth-amendment judgement, Justice Shahbuddin Ahmed stated that supremacy of the constitution as the solemn expression of the will of the people, unitary state, republican government, parliamentary democracy, independence of the judiciary, separation of power among the different organs of the state i.e. executive, judiciary, and legislative and the judiciary as the repository of the plenary judicial power of the republic etc. are basic structure of the constitution. So, the desirability of basic structure doctrine is felt by the parliament itself. The task of judiciary has been eased by the parliament. Unlike India, where the parliament had to fight against judiciary to acquire unlimited constitutional amendment power whereas in Bangladesh, the parliament is ready to sacrifice its plenary power of constitutional amendment to some judicially made doctrine of basic structure. The parliament in Pakistan enjoys the unlimited power of constitution amendment as no such doctrine of basic structure was accepted by the judiciary of Pakistan.

It is now quite evident that in Bangladesh, the constitution amending power of the parliament is very narrow in fact narrower than any country of the world. Almost fifty articles have been made unamendable including the basic structure of the constitution. It is done by the parliament itself. Some say that parliament has thrown down the sword before the judiciary. The desire of basic structure in Bangladesh is significant from the point of view of article 7 which states that the constitution is the solemn expression of the will of the people and the supreme law of the land. So, the constitutional supremacy is prevalent in Bangladesh unlike UK, where parliamentary supremacy is recognized in the absence of any written constitution. In Bangladesh, the constitution amendment power of the parliament is not unlimited so as to say that it can amend any provisions of the constitution by virtue of eight-amendment which introduced the basic structure doctrine in Bangladesh, and also held that in Bangladesh constitution amendment power of the parliament is not a constituent one rather it is derivative power from the constitution. The derivative power cannot be exercised to destroy the edifice or emasculate the constitution. The constituent power cannot be exercised to destroy the edifice or emasculate the constitution. The constituent power only belongs to the people of Bangladesh.

The doctrine of basic structure was reiterated in the thirteenth-amendment judgement when it declared the interim system of non-party care-taker government illegal. So, the basic structure doctrine established in Bangladesh by the higher judiciary first in eighth-amendment and then reiterated in the thirteenth-amendment.

8. The Illegality of Sixteenth Amendment to the Constitution

The supreme court of Bangladesh has declared the sixteenth amendment to the constitution which purported to remove the judges of the supreme court of Bangladesh by members of parliament on grounds of incapacity or misconduct

as illegal and unconstitutional. The amendment was declared unconstitutional solely on grounds of interfering with the judicial independence which is thought to be a basic structure of the constitution.

9. The Debate of the Utility of Basic Structure Doctrine in Bangladesh

The debate whether the basic structure putting restrictions on the unlimited power of the parliament to amend the constitution is useful for Bangladesh where there has been a culture of making politically motivated constitutional amendments. In the eighth-amendment case the learned counsel argued before the court that if the makers of the constitution had wanted to put restrictions on the amending power of the constitution by the parliament, they would have made specific provisions that basic structures of the constitution could not be amended. In response to this argument, the parliament by the fifteenth-amendment inserted article 7B which made clear that the basic structure of the constitution cannot be amended. As the article 7B did not specify what constitute basic structure of the constitution, a wide scope of judicial discretion has been given to the judiciary.

In the thirteenth-amendment case which declared the non-party care-taker government void, quite a few Amicus Curiae have given their opinion that considering the culture of socio-political mistrust there is no alternative of non-party care-taker government in Bangladesh and it did not violate the basic structure of the constitution rather it has been argued that democracy which is a basic structure of the constitution cannot function and flourish with a free, fair and credible election. So, free, fair and credible election is the prerequisite for the proper functioning of parliamentary democracy. In Bangladesh only a neutral government can organize a free, fair and credible election. In the past, it has been seen since the birth of Bangladesh that election under incumbent government has given rise to turmoil and that governments had failed to complete their tenure successfully. It is also argued that if the basic structure of the constitution cannot be amended, it means that it is going to be the same in all the times to come. It cannot be thought that the constitution makers have decided certain matters for all and for all time to come without giving any opportunity to future generation. It is also argued that all the provisions of the constitution are equally important and no such importance to be given to any specific provision on the ground of basic structure doctrine. The dissenting judge in the eighth-amendment case stated that if the positive power of the parliament to amend the constitution is restricted by raising the wall of essential features, the clear intention of the constitution would be vitiated and this would encourage the unconstitutional or revolutionary change. But the article 7B categorically stated that basic provisions and basic structure of the constitution cannot be amended by way of insertion, addition, substitution and alteration etc. As the article 7B did not state what constitute basic structure, it has been said that the vagueness around the basic

structure of the constitution remains as before.

Some even go on to say that the rigidity in the amendment process as it is if made more rigid by placing bars on it, this would encourage extra constitutional means to change the constitution. Justice Shahabuddin Ahmed opposed this argument and stated that, "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 power by any means fair or foul. If a real revolution comes, it cannot be prevented by any constitution, however, flexible it might be".

It is also said that as the basic structure of the constitution is vague neither the parliament nor will the citizens know about it and there will be a confusion in the country when the court declares an amendment void on the ground that it violates the basic structure of the constitution. It is now evident that when the Appellate Division of the Supreme Court of Bangladesh declared void thirteenth-amendment of the constitution which established the non-party caretaker government on the ground that it is violative of the democracy which is a basic structure of the constitution, the whole country descended into chaos. It is a must that first of all it must be categorically established what constitute the basic structure of the constitution so as to stop further misunderstanding and chaos in the country. But the fifteenth-amendment to the constitution in article 7B while stating that basic provisions cannot be changed made almost one-third of the constitution static. And further provisions will be included in the bag of basic structure.

It is the judiciary which only can state on a relevant point what constitute basic structure of the constitution. But giving the judiciary with so much power to declare an amendment of the constitution void on the ground of inconsistency with basic structure of the constitution is dangerous. The reason is that the opinions of some judges cannot be held superior to those of numerous parliamentarians or absolute majority of the parliament. In the fifteenth-amendment, when the parliament incorporated article 7B, it had a clear picture in front of it of the fourth-amendment that completely changed the constitution even though it lasted for a few months only. The doctrine of basic structure which has been developed by the courts of India cannot be followed blindly by our higher courts. They need to understand the socio-economic and socio-political context of our country which is different from those of India. The doctrine of basic structure has not been accepted in Pakistan likely because the will of the people i.e. the elected representative can change the basic structure if the situation and the circumstances demand. So, it may be because, the history of Pakistan is the history of martial law, and military backed parliament. The parliament is allowed to mould the constitution however it wanted. But in Bangladesh after post democratic transition the higher court became vigilant to safeguard the basic structure of the constitution from being changed whimsically to gain political purpose.

The democratic nature of the country cannot be replaced by monarchy as democracy is a basic structure of the constitution. Even if the parliament on the force of majority does so, the judiciary would strike it down on the ground of it being inconsistent with the basic structure of the constitution. If the unitary state of Bangladesh is wanted to be turned into a federal state, it cannot be done so, because of two reasons, first on the ground that article 7B categorically states that all articles in part one under the title “The Republic” cannot now be amended and second on the ground that the unitary nature of the state is a basic structure of the constitution. But in the fifteenth-amendment, besides basic structure of the constitution, basic provisions of the constitution cannot be changed. Writers and columnists have been saying that the ruling party made these provisions unamendable because to incapacitate the opposition from future amendment. Whatever constitutes the basic structure cannot be amended. It is stated earlier that Justice Shahabuddin Ahmed gave a list of what constitute the basic structure of the constitution. In Bangladesh, where the power and money matter to the politicians and to political parties, they do not feel unscrupulous to amend the constitution in an ill way.

It is the political history of Bangladesh that to gain political advantage, the constitution was amended so as to increase the age of the judges of the Supreme Court. The judiciary of Bangladesh felt that if no restrictions are put on the parliament to amend the constitution, it would go whirl and amend the constitution to change its basic structure. Even though its usefulness some regard it as the unjust interference by the judiciary in the law making process. Some even say that parliament should state categorically in the constitution what constitutes the basic structure of constitution in order to thwart the interference by the judiciary. But the judicial activism in determining the basic structure of the constitution is inevitable because the amendment is ultimately to be challenged in the court and then court has to decide whether the said amendment violated the basic structure of the constitution. But the danger would be ambitious judicial activism since it sometimes tends to ignore the socio-political and political culture of the country and create judicial tyranny in the country.

Although the doctrine of basic structure has been invented by the Indian Supreme Court, it is accepted and recognized in Bangladesh by the Appellate Division of the Supreme Court in the eighth-amendment and thirteenth-amendment cases. In fifteenth-amendment to the constitution, the parliament expressly stated in article 7B that basic structure cannot be amended although it does not mention what the basic structures of the constitution are. It is quite clear that parliament does not have unlimited power to amend the constitution. And the constitution amending power is a derivative power and not the constituent power and the derivative power cannot be used to damage or change the basic structure of the constitution. The judiciary has a huge role to play in determining what constitute the basic structure of the constitution. Three structural pillars of government i.e. executive, judiciary and legislative and nature of state,

independence of judiciary and separation of power no doubt, are basic structure of the constitution. Without some sort of restrictions on the amending power of the parliament, the constitution would become the plaything in the hands of majority in the parliament. Bangladesh has a history of political constitutional amendments where the constitution was amended to perpetuate power. The judicial review power of the higher court could work a check on this type of arbitrary constitutional amendment since the constitutional amendment breaching the basic structure would be quashed by the court on the serious allegation of violating the basic structure of the constitution. Constitutional supremacy as declared in article 7 is the touch stone of sorting out the constitutional constitution amendment. The doctrine of basic structure is regarded as a tool to originalism. What was *decided* by the makers of the constitution as basic cannot be changed thus maintaining the originality of the constitution. The constitution amending power is a derivative power. Justice Shahabuddin Ahmed in the eighth-amendment judgement stated that, there is no dispute that the constitution stands on certain fundamental principles which are its structural pillars and if these pillars are demolished the whole constitutional edifice will fall down. As to the implied limitation on the amending power, it is inherent in the word amendment in article 142 and is also deducible from the entire scheme of the constitution. Amendment of the constitution means change or alteration for improvement or to make it effective or meaningful and not its elimination or abrogation. Amendment is subject to the retention of the basic structure. The court therefore has power to undo an amendment if it transgresses its limit and alters a basic structure of the constitution. So, the parliament cannot do whatever it wants in the matter of constitution amendment because this power of amendment is a limited power. But the judicial activism must be guided to the right direction and should not be used to strike down just amendment of the constitution. The vagueness surrounding this doctrine must be removed if it is removed by the parliament by an amendment would be highly welcomed and the task of judiciary would be lessened. But it is to be kept in mind that the constitution would not be made static otherwise the social development would be retarded and the unrest would outbreak in the society.

10. Conclusion

The constitution is the solemn expression of the will of the people and the supreme law of the land and can be amended if the circumstances come for the smooth functioning of the society and for the welfare of the people and the country. Constitution must maintain its originality. It is a link with the past to the present of a country. The originality of the constitution must be maintained at any cost and it is the duty of the judiciary to do so. Parliament has the absolute authority to amend the constitution under the constitution but it must not destroy its basic structure and the Supreme Court has the duty to superintend over the parliament in the case of constitutional amendment. The doctrine of

basic structure is a response to parliament's arbitrary constitutional amendment power. In the past in Bangladesh various amendments have destroyed the basic structure of the constitution and till now four out of fifteen amendments have been declared void and one still exists with impunity. A constitution is the mirror of a society and it should not be smeared with dirt and mud. The constitution must be kept clean so that the reflection on it of the country could encourage us to go forward. Now, it has been settled from all quarters that basic structures of the constitution are inviolable and cannot be destroyed. The Supreme law must be kept supreme and other laws and constitutional amendments must supplement it and not flout its visions and objectives. The task of parliament to amend the constitution is a sacred and dangerous at the same time. Sacred because it is undoubtedly the supreme law of the country and dangerous because it must not destroy the basic structure of the constitution. The constitution makers took a long time to formulate a constitution after so much discussion and deliberations. But when the time of amendment comes, sometimes parliament does not care for or endeavor to discuss and deliberate. In Bangladesh in fourth-amendment, parliament did not feel unscrupulous to destroy the basic structure of the constitution without any discussion and deliberation, so did in fifteenth amendment. So, it is important to remember that the constitution making process and amending process is different. In case of amendment, parliament should initiate the discussion and deliberation with all the stakeholders of the society only then would the amendment be successful. The discussion and deliberation with people and organizations should not be a mere farce. It is seen in the case of fifteenth-amendment, before the amendment, the government discussed with university teachers, journalists, lawyers and social groups but did what it wanted. This type of farcical discussion would not bring any success to constitutional amendment. To conclude with the words of Niccolo Machiavelli in *The Prince*, "There is nothing difficult to arrange, more doubtful of success, and more dangerous to carry through than initiating changes in a state's constitution".

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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