

# A Legal Analysis of the Constitutional Court and Unconstitutional Constitutional Amendments in Bangladesh

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## Abstract

The judiciary has a crucial role in maintaining the rule of law and good governance, eradicating anarchy, and ensuring justice in society. The judiciary in Bangladesh is organized in a hierarchical structure, comprising the Supreme Court and the lower judiciary. The Supreme Court of Bangladesh serves as the highest judicial authority in the country. One of its functions is to act as the Constitutional Court, ensuring the protection of citizens' constitutional rights and the maintenance of constitutionalism. This study seeks to assess the authority and effectiveness of the Supreme Court in its role as a constitutional court and protector of the constitution. The study catches that the Supreme Court possesses the power to function as a constitutional court, which it has extensively exercised. Additionally, it has proclaimed several constitutional changes as *ultra vires*. This article aims to present the legal community with a comprehensive knowledge of the Constitutional Court's role. It will also enable the policymaker to make a conspicuous effort to establish a proficient and successful institution of adjudication.

## Keywords

Constitutional Court, Unconstitutional Amendments, Basic Structure, Constitutional Supremacy, Judicialization of Politics, Military Rule

## 1. Introduction

The Constitution functions as the fundamental framework and supreme legal authority for carrying out all governmental actions. Constitutionalism is the concept of holding public governance accountable for fulfilling constitutional mandates, which include protecting constitutional rights, expanding the public domain in the governance system, and recognizing principles of justice, equality, and human

dignity (Khilnani et al., 2013: p. 303). The Constitution serves as the highest legal authority in the country, while the Supreme Court acts as the protector of the constitution<sup>1</sup>. The conventional perception of the Court as the “weakest” branch of the government lacks the power to aggressively fulfill its judicial duty in achieving constitutionalism (Hamilton, 1999: p. 433). Nevertheless, there has been a significant increase in the worldwide expansion of judicial authority, with a strong recognition of judges’ unique constitutional competence in making decisions related to constitutional problems (Hoque, 2013: p. 304). The Supreme Court of Bangladesh performs a variety of functions, including resolving disputes, correcting mistakes made by subordinate courts, interpreting the law, and safeguarding constitutional rights and constitutionalism.

The Supreme Court of Bangladesh, acting as the custodian of the constitution, has the authority to declare any legislation or modifications to the Constitution adopted by the parliament as null and unconstitutional through the exercise of judicial review. The Supreme Court of Bangladesh, as a constitutional court, has played a crucial role in upholding constitutionalism and ruling numerous constitutional amendments *ultra vires* and beyond the scope of authority. The Supreme Court maintains public trust as a final resort for justice, functioning as an autonomous constitutional entity. However, at times, it encounters public frustration and undermines public confidence as a result of the political selection of judges and their unwavering loyalty to the governing administration.

From the inception of the Constitution in 1972 to 2023, it has been changed 17 times. It is an unfortunate reality that, under some rare situations, each government has modified the Constitution for its own advantage, rather than for the good of the populace. The rulers under martial law enacted several amendments to the Constitution. Furthermore, the Supreme Court’s ruling deemed five amendments to the Constitution as *ultra vires*. The Constitution does not clearly designate the Supreme Court as the nation’s constitutional court. Nonetheless, pursuant to the principle of constitutional supremacy and various provisions of the Constitution, it is evidently established that the Supreme Court of Bangladesh serves as the guardian of the Constitution and possesses the authority to act as the constitutional court in determining the validity and legality of any laws enacted by parliament, including constitutional amendments. The declaration of the fifth, seventh, thirteenth, and sixteenth amendments as unlawful engenders fresh challenges and discussions within the political and constitutional spheres. The discourse on constitutionalism has also transitioned into scholarly inquiry aimed at elucidating the foundations of the constitutional court and the rationale for deeming some constitutional modifications unlawful.

This study introduces novel scholarly literature on the Supreme Court’s function as a constitutional court. It would capture the interest of legal experts, judges, legal professionals, and everyone with a curiosity for Bangladesh’s adjudication system. This study primarily adopts a qualitative approach and incorporates

<sup>1</sup>The Constitution of Bangladesh 1972, Art. 7.

analytical aspects. This study has conducted a content analysis of trustworthy primary and secondary sources. The content analysis encompasses several sources, including constitutional law, statutory law, Supreme Court rules, case law, reliable journal articles, books, media reports, newspaper articles, and online documents.

## 2. The Supreme Court of Bangladesh and Its Authority as the Constitutional Court

### 2.1. Constitutional Arrangement of the Supreme Court

Bangladesh attained independence in 1971<sup>2</sup> and acknowledged the pre-existing laws and legal institutions that were in place before 1971 in the country<sup>3</sup>. Consequently, the Constitution affirmed, “Subject to the provisions of this constitution all existing laws shall continue to have effect but may be amended or repealed by law made under this constitution.”<sup>4</sup> Following the country’s independence, the High Court was constituted as the superior court through the High Court of Bangladesh Order 1972<sup>5</sup>, which was conveyed through the Proclamation of Independence in 1971 and the Provisional Constitution of Bangladesh Order 1972 (Akkas, 2004: p. 87). Subsequently, the High Court of Bangladesh Order 1972 was amended to create the Appellate Division of the High Court. This division is comprised of the Chief Justice and two additional judges of the High Court, who are appointed by the president in consultation with the Chief Justice<sup>6</sup>. Prior to the establishment of the Supreme Court of Bangladesh, the High Court was in existence (Akkas, 2004: p. 87). Currently, the Constitution organizes the provisions regarding the Supreme Court under chapter I of part VI (Art. 94-113). The Supreme Court is the apex legal institution in the judicial system, comprising two divisions: the Appellate Division (AD) and the High Court Division (HCD)<sup>7</sup>. The Supreme Court consists of the Chief Justice (CJ) and additional justices that the president may choose to appoint to each division<sup>8</sup>.

### 2.2. Authority of the Constitutional Court

By asserting the constitutional clause, it is established that the Constitution holds the highest authority in the country, and any other legislation that conflict with the Constitution will be considered invalid<sup>9</sup>. Constitutionalism refers to a system where the Constitution is written down and the process for making changes to it is rigid. In such a system, the Constitution is considered to be the highest authority. The Supreme Court or constitutional court is responsible for validating any

<sup>2</sup>The Proclamation of Independence Order, April 10, 1971, affected on March 26, 1971.

<sup>3</sup>The Laws Continuance Enforcement Order 1971 came into effect on March 26, 1971.

<sup>4</sup>The Constitution of Bangladesh 1972, Art. 149.

<sup>5</sup>The High Court of Bangladesh Order 1972, Sec. 2.

<sup>6</sup>The High Court of Bangladesh (Amendment) Order 1972, Sec. 3.

<sup>7</sup>The Constitution of Bangladesh 1972, Art. 94(1).

<sup>8</sup>*Ibid.* Art. 94(2).

<sup>9</sup>Article 7(2) of the Constitution states: “This constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void.”

interpretation of the constitution. The Constitution of Bangladesh upholds two fundamental requirements for supremacy. As a result, the Constitution has the characteristic of being supreme, and the Supreme Court has the authority to safeguard the Constitution through the process of judicial review. Therefore, the Supreme Court of Bangladesh functions as the constitutional court of the country (Hoque, 2014: p. 448; Islam, 2017: pp. 35-36).

Article 7(1) of the Constitution mentions, “All powers in the Republic belong to the people, and their exercise on behalf of the people shall be affected only under, and by the authority of, this constitution.” This clause emphasizes that the entirety of the state’s executive, legislative, and judiciary branches are governed by the constitution, and their acts must be confined to what is allowed by the constitution. Constitutional supremacy requires that any decision taken by the executive, legislative, or judicial branch must be in accordance with the law. If it does not, it violates the constitution.

The parliament is only able to enact laws and carry out its tasks by adhering to the constraints set by the constitution<sup>10</sup>. The constitution, being a rigid written framework, upholds the principle of constitutional supremacy. Nevertheless, we have observed numerous instances where rulers have willfully ignored, modified, or temporarily halted the authority of the constitution, demonstrating a troubling disrespect for the principles of constitutionalism<sup>11</sup>. Without a doubt, the supreme court of Bangladesh has a persistent obligation to verify and maintain the supremacy of the Constitution. Accordingly, the judiciary has made significant efforts to assert its authority in upholding constitutional supremacy through judicial review<sup>12</sup>. This includes declaring the unconstitutionality and invalidity of many amendments, such as the 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 13<sup>th</sup>, and 16<sup>th</sup> amendments, as well as other ordinary legislation.

The HCD of the Supreme Court has utilized judicial review, as outlined in Article 102 of the constitution, to enforce constitutional guarantees and legal responsibilities. The Supreme Court exercises its power of judicial review to examine the constitutionality of executive orders, court decisions, and legislation in order to

<sup>10</sup>Article 65(1) of the Constitution establishes a restricted framework for the enactment of legislation in parliament. The expression of the Constitution is “There shall be a Parliament for Bangladesh (to be known as the House of the Nation) in which, subject to the provisions of this constitution, shall be vested the legislative powers of the Republic.”

<sup>11</sup>The latest experience is spick-and-span that happened after the declaration of the 16<sup>th</sup> amendment as invalid and unconstitutional. The ruling party’s members of parliament and other political leaders of that party disseminated propaganda against the judiciary, particularly counter to AD of the Supreme Court, and it is well known established true that only for this event the existing chief justice at that time (Justice S. K. Sinha) was forced for resignation.

<sup>12</sup>Judicial review is the process by which the constitutionality of executive acts, court decisions, and legislation is examined to ensure they are within the limits set by the constitution. The term “judicial review” refers to the authority of a court to invalidate any statute, order, or action by a public authority that is found to be inconsistent or contradictory with the highest law of the country (Takwani, 2001: p. 236). Judicial review is the ultimate authority of the court to deem any statute or official action as unconstitutional and unenforceable if it is deemed incompatible with the Constitution (Abraham, 1996). The Supreme Court serves as the ultimate protector of constitutional rights and holds the supreme authority in safeguarding against any form of arbitrary power (Diwan & Diwan, 1996). The main objective of judicial review is to ensure that the governing body does not abuse its power and that individuals get equitable and impartial treatment (Wilkey, 1985).

uphold constitutionalism and the principle of constitutional supremacy. The Constitution of Bangladesh does not explicitly grant the power of judicial review on the Supreme Court to assess the legality of laws and the authority to invalidate any law. By examining Articles 7, 26, 44, and 102 of the Constitution collectively, it becomes evident that the Supreme Court has been given the significant authority of judicial review to declare any law as unconstitutional.

The declaration of the aforementioned Articles is presented in the following manner. Article 7 establishes the principle that the Constitution is the highest authority and stipulates that any laws that contradict the Constitution would be considered illegal. According to Article 26, the legislature is prohibited from enacting laws that go against fundamental rights. Therefore, Article 7 establishes overall authority over the entire constitution, whereas Article 26 guarantees the absolute protection of fundamental rights<sup>13</sup>. Article 44 facilitates the implementation of Article 102, which ensures the protection of constitutional rights, by entrusting the Supreme Court with this responsibility.

The combination of these Articles has unequivocally granted the Supreme Court the power of judicial review. Articles 7 and 26 of the Constitution grant the Supreme Court the authority to review laws passed by the legislature that are in conflict with the Constitution or violate fundamental rights. Article 102(1) pertains to the enforcement of violations of fundamental rights as protected by the constitution. According to Article 102(2) of the constitution, the Supreme Court is empowered to engage in judicial review of executive and bureaucratic activities in the public domain (Hossain Mollah, 2010: p. 311; Ahmed, 2016: p. 2). Undoubtedly, the Constitution envisions a robust system of constitutional judicial review, which extends to the executive or administrative actions, legislative enactments, and constitutional amendments (Khilnani et al., 2013: p. 308; Hoque, 2014: p. 451). In contemporary times, the scope of judicial review has greatly expanded<sup>14</sup>.

### 3. Substances of Unconstitutional Constitutional Amendments

The Supreme Court has deemed several constitutional amendments to be invalid and in violation of the constitution. The study has attempted to address a portion of these issues, namely focusing on cases that have been deemed unlawful by the country's Supreme Court, which serves as the constitutional court.

<sup>13</sup>Articles 27 - 44 of Part III of the Constitution list the essential rights. Article 26(3) states that constitutional amendments can modify fundamental rights. However, Article 7B, which was added to the Constitution by the Fifteenth Amendment in 2011, states that fundamental rights provisions cannot be changed or modified. These two provisions are contradictory, although a definitive interpretation has yet to be established.

<sup>14</sup>The Supreme Court has exercised its constitutional authority of judicial review to address policy, political, and economic matters pertaining to important questions of law, as demonstrated in the case of *Mohammad Badiuzzaman v. Bangladesh* (2010) 7 LG (HCD) 208. The Supreme Court has utilized judicial review through the application of public interest litigation (PIL), as demonstrated in the case of *Dr Mohiuddin Farooque v. Bangladesh & others*, 17 BLD (AD) 1997. Judicial reviewability has examined the actions and decisions of private entities operating in the public sphere, as demonstrated in the case of *Moulana Md. Abdul Hakim v. Government of Bangladesh & others* (2014) 34 BLD (HCD) 129.

### 3.1. Fifth Amendment of the Constitution

This amendment to the Constitution was enacted on April 6, 1979, and introduced significant and noteworthy changes<sup>15</sup>. These changes included the elimination of the one-party system<sup>16</sup>, restoring the authority of the HCD of the Supreme Court to enforce fundamental rights as outlined in the original constitution<sup>17</sup>, establishing the Supreme Judicial Council to ensure the tenure security of Supreme Court judges<sup>18</sup>, introducing a referendum system for amending specific constitutional provisions<sup>19</sup>, abolishing the president's absolute veto power<sup>20</sup>, promoting Bangladeshi nationalism<sup>21</sup>, integrating the religious phrase “*Bismillahir Rahmanir Rahim*” at the beginning of the constitution<sup>22</sup>, and replacing the principle of secularism in state policy with an expression of “absolute trust and faith in the Almighty Allah,” presenting a novel interpretation of “socialism” that encompasses the concept of “economic and social justice.”<sup>23</sup> (Fifth Amendment, 1979; Halim, 2008, p. 157-158). In addition to these modifications, this amendment<sup>24</sup> was enacted to legalize the first military regime (August 20, 1975 to April 9, 1979) and its activities and laws (Halim, 2008: p. 105; Hoque, 2015: p. 279).

### 3.2. Seventh Amendment of the Constitution

The seventh amendment of the Constitution, ratified on November 11, 1986, legitimized *Ershad's* seizure of power and all his activities carried out during his tenure as the second Martial Law Authority (March 24, 1982, to November 11, 1986)<sup>25</sup> (Halim, 2008, p. 163; Hoque, 2015, p. 280). This amendment<sup>26</sup>, entailed a modification to Article 96 of the Constitution, specifically aimed at extending the term of Supreme Court judges from 62 to 65 years (Seventh Amendment, 1986).

### 3.3. Eighth Amendment of the Constitution

The eighth constitutional amendment was adopted on June 7, 1988, encompassing multiple changes to the constitution. A significant amendment has been made to

<sup>15</sup>For all changes, see *Khondker Delwar Hossain, Secretary, BNP Party & Ors. v. Bangladesh Italian Marble Works Ltd & Ors.* (2010) BLD (Spl) 2, para 332, p.133.

<sup>16</sup>Part VIA of the Constitution was inserted for a one-party system introduced by the 4<sup>th</sup> Amendment 1975.

<sup>17</sup>The Constitution of Bangladesh 1972, Art. 44, 102.

<sup>18</sup>*Ibid.* Art. 96.

<sup>19</sup>*Ibid.* Art. 142.

<sup>20</sup>*Ibid.* Art. 80.

<sup>21</sup>*Ibid.* Art. 6.

<sup>22</sup>In the beginning of the Constitution, i.e. above the preamble.

<sup>23</sup>The Constitution of Bangladesh 1972, Art. 8.

<sup>24</sup>In 2005, the HCD declared this amendment as unconstitutional in *Bangladesh Italian Marble Works Ltd v Bangladesh* (2006) BLT (Special) (HCD) 1. The AD successfully maintained the HCD's decision with tiny modifications in *Khondker Delwar Hossain v Bangladesh Italian Marble Works Ltd and Others* (2010) 62 DLR (AD) 298.

<sup>25</sup>On March 24, 1982, after 128 days of the presidential election, a military interference was led by *Hussain Muhammad Ershad*, Chief of Army Staff. Later, he took the office of Chief Martial Law Administrator (CMLA) and president till November 11, 1986 (Halim, 2008: p. 163).

<sup>26</sup>In 2010, the HCD declared this amendment unconstitutional in *Siddique Ahmed v Bangladesh* (2011) 33 BLD (HCD) 84.

the Constitution, introducing Article 2A which declares that “Islam is the official religion of the republic, while allowing for the peaceful coexistence of other religions.” One notable change is the decentralization of the higher judiciary with the establishment of six permanent benches of the HCD outside of Dhaka<sup>27</sup> (*Eighth Amendment, 1988*).

### 3.4. Thirteenth Amendment of the Constitution

The amendment was passed on March 26, 1996, and subsequently became law on March 28 of the same year. This amendment introduced a new chapter in part IV of the Constitution, which included provisions for a Non-Party Caretaker Government to serve as an interim government<sup>28</sup>. Its purpose is to facilitate and guarantee the fairness, impartiality, and independence of the entire parliamentary election process, devoid of any government interference<sup>29</sup>.

### 3.5. Sixteenth Amendment of the Constitution

The sixteenth amendment of the Constitution was enacted by the parliament on September 17, 2014. It involved amending Article 96 to abolish the Supreme Judicial Council (SJC) headed by the Chief Justice, which had the power to dismiss Supreme Court judges. This amendment grants the *Jatiyo Shangshad* the authority and procedure to remove Supreme Court justices if they are accused of misconduct or incapacity, requiring a two-thirds majority for the decision (*Sixteenth Amendment, 2014*).

In the case of *Asaduzzaman Siddiqui and Others v. Bangladesh*, the HCD ruled on May 5, 2016, that this amendment was invalid and in conflict with the Constitution<sup>30</sup>. Subsequently, the government lodged an appeal to the AD. Ultimately, on July 3, 2017, the AD upheld the findings of the HCD and deemed this action to be beyond the powers granted by the Constitution. As a result, the previous

<sup>27</sup>Articles 100 and 107 of the Constitution were amended to set up the six permanent benches of the HCD in Barisal, Chittagong, Comilla, Jessore, Rangpur, and Sylhet. However, in respect of changing the original Article 100 vis-à-vis the seating up the benches of HCD outside Dhaka was challenged in the Supreme Court, and the AD has declared this amendment of Article 100 unconstitutional in the historic case *Anwar Hossain Chowdhury v. Bangladesh* (1989) BLD (AD) (Spl) 1.

<sup>28</sup>The Caretaker Government Bill was presented in the parliament as “the Constitution (13<sup>th</sup> Amendment) Act” on March 21 at the first session of the sixth parliament in 1996. This amendment added five new Articles, e.g., 58A, 58B, 58C, 58D and 58E. It also amended Articles 61, 99, 123, 147, 152 and the Third Schedule of the Constitution. After passing the Act, the parliament was dissolved on March 30, and Justice Habibur Rahman was appointed as the Chief Adviser of the Caretaker Government (*Halim, 2008: p. 459*).

<sup>29</sup>The amendment was challenged in the Supreme Court to abolish the non-party Caretaker Government system. Then, the HCD legalized the Caretaker Government system in *Saleem Ullah v. Bangladesh* (2005) 57 DLR (HCD) 171. Afterwards, the HCD’s judgment was challenged in the AD. Then, the AD declared the thirteenth amendment unconstitutional by a four-to-three decision in *Abdul Mannan Khan v. Bangladesh* (2012) 64 DLR (AD) 1.

<sup>30</sup>This decision was made in Writ Petition No. 9989 of 2014. For details, see “Bangladesh High Court scraps 16<sup>th</sup> amendment to constitution,” *The Daily Star*, May 6, 2016, last modified November 11, 2017, <https://www.thedailystar.net/frontpage/hc-scraps-16th-amendment-1219480> accessed on November 15, 2023; “Full text of 16th Amendment verdict released,” *Dhaka Tribune*, August 2, 2017, <https://www.dhakatribune.com/bangladesh/court/2017/08/01/full-text-16th-amendment-released/> accessed on November 15, 2023.

provision was reinstated<sup>31</sup>. This amendment includes the terms “misbehavior or incapacity” as reasons for impeaching Supreme Court judges, but it does not provide any specific explanations for what constitutes misbehavior or incapacity. The criteria for determining the justification for misbehavior or incapacity are completely ambiguous and not clearly defined. The presence of ambiguity and uncertainty allows the executive to gain complete influence over the higher court, effectively turning it into a tool for implementing political agendas.

In summary, the Supreme Court, as the constitutional authority, proclaimed five constitutional amendments unlawful and void. The martial law authorities adopted the Fifth and Seventh Amendments to legitimize their acts and regulations during the periods of martial law. The Eighth Amendment established Islam as the national religion and created multiple permanent benches of the High Court Division beyond Dhaka to decentralize the higher court. The Thirteenth Amendment to the Constitution established a non-partisan caretaker government in Bangladesh to ensure fair, impartial, and peaceful elections. The Sixteenth Amendment established the provision for the impeachment of higher judicial judges by Parliament. Though, the Supreme Judicial Council once oversaw the impeachment procedure due to the judges’ moral turpitude.

## 4. Reasons for Declaring Unconstitutional

### 4.1. Contradictory to the Constitutional Provisions

The Supreme Court exercised its power of judicial review, as granted under the Constitution, to declare the amendments to the Constitution null and unconstitutional. The main justification for declaring it illegal is that amendments seem to contradict the provisions of the Constitution. The 15<sup>th</sup> Amendment of the Constitution has limited and regulated the parliament’s legislative authority through the addition of Article 7B. Therefore, under the current state of the Constitution, the legislature is unable to exceed the restrictions set by the parliament as stated in Article 7B<sup>32</sup>. The 16<sup>th</sup> amendment of the Constitution falls outside the scope of the Constitution’s amending power, as stated in article 7B of the Constitution<sup>33</sup>. The AD’s verdict holds legal authority as per Articles 111 and 112 of the Constitution. However, the 16<sup>th</sup> amendment to the Constitution contradicts the Appellate Division’s judgment<sup>34</sup>.

### 4.2. Infringement of Constitutional Supremacy

The amendments to the Constitution encroach upon the principle of constitutional supremacy as outlined in Article 7 of the Constitution. The Constitution is the result of the collective desire of the sovereign citizens of the republic and serves as the

<sup>31</sup> *Government of Bangladesh and others v. Advocate Asaduzzaman Siddiqui and others* in Civil Appeal No. 6 of 2017 reported in 71 DLR (AD) 52.

<sup>32</sup> *Ibid.* p. 716, 717, 731.

<sup>33</sup> *Ibid.* p. 87, 99.

<sup>34</sup> *Ibid.* p. 547.

highest legal authority of the nation<sup>35</sup>. Article 7 establishes the unquestionable supremacy of the Constitution, and any changes to the Constitution must be examined in accordance with Article 7<sup>36</sup>. The Constitution's absolute supremacy surpasses all institutions, functionaries, and services it has established<sup>37</sup>. The Supreme Court unequivocally declares that all laws, actions, and processes must adhere to and comply with the Constitution. Any law that exceeds the scope of the Constitution is considered ultra vires and invalid according to the law<sup>38</sup>. The Constitution establishes and constrains the three branches of the state, namely the executive, legislative, and judiciary. Furthermore, the constitutional court mandates that all individuals working in the various branches of the state, including the civil service, defense service, and other agencies, are obligated to uphold and abide by the Constitution and its declarations<sup>39</sup>. The Supreme Court affirms that the Fifth Amendment violated the authority of the Constitution and the principle of rule of law by endorsing and approving the rules, proclamations, and directives of martial law<sup>40</sup>.

### 4.3. Contravention of the Basic Structure of the Constitution

The basic structure refers to the essential and unalterable foundations of a Constitution that cannot be modified by parliament (Hoque, 2015: p. 277). While the Constitution does not explicitly define the word "basic structure," it is easily recognizable. The AD of the Supreme Court established the basic structure concept in a significant ruling in the case of *Anwar Hossain Chowdhury v. Bangladesh*, by invalidating the eighth constitutional amendment. Subsequently, the Supreme Court, through various judicial decisions, expanded on the amendments to the Constitution. These amendments case recognized that the Constitution upholds the "sovereignty of the people, supremacy of the Constitution, Rule of Law, Democracy, Republican form of Government, Unitary State, Separation of Powers, Independence of the Judiciary, Fundamental rights, Secularism, as the basic structures of the Constitution."<sup>41</sup> The basic feature of the Constitution is its inherent nature that cannot be deconstructed by any entity established by the Constitution itself, specifically the parliament<sup>42</sup>. The Legislature possesses unrestricted powers, but, the basic structure of the Constitution regulates these powers.

According to Article 7B of the Constitution, it is stated that the basic structure

<sup>35</sup>The Constitution of Bangladesh 1972, Preamble and Art. 7; *Anwar Hossain Chowdhury v. Bangladesh* (1989) BLD (AD) (Spl) 1, para 272, p. 118.

<sup>36</sup>*Bangladesh Italian Marble Works Ltd & Ors. v Bangladesh & Ors.* (2010) BLD (Spl), p. 48, 122.

<sup>37</sup>*Khondker Delwar Hossain, Secretary, BNP Party & Ors. v. Bangladesh Italian Marble Works Ltd & Ors.* (2010) BLD (Spl) 2, para 254, p.117.

<sup>38</sup>*Bangladesh Italian Marble Works Ltd & Ors. v Bangladesh & Ors.* (2010) BLD (Spl), p. 250; *Khondker Delwar Hossain, Secretary, BNP Party & Ors. v. Bangladesh Italian Marble Works Ltd & Ors.* (2010) BLD (Spl) 2, para 254, p.117.

<sup>39</sup>*Bangladesh Italian Marble Works Ltd & Ors. v. Bangladesh & Ors.* (2010) BLD (Spl), p. 141, 250.

<sup>40</sup>*Khondker Delwar Hossain, Secretary, BNP Party & Ors. v. Bangladesh Italian Marble Works Ltd & Ors.* (2010) BLD (Spl) 2, para 271, p.121.

<sup>41</sup>*Bangladesh Italian Marble Works Ltd & Ors. v. Bangladesh & Ors.* (2010) BLD (Spl), p.122; *Government of Bangladesh and others v. Advocate Asaduzzaman Siddiqui and others* in Civil Appeal No. 6 of 2017, p. 772-773 reported in 71 DLR (AD) 52.

<sup>42</sup>*Anwar Hossain Chowdhury v. Bangladesh* (1989) BLD (AD) (Spl) 1.

of the Constitution is not subject to amendment<sup>43</sup>. The *Kesavananda Bharati v. State of Kerala*<sup>44</sup> established that the parliament's authority to amend the Constitution does not extend to modifying or eradicating its basic features. The Court held that parliament's power to amend the Constitution is not absolute and is subject to the preservation of the Constitution's basic structures; hence, the power cannot be applied to amend, alter or destroy its basic features<sup>45</sup> (Khilnani et al., 2013: p. 314). The judiciary possesses the legitimate authority to declare any alteration of the Constitution that revokes the basic features or structure as unlawful (Hoque, 2015: p. 277). In the instance of the 5<sup>th</sup> and 16<sup>th</sup> Amendments, the Supreme Court has ruled that the parliament's authority to change the Constitution does not allow them to eliminate, suspend, harm, or dismantle any basic features or structure of the Constitution<sup>46</sup>.

The invalidity of constitutional amendments can be attributed to the erosion of the basic feature of the Constitution. In several decisions concerning constitutional amendments, the Supreme Court has indicated that these amendments have undermined the fundamental features of the Constitution. In the landmark decision of *Bangladesh Italian Marble Works Ltd v. Bangladesh*, also referred to as the 5<sup>th</sup> Amendment case, the High Court Division of the Supreme Court ruled that the Fifth Amendment to the Constitution is invalid. The Court deemed the various alterations made to the Constitution during the period of martial law as a significant violation of the Constitution and as having destroyed several key features of the Constitution (Khilnani et al., 2013: p. 317). The 5<sup>th</sup> Amendment to the Constitution altered the secular nature, invalidated *Bangalee* nationalism<sup>47</sup>, and undermined "two other more basic features of the Constitution, specifically, the independence of the judiciary and its power of judicial review."<sup>48</sup>

The Supreme Court declared the 8<sup>th</sup> Amendment to the Constitution illegal, stating that parliament's capacity to make amendments is limited by the unchangeable "basic structures" of the Constitution (Khilnani et al., 2013: p. 314). The Apex Court declares that the 8<sup>th</sup> constitutional amendment violated the "unitary character of the Republic," which is a basic structure of the Constitution<sup>49</sup>. The 13<sup>th</sup> amendment of the Constitution was deemed null and void due to its infringement upon two elements of the basic feature, namely the "principle of democracy" and "judicial independence"<sup>50</sup> (Hoque, 2015: p. 280). The independence of the judiciary is one of the Constitution's basic features and has been acknowledged in the rulings of the Appellate Division in instances involving the 5<sup>th</sup>, 8<sup>th</sup>,

<sup>43</sup> *Government of Bangladesh and others v. Advocate Asaduzzaman Siddiqui and others* in Civil Appeal No. 6 of 2017, p. 715, 548 reported in 71 DLR (AD) 52.

<sup>44</sup> AIR 1973 SC 1461.

<sup>45</sup> *Anwar Hossain Chowdhury v. Bangladesh* (1989) BLD (AD) (Spl) 1, p.143.

<sup>46</sup> *Bangladesh Italian Marble Works Ltd & Ors. v. Bangladesh & Ors.* (2010) BLD (Spl), p. 121; *Government of Bangladesh and others v. Advocate Asaduzzaman Siddiqui and others* in Civil Appeal No. 6 of 2017 reported in 71 DLR (AD) 52.

<sup>47</sup> *Bangladesh Italian Marble Works Ltd & Ors. v. Bangladesh & Ors.* (2010) BLD (Spl), p. 252-253.

<sup>48</sup> *Khondker Delwar Hossain, Secretary, BNP Party & Ors. v. Bangladesh Italian Marble Works Ltd & Ors.* (2010) BLD (Spl) 2, para 271, p.121.

<sup>49</sup> *Anwar Hossain Chowdhury v. Bangladesh* (1989) BLD (AD) (Spl) 1.

<sup>50</sup> *Abdul Mannan Khan v Bangladesh*, Civil Appeal No. 139 of 2005, p. 6 reported in 64 DLR (2012) (AD) 1.

13<sup>th</sup>, and 16<sup>th</sup> amendments. The 16<sup>th</sup> Amendment of the Constitution has jeopardized the independence of the judiciary and has enabled the executive branch to exert influence over the court, in violation of the basic structures of the Constitution<sup>51</sup>.

#### 4.4. Transgression of the Limited Power of Making Legislation to the Parliament

The powers of the several branches of the government are restricted by the Constitution in a written constitution<sup>52</sup>. As a written constitution in Bangladesh, the power of the parliament to make amendments is restricted. Article 65 of the Constitution grants parliament the authority to exercise the legislative powers of the republic, with the condition that it must adhere to the provisions of the Constitution. The parliament possesses complete legislative authority and fulfills its legislative duties through the powers granted to it by the applicable sections of the Constitution<sup>53</sup>. It has the ability to modify a specific part of the Constitution by completing the required process<sup>54</sup>. In the case involving the 16<sup>th</sup> Amendment, the Supreme Court determined that the parliament's authority to alter the Constitution is not unlimited and cannot exceed the boundaries set by the constitution<sup>55</sup>.

The constitutional court has declared that the amendments to the Constitution are extra vires due to the infringement of the parliament's limited jurisdiction to make legislation. In the instance of the 5<sup>th</sup> Amendment, the court declares that regulations, proclamations, and orders related to Martial Law are unconstitutional and invalid. Therefore, the parliament has no authority to approve or validate them. The parliament's confirmation, validation, and ratification of it are in violation of the common right<sup>56</sup>.

#### 4.5. Arbitrary and Illegal Military Rule Over Democracy

The constitutional court invalidated some constitutional amendments on the grounds of arbitrary and unconstitutional exercise of military authority. The court declares that military rule is incompatible with the nation's dignity, honor, and glory, which it attained with significant sacrifice<sup>57</sup>. The Supreme Court upholds the fact, in accordance with the Constitution, that Bangladesh is a democratic republic controlled by the elected legislative bodies representing the people. Therefore, Bangladesh does not have any martial law or martial law authority. Under the Martial Law rule, the country was governed without the participation of

<sup>51</sup> *Government of Bangladesh and others v. Advocate Asaduzzaman Siddiqui and others* in Civil Appeal No. 6 of 2017, p. 87, 99, 150 reported in 71 DLR (AD) 52.

<sup>52</sup> *A.K. Kaul v. Union of India* (1995) 4 SCC 73.”

<sup>53</sup> *Government of Bangladesh and others v. Advocate Asaduzzaman Siddiqui and others* in Civil Appeal No. 6 of 2017, p. 715 reported in 71 DLR (AD) 52.

<sup>54</sup> *Bangladesh Italian Marble Works Ltd & Ors. v Bangladesh & Ors.* (2010) BLD (Spl), p. 121.

<sup>55</sup> *Asaduzzaman Siddiqui and Others v Bangladesh* (Writ Petition No. 9989 of 2014; decision of 5 May 2016).

<sup>56</sup> *Bangladesh Italian Marble Works Ltd & Ors. v Bangladesh & Ors.* (2010) BLD (Spl), p. 252.

<sup>57</sup> *Khondker Delwar Hossain, Secretary, BNP Party & Ors. v. Bangladesh Italian Marble Works Ltd & Ors.* (2010) BLD (Spl) 2, para 263, p. 119.

elected representatives, resulting in the loss of its status as a sovereign republic. Furthermore, the absence of a functioning parliament resulted in the loss of its democratic essence during the period of Martial Law<sup>58</sup>.

In the *Anwar Hossain Chowdhury v. Bangladesh* case, the Supreme Court determined that during periods of Martial law, the Constitution was not abolished, but rather either temporarily set aside or treated as a law that is “subordinate to the Martial Law Proclamations, Orders, and Regulations.”<sup>59</sup> The High Court Division of the Supreme Court has ruled that the Fifth Amendment to the Constitution is invalid since it provided constitutional safeguards to the first martial law rule and its actions and legislation (Khilnani et al., 2013: p. 317). In the 5<sup>th</sup> Amendment case, the Supreme Court observed that Martial Law regulations and orders were issued by individuals who lacked lawful power and authority, thereby disrespecting the Constitution and the people of Bangladesh. The Martial Law Authority unlawfully altered and amended the provisions of the Constitution, so rendering the Constitution subject and obedient to Martial Law<sup>60</sup>.

#### 4.6. Undermined the Independence of the Judiciary

The Constitution declares, “The state shall ensure the separation of the judiciary from the executive organs of the state.”<sup>61</sup> Following the verdict in the case of *Secretary, Ministry of Finance vs Masdar Hossain*, the judiciary became independent from the executive and legislative branches on November 1, 2007. The Constitution explicitly establishes an autonomous and unbiased judiciary as one of its fundamental principles. It is indispensable in establishing the rule of law<sup>62</sup>. Article 94(4) explicitly confirms the autonomy of Supreme Court justices in carrying out their judicial duties, “Subject to the provisions of this Constitution the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions.” Article 116A guarantees independence of judicial officers, “Subject to provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions.”

In the *Masdar Hossain* case, the Supreme Court asserts that the independence of the judiciary “is one of the basic pillars of the Constitution and cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provision of the Constitution.”<sup>63</sup> In the same case, the AD of the Supreme Court specifically observed: “The judiciary must be free specially from the parliament and the Executive to decide on its own matters of administration bearing directly on the exercise of its judicial functions.” The Supreme Court affirms that the legislature has a constitutional duty to safeguard the independence of the judiciary and maintain a clear separation of powers between the judiciary

<sup>58</sup> *Bangladesh Italian Marble Works Ltd & Ors. v Bangladesh & Ors.* (2010) BLD (Spl), p. 250-252.

<sup>59</sup> *Anwar Hossain Chowdhury v. Bangladesh* (1989) BLD (AD) (Spl) 1.

<sup>60</sup> *Bangladesh Italian Marble Works Ltd & Ors. v Bangladesh & Ors.* (2010) BLD (Spl), p. 250-251.

<sup>61</sup> The Constitution of Bangladesh 1972, Art. 22.

<sup>62</sup> *Government of Bangladesh and others v. Advocate Asaduzzaman Siddiqui and others* in Civil Appeal No. 6 of 2017, p. 545, 548 reported in 71 DLR (AD) 52.

<sup>63</sup> *Secretary, Ministry of Finance vs Masdar Hossain* 2000 (VIII) BLT (AD) 234, para 44, p. 257.

and the executive branch. This requirement is rooted in the common law principles that are implicitly embedded in the Constitution<sup>64</sup>.

The Supreme Court invalidated the 16<sup>th</sup> Amendment of the Constitution due to its detrimental impact on the autonomy of the judiciary. The 16<sup>th</sup> amendment of the Constitution has weakened and restricted the independence of the judiciary by subjecting it to potential removal by the parliament<sup>65</sup>. This constitutional change introduced ambiguity over the length of time judges can serve, which in turn opened up the possibility of compromising the independence of the judiciary by making it susceptible to unwarranted pressures and influence. Furthermore, the amendment undermines the autonomy of the judiciary by establishing a procedure for impeachment by the legislature, which could be susceptible to political interference and coercion<sup>66</sup>.

As a result, the Supreme Court invalidated parliament's authority to dismiss judges and restored the Supreme Judicial Council's ability to remove judges who behave improperly. According to the verdict, "neither individual judges nor the judiciary should be accountable to the executive." The court utters, "The chief justice and judges are constitutional functionaries. They are not servants of anybody and have no master whatsoever. There is no master-servant relationship at all between them and anybody else, least of all other branches of the state."<sup>67</sup> Furthermore, the ruling affirms that both individual judges and the judiciary should not be held responsible to the executive branch, as it poses a threat to judicial independence. This independence is crucial for judges to fulfill their duty of resolving disputes in a fair and unbiased manner<sup>68</sup>.

#### 4.7. Judicialization of Politics

In addition to valid arguments, there is a significant amount of controversy among jurists, attorneys, academicians, and politicians on the justification for declaring constitutional amendments unlawful. Over the past few years, the majority of changes that have been deemed unlawful have had strong ties to the country's politics and crucial political governance. More precisely, the government can achieve its objective by invalidating certain amendments. There are claims that the government is able to achieve its significant political goals by influencing the judiciary, a phenomenon known as the judicialization of politics<sup>69</sup>. The intellectuals

<sup>64</sup> *Government of Bangladesh and others v. Advocate Asaduzzaman Siddiqui and others* in Civil Appeal No. 6 of 2017, p. 715 reported in 71 DLR (AD) 52.

<sup>65</sup> *Ibid.* p. 136.

<sup>66</sup> *Ibid.* p. 547-549.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> See, among others, Ridwanul Hoque, "The Judicialization of Politics in Bangladesh Pragmatism, Legitimacy, and Consequences" in Mark Tushnet and Madhav Khosla (ed.), *Unstable Constitutionalism—Law and Politics in South Asia* (Cambridge: Cambridge University Press, 2015): 261-290; Ridwanul Hoque, "Constitutionalism and the Judiciary in Bangladesh" in Sunil Khilnani, Vikram Raghavan and Arun K Thiruvengadam (ed.), *Comparative Constitutionalism in South Asia* (Oxford: Oxford University Press, 2013): 303-340; Adeeba Aziz Khan, "The politics of constitutional amendments in Bangladesh: The case of the non-political caretaker government," *International Review of Law* 9, (2015): 1-16; Ridwanul Hoque, "The Recent Emergency and the Politics of the Judiciary in Bangladesh," *NUJS Law Review* 2, no. 2 (2009): 183-204; Abdul Halim, "The 7<sup>th</sup> Amendment Judgment by the Appellate Division: Judicial Politics or Judicial Activism," *The Counsel Law Journal* 19-82.

and jurists argued that the basic structure theory has been used as a means to excessively involve the judiciary in political matters. The AD's decision in the 13<sup>th</sup> Amendment judgment resulted in significant political consequences due to its erroneous application of the basic structure theory (Hoque, 2015: pp. 278-281).

Similarly, scholars have underscored that the ruling of the 7<sup>th</sup> Amendment case was influenced by the political predisposition of the sitting judges, and it exhibits evident party prejudice (Halim, 2013: p. 21). An example of upholding judicial independence by ensuring judges' mandatory retirement tenure is the nullification of the 16<sup>th</sup> Amendment. The purpose of this amendment was intentionally implemented to exert control over the higher court by dismissing judges according to political preferences. This endeavor constituted a clear and explicit menace to the upper judiciary. Nevertheless, the Supreme Court nullified this modification in order to maintain public trust in the justice system.

In addition, there are several significant reasons for deeming the constitutional amendments as invalid. Firstly, they are in direct contradiction with the essence of the preamble of the constitution. Secondly, they are not in line with the fundamental principles of state policy outlined in Part II of the constitution. Thirdly, they undermine the principle of judicial independence, which is safeguarded by the constitution. Fourthly, they are inconsistent with the nature of the unitary system of the state. Lastly, they completely overhaul the provision of the Constitution under Article 26.

## 5. Research Findings

The paper rigorously examines the Supreme Court of Bangladesh's authority as a constitutional court, the unconstitutional amendments to the Constitution, and the rationale for finding five constitutional amendments *ultra vires*. The study's findings indicate that the Constitution designates the Supreme Court as the paramount authority in the nation's adjudication system and the guardian of the Constitution and constitutionalism. The Supreme Court is regarded as the constitutional court in this context. The Constitution grants the Supreme Court the power to invalidate any statute, judicial ruling, or executive action that conflicts with constitutional limitations and jurisdiction. The study examines the rationale behind declaring constitutional amendments *ultra vires*. The significant arguments are that the constitutional amendments contravene constitutional principles, specifically the supremacy of the Constitution and the restricted authority of parliament to amend it. The martial law authorities enacted several constitutional amendments that violate the principles and essence of the Constitution. The majority of the changes were deemed illegal as they modified the fundamental structures of the Constitution. Numerous modifications undermined the fundamental principles of judicial independence. Furthermore, legal scholars, constitutional authorities, and academics assert that numerous constitutional changes were rendered unconstitutional as a result of the judicialization of politics.

## 6. Conclusion

The Constitution plays a vital role in establishing the various bodies and functionaries of the state. It serves as a crucial source of legitimacy for all actions and proceedings carried out by state organs, ensuring accountability and fairness in governance. The judiciary, a fundamental pillar of the state, is not only empowered to settle disputes but also mandated to uphold the rule of law and safeguard the fundamental rights of citizens. Its role encompasses fostering a just and equitable society, delivering impartial justice, sanctioning wrongdoers, and safeguarding innocent individuals from injury and injustice (Islam, 2018: p. 16; Islam, 2019: p. 110). The Supreme Court stands as the apex of our judicial system, wielding the power to uphold justice and correct errors of judgment through careful adjudication. Mandated by the Constitution, its far-reaching functions and jurisdictions ensure that our fundamental laws are upheld and protected.

The Supreme Court goes beyond its function within the government framework and serves as a guardian of the constitution. Its duties and functions are not those of a typical government servant; instead, it upholds Constitutionalism. As the guardian of the Constitution, the Supreme Court has the authority to interpret and clarify the Constitution, ensuring that its principles and directives are upheld and implemented throughout the judiciary and beyond. The Supreme Court fulfills its role as a constitutional body by upholding constitutionalism. Through this authority, the highest court has invalidated several constitutional amendments that can help in the progress toward creating a truly democratic nation. However, in certain rulings, scholars have observed the use of judicial power to influence politics, a phenomenon known as the judicialization of politics.

## Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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