The Dhaka University Studies, Part-F Vol. XVI (2) : 123—154, December 2005

THE CONCEPT OF 'BASIC STRUCTURE': A CONSTITUTIONAL PERSPECTIVE FROM BANGLADESH

Muhammad Ekramul Haque

Introduction

One of the important constitutional laws in Bangladesh is that its basic structure cannot be changed by the Parliament even it can not be done by referendum. The chief advantage of such a doctrine probably is to secure the Constitution, the solemn expression of the will of the people, from unwanted encroachment to be made by the legislatures exercising their arbitrary and capricious use of the strength of majority. But, though the Constitution of Bangladesh is an elaborate written Constitution which is also one of the largest constitutions in the world it does not contain any specific provision regarding its basic structure or does not say anything regarding unamendablity of its basic structure. It has been established only in 1989 in the famous milestone case of Anwar Hossain V. Bangladesh[1] popularly known as the 8th Amendment case. Thus, now the basic structure of our Constitution is set beyond the purview of the amending power and a new interpretation of Article 142 has also been given. The object of writing this article is to trace the history of basic structure and examining the concept of basic structure in the context of the constitutional law of Bangladesh. In doing so, obviously, much more emphasis has been given on the Constitution 8th Amendment case by frequently referring and quoting from it. Because, the 8th Amendment case is the only authority in Bangladesh that deals with the concept of basic structure and the judgment is so elaborate that includes so many references of cases, legal literatures and full with arguments. Thus, studying the concept of basic structure in Bangladesh necessarily also leads towards the study of the glorious 8th Amendment case.

Origin and development of the doctrine of basic structure

Before the 8th Amendment case in Bangladesh a lot of cases have been decided in India through which the doctrine of basic structure was established and developed further. But, in fact the origin of this doctrine

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1. 1989 BLD (Spl) 1

in this sub-continent is found at first in a decision of the then 'Dacca High Court' in Md. Abdul Haque V. Fazlul Qader Chowdhury, PLD 1963 Dacca 669, as 'Dr. Kamal Hossain has emphasized that the doctrine of basic structure as applied by the Indian Supreme Court had originated from a decision of the then Dhaka High Court which was upheld in appeal by the Pakistan Supreme Court in the case of Fazlul Qader Chowdhury V. Abdul Huq, PLD 1963 SC 486=18 DLR SC 69.'[2] Shahabuddin Ahmed, J in the following words, summarized this case:

> The question raised in the case of Fazlul Qader Chowdhury related to interpretation of Art. 224(3) of the Constitution of 1962 and President's Order No. 34 of 1962 made there under. Under that Constitution is Presidential Form of Government was provided with a cabinet consisting of Ministers who should not be members of Parliament. Mr. Fazlul Qader Chowdhury was elected a member of the Parliament but he was appointed a member of the President's cabinet as well. Under Art. 224(3) of the Constitution the President was empowered for the purpose of removing any difficulties that may arise in bringing this Constitution into operation, to direct by an Order that the provisions of the Constitution shall have effect subject to "such adaptations, whether by way of modification, addition or omission, as he may deem necessary or expedient". The President made Order No.34 for removing the difficulties providing that a Minister of his Government might retain his seat in the Parliament. This Order was challenged by a writ petition before the High Court on the ground that the President's power to remove "difficulties" in launching the Constitution does not extend to amend the Constitution altering one of its basic structures—namely, no person shall be a Minister and a member of Parliament at the same time. This contention was upheld and the President's Order was struck down as ultra vires of the Constitution.[3]

Thus, it appears that ultimately in Fazlul Qader Chowdhury case the concept of basic structure was recognized. 'This decision was cited by the Indian Supreme Court in Sajjan Singh's case AIR 1965 SC p. 845 at p. 867 in support of the proposition that amending power could not be exercised to destroy the basic structure of the Constitution':[4]

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2. Ibid., para 309.
3. Ibid., para 310.
4. Ibid., para 426.

> "If upon a literal interpretation of this provision an amendment even of the basic feature of the Constitution would be possible it will be a question of consideration as to how to harmonize the duty of allegiance to the Constitution with the power to make an amendment to it. Could the two be harmonized by excluding from the procedure for amendment, alteration of a basic feature of the Constitution? It would be of interest to mention that the Supreme Court of Pakistan has in Fazlul Qader Chowdhury V. Mohd. Abdul Haque, PLD 1963 SC 486 held that franchise and form of Government are fundamental features of a Constitution and the power conferred upon the President by the Constitution of Pakistan to remove difficulties does not extend to making an alteration in a fundamental feature of the Constitution."

Let us now trace the development of this doctrine in the context of the Indian constitutional law where the doctrine of basic structure was recognized by the judiciary even before Bangladesh. In fact, in Kesavananda case[5] in 1973 this doctrine was recognized formally for the first time in India. But apart from this case there are also some pre-development of this doctrine through different cases. Again, after Kesavananda case this doctrine was applied further in some other cases. Seervai[6] discussed this entire development of the doctrine dividing it into four periods. I will prefer to discuss it dividing into the following three phases based on the Kesvananda case:

1. First phase: Pre-Kesavananda position
2. Second phase: Kesavananda case
3. Third phase: post Kesavananda case

First phase: Pre-Kesavananda position: At this phase though the doctrine of basic structure was not established as a concept, yet the ground was prepared to have this doctrine. This phase starts in 1951 with Sankari Parasad's Case[7] and comes to an end in 1967 with Golak Nath's Case[8]. Apart from these two cases the third case that will be considered here is Sajjan Singh's case.[9]

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5. *Kesavananda Bharati V. State of Kerala,* AIR 1973 Sc 1461.
6. Seervai, H. M. *Constitutional Law of India,* 4th ed. Universal Book Traders, Delhi, 1996, vol.3; p. 3109.
7. *Sankari Prasad Singh Deo V. Union of India,* AIR 1951 SC 458.
8. *I.C. Golaknath V. State of Punjab,* AIR 1967 SC 1643.
9. *Sajjan Singh V. State of Rajasthan,* AIR 1965 SC 845.

In **Sankari Prasad Singh Deo V. Union of India**[10], 'the first case on amendability of the Constitution'[11], the validity of the Constitution (First Amendment) Act, 1951, curtailing the right to property, one of the fundamental rights guaranteed by the Constitution, was challenged. The Court in this case recognizes unlimited amending power and says that even the fundamental rights are not beyond the reach of this amending power. Jain sums up the Court's ultimate stand in the following words[12]:

> The court held that the terms of Art. 368 were perfectly general and empowered Parliament to amend the Constitution without any exception. The fundamental rights were not excluded or immunized from the process of constitutional amendment under Art. 368. These rights could not be invaded by legislative organs by means of laws and rules made in exercise of legislative powers, but they could certainly be curtailed, abridged or even nullified by alteration in the Constitution itself in exercise of the constituent power. The Court insisted that there was a clear demarcation between ordinary law, which was made in exercise of legislative power, and constitutional law, which was made in exercise of constituent power. ... the Court thus disagreed with the view that the fundamental rights were inviolable and beyond the reach of the process of constitutional amendment.[13]

Thus, in this case the amending power of the Constitution was considered as absolute which ultimately destroys the possibility of recognition of anything like basic structure of the Constitution to keep them beyond the purview of such amending power.

Later on in 1965 in **Sajjan Singh V. State of Rajasthan**[14], the Constitution (Seventeenth Amendment) Act, 1964 was challenged on the ground of curtailing fundamental rights. But the Supreme Court again rejected the contention altogether by a majority of 3:2following the decision of Sankari Prasad. Thus it was decided by the majority that the fundamental rights were not inviolable and beyond the reach of the constitution amending power. But, the two dissenting Judges in this case expressed their doubts that whether the parliament can really make the fundamental

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10. AIR 1951 SC 458.
11. Jain M.P., *Indian Constitutional Law*, 4th edition reprint, Wadhwa and Company Law Publishers, Agra, Nagpur, India, 2002; p. 876.
12. Ibid., 877.
13. Ibid.
14. AIR 1965 SC 845.

rights as their 'play-thing'. Their concluding opinions have been summarized by Jain, M P in the following words:[15]

Hidayatullah and Mudholkar, JJ., however, in separate judgments, raised doubts whether Art. 13 would not control Art. 368. 'I would require stronger reasons than those given in Shankari Prasad'a case', observed Hidayatullah, J., 'to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without concurrence of the States,' because, 'the Constitution gives so many assurances in Part III that it would be difficult to think that they were play-things of a special majority.' Mudholkar, J., felt reluctant 'to express a definite opinion on the question whether the word 'law' in Art. 13 (2) of the Constitution excludes an Act of Parliament amending the Constitution and also whether it is competent to parliament to make any amendment at all to Part III of the Constitution.' But Mudholkar, J.'s argument was set in a broader frame. His basic argument was that every constitution has certain fundamental features which could not be changed. As will be seen, Golak Nath was based on Hidayatullah J.'s argument of non-amendability of fundamental rights, but Kesavananda was based on Mudholkar J.'s view of basic features.

In 1967, again the same question of amendability of fundamental rights was raised before the Court in **I.C. Golaknath V. State of Punjab**[16]. The majority Judges in this case decided fundamental rights as inviolable and beyond the reach of the amending power but not on the ground of basic structure, rather the ground is that these are the fundamental rights. The minority view still decides in line with the Sankari Prasad. Their fear was that the Constitution would become static if no such power were conceded to Parliament.[17] However, 'to make the fundamental rights non-amendable, the majority refused to accept the thesis that there was any distinction between 'legislative' and 'constituent' process'[18] and decided amending power as merely legislative in nature. This was the crux of the whole argument.[19]

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15. Supra note 11, p. 877.
16. AIR 1967 SC 1643.
17. Supra note 11, p. 879.
18. Ibid.
19. Ibid.

Golak Nath raised an acute controversy in the country; one school of thought applauded the majority decision as a vindication of the fundamental rights, while the other school criticized it as creating hindrances in the way of enactment of socio-economic legislation required to meet the needs of a developing society.[20]

Subsequent to this decision curtailing the power of the Parliament an initiative was taken to bring another amendment in the Constitution so as to increase the power of the Parliament removing the impact of Golak Nath case, but it failed. The effort taken by the them Parliament has been summed up by Jain in the following words:

> To neutralize the effect of Golak Nath, Nath Pai introduced a private member's bill in the Lok Sabha on April 7, 1967, for amending Art. 368 so as to make it explicit that any constitutional provision could be amended by following the procedure contained in Art. 368. The proposed bill was justified as an assertion of "Supremacy of Parliament" which principle implied 'the right and authority of Parliament to amend even the fundamental rights.' Nath Pai's bill did not however make such headway in Parliament. It was criticized as "an effort to the dignity of the Supreme Court" and as placing the fundamental rights at the "mercy of a transient majority in Parliament." There was also a feeling that the bill when enacted would itself be subject to a challenge in the courts and could be declared unconstitutional if the Supreme Court were to reiterate its Golak Nath ruling.[21]

This is true that Golak Nath case by declaring all fundamental rights generally as beyond reach of the amending power has been criticized by many including Seervai who termed the majority judgment as 'clearly wrong'.[22] However, apart from that criticism, this decision in fact paved the way to recognize the doctrine of basic structure in future as it has somehow restricted the amending power which is at the basis of basic structure theory. It is worth mentioning here that though the concept of basic structure was not discussed by the judges in this case as Seervai comments that 'In the result, there was no pronouncement by the majority in Golak Nath's Case on the doctrine of basic structure'[23] yet the

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20. Ibid.
21. Ibid., p. 882.
22. Seervai, H. M. *Constitutional Law of India*, 4th ed. Universal Book Traders, Delhi, 1996, vol.3, at p. 3110.
23. Ibid., p.3136

phrase basic structure was introduced for the first time by the counsels while arguing for the petitioners in the Golaknath case as it was contended that 'The fundamental rights are a part of the basic structure of the Constitution and, therefore, the said power can be exercised only to preserve rather than destroy the essence of those rights'[24]. The counsels also explained the meaning of the term 'amendment' that restricts the amending power so as to accommodate the doctrine of basic structure. It was contended that 'the word 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed and it cannot be so construed as to enable the parliament to destroy the permanent character of the Constitution.'[25]

Second phase: Kesavananda case: This is the milestone phase in the sense that in this case of Kesavananda Bharati V. State of Kerala[26] for the first time the Indian Supreme Court recognized the doctrine of basic structure. It was decided by the majority that the Parliament's constituent power to amend the Constitution is subject to inherent limitations and the parliament cannot use its amending power so as to damage, emasculate, destroy, abrogate, change or alter the basic structure or framework of the Constitution.[27]

The reason of Kesavananda case arose in 1971 when the Parliament to undo the effect of Golak Nath case passed the Constitution 24th Amendment Act introducing some basic things that declares the amending power of the Constitution as 'constituent' to be found only in Art. 368 and that the Parliament can amend any part of the constitution, including the provisions regarding the fundamental rights. This Amendment was challenged in Kesavananda case where the majority recognized the power of parliament to amend any or all provisions of the Constitution provided such an amendment does not destroy its basic structure.

Jain M P properly compared Kesavananda Bharati case with the Golak Nath case terming Bharati case as an improvement over the formulation in Golak Nath case at least in the following three respects, which are, in his words:[28]

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24. *I.C. Golaknath V. State of Punjab,* AIR 1967 SC 1643, at p. 1652.
25. Ibid., pp.1652-53.
26. AIR 1973 SC 1461.
27. Ibid.
28. Supra note 11, p. 884.

1. It has been stated earlier that there are several other parts of the Constitution which are as important, if not more, as the fundamental rights, but Golak Nath formulation did not cover these parts. This gap has been filled by Bharati by holding that all 'basic' features of the Constitution are non-amendable.
2. Golak nath made all fundamental rights as non-amendable. This was too rigid a formulation. Bharati introduces some flexibility in this respect. Not all fundamental rights are now to be non-amendable but only such of them as may be characterized as constituting the "basic" features of the Constitution. Theoretically, Kesavananda is therefore a more satisfactory formulation as regards the amendability of the Constitution than Golak Nath which gave primacy to only one part, and not to other parts, of the Constitution.
3. Bharati also answers the question left unanswered in Golak Nath, namely, can parliament, under Art. 368, rewrite the entire Constitution and bring in a new Constitution? The answer to the question is that Parliament can only do that which does not modify the basic features of the Constitution and not go beyond that.

However, the most important thing is that the Kesavananda Bharati case frustrated the intention of the Parliament passing the 24th Amendment to enjoy an absolute power to amend the Constitution, as the Supreme Court ultimately made this amending power subject to the basic structures of the Constitution.

Third phase: Post Kesavananda case: After the establishment of the doctrine of basic structure in Kesavananda case during this third phase in fact this decision has been reaffirmed in different cases. At this stage also the conflict between the judiciary and the Parliament becomes evident as the Parliament still tried to undo the impact of even Kesavananda case and in that battle the judiciary won finally.

The Kesavananda decision was first affirmed in **Indira Nehru Gandhi V. Raj Narain**[29] popularly known as Election case, where the election of Indira Gandhi was challenged on the ground of electoral malpractice, that reaffirms the concept of basic structure keeping it beyond the scope of amending power. In this case, even pending appeal before the Court the parliament passed a new Amendment to the Constitution (39th Amendment) to avoid any unfavourable decision of the Supreme Court, but finally the Parliament failed. The relevant events have been chronologically described by Venkatesh Nayak in the following words:[30]

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29. AIR 1975 SC 2299.
30. http://www.humanrightsinitiative.org, last visited 01/5/06.

> A challenge to Prime Minister Indira Gandhi's election victory was upheld by the Allahabad High Court on grounds of electoral malpractice in 1975. Pending appeal, the vacation judge- Justice Krishna Iyer, granted a stay that allowed Smt. Indira Gandhi to function as Prime Minister on the condition that she should not draw a salary and speak or vote in Parliament until the case was decided. Meanwhile, parliament passed the Thirty-ninth amendment to the Constitution which removed the authority of the Supreme Court to adjudicate petitions regarding elections of the President, Vice President, Prime Minister and Speaker of the Lok Sabha. Instead, a body constituted by Parliament would be vested with the power to resolve such election disputes. Section 4 of the Amendment Bill effectively thwarted any attempt to challenge the election of an incumbent, occupying any of the above offices in a court of law. This was clearly a pre-emptive action designed to benefit Smt. Indira Gandhi whose election was the object of the ongoing dispute.
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> Amendments were also made to the representation of Peoples Acts of 1951 and 1974 and placed in the ninth Schedule along with the Election laws Amendment Act, 1975 in order to save the Prime Minister from embarrassment if the apex court delivered an unfavourable verdict. The *malafide* intention of the government was proved by the haste in which the thirty-ninth amendment was passed. The bill was introduced on August 7, 1975 and passed by the Lok Sabha the same day.... It was gazetted on August 10. When the Supreme Court opened the case for hearing the next day, the Attorney general asked the Court to throw out the case in the light of the new amendment.
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> Counsel for Raj Narain who was the political opponent challenging Mrs. Gandhi's election argued that the amendment was against the basic structure of the Constitution as it affected the conduct of free and fair elections and the power of judicial review. ... Four out of five judges on the bench upheld the Thirty-ninth amendment, but only after striking down that part which sought to curb the power of the judiciary to adjudicate in the current election dispute.

Thus, the Supreme Court reaffirmed the concept of basic structure fighting with the parliament though the judges differed regarding what actually constitute basic structures.

Ray, C. J. then formed a bench to review the Kesavananda verdict with a view to change the decision but effort was failed. As Venkatesh Nayak compiles:[31]

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31. Ibid.

> Within three days of the decision on the Election case ray, C. J. convened a thirteen judge bench to review the Kesavananda verdict. ...In effect the review bench was to decide whether or not the basic structure doctrine restricted Parliament's power to amend the Constitution. ...Meanwhile Prime Minister Indira Gandhi, in a speech in Parliament, refused to accept the dogma of basic structure (*Speech in Parliament- October 27, 1976: see Indira Gandhi: Selected Speeches and Writings, vol. 3, p. 288*).... N. N. Palkhivala appearing for on behalf of a coal mining company eloquently argued against the move to review the Kesavananda decision. Ultimately, Ray, C. J. dissolved the bench after two days of hearings. Many people have suspected the government's indirect involvement in this episode seeking to undo an unfavourable judicial precedent set by the Kesavananda decision. However no concerted effort were made to pursue the case.

Thus, another politically motivated judicial effort was failed to frustrate the Kesavananda judgment that establishes the concept of basic structure.

Then the government, surprisingly, took another initiative to undo Kesavananda case. In 1976, the Constitution Forty-second Amendment was passed that includes also the following provisions:

1. No amendment of this Constitution shall be called in question in any court on any ground.
2. For removal of doubts it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this constitution under this Article.

The background of passing this new 42nd Amendment has been summed up by Jain in the following words:

> The government did not relish the Supreme Court's pronouncement in the *Indira Nehru Gandhi* case declaring Cl. 4 of the Thirty-ninth amendment invalid and it very much desired to ensure that never in future the courts should have the power to pronounce a constitutional amendment invalid. Accordingly, Art. 368 was again amended by the Forty-second Amendment enacted in 1976. a major argument advanced by the Law Minister in favour of such an amendment was that the supremacy of the parliament must be asserted in the area of constitutional amendment, and that a constitutional amendment should be taken out of judicial purview. Many adverse comments were made by him in the Houses of Parliament during the course of discussion on the Amendment Bill on the Supreme Court pronouncements in Golak Nath and Bharati.

> The doctrine laid down by the Supreme Court in Kesavananda Bharati that Parliament in the exercise of its constituent power could not amend the basic features of the Constitution was much criticized. It was asserted by him that there was no basic feature of the Constitution which Parliament as the constituent power could not amend. ...In justification of the new amendments to Art. 368, the Law Minister had claimed that—(i) there was no basic feature of the Constitution which needed to be protected from amendment; and (ii) the supremacy of Parliament ought to be established in the area of constitutional amendment.[32]

Thus, the arguments made by the Law Minister in favour of the 42nd Amendment really seem to be highly astounding. Anyway, this Amendment was challenged in **Minerva Mills Ltd. V. Union of India**[33] and 'the Supreme Court again reiterated the doctrine that under Art. 368, Parliament cannot so amend the Constitution as to damage the basic or essential features of the Constitution and destroy its basic structure.'[34] It was also decided that the power of Parliament to amend the Constitution is a limited power, Parliament can not give to itself unlimited power of amendment and the limited power of amendment is also a basic feature of the Constitution.

The same proposition that Parliament does not have an absolute power to amend the Constitution so as to destroy its basic structure was again reaffirmed and applied by the Supreme Court in **Waman Rao V. Union of India.**[35] Basic structure as a concept was also recognized in **A. K. Roy V. India.**[36]

Amending power and the basic structure of the Constitution

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

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32. Supra note 11, p. 887-8.
33. AIR 1980 SC 1789.
34. Supra note 11, p. 889.
35. AIR 1981 SC 271.
36. AIR 1982 SC 710.

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

Article 142 says:

1. "Notwithstanding anything contained in this Constitution—

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

   Provided that—

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

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

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

   (1B) A referendum under this article shall be conducted by the Election Commission, within such period and in such manner as may be provided by law, amongst the persons enrolled on the electoral roll prepared for the purpose of election to Parliament.

   (1C) On the day on which the result of the referendum conducted in relation to a Bill under this article is declared, the President shall be deemed to have—

a) assented to the Bill, if the majority of the total votes cast are in favour of the Bill being assented to; or

b) withheld assent therefrom, if the majority of total votes cast are in favour of the Bill being assented to.

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

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

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

1. ***General process:*** By the votes of at least two-thirds of the total number of members of Parliament. Following this process any provision of the Constitution may be amended except its preamble and articles 8, 48, 56 or 142.

2. ***Special process:*** To amend the Preamble, article 8, 48, 56 or 142, votes of at least two-thirds of the total number of members of Parliament and a referendum also will be required.

Apparently the amending power seems to be an absolute power so as to amend any provision of the Constitution since it says 'notwithstanding anything contained in this Constitution—any provision thereof may be amended'.[37] But there are also many other interpretations of this Article 142. According to those other interpretations this amending power is not an absolute one. The concept of basic structure in fact imposes some restrictions on such amending power.

Meaning and nature of the amending power of the Constitution

B.H. Chowdhury, J commented that 'the power to frame a Constitution is a primary power whereas a power to amend a rigid constitution is a derivative power derived from the constitution'.[38] Thus the amending power is secondary in nature in comparison with the constituent power. So, if this interpretation is accepted then it appears that by exercising the power of amendment everything which could be done by constituent power that can not be done. In other words, there must have a difference between primary power and secondary power and then the basic structure is based on that difference. Shahabuddin Ahmed J also expressed the same view that the "constituent power" belongs to the people alone. Even if the "constituent power" is vested in the Parliament the power is

37. Article 142 of the Constitution of the People's Republic of Bangladesh.

38. *Anwar Hossain V. Bangladesh*, 1989 BLD (Spl) 1, at 83.

derivative one and the mere fact that an amendment has been made in exercise of the derivative constituent power will not automatically make the amendment immune from challenge.[39] He says that the word "amendment" is a change or alteration, for the purpose of bringing in improvement in the statute to make it more effective and meaningful, but it does not mean its abrogation or destruction or a change resulting in the loss of its original identity and character.[40] The term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed.[41] Though A.T. M. Afzal, J, the dissenting Judge in the 8th Amendment case, says that 'The power to amend any provisions of the Constitution by way of addition, alteration, substitution or repeal is found to be plenary and unlimited except as provided in article 142 itself',[42] but ultimately he favours the opinion regarding the existence of basic structure, as he says that 'There is, however, a built-in limitation in the word "amend" which does not authorize the abrogation or destruction of the constitution or any of its there structural pillars which will render the Constitution defunct or unworkable.'[43] Thus, he dissented with the majority judgment on a different ground that the said amendment does not violate the basic structure, not on the ground of non-existence of basic structure or that the amending power is absolute. As he says that 'The impugned amendment of article 100 has neither destroyed the Supreme Court/High Court Division as envisaged in the Constitution nor affected its jurisdiction and power in a manner so as to render the Constitution unworkable.'[44] It seems that this dissenting Judge has accepted basic structure in a very limited sense and not in the sense the others have taken it. However, throughout the judgment he opposed the existence of basic structure from various angles.

Among the learned counsels for the appellants Dr. Kamal Hossain (with reference to Mridha's case, 25 DLR 335 at p.344 on structural pillars) argues that 'the amending power is a power within and under the Constitution and not a power beyond or above the Constitution.[45] It does not empower Parliament to undermine or destroy any fundamental

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39. Ibid. para 342
40. Ibid. para 336
41. Ibid., para 192, *per* B. H. Chowdhury, J.
42. Ibid. para 635
43. Ibid.
44. Ibid.
45. Supra note 38, p.23.

feature or 'structural pillar' of the Constitution.[46] He explains it further in the following words:

> The amending power under Art. 142 is a power under the Constitution and not above and beyond the Constitution and is not an unlimited power. Any power of amendment under Constitution is subject to limitations inherent in the Constitution. The structural pillars or basic structure of the Constitution established by framers of the Constitution cannot be altered by the simple exercise of amending power. The contention that Parliament has unlimited power of amendment is inconsistent with the concept of supremacy of the Constitution which is expressly embodied in the Preamble and Art. 7 and is undoubtedly a fundamental feature of the Constitution. (Ref: Marbury V. Madison, 2 L.Ed. 5-8; Cahn: Supreme Court and Supreme Law (1954) p.18).[47]

Mr. Asrarul Hossain, another counsel, argued :

> The Parliament is a creature of the Constitution and it cannot have unlimited power. Its power of amendment is one within and under the Constitution. Even in the case of unwritten constitution like the British Constitution, the Parliament is not omnipotent and it has its limitations.... The power to amend 'any provision' in Art. 142 does not include the power to replace or destroy the Constitution and in exercise of that power the basic structures of the Constitution cannot be altered or damaged.[48]

The learned Attorney General in the 8th Amendment case has termed the amending power under Article 142 as "constituent power"[49] which has been ultimately rejected by the majority view of the Judges in this case.

Scope and extent of the amending power: About the scope of amending power B.H. Chowdhury, J has made the following points:[50]

1. This derivative power is subject to limitations.[51]

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46. Ibid.
47. bid. P.27.
48. Supra note 38, Summary of submissions, p.42.
49. Ibid., para 270.
50. Ibid.
51. Ibid. para 145

2. Laws and the amendment of a rigid constitution will be ultra vires if they contravene the limitations put on the law making or amending power by the Constitution, for the Constitution is the touchstone of validity of the exercise of the powers conferred by it.[52]
3. The term "amendment" implies such an addition or change within the line of the original instrument as will effect an improvement or better carry out the purpose for which it was framed.[53]
4. Call it by any name—basic feature or whatever but that is the fabric of the Constitution which can not be dismantled by an authority created by the Constitution itself, namely, the Parliament.[54]

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

> Amendment is subject to the retention of the basic structures.[55] By amending the Constitution the Republic can not be replaced by monarchy, democracy by oligarchy or the Judiciary can not be abolished, although there is no express bar to the amending power given in the Constitution.[56]

Original Article 142 of our Constitution says that the Constitution 'may be amended or repealed by an Act of Parliament'. But it was amended in 1973 to qualify the term amendment by the terms 'by way of addition, alteration, substitution'. It may create a confusion that this amended Article has widened the scope of amending power adding the said explanation and the same has made it unlimited. But Shahabuddin Ahmed, J has removed this confusion saying that this amended Article 142 only indicates to the different kinds of amendment.[57] Syed Ishtiaq Ahmed, the learned counsel, in his submission argued that 'Expressions like addition, alteration, substitution or repeal are merely modes of amendment and do not increase the width of the power of amendment.'[58] Shahabuddin Ahmed, has distinguished between Constitution and its amendment in the following words:

> There is... a substantial difference between Constitution and its amendment. Before the amendment becomes a part of the

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52. Ibid.
53. Ibid. para 192
54. Ibid. para 195
55. Ibid. para 378
56. Ibid. para 377
57. Ibid. para 338
58. Ibid., p. 31.

> Constitution it shall have to pass through some test, because it is not created by the people through a Constituent Assembly. Test is that the amendment has been made after strictly complying with the mandatory procedural requirements, that it has not been brought about by practicing any deception or fraud upon statutes and that it is not so repugnant to the existing provision of the Constitution, that its co-existence therewith will render the Constitution unworkable, and that, if the doctrine of bar to change of basic structure is accepted, the amendment has not destroyed any basic structure of the Constitution.[59]

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

> It will be seen, in the first place, that there is no substantive limitation on the power of the Parliament to amend any provision of the Constitution as may be found under Art. V of the Constitution of the USA... The limitation which is provided in Art. 142 related only to procedure for amendment and not substantive in the sense that no article is beyond the purview of amendment.[60]
>
> Sub-art. (1) shows that any provision of the Constitution may be amended by way of addition, alteration, substitution or repeal by Act of Parliament. Any provision evidently includes all provisions. The language is clear and suffers from no ambiguity. Any provision could not mean some provision. This clear language amply indicates the wide sweep and plenitude of power of the Parliament to amend any provision of the Constitution. It is difficult, therefore, to conceive, as contended by the appellants, that there are some provisions called "basic" which are not amenable to the amendatory process... it is significant that the Article opens with a non-obstante clause. Non-obstante clause is usually used in a provision to indicate that, that provision should prevail despite anything to the contrary in the provision mentioned in such non-obstante clause... In the presence of such a clause in Art. 142, it is difficult to sustain the contention of the appellants that some provision containing basic features are unamendable or that the amendment of any provision has to stand the test of validity under Art. 7.[61]

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59. Ibid. para 341
60. Ibid. para 529
61. Ibid. para 534, 535.

But the learned Attorney General, M. Nurullah, in the 8th Amendment case rejects the idea of basic structure and portrayed the amending power under article 142 as unlimited. He in fact has relied on the plain and simple meaning of this article 142 instead of deducing any principle from there.[62] He argued 'that Parliament's amending power is unlimited, unrestricted and absolute and it is capable of reaching any Article of the Constitution excepting the Articles specified in clause (1A) of Art. 142, which provides for a referendum for amendment'.[63]

Syed Ishtiaq Ahmed argued before the Court that 'Amendment of any provision of the Constitution is the power to bring about changes to make the Constitution more complete, perfect or effective, and repeal is different from amendment.'[64] He continues:

> This power is given to the Parliament under the Constitution, and is not a power beyond or above the Constitution. Parliament itself is a creature of the Constitution and is merely donee of this limited power which cannot be exercised to alter the basic structure of the Constitution.... Treating amending power as constituent power so as to grant unlimited power of amendment to Parliament except for the express limitation of Art. 142(1A) is to displace the carefully implanted supremacy of the Constitution by supremacy of Parliament.... Concept of unlimited amending power is opposed to Art. 7.[65]

An examination of the objections against the doctrine of basic structure

There are many objections against the doctrine of basic structure that were raised in the Constitution 8th Amendment case; some of them are discussed with their replies.

1. When Constitution makers have imposed no limitation on the amending power of Parliament, the power cannot be limited by some vague doctrines of repugnancy to the natural and unalienable rights and the preamble and state policy.[66] The argument that Parliament cannot change the basic structure of the Constitution is untenable.[67]

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62. Ibid. para 163
63. Ibid. para 270.
64. Ibid., p.30.
65. Ibid.
66. Ibid. para 163, submission of the Attorney General.
67. Ibid.

Shahabuddin, J rejects the claim of 'vague doctrines' altogether saying that the 'main objection to the doctrine of basic structure is that it is uncertain in nature and is based on unfounded fear. But in reality basic structures of the Constitution are clearly identifiable.'[68]

Badrul Haider Chowdhury, J also refutes the contention made by the Attorney general terming it as a 'clear wrong'. In his words:

> The Attorney General is clearly wrong. This is not the case of "vague doctrines of repugnancy". Article 142(1A) itself says that the Preamble amongst other can only be amended when in referendum the majority votes for it otherwise the Bill though passed by the Parliament does not become law. Here is the limitation on legislative competence.[69]

2. The Attorney general argued that the amending power is a constituent power.[70] It is not a legislative power and therefore the Parliament has unlimited power to amend the Constitution invoking its constituent power.[71]

   Badrul Haider Chowdhury, J made the following points in giving reply to this contention made by the Attorney General:[72]

   i. The argument is not tenable. He argued this point keeping an eye on Article 368 of the Constitution of India which says that " Parliament may in exercise of its constituent power amend". Our Constitution does not have any such provision.

   ii. Our Constitution is not only a controlled one but the limitation on legislative capacity of the Parliament is enshrined in such a way that a removal of any plank will bring down the structure itself.

   iii. The constituent power is here with the people of Bangladesh. If Article 26 and article 7 are read together the position will be clear.

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

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68. Ibid. para 377
69. Ibid. para 164
70. Ibid. para 165
71. Ibid.
72. Ibid. para 167.

3. Rigidity in the amendment process as it is today if made more rigid by implied limitation, will leave no scope for peaceful change and this may lead to change by violent and unconstitutional means, such as, revolution.[73]

   Shahabuddin Ahmed opposed this argument on the ground that absence of basic structure cannot guard against revolution. He observes:

   > I would not very much appreciate this argument for, now a days, there is hardly any revolution in the sense of French or Russian revolution for radical change of the socio economic structure. What is spoken of as revolution in the third world countries is the mere seizure of state power by any means fair foul. If a real revolution comes, it cannot be prevented by a Constitution however flexible it might be.[74]

4. The Constitution has undergone so many radical changes... that the doctrine of basic structure merely evokes an amazement why if it is such an important principle of law.... It was not invoked earlier in this Court.[75]

M. H. Rahman says that 'Because the principle was not invoked earlier in the past the Court cannot be precluded from considering it'.[76]

Shahabuddin Ahmed, J said that the 'trump-card of the learned Atty. Gen. is that some of the past amendments of the Constitution destroyed its basic structures and disrupted it on several occasions'.[77] Then he starts giving a long reply to this contention citing different changes in the constitution in the following words:

> It is true that such mishaps did take place in the past. The Constitution Fourth Amendment Act, dated 25 January 1975, changed the Constitution beyond recognition in many respects and in place of democratic Parliamentary form of Government on the basis of multiple party system a Presidential form of Government authoritarian in character on the basis of a single party was brought about overnight thereby. Fundamental rights to form free association was denied, all political parties except the Government party were banned and members of Parliament who did not join this Party lost their seats though

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73. Ibid. para 346, submission of the Attorney General.
74. Ibid., para 346.
75. Ibid., para 442.
76. Ibid., para 442.
77. Ibid., para 330.

> they were elected by the people. Freedom of the press was drastically curtailed; independence of the Judiciary was curbed by making the Judges liable to removal at the wish of the chief Executive; appointment, control and discipline of the subordinate Judiciary along with Supreme Court's power of superintendence and control of subordinate courts were taken away from the Supreme Court and vested in the Government. The change was so drastic and sudden, Friends were bewildered, Enemies of the Liberation had their revenge and the Critics said with glee that it is all the same whether damage to democracy is caused by democratically elected persons or by undemocratic means like military coup.[78]
>
> Within a short time came the first martial Law which lasted for four years. By Martial Law Proclamation Orders the Constitution was badly mauled on 10 times.... All these structural changes were incorporated in and ratified, as the Constitution fifth Amendment Act, 1979.[79]
>
> In spite of all these vital changes from 1975 by destroying some of the basic structures of the Constitution, nobody challenged them in court after revival of the Constitution; consequently, they were accepted by the people, and by their acquiescence have become part of the Constitution.[80]

Thus, Shahabuddin Ahmed, J concluded negativing the contention made by the Attorney General saying that 'The fact that basic structures of the Constitution were changed in the past, cannot be, and is not, accepted as a valid ground to answer the challenge to future amendments of this nature, that is, the impugned amendment may be challenged on the ground that it has altered the basic structure of the Constitution.'[81]

5. In the absence of a full catalogue of these basic structures neither the citizens nor the Parliament will know what is the limit of the power of amendment of the Constitution.[82]

Shahabuddin Ahmed, J has rightly rejected this contention made by the Attorney general saying that 'There are many concepts which are not capable of precise definition, nevertheless they exist and play important part in law'.[83]

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78. Ibid., para 330.
79. Ibid., para 331.
80. Ibid., para 332
81. Ibid.
82. Ibid., para 328, argued by the Attorney General.
83. Ibid., para 329.

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

1. It is inconceivable that the makers of the Constitution had decided on all matters for all people of all ages without leaving any option to the future generation.[84]
2. If it is right that they (framers of the Constitution) wanted the so-called "basic features" to be permanent features of the Constitution there was nothing to prevent them from making such a provision in the Constitution itself.[85]
3. The makers placed no limitation whatsoever in the matter of amendment of the Constitution except providing for some special procedure in Art. 142. Further after the incorporation of sub-art. (1A) providing for a more difficult procedure of referendum in case of amendment of the provisions mentioned therein, the contention as to further 'essential features' becomes all the more difficult to accept.[86]
4. All the provisions of the Constitution are essential and no distinction can be made between essential and non-essential feature from the point of view of amendment unless the makers of the Constitution make it expressly clear in the Constitution itself.[87]
5. If the positive power of amendment of the Constitution in Art. 142 is restricted by raising the wall of essential feature, the clear intention of the Constitution makers will be nullified and that would lead to destruction of the Constitution by paving the way for extra-constitutional or revolutionary changes.[88]
6. The limitation which is provided in art. 142 relates only to procedure for amendment and not substantive in the sense that no article beyond the purview of amendment.[89]
7. It is significant that the article (142 of the Constitution of Bangladesh) opens with a Non-obstante Clause. A Non Obstante Clause is usually used in a provision to indicate that, that provision should prevail despite anything to the contrary in the provision mentioned

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84. Ibid., para 536
85. Ibid.
86. Ibid.
87. Ibid., para 537
88. Ibid.
89. Ibid., para 530.

in such Non Obstante Clause... In the presence of such a clause in art. 142, it is difficult to sustain the contention of the appellants that some provision containing 'basic features' are unamendable or that the amendment of any provision has to stand the test of validity under art. 7.[90]

8. In our context the doctrine of basic features has indigenous and special difficulties for acceptance. The question naturally will arise "basic features" in relation to which period? What were or could be considered to be 'basic' to our Constitution on its promulgation on 16th December 1972, a reference to the various amendments made up to the (Eighth) Amendment Act will show that they have ceased to be basic any more. The 'basic features' have been varied in such abandon and with such quick succession that the credibility in the viability of the theory of fundamentality is bound to erode. Few examples, will be sufficient. There has been repeated reference to art. 44 by all the learned Counsels saying that this article providing for guarantee to move the High court Division for enforcement of fundamental rights is one of the cornerstones of our Constitution. It is well-known that this article was completely substituted by the Fourth Amendment Act (Act 11 of 1975) excluding the Supreme Court entirely. It somewhat ironical that the article has come back to the Constitution by a Proclamation Order. (Second Proclamation Order No. IV of 1976). It has been claimed that art 94 is another cornerstone providing for an integrated Supreme Court with two Divisions. We have the experience of abandoning this Supreme Court and establishing altogether two different Courts, the Supreme Court and the High Court in a unitary state (see Second Proclamation Order no. IV of 1976). And this was again done away with and the Supreme Court as before was restored by the Second Proclamation Order No. 1 of 1977.[91]

9. The changes made in the basic features within a span of 17 years have been too many and too fundamental and it is not necessary to refer to all of them nor is it my purpose to find fault with any amendment or anybody or any regime for the amendments made in the Constitution... I have only endeavoured to show how the organic document, such as a Constitution of the Government is, has developed and grown in our context in fulfillment of the hopes and aspirations of our people during this brief period of 17 years. In view

90. Ibid., para 535.

91. Ibid., para 551.

> of the experience as noticed above, any doctrinaire approach as to 'basic features', in my opinion, will amount to turning a blind eye to our constitutional evolution and further will not be in the interest of the country. I shall give one example. To-day a basic feature in our constitution is the Presidential form of government. We can take judicial notice that there is a demand by some political parties to restore Parliamentary for of Government as it originally obtained. Why should a road block be created by the Court, if people choose to send the members of those political parties to the Parliament, against amending the Constitution providing for Parliamentary system?[92]

Sources of the concept of the basic structure

It is true that the Constitution of Bangladesh does not contain any direct provision regarding the existence of basic structure or even does not restrict the amending power of the Constitution expressly, then from where has this principle been deduced? M. H: Rahman, J terms the doctrine of basic structure as 'one growing point in the constitutional jurisprudence'.[93] He adds further –

It has developed in a climate where the executive, commanding an overwhelming majority in the legislature, gets snap amendments of the Constitution passed without a Green Paper or White Paper, without eliciting any public opinion, without sending the Bill to any Select Committee and without giving sufficient time to the members of the Parliament for deliberation on the Bill for amendment.[94]

Then he terming this doctrine as 'a new one' says that this is in fact an extension of the principle of judicial review.[95] Thus, this interpretation has added a new dimension to the basic structure theory to prove its existence through an easier way. That the Court had already the power to set aside the unconstitutional laws and actions, and the doctrine of basic structure theory just gives an extended power in the hands of the judiciary to give special protection to constitutional basic structures. Thus, he tried to portray that this concept is not new in the sense of totally innovative idea, rather it has been emerged as a new extended interpretation from an existing principle. '...it may take some time before

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92. Ibid., para 553.
93. Ibid., para 435.
94. Ibid.
95. Ibid. para 438.

the doctrine of basic structure gets acceptance from the superior courts of the countries where constitutionalism is prevailing."[96]

Inherent in the Constitution: Implied limitation on the amending power is 'deducible from the entire scheme of the Constitution."[97] In fact, limitation on the amending power will justify the existence of non-amendable basic structures. Shahabuddin Ahmed J explains further in the following words that such limitation exists in the Constitution itself:

"There is no dispute that the Constitution stand on certain fundamental principles which are its structural pillars and if those pillars are demolished or damaged the whole constitutional edifice will fall down. It is by construing the constitutional provisions that these pillars are to be identified. Implied limitation on the amending power is also to be gathered from the Constitution itself including its Preamble...."[98]

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

Now, some features are basic features of the Constitution and they are not amendable by the amending power of the Parliament. In the scheme of Article 7 and therefore of the Constitution the structural pillars of Parliament and Judiciary are basic and fundamental. It is inconceivable that by its amending power the Parliament can deprive itself wholly or partly of the plenary legislative power over the entire Republic... the constitutional scheme if followed carefully reveals that these basic features are unamendable and unalterable.[99]

Inherent in the term amendment: The meaning of the term amendment itself shows that it has some limitations and not absolute in its operation. Shahabuddin, J rightly commented that "As to implied limitation on the amending power it is inherent in the word 'amendment' in Art. 142".[100] Even the dissenting Judge in the 8th Amendment case, A. T. M. Afzal, J said that 'there is a limitation inherent in the word "amend" or "amendment" which may be said to be a built-in limitation'.[101]

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96. Ibid. para 439.
97. Ibid., *per* Shahabuddin Ahmed, J, para 278.
98. Ibid. para 376
99. Ibid. para 255-56.
100. Ibid. para 378
101. Ibid. para 562

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

Shahabuddin Ahmed, J makes the following citations—

I shall also keep in mind the following observation of Conrad in "Limitation of Amendment Procedure and the Constitutional power"— "Any amending body organized within the statutory scheme, however verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority". He has further stated that the amending body may effect changes in detail, adopt the system to the changing condition but "should not touch its foundation". Similar views have been expressed by Carl J. Friedman in "Man and his Govt.", Crawford in his 'Construction of Statutes' and Cooley in his 'Constitutional Limitation'.[102]

Dr. Kamal Hossain in his submission quoted:

Power to amend does not extend to destroying the Constitution in any of its structural pillars or basic structure (Ref: Murphy: Constitutions, Constitutionalism and Democracy; Baxi: "Some reflections on the nature of constituent power" in Indian Constitution: Trends and Issues (1978), pp. 123-24).[103]

What are the basic structures of the Constitution of Bangladesh?

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

Badrul Haider Chowdhury, J gave the following clear and long list of 'unique features' which are 21 in number:[104]

1. It is an autochthonous constitution because it refers to the sacrifice of the people in the war of national independence after having proclaimed independence.

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102. Ibid., para 376.
103. Ibid., Summary of submissions, p.27.
104. Ibid., para 254

2. The Preamble: It postulates that it is our sacred duty to safeguard, protect, and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh.
3. Fundamental aim of the State is to realise through democratic process a society in which the rule of law, fundamental human rights and freedom, equality, and justice will be secured.
4. Bangladesh is a unitary, independent, sovereign Republic.
5. All powers in the Republic belong to the people. The Constitution is the supreme law of the Republic and if any other law is inconsistent with the Constitution that other law shall be void to the extent of inconsistency. Such article e.g. Article 7 cannot be found in any other Constitution.
6. Article 8 lays down the fundamental principles to the Government of Bangladesh. This article is protected like the Preamble and can only be amended by referendum.
7. Article 44 figures as a fundamental right and sub-article (2) says without prejudice to the powers of the High Court Division under Article 102 Parliament may by law empower any other court, within the local limits of its jurisdiction, to exercise all or any of those powers; ...
8. Article 48. The President shall be elected by direct election. This is also a protected Article which can only be amended by referendum.
9. The President shall appoint as prime Minister who commands the support of the majority of the members of Parliament. This Article 58 is also protected and can be amended by referendum. This presupposes the existence of parliament within the meaning of Article 65.
10. There shall be Supreme Court for Bangladesh to be known as the supreme Court of Bangladesh comprising the Appellate Division and High Court Division (Article 94). This is given by the Constitution which the people of Bangladesh "do hereby adopt, enact and give to ourselves this Constitution".
11. This Constitution has erected three structural pillars e.g., Executive, Legislature, and Judiciary—all these organs are creatures of the Constitution. None can compete with the other.
12. Judges shall be independent in the exercise of their judicial functions (Article 94(4) and 116A).

13. In case of necessity a Judge of the High Court Division can sit as ad-hoc Judge in the Appellate Division-that shows to the oneness of the Court itself. (Article 98).

14. If any question of law of public importance arises the President can refer the question to the Appellate Division although it is the opinion of the Supreme Court (Article 106).

15. In the absence of the Chief Justice the next most Senior Judge of the appellate Division may perform those functions if approved by the president. Such clause cannot be found in any other Constitution. It thus safeguards the independence of judiciary (Article 97) (See Art. 126 and 223of Indian Constitution).

16. The plenary judicial power of the Republic is vested in and exercised by the High Court Division of the Supreme Court (Articles 101, 102, 109 and 110) subject to few limitation e.g. in Article 47, 47A, 78, 81(3) and 125.

17. The power of superintendence of subordinate Courts is exercised by the High Court Division and these courts are subordinate to the Supreme Court (Article 114).

18. If a point of general public importance is involved in a case pending before a subordinate court the High Court Division has the power to transfer the case to itself. This is unique feature of the Constitution because this power is not available to any High Court either in India or in Pakistan. Nor such power was available under the Government of India Act, 1935.

19. The plenary judicial power of the republic is not confined within the territories of the Republic but extends to the functionaries and instrumentalities of the Republic beyond the Republic. See Article 102.

20. The declaration and pledges in the preamble have been enacted substantively in Article 7 and 8. while Preamble and Article 8 have been made unamendable, necessarily Article 7 remains as unalterable.

21. Judges cannot be removed except in accordance with provisions of Article 96-that is the Supreme Judicial Council. Sub-article (5) says if after making the inquiry, the Council reports to the President that in its opinion the Judge has ceased to be capable to properly performing the functions of his office or has been guilty of gross misconduct, the President shall, by order remove the Judge from office. This is unique feature because the Judge is tried by his own

peers, 'thus there is secured a freedom from political control' (1965 A.C. 190).

It has been erroneously thought by some that he identified above 21 as basic structure. The fact is that he says that some of those features are basic features which are unamendable. After giving the list of 21 he says in the next paragraph clearly that 'some of the aforesaid features are the basic features of the Constitution and they are not amendable by the amending power of the Parliament.'[105] What are those 'some' which are basic structures and as such unamendable? He does not give the list, rather he identifies some of those as basic structure in a scattered manner. However, by an examination of his judgment following appear to be the basic structures according to his opinion:

1. Structural pillars of Parliament and judiciary, as he says that 'In the scheme of Article 7 and therefore of the Constitution the structural pillars of Parliament and judiciary are basic and fundamental'.[106]
2. Articles 48, 58 and 80 of the Constitution are also basic structure which is evident from his following observation:

To illustrate further, the President must be elected by direct election (Article 48). He must have a council of ministers (Article 58). He must appoint as Prime Minister the member of Parliament who appears to him to command the support of the majority of the members of Parliament (Article 58(3)). Both these Articles 48 and 58 are protected and so is Article 80 which says every proposal in Parliament for making a law shall be made in the form of a Bill.... Hence the constitutional scheme if followed carefully reveals that these basic features are unamendable and unalterable.[107]

However, there are anomalies regarding Articles 48 and 58 as in another place he says that these may be amended by referendum.[108] But, this is expressed in para 254 whereas the above has been mentioned in para 256 which is subsequent to this one. In fact, if the above opinion is accepted that even Article 48 constitutes a basic structure which is unamendable then another legal problem arises because this Article 48 has been changed by the Constitution 12th Amendment subsequent to this

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105. Ibid., para255.
106. Ibid., para 255.
107. Ibid., para 256.
108. Ibid., para 254, points (8) & (9).

amendment when the country switched towards parliamentary form of government replacing the presidential form that prevailed at the time of pronouncing this judgment.

3. Preamble, Articles 7 and 8 are basic structures, as he says that 'While Preamble and Article 8 have been made unamendable, necessarily Article 7 remains as unalterable'.[109]

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

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

The recognition of seven out of above eight is found at one place of his judgment that he observes that 'Supremacy of the Constitution as the solemn expression of the will of the people, Democracy, Republican Government, Unitary State, Separation of powers, Independence of judiciary, Fundamental Rights are basic structures of the Constitution'[110] and 'there is no dispute about their identity'.[111] The eighth one is obvious from his observation that 'High Court Division, as contemplated in the unamended Article is no longer in existence and as such the Supreme Court, one of the basic structures of the Constitution, has been badly damaged, if not destroyed altogether'.[112]

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109. Ibid., para 254, point (20).
110. Ibid., para 377
111. bid.
112. Ibid., para 378.

It appears among the three concurring Judges in the 8th Amenment case, only M. H. Rahman, J does not give any clear list of basic structure, in whatsoever form. But it is evident that the 'unitary character' of our Republic, according to him, is a basic structure as he gives his judgment relying on this fact.[113] 'Preamble' and 'Rule of law' are also seemed to be identified by him as basic structures which may be presumed from his following observations:

The provisions contained in Part VI for the Supreme Court are not entrenched provisions and they can be amended by the legislature under art. 142. but if any amendment causes any serious impairment of the powers and the functions of the Supreme Court, the makers of the Constitution devised as the kingpin for securing the rule of law to all citizens, then the validity of such an amendment will be examined on the touchstone of the Preamble.[114]

I have indicated earlier that one of the fundamental aims of our society is to secure the rule of law for all citizens and in furtherance of that aim Part VI and other provisions were incorporated in the Constitution. Now by the impugned amendment that structure of the rule of law has been badly impaired.[115]

Conclusion

As we have seen that in Bangladesh in the 8th Amendment case it was seriously tried by the Attorney General to establish that the amending power under Article 142 is a constituent power so that the amending power will be unlimited which was denied by the opponents. But, in India we see that Indian Constitution in spite of having an express declaration in Article 368 that the amending power is constituent power doctrine of basic structure has been recognized. Thus, it may be concluded that in fact the term 'amendment' inherently bears the limitation of basic structure and that need not be proved by any other argument.

Unlike in India, in Bangladesh there was no repeated tussle between the Parliament and judiciary to establish the concept of basic structure. Almost without any challenge coming from the executive or the legislature it has been established peacefully in the 8th Amendment case. Even after

113. Ibid., para 484

114. Ibid., para 391

115. Ibid., para 456.

pronouncing the 8th Amendment judgment so far no initiative is taken yet by the Parliament to undo it. Thus, unlike the Indian Parliament, the reaction of the Parliament in Bangladesh towards the doctrine of basic structure curtailing the amending power of the Constitution seems to be more tolerant and patient.

However, in spite of the existence of the theory of basic structure in the jurisprudence of constitutional law in Bangladesh, still the actual number of basic structure is uncertain, due to the absence of clear judicial authority in this regard. Obviously, such a situation goes against this theory for lack of its preciseness and clarity, and even if it is argued that it will be settled from time to time what constitutes basic structure that also does not become free from the criticism that such a theory then creates an unknown restriction that will be determined after allegation of its violation is made.

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