



**Daffodil**  
*International*  
**University**

**DISSERTATION**

**ON**

**BASIC STRUCTURE DOCTRINE IN THE SOUTH ASIAN  
CONSTITUTION**

A thesis paper is submitted in partial fulfillment of the requirements of the  
LL.M. Department of Law

**SUBMITTED TO**

**ABU SALEH**

**ASSISTANT PROFESSOR**

**DEPARTMENT OF LAW**

**DAFFODIL INTERNATIONAL UNIVERSITY**

**SUBMITTED BY**

**A.M. FOYSAL KABIR SATU**

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**PREPARED BY**

**A.M. FOYSAL KABIR SATU**

**ID: 182-38-27**

## DECLARATION AND CERTIFICATED

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I am completely aware that I have a commitment to clarify to the assessor which is my own work, and which is crafted by others whom I am referring to in my paper. Unless, I unmistakably demonstrate something else, my assessor is qualified for expect that everything being exhibited in the paper starts from me. I additionally proclaim that I have not presented this paper or any piece of it, for evaluation in any of my post-graduate coursework or other scholarly undertakings. I am additionally completely mindful that reestablishing to written falsification would lead me to get a characteristic of 'zero' and open me to facilitate disciplinary activities as recommended by the University's principles and controls.



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A.M. FOYSAL KABIR

LL.M.

ID: 182-38-271

Department of Law Daffodil International University

## **CRTIFICATE**

This is to certify that the thesis on “BASIC STRUCTURE DOCTRINE IN THE SOUTH ASIAN CONSTITUTION” is done by A.M. FOYSAL KABIR SATU in the partial fulfillment of the requirement for the degree of LL.M. from Daffodil International University of Bangladesh. The thesis has been carried out under my guidance and is a record of research which carried out successfully.

*MA Saleh*  
21.4.19

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Mr. Md. Riaduzzaman

Head

Department of law

Daffodil International University

---

Abu Saleh

Advisor

Assistant professor

Department of law

Daffodil International University

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## **List of Abbreviations**

AD : Appellate Division

HCD : High Court Division

DLR: Dhaka Law Reports

BLD : Bangladesh Legal Digest

AIR : All India Reporter

SC : Supreme Court

PLD : Pakistan Legal Digest

BLT : Bangladesh Law Times

SCC : Supreme Court Cases

BLC : Bangladesh Law Chronic

# TABLE OF CONTENTS

<b>CHAPTER NAME</b>	<b>CHAPTER TITLE</b>	<b>PAGE NO</b>
<b>01</b>	INTRODUCTORY	<b>01</b>
<b>1.1</b>	BACKGROUND	<b>01</b>
<b>1.2</b>	OBJECTIVE	<b>02</b>
<b>1.3</b>	RESEARCH QUESTION	<b>02</b>
<b>1.4</b>	METHODOLOGY	<b>03</b>
<b>1.5</b>	SCOPE AND LIMITATIONS OF THE RESEARCH	<b>03</b>
<b>1.6</b>	SIGNIFICANCE OF THE STUDY	<b>04</b>
<b>02</b>	ORIGIN OF BASIC STRUCTURE DOCTRINE	<b>05</b>
<b>2.1</b>	BASIC STRUCTURE DOCTRINE	<b>05</b>
<b>2.2</b>	THE BEGINNING AND ADVANCEMENT OF THE IDEA “BASIC STRUCTURES” OF THE CONSTITUTION IN SOUTH ASIA	<b>05</b>
<b>03</b>	APPLICATION OF BASIC STRUCTURE OF DOCTRINE IN SOUTH ASIAN COUNTRIES	<b>07</b>
<b>3.1</b>	BHUTAN	<b>07</b>
<b>3.2</b>	MALDEVIS	<b>08</b>
<b>3.3</b>	NEPAL	<b>08</b>
<b>3.4</b>	SRILANKA	<b>09</b>
<b>3.5</b>	PAKISTAN	<b>10</b>
<b>3.6</b>	BANGLADESH	<b>11</b>
<b>3.7</b>	INDIA	<b>14</b>
<b>04</b>	NEED AND CRITISIZE OF BASIC STRUCTURE OF DOCTRINE	<b>16</b>
<b>4.1</b>	SHOULD BASIC STRUCTURE DOCTRINE BE A MANDATORY PART OF THE CONSTITUTION AND CONSTITUTIONALISM	<b>16</b>

<b>4.2</b>	PARLIAMENT SOVEREIGNTY AND THE STRUCTURE OF DOCTRINE	<b>17</b>
<b>4.3</b>	ARGUMENT ABOUT BASIC STRUCTURE OF DOCTRINE	<b>18</b>
<b>05</b>	CONCLUSION	<b>21</b>



## CHAPTER 01

### **INTRODUCTORY**

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#### **1.1 BACKGROUND**

The constitution empowers the legislative bodies in the country to make laws in their respective jurisdiction. However, this power is not absolute but is subject to judicial review. Power of judicial review makes Supreme Court guardian of not only fundamental rights but the constitution itself. Like our constitution, the supreme rule that everyone must follow has been received and acknowledged by the general population of country as it is the impression of the goals of the general population of country. This bears the modest obligation to ensure the power of the general population and the welfare of the everyday citizens of the nation. It is our sacred obligation to shield, secure and guard this constitution and to keep up its matchless quality as the encapsulation of the desire of the general population of country. In any case, realities substantiate that our political pioneers now and again don't play out this consecrated obligation and thusly it makes ready for military intercession. Having no express bar to correct the constitution they once in a while alter the constitution unconventionally to pick up their political benefit. Consequently, presently the basic structure of our Constitution is set past the domain of the altering intensity of Parliament. In any case, it is a serious issue that there still remains an impressive debate with regards to the substance of the precept of the basic structure.

The interpretation has occurred either through an "eternity condition" in the first constitution or addition by amendment. Without such identified features courts have Summoned the doctrine of basic structure to invalidate corrections which generally meet procedural prerequisites. The wide acknowledgment of the doctrine demonstrates its intrigue to constitutionalism, and yet brings into center patience of the judiciary in not steering into the rocks protected development and advancement.

## **1.2 OBJECTIVE**

The point out of the examination are to dissect the use of the doctrine of the basic structure in south Asian countries and the legal reactions and to discover its effects on the constitutional improvement in south Asia. Following goals will be done in the examination,

- To evaluate whether there exists, extremely, the idea of basic structure in the field of a constitutional statute or not.
- To look at the improvement of the idea of basic structure basically.
- To weigh up whether the amending power of the constitution is a constituent power or lies under certain impediments.
- To consider its need for utilization of the idea of basic structure in the field of constitutional law in south Asian constitution.
- To examine the ongoing perspective on courts and the global, local and national legal reactions, covering from statutory law to exceptional legal decisions, towards the idea of basic structure in settling cases recording before it.

## **1.3 RESEARCH QUESTION**

1. How Basic structure doctrine has been evolved in the south Asia constitution?
2. What is the present condition basic structure of doctrine in the South Asian constitution?
3. Should basic structure doctrine be a mandatory part of the constitution and constitutionalism

## **1.4 METHODOLOGY**

The methodology of this research paper are qualitative and comparative and also all around dependent on secondary materials however to some degree I have utilized essential information moreover. The secondary source of data are Books, digital books, DLR, BLD, BLT, AIR, PLD, online case reports, diaries, sites and newspapers. In doing as such, clearly, substantially more accentuation has been given on the Constitution by every now and again alluding and citing the fifth, seventh, eighth, and thirteenth Amendment cases, particularly on Anwar Hossain Chowdhury versus Bangladesh prominently known as eighth amendment case by which the idea of fundamental structure has [www.thedailystar.net/law-our-rights/survey constitutional-amendments](http://www.thedailystar.net/law-our-rights/survey-constitutional-amendments) been perceived in Bangladesh. There are likewise given some Indian case references like Kesavananda case, Golak Nath's case and Indira Nehru Gandhi. Versus Raj Narayan referred to as decision case as these cases have earth shattering commitment in setting up the idea of Essential Structure in this subcontinent.

## **1.5 SCOPE AND LIMITATIONS OF THE RESEARCH**

The scope of my investigation is to check the utilization of the doctrine of the basic structure in Bangladesh. This research does not discover the particular causes behind the individual and network personal conduct standard through the fundamental center zone of this research is essentially the lawful reactions. Consequently, numerous local and Indian case references have been examined here for better understanding. In my research, I have confronted a few confinements too.

- Since the research point is immense, really, I have, similarly, restricted time to meet and take a few meetings of constitutional specialists. Thusly, I have utilized here optional materials just, for example, on books, web, and different diaries.

- As the center territory of this research is predominantly on attractive quality and legal reactions in Bangladesh, in view of milestone cases, I couldn't allude any information from the web for not being Bangladeshi references accessible here.
- In my research the perspectives and articulations are solely mines in like manner any off shaft encasing in this research paper I will be responsible for that.

## **1.6 SIGNIFICANCE OF THE STUDY**

Since the political leaders of our nation are all things considered degenerate and they amend the constitution for them to hold the power for good in Bangladesh, there ought to have some fundamental principle convictions, as protection of the constitution, which are its auxiliary backings which the parliament can't amend by its amending power. In this sense, there ought to have the utilization of the Idea of Basic Structure in the Constitution of Bangladesh.

Then again, judges are winding up politically one-sided and courts structure is getting to be more fragile in view of political obstruction in mediating any cases in Bangladesh lately. Along these lines, there has incredible opportunity to be manhandled, by the judiciary, this doctrine in our nation and appropriately some past judgment, truth be told, strengthen this probability. sixteenth amendment case is the most recent case which the court pronounced the sixteenth amendment by the parliament as void underground independence of the judiciary of basic structure doctrine.

Henceforth, there has an incredible discussion on the purpose of the use of the Idea of Basic Structure in the Constitutional jurisprudence in Bangladesh. The utilization of the Basic Structure is attractive or not is the extraordinary worry as of late. This investigation essentially centers around this enormous issue to analyze the presence and attractive quality of utilization of the Idea of Basic Structure in the Constitution of Bangladesh. Along these lines, this investigation has huge significance thinking about the current circumstance of the Constitutional jurisprudence in Bangladesh.

## CHAPTER 02

### **ORIGIN OF BASIC STRUCTURE DOCTRINE**

#### **2.1 BASIC STRUCTURE DOCTRINE**

Doctrine of basic structure is a judge-made Indian rule expressing that a nation's constitution has certain basic features that can't be revised by its administrative body. The amendment of these features will result in exceptional changes to the constitution and render it unrecognizable. Consequently, amendments to a constitution must not be in strife with the basic structure of the constitution. On the other hand, a nation's authoritative body, with solid reasons normally identified with open wellbeing, is permitted to revise any arrangements in the nation's constitution, however the amendments can't change the basic feature of the constitution. Indira Nehru Gandhi case<sup>1</sup> the court held that Vote based system, Expense and Reasonable Race is a basic structure of the constitution (Equity H R Khanna, J. Y V Chandrachud). Minerva Plants Ltd case <sup>2</sup> the court held that A restricted amending power of the constitution itself a basic structure consequently cannot be adjusted. (justice Y V Chandrachud, J Bhagwat)

#### **2.2 THE BEGINNING AND ADVANCEMENT OF THE IDEA “BASIC STRUCTURES” IN THE CONSTITUTION OF SOUTH ASIA**

The idea of the basic structure of the constitution can be found in the sub-landmass on account of Pakistan Supreme Court in - FAZLIL QUDER CHOWDHURY Versus ABDUL HAQUE <sup>3</sup> . It was held that Establishment and type of government are fundamental features of a constitution<sup>4</sup> . The power gave upon the administration by the constitution of Pakistan to expel troubles does not stretch out to making a claim in a fundamental feature of the constitution. The advancement of the Basic structure of the constitution in INDIAN locale. The first formal legal detailing of this doctrine turned out in the KESEVANANDA'S CASE

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<sup>1</sup> Indira Nehru Gandhi v. Raj Narayan, AIR 1975 SC 2299

<sup>2</sup> Minerva Mills Ltd. v. India AIR ,1980 SC 1789:

<sup>3</sup> PLD, 1963, SC, 486

<sup>4</sup> MD.Halim Abdul 2008(first edition 1998). Constitution, Constitutional Law and Politics: Bangladesh Perspective

<sup>5</sup> . Article 368 of the Constitution gives the feeling that Parliament's amending powers are supreme and envelop all pieces of the record. Yet, the Supreme Court has gone about as a brake to the authoritative energy of Parliament as far back as freedom. With the expectation of protecting the original ideas imagined by the constitution-producers, the peak court articulated that Parliament couldn't twist, harm or modify the fundamental highlights of the Constitution under the affection of amending it. The expression 'essential structure' itself can't be found in the Constitution. The Supreme Court perceived this idea without precedent for the noteworthy Kesavananda Bharati case in 1973. As far back as the Supreme Court has been the translator of the Constitution and the referee of all changes made by Parliament. Parliament's position to revise the Constitution, especially the part on the fundamental rights of natives, was tested as ahead of schedule as in 1951. After autonomy, a few laws were ordered in the states with the point of transforming land proprietorship and occupancy structures. This was with regards to the decision Congress gathering's discretionary guarantee of actualizing the communist objectives of the Constitution Article 39 (b) and (c) of the Directive Principles of State Policy required evenhanded appropriation of assets of creation among all residents and aversion of centralization of riches in the hands of a couple. Property proprietors had unfavorably influenced by these laws had requested of the courts. The courts struck down the land changes laws saying that they transgressed the fundamental appropriate to property ensured by the Constitution.

Piqued by the unfavorable judgments, Parliament set these laws in the Ninth Schedule of 2 the Constitution through the First and Fourth revisions (1951 and 1952 individually), subsequently adequately expelling them from the extent of legal audit. Property proprietors again tested the constitutional changes which put land changes laws in the Ninth Schedule under the watchful eye of the Supreme Court, saying that they disregarded Article 13 (2) of the Constitution.

Article 13 (2) provides the protection of the fundamental rights of the citizen. Parliament and the state assemblies are obviously denied from making laws that may remove or condense the fundamental rights ensured to the native. They contended that any correction to the Constitution had the status of a law as comprehended by Article 13 (2).

In 1952 (Sankari Prasad Singh Deo v. Association of India) and 1955 (Sajjan Singh v. Rajasthan), the Supreme Court rejected the two contentions and maintained the intensity of Parliament to alter any piece of the Constitution including what influences the fundamental rights of natives.

Altogether however, two disagreeing made a decision in Sajjan Singh v. Rajasthan case raised questions whether the fundamental rights of residents could turn into a toy of the lion's share party in Parliament.

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<sup>5</sup> AIR, 1973, SC, 146

## CHAPTER 03

### **APPLICATION OF BASIC STRUCTURE OF DOCTRINE IN SOUTH ASIAN COUNTRIES**

Basic structure first develops from India in the south Asian countries inspired to the German basic law by the judicial practice then it spread all over the south Asian countries. some country develops it by eternity clause and another country has been developed by judicial practice.

#### **3.1 BHUTAN**

The Constitution of Bhutan was enacted 18 July 2008 by the Royal Government of Bhutan. The Constitution of Bhutan included eternity clause .The unamending principle of the Constitution of Bhutan is that "the type of Government will be that of a Democratic Constitutional Monarchy."<sup>6</sup> Immutable principle is otherwise called the basic structure of the constitution. In Bhutanese setting, it tends to be either repealed or amended just "through a National Referendum"<sup>7</sup> or plebiscitary democracy. It was disclosed by His Majesty to general society of Trashigang amid the open discussion that "Bhutan had purposefully vested the intensity of sway in the general population." Parliament won't have capacity to change the basic structure of the Constitution, yet the People of Bhutan would have such power.

In a delegate democracy, Parliament does not have the ability to alter the basic structure of the Constitution. In this manner, on account of Bhutan, the ability to revise the basic structure of the Constitution, through a choice, is vested with the general population since sovereign power has a place with the general population of Bhutan under area 1 of Article 1. As per His Majesty, the power of the general population is the principle of the Constitution, which rests with the general population, while the administrative sway is giving to the delegate Parliament by the Constitution. This is the first will of the Constitution.

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<sup>6</sup> The Constitution of Bhutan, Section 2 of Article 1.

<sup>7</sup> Ibid Section 26 of Article 2

### 3.2 MALDIVES

A further case of an Islamic religious state is Maldives; in 2008, Maldives received another constitution that states, inter alia, so as to be a citizen of Maldives, one needs to claim the religion of Islam<sup>8</sup> and all laws must be founded on Islam and any law that is in opposition to any principle of Islam can't be enacted in Maldives<sup>9</sup>. As a Islamic Iran also include unamendable provision which relate to the Islamic and democratic character as well as the objectives of the republic such as social and economic goals<sup>10</sup>.

### 3.3 NEPAL

The Constitution has vested the intensity of correction to the Parliament, however the Supreme Court of Nepal has the ammunition to interpret the extent of such power. All things considered, this will prompt a contention between the lawmaking body and the legal executive, as in India. Strangely, this contention between Indian legal executive and parliament brought forth a critical convention: the principle of basic structures. The "basic structure" convention is unmistakably a legal principle which confirms that specific arrangements of the Constitutions are unamendable and can't be modified or annihilated through revisions in Parliaments. As indicated by the principle of basic structure, the Parliament can change any arrangement of the Constitution, with the exception of those which structure the piece of its 'basic structure'. The basic structure, along these lines, is the arrangement of arrangements that structure the crucial establishment and offers personality to a Constitution.

Our constitution has influenced certain critical takeoffs as far as the constitutional set-to up of this country; Federalism, Democratic-Republican framework, Secularism, and so on to give some examples. These are nevertheless just a portion of the notable qualities which recognize the at present subsisting Constitution from every single past constitution that were executed in this nation. In any case, the Constitution is peaceful whether such remarkable highlights are the piece of the basic skeleton which can't be amended. Additionally, Article 274 is completely quiet in regards to the ambit of intensity which the governing body can practice in revising such striking highlights of the Constitution. Truth be told, there's no confinement to the changing intensity of the Parliament with the exception of except if such correction is against oneself guideline, sway and regional trustworthiness of Nepal and its kin. Also, since those terms themselves are

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<sup>8</sup> Constitution of the Maldives Article 9(d)

<sup>9</sup> Ibid (Article 10(b)).

<sup>10</sup> Article 177(5), Qanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran], 1980.



open-finished, no arrangement is impenetrable to the sword of correction under Article 274 of the Constitution. There are articles in the Constitution which give an identity to our country. For instance, <sup>11</sup>Constitution gives that Nepal is a free, resolute, sovereign, mainstream, comprehensive democratic, communism arranged government democratic republican state. The Constitution likewise features further that the Federation, Provinces and Local dimensions will ensure Nepal's freedom, sway, regional trustworthiness, self-governance, national interests, in general advancement, multi-party aggressive democratic republic and government arrangement of administration, human rights and major rights, principle of law, division of forces and check and equalization, impartial society dependent on majority and balance, and comprehensive portrayal and character. We don't have a clue what are the basic structures of the Constitution could be in supreme and clear terms. All things considered, the word 'change' under Article 274 would intend to make 'constructive improvements' as opposed to in a general sense revoke or modify the very skeleton of the Constitution. All things considered, a change ought not be utilized as a weapon to crush the soul of the Constitution.

Things being what they are, what could develop the potential basic structure of the Constitution of Nepal? First, Fundamental Rights involve a one of a kind spot in any cultivated society, and have been portrayed by our legal executive over and over as 'elevating and certain'. This has been perceived by the Constitution too.

The Constitution of Nepal is in reality established in the bedrock of Part III alongside the offset with the string of different arrangements. This amicability of the equalization of Part III of the Constitution to accomplish the objective referred to in Part IV is the essential and the most fundamental piece of the basic structure.

### **3.4 SRILANKA**

The 1948 Constitution, otherwise called the Soulbury Constitution, had a basic structure. This basic structure was equivalent to in India and in pretty much every other nation in the previous British realm. The fundamental components of a democracy, including the matchless quality of law, the standard of law, the

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<sup>11</sup> The constitution of Nepal, article 4

partition of forces and the autonomy of the legal executive, are a piece of this basic structure. Any amend that influences this basic structure vitiates the constitution and along these lines will annihilate the very probability of the state remaining a democracy. It was this basic structure that was changed by the 1972 and 1978 Constitutions. Tragically, the Supreme Court did not then pursue a course like what the Indian Supreme Court pursued (for example the basic structure tenet). Had that occurred, a few pieces of the 1972 and 1978 Constitutions would not have been permitted to be passed as law and Sri Lanka would not be in the chaos that it is in today.

### 3.5 PAKISTAN

With respect to Pakistan, at first after the Kesavananda choice in India, a discussion followed in Pakistan, which anyway brought about the dismissal of setting substantive points of confinement on the amendments<sup>12</sup>. Notwithstanding, in 1997, the Pakistani Supreme Court revived this inquiry when choosing whether a change that enabled the President to break up the National Assembly was legitimate or not<sup>13</sup>. Despite the fact that the revision was not struck down, Chief Justice Ali Shah opined that the central or basic highlights of the Preamble ought to be held and not modified. While this at first prompted a basic structure principle in Pakistan, the extremely one year from now it was overruled impliedly by a 7 judge bench. <sup>14</sup>Since at that point, the Courts have embelectiond either approach in specific cases, swinging both ways and it stays to be seen whether it will be set or disposed of.

For a situation of 2015, be that as it may, this inquiry was unequivocally tended to. In the dominant part supposition, 8 makes a decision about held that there were inferred constraints on the revising forces of the Parliament. The court held that, "This Court is vested with the locale to decipher the Constitution so as to determine and recognize its characterizing Salient Features. It is similarly vested with purview to analyze the vires of any constitutional change to decide if any of the Salient Features of the Constitution has been canceled, revoked or substantively adjusted as an outcome thereof." Democracy, parliamentary type of government and the Judiciary were laid out as the basic structure. The minority judges, 4 in number expressed that, "The basic structure convention... has... [become] a vehicle for legal glorification of

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<sup>12</sup> Karim, F.: Judicial Review of Public Actions: A Treatise on Judicial Review (Karachi, Pakistan Law House 2006), 1254–76.

<sup>13</sup> Mahmood Khan Achakzai v. Federation of Pakistan, PLD 1997 SC 426.

<sup>14</sup> Wukala-Muhaz v. Federation of Pakistan, PLD 1998 SC 1263.

intensity to the detriment of the chosen agents of the general population. On the calculated plane, it is without legitimacy and sums to minimal in excess of a vessel into which the Judges can pour whatever monetary, political or social hypothesis as may get their extravagant or impulse at

any given time."5 different judges, while concurred that there were impediments, did not embelection the principle as that of the basic structure of the Constitution.

### **3.6 BANGLADESH**

doctrine of basic structure firstly developed in the constitution by judicial practice and its included in the constitution as eternity clause by 15<sup>th</sup> amendment of the constitution.

#### **Judicial practice**

##### **8<sup>th</sup> amendment case**

The eighth Amendment Act was passed on 7 June 1988. It amended Articles 2, 3, 5, 30 and 100 of the constitution. It might be noted here that the Supreme Court along these lines proclaimed, in 1989 in the milestone instance of Anwar Hossain Chowdhury versus Bangladesh prevalently known as eighth amendment case, the correction of Article 100 unconstitutional since it had changed the basic structure of the constitution. Where the learned Attorney General, M. Nurullah, rejected the possibility of basic structure and depicted the changing force under article 142 as boundless. He in actuality depended on the plain and basic significance of this article 142 as opposed to finding any principle from that point. He contended that Parliament's correcting power is boundless, unlimited and total and it is fit for achieving any article of the Constitution with the exception of the Articles determined in condition (1A) of Art.142, which accommodates a choice for alteration.

Notwithstanding, the utilization of basic structure has been built up in 1989 in the milestone eighth amendment case. Subsequently, presently the basic structure of our Constitution is set past the domain of the changing intensity of Parliament and another understanding of craftsmanship. 142 have been given. About the extent of changing force B.H Chowdhury, J has put forth, for this situation, the accompanying focuses:

1. This directive power is subject to limitations

2. Call it by any name-basic structure or whatever however that is the texture of the Constitution which cannot be disassembled by a specialist made by the Constitution itself, to be specific, the Parliament

Shahabuddin Ahmend, J has made the focuses:

"Alteration is liable to the maintenance of the basic structures. By revising the Constitution, the Republic can't be supplanted by monarchy, democracy by theocracy or the Judiciary can't be canceled, in spite of the fact that there is no express bar to the changing force given in the Constitution"<sup>29</sup>.

In any case, the main disagreeing Judge in the eighth amendment case, A.T.M. Afjal, J does not feel that there are a few arrangements in the Constitution which are kept past the range of revising power. He says- "Sub-craftsmanship. (1) of craftsmanship. 142 demonstrates that-'any arrangement of the Constitution might be amended by method for expansion, adjustment, substitution, or nullification by Act of Parliament'. Any arrangement clearly incorporates all arrangements. The language is clear and experiences no uncertainty. Any couldn't mean some provision.....it is critical that the Article opens with a non-obstruction clause"<sup>30</sup>.

Subsequently, I think, A.T.M. Afjal, J was on the correct point since basic structure and basic element may not be same and basic structures are unwritten standards which may expect by the soul and structure of the constitution emerges on the infringement of the privileges of individuals. In this way, basic structures may not be unmistakable in number as appeared by J Shahabuddin Ahmend and B.H Chowdhury. On the off chance that these are limited in clear number, at that point may have probability to be manhandled by the one-sided judges.

### 13<sup>th</sup> amendment case

Thirteenth Amendment Act 1996 was passed on 26 March 1996. It accommodated a non-party overseer government which, going about as a between time government, would give all conceivable guide and help to the Election Commission for holding the general election of individuals from the Jatiya Sangsad gently, decently and unbiasedly. The judgment of thirteenth amendment case was pronounced by a short request on tenth May, 2011 by a seven-part seat of the Appellate Division, which has announced unconstitutional and void a delegated non-divided guardian government, to administer another parliamentary decision on fruition of its term, and it might be drilled for another two parliamentary terms depending on the principle

of vital. Following 16 months of its affirmation the full judgment was discharged, on sixteenth September, 2012, where the Chief Justice ABM Khairul Haque announced the thirteenth amendment unconstitutional.

## 5<sup>TH</sup> amendment case

Fifth Amendment Act was passed by the Jatiya Sangsad on 6 April 1979 which amended the fourth Schedule to the constitution by including another passage 18 there to, which gave that all changes, increases, adjustments, substitutions and exclusions made in the constitution amid the period between 15-8-1975 and 9-4-1979 by any Proclamation or Proclamation Order of the Martial Law Authorities had been legitimately made and would not be brought being referred to in or under the watchful eye of any court or council or expert on any ground at all.

The judgment in fifth Amendment case proclaimed the fifth Amendment to the Constitution illegal. The judgment is to a great extent dependent on basic of basic structure.

## Eternity clause

### 15<sup>th</sup> amendment

Fifteenth Amendment Act the Constitution (Fifteenth Amendment) Act 2011 was passed on 25 June 2011 having correction to the Constitution reestablishing secularism and opportunity of religion, consolidating patriotism, communism, democracy and secularism as the key principles of the state approach. The Constitution presently additionally recognizes the nation's freedom war saint Sheik Mujibur Rahman as the Father of the Nation. The Amendment rejected the arrangement of Caretaker Government, expanded number of ladies hold seats to 50 from existing 45 and embedded Articles 7(a) and 7(b)<sup>15</sup> in the Constitution after Article 7 of every an offer to end takeover of intensity through additional constitutional methods. In this amendment, basic structure includes in the constitution as eternity clause.

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<sup>15</sup> Notwithstanding anything contained in article 142 of the Constitution, the preamble, all articles of Part I, all articles of Part II, subject to the provisions of Part IXA all articles of Part III, and the provisions of articles relating to the basic structures of the Constitution including article 150 of Part XI shall not be amendable by way of insertion, modification, substitution, repeal or by any other means.]

### 3.7 INDIA

Following the Indian Supreme Court's effective summon of the fundamental structure doctrine in *Kesavananda Bharati v State of Kerala*, it has gotten shifted thought or potentially acknowledgment by constitutional courts or parliaments in Asia<sup>16</sup>. Indeed, even a wrestle over the source of the doctrine is unmistakable which anyway is past the extent of this article. In India, a progression of cases in which 'doctrine of fundamental structure' desired thought under the steady gaze of the Court identified with agrarian law change as ensured by the First Amendment Act (1951) and their conflict with the right to property. At first in *Sanskrit Prasad Singh Deo v Association of India*<sup>17</sup>, the Court held that under art. 368 the Parliament may change any part of the Constitution including the fundamental rights. In *Swan Singh v Territory of Rajasthan*, in connection to the Seventeenth Amendment Act (1964), the Court by a minimal greater part of 3:2 maintained the boundless amending power of the Parliament. In *I. C. Golaknath v Province of Punjab*, by a larger part of 6:5 the Court tentatively overruled *Swan Singh* holding that the fundamental rights are sacred. The Court translated that constitutional amendments fall inside the domain of "any law" in art. 13(2) accommodating the cancellation of laws conflicting fundamental values for the congruity of the state and is settled in by prerequisite of 75% casting a ballot and promotion of six out of nine regions for amendments. This high entrenchment makes a prepared ground for the utilization of the doctrine of fundamental structure.

Accordingly, the Parliament passed the Twenty-fourth Amendment Act in 1971 amending the two arts. 13 and 368 to the end that "an amendment of the Constitution go as per Article 368, won't be 'law' inside the significance of art. 13 and the legitimacy of a Constitution Amendment Act won't be available to address on the ground that it removes or influences a fundamental right" The Incomparable Court by a thin edge of 7:6 in *Kesavananda Overruling Golaknath* held that Parliament has wide power to change the Constitution, but without disregarding the basic structure of the constitution The case remained profoundly antagonistic as eleven judges out of thirteen composed distinctive decisions, six driven by the Boss Sikri C. J. consenting

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<sup>16</sup> Apart from Bangladesh and Pakistan some of the countries considering the doctrine in different extent are South Africa, Nepal, Sri Lanka, Malaysia, Belize. The Constitution of the Kingdom of Nepal 1990 provided that no amendment could offend the spirit of the preamble to the Constitution. However, the Constitution was replaced by an interim Constitution in 2007 in order to create a federal republic in place of a unitary monarchy. Nepal has enacted a new constitution recently. Article 167 (4) (d) of the 1996 of the Federal Republic of South Africa enables the Court to review any constitutional amendment.

<sup>17</sup> (1951) AIR (SC) 458.

to the sacredness of the basic structure, with six dissentients driven by Beam J. what's more, the thirteenth judge staying ambiguous. Notwithstanding, nine judges (counting two dissentients) marked an announcement composed by the Central Equity saying that the amending power under Art. 368 did not reach out to adjustment of the fundamental structures. As will be seen in the blink of an eye, it was the resulting decisions that solidly settled in the doctrine in Indian Constitutional texture.

In Territory of Uttar Pradesh v Raj Narain, the Allahabad High Court found the Executive Indira Gandhi blameworthy of constituent negligence and banned her from holding any chosen post for a long time. In this manner, India entered a twenty-one-month prolonged crisis. Amid the pendency of the intrigue against the choice in Raj Narain under the steady gaze of the Incomparable Court, Parliament passed the Thirty-ninth Amendment barring legal survey of the appointive question with review impact. As the Court continued the intrigue in Indira Gandhi v Raj Narain, it approved the race and four out of five judges maintained the amendment however barring the shortening of legal audit in connection to race question conjuring majority rules system, free and reasonable and legal survey as the basic structures of the Constitution. Inside of three days of the choice Beam C. J. constructed a bench to survey the Kesavananda decision. The seat was broken up following two days of the hearing. Parliament made one more fizzled endeavor through Forty-second Amendment Act (1976) by expressing obviously that Parliament has the option to revise any part of them and no such amendment can be exposed to the legal survey; this excessively was passed on in Minerva Plants V State of India.

The judges in Kesavananda couldn't concur with regards to the basic features, case after case the doctrine was given more current implications and indications to extemporize over the prior decision. For instance, in Indira Gandhi, the Court explicitly expressed that "[t]he hypothesis of Basic Structure must be considered in every individual case, not in theory, yet with regards to the solid issue." Seen along these lines, the doctrine stayed attached to the establishing standards and permitted space for development with a change of time. For instance, in S. R Bommai v Association of India, the Court pronounced secularism as one of the fundamental features of the Indian Constitution that the guideline was verifiable in the constitutional texture and was made unequivocal by the Forty-second Amendment (1976). The pull of war between the Parliament and the legal executive has kept the consideration over the fundamental structure alive and pertinent in India.

## CHAPTER 04

### **NEED AND CRITISIZE OF BASIC STRUCTURE OF DOCTRINE**

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#### **4.1 SHOULD BASIC STRUCTURE DOCTRINE BE A MANDATORY PART OF THE CONSTITUTION AND CONSTITUTIONALISM**

Basic structure doctrine in the constitution will be mandatory or not is big debate. member of the parliament says that it is illegal because it is an interfere of judicial in the amending power of parliament. On the other hand, judiciary says that it is a check and balance in the amendment power of the court.

Constitutionalism not simply suggests limitations on the forces of these holding knowledgeable, nevertheless, in addition, offers the space to the relentless development of the constitution through alterations. Despite the actual fact that inflexibility or the ability of the alteration system cannot be the only determinant of constitutionalism or nonattendance therefrom, visit and fulminant protected changes by the transgression of intensity will influence constitutionalism. permanency of "type of government" is not obscure to world constitutions; but when warfare II changelessness statements are extended to confirm fundamental rights and opportunities. during this set, the chance of permanency of bound basic features has been distinguished as associate "effective transplantation" over the world.

Constitutionalism not only implies irritations on the powers of those holding authority, but also provides room for the steady growth of the constitution through amendments. Although rigidity or flexibility of amendment procedure cannot be the sole determinant of constitutionalism or absence thereof, frequent and abrupt constitutional changes by transgression of power can affect constitutionalism. Immutability of "form of government" is not unknown to world constitutions; but after World War II immutability clauses have been expanded to guarantee fundamental rights and freedoms. In this context the idea of immutability of certain basic features has been identified as a "successful transplantation" across the world.



On the other hand, some scholar defines as The doctrine of "basic structure of the Constitution "is extremely questionable. This doctrine does not have a printed premise. We don't discover, an arrangement stipulating that this Constitution has a basic structure and that this structure is past the competence of amending power. Therefore, the confinement of the amending power through the basic structure of the Constitution is denied of positive legitimate legitimacy. Besides, not having its root in the content of the Constitution, the idea of the "basic structure of the Constitution" can't be characterized. What established the basic structure of the Constitution? Which standards are or excluded in this idea? A target and consistent answer can't be given to this inquiry. To be sure, in the Kesavananda Bharani's case, most of judges who conceded the presence a "basic structure of the Constitution" did not concur with the rundown of the standards incorporated into this idea. Each judge drew an alternate rundown. Each judge can characterize the basic structure idea as indicated by his own emotional fulfillment. This prompts the way that the legitimacy or weakness of the Constitution Amendment lies on the individual inclination of each judge.

## **4.2 PARLIAMENT SOVEREIGNTY AND THE STRUCTURE OF DOCTRINE**

Critics of basic structure doctrine argue that by introducing basic structure doctrine Supreme Court has usurped the sovereignty of Parliament. It is argued that ‘no supreme court and no judiciary will sit in judgment over the sovereign will of the Parliament. Ultimately, the whole of the Constitution is a creature of parliament.’ Sovereignty of parliament is justified as Parliament ‘represented the most authoritative expression of the will of the people’. Invoking Dicey’s formulation of ‘doctrine of parliamentary sovereignty’ in public law of Bangladesh and India has two apparent failures: firstly, it misunderstands the nature of sovereignty under the constitutional law of Bangladesh or India which has a written constitution, secondly, proponents of such idea fail to understand the character and nature of the doctrine of basic structure. If sovereignty is taken to be a phenomenon of “supreme authority in a territory”, then it can be rightly argued that such concept of sovereignty of parliament is unknown to the constitutional law of Bangladesh or India. The question of sovereignty was well settled long before Kesavanand in Re special Reference 1964 where Chief Justice Gajendragadkar noted that: “In a democratic country governed by a written Constitution, it is Constitution which is supreme and sovereign Therefore, the can be no doubt that the sovereignty which can be claimed by parliament in England cannot be claimed by any Legislature in India in the literal absolute sense” Courts in India or Bangladesh have unequivocally declared that sovereignty lies to people and such is clear from the text of the constitution. Further, even if parliament is sovereign, it does not necessarily claim that parliament should enjoy the same sovereign and constituent

power of Constituent Assembly in amending constitution. Fifthly, we have already seen that the Court in invoking basic structure doctrine does not declare itself to be sovereign, and basic structure doctrine adopting 'dualist model of democracy' resolved the problem of representative authority.

### **4.3 ARGUMENT ABOUT BASIC STRUCTURE OF DOCTRINE**

#### **For:**

- Expanding the power of Judiciary: Out of the blue, it expressly offered power to Judiciary and confined the boundless power of the Parliament while making amendments.
- Point of confinement the amending powers of the parliament: It clarified that the amending powers of the parliament do not ensure the power to 'harm', 'castrate', 'demolish', 'annual', 'change' or 'modify' the 'basic structure' or system of the constitution.
- Optional power to the Judges to choose basic structure: It has been held on different occasions that it is risky to characterize what is the basic structure of the Constitution? As what is basic does not stay static forever to come. This equivocalness obviously offers to ascend to the optional power to the Judges to choose whether a particular provision is a part of a basic structure or not.
- Secure the Constitution against negative' changes: The doctrine of the basic structure contains the basic standards and dependably attempts to discredit any 'negative' changes made against the soul of The Constitution.
- Inferred restriction on the power to the amendment of the constitution: In Keshavanand Bharati versus territory of Kerala, the dominant part Judges held that the amending power does exclude the power to

obliterate or revoke the 'basic structure' or 'casing work' of the constitution. There are suggested restrictions on the power of amendment under Article 368 of the constitution of India.

- Amendment made through choice: While propelling Basic Structure, the Appellate Division did not make any qualification between amendment made by 66% larger part in the House and amendment affected by the House in addition to choice.

- Conventional Demonstrations of Parliament does exclude: The basic structure doctrine applies just to the constitutionality of amendments and not to conventional Demonstrations of Parliament, which must fit in with the total of the constitution and not simply to its basic structure.

- The late pattern in and a developing guideline of constitutional jurisprudence: This doctrine is certainly not an all-around settled rule of constitutional law; it is fairly an ongoing pattern in and a developing guideline of constitutional jurisprudence.

- the idea of basic structure is exceptionally wide, and differed in nature: The idea of basic structure is exceptionally wide and differed in nature. The supreme court of India proclaimed, "The rule of free and reasonable election" being the basic proposition of vote based system is a part of the basic feature of the constitution.

- Basic Structure is the most exceptional constitutional 'innovation': The commended doctrine of Basic Structure is the most extraordinary constitutional 'development' of the Indian Supreme Court in Kesavananda Bharati v Province of Kerala.

## **AGAINST:**

- Disregards the agreement and harmony between the mandate standards and fundamental rights: The ongoing discussion to expel 'secularism' and 'communism' from the preface is disregarding the basic structure of the constitution since 'secularism' is a basic feature of our constitution. This unmistakably

disregards the concordance and harmony between the mandate standards and fundamental rights, damaging the basic structure of the Constitution.

- Optional power to the Judges is ultra vires: Basic Structure has been condemned for being equivocal and lacking exact significance, uncertainty unmistakably offers to ascend to the optional power to the Judges to choose whether a particular provision is a part of a basic structure or not. It plainly can then again be called ultra vires and can't be connected in all actuality.

- The doctrine of Basic Structure obviously relies on the reality and condition of the case: It obviously relies on the reality and condition of the case and aides in saving the very pith of The Constitution. So there is no explicit constitutional provision referencing the term doctrine of basic structure.

- No firm guideline for a basic feature of the Constitution: Presently we can say, there is no firm guideline for a basic feature of the Constitution. Diverse judge keeps distinctive perspectives with respect to the hypothesis of premise structure. Be that as it may, at one point they have a comparable view that parliament has no power to crush, adjust, or castrate the 'basic structure' or system of the constitution.

- Significant discussion of real importance by the doctrine: There still remains a significant discussion and contrasts of supposition with regards to the substance of real importance by the doctrine of 'basic structure'.

## CHAPTER 05

### **CONCLUSION**

A constitution is intended to be perpetual, however as every single changing circumstance can't be visualized and amendment of the constitution might be important to adjust to the future advancements, provision is made in the constitution itself to impact changes required by the changing situations. when a council, which is an animal of the constitution, is given the power of amendment, it is a power offered not to subvert the constitution, however, to make it reasonable to the evolving circumstances. "the lawmaking body is the fundamental organ of the state and #the store of the supreme will of society. "in this manner, only it speaks to the desire of the general population. "To respect the lawmaking body is to respect the general population and subsequently, to respect democracy. or this reason the assembly, however, it is under the constitution and capacities inside the cutoff points endorsed by it, is vested with the power to achieve changes in the constitution. "he discerning of the amending power of the governing body is that, despite the matchless quality of the constitution, the constitution must create out of life and yearning of the general population! its fundamental ideas, on the off chance that they must be valuable and enduring, ought to be tuned in to the way of life and the occasions. "his requires a persistent adjustment of the constitution. "the reason for accommodating the amendment of the constitution is to make it conceivable slowly to change the constitution in an organized manner as the adjustments in social conditions make it important to change the fundamental law to relate with such social change.

Amending the constitution is an on-going procedure in any just nation to satisfy the needs of changed conditions. nations having a long custom of vote based system has gone for amendment of their constitutions in more noteworthy national interests. however, in nations like Bangladesh, where the popular government is yet to flourish, amendments to constitutions at times have occurred to suit the interests of a particular individual or to meet the interests of the party in power. the basic structure of the constitution can't be changed or amended. "the constitution isn't a conventional enactment. It is a basic structure of how a nation is represented. It reflects history, ethos, and desires of individuals of a nation. "here are sure basic standards on which a constitution is established and these standards must be protected.

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