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The Antagonistic Style of Judicial Review in Bangladesh: A Good Candidate for the Dialogic Model?

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ABSTRACT

The Dialogic Model of judicial review famously curved out of the Canadian Charter of Rights and Freedoms, 1982, and later endorsed by the UK Human Rights Act 1998, has inspired many judicial review — strong or weak — systems worldwide. This article argues that it has relevance for the "antagonistic" strong form judicial review system of Bangladesh as well. Building upon how the Parliament and judiciary in Bangladesh (un)relate each other, this article argues that Dialogic Model could solve confusions in three particular areas of Bangladeshi judicial review: fundamental right based statute review, fundamental principles based collective rights review, and constitutional amendment review. It is shown that certain areas of judicial review in Bangladesh are subtly dialogic and hence could be potential breeding grounds for broader application of the Model. The Dialogic Model's own internal dilemmas and objection to its over generalisations also are noted in this article and a case is made why those might not constitute a very big stumbling block on the way of its application in Bangladesh. This has been done through a special consideration of the comparative judicial review regimes of some of Bangladesh's close commonwealth neighbours in south-east Asia.

INTRODUCTION

In 1974, a Bangladeshi citizen Mr. Kazi Mukhlesur Rahman, approached the Supreme Court challenging a bilateral agreement between the prime Minister of the newly independent Bangladesh and his Indian counterpart. The agreement was about ceding some enclaves of Bangladesh to India in exchange for some Indian ones. Mr. Rahman argued that annexation or cessation of state territory is a privilege of Parliament only to be exercised through

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statutes.[1] Mr. Rahman claimed, as a law-abiding citizen of Bangladesh, to have sufficient interest in seeking judicial review of the alleged violation of the Constitution. The Court entertained his petition, examined the breadth of the Prime Minister's executive power and Parliament's legislative power and held that absent any parliamentary statute, the bilateral agreement was unconstitutional and non-enforceable.[2] The case — *Kazi Mukhlesur Rahman v. Bangladesh* — was significant in multiple ways. First, it impliedly endorsed the concept of public interest litigation (hereinafter PIL) in Bangladesh. Secondly, it yielded what may be called the first-ever institutional dialogue between the judiciary and the legislature. A constitutional amendment followed the verdict. The territories acquired and ceased through the agreement were declared respectively as included and excluded territory for the purpose of Article 2 of the Constitution.[3] As will be explained in this article, unfortunately, *Mukhlesur Rahman*'s potential of leading the way towards a healthy, on-going and institutionalised dialogue between the legislature and judiciary did not materialise later. Though judicial review in Bangladesh continued to operate within a constitutional supremacy framework, the legislature and judiciary remained two distant, reactionary, and combative siblings shielding behind a watertight wall of separation.

The judicial review of legislation, which is a contested concept in the UK, happens to be a constitutional mandate in Canada[4] and Bangladesh.[5] This, however, does not put it beyond all questions. The judicial activism enthusiasts in Bangladesh, including the judges themselves, tend to defend judicial review with reference to a US styled framework of constitutional supremacy enforced through the separation of power and checks and balances.[6] Within the framework, invalidating parliamentary statutes contrary to fundamental

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1 Clause 2 of Article 143 of the Constitution of Bangladesh leaves the power to determine the boundaries of the landed territory, territorial waters and the continental shelf of Bangladesh with the Parliament. Online: http://bdlaws.minlaw.gov.bd/act-367/section-24707.html.

2 *Kazi Mukhlesur Rahman v. Bangladesh*, 26 DLR (Supreme Court) 44.

3 Article 2 of the Constitution as amended by the Constitution (Third Amendment) Act of 1974, online: http://bdlaws.minlaw.gov.bd/act-367/section-24548.html.

4 Article 52 of the *Canadian Constitution Act 1982* expressly provides that "any law inconsistent with the constitution is of no force or effect." The *Charter of Rights and Freedoms* 1982 is made part I of the Constitution and hence the *Charter* violating statutes are clearly of no force or effect in Canada. Though the judicial review of statutes is not expressly granted in the Constitution, the *Marbury v. Madison* (5 U.S. (1 Cranch) 137 (1803)) logic of constitutional supremacy leads Canada towards judicial review of parliamentary statutes. For a constitutional and democratic defense of *Charter* based judicial review in Canada see: Peter W. Hogg, 'The Charter Revolution: Is It Undemocratic?' (2001/2002) 12 Constitutional Forum 1.

5 Articles 7(2) and 26(2) of the Constitution of Bangladesh 1972 expressly provides that laws consistent with the constitution or the fundamental rights in it are invalid and without any effect. Like Canada, the power of judicial review of statute laws are not express grant. It is rather inferred from the same *Marbury v. Madison* logic of constitutional supremacy.

6 Kawser Ahmed, 'The Supreme Court's Power of Judicial Review in Bangladesh: A

rights[7] and/or other written constitutional provisions[8] has been a relatively straightforward exercise of judicial review. However, the Bangladesh Supreme Court's activist entanglement with constitutional amendments, laws contravening the Fundamental Principles of State Policies[9] and PIL has drawn forceful counter-majoritarian critique.[10] Given the controversy, the US styled separation of power and checks and balances model appears inadequate in explaining these areas of confusion. This article considers the suitability of a *Canadian Charter of Rights and Freedoms*, 1982 (hereinafter the *Charter*) and the UK Human Rights Act 1998 (hereinafter the HRA) styled "Dialogic" framework instead.

Next part of the article — Part 1 — briefly discusses the *Charter* and HRA-inspired Democratic Dialogic Model. Part II of the article sets out the broader landscape of non-dialogic judicial review in Bangladesh with an explanation of the way Parliament and judiciary (un)relate to each other. This part elaborates on three areas of Bangladeshi judicial review: *fundamental right based statute review*, *fundamental principles based collective rights review* and *constitutional amendment review*. It analyses how the judiciary-executive relationship rolled out in some prominent cases within each category. Part III of the article identifies certain areas of judicial review in Bangladesh which may arguably have their own dialogic potentials and thereby could provide a breeding ground for broader application of the Model in the confusing areas. The article concludes by addressing some of the internal dilemmas of the Dialogic Model and explaining how those might not be pervasively impairing its prospects in Bangladesh.

Critical Evaluation' (SSRN, 16 April 2015). Online: https://ssrn.com/abstract=2595364.

7 Article 26(2) of the Constitution of Bangladesh has expressly restricted the Parliament from enacting laws inconsistent with the constitution. If such laws are in fact enacted those laws shall be declared void to the extent of the inconsistency. Online: http://bdlaws.minlaw.gov.bd/act-367/section-24574.html.

8 Article 7(2) of the Constitution of Bangladesh is about constitutional supremacy. Clause 2 of article 7 declares that laws inconsistent with any part of the Constitution will be void to the extent of such inconsistency. Online: http://bdlaws.minlaw.gov.bd/act-367/section-24555.html.

9 Fundamental Principles of State Policies are accommodated in Part II of the Constitution of Bangladesh. These principles are analogous to the Directive Principles of State Policies in the Indian Constitution. These principles are described as guiding principles for the governance of the state but not judicially enforceable. Online: http://bdlaws.minlaw.gov.bd/act-367/section-24556.html.

10 Muhammad Ekramul Haque, 'The Concept of 'Basic Structur': A Constitutional Perspective from Bangladesh", (2005) 16(2) The Dhaka University Studies, Part-F 123; Mohammad Moin Uddin and Rakiba Nabi, "Judicial Review of Constitutional Amendments in Light of the 'Political Question' Doctrine: A Comparative Study of the Jurisprudence of Supreme Courts of Bangladesh, India and the United States" (2016) 58(3) Journal of the Indian Law Institute 313; Md. Abdul Malek, "Vice and Virtue of the Basic Structure Doctrine: A Comparative Analytic Reconsideration of the Indian Sub-continent's Constitutional Practices" (2017) 43(1) Commonwealth Law Bulletin 48.

1. THE DIALOGIC MODEL OF THE *CHARTER* AND HRA

Institutional dialogue between judiciary and legislature consists of conversational or deliberational back and forth between Parliament and judiciary over what could be the reasonable interpretation of a constitutional norm or the rule of law.[11] While the last voice is expectedly reserved for the legislature, the judicial voice adds a qualitative and quantitative value to the resultant legal position.[12] The Dialogic model inspired by the *Charter* and HRA operates in the context of individual fundamental rights cases but works through judicial consideration of legislative intent as transpired through conflicting arguments and legislative consideration of judicial reasoning as expressed through judgment. This leaves a space for the legislature to override the judicial view if necessary.[13]

The dialogue premise of the judicial review found its root in a 1997 article of Peter Hogg and Allison Bushell written on the *Canadian Charter of Rights and Freedoms*.[14] Hogg and Bushell's ideas were based on the 'notwithstanding clause' of sections 1 and 33 of the Canadian *Charter*. Hogg and Bushell argued that section-one's substantive limit of "demonstrable justification" behind any parliamentary restriction of rights,[15] has created a scope for the judiciary to sit over the judgment of parliament's right limiting statutes. Once the court signals the unconstitutionally, the legislature gets an option to respond through its subsequent legislative action. Hogg and Bushell applied similar logic of parliamentary response through overriding legislation under section 33 and argued that parliament's penultimate law-making authority against a judicial invalidation of statute constituted a brand-new regime of "Charter Dialogue" in Canada. The 1997 piece drew incredible attention from the Canadian judges and academia. By 2007, when Hogg and Bushell (now Thornton) revisit[16] their Dialogue thesis, the Canadian judges would apply the dialogic logic in series of cases. The Court would show better comfort in straight or deferred "declaration of invalidity" on the assumption that the

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11 F. F. Davis, "Parliamentary Supremacy and the Re-Invigoration of Institutional Dialogue in the UK" (2012) 67 Parliamentary Affairs 137, 141-142.

12 Mark Tushnet, "The Hartman Hotz Lecture: Dialogic Judicial Review" (2008) 61 Arkansas Law Review 205.

13 Janet L. Hiebert, "Interpreting A Bill of Rights: The Importance of Legislative Rights Review" (2005) 35(2) British Journal of Political Science 235.

14 Peter W. Hogg and Allison A. Bushell, "The Charter Dialogue Between Courts and Legislatures (Or perhaps The Charter of Rights isn't such a bad thing after all)" (1997) 35 Osgoode Hall Law Journal 75.

15 Section 1 of the *Canadian Charter of Rights and Freedoms 1982* runs: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

16 Peter W. Hogg, Allison A. Bushell Thornton and Wade K. Wright, "Charter Dialogue Revisited: Or 'Much Ado About Metaphors'" (2007) 45(1) Osgoode Hall Law Journal 1.

Charter calls for an institutional dialogue between the court and parliament and the legislature is free to, and should, respond to such declaration.[17]

Unlike the courts, Hogg and Bushell's Dialogic theory was not universally endorsed by the Canadian academia. Some argued that their dialogic premise was devoid of reality and purely rhetorical.[18] Some argued that section one of the *Charter* did not envisage any dialogue in the way Hogg and Bushell were arguing.[19] Some argued that the *Charter* did not generate any dialogic or weak judicial review. It was rather a US-styled strong judicial review granting the penultimate say in the judiciary.[20] Some other argued that Hogg and Bushell exaggerated the dialogic premise by ignoring or underestimating the fact that the legislature has almost never used the section 33 power of overriding judicial interpretation. The *Charter*, in that sense created a predominant monologue rather than dialogue.[21] Yet some other argued that Hogg and Bushell conceived the Dialogue very narrowly as one between the court and parliament only. The *Charter* dialogue, if there be any, is actually happening more on the societal level and between the people, politics, and the judiciary.[22] Despite the nitty gritty of academic thesis and anti-thesis, Hogg and Bushell's Dialogic premise has earned the badge of a "landmark innovation in constitutional design"[23] and a defining symbol of the Canadian weak form judicial review to the world.

It is therefore not surprising that the British scholars would later invoke this dialogic premise[24] to explain the declaration of incompatibility clause found in section 4 of the HRA, 1998.[25] Section 4 is identified as transformative of the UK's traditional parliamentary sovereignty towards a new one of bipolar sovereignty between the legislature and judiciary.[26] Sections 3, 4, and

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17 *Ibid.*, at 7-25.

18 Luc B. Tremblay, "The legitimacy of judicial review: The limits of dialogue between courts and legislatures" (2005) 3(4) International Journal of Constitutional Law (I•CON) 617.

19 Carissima Mathen, "Dialogue Theory, Judicial Review, and Judicial Supremacy: A Comment on 'Charter Dialogue Revisited'" (2007) 45(1) Osgoode Hall Law Journal 125.

20 F.L. Morton and R. Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000).

21 Christopher P Manfredi and James B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37(3) Osgoode Hall Law Journal 513.

22 Christine Bateup, "Expanding the Conversation: American and Canadian Experiences of Constitutional Dialogue in Comparative Perspective" (2007) 21 Temple International & Comparative Law Journal 1.

23 Mark Tushnet, "Dialogic Judicial Review" (2009) 61 Arkansas Law Review 205.

24 Philip Norton, "A Democratic Dialogue? Parliament And Human Rights In The United Kingdom" (2013) 21 Asia Pacific Law Review.

25 Catherine A. Fraser, "Constitutional Dialogues between Courts and Legislatures: Can We Talk?" (2005) 14(3) Forum Constitutionnel 7.

26 Alison L Young, *Democratic Dialogue And The Constitution* (Oxford University Press 2017) at 180. Also see, T. R. S. Allan, 'Constitutional Dialogue and The Justification of Judicial Review' (2003) 23(4) Oxford Journal of Legal Studies 563, at 582-584.

19 are the provisions that create an opportunity for dialogue between Parliament and the courts. Section 19(1) of the HRA requires the responsible Minister to make "a statement of compatibility" before the House during its second reading. Minister would have to state "to the effect that in his view the provisions of the bill are compatible with (European) Convention rights". If he is unable to make such a statement s/he would need to say that the government wants the House to proceed without such a statement being made. Section 3(1) obliges the courts to read, so far as possible, any primary or subordinate legislation in a way that is compatible with European Convention rights. In cases where a law appears incompatible and the Court's interpretative engineering fails to do a compatible reading, section 4 would require the Court to "make a declaration of incompatibility."

Like Canada, there are diametrically opposed political and legal constitutionalist views on the Democratic Dialogic Model in the UK. Both sides of the argument are dialogue-sceptic for opposing reasons. Legal constitutionalists consider the strong form of judicial review as a must-have requirement of a rights protection system. Political constitutionalists, on the other hand, brand the HRA as a "counter-majoritarian" invasion of the UK's parliamentary supremacy.[27] Pro-HRA scholars are, therefore, burdened with a balancing responsibility. Richard Bellamy,[28] for example, claims that the HRA's judicial review is a relatively weak one that aligns more with political constitutionalism. The judiciary merely signals the need for additional parliamentary consideration of a disputed issue. Walker and Weaver also saw the HRA review as a "not strong one".[29] It is rather a "subtle approach"[30] to judicial review which would encourage a harmonious reading of the UK statutes with the European Convention on Human Rights (hereinafter ECHR) and HRA. Under this subtle approach, presumption is always in favour of compatibility[31] and a declaration of incompatibility is invited only in "a small number of cases"[32] where the government would be given a chance to reply in detail.[33]

Interestingly, not all pro-HRA scholars submit to the view that HRA's dialogic review is a weak one. Aileen Kavanagh has questioned Mark Tushnet's branding of the HRA as "the weakest of the weak form of judicial review"[34]. Kavanagh argues that Tushnet has underestimated the

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27 Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009) at 367 (Kavanagh calls it the procedural account of democracy).

28 Richard Bellami, "Political Constitutionalism and the Human Rights Act 1998" (2011) 9(1) International Journal of Constitutional Law 86, at 109.

29 Clive Walker and Russell L. Weaver, "The United Kingdom Bill of Rights 1998: The Modernisation of Rights in The Old World" (2000) 33(4) University of Michigan Journal of Law Reform 497, at 551.

30 *Ibid.*, at 533.

31 *Ibid.*, at 546.

32 *Ibid.*, at 547-548.

33 *Ibid.*, at 549.

"transformative rights construction" tendency of section 3 of the HRA. Section 3 sometimes permits "stronger form of displacement"[35] than those that normally occur in a strike-down judicial review system like Bangladesh. Historically the UK parliament has been respectful to the Court's views and shown clear inertia to expressly overturn judicial positions.[36] Thus, if the defining feature of a weak form of judicial review is the relative ease with which legislature can overturn judicial decisions, that does not happen in the UK.[37] One of Kavanagh's subsequent books[38] has branded the HRA even as an "entrenched constitutional bill of rights"[39] that invests in the UK Supreme Court a constitutional power of judicial review akin to that of the US.

This, however, is not to say that Kavanagh is digging a strong form of constitutionality review out of the HRA. What Kavanagh emphasises is the actual outcome of a dialogue that serves no less than any strong form of the judicial review found in written constitutional systems like Bangladesh. Kavanagh sees democratic legitimacy in HRA's deferential approach.[40] She also sees judges' independence and insulation from politics as a quality of the process. She argues that the HRA's Dialogic Model calls for balancing between the transformative power of section 3 and the incompatibility signal of section 4. Judiciary's choice is controlled by its "ability and willingness"[41] to take any of the paths. Section 3 could be used in a rights construction process to which the legislature usually acquiesces. While this constitutes a dialogic process between the institutions, it might, however, be problematic to carry the dialogue indefinitely. This is where Kavanagh resorts to section 4 declaration of incompatibility.[42] Like Kavanagh, Tom R Hickman also views the HRA as a "strong form" dialogue where section 3 will not be read minimally so as to favour the use of section 4 declarations maximally.[43] Neither would section 4 be read maximally so as to achieve universal convention compliance.

Once a declaration of incompatibility is made, the "institutional dialogue" ensues, and the government, parliament and its committees take the baton therefrom. Janet L. Hiebert's "Parliamentary Protection Model"[44] explains

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34 Mark Tushnet, "New Forms of Judicial Review and The Persistence of Rights — And Democracy — Based Worries", (2003) 38 Wake Forest Law Review 813, at 820; Mark V. Tushnet, *Weak Courts, Strong Rights* (Princeton: Princeton University Press, 2008) at 28.

35 Aileen Kavanagh, "What's so weak about 'Weak-Form Review'? The case of The UK Human Rights Act 1998" (2015) 13(4) International Journal of Constitutional Law 1008, at 1019.

36 *Ibid.*, at 1025-26.

37 *Ibid.*, at 1029.

38 Kavanagh (n 27).

39 *Ibid.*, at 294, 307.

40 *Ibid.*, at 196.

41 *Ibid.*, at 237, 268.

42 *Ibid.*, at 169-170.

43 Tom R. Hickman, "Constitutional dialogue, constitutional theories and the Human Rights Act 1998" (2005) Public Law 306.

how the HRA's inter-institutional dialogue works. Hiebert argues that a strong show of backbench autonomy and non-partisanship[45] within the Joint Committee on Human Rights (hereinafter JCHR) has placed it in a position of "Parliament's *de facto* legal adviser on human rights".[46] JCHR oversees the governmental vetting process of laws and also the government's response to any incompatibility declaration under section 10 of the HRA.[47] His elaborate analysis of the JCHR's contribution in the House of Commons deliberation and House of Lords' judicial intervention into counter-terrorism[48] and immigration and asylum bills[49] shows that JCHR has emerged as a very significant contributor to the HRA's dialogic project.[50]

2. THE MONOLOGIC JUDICIAL REVIEW IN BANGLADESH

Judicial review power in Bangladesh is apparently a "strong form"[51] one. The Constitution of Bangladesh does not expressly designate the Supreme Court as the guardian of the Constitution. Judicial review is rather based on a combined reading of articles 7, 102, 44 and 65 of the Constitution.[52] It extends to individual fundamental rights review, adjudication of collective socio-economic rights or public interest under the guise of an expansive fundamental rights reading, constitutional and common law review of administrative or executive actions, constitutional review of statute laws and also the basic structure review of constitutional amendments.

So far as statutory construction is concerned, it has been a rule that Bangladeshi courts do not question the intent or wisdom of the legislature. The courts also cannot issue *mandamus* upon the legislature to legislate on a particular topic or in a particular way.[53] While challenging any laws passed by the legislature, the government of Bangladesh is represented by the Ministry of Law — who is made a party to the suit. The Parliament not being a party to the constitutional challenge, any deceleration of invalidity does not attract the

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44 Janet L. Hiebert, "Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?" (2006) 4(1) International Journal of Constitutional Law 1, at 2-3.

45 *Ibid.*, at 16.

46 *Ibid.*, at 22.

47 *Ibid.*

48 *Ibid.*, at 28-30.

49 *Ibid.*, at 31-35.

50 *Ibid.*, at 36.

51 Ridwanul Hoque, "Constitutionalism and the Judiciary in Bangladesh", in Sunil Khilnani, Vikram Raghavan, and Arun K. Thiruvengadam, eds., *Comparative Constitutionalism in South Asia* (New Delhi: Oxford University Press 2012) 303, at 307-308.

52 *Jamil Huq v. Bangladesh*, 34 DLR (Appellate Division of the Supreme Court) 125 (Bangladesh).

53 *Secretary Ministry of Finance v. Master Hossain*, 2000 BLD (Appellate Division of the Supreme Court) 104 (Bangladesh).

Parliament *ipso facto* in the scene. It is generally understood that law declared invalid or unconstitutional loses its force from the very moment such declaration is made without waiting for any positive action of Parliament. Though such incident is unheard of so far, it is not clear what could happen if Parliament expressly refuses to accept a judicial invalidation and re-enacts the same law after the court invalidation. Though there is a prohibition on the legislative judgment, it is not clear whether this prohibition could prevent Parliament from passing the same law or constitutional amendment invalidated by the Court. Discussion on the Sixteenth Amendment of 2016 will show the complexity of this situation.

In Bangladesh, Parliament's relation with the judiciary has been tested in a series of cases where the day to day political feuds among the government and opposing parties were dragged to the Supreme Court. Put in a zone of utter discomfort, the Supreme Court of Bangladesh came out with inconsistent positions over the Parliament's internal proceedings and parliamentary privileges. While the general trend has been deferential to the autonomy of Parliament, the Supreme Court has occasionally shown its readiness to intervene in parliamentary proceedings related matters particularly where any constitutional question was asked.[54] While judges in Canada and the UK are frequently called to parliamentary committee hearings and tend to answer to the calls, Bangladesh has not fostered any culture of judges being called by and answering to, Parliament or its committees. The speaker in his/er turn does not answer to any summons of the Court.[55] As will be seen later, this reality of not having a conversation culture explains why the Parliament and judiciary remained two distant, reactionary, and combative siblings.

The Democratic Dialogue model, it will be argued, has significant relevance for Bangladesh because of two aspects of Bangladeshi judicial review which go beyond the US styled judicial review of statute laws. As mentioned earlier, though the fundamental rights review of statute laws involves a rather straight forward testing of constitutionality, amendment reviews and collective rights reviews have been problematic. First, the Bangladesh Supreme Court has endorsed the public interest litigation jurisprudence of the Indian Supreme Court that allows it to read the individual fundamental rights — *e.g.*, the right to life[56] — in an expansive way

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[54] In *Anwar Hossain Khan v. Speaker, Jaya Sangsad*, 47 DLR (High Court Division of Bangladesh Supreme Court) 42, *Rafique Hossain and Alauddin Khalid v. Speaker*, 47 DLR (High Court Division of Bangladesh Supreme Court) 361, *Khandker Delwar Hossain v. The Speaker*, 51 DLR (High Court Division of Bangladesh Supreme Court) 1 and *The Special Reference No 1 of 1995*, 47 DLR (Appellate Division of Bangladesh Supreme Court) 111 cases, the continuous boycott of parliamentary sessions and MPs' *en masse* resignation therefrom was disputed. The Court took a position that internal proceedings of Parliament doctrine in itself might not be enough to exclude the court's jurisdiction if an allegation of violation of specific constitutional provision (e.g., 90 days consecutive absence rule or the Speaker's responsibility to notify the members' resignation to the Election Commission) were involved in the dispute.

[55] *Khandker Delwar Hossain v. The Speaker*, 51 DLR (High Court Division of Bangladesh Supreme Court) 1.

to address certain social injustices invading the peoples' socio-economic and collective rights. This has dragged the Court in the arena of governmental policies and polycentric decision making. It has been argued that the judiciary is thereby travelling to an area unsuitable for its genius and seeking to enforce "a government by court".[57] Secondly, the Bangladesh Supreme Court has adopted the so-called basic structure doctrine of the Indian Supreme Court to invalidate even constitutional amendments passed by parliamentary super-majority. In this area of judicial review, the courts face — apart from counter-majoritarian difficulties — an additional accusation of promoting a dead hand rule. According to this critique, a court striking down a constitutional amendment by reference to some so-called basic, pre-fixed and perpetual or eternal principles of the original Constitution essentially locks the generations of citizens to some potentially outdated and outmoded ideas of the past.[58]

(a) Fundamental Rights Review

In relation to the enforcement of fundamental rights guaranteed in Part III of Bangladesh constitution, article 44 mentions that citizens aggrieved by the violation of their fundamental rights would have a right to move the Supreme Court with a writ petition. Upon receipt and consideration of such a complaint, the High Court Division of the Supreme Court may conclude that there have been no other equally efficacious remedies available for the petitioner and hence issue directives or orders against "any person or authority including any person performing any function in connection with the affairs of the Republic".[59] Scope of striking out statute laws for contravention of fundamental rights is based on Article 26(2), which declares such laws unconstitutional. In fundamental rights cases, the Court has invariably applied a strict scrutiny test and declared discriminatory laws, laws capable of being used in a discriminatory way in the absence of detailed guidelines,[60] laws seeking to *ex post facto* criminalise something,[61] laws involving legislative

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56 Muhammad Mahbubur Rahman, "Right to Life as a Fundamental Right in The Constitutional Framework of India, Bangladesh And Pakistan: An Appraisal" (2006) 17(1) The Dhaka University Studies, Part-F 143.

57 Ridwanul Hoque, "Judicialisation of Politics in Bangladesh", in Mark Tushnet and Madhav Khosla, eds., *Unstable Constitutionalism: Law and Politics in South Asia* (New York, Cambridge University Press 2015) at 261.

58 M. Jashim Ali Chowdhury and Nirmal Kumar Saha, "Amendment Power in Bangladesh: Arguments for the Revival of Constitutional Referendum" (2020) 9 Indian Journal of Constitutional Law 38.

59 Clause 1 of Article 102 of the Constitution of Bangladesh, online: http://bdlaws.-minlaw.gov.bd/act-367/section-24659.html.

60 *Dr. Nurul Islam v. Bangladesh*, 1 BLD (1981) (Appellate Division of the Supreme Court); *Muhibur Rhaman Manik v. Bangladesh & ors*, 23 BLD (High Court Division of the Supreme Court) 26.

61 Article 35(1) of the Constitution provides that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from that which might have been inflicted under the law in force at the time of the commission of

judgement,[62] etc., unconstitutional. In such cases, the government and Parliament reacted to the judgment by taking appropriate steps.

To take an example, in *Dr. Nurul Islam v. Bangladesh*, 1 BLD (AD) 140, the petitioner was given a compulsory retirement under Section 9(2) of the Public Servant (Compulsory Retirement) Act, 1974. No reason except that he had completed 25 years of service was assigned. Dr. Nurul Islam challenged the validity of Section 9(2) on the basis of Articles 27 and 29 equality and non-discrimination clauses of the Constitution. As a matter of fact, at the time of Dr. Nurul Islam's compulsory retirement, there were at least 34 doctors who had completed the age of 25 years in service. But the government chose the petitioner only to send to compulsory retirement. It was argued that section 9(2) of the Act lacked guideline to exercise power and allowed the government to choose and pick any public servant they target.[63] The Court could not find how or on what principle a government servant, out of a group of so many others similarly placed like him, could be selected for such compulsory retirement.[64] Accordingly, section 9(2) was declared unconstitutional.[65] Eight months after the decision in *Dr. Nurul Islam*, section 9(2) was amended by Parliament. A new phrase "public interest" was inserted in section 9(2), which was to be used as the sole guiding principle for exercising such power.

Parliament however did something extra. It inserted a retrospective validation clause in the 1974 Act that would validate all previous retirement orders, including Dr. Nurul Islam. This again being challenged in *Mofizur Rahman v. Bangladesh*, the Court, though acknowledged the Parliament's power to pass retrospective laws,[66] held that Parliament could not pass a legislative judgment by merely declaring that something done in the past were validly done despite a judgment of the Court to the opposite. As Shahabuddin Ahmed J. argued, "[T]he legislature cannot reverse or set aside the court's

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the offence. Article 35(1) of the Constitution, occurring in the Fundamental Rights part of the Constitution prohibits *ex post facto* laws in respect of criminal punishment. *Sheikh Hasina v. Bangladesh*, (2008) 13 BLC (High Court Division of the Supreme Court) 121. The Appellate division however controversially narrowed down the rule by *Bangladesh v. Sheikh Hasina*, (2008) 60 DLR (Appellate Division of the Supreme Court) 90. Based on the mere text of Article 35(1) of the Constitution, it found that the prohibition as to operation of *ex post facto* laws concerned only with 'conviction' or 'sentence', not the 'trial' of the offence concerned

62 There is a limitation on the power of the Parliament to pass 'legislative judgments.' It is a well-established judicial principle that the legislature cannot make direct inroad into the judicial power of the State. When the court declares a law to be invalid, Parliament cannot pass a law declaring that judgment to be invalid or that the action taken under the invalid statute shall be deemed to be valid retrospectively. *Mofizur Rahman v. Bangladesh*, 34 DLR (Appellate Division of the Supreme Court) 321.

63 *Dr. Nurul Islam v. Bangladesh*, 1 BLD (1981) (Appellate Division of the Supreme Court) 1 [35].

64 *Ibid.*, at [42].

65 *Ibid.*, at [87].

66 *Mofizur Rahman v. Bangladesh*, 34 DLR (AD) 321 [22].

judgment, order or decree but it can render the judgment, order or decree redundant by removing the grounds of objection raised by the court".[67]

While the Parliament was seen responding to *Dr. Nurul Islam*, such responsiveness is not a regular phenomenon. There are many cases where the Supreme Court came out with specific recommendations on necessary amendment in laws and sometimes even with quasi-legislative guidelines, Parliament has refused to act and amend the laws accordingly. To take an example, marred by continuous allegations of custodial torture and abuse of police power, the Supreme Court issued some specific guidelines to be followed by the law enforcement agencies during arrest and remand of suspects in *Bangladesh Legal Aid and Services Trust v. Bangladesh*, 55 DLR (2003) HCD 363. The court emphasised the importance of amendments in criminal laws concerned and awaiting the amendments, ordered the observance of its guidelines as a matter of law. The Court formulated similar guidelines again in *Saifuzzaman v. State and others*, 56 DLR (2004) HCD 324. The Parliament has not responded to the suggestions yet. In the absence of legislative response — positive or negative, judicial guidelines remain in force as soft quasi-legislative guidelines.[68]

(b) Fundamental Principles of State Policy Review

If the parliamentary reaction to the Court's fundamental rights jurisprudence is mostly of indifference, socio-economic or collective rights jurisprudence of Bangladeshi courts has generated some indirect and deferred reactions from Parliament. However, the process has failed to engage the Parliament in an institutional and dialogic exchange with the judiciary.

The Court's initial attitude towards the collective rights placed in the non-justiciable state policy part of the Constitution was largely deferential. The Supreme Court usually refused to invalidate laws inconsistent with fundamental principles of state policies holding that those are not judicially enforceable. Two cases from this period deserve special mention. In *Sheikh Abdus Sabur v. Returning Officer* a law disqualifying the defaulters of bank loans from contesting in local government election was challenged. Until then, candidates seeking election to Parliament had no such disqualification. Justice ATM Afzal preferred the question to be answered by the Parliament to the people, not by the Court:

> I do not think that this Court has any duty under the Constitution to offer unsolicited advice as to what the Parliament should or should not do. As long as the law enacted by it is within the bounds of the Constitution, it will be upheld by this Court, but if the law is

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67 *Ibid.*

68 Abdullah Al Faruque, *Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh* (National Human Rights Commission of Bangladesh, January 2013). Online: http://nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/348ec5eb_22f8_4754_bb62_6a0d15ba1513/Analysis%20of%20Decisions%20of%20the%20Higher%20Judiciary%20on%20%20Arrest%20and%20Detention%20in%20Bangladesh.pdf.

> otherwise open to criticism, it is for the Parliament itself to respond in the manner it thinks best. The new 'disqualification' the Parliament has not attached to persons seeking election to it (the Parliament) which means that a defaulter in repaying public money can sit in the House of the Nation with glory but he cannot sit in the Union Parishad or a local body. The members of the Parliament owe an answer to this, not the Court. But now that they have declared Islam as the State Religion of the Republic by the Constitution (Eighth Amendment) Act, 1988, I shall content myself by reminding them two verses from the Holy Koran:
>
> 2. Ye who believe why say ye that which ye do not?
>
> 3. Grievously odious is it in the sight of God that ye say that which ye do not. (Sura: Saff, Verse: 2 and 3)[69]

Next, *Kudrat-E-Elahi Panir and Others v. Bangladesh*, 44 DLR (AD) 319 was a challenge to abolishing a democratically elected local government body called Upazilla Parishad and replacing it with bureaucratic officials. The Court found that democratic participation in local government being a Fundamental Principles of State Policy was not judicially enforceable.[70] Justice Mustafa Kamal explained:

> A hypothetical question has been asked. Parliament passes a law which glaringly violates and flouts a fundamental principle of state policy, and if its vires is challenged only the ground of inconsistency with principle and with no other ground whatsoever, will the high court division declare or not declare the law void? It is a madness scenario. The learned counsels could not show any such legislation in this subcontinent, but suppose Parliament is struck with such madness, is the High Court Division in its writ jurisdiction the only light at the end of the tunnel? What does public opinion, political party and election do if Parliament goes berserk?[71]

In this case, considering some other technical requirement of the Constitution about local government system, the Court opined that the government "should" replace the non-elected person by-election "as soon as possible — in any case within a period not exceeding six months from date".[72] Parliament, however, ignored the suggestion.

Greater potential for democratic dialogue opened up in the mid-1990s when Bangladesh Supreme Court, influenced by the Indian Supreme Court started liberalising the *locus standi* rule and opening up the door of Public Interest Litigation as a way of social or class actions vindication of peoples' collective rights.[73] The Court's receptiveness to class action litigations led to

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69 *Sheikh Abdus Sabur v. Returning Officer*, 41 DLR (AD) (1989) 30 at para. [69] (ATM Afzal J).

70 *Kudrat-E-Elahi Panir and Others v. Bangladesh*, 44 DLR (Appellate Division of the Supreme Court) 319 at para. [22] (Shahabuddin Ahmed J.).

71 *Ibid.*, at para. [86] (Mustafa Kamal J.).

72 *Ibid.*, at para. [41].

limited enforcement of socio-economic rights reflected in the principles of state policies.[74] In a series of environmental law cases,[75] the Supreme Court has read the otherwise unenforceable state principles into the fundamental rights claim of right to life.[76] In doing so, the Court used its constitutional "power to do complete justice"[77]. It has issued prohibitive and mandatory orders requiring the government either to refrain from doing something or to take appropriate legislative or administrative actions in certain areas. Though the courts' structural orders[78] have opened up scopes of back and forth between the Executive and judiciary, the "much-needed democratic dialogue"[79] between Parliament and the judiciary remained absent. Though the Parliament later endorsed the Supreme Court's public interest litigation activism in the environmental field by recognising the assurance of pollution-free environment as a state policy,[80] this would perhaps qualify as a delayed

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73 *Dr. Mohiuddin Farooque v. Bangladesh*, 49 DLR (Appellate Division of the Supreme Court) 1; *National Board of Revenue v. Abu Saeed Khan*, 18 BLC (Appellate Division of Bangladesh Supreme Court) 116.

74 *Chairman, National Board of Revenue v. Advocate Julhas Uddin*, (2010) 15 MLR (Appellate Division of Bangladesh Supreme Court) 457; *Major General KM Shafiullah v. Bangladesh*, 2009 DLR (High Court Division of the Supreme Court) 340. Also see, Muhammad Ekramul Haque, "Legal and Constitutional Status of the Fundamental Principles of State Policy as Embodied in the Constitution of Bangladesh" (2005) 16(1) Journal of the Faculty of Law 45; M. Jashim Ali Chowdhury, "Does inconsistency with Fundamental Principles of State Policy invalidate a Law?" (2009) 5 BRAC University Journal 71; Md. Reajul Hasan Shohag and A.B.M. Asrafuzzaman, "Enforcing Socio-Economic Rights Judicially: Experiments in Bangladesh, India and South Africa" (2012) 3 Northern University Journal of Law 87; M. Waheduzzaman, "Economic, Social and Cultural Rights under the Constitution: Critical Evaluation of Judicial Jurisprudence in Bangladesh" (2014) 14(1&2) Bangladesh Journal of Law 1.

75 *Dr. Moohiuddin Faruque v. Bangladesh and Ors*, 49 DLR 1997 (Appellate Division) 1 (FAP 20 Case); *Dr. Mohiuddin Farooque (BELA) v. Bangladesh*, 55 DLR (High Court Division) 69 (Environment Pollution Case); *Dr. Mohiudin Farooquee v. Bangladesh*, 55 DLR (2003) (High Court Division) 613 (Two-Stroke Motor Vehicle Case); *Human Rights and Peace for Bangladesh v. Bangladesh*, WP 13989/2016 (High Court Division of the Supreme Court).

76 *Dr. Mohiuddin Farooque v. Bangladesh and others*, 48 DLR (1996) (High Court Division) 438 (Radioactive Milk Powder Case); *Ain O. Shalish Kendra & Ors v. Government of Bangladesh*, 4 MLR (High Court Division) 358 (Slum Dewellers case); *Professor Nurul Islam v. Govt. of Bangladesh & others*, 52 DLR 413 (Gold Leafs Voyage of Discovery Case); *Adv Zulhas Uddin Ahmed & Manzil Morshed v. Bangladesh*, 15 MLR (High Court Division) 2010 (VAT on Health Services Case).

77 Article 104 of the Constitution of Bangladesh, online: http://bdlaws.minlaw.gov.bd/act-367/section-24661.html.

78 M. Jashim Ali Chowdhury, "Claiming a 'Fundamental Right to Basic Necessities of Life': Problems and Prospects of Adjudication in Bangladesh" (2011-12) 5 Indian Journal of Constitutional Law 184, at 196-205.

79 Ridwanul Hoque, "Taking justice seriously: Judicial Public Interest and Constitutional Activism in Bangladesh" (2006) 15(4) Contemporary South Asia 399, at 414.

80 Article 18A (Protection and Improvement of Environment and Biodiversity) was

reaction rather than a dialogue. *The Separation of Judiciary* case[81] constitutes the most glaring example of this trend.

Around 441 subordinate judicial officers of Bangladesh sought the subordinate judiciary's separation from the Executive as per Article 22 of the Constitution. Article 22 happens to be in Fundamental Principles of State Policy part of the Constitution. Until then the subordinate judiciary, particularly the criminal justice courts, were run by the bureaucrats known as executive magistrates. A limited number of judicial officers were recruited by the Public Service Commission to run civil justice administration. Judicial officers prayed for a mandamus on the government to frame necessary Rules facilitating the separation. Finding the direct enforcement of article 22 problematic, the Court resorted to a harmonious construction approach to the Constitution's overall scheme.[82] The High Court Division upheld the petition and ordered the government to frame rules. The government preferred an appeal. The Appellate Division meticulously examined various provisions of the Constitution and the found that successive governments and parliaments were committing "constitutional deviation" from their obligation to ensure the independence and separation of judiciary from the executive branch.[83] It was held that subordinate judiciary could be separated through presidential rulemaking powers granted under article 115 of the Constitution.[84] As the Court was clearly lacking in power to order the Parliament to pass necessary laws to give effect to the constitutional requirement of separation, it consciously avoided involving Parliament in this process. It was argued that the president's rulemaking power in this regard was independent of Parliament's power to regulate the Court by laws.[85] The Court, however, did not brush aside the need for further legislation and constitutional amendments for further consolidation of the separation. The Court issued several directions to achieve the desired separation, including among other things, the framing of Rules, creation of a separate Judicial Service Commission and a separate Judicial Pay Commission, and the maintenance of the Supreme Court's financial independence from the Executive.[86]

The initial eight weeks' time given by the Court was ignored. Three successive governments sought and were granted, as many as twenty-two extensions over the next 8 years. Finally, an election-time caretaker government took necessary steps on November 1 2007. Though the Court's

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inserted in the Constitution by the Constitution (Fifteenth Amendment) Act, 2011 (Act XIV of 2011), online: http://bdlaws.minlaw.gov.bd/act-367/section-41505.html.

81 *Secretary, Ministry of Finance v. Masdar Hossain*, 52 DLR (Appellate Division of Bangladesh Supreme Court) 82.

82 *Ibid.*, at [20], [28], [31].

83 Hoque (n. 79) at 410-411.

84 Article 115 of the Constitution of Bangladesh, online: http://bdlaws.minlaw.gov.bd/act-367/section-24672.html.

85 *Masdar Hossain* (n. 81) at [32]—[33].

86 *Ibid.*, at [49].

continuous mandamus and relentless pursuing forced the executive branch into some sort of dialogue with the Court, the absence of the Parliament from the scene is evident in the fact that no legislative or constitutional reform was attempted to consolidate the separation. The subordinate judiciary's institutional separation from the bureaucracy therefore remains a mere "separation" without substantial independence. The Ministry of Law remains in charge of the control and discipline of the subordinate judiciary, albeit with the supreme Court's mere right to be consulted.[87]

(c) Constitutional Amendment Review

Parliament of Bangladesh is given plenary legislative power[88] as well as the power to amend the Constitution.[89] Though the Constitution has recognised judicial review of statute laws, judicial review of a constitutional amendment is a contested concept. The original Constitution of 1972 contained no limitation whatever on the Parliament's power of amendment. An amendment could be done through a bill passed by a two-thirds majority of the members of Parliament. As mentioned earlier, the Constitution provided for invalidity of statutes contravening fundamental rights. It was however provided that this statute law limitation would not apply to constitutional amendments.[90] While the framers' intention in keeping constitutional amendments beyond judicial review was clear, the Supreme court claimed its power of reviewing constitutional amendments under a so-called doctrine of "Basic Structures"[91] borrowed from the Indian *Keshabanandha Bharati* case.[92] The doctrine was embraced by the Supreme Court of Bangladesh in its 1989 *Anwar Hossain Chowdhury* case.[93] The doctrine holds that certain provisions and principles constitute the Constitution's basic structure and are unamendable.

There is debate about whether the Supreme Court could give itself such a power, especially when amendments are passed by in Parliament through a special super-majority and under its constituent, rather than plenary legislative, authority.[94] Despite these, judicial review of constitutional

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87 Md. Milan Hossain, "Separation of Judiciary in Bangladesh-Constitutional Mandates and *Masdar Hossain Case's* Directions: A Post Separation Evaluation" (2020) 11(2) International Journal for Court Administration 4.

88 Art. 65 of the Constitution of Bangladesh, online: http://bdlaws.minlaw.gov.bd/act-367/section-24619.html.

89 Art. 142 of the Constitution of Bangladesh, online: http://bdlaws.minlaw.gov.bd/act-367/section-24706.html.

90 Clause 3 of Article 26 of the Constitution of Bangladesh, online: http://bdlaws.minlaw.gov.bd/act-367/section-24574.html.

91 Salimullah Khan, "Leviathan and the Supreme Court: An Essay on the 'Basic Structure' Doctrine" (2011) 2 Stamford University Journal of Law 89.

92 Jafar Ullah Talukder and M. Jashim Ali Chowdhury, "Determining the Province of Judicial Review: A Re-evaluation of 'Basic Structure of the Constitution of Bangladesh" (2009) 2(2) Metropolitan University Journal 161.

93 *Anwar Hossain Chowdhury v. Bangladesh*, 18 CLC (1989) (AD) 1.

94 Chowdhury and Saha (n. 58); Uddin and Nabi (n. 10).

amendments has been a rule rather than the exception in Bangladesh. So far, out of the eight constitutional amendments that are challenged, the Court has invalidated five. All the invalidations have been subject to a varying degree of questioning from different sides of the argument.[95] The legislative response to the amendment invalidation had been one of acquiescence except in the latest invalidation of the sixteenth amendment, which resulted in an intensely combative exchange.

The first-ever invalidation of any constitutional amendment involved part of the Eighth Amendment in *Anwar Hossain Chowdhury* (1989). It was an amendment seeking to decentralise the supreme Court and establishing around eight circuit benches of the High Court Division. The Court invalidated it holding that Bangladesh's unitary character was a basic feature of the Constitution[96] and it could not be destroyed by decentralising the Supreme Court. The decentralisation being a hugely popular idea then, the Court's decision was criticised as protectionist and self-serving.[97] The 4th Parliament (1988-1989) and the ruling party — Jatya Party (hereinafter JP) — quietly submitted to the Court's view. JP rather tried to raise political capital out of the judgment by projecting it as a sign of an independent judiciary's presence in the country.[98] The Ministry of Law reprinted the Constitution by restoring the former version of the relevant provision.

The fifth amendment was invalidated by a High Court Division bench in *Bangladesh Italian Marble Works Company Ltd v. Bangladesh* in 2005.[99] The amendment validated the assumption of power and subsequent activities by martial law rulers, including Major Zia. This decision came around one year before the end of the tenure of the 8th Parliament and the then ruling party Bangladesh Nationalist Party (hereinafter BNP)'s tenure. Major Zia's Party — BNP — was the fifth amendment's direct beneficiary in the late 1970s. Expectedly, the government reacted fiercely, appealed the decision to the Appellate Division immediately and secured a stay over the High Court judgment.[100] They, however, could not finish the appeal hearing. Coming to power in 2009, the government of Awami League (hereinafter AL) withdrew the appeal. Though the appeal's subsequent proceedings continued by allowing a BNP leader to be the appellant, the Appellate Division upheld the High Court Division's judgment.[101]

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95 Ridwanul Hoque, "Can the Court Invalidate an Original Provision of the Constitution?" (2106) 2(2) University of Asia Pacific Journal of Law and Policy 13.

96 *Anwar Hossain Chowdhury* (n. 93) at paras. [419], [420].

97 Rokeya Chowdhury, "The Doctrine of Basic Structure in Bangladesh: From 'Calfpath' to Matryoshka Dolls", (2014) 14 Bangladesh Journal of Law 43.

98 Syed Rahman, "Bangladesh in 1989: Internationalization of Political and Economic Issues" (1990) 30(2) Asian Survey 150, at 154.

99 *Bangladesh Italian Marble Works Ltd v. Bangladesh*, (2006) BLT (Special) (High Court Division) 1.

100 Ali Riaz, "Bangladesh in 2005: Standing at a Crossroads" (2006) 46(1) Asian Survey 107, at 111.

The seventh amendment was invalidated by the Court in *Siddique Ahmed v. Bangladesh* in 2010.[102] This time it demoralised the political base of JP whose leader Lt Colonel HM Ershad sponsored the amendment in the 1980s. Like Zia's fifth amendment, Ershad's seventh amendment validated his accession to power and subsequent activities. This time as well, the ruling AL government did not appeal the judgment. BNP and JP, however, criticised the decision as the unnecessary reopening of foreclosed history.[103]

Invalidation of the Thirteenth Amendment in 2011 was politically controversial. Thirteenth Amendment of 1996 introduced a system of election time caretaker government. Some have argued that the Supreme Court was doing the ruling party AL's bidding in prematurely invalidating the system.[104] In a face-saving observation, the Court opined that two subsequent national elections could be arranged under the invalidated caretaker government system beyond which the system would stand nullified. However, the AL government ignored this observation and used the judgment as an excuse to omit the caretaker government system immediately through a constitution reprint.[105]

The AL government reprinted the Constitution in so-called compliance with the Supreme Court's fifth, seventh and thirteenth amendment judgments.[106] However, it was seen that the government cherry-picked some parts of the judgments to ignore in the reprint. Finding it politically inconvenient to erase the Islamic provisions included by the fifth and seventh amendments, the AL government's reprint posed as if those parts were not declared invalid. The Supreme Court also quietly avoided tussling with the government further on this. As is seen, in these cases, the Parliament remained totally sidelined in the reception or rejection of amendment reviews by the judiciary. It seems that the Parliament was merely following the clue from the government of the day and leaving it up to the Ministry of Law to reprint the constitutions as per the Court's judgments.

Parliament however entered the scene after the controversial reprint. An All-party parliamentary constitutional review committee was formed which

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101 *Khondhker Delwar Hossain v. Bangladesh Italian Marble Works Ltd and Others*, (2010) 62 DLR (Appellate Division) 298.

102 *Siddique Ahmed v. Bangladesh*, (2011) 33 BLD (High Court Division) 84.

103 Abdul Halim, "The 7th Amendment Judgment by the Appellate Division: Judicial Politics or Judicial Activism" (2012) The Counsel Law Journal 19.

104 *Saleem Ullah v. Bangladesh*, (2005) 57 DLR (High Court Division of the Supreme Court) 171; *Abdul Mannan Khan v. Bangladesh*, (2012) 64 DLR (Appellate Division of the Supreme Court) 1.

105 Maximum Ahsan Khan, "Constitutional disaster & 'Legal' Impunity: Constitutional amendments in perspective", Asian Human Rights Commission, online: http://www.humanrights.asia/resources/journals-magazines/article2/special-report-inexistent-rule-of-law-in-bangladesh/04-2/.

106 M. Jashim Ali Chowdhury, "The dilemma of constitution reprint", *The Daily New Age* (Dhaka, 15 April 2011), online: http://newagebd.com/newspaper1/op-ed/15412.html.

would work on revision of the Constitution with a view to restore fundamentals of the original Constitution of 1972. Admittedly the committee worked on the reprint and proceeded as if the invalidated fifth, seventh and thirteenth amendments were not in the texts of the Constitution. Parliamentary committee never reached out for any judicial input in the process. Later, the Fifteenth Amendment was passed in pursuance of the committee recommendations. Interestingly, there the Parliament officially endorsed the doctrine of basic structure as a basis of amendment review. A newly inserted article 7B vaguely provided that basic provisions of the Constitution will not be amendable in the future. This article also provided a huge list of some other specific provisions which could not be amended in the future. Given the inclusion of specific unamendable provisions in the Constitution which are coexistent with unspecific "basic structures", it appears that the Parliament accepted the Court's right to judicially review the constitutional amendments which were missing in the original Constitution. The fifteenth amendment has reserved the Court's right to judge future amendments to see whether those implicate any specifically mentioned unamendable provision or any other basic structures of the Constitution.[107]

If the fifteenth amendment constitutes the Parliament's *ex post facto* approval of amendment reviews, the sixteenth amendment presents a strikingly opposite position. The *Sixteenth Amendment Case*[108] is so far the only incident of the Court's face to face tussle with Parliament. The Sixteenth Amendment sought to restore parliamentary removal system for the supreme court judges. A Supreme Judicial Council system replaced this system of the original Constitution (1972) during the fifth amendment. Supreme Judicial Council comprised the Chief Justice and two other senior judges who would investigate and recommend supreme court judges' removal. As is mentioned earlier, the fifth amendment was invalidated by the Court. The Court, however, condoned the supreme judicial council system. This cherry-picking of the system was criticised as a manifestation of the judiciary's institutional self-interest.[109] The AL government kept the supreme judicial council system in the fifteenth amendment. It, however, changed its mind soon after. The sixteenth amendment was passed to restore the system of parliamentary removal by the two-thirds majority. This time the Court revolted and a defiant supreme court passed a scathing rebuke of the Parliament. The High Court Division ruling of May 5 2016 infuriated the ministers and MPs. The full-text judgement allegedly contained some derogatory remarks on the character and

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[107] Ridwanul Hoque, "Eternal Provisions in the Constitution of Bangladesh: A Constitution Once and for All?", in Richard Albert and Bertil Emrah Oder, ed., *An Unamendable Constitution?* (New York: Springer, 2018) at 195, 224.

[108] *Advocate Asaduzzaman Siddiqui v. Bangladesh*, 2012 CLC (High Court Division of the Supreme Court) 41.

[109] M. Jashim Ali Chowdhury and Nirmal Kumar Saha, "Advocate Asaduzzaman Siddiqui v. Bangladesh: Bangladesh's Dilemma with Judges' Impeachment" (2017) 3(3) Comparative Constitutional Law and Administrative Law Quarterly 7, at 11.

disposition of the Parliament members in general, and this took the matter to a situation of direct institutional confrontation between the Parliament and Court. MPs scrambled the floor and aired heavy criticism of the Court for refusing to submit itself to the Parliament's removal power.[110]

The High Court Division judgment was immediately appealed against and the Appellate Division rejected the government's appeal on July 3, 2017. Another round of infuriated criticism ensued in the floor of the House on July 9, 2017. Full-text judgement of the Appellate Division came out on August 1, 2017. While the High Court Division's comments were already fueling the fire, the opinion of the Chief Justice himself was full of attacks on the politicians and morale of Parliament. This put him in a straight hot seat. He was accused of bias[111], and a demand for his resignation started to echo in the political spectrum. While the AL government was preparing for a review petition against the judgement,[112] Chief Justice S K Sinha declared the sixteenth amendment dead and hurriedly called a meeting of the Supreme Judicial Council within two days of the publication of the full-text verdict. That meeting adopted a Code of Conduct for the higher court judges.[113] In reaction, the offended lawmakers called the government to refuse compliance of the Appellate Division verdict through constitution reprint. On September 13, 2017, Parliament unanimously passed a resolution for taking "proper" legal steps towards cancelling the verdict and expunction of the Chief Justice's "unconstitutional, objectionable and irrelevant" observations therein.[114] The Parliament's combative engagement with this amendment is anything but a dialogue. Scenes changed swiftly after that and, by November 11, 2017, Chief Justice Sinha was forced to leave the country "for treatment" and later resigned as the Chief Justice.[115]

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[110] Ashutosh Sarkar and Shakhawat Liton, "JS's authority to impeach SC Judges: Bangladesh High Court scraps 16th amendment to Constitution Govt to appeal", *The Daily Star* (Dhaka, 11 November 2017), online: https://www.thedailystar.net/frontpage/hc-scraps-16th-amendment-1219480.

[111] Nazrul Khasru, "Justice Sinha's 'Broken Dream': A Death Knell of the 16th Amendment Judgment", *Bangladesh Law Digest Blog* (11 December 2018), online: http://bdlawdigest.org/justice-sinhas-broken-dream.html.

[112] Ashutosh Sarkar, "Chief justice steps down", *The Daily Star* (Dhaka, 12 November 2017), online: https://www.thedailystar.net/frontpage/chief-justice-steps-down-1489819.

[113] Tribune Report, "Supreme Judicial Council reinstated, SC judges get their own code of conduct", *The Dhaka Tribune* (Dhaka, 03 August 2017), online: http://www.dhakatribune.com/bangladesh/court/2017/08/03/supreme-judicial-council-reinstatedsc-judges-get-code-conduct/.

[114] New Nation Report, "JS Will Again Pass 16th Amendment", *The New Nation* (Dhaka, 5 August 2017), online: http://thedailynewnation.com/news/143137/js-will-again-pass-16th-amendment.html.

[115] D.S. Report, "PM critical of CJ's remarks", *The Daily Star* (Dhaka, 22 August 2017); D.S. Report, "AL leaders now calling for CJ to step down", *The Daily Star* (Dhaka 23 August 2017); D.S. Report, "I am completely well, says Chief Justice SK Sinha as he leaves country", *The Daily Star* (Dhaka, 13 October 2017); D.S. Report, "Chief justice steps down", *The Daily Star* (Dhaka, 12 November 2017); D.S. Report, "Forced to

Review petition against the Appellate Division judgement is still pending. The AL government has not reprinted the Constitution as per the traditions of eighth, fifth, seventh and thirteenth amendment judgments. Subsequent Chief Justices also did not call any meeting of the Supreme Judicial Council. Now, the opinions are divided on the exact status of the sixteenth amendment. While some argue that pending the review petition, the Sixteenth Amendment should hold the ground, and others argue that sixteenth amendment is no more the part of Constitution as per the trends of eight, fifth, seventh and thirteenth amendment cases.[116] The third opinion is that currently, there is a vacuum of law regarding judges' removal. This argument was pleaded in a contempt of court-related case later to which the Court did not give any clear answer.[117] On a subsequent occasion, three judges of the supreme Court facing misconduct charges were instructed by the then Chief Justice to refrain from their respective benches. It was not clarified whether the Supreme Judicial Council would investigate them or whether they be subjected to the parliamentary removal process.[118]

3. COULD THE DIALOGIC MODEL BE APPLIED IN BANGLADESH?

Now the question is how and why the *Charter* and HRA's dialogic model could be relevant for Bangladesh. While Bangladesh's judicial review premise is clearly a combative and non-cooperative one, does she have any prospect for the system's dialogic transformation? Careful observations of some undercurrents in Bangladesh's judicial review systems seems to indicate some leeway. I may try to build a case by drawing analogical comparison with some commonwealth jurisdictions like Hong Kong, Singapore, Malaysia, and India. However, in doing this, I must face some credible objections against 'over generalisation' of the dialogic premise and respond why those should not stand in the way of my basic arguments.

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quit: BNP, No pressure: AL", *The Daily Star* (Dhaka, 12 November 2017). For a compendium of all the news on this incident, online: https://www.thedailystar.net/tags/chief-justice-surendra-kumar-sinha.

116 Haroon Habib, "Bangladesh: Judiciary v. Parliament", *The Hindu, Frontline* (New Delhi, 18 August 2017), online: https://frontline.thehindu.com/world-affairs/judiciary-vs parliament/article9794951.ece. The later argument is also backed by reliance on article 112 of the constitution, which requires Parliament to 'act in aid of the Supreme Court'. See, M. Rafiqul Islam, "Judging apex judges by parliamentarians", *The Daily Star, Law and Our Rights* (Dhaka, 18 July 2017), online: https://www.thedailystar.net/law-our-rights/law-vision/judging-apex-judges-parliamentarians-1434616.

117 Tribune Report, "High Court hears argument over existence of contempt law" *Dhaka Tribune* (Dhaka, 10 March 2014), online: https://www.dhakatribune.com/uncategorized/2014/03/10/high-court-hears-argument-over-existence-of-contempt-law.

118 TBS Report, "A catch 22 for the Supreme Court", *The Business Standard* (Dhaka, 25 August 2019), online: https://tbsnews.net/bangladesh/court/catch-22-supreme-court.

(a) 'Dialogic' Judicial Review in Some Commonwealth Jurisdictions

The Dialogic formulation has been advocated an array of diverse legal systems.[119] Yap Po Jen has studied three Asian common law jurisdictions — Singapore, Malaysia, and Hong Kong — who represent weak judicial review systems. Po Jen argues that these courts have engaged in a "thin dialogic review" via the application of some sub-constitutional doctrines like signalling of unconstitutionality rather than declaring straight invalidity,[120] and delayed declarations of invalidity by keeping the matter in hold and allowing public momentum to gather, etc.[121] If Po Jen's mere signalling or deferred declaring of invalidity is a thinly veiled dialogue, Bangladesh Supreme Court's decision in cases like *Mukhlesur Rahman*, *Sheikh Abdus Sabur* and *Kudrat Elahi Panir* seems to pass the test. Also, the Supreme Court's position about applying international customary and treaty law obligations of Bangladesh would potentially pass the sub-constitutional dialogue test. *HM Ershad v. Bangladesh* was a case related to the petitioner's right to leave and enter the country freely without his passport being unlawfully held by the government. The petitioner was relying on Article 13 of the Universal Declaration of Human Rights 1948. Granting him the remedy prayer for, Justice BB Roy Chowdhury held as follows:

> The local laws, both constitutional and statutory, are not always in consonance with the norms contained in the international human rights instruments. The national courts should not, I feel, straight-away ignore the international obligations, which a country undertakes. If the domestic laws are not clear enough or there is nothing therein, the national courts should draw upon the principles incorporated in the international instruments. But in the cases where the domestic laws are clear and inconsistent with the international obligations of the state concerned, *the national courts will be obliged to respect the national laws but shall draw the attention of the lawmakers to such inconsistencies.*[122] (Emphasis supplied)

Like Yap Po Jen, Rehan Abeyratne and Didon Misri took upon the Indian system as a potential candidate for dialogic judicial review. Abeyratne and Misri argue that the Indian Supreme Court's socio-economic rights activism[123] — which has been fully endorsed by Bangladesh Supreme Court — invites a dialogue between the Court and other coordinate branches. This is particularly true when the Indian Supreme Court draws different quasi-legislative guidelines to remain in force until Parliament attempts legislation in

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[119] Yap Po Jen, *Constitutional Dialogue in Common Law Asia* (Oxford University Press 2015) at 80–86.

[120] *Ibid.*, at 88–89.

[121] *Ibid.*, at 101.

[122] *HM Ershad v. Bangladesh*, II Appellate Division Cases (2005) 371 at para. [11] (BB Roy Chowdhury J.).

[123] Rehan Abeyratne and Didon Misri, "Separation of Powers and The Potential for Constitutional Dialogue in India" (2018) 5(2) Journal of International and Comparative Law 363, at 371-376.

that area.[124] Abeyratne and Misri present the Indian Parliament's response on several occasions, e.g., enactment of the Protection of Women from Domestic Violence Act as examples of constitutional dialogue ensuing from judicial activism. If this is a viable sign of the much-expected dialogue, Bangladesh supreme court's environmental rights review could be a stepping-stone towards that direction. As mentioned earlier, the right to environment found its place in the Constitution through the Fifteenth Amendment.

As regards the Indian Supreme Courts' basic structure jurisprudence, Mark Tushnet and Rosalin Dixon argue that the capability of the Parliament to respond to such decision through further amendment shows a weakness of the review and non-penultimate of judicial ruling on constitution amendment.[125] While this may signal a *Charter* and HRA like dialogic tune, the Indian Parliament's response to amendment nullification has not always been coherent. On occasions, the Indian Parliament promptly neutralised the Supreme Court verdicts through fresh constitutional amendments.[126] On some other occasions, the Indian Supreme Court nullified the reactionary amendment again.[127] If the non-penultimacy of judicial opinion is a hallmark of dialogic review, Indian Supreme Court's amendment review might be combatively dialogic. Bangladesh's amendment jurisprudence is however exceedingly complex. While the legislature acquiesced on fifth, seventh, eighth and thirteenth amendment reviews, it was fiercely combative over the sixteenth amendment review. Even in the sixteenth amendment, the Parliament has not penultimately and decisively spoken over the Court's decision except those verbal rants against the Court in the floor of the House. Again, if we take the Fifteenth Amendment's endorsement of basic structure doctrine as a sign, the Parliament has *ex post facto* endorsed the Court's claim to review constitutional amendments. In that sense, unlike India, Bangladesh Supreme Court's amendment review is antagonistic if not combative. However, this is not to claim that signs are not there for a possible dialogic discourse in the future.

Despite the Constitution's strong exposure of the power, the advisory jurisdiction of the Supreme Court has remained grossly underutilised.[128]

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[124] *Vishaka and others v. State of Rajasthan and others*, AIR 1997 (Supreme Court of India) at 3011.

[125] Mark Tushnet and Rosalind Dixon, "Weak-form review and its constitutional relatives: An Asian perspective", in Rosalind Dixon and Tom Ginsburg, ed., *Comparative Constitutional Law in Asia* (Edward Elgar Publishing 2014) at 102; Rosalin Dixon, "Creating dialogue about socio-economic rights: Strong-form versus weak-form judicial review revisited" (2007) 5(3) International Journal of Constitutional Law 391.

[126] Chintan Chandrachud, "Nehru, Non-Judicial Review, & Constitutional Supremacy" (2018) 2 Indian Journal of Constitutional & Administrative Law 45, at 50-52.

[127] Swati Jhaveri, "Interrogating Dialogic Theories of Judicial Review" (2019) 17(3) International Journal of Constitutional Law 811.

[128] *S. M. Masum Billah*, "Making the journey of constitutionalism smooth: Is 'Advisory Jurisdiction' a catalyst?" (2008) 19(1) Dhaka University Law Journal 131, at 159-160.

During the fifty years of Bangladesh's existence, the jurisdiction was resorted only twice. On both the occasions, despite some US styled strong "political question" arguments in favour of declining the requests,[129] the Supreme Court did not shy away from coming to the aid of the government and Parliament. In the *Special Reference No 1 of 1995*, the Supreme Court clarified the constitutional consequences of the resignation of 147 opposition Members of Parliament from the House and helped the legislative branch avoid a constitutional vacuum in its functioning. In the *Special Reference No 1 of 2009*, the political government and peoples' representatives in Parliament faced extreme pressure from the military to try Bangladesh Rifles (BDR) — currently the Border Guards Bangladesh (BGB) mutineers under martial law courts. The 2009 mutiny within Bangladesh's border force left around a hundred military officers killed, and the furious military force was vying for a harsh and immediate justice under military tribunals. The Supreme Court helped the government and the Parliament by favouring regular criminal Court and fair trial standards. Accordingly, the BDR Mutiny Act 2009 was passed, and the trial was conducted under normal criminal court process.[130] If the two advisory opinions of the Supreme Court of Bangladesh are any indication, it may be argued that there is a very rich constitutional potential for wider acceptance of a dialogic judicial review framework.

(b) 'Over generalising' the Dialogic premise?

While advocating a broader acceptance of the dialogic model for Bangladesh, it must be noted that there is a risky tendency of overly generalising the model. As shown in Part I, the model is not asserted coherently even in Canada and the UK. Hogg and Bushell agrees that the dialogic theory has not been consistently used by the Canadian Supreme Court in some so-called "second look cases" where the court was asked to review the validity of laws passed to replace a law earlier declared invalid by the court. Sometimes the court acquiesces to the legislature by saying that dialogue did not mean judicial penultimacy in legislative policy making. Some other times, the court invalidates even the second law saying that dialogic theory cannot be applied to force it to blindly accept the good faith defense.[131]

Similarly, Aileen Kavanagh in the UK argues that dialogic theory has been used to justify even highly intrusive decisions made by over-relying on HRA's section 3 to "rewrite legislation". It has also been used to justify the Court's overly deferential approach to the legislature and passive acceptance of potential rights violations leading to foreclosure of legislative input on rights issues. The UK parliament, on its part, is criticised for being too passive. Some

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[129] For a political context and culture-specific argument for the development and entrenchment of judicial review of political questions including the constitutional amendments in Bangladesh, please see Uddin and Nabi (n. 10).

[130] *Special Reference No 1 of 2009*, 15 BLC (Appellate Division of Bangladesh Supreme Court) 1 at paras. [15], [16].

[131] Hogg and Bushell (n. 16) at 19-25.

portray the almost uniform practice of legislative compliance with declarations of incompatibility in the UK as a lamentable 'legislative capitulation' to the judiciary which did not match the ideal of open, transparent discussion between equals. Some also argued that the Executive and legislature are unduly aggressive in areas such as immigration, national securities etc which have yielded "a dysfunctional dialogue".[132]

Beyond the UK, Swati Jhaveri has sharply questioned Yap Po Jen and Tushnet-Dixon's oversimplified and overinclusive reading of the dialogic Model.[133] She has branded Yap Po Jen's thin dialogic theory as one of excessive deferral rather than dialogue.[134] She also argues that the Indian parliament's response to the court's amendment jurisprudence is a politically motivated[135] and combative exchange rather than dialogue. Jhaveri also refuses to accept the Indian PIL activism as dialogic.[136] She argues that the Indian Supreme Court's PIL jurisprudence lacks coherent reasoning and leaves little scope for the legislature to engage in dialogic reply. While much of her examples and analysis are not disputed, it may be argued that Jhaveri's refusal to accept the particular system as 'dialogic' should not preclude us from seeking ways to address the deferential and/or combative tendencies of the system and arguing for general adoption of a dialogic premise based on whatever little signs there already are. Without going deep into Jhaveri's "much ado about (the) metaphor"[137] of dialogue, it may sensually be claimed that in as much as the exchange of views and wisdom and positive or negative influencing of each other is concerned, there are some sort of institutional dialogue going on between the courts and legislatures in the above mentioned jurisdiction. Disagreement over the terminology to be used, should not prevent an otherwise reasonable call for bolstering institutional dialogic interaction between the court and legislature. Chintan Chandrachudh has done the same in relation to India and called for a "balanced constitutional dialogue" approach to judicial review.[138] Though the fundamental rights review jurisprudence of Indian Supreme Court has accorded penultimacy in rights interpretation, a non-dialogic gesture albeit, its PIL framework has fostered a co-operative mode of constitutionalism participated by all the three branches of government.[139]

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[132] Aileen Kavanagh, "The Lure and The Limits of Dialogue" (2016) 66(1) University of Toronto Law Journal 83, at 99, 105-106.

[133] Swati (n. 127).

[134] Ibid., at 818.

[135] Ibid., at 830-31.

[136] Ibid., at 819.

[137] Hogg and Bushell (n. 16).

[138] Chintan Chandrachud, *Balanced Constitutionalism: Courts and Legislatures in India and the United Kingdom* (Oxford: Oxford University Press, 2020) at 61.

[139] Hickman (n. 43).

CONCLUSION

Despite some disagreement over the coinage, the "dialogue" premise of judicial review is travelling across the globe. It has effectively been assimilated with the weak judicial review systems of the UK and Canada. Scholars are trying to discover latent dialogic premises in some Commonwealth systems of weak judicial review like Singapore, Malaysia and Hongkong. Academics have tried the same with strong judicial review systems like India and even the U.S[140]. This article has tried to do the similar with Bangladesh. It has identified three particular areas of Bangladesh's strong judicial review that call for a strong dialogic logic. It is argued that without a dialogic logic, Bangladesh Supreme Court's fundamental rights review of statute law, PIL activism in relation to socio-economic rights and constitutional amendment review remain deeply problematic.

The so far ignored signs from sub-constitutional reviews, quasi-legislative judicial guidelines, and combative, co-operative parliamentary gestures in amendment reviews and the two advisory opinions of the Supreme Court of Bangladesh suggest that Dialogic Model is rather a strong candidate here. If the Parliament's capability and say in the governance process is not deliberately suppressed, which Bangladesh's dysfunctional Westminster system unfortunately does,[141] and if the parliamentary committee system is elaborated with a judiciary committee and a human rights committee, Bangladesh's current landscape of judicial review does not appear an unfit candidate for adoption of the dialogic premise sponsored by the *Charter* and the HRA. Problem in Bangladesh, however, lies in the executive and legislative branches' continued disinterest in deliberative engagement with the judiciary. Hence the judicial review in Bangladesh has remained manifestly monologic and antagonistic.

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[140] Bateup (n. 22); Tushnet (n. 23).

[141] M. Jashim Ali Chowdhury, "'Eastminster' Adaptations in the Westminster Model: The Confusing Case of Bangladesh", *Dhaka Law Review Blog* (11 February 2020), online: https://www.dhakalawreview.org/blog/2020/02/eastminster-adaptations-in-the-westminster-model-the-confusing-case-of-bangladesh-4488.