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Contents

Protecting Secularism in Bangladesh: A Critique of the Constitutional Unamendability Approach

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Abstract: *Bangladesh's struggle with religious fundamentalism is persistent. The liberal political force that spearheaded the country's liberation war in 1971 tried to adopt a hard secularist policy by banning the religion-based political parties. However, the newly independent nation soon faced conservative and Islamist upsurge. Secularism was omitted, and Islam was officially endorsed as the State Religion. In 2011, the current secularist regime revived Secularism. It, however, failed to remove the State Religion clause. The ban on religion-based political parties also could not be revived to its original extent. Still, the Parliament tried to entrench and better protect the compromised version of Secularism. An 'eternity clause' inserted through the Fifteenth Amendment Act 2011 made a large part of the Bangladesh Constitution, including the principle of Secularism, totally unamendable by any future parliament. This paper examines whether the 'eternity clause' ultimately saves the future of Secularism in Bangladesh. It argues that textual entrenchment in the form of total unamendability may not prevent what the American constitutional experts call the 'informal', 'off text' or 'stealth' amendments to the Constitution. It also argues that the judicial doctrine of the implicit unamendability of 'basic structures' may not be adequate to safeguard against any future dismemberment of Secularism in Bangladesh.*

Keywords: Secularism, Constitutional Unamendability, Constitutional Amendment, Judicial Review, State Religion, Politics.

1. Introduction

Like her South Asian neighbours, Bangladesh has to go through a protracted history of religious tension, communal riot, and anti-minority violence. At the end of the British Empire, the separation of

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India and Pakistan in an antagonistic religious line[1]has left its legacy for Bangladesh. At independence in 1971, Bangladesh tried to adopt a robust constitutional Secularism that would strictly prohibit religion-based political parties and even the use of religion as a tool of politics.[2] However, the concept remained contested by the conservative and religious forces. After the demise of Bangabandhu Sheikh Mujibur Rahman, the liberal spearhead of Bangladesh's Liberation War, Secularism was dropped from the Constitution in 1976. Again in 1988, Islam was given the status of State Religion. Since the mid-1970s, political parties in the name of Islam and Muslims witnessed a mushroom growth albeit with some popularity. In 2011, with Bangabandhu's daughter Sheikh Hasina returning to power with a landslide victory and an absolute supermajority, Secularism was revived with a compromised definition, though. The Fifteenth Amendment Act of 2011 inserted an eternity clause[3] in the Constitution and made the principle of Secularism – along with many other parts and provisions of the Constitution – unamendable by way of any future amendment. Since then, the step has remained the subject of intense political, legal, cultural controversies, leaving the constitutional experts and citizen groups in doubt over the sustainability and suitability of the unamendability approach.

The emergence of the Unamendability Approach to constitutional entrenchment is a recent development in global constitutional literature. While a whole Constitution is not likely to be declared *unamendable*, a study by Yaniv Roznai demonstrates that a growing number of countries now attempt to insulate parts of their constitutions from amendments.[4] Such an insulation is being done by the legislative as well as judicial entrenchments. Parliaments

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1 Mehreen Hassan, 'The Two Nation Theory and the Creation of Pakistan', *Asian Journal of Social Sciences and Management Studies*, Vol. 7 (2), 2020, p.80

2 Article 38, *The Constitution of Bangladesh.*

3 Article 7B, *Ibid.*

4 Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers*, PhD Dissertation, London School of Economics 2014, p.27, available at *http://etheses.lse.ac.uk/915/*, accessed on 19 November 2021.

consciously take the route of 'codified unamendability'[5] by introducing eternity or perpetuity clauses in the Constitution.[6] The highest judiciaries also have claimed 'constructive or implicit unamendability'[7] for certain parts or provisions of the Constitution, which they consider its basic structures.[8] The judicial branch may likely label any constitutional amendment destroying a basic structure as an 'unconstitutional constitutional amendment'.[9]

The eternity, perpetuity or unamendability clauses and the judicial invalidation of "unconstitutional constitutional amendments" are "not devoid of reasoning".[10] Eternity clauses and the basic structure doctrine work to resist amendments of some constitutional provisions and principles through formal amendment procedure.[11] Still, there are questions over the normative propriety of eternity clauses[12] and the

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5 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions,* Oxford University Press, 2019, p. 140.

6 Yaniv Roznai, 'The Uses and Abuses of Constitutional Unamendability' in Xenophon Contiades and Alkmene Fotiadou (eds), *Handbook of Comparative Constitutional Change*, Routledge, 2020, pp. 150-166.

7 Richard Albert, 'Constructive Unamendability in Canada and the United States', *The Supreme Court Law Review,* Vol. 67 (I), 2014, pp. 181, 183, 184.

8 J. U. Talukder and M J. A. Chowdhury, 'Determining the province of judicial review: A Re-evaluation of Basic Structure of the Constitution of Bangladesh', *Metropolitan University Journal,* Vol. 2 (I), 2008, pp. 161, 163.

9 R. G. Wright, 'Could a Constitutional Amendment be Unconstitutional?', *Loyola University Chicago Law Journal,* Vol, 22(4), 1991, p.741; Yaniv Roznai, 'Unconstitutional Constitutional Amendments— The Migration and Success of a Constitutional Idea', *The American Journal of Comparative Law,* Vol. 61 (3), 2013, pp. 657; Richard Albert, 'How a Court Becomes Supreme: Defending the Constitution from Unconstitutional Amendments', *Maryland Law Review,* Vol. 77 (I), 2017, pp. 181; D. Landau, R. Dixon and Y. Roznai, 'From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution?' *Lessons from Honduras*, Vol. 8 (I), 2019, p. 40

10 *Supra note 4*, pp. 124-126.

11 G. Mader, 'Binding Authority: Unamendability in the United States Constitution— A Textual and Historical Analysis', *Marquette University Law Review*, Vol. 99(4), 2016, pp. 841.

12 A. Bikel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Yale University Press, 1986, pp. 16-18; M. Abdelaal, 'Entrenchment Illusion: The Curious Case of Egypt's Constitutional Entrenchment Clause', Vol. 16(2), *Chicago-Kent Journal of International and Comparative Law 1*; L. H. Tribe, 'A Constitution We Are Amending: In Defense of a Restrained Judicial Role', *Harvard Law Review,* Vol. 97(2), 1983, p. 433,; E. Katz, 'On amending constitutions: the legality and legitimacy of constitutional entrenchment', *Columbia Journal of Law and Social Problems*, Vol. 29(2), 1996, p. 251.

basic structure doctrine.[13] Also, there are questions about the effectiveness of these entrenchment techniques in preventing undesirable amendments.[14]

This paper addresses the effectiveness question in the context of Bangladesh's 'unamendable' Secularism. The next part of the article, Part 2, will briefly introduce the constitutional amendment process in Bangladesh, the Supreme Court's basic structure jurisprudence and the recently introduced eternity or perpetuity clause in the Constitution. Part 3 would present some theories that claim that constitutions may be amended even when there is either an exceptionally hard amendment process or no conceivable textual and formal ways to amend. Known as the theories of off-text or informal amendments,[15] these theories are laid down mostly by the American scholars who

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13 Rokeya Chowdhury, 'The Doctrine of Basic Structure in Bangladesh: From Calfpath to Matryoshka Dolls', *Bangladesh Journal of Law*, Vol. 14 (1-2), 2014, p. 43; Salimullah Khan, 'Leviathan and the Supreme Court: An Essay on the 'Basic Structure' Doctrine', *Stamford Journal of Law*, Vol. 2, 2014, p. 89; R. Stith, 'Unconstitutional Constitutional Amendments: The Extraordinary Power of Nepal's Supreme Court', *American University Journal of International Law and Policy,* Vol. 11(1), 1996, p. 47; S. Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine*, Oxford University Press 2009; R. Dixon and D. Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment', *International Journal of Constitutional Law*, Vol. 13(3), 2015, p.606; C. Chandrachud, 'Constitutional Falsehoods: The Fourth Judges' Case and The Basic Structure Doctrine in India' in Richard Albert and Bertil Emrah Oder (eds), *An unamendable Constitution? Unamendabilities in Constitutional Democracies,* Springer, 2019, pp. 149-168; E. Daly, 'Translating Popular Sovereignty as Unfettered Constitutional Amendability', *European Constitutional Law Review*, Vol. 15(4), 2019, p. 619.

14 T. Ginsburg and James Melton, 'Does the Constitutional Amendment Rule Matter at all? Amendment Cultures and the Challenges of Measuring Amendment Difficulty', *International Journal of Constitutional Law,* Vol.13(3), 2015, p.686; M. M. Khaled and M. M. Uddin, 'The Role of Procedural Rigidity or Flexibility on Amendment Frequency: A Study of the U.S. State Constitutions', *The Chittagong University Journal of Law,* Vol.17, 2012, p.91; V. C. Jackson, 'The Myth of (un)amendability of the US Constitution and the Democratic Component of Constitutionalism', *International Journal of Constitutional Law*, Vol. 13(3), 2015, p.575.

15 Stephen M. Griffin, 'Against historical practice: facing up to the challenge of informal constitutional change', *Constitutional Commentary*, Vol. 35, 2020, p.79; O. Doyle, 'Informal constitutional change', *Buffalo Law Review*, Vol. 65(5), 2017, p. 1021; N. Lupo, 'Two Examples of Quasi-Constitutional Amendments from the Italian Constitutional EVolution-A Response to Richard Albert', *Buffalo Law Review*, Vol. 65(5), 2017, p. 1039; R. A. Strickland, 'The Twenty-Seventh Amendment and Constitutional Change by Stealth', *Political Science and Politics*, Vol. 26(4), 1993, p. 716

tried to make sense of many revolutionary changes the American constitutional system accomplished *despite* its excessively rigid constitutional amendment procedure and very few formal constitutional amendments. Part 4 would then briefly describe the historical journey of Bangladesh's constitutional principle of Secularism. This article would try to explain how the principle of Secularism underwent various formal and informal or off-text amendments over the time. It would also explain how the 2011 entrenchment of Secularism through an eternity clause, *i.e.,* article 7B of Bangladesh Constitution and its judicial entrenchment through the Supreme Court's 'basic structure' jurisprudence, may be of little utility in preventing its future dismemberment. Part 5 concludes the paper by re-emphasizing that Secularism's textual entrenchment through the eternity clause and judicial entrenchment through the basic structure doctrine may not have sealed its fate for once and all.

2. Bangladesh's Journey Towards Constitutional Unamendability

As the highest and the supreme law of the land, the Constitution should be difficult, if not impossible, to amend. Accordingly, a typical constitutional amendment clause may provide hard, harder, or the hardest procedures to follow. The majority of the written constitutions prescribe a *hard* amendment process. Bangladesh, for example, until recently required a two-thirds majority in its unicameral Parliament for constitutional amendments.[16] Some constitutions provide a *harder* amendment process. The Union of India, for example, requires a two-thirds majority of the members present and voting in each House of its bicameral Federal Parliament[17] plus the support of no less than one-half of the states in certain cases.[18] Some other constitutions provide the *hardest* procedure of amendment. The United States, for example, requires ratification and concurrent action by the state legislatures, or specially called constitutional conventions and a two-thirds majority of both houses of its bicameral federal legislature.[19]

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16 Article 142, *The Constitution of Bangladesh.*
17 Article 368(2), *The Constitution of India, 1949.*
18 *Ibid.*
19 Article V, *The Constitution of the United States, 1789.*

In 1972, Bangladesh's original Constitution did not contain any unamendability or eternity clauses. The Constitution could be amended through a bill passed on the floor of the House by a two-thirds majority of the total members of Parliament.[20] There was no further procedural or substantive limitation on the Parliament's amendment power. Any part or provision of the Constitution could be amended by alternation, addition, substitution or repeal.[21] In 1979, the Fifth Amendment to the Constitution introduced some changes. This time, some provisions and parts of the Constitutions were enlisted as a special category - amendment to which would require a two-thirds parliamentary majority plus a referendum of the people.[22] Understandably, the sponsors of the Fifth Amendment considered certain provisions of the Constitution more important or "basic" than the others and further entrenched those.[23] Those provisions were notunamendable, though.

However, in 1989, the Supreme Court of Bangladesh, in its famous *Anwar Hossain Chowdhury vs Bangladesh*[24] judgment, endorsed the Indian Supreme Court's Basic Structure Doctrine[25] and declared some unspecified[26] provisions, principles or parts of the Constitution as its basic structures and hence unamendable. In 1988, the Eight Amendment to the Constitution introduced Islam as a State Religion for Bangladesh.[27] It also decentralized the Supreme Court of Bangladesh by establishing six divisional benches of the High Court Division that would sit outside the capital city of Dhaka.[28] Two writ

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20 Article 142(1)(a)(ii), *The Constitution of Bangladesh*.

21 *Ibid*.

22 As per the list mentioned in Article 142(1A), the Preamble and Articles 8, 48, 56, 92A and 142, as they stood then, would require popular referendum above the parliamentary two-thirds majority.

23 M. Jashim Ali Chowdhury, 'Negotiating article 142(1a) for the 'basic structure'' *The Daily Star*, Dhaka, 6 March, 2010, available at *https://archive.thedailystar.net*, accessed on 19 November 2021.

24 [1989] BLD (Spl) 1.

25 *Keshvananda Bharati vs State of Kerala* [1973] AIR SC 1461.

26 *Anwar Hossain Chowdhury* (n 24) [377] (Shahabuddin Ahmed J. mentioned a list of eight basic features), [443] (Mohammad Habibur Rahman J. mentioned a ninth one), [292] (Badrul Haider Chowdhury J. mentioned twenty-one unique features, some of which he thought, without specifying, were basic).

27 Article 2A, *The Constitution of Bangladesh*.

28 Article 100, *Ibid*.

petitions were filed with the Supreme Court – one challenging the High Court decentralization and another challenging the State Religion. The Supreme Court did not take up the State Religion case for hearing until 2011. The High Court decentralization case, *Anwar Hossain Chowdhury v Bangladesh*, was, however, decided immediately.

The judges in *Anwar Hossain Chowdhury* case considered the unitary and centralized character of the Supreme Court as one of the basic structures of the Constitution and hence unamendable. The decentralization part of the Eighth Amendment was accordingly declared unconstitutional. However, the judgment did not claim that the "basic structures", be it the Court's unitary character or any other, could not be changed or amended in any way.[29] The Court argued that 'the power to frame a Constitution is primary whereas a power to amend a rigid constitution isderived from the Constitution.[30] It may mean that while the Parliament could not amend the basic structures of an existing constitution, the people could democratically adopt a new constitution, perhaps with some set of different basic structures. Bangladesh does not have any constitutionally sanctioned way of adopting a new constitution except through changing it through the parliamentary amendment procedure. The result of *Anwar Hossain Chowdhury* case was, therefore, the practical unamendability of an unspecified list of "basic structures" that the Court may,from time to time, designate as such.[31]

In 2011, the Fifteenth Amendment to the Bangladesh Constitution[32] formally declared certain provisions and parts unamendable. A newly inserted eternity clause made the Preamble, all articles of Part I (The Republic), Part II (Fundamental Principles of State Policy), Part III (Fundamental Rights; subject to the Emergency Provisions in Part IX), Part XI (Transitional and Temporary Provisions), the Article 150, and

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29 Kawser Ahmed, 'What is actually the basic feature doctrine?' *The Daily Star*, Dhaka, 2018, 5 June, available at *https://www.thedailystar.net*, accessed on 12 November 2021.

30 *Supra note 24,* pp. 255-256.

31 M Jashim Ali Chowdhury and Nirmal Kumar Saha, 'Amendment Power in Bangladesh: Arguments for Revival of Constitutional Referendum', *Indian Journal of Constitutional Law*, Vol. 9, 2020, pp. 39-61.

32 *The Constitution (Fifteenth Amendment) Act 2011*, available at *http://www.clcbd.org/document/834.html*, accessed on 19 November 2021.

'all the provisions of articles relating to the basic structures of the Constitution' unamendable by way of 'insertion, modification, repeal, substitution or by any other means.[33] A rough estimate of the eternity clause's list reveals that around 47 articles, which constitute almost 31% of the whole Constitution, are now made unamendable. Added to this list are the other unspecified provisions which the judiciary may time to time declare as the Constitution's 'basic structures'.[34] Compared to the global standards of eternity or unamendability clauses,[35] Bangladesh's approach has been called 'deviant'[36] and 'extremely wide'.[37]

By introducing the eternity clause in 2011, Bangladesh has become the second country in the South Asian region to have codified constitutional unamendability. The Afghan Constitution drafted under the supervision of the Western constitutional mind-sets was the only other example in the region.[38] That unamendable Constitution of Afghanistan has recently withered away in the face of a resurgent Taliban, making Bangladesh the only country in the region with an eternity clause.[39] This article proposes considering the effectiveness of

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33 Article 7B, *The Constitution of Bangladesh*.

34 *Ibid*.

35 Usually, the eternity clause is invoked to protect identity principles of the State such as federalism, republicanism, official religion and secularism. But Bangladesh included some parts of the constitution that constitutes historical materials like speeches, proclamations relating to its liberation war of 1971.

36 Shakhawat Liton, 'How the controversial 15th amendment curtailed people's power'. *The Daily Star*, Dhaka 2013, 12 September, available at *https://www.thedailystar.net/news/how-the-controversial-15th-amendment-curtailed-peoples-power*, accessed on 14 September 2021; Kawser Ahmed, 'Article 7B or Death of the Basic Feature Doctrine?', *The Daily Star Law & Rights,* Dhaka, 2018, 12 June, available at *https://www.thedailystar.net/law-our-rights/article-7bor-the-death-the-basic-feature-doctrine-1589884*, accessed on 14 September 2021.

37 Ridwanul Hoque, 'Eternal Provisions in the Constitution of Bangladesh: A Constitution once and for all?' in Richard Albert & Bertil Emrah Oder (eds), *An unamendable constitution? Unamendabilities in Constitutional Democracies*, Springer 2018, Vol. 218, pp. 195-230

38 Article 149, The Constitution of Afghanistan, 2004, ("The principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism shall not be amended. Amending fundamental rights of the people shall be permitted only to improve them.")

39 For an excellent analysis of the reasons behind the failure of Afghanistan's Western liberal value laden constitution in the hands of the Taliban see: Jennifer Murtazashvili, 'The Collapse of Afghanistan', *Journal of Democracy* Vol. 33(1), 2022, p. 40, ; available at *https://www. journalofde mocracy. org/articles,* last accessed on 09 May 2023.

Bangladesh's eternity clause in actually preserving the unamendable parts and provisions. While a Taliban style capture of the state might be unlikely in Bangladesh, there is still a powerful conservative resistance to the key constitutional principles - including Secularism – entrenched by the 2011 eternity clause.[40] It appears that should the current regime depart in the near or distant future, the opponents of Secularism might find a bunch of formal and informal ways through which they may short circuit the eternity clause and get the unamendable parts like Secularism amended. The next part of the article will theoretically consider the ways the off-text and informal amendments to an otherwise rigid constitution could happen.

3. The Theories of Off-text or Informal Constitutional Changes

A Constitution is formally amended following the procedure mandated in its texts. While a lesser number of formal amendments should ideally indicate the greater longevity of constitutions, there are doubts as to whether it is the rigidity of the amendment procedure or the presence of a change-resistant society or even the culture of informal, off-text amendments that contribute to the lower frequency of formal amendments. As is asserted by Ginsburg and Melton, the choice of amendment rule is a less important predictor of constitutional change than the amendment culture of a given political society.[41] Studies find that 'formally rigid constitutions die more frequently' than flexible ones.[42] While rigid but established constitutions like the U.S. may not be at the risk of total mortality, their structural and philosophical foundations may still be irreversibly changed by

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40 Ali Riaz, 'Islam, Islamization and politics in Bangladesh' in Christophe Jaffrelot and Aminah Mohammad-Arif (eds), *Politics and religion in South Asia: whither secularism? School of Advanced Studies in Social Sciences*, 2012, pp. 93-115.

41 Tom Ginsburg and James Melton, 'Does the Constitutional Amendment Rule Matter at all? Amendment Cultures and the Challenges of Measuring Amendment Difficulty', *International Journal of Constitutional Law*, Vol. 13(3), 2015, pp. 686-87.

42 Aziz Huq, 'The Function of Article V', *University of Pennsylvania Law Review*, Vol.162, 2013, p. 1165.

informal constitutional amendments that get around the formal amendment process.[43]

Article V of the U.S. Constitution provides an extremely hard amendment process. Amendments may be proposed either by the Congress with a two-thirds vote in both of its Houses or by a Constitutional Convention called by the Congress at the request of two-thirds of the state legislatures. Given the strong bipartisan contest in the U.S., both routes are exceptionally hard to attempt and materialize in practice.[44] Even if Congress proposes amendments, the requirement of ratification by three-fourths of the state legislatures or state-level constitutional conventions is even harder to achieve.[45] American constitutional scholars have criticized Article V for allocating exceptional powers in the states in the amendment process[46] Dixon has described Article V as 'comatose',[47] and Strauss has called it 'functionally irrelevant'.[48] Levinsonhas called Article V 'an iron cage and its process next to impossible to achieve'.[49]

However, the constitutional changes continue to occur in the U.S. in silence and through informal socio-political development.[50] Aziz Huq[51] argues that the puzzling level of complexity and rigidity of the amendment process in the U.S. has led to 'informal flexibility […..] through [judicial] interpretation and various bisectional compromises'.

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43 Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions*, Cambridge University Press, 2009; R. Dixon, 'Partial constitutional amendments', University of Pennsylvania Journal of Constitutional Law, *Vol. 13(3), 2011, pp. 643,645-646.*

44 D. S. Lutz, 'Toward a Theory of Constitutional Amendment' *American Political Science Review* Vol. 88(2), 1994, pp. 335-369.

45 M. S. Paulsen, 'A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment', *The Yale Law Journal*, Vol. 103(3), 1993, pp. 677, 734.

46 C. L. Black Jr, 'The Proposed Amendment of Article V: A Threatened Disaster', *Yale Law Journal,* Vol. 72, 1962, pp. 957, 959-60.

47 R Dixon, 'Article V: The Comatose Article of Our Living Constitution?' *Michigan Law Review,* Vol. 66(5), 1968, pp. 931, 932.

48 D. A Strauss, 'The Irrelevance of Constitutional Amendments', *Harvard Law Review*, Vol. 114(5), 2001, pp. 1457, 1460

49 Sandford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It),* Oxford University Press, 2006, p. 160.

50 Richard Albert, 'Constitutional Amendment by Stealth', *McGill Law Journal*, Vol. 60, 2015, p. 673

51 *Supra note* 42, p. 1177

Richard Albert has called the process one of the informal amendments by 'desuetude of Article V'.[52] Changes are being brought through various constitutional actors' interpretations and practices that give rise to a new public understanding of constitutional provisions and establish constitutional conventions for later generations.[53] Stephen M Griffinhas described the process as 'amendment-level changes to the constitutional order outside the [formal] amendment process'.[54] Griffin[55] and Prakash[56] have studied the exercise of war power by various Presidents from a historical perspective. It appears that Congress's constitutional power to declare war[57] has been subdued by the successive U.S. Presidents who have routinely deployed troops into combat without obtaining congressional approval.[58] This practice has arguably introduced an informal amendment to the constitutional system.[59]

Apart from the War power, David Strauss has pointed out three more examples of off-text and informal amendments in the U.S. Constitution. First, there has been enormous growth in federal legislative competence vis-à-vis the states. Secondly, presidential powers, particularly that of foreign affairs, have expanded. Thirdly, the rise of the administrative state has changed the federation-state relationship in the U.S. beyond the framers' contemplation.[60] At the

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52 Richard Albert, 'Constitutional Disuse or Desuetude: The Case of Article V', *Boston University Law Review*. Vol.94, 2014, pp. 1029,

53 J. Jaconelli, 'The Nature of Constitutional Convention', *Legal Studies*. Vol. 19(1), 1999, pp. 24-27.

54 Stephen M. Griffin, 'The United States of America' in Dawn Oliver and Carlo Fusaro (eds), *How Constitutions Change: A Comparative Study,* Oxford: Hart Publishing, 2011, pp.357-378

55 Stephen M Griffin, *Long Wars and the Constitution*, Harvard University Press 2013.

56 S. B. Prakash, *The Living Presidency: An Originalist Argument against its Ever-expanding Powers,* Belknap Press, 2020.

57 Article I, *The Constitution of the United States*.

58 H. P. Monaghan, 'Presidential War-making', Boston University Law Review, Vol. 50(5), 1970, pp. 19-31.

59 B. Ackerman, *We the People, Volume 3: The Civil Rights ReVolution,* Harvard University Press, 2014); Akhil R Amar, 'Philadelphia Revisited: Amending the Constitution outside Article', *University of Chicago Law Review*, Vol. 55(4), 2010, p. 1043; D. A. Strauss, *The Living Constitution,* Oxford University Press; J. M Balkin and S. Levinson 'Understanding the Constitutional ReVolution', Virginia Law Review, Vol. 87(6), 2001, p. 1045; E. A. Young, 'The Constitution Outside the Constitution', Yale LJ ,Vol.117, 2007, pp. 408-473.

60 *Supra note* 48.

Constitution framing stage, the U.S. was mainly a contractual association between sovereign states forged on common purposes like the economy, defence, etc.[61] This relationship had drastically changed through off-text or informal amendments at the expense of the state powers. At various stages of the evolution of U.S. federalism, the Supreme Court sided with the federal expansion cases like *McCulloch v. Maryland*[62] and *Crowell v. Benson*[63] etc.

In other parts of the world, rigidity or impossibility of the amendment process has encouraged the constitutional actors to attempt what Richard Albert calls the 'amendments by stealth'. Amendment by stealth is a species of the informal amendment. Both processes circumvent the formal amendment rules and create practices that bind successive generations of constitutional actors and ripe into constitutional conventions.[64] Amendment by stealth, however, is deliberately done to create binding constitutional conventions that would allow the constitutional actors to achieve amendments that would otherwise not have been possible through formal amendment. In the case of informal amendments, practices and conventions grow spontaneously without any deliberate intention of by-passing the Constitutional amendment process. Richard Albert used the 'amendment by stealth' thesis to the Canadian Conservative Party's 2013 effort to introduce a consultative senatorial election for Canadian Federal Senate. The Canadian Supreme Court denied the government's proposal to introduce the consultative election because the government could not unilaterally amend the constitutional rule relating to the constitution of the federal senate.[65] The introduction of the consultative election would mean indirectly changing the Senatorial nomination process by the federal government's unilateral action under section 44

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61 B. Klein, R. G. Crawford, and A. A. Alchian, 'Vertical Integration, Appropriable Rents, and the Competitive Contracting Process', *The Journal of Law and Economics*, Vol. 21(2), 1978, pp. 297-326.

62 [1819] 17 U.S. 316

63 [1932] 285 U.S. 22

64 Article 50, Richard Albert.

65 *Reference Re Senate Reform 2014,* The Supreme Court of Canada, p 32.

of the Canadian Constitution.[66] Formally, such a change would require the government to follow the Canadian Constitution's amendment process defined in either of sections 38 or 41. Under the sections 38 and 41 processes, the state legislatures would need to engage in the amendment process.[67] In Albert's view, while informal constitutional amendments like the two-terms presidential terms in the U.S. and dispensing with congressional authorization for declaration of war could qualify as an informal constitutional amendment, amendment by stealth like that of the Canadian consultative senatorial election would lack democratic and social legitimacy.[68] Despite disfavouring the attempted 'amendment by stealth' in the senate reform incident, Albert concedes that it could constitute an informal constitutional amendment if the Canadian Supreme Court allowed the consultative election.[69]

At the end, the presence of various executive, judicial and extra-judicial avenues of informal, off-text or even stealth amendments in the constitutional regime suggests that merely designating something as unamendable or making the amendment process excessively hard may not necessarily guaranteea constitution'sperpetual endurance.

4. The Textual and Off-text Amendments of Secularism in Bangladesh

At independence from Pakistan, the 1972 constitution of Bangladesh endorsed Secularism as one of its four foundational principles. It marked a sharp departure from the religion-based ideological make-up of Pakistan. The original idea of Bangladesh's Secularism accommodated a mix of state neutrality and intervention in religion. The State endorsed the principles of religious non-establishment and non-discrimination. It also undertook the responsibility to eliminate

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66 Section 44 of the Canadian Constitution Act 1982 ("Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.")

67 Section 38 of the Canadian Constitution requires assent of two-thirds of the state legislatures in making constitutional amendments through the Governor General's Proclamation. Section 41, on the other hand, requires consent of all the state legislatures for amendments in certain designated provisions. See the full text of the Canadian Constitution availabled at *https://www. canlii. org/ en/ ca/laws/*, last accessed on 9 May 2023.

68 *Supra note*, pp. 734-35.

69 *Ibid*, P. 731.

communal hatred, violence and intolerance among the citizens and ban religion as a tool of politics.[70] A strict prohibition on the formation of religion-based political parties was inserted in Article 38 of the Constitution:

> '[N]o person shall have the right to form, or be a member or otherwise take part in the activities of, any communal or other association or union which in the name or based on any religion, has for this object, or pursues, a political purpose.'

The farmers, however, did not intend to achieve an extreme type of secularist regime to fight the populist culture practiced by the people. They also did not mean to achieve a total privatisation or decline of religious belief among the people.[71]The first government of Bangladesh officially sponsored the institutions imparting religious education, places of worship, and clerics. It became a member of the Organization of Islamic Conferences (OIC)[72], established an Islamic Foundation for research and publication of religious literature. National mosques with better outlook were established in major cities. Religious rituals like recitation from the Holy Quran were introduced in all governmental events. Therefore, the Bangladeshi versions of Secularism appeared akin to a soft version of Secularism rather than the hard ones like those adopted in post-WWI Turkey and other countries in the Maghreb regions.[73]

However, in 1976, a military takeover by General Ziaur Rahman led to the removal of Secularism from the Constitution by a martial law

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70 Article 12 of the Constitution of Bangladesh states that he Principles of secularism shall be realized by the elimination of communalism in its all forms; the granting by the state of political status in favour of any religion; the abuse of religion for political purposes; any discrimination against, or persecution of, persons practicing a particular religion.

71 J. H. Bhuiyan, 'Secularism in the constitution of Bangladesh', *The Journal of Legal Pluralism and Unofficial Law,* Vol. 49(2), 2017, pp. 204, 209.

72 For general understanding of the diplomatic and international relations issues that prompted the Mujib government to seek OIC membership see: Syed Shah Amran, 'OIC and Bangladesh' *The Daily Prothom Alo Sub-editorial,* Dhaka, 06 May 2018, available at *https://en.prothomalo.com/opinion/OIC-and-Bangladesh,* accessed on 09 May 2023.

73 H. H. Khondker, 'State and Secularism in Bangladesh' in Chin Liew Ten and Michael Heng Siam-Heng (eds), *State and Secularism: Perspectives from Asia*, World Scientific Publishing, 2009, pp.219-221.

proclamation.[74] Zia replaced Secularism with an Islamist ideal of 'Absolute trust and faith in the Almighty Allah'.[75] He also added the phrase 'Bismillah-Ar-Rahman-Ar-Rahim (In the name of Allah, the Beneficent, the Merciful)' at the beginning of the Constitution. He also amended Article 25 of the Constitution by emphasising the relationship with other Islamic states of the world.[76] The Parliament later endorsed all of Ziaur Rahman's changes through the Fifth Amendment of 1979. In 1988, another military ruler Lt General Ershad installed Islam as the State Religion through the Eight Amendment Act passed by the Parliament dominated by his party men. As mentioned earlier, the Eighth Amendment also decentralised the High Court Division of the Supreme Court. Fifteen members of a civil society organisation challenged the state religion clause arguing that it would violate the Constitution's basic structure of religious equality.[77] The Supreme Court did not take the state religion case for hearing at the time. However, it heard the decentralisation case and found the amendment as destroying the unitary character of the Republic, which according to the Court, was a basic structure of the Constitution.[78]

Years later, in *Bangladesh Italian Marble Works Ltd vs. Bangladesh*[79] and *Khondhker Delwar Hossain v Bangladesh Italian Marble Works Ltd and Others,*[80] the Supreme Court invalidated Ziaur Rahman's usurpation of power. This time, the Court declared the principle of Secularism as a basic structure of the Constitution, condemned its removal and declared the insertion of Islamist clauses and phrases illegal.[81] Lt General Ershad's usurpation of power was invalidated in another case.[82] In response to the judgments, the government of Bangladesh published a reprint of the Constitution, omitting all the changes brought by Zia and Ershad. However, the government retained

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74 *The Second Proclamation (Sixth Amendment) Order*, 1976 (Bangladesh).
75 *The Constitution of Bangladesh* (n 2), Preamble and art 8(2) (As amended in 1976).
76 Article. 25(2), *Ibid*, (As amended in 1976).
77 Shah Alam, 'The State-religion Amendment to the Constitution of Bangladesh: A Critique', *Journal of the Law and Politics in Africa, Asia and Latin America,* Vol. 24(2), 1991, p. 209.
78 Article 24, *Anwar Hossain Chowdhury.*
79 [2006] BLT (Special) (HCD) 1.
80 [2010] 62 DLR (A.D.) 298.
81 Article 79, pp. 223-224, 231, *Bangladesh Italian Marble Works Ltd.*
82 *Siddique Ahmed vs Bangladesh* [2011] 33 BLD (HCD) 84.

'BISMILLAH-AR-RAHMAN-AR-RAHIM' and the State Religion clause, despite the Court having invalidated those amendments.[83] The Fifteenth Amendment Act of 2011 also kept the State Religion and BISMILLAH clauses intact. At the same time, it revived the original principle of Secularism along with the other foundational principles of the original constitution.[84]

However, the 2011 definition of Secularism discarded a crucial element of its 1972 version – the prohibition of religiously based political parties. This time, the Constitution tried to accommodate the religion-based political parties within a compromised version of Secularism. The amended article 38 fell short of prohibiting the religious parties. Under the new criteria, the religious parties will be held destroying Secularism only when they:

> '(a) [destroy] the religious, social and communal harmony among the citizens;
>
> (b) [create] discrimination among the citizens, on the ground of religion, race, caste, sex, place of birth or language; or
>
> (c) [organise] terrorist acts or militant activities against the State or the citizens of any other country.[85]

Considered in light of the Supreme Court's Fifth Amendment judgement, the compromised version of 2011 remains constitutionally questionable. In that case, the Court declared the principle of Secularism is a basic structure of the Constitution.[86] The Fifteenth Amendment of 2011 attempted a formal and textual amendment to the 'unamendable' basic structure of Secularism. This incident, therefore, substantiates the perception that judicial recognition of something as an 'unamendable' basic structure may not be enough to save it from

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83 M. Jashim Ali Chowdhury, 'The Dilemma of Constitution Reprint' *The Daily New Age,* Dhaka, 15 April 2011, available at *http://newagebd.com/newspaper1*, accessed on 9 September 2021.

84 Four foundational principles of Bangladesh Constitution 1972 included Bangalee Nationalism, Secularism, Democracy and Socialism. Collectively known as "Mujibism" those were projected as the guiding philosophy of Bangladesh's liberation war and hence were enshrined in the Preamble and Articles 8 (1), 9, 10, 11 and 12 of the Constitution.

85 Article 38(2), *The Constitution of Bangladesh*

86 *Bangladesh Italian Marble Works Ltd* (n 79).

the subsequent amendments. Understandably the government in 2011 had to acknowledge the reality of strong religious parties that have emerged and taken root in the society since Zia and Ershad's amendments.[87] Unsurprisingly, Secularism's compromised definition of 2011 has attracted a significant amount of academic and intellectual support. Scholars argue that the cohabitation of State Religion with constitutional Secularism in Bangladeshi may make sense to the majority of the Bangladeshi citizens who have shown a strong commitment to the hybridity of their areligious *Banglaee* nationhood with their Islamic psyche.[88]

4.1 Amendment through moulding the meaning of a Basic Structure

In the face of such political realities, the mere judicial entrenchment of the constitutional principle will prove inadequate. The Supreme Court of Bangladesh silently gave in to the Fifteenth Amendment's compromised definition of Secularism and controversial retention of Islamist clauses and phrases in the Constitution. The 1989 case challenging the state religion clause was kept pending until 2011. In 2011, a division bench of the High Court Division of the Supreme Court took the case for hearing and served notice upon the government to explain why the state religion clause should not be declared unconstitutional. The matter was taken up again in 2015 by a larger bench. After a hearing on 28 March 2016, it dismissed the case. The larger bench held that the fifteen petitioners did not have the standing to challenge the State Religion clause.[89] Considering the consistent liberalisation of the standing rule since the mid-1990s and the spectacular development in public interest litigation jurisprudence

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87 It has been argued that the 2011 government's accommodation of a state religion side by side a compromised version of Secularism was guided by pragmatic consideration of Bangladesh's social reality that has been emerged in 1980s and later. For the pragmatic argument see: V. Menski, 'Bangladesh in 2015: Challenge of the "IccherGhuri" for Learning to Live Together', *University of Asia Pacific Journal of Law and Policy*, Vol. 1(1), 2015, p.7.

88 *Ibid,* pp. 7-8.

89 Maher Sattar and Ellen Barry, 'In 2 minutes, Bangladesh rejects 28-year-old challenge to Islam's role' *The New York Times,* New York, 28 March 2016, available at *http://www.nytimes.com/2016*, last accessed on 12 September 2021.

of the Bangladesh Supreme Court,[90] this 2016 decision on the State Religion case appears superficial.[91] Presumably, the Court was influenced by the same political development that prompted the government to retain the State Religion in the Fifteenth Amendment Act of 2011.[92]

The Supreme Court's refusal to answer an important constitutional question about the status of Secularism shows that the basic structure-based guarantee of unamendability is very shaky and unreliable protection against undesirable amendments. Judicial entrenchment as a way of constitutional unamendability is highly volatile. There is no certainty that the judiciary would stick to any definition or understanding of a constitutional concept.

The Fifteenth Amendment's compromised definition of Secularism was tested in 2014 against Bangladesh's largest religious party – the Jamaat-i-Islami. In *Maulana Syed Rezaul Haque Chadpuri v Bangladesh Jamaat-e-Islam,*[93] it was successfully argued that Jamaat Islami's*militant version of Islam* was impermissible under the Bangladesh Constitution.[94]In this case, the petitioner, himself a member of another Islamist political party, did not question the existence of Jamaat as a religious party. His argument was rather based on Jamaat's discriminatory approach to non-Muslims. Jamaat Islami bared the non-Muslims from entering its Executive Committee and the top tier of its leadership.[95] The Court agreed and declared Jamaat Islami's Constitution contradictory to the

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90 Naim Ahmed, 'Litigating in the Names of the People: Stresses and Strains of the Development of Public Interest Litigation in Bangladesh' (Ph.D. Dissertation, SOAS, University of London 1998), available at *https://eprints.soas.ac.uk*, accessed on 14 September 2021.

91 R. Hoque, 'Constitutional Challenge to the State Religion Status of Islam in Bangladesh: Back to Square One?' (I-CONnect Blog, 27 May 2016), available at *http://www.iconnectblog.com/2016*, accessed on 8 September 2021; S. S. Pattanaik, 'Majoritarian State and the Marginalised Minorities: The Hindus in Bangladesh', *Strategic Analysis*, Vol. 37(4), 2015, p.411.

92 E. R. Huq, 'The legality of a state religion in a secular nation', *Washington University Global Studies Law Review,* Vol. 17(1), 2018, pp. 245, 259-264.

93 [2014] 66 DLR (HCD) 14.

94 *Ibid,* p.346.

95 *Ibid,* p.347.

Constitution of Bangladesh.[96] Since the judgment, Jamaat's registration has been cancelled. The party has been barred from participating in elections, though its appeal against the judgment is still pending.

While some have hailed the judgment as a victory of Secularism in Bangladesh, the judgment itself has almost nothing to do with Secularism. Jamaat Islami's registration was cancelled mainly on the ground of discrimination against non-Muslims. The judgment had nothing to say on the militant Islamic ideology or the communal agenda of Jamaat. Interestingly, the allegation of discrimination would most likely apply to all other religion-based parties that continue to operate in Bangladesh. Suppose the appeal of Jamaat Islami is heard by the Supreme Court in future when a conservative regime might be in power. In that case, there is a strong possibility that Jamaat may be successful in arguing that the current secularist regime cherry-picked it for political vengeance. In this sense, the *Maulana Syed Rezaul Haque Chadpuri* case is hardly a sustainable victory for the secularists.[97]

If the State Religion and Chadpuri cases are any indications, a constitutional principle's judicial formulation and interpretation may not offer it a total unamendability. Judicial understanding of what could or could not be a basic structure changes over time. In the process, the courts sometimes contradict their previously held positions. Noam J. Zohar has called this slippery slope of judicial interpretation an 'amendment through the molding of meaning'.[98]

4.2 Amending the Unamendable

Constitutional principles may not be successfully protected through eternity or umamendability clauses.[99] Roznai and Albert argue that the

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96 *Ibid,* p. 341.

97 U. Kumar, 'Religion and Politics: A Study of Bangladesh Jamaat-e-Islami,' *Asian Journal of Research in Social Sciences and Humanities*, Vol. 7(5), 2017, p. 146; Arshi S. Hashmi, 'Bangladesh ban on religion-based politics: reviving the secular character of the constitution' (2011) Spotlight on Regional Affairs available at *https://papers.ssrn.com/sol3/*, accessed on 20 September 2021.

98 Noam J. Zohar, 'Midrash: Amendment through the Molding of Meaning' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment,* Princeton University Press, 1995, pp. 307-318

99 Y. Roznai, 'Amending 'Unamendable' Provisions' (Constitution-Making and Constitutional Change Blog) available at *https://www.constitutional-change.com/amending-*

eternity clauses cannot withhold societal changes indefinitely.[100] When the societal context changes, an eternal principle would likely be interpreted and reinterpreted to assign changed meaning to those. In societies with increased religious sensitivities, like Bangladesh, the 'constitutional unamendability of secularism […..] will remain negotiable'.[101] There seem to be several avenues of parliamentary or judicial nullification of the Bangladesh Constitution's eternity clause.

First, a future parliament may amend an Eternity clause through a 'double amendment' procedure.[102] Suppose the eternity clauses themselves are not protected from the subsequent amendments. In that case, a legislature may decide to repeal the eternity clause first and then amend a constitutional provision or principle protected by the repealed eternity clause. The Bangladeshi eternity clause, *i.e.,* Article 7B, is placed in Part I of the Constitution. Since Article 7B protects Part I from future amendments, the clause stands self-entrenched. It, however, does not prevent any citizen from judicially challenging Article 7B.

Secondly, the independence of the judiciary and its power to interpret the laws and the Constitution of Bangladesh has been declared a basic structure of the Constitution in a series of cases.[103] Now in case of a future challenge to Article 7B, it may be reasonably argued that the clause has limited the Supreme Court's power to determine basic structures on a "substantive test of constitutional core" by compelling

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unamendable-provisions, accessed on 21 September 20212; Richard Albert, 'Amending Constitutional Amendment Rules', *International Journal of Constitutional Law*, Vol. 13(3), 2015, pp. 655, 662-64.

100 R. Albert and Y. Roznai, 'Religion, Secularism and Limitations on Constitutional Amendment' in Rex Ahdar (eds), *Research Handbook on Law and Religion,* Edward Elgar Publishing, 2018, pp.154-177; Y. Roznai, 'Negotiating the Eternal: The Paradox of Entrenching Secularism in Constitutions', *Michigan State Law Review,* 2017, pp. 253, 328-329.

101 *Ibid*, pp.176-177.

102 L. H. Tribe, '*American Constitutional Law*', Foundation Press 2000, 111-114; E Smith, 'Old and Protected? On the "Supra-constitutional" Clause in the Constitution of Norway', *Israel Law Review,* Vol. 44(3), 2011, pp. 369, 375.

103 *Mujibur Rahman vs. Bangladesh* [1992] 44 DLR (AD) 111.

the Court to follow a codified list occurring in Article 7B mechanically.[104]

Thirdly, it may be argued that the Fifteenth Amendment has unconstitutionally restrained the subsequent parliaments' amendment power.[105] It is unclear why and how the Fifteenth Amendment of 2011 could claim its superiority over other subsequent amendments. As Hoque argues, '[I]f the institutional capacity and legitimacy is an issue, all these amendments are actions of Parliament representing the people of Bangladesh'.[106] Richard Albert[107] has explored a plausible way for some constitutional amendmentsto claim superiority over other amendments. Such amendments may bring about what Albert calls C*onstitutional Dismemberment* – a fundamental change in the nature and character of the Constitution.[108] However, Albert emphasises that a dismembering amendment must go through some 'escalated amendment process'[109] that is either similar or substantively 'mutual'[110] to the original constitution-making process. The mutuality of procedure is a fundamental requirement of constitutional dismemberment. Seen from that light, the Fifteenth Amendment passed through a mere two-thirds parliamentary majority without opting for any referendum does not appear to fulfil Albert's 'rule of mutuality' that could grant it, at least doctrinally, a superior status over the other amendments.

An additional problem with Albert's dismemberment rationale is that such amendments are not immune from judicial challenges altogether. Albert argues[111] that though the courts will not have the legal authority to invalidate a dismembering amendment, it will have an 'advisory

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104 *Supra note* 36.

105 Lima Aktar, 'Article 7B and the paradox of eternalising the constitution of Bangladesh' (IACL-AIDC Blog 2021, May 11) available at *https://blog-iacl-aidc.org/2021-posts/article-7b-and-the-paradox-of-eternalising-the-constitution-of-bangladesh*, accessed on 27 September 2021.

106 Ridwanul Hoque, 'Can the Court Invalidate an Original Provision of the Constitution?', *University of Asia Pacific Journal of Law and Policy*, Vol. 2(1), 2011, pp. 13, 23.

107 Albert Richard, 'Constitutional Amendment and Dismemberment', Yale Journal of International Law, Vol. 43(1), 2018, p.1.

108 *Ibid,* p.66.

109 *Ibid,* pp.53-56.

110 *Ibid,* pp.5-6.

111 *Ibid,* p.72.

judgment' on the nature of the change brought by a dismembering amendment and also on the 'quantum of agreement' that may be needed to provide legitimacy to such dismemberment. Yaniv Roznai has interpreted this as a power of the Court to judge whether the dismembering amendment has followed 'the appropriate, more demanding procedure for its passage'.[112] As mentioned above, the Fifteenth Amendment of the Bangladesh Constitution fails the 'more demanding procedure' of mutuality.

Fourthly, there is a fundamental question about how the Constitution reprint before the fifteenth amendment was handled. As mentioned earlier, the government reprinted the Constitution of Bangladesh in 2010 following the Supreme Court's judgments in the Fifth and Seventh Amendments cases. In 1979, the Fifth Amendment introduced a two-thirds majority plus referendum system to amend some constitutional provisions. The referendum clause was omitted in the reprint because the Fifth Amendment was unconstitutional.[113] Accordingly, the Fifteenth Amendment was passed by a mere two-thirds majority unaccompanied by a popular referendum. It was done on the premise that the reprinted Constitution did not have any referendum clause. However, this assumption of absence is legally problematic. As mentioned earlier, while reprinting the Constitution, the government did not meticulously follow the Supreme Court's Fifth and Seventh judgments. The State Religion, 'Bismillah' and 'Absolute Trust and Faith in the Almighty' clauses were left untouched despite the Supreme Court invalidating those. Also, on a subsequent occasion of 2016, the government refused to reprint the Constitution following the Supreme Court's invalidation of the Sixteenth Amendment.[114] Given the confusion, the legal status of the reprinted Constitution of

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112 Y. Roznai, 'Constitutional Amendment and "Fundamendment": A Response to Professor Richard Albert', Yale Journal of International Law, 2018, p.26, available at *https://www.yjil.yale.edu*, accessed on 2 octobr 2021.

113 Iftekhar Ahmed Chowdhury, 'Bangladeshi Courts: Reaffirmation of Democratic and Secular norms', *ISAS Insights*, Vol. 113, 2010, pp. 1-6.

114 M Rafiqul Islam, 'Judging apex judges by parliamentarians' *The Daily Star,* Dhaka, 18 July 2017, available at *https://www.thedailystar.net/law-our-rights/law-vision/judging-apex-judges-parliame ntarians- 1434616*, accessed on 29 September 2021.

2010 and the Fifteenth Amendment's dispensing with the referendum requirement remains questionable on the substantive ground.

All these legal and doctrinal points considered together, Bangladesh's eternity clause, Article 7B, does not appear protected from its constitutionality challenge. In case of a regime change, the opponents of Secularism would probably find the strategy of a government-sponsored challenge to the clause and its judicial nullification as the most plausible way of getting rid of Article 7B. While this may sound a hypothesis now, given Bangladesh's long history of 'judicialization of politics'[115] and 'politicization of the judiciary'[116], it may become a ground reality once the regime is changed in future.

5. Conclusion

Eternal clauses and the basic structure doctrine have been subject to elaborate academic consideration recently. Apart from the normative critique of these unamendability tools, their effectiveness in providing sustained protection to the Constitution is questioned. This paper has argued that eternity clauses and the basic structure doctrine are not enough to prevent formal or textual and informal or off-text amendments. The case study of Bangladeshi Secularism attempted in this paper shows that we have faced enduring confusion about the breadth and reach of the basic structure doctrine which was outlined in the *Anwar Hossain Chowdhury* case. As discussed in the paper, the Supreme Court's understanding of the Basic Doctrine has remained fluid and the list of basic structures is not settled yet. On the top of that, the Fifteenth Amendment to the Constitution inserted a new provision popularly called - the eternity clause. The discussions in this article have shown that while the use of eternity clauses is gaining currency in the contemporary world, the actual contribution of these clauses in preventing unwanted constitutional amendments are questionable.

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115 R. Hoque, 'Judicialisation of politics in Bangladesh' in Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia,* Cambridge University Press 2015, pp.261-290.

116 M. Kazuki, and N. Asano, 'Politicization of the appointment and removal of judges in a declining democracy: the case of Bangladesh' Institute of Developing Economies, Japan External Trade Organization (JETRO), Discussion Paper No 758, 2019, available at *https://www.ide.go.jp/English/Publish/ Reports/Dp/758.html*, accessed on 2 October 2021.

Problems of this approach to protect constitutional values through basic structures and eternity clauses (which we have called unamendability approach) are multiple. This article has discussed at length various theories and examples from the US and other jurisdictions to show that even the most rigid and immutable constitutions are amended through "informal", "off-text" or "stealth" processes that may happen with the historical evolution political and administrative practices. This article has shown, with examples of Bangladesh's secularism and religious party related cases, that the judicial interpretation of basic structure evolves over time and it is not guaranteed that the judiciary will stick to any particular meaning of secularism in future. Also, the judiciary is unlikely to accept any proposition that the fifteenth amendment that inserted the eternity clause is immune from judicial review. Therefore, there is a possibility that the judicial entrenchment of the principle of Secularism as a basic structure of the Bangladesh Constitution may not ultimately guaranteeits perpetual endurance. The evolving nature of constitutional interpretation and the changing nature of public understanding about constitutional principles create scope for their judicial reinterpretation and legislative manipulation.[117] Bangladesh's past history of judicializing the politics and politicizing the judiciaryconveys an important indication that a reconstituted Supreme Court may interpret the eternity clause, basic structures doctrine and the principle of Secularism in a completely different way. Seen in this light, the unamendability approach that is advocated by the proponents of Bangladesh constitution's A rticle 7B appears to offer the principle of Secularism a very shaky protection against its future distortion.

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117 L. Zucca, *A secular Europe: Law and Religion in the European Constitutional Landscape*, Oxford University Press 2012, pp.178-179, 295.