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Volume II: Constitutional Amendments

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and
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Amendment Rules, Politics and Debates in Bangladesh

M JASHIM ALI CHOWDHURY

I. Introduction

Written constitutions are characteristically resistant to frequent textual alterations. Conversely, they need to endure the evolving societal realities. Formal amendment clauses ensure that the constitutions do not lose their intergenerational adaptability while insulating them from too frequent changes. Amendment clauses vary in their breadth and rigour. A typical amendment process would require a qualified majority, say, two-thirds or three-fourths, in the legislature. Some arduous processes may require additional steps like ratification and concurrent action by other institutions like state legislatures and/or the people. Some constitutions even include eternity or unamendability clauses – whereby specific provisions or parts of the constitution are made unamendable.¹ In many parts of the world, the judiciaries also claim ‘constructive or implicit unamendability’² of constitutional cores, which they consider as the constitutions’ basic structures.³ Though there are

¹ Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* PhD thesis (Department of Law, the London School of Economics, 2014) 27, available at <http://etheses.lse.ac.uk/915/>. (As Roznai’s groundbreaking thesis on unamendability doctrine notes, ‘between 1789 and 1944, only 17% of world constitutions enacted in this period included unamendable provisions (52 out of 306), whereas between 1945 and 1988, 27% of world constitutions enacted in those years included such provisions (78 out of 286). Out of the constitutions which were enacted between 1989 and 2013 already more than half (53%) included unamendable provisions (76 out of 143). In total, out of 735 examined constitutions, 206 constitutions (28%) include or included unamendable provisions.’) See also: Yaniv Roznai, ‘The Uses and Abuses of Constitutional Unamendability’ in Xenophon Contiades and Alkmene Fotiadou (eds), *Handbook of Comparative Constitutional Change* 150–166 (Routledge, 2020) 150–66; Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press, 2019) 140.

² Richard Albert, ‘Constructive Unamendability in Canada and the United States’ (2014) 67(1) *The Supreme Court Law Review* 181, 183–84.

³ Ronald George Wright, ‘Could a Constitutional Amendment be Unconstitutional?’ (1991) 22(4) *Loyola University Chicago Law Journal* 741; Yaniv Roznai, ‘Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea’ (2013) 61(3) *The American Journal*

disputes about the normative claims of the eternity clauses⁴ and basic structure doctrine,⁵ they generally aim to resist illiberal or retrogressive amendments done through formal amendment processes.

However, amendments are done in unchartered or informal ways too.⁶ Ginsburg and Melton argue that amendment rule is a less significant predictor of constitutional change than the amendment culture of a political society.⁷ Studies confirm that ‘formally rigid constitutions die more frequently’ than flexible ones.⁸ Finding the formal amendment routes onerous, the political actors often attempt ‘amendment-level changes’ outside the [formal] amendment process.⁹ These are called ‘informal’,¹⁰ off-text or ‘stealth amendments’.¹¹ It is, therefore, important that the formal amendment rules and processes are read in conjunction with the political contexts and culture within which they work.

This chapter considers Bangladesh’s amendment rules, politics and debates. It evaluates the history, nature and impact of Bangladeshi amendments from a functionalist perspective developed by Ngoc Son Bui – one of the two editors of this

of *Comparative Law* 657; Richard Albert, ‘How a Court Becomes Supreme: Defending the Constitution from Unconstitutional Amendments’ (2017) 77(1) *Maryland Law Review* 181.

⁴ Mohammed Abdelaal, ‘Entrenchment Illusion: The Curious Case of Egypt’s Constitutional Entrenchment Clause’ (2016) 16(2) *Chicago-Kent Journal of International and Comparative Law* 1; Elai Katz, ‘On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment’ (1996) 29(2) *Columbia Journal of Law and Social Problems* 251.

⁵ Rokeya Chowdhury, ‘The Doctrine of Basic Structure in Bangladesh: From Calpath to Matryoshka Dolls’ (2014) 14 (1–2) *Bangladesh Journal of Law* 43; Salimullah Khan, ‘Leviathan and the Supreme Court: An Essay on the ‘Basic Structure’ Doctrine’ (2011) 2 *Stamford Journal of Law* 89; Richard Stith, ‘Unconstitutional Constitutional Amendments: The Extraordinary Power of Nepal’s Supreme Court’ (1996) 11(1) *American University Journal of International Law and Policy* 47; Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford University Press, 2009); Rosalind Dixon and David Landau, ‘Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment’ (2015) 13(3) *International Journal of Constitutional Law* 606; Chintan 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) 149–68; Eoin Daly, ‘Translating Popular Sovereignty as Unfettered Constitutional Amendability’ (2019) 15(4) *European Constitutional Law Review* 619; Alexander Bikel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 1986) 16–18; Lawrence Henry Tribe, ‘A Constitution We Are Amending: In Defense of a Restrained Judicial Role’ (1983) 97(2) *Harvard Law Review* 433.

⁶ Vicky C Jackson, ‘The Myth of (Un)amendability of the US Constitution and the Democratic Component of Constitutionalism’ (2015) 13(3) *International Journal of Constitutional Law* 575.

⁷ Tom Ginsburg and James Melton, ‘Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty’ (2015) 13(3) *International Journal of Constitutional Law* 686, 686–87.

⁸ Aziz Huq, ‘The Function of Article V’ (2013) 162 *University of Pennsylvania Law Review* 1165, 1165; Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (Cambridge University Press, 2009) 101.

⁹ Stephen M Griffin, ‘The United States of America’ in Dawn Oliver and Carlo Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart Publishing, 2011) 357, 366–67.

¹⁰ Rosalind Dixon, ‘Partial Constitutional Amendments’ (2011) 13(3) *University of Pennsylvania Journal of Constitutional Law* 643, 645–46; Richard Albert, ‘Constitutional Disuse or Desuetude: The Case of Article V’ (2014) 94 *Boston University Law Review* 1029.

¹¹ Richard Albert, ‘Constitutional Amendment by Stealth’ (2015) 60 *McGill Law Journal* 673.

volume. Bui argues that a mere rule-based and theoretical perception of constitutional amendments might not tell the whole story of amendment realities.¹²

He rather offers a 'functional'¹³ approach which would focus on the contexts – regional, regime and historical – in which the amendment politics roll out, the actual functions the amendments discharge in the body politic and the factors that influence the amendment choices made by the political actors. This chapter argues that Bui's framework constitutes a suitable model for appreciating the Bangladeshi constitutional amendments within the broader lens of Asian constitutionalism. The following section (section II) of this chapter briefly outlines Bangladesh's original amendment rules and subsequent changes in the rules. Section III first engages with Bui's enticing idea of three amendment contexts – region, regime and history. It appears that Bangladesh's constitutional amendment politics has a deep connection with the broader South Asian geopolitics, the nature of the regimes sponsoring an amendment and the political mode of the time when the amendment is brought. The second part of section III tries to classify Bangladesh's 17 constitutional amendments into Bui's 'four amendment models',¹⁴ namely, the foundational, constructive, progressive and retrogressive amendments. The third part of section III deals with Bui's amendment as a replacement thesis. Within Bui's replacement logic, this part explains why and when the Bangladeshi political actors go for replacement-type amendments. Section IV then discusses the three streams of Bangladesh's amendment debates surrounding the basic structure doctrine, eternity clause and referendum system. It argues that the discarded referendum system could provide a pragmatic and normative solution to the problems of basic structure doctrine and eternity clause. Section V concludes the chapter by summarising the discussion and arguments.

II. The Rules

Bangladesh's constitutional amendment process starts in the Parliament and ends at the presidential desk. Generally, an amendment requires a two-thirds parliamentary majority and presidential assent. In the late 1970s, a military ruler introduced an additional layer of popular referendum which would be removed in 2011. In 1989, the Bangladesh Supreme Court took inspiration from its Indian counterpart and introduced the 'implicit unamendability' or basic structure doctrine, which continues to hold the field. Additionally, a controversial eternity clause, making around 40 per cent of the Constitution unamendable, was inserted in 2011.

¹²Ngoc Son Bui, 'Constitutional Amendment and Democracy' (2021) 30(1) *Minnesota Journal of International Law* 75, 80–81.

¹³*ibid* 143.

¹⁴*ibid* 83.

A. Original Amendment Process and the Referendum System

As it currently stands, any amendment to the Constitution of Bangladesh needs the approval of a two-thirds majority of the Members of Parliament and the assent of the President.¹⁵ It was the original rule of 1972 too. In 1979, a military ruler amended the rule to insert an additional referendum stage.¹⁶ From 1979 onwards, all amendments in the Constitution's Preamble and other specified articles,¹⁷ including the amended amendment rule itself, must be referred to a popular referendum. In 2005, the High Court Division of the Supreme Court of Bangladesh declared it unconstitutional.¹⁸ The High Court observed:

The addition [the referendum clause] was craftily made. On the one hand, the [...] Chief Martial Law Administrator were [*sic*] not only merrily making all the amendments in the Constitution [...] according to his own whims and caprices [...] but, at the same time, made provision [...] in such a manner so [*sic*] that the amended [amendment rule] cannot be changed even by the two-thirds majority members of the parliament short of a referendum. [...] We are charmed by the sheer hierocracy of the whole process.¹⁹

The Appellate Division of the Supreme Court upheld the High Court Division's verdict.²⁰ The 15th Amendment (2011) removed the Referendum system.²¹ Section IV of this chapter would, however, highlight a curative role the repealed system could have played in Bangladesh's ongoing amendment debates.

B. 'Implicit Unamendability' and the Basic Structure Doctrine

In 1989, the Supreme Court endorsed the Basic Structure or Unconstitutional Constitutional Amendment doctrine.²² The doctrine claims that some provisions and principles of the Constitution form its basic structures and, therefore, are not amendable. Despite some normative and pragmatic objections to the Basic Structure doctrine,²³ which are raised in section IV of this chapter, the Bangladesh Parliament internalised the doctrine in the Constitution through the 15th Amendment of 2011. The 2011 amendment declared the 'articles relating

¹⁵ The Constitution of the People's Republic of Bangladesh 1972 ('Constitution'), Art 142(1).

¹⁶ The Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No IV of 1978).

¹⁷ Those provisions were related to the status of fundamental state policies, presidential powers, Prime Minister and the cabinet's powers and the amendment clause itself (Arts 8, 48, 56 or 142).

¹⁸ *Bangladesh Italian Marble Works Ltd v Bangladesh* 14 BLT (2005) (Spl) 1.

¹⁹ *ibid* 238 (per ABM Khairul Haque J).

²⁰ *Khandker Delwar Hossain v Bangladesh Italian Marble Works Ltd* 15 MLR (2009) (AD) 249–368.

²¹ The Constitution (Fifteenth Amendment) Act 2011, Section 42.

²² *Anwar Hossain Chowdhury v Bangladesh* 1989 BLD (Spl) 1.

²³ 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.

to the basic structures of the Constitution'²⁴ unamendable. Bangladesh's 2011 amendment constitutes probably the world's first example of constitutionalising the basic structure or implicit unamendability doctrine.²⁵ However, section IV of this chapter will argue that the 2011 amendment's vague reference to some unspecified basic structures is even more problematic.

C. 'Explicit Unamendability' and the Eternal Clauses

The 2011 amendment also made some specific constitutional provisions unamendable. The list includes the Preamble, all articles of Part I, II and III and Article 150, constituting around 40 per cent of the Constitution. While eternalising some core values of the constitutional order is not unheard of,²⁶ Bangladesh's 'extremely wide',²⁷ un-pragmatic and 'unsustainable'²⁸ list of unamendable provisions inconsiderately constrain the people from adapting their Constitution to evolving realities. Section IV of this chapter will revert to some of these arguments.

III. The Politics

Within a short span of 50 years, the Constitution of Bangladesh has undergone 17 amendments. These are mostly controversial, and a few progressive amendments of major and minor scale. Minor amendments were often done in haste and to meet some immediate needs of the regimes. Major amendments involved drastic changes in the constitutional system. All combined reflect a very visible instability and restlessness in Bangladesh's constitutional system. This section considers the political economy of Bangladesh's constitutional amendments through the functionalist lens of Ngoc Son Bui. Bui's 'functionalism' involves three questions. First, how the regional, regime and historical contexts shape the amendments;²⁹ second, what the amendments actually do;³⁰ and third, when amendments amount to replacements and when the political actors go for replacement-type amendments.³¹

²⁴ Constitution (n 15) Art 7B (Introduced by the Constitution (Fifteenth Amendment) Act 2011, Section 7).

²⁵ Comment by Professor Ngoc Son Bui at the Workshop on Asian Comparative Constitutional Amendments organised by the Oxford Programme in Asian Laws and Warwick Law School, held in St Hugh's College, Oxford on 27–28 April 2023.

²⁶ Abdelaal (n 4).

²⁷ Ridwanul Hoque, 'An Unamendable Constitution? Eternal Provisions in the Constitution of Bangladesh: A Constitution Once and for All?' in Richard Albert and Bertil Emrah Oder (eds), *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer, 2018) 218, 222.

²⁸ Kawser Ahmed, 'Revisiting Judicial Review of Constitutional Amendments in Bangladesh: Article 7B, the Asaduzzaman Case, and the Fall of the Basic Structure Doctrine' (2023) 56(2) *Israel Law Review* 263.

²⁹ Bui (n 12) 144–45.

³⁰ *ibid* 145.

³¹ *ibid* 147.

A. Regional, Regime and Historical Contexts of Constitutional Amendments

Bui argues that a functionalist approach to amendment studies must consider the regional, regime and historical contexts within which amendment processes and politics roll out. As this author has argued in the prequel of this volume, Bangladesh's constitution-making and unmaking process is deeply related to the regional politics surrounding its independence revolution in 1971 and the counter-revolution in 1975.³² The division of India and Pakistan in 1947 was based on a religious nationalist idea called – the Two Nation Theory.³³ Later, East Pakistan's secular forces staged a movement against the West Pakistani political elites which wanted to use Islam as a repressive tool of political manipulation and identity building in undivided Pakistan. Conversely, the ethno-linguistic nationalist identity the East Pakistani political forces pressed had a secularist tune.³⁴ The struggle ultimately led to the independence of Bangladesh in 1971. Bangladesh's secularist pro-independence forces enjoyed strong Indian support and backing. However, the pro-Pakistani elements in Bangladesh's army and society soon staged a counter-revolution in 1975. They uprooted the secularist principles and initiated the process of Islamisation. Since then, Bangladesh's political forces have remained divided along the geopolitical rivalry between India and Pakistan.³⁵ Major political groups in Bangladesh are strongly believed to be sponsored, or at least supported,³⁶ by the opposing sides of the rivalry. It caused instability, coups and counter-coups in the 1970s–80s. The ideological clash continued during the post-1990 democratic era. Bangladesh's amendment politics thus played out within the wider South Asian geopolitical contexts.

From a regime context, the political and military forces – pro-independence or pro-Pakistani alike – showed a person-centric, clientelist and monopolistic attitude to state power.³⁷ The framing of the original Constitution in 1972 was generally inclusive and participatory.³⁸ However, the exclusion of the Islamist

³² M Jashim Ali Chowdhury, 'Making and Unmaking the Constitution in Bangladesh' in Ngoc Bui Son and Mara Malagodi (eds), *Asian Comparative Constitutional Law, Volume I: Constitution-Making* (Hart Publishing, 2023) 363–82.

³³ The basic claim of the Two Nation Theory was that Hindus and Muslims in the British India formed two separate nations and hence should become two independent countries after the British leave the region.

³⁴ Ali Riaz, 'More than Meets the Eye: The Narratives of Secularism and Islam in Bangladesh' (2018) 49(2) *Asian Affairs* 301, 303–304.

³⁵ ThazhaV Paul, 'Why has the India-Pakistan Rivalry Been so Enduring? Power Asymmetry and an Intractable Conflict' (2006) 15(4) *Security Studies* 600.

³⁶ Mohammed Abdul Mannan, 'Islamism-Nationalism, Domestic Politics, and Bangladesh's Policy of Balancing against India Since the 1990s' (2018) 21(4) *International Area Studies Review* 340.

³⁷ Mohammad Mozahidul Islam, 'The Toxic Politics of Bangladesh: A Bipolar Competitive Neopatrimonial State?' (2013) 21(2) *Asian Journal of Political Science* 148.

³⁸ Abul Fazl Huq, 'Constitution-Making in Bangladesh' (1973) 46(1) *Pacific Affairs* 59.

political parties from the process encouraged them to disown the Constitution later.³⁹ In the late 1970s and 80s, the military's amendments came as martial law orders and proclamations. After the post-1990 democratic revival, politics took an illiberal, antagonistic and dynastic tune, and constitutional changes have mostly been applied to abusive and power-perpetuating purposes.⁴⁰

From a historical context, constitutional amendments during the first three and a half years of Bangladesh mostly aimed at regime stabilisation. The most drastic amendment of this period – the Fourth Amendment (1975) – was a constitutional replacement whereby the regime wanted to switch from a democratic system to a one-party presidential one. Later amendments during the military rulers sought to consolidate the presidential system and entrench the military's grab over state power. Amendments made during the post-1990 democratic revival were concerned mostly with the electoral system.

B. The Four Amendment Models

Building upon the region, regime and historical contexts of constitutional amendments, Bui's 'functionalism' next looks into how those amendments work 'for or against democracy'.⁴¹ Son Bui argues that, like the constitutions themselves, amendments provide textual rules, principles, hopes, aspirations, values, and commitments that can facilitate the actions of social and political actors. They enable or allow the political elites, citizens, parties, and social groups to facilitate the foundation, transformation, service, or even degeneration of democracy. In this sense, amendments may be foundational, constructive, progressive, or retrogressive.⁴² Foundational amendments facilitate the creation of a democracy. Constructive amendments facilitate the transformation of democracy. Progressive amendments facilitate the Government's role in serving the public. Conversely, the retrogressive amendments facilitate the deterioration of democracy.⁴³ Bangladesh has seen all four types of amendments.

³⁹ Dr Jashim Ali Chowdhury, 'Constitution-Making and Unmaking in Bangladesh' *The Daily Star* (Dhaka), 4 November 2022.

⁴⁰ Ridwanul Hoque, 'The Risk of Abusive Constitutionalism', Interview with *The Daily Star* (Dhaka) 7 November 2017; Ridwanul Ridwanul Hoque, 'Deconstructing Public Participation and Deliberation in Constitutional Amendment in Bangladesh' (2021) 21(2) *Australian Journal of Asian Law* 7 (In this article, Hoque argues, 'The politics of constitutional amendment in Bangladesh are extremely deficient in public participation and deliberation [.....] The amendment rules have often been abused, which shows a trait of "constitution without constitutionalism" in the country. It is argued that the abusive amendment processes may be attributable to democratic backsliding as well as regression of the amendment culture.').

⁴¹ Bui (n 12) 75.

⁴² *ibid* 83.

⁴³ *ibid* 95.

i. Progressive Amendments

Over the years, some progressive amendments facilitated the Bangladesh Government's role in public service. Those include the First (1973), Third (1974), Ninth (1989), 10th (1990), 11th (1991), part of the 14th (2004) and 17th (2018) amendments. The First Amendment (1973) conferred domestic jurisdiction over 'genocide, crimes against humanity or war crimes and other crimes under international law'. It was intended for the proposed trial of 195 Pakistani military officers whom the Bangladesh Government accused of war crimes during the 1971 war for independence. Though they could not be brought to justice in Bangladesh, the amendment was later used to facilitate the trial of Bangladesh's domestic collaborators in the 2010s. The Third Amendment (1974) validated an Agreement between Bangladesh and India to exchange certain enclaves. The exchange of enclaves was previously questioned by the Supreme Court, claiming that the Government could not cease territories of Bangladesh without amending the Constitution.⁴⁴

The Ninth Amendment (1989) created an elected Vice Presidential office. The 10th Amendment Act (1990) provided for the continuation of women's reserved seats in Parliament, an original constitutional rule initially made for 20 years. The 11th Amendment (1991) legalised the appointment of Chief Justice Shahabuddin Ahmed as the country's Vice President. The Chief Justice was brought to the presidential succession line to facilitate the departure of military ruler HM Ershad who was then facing a violent political movement against his regime. Minutes after Shahabuddin was appointed the Vice President, President Ershad resigned and handed the power to Shahabuddin. Shahabuddin oversaw the national election of 1991, handed over the presidency to a new political appointee and then returned to his original position of Chief Justice. The 11th Amendment validated the whole thing.

The 14th Amendment (2004) ensured the continuance of the women's reserved seats as provided in the 10th Amendment (1990). It, however, increased the reserved seats from 30 to 45 and provided for proportionate distribution of those seats among the political parties. Previously, the party winning the general election took all the women-reserved seats. The 17th Amendment (2018) increased it to 50 and extended the reservation for another 25 years. Notably, lacking a direct electoral mandate from the people, reserved seat MPs remain as essentially partisan delegates.⁴⁵ Despite the demand for direct election in the reserved seats, the political parties remained content with a periodic extension of the system, proportionate distribution of those seats among the political parties and indirect election.

⁴⁴ *Kazi Mukhlesur Rahman v Bangladesh* 26 DLR (SC) 44.

⁴⁵ Nizam Ahmed and Sadik Hasan, 'Alangkar or Ahangkar? Reserved-Seat Women Members in the Bangladesh Parliament' in Nizam Ahmed (ed), *Women in Governing Institutions in South Asia* (Palgrave Macmillan, 2018) 17–39.

ii. Retrogressive Amendments

Besides the few facilitating amendments discussed above, Bangladesh's other amendments pursued retrogressive causes like validating unconstitutional regimes, manipulating the judiciary and electoral institutions, repressing the political opposition, and suppressing the people's civil liberties. Some notably retrogressive amendments include the Second (1973), Fifth (1979), Sixth (1981), Seventh (1982), Eighth (1988) and 14th (2004) amendments.

Within one year of making the Constitution in 1972, the Government sought stronger executive powers to tame its rising and violent opposition. The Second Amendment (1973) introduced emergency provisions, restrained fundamental rights during emergencies and gave the Government the power of preventive detention without trial. Under this amendment, a highly controversial Special Powers Act was passed in 1974. This 'Black Law' proved a tool of political repression in the later decades, only to be replaced by harsher laws.⁴⁶

The Sixth Amendment (1981) allowed a sitting Vice President to run for presidency without resigning from his post. After the murder of military ruler Ziaur Rahman in 1981, his party nominated Vice President Abdus Sattar for the next presidential election. As per the Constitution, he had to resign from his office and compete in the election. The ruling party, however, decided to amend the Constitution to allow him to run without resigning. Anticipatedly, he won the election.

The Fifth (1979) and Seventh (1982) amendments validated the usurpation of power by the two military rulers, Zia and Ershad. During the waning days of his regime, Ershad made a populist move, sponsored the Eighth Amendment (1988) and declared Islam as the state religion. The amendment also decentralised the judiciary by setting up six permanent High Court Division benches outside Dhaka. The next year, the Court declared the decentralisation of the High Court Division invalid.⁴⁷ The State Religion was not challenged.

The 14th Amendment (2004) changed the retirement age for the Supreme Court judges to ensure that a retired Chief Justice, KM Hasan, took charge of the election-time caretaker government of 2006. Justice Hasan was once a member of the ruling party BNP. The opposition parties protested the Amendment as a move to politicise the non-party caretaker government and staged a violent street agitation. Ultimately the caretaker government of 2006 collapsed into military intervention.

iii. Foundational Amendment

Considered within Bui's framework, the 12th Amendment (1991) seems to qualify as the only foundational amendment in Bangladesh. It restored the

⁴⁶ Md Jahid Hossain Bhuiyan, 'Preventive Detention And Violation Of Human Rights: Bangladesh, India And Pakistan Perspective' (2004) 8 *Bangladesh Journal of Law* 103.

⁴⁷ Chowdhury (n 22).

parliamentary system, replaced by a one-party presidential system through the Fourth Amendment (1975). This Amendment was the first amendment since 1972 to enjoy unanimous political support from all quarters. It was a follow-up of the political parties' joint movement against the military ruler Ershad in 1990. Though Ershad's predecessor Major Zia discarded the one-party system by reviving the multi-party system in 1979, the presidential form remained intact. During Zia and Ershad, a rubber stamp Parliament worked under an authoritarian and absolute presidency. Parliaments would mostly 'discuss and approve' the laws made by the presidential ordinances. The 12th Amendment reinstalled the parliamentary system. From the Fourth to the 12th, Bangladesh completed a constitutional cycle.⁴⁸ The 12th Amendment is foundational because it has somewhat settled Bangladesh's constitutional preference for parliamentary democracy. It constituted the bedrock of post-1990 Bangladesh as a bipartisan democracy, how imperfect in practice it may be.

iv. Constructive Amendment

Introducing an election-time caretaker government through the 13th Amendment (1996) may be considered a constructive one. The Amendment resulted from widespread political agitation and street violence staged by the opposition parties during 1994–1996. The opposition parties, claiming that elections under the political party governments were corrupt, demanded a party-neutral government to facilitate the election. The Amendment was constructive because it offered a unique opportunity to transform the quality of Bangladesh's democracy. It introduced an election-time, non-party caretaker government, which, acting as an interim government, would give all possible aid and assistance to the Election Commission in peacefully, fairly, and impartially conducting the parliamentary election. Once the election was done, the non-party caretaker government would step down, handing over the power to the newly elected Prime Minister. The most recently retired Chief Justice of the Supreme Court of Bangladesh was designated to lead the caretaker government. Unfortunately, the constructive potential of the caretaker government could not be realised as the political parties manipulated the system by politicising judicial appointments. As mentioned earlier, a political party even amended the Constitution (14th Amendment 2004) to ensure their favoured Chief Justice led the next caretaker government. It led to the collapse of the 2006 caretaker government. Later, another political party controversially removed it from the Constitution (15th Amendment 2011).⁴⁹ The direct impact

⁴⁸ Syed Istiaq Ahmed, 'Constitution and Democracy in Bangladesh since 1972' (1992) 44 *Dhaka Law Report Journal* 52.

⁴⁹ Adeeba Aziz Khan, 'The Politics of Constitutional Amendments in Bangladesh: The Case of the Non-political Caretaker Government' (2015) 3 *International Review of Law* 11; Sonia Zaman Khan, *The Politics and Law of Democratic Transition: Caretaker Government in Bangladesh* (Routledge, 2017).

of its removal has been the total collapse of the country's electoral system.⁵⁰ Since then, the two controversial parliamentary elections (2014 and 2018) held under the political government were marked by electoral fraud,⁵¹ and the political parties are now fighting over the third one.

C. Amendment as Constitutional Replacement

The third element of Bui's 'functionalism' is amendment as a constitutional replacement. Bui argues that the conventional understanding of amendment as a mere alteration of the existing system does not reflect a universal reality. Drawing support from Richard Albert's constitutional dismemberment thesis,⁵² Bui argues that amendments may fundamentally alter a constitution's original principles or settings and constitute, reconstitute, or replace the constitution.⁵³ In deserving cases, such replacement amendments may discharge a 'deeply constitutive function' akin to an original constitution.⁵⁴ When the political actors opt for replacement-type amendments is another question. Bui argues that they do not attempt replacement-type amendments solely to address the 'failure of an existing design'. They rather attempt replacements when they want to revise the national or collective identity of the people as a political community.⁵⁵ The more the 'desire for substantive political transformation through constitutional expression and national identity formation',⁵⁶ the more the possibility of replacement-type amendments.

D. Replacement-Type Amendments

Seen through Bui's lens, Bangladesh's replacement of the multi-party parliamentary system with a one-party presidential system through the Fourth Amendment (1975), change of constitutional identity through the Fifth Amendment (1979) and partial restoration of the identity through the 15th Amendment (2011) may be categorised as the replacement-type amendments.

⁵⁰ M Jashim Ali Chowdhury, 'Fifty Years of Electioneering in Bangladesh: The Collapse of a Constitutional Design' in M Rafiqul Islam and Muhammad Ekramul Haque (eds), *The Constitutional Law of Bangladesh: Progression and Transformation at its 50th Anniversary* (Springer Singapore, 2023) 173–93.

⁵¹ Ole Solvang, *Democracy in the Crossfire: Opposition Violence and Government Abuses in the 2014 Pre- and Post-Election Period in Bangladesh* (Human Rights Watch, 2014).

⁵² Richard Albert, 'Constitutional Amendment and Dismemberment' (2018) 43(1) *The Yale Journal of International Law* 1.

⁵³ Bui (n 12) 146.

⁵⁴ *ibid* 146–47.

⁵⁵ *ibid*.

⁵⁶ *ibid* 149.

The Fourth Amendment (1975) was the first incident of constitutional replacement and stands as the most controversial of all. Within three and a half years of adopting the Constitution, the ruling party headed by the independence movement leader – Sheikh Mujib – decided to rewrite it. Mujib argued that the Westminster-type parliamentary system proved unsuitable in the newly independent country marred by instability, sabotage, economic distress and insurrectionist political opposition. The Fourth Amendment opted for a Soviet-styled socialist and one-party state governed by an all-powerful president. All political parties were abolished, and all were asked to join one newly formed national party. Parliament and judiciary were reduced to a subordinate position. The Fourth Amendment was largely discredited, though its supporters justified it as a response to the deteriorating law and order situation and governance breakdown in the newly independent country. It was in operation for only seven months until Mujib was murdered along with his family members by a disgruntled military faction on 15 August 1975.

After four years of martial law rule (1975–1979), the military ruler Zia discarded the one-party system but kept the presidential powers found in the Fourth Amendment intact and built upon that. Zia's system was a multi-party but not a parliamentary one. During his four years, Zia made many constitutional amendments through his martial law orders, proclamations and regulations. He rewrote the original Constitution's four foundational principles, which were not touched even by the Fourth Amendment. He removed secularism and socialism as constitutional ideals. A new identity politics, influenced by Zia's Pakistan-leaning political ideology, took root. 'Absolute trust and faith in almighty Allah' was made a constitutional principle. In contrast to Mujib's socialist ideologies, Zia's Government forcefully pursued a Western capitalist agenda. Most prominently, Zia replaced the independence leaders' Ethno-linguistic Bangalee nationalism with a territorially confined makeshift national identity called 'Bangladeshi nationalism'. Zia's successor in the military, Ershad, would bolster the new identity politics by making Islam the state religion (Eighth Amendment 1988). Though the Supreme Court would later condemn the two military rulers' usurpation of power,⁵⁷ the ideological prong of the Fifth Amendment endured and continued to divide the political parties. Mujib's political party, Awami League (AL), returned to the political scene by 1990. However, the post-1990 politics of Bangladesh could not simply obliterate Zia's identity politics and economic approaches.⁵⁸ In this sense, the Fifth Amendment (1979) marks the second incident of constitutional replacement in Bangladesh.

⁵⁷ *Khondhker Delwar Hossain v Bangladesh Italian Marble Works Ltd and Others* (2010) 62 DLR (AD) 298 (Fifth Amendment Case) and *Siddique Ahmed v Bangladesh* (2011) 33 BLD (HCD) 84 (Seventh Amendment Case).

⁵⁸ M Jashim Ali Chowdhury, Md Abdullah Al Mamun and Md Jahedul Islam, 'Protecting Secularism in Bangladesh: A Critique of the Constitutional Unamendability Approach' (2023) 11 *Rajshahi University Law Journal* 108–31.

The third example of a replacement-type amendment is the 15th Amendment (2011). It was done by AL – Mujib’s party, now led by his daughter Hasina. AL got an absolute majority in the 2009 general election, hence the first real opportunity since 1975 to revive the original ideals of the 1972 Constitution- Bangalee nationalism, democracy, socialism and secularism. Vying for a replacement – better be called the restoration – of the Constitution, AL tried to be as inclusive as possible. An All-Party Committee was formed to finalise the amendment proposals. For the first time in the history of Bangladesh, a parliamentary committee heard around 100 experts, including several former Chief Justices, constitutional law experts, academics, intellectuals, and journalists. However, the opposition parties led by BNP – Zia’s party, now led by his widow Begum Zia – refused to participate. They protested, in the strongest terms, the revival of original constitutional principles. Finding itself in a new political reality – unmatched by 1972 – AL had to compromise. The 15th Amendment retained the state religion and revived Bangalee nationalism, secularism and socialism in a compromised fashion. The Amendment also brought scores of changes in many other places – including discarding the caretaker government system and making a substantial part of the Constitution unamendable. AL feared that the opposition parties might try to dislodge even these compromised ideological pillars in future. The magnanimity of the changes and the political divide over those confirm that the 15th Amendment constituted Bangladesh’s latest replacement-type amendment performing a deeply restorative function.

IV. The Debates

There are currently three issues in the debate surrounding Bangladesh’s amendment politics and processes. First, normative challenges to the Basic Structure or Unconstitutional Constitutional Amendment doctrine seem to grow. Secondly, the pragmatic utility of the amendment review is being questioned. Thirdly, there is a curiosity about whether the discarded referendum system could have been a safety- valve against excessive constitutional rigidity and judicial overreach in amendment reviews and abusive amendment politics.

A. Normative Challenges to the Basic Structure Doctrine

In Bangladesh, judicial review of amendments is seen with ‘reverence and suspicion.’⁵⁹ The original Constitution of 1972 contained no substantive limit on the Parliament’s amendment power. It reserved the Parliament’s right even

⁵⁹ Mostafa Kamal, *Bangladesh Constitution: Trends and Issues* (University of Dhaka, 1994) 139.

to discard the fundamental rights.⁶⁰ The only limit prescribed was procedural. An amendment could be done through a bill passed by a two-thirds majority of the Parliament members. While the framers' intention to keep constitutional amendments beyond judicial review was clear, the Supreme Court claimed its amendment review power under the Basic Structure Doctrine borrowed from the Indian *Keshabanandha Bharati* case.⁶¹ The Supreme Court of Bangladesh embraced the doctrine in the 1989 *Anwar Hossain Chowdhury* case.⁶² Under the doctrine, some provisions and principles – as determined by the Court on a case-by-case basis – constitute the Constitution's Basic Structures and are unamendable.⁶³

Public reaction to the *Anwar Hossain Chowdhury* judgment – invalidating the Eighth Amendment (1988) – was massively favourable.⁶⁴ At that time, the Supreme Court Bar Association and the political parties saw the invalidation of a constitutional amendment passed by a military-led government as a victory for judicial independence. Problematic aspects of the doctrine, however, did not get much attention.⁶⁵ From *Anwar Hossain* onwards, Basic Structure became a '*cause celebre*'⁶⁶ in the country's constitutional jurisprudence. However, several confusions surfaced later.

First, the judiciary got unlimited authority in defining basic structures, making the concept unpredictable and, consequently, bad. It gave judges leeway to inject their personal value judgments into constitutional law. The fluidity of basic structures allowed the judges to pick and choose provisions that appeared 'basic' in their subjective judgments. For example, the Fifth and 16th Amendment judgments of the Supreme Court, so far as they relate to the appointment and removal of supreme court judges, are criticised for self-serving, prioritising the 'judicial independence' principle over other key constitutional principles like separation of power and judicial accountability.⁶⁷ The courts may even apply the basic structures of the original Constitution against the original Constitution itself.⁶⁸ Similarly, the

⁶⁰ Constitution (n 15) Art 26(3).

⁶¹ 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.

⁶² *Chowdhury* (n 22).

⁶³ Khan (n 5).

⁶⁴ Kawser Ahmed, *The Supreme Court's Power of Judicial Review in Bangladesh: A Critical Evaluation* presented in the Seminar titled 'Celebrate the 40th Anniversary of the Constitution of Bangladesh' on 20 October 2012, available at <http://dx.doi.org/10.2139/ssrn.2595364>.

⁶⁵ *Chowdhury* (n 5), Khan (n 5).

⁶⁶ Zakir Hossain and Imtiaz Omar, 'Coup d'etat, Constitution and Legal Continuity' *The Daily Star* (Dhaka, 17 and 24 September 2005) 8.

⁶⁷ M Jashim Ali Chowdhury and Nirmal Kumar Saha, 'Advocate Asaduzzaman Siddiqui v. Bangladesh: Bangladesh's Dilemma with Judges' Impeachment' (2017) 3 *Comparative Constitutional and Administrative Law Quarterly* 7.

⁶⁸ David Landau, Rosalind Dixon and Yaniv Roznai, 'From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras' (2019) 8(1) *Global Constitutionalism* 40.

13th Amendment judgment allegedly over-emphasised the 'unelected' nature of the election-time caretaker government against the country's democratic interest in having a free and fair election.⁶⁹

Secondly, the Constitution being a document of fundamental importance, it appears extremely difficult, if not impossible, to classify some provisions as basic and others as peripheral. The Supreme Court's list of 'basic structures' is ever-expanding. In *Anwar Hossain Chowdhury*, Justice Shahabuddin Ahmed gave a list of seven basic features.⁷⁰ Justice Mohammad Habibur Rahman added another one to the list.⁷¹ Justice Badrul Haider Chowdhury felt that there were 21 'unique features', of which 'some' were basic.⁷²

Thirdly, the judicially invented implicit unamendability was against the framers' intention. The framers intended an amendable constitution by all means. The original Constitution required nothing more than a qualified majority on the floor. Moreover, the Court never explained how it could assume, under the cloak of its so-called constitutional guardianship, a power expressly denied to it.

Fourthly, institutional considerations are even more problematic. The doctrine of 'basic structure' arguably gives the judiciary a final say over the amendment process. In one sense, the *Anwar Hossain Chowdhury* version of the doctrine was more extreme than the Indian one. In 1989, the Indian Constitution could be amended by the Parliament alone. The Bangladeshi Constitution could be amended either by Parliament acting in itself or by Parliament acting in conjunction with a popular referendum. The *Anwar Hossain Chowdhury* judgment did not note this distinction in amendment processes. It simply held that the Basic Structures could not be destroyed. Had the Eighth Amendment been passed through a popular referendum, could the Supreme Court place it above the people and declare it invalid? One of the judges in the Eight Amendment case – Mohammad Habibur Rahman J – seemed aware of the problem when he argued that the Parliament could not 'by itself' impair or destroy the fundamental aim of our society.⁷³ In writing this, Justice Rahman perhaps impliedly acknowledged that amendments done through referendum might not be judicially reviewed. However, most judges of that case simply bypassed the issue.

Fifthly, in the context of the volatility of Bangladesh politics, the supporters of judicial review argue that constitutional supremacy requires extraordinary entrenchment. The two-thirds majority requirement can be only one of the many

⁶⁹Ridwanul Hoque, 'Judicialization of Politics in Bangladesh: Pragmatism, Legitimacy and Consequences' in Mark V Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism* (Cambridge University Press, 2015) 261, 287.

⁷⁰*Chowdhury* (n 22) [416] (Justice Shahabuddin Ahmed identified the constitutional supremacy, democracy, republican government, unitary state, separation of powers, independence of judiciary and fundamental rights as basic structures of the Bangladesh Constitution).

⁷¹*ibid* [496] (Justice Habibur Rahman added the Preamble to the list).

⁷²*ibid* [292].

⁷³*ibid* [496].

ways to ensure this. As a 'guardian of the constitution',⁷⁴ the judiciary should also have a say in the constitutional amendment process. Once elected, the parliamentarians do not acquire a blanket power to do everything they wish until de-elected in the next electoral cycle.⁷⁵ If judicial involvement is not there, a constitution may become a plaything in the hands of the majority party and give rise to unregulated parliamentary supremacy.⁷⁶ Conversely, the critics of the Basic Structure doctrine ask whether a mere likelihood of parliamentary abuse of amendment power may sufficiently justify the judicial review. As seen in the 16th Amendment judgment (2016), the judges may apply their review power in self-serving ways.⁷⁷ What happens if the judiciary, as an institution, transgresses its limit and starts abusing its power?⁷⁸ How could the legislature and people check the unelected judges acting in unison? Therefore, the vulnerabilities of democracies like Bangladesh to their representatives do not seem to offer a strong justification for the Basic Structure doctrine in the way the Supreme Court asserts it. These concerns of the Basic Structure critics are real. Hence some pro-Basic Structure scholars concede the 'minimal legitimacy'⁷⁹ of the doctrine and call for its scarce and limited application.⁸⁰

B. Pragmatic Questions Over the Amendment Reviews

There are pragmatic questions over the efficiency of judicial review as a check on abusive constitutional amendments. In Bangladesh, eight constitutional amendments have been challenged in the Court so far. The Court has invalidated five of them.⁸¹ All the invalidations have faced questions from different sides of the argument.⁸² The Fifth, Seventh, Eighth, 13th, and 16th Amendment cases have been criticised for adventurously meddling in the political process.⁸³ Academic and political critiques apart, the Government and parliamentary response to the amendment reviews had traditionally been shaped by their political conveniences. The latest invalidation of the 16th amendment resulted in an excessively combative showdown and ended badly for the Court.

⁷⁴ *Secretary of Ministry of Finance v Masder Hossain*, (2000) 20 BLD (AD) 104.

⁷⁵ Ridwanul Hoque, 'On coup d' etat, Constitutionalism, and the Need to Break the Subtle Bondage with Alien Legal Thought: A Reply to Omar and Hossain' *The Daily Star* (Dhaka, 29 October 2005).

⁷⁶ Chowdhury (n 22) [525].

⁷⁷ Chowdhury and Saha (n 67) 11.

⁷⁸ Stith (n 5) 73.

⁷⁹ Krishnaswamy (n 5) xxxii.

⁸⁰ Dixon and Landau (n 5) 623.

⁸¹ Chowdhury and Saha (n 23).

⁸² Ridwanul Hoque, 'Can the Court Invalidate an Original Provision of the Constitution?' (2016) 2(2) *University of Asia Pacific Journal of Law and Policy* 13.

⁸³ Abdul Halim, 'The 7th Amendment Judgment by the Appellate Division: Judicial Politics or Judicial Activism' (2012) *The Counsel Law Journal* 19.

In 1989, the military Government of Ershad, in the waning days of its rule, reluctantly complied with the invalidation of the Eighth Amendment. However, Ershad's Jaty Party (JP) MPs strongly criticised the judicial overreach and aggression on Parliament's 'sovereignty' in their floor speeches. The Parliament constituted a 22-member committee to recommend that the President issue some guidelines specifying the boundaries of judicial review.⁸⁴ In 2005, the High Court Division's invalidation of the Fifth Amendment came around one year before the end of the Bangladesh Nationalist Party (BNP) Government's tenure. The founder of BNP, Major Ziaur Rahman, sponsored the amendment in 1979. Expectedly, the Government reacted fiercely, appealed the decision to the Appellate Division overnight and secured a stay over the High Court judgment.⁸⁵ They, however, could not finish the appeal hearing. Coming to power in 2009, BNP's archrival – the AL – withdrew the appeal. Though the appeal continued by allowing a BNP leader to be included as an appellant, the Appellate Division upheld the High Court Division's judgment.⁸⁶ Next, the Court invalidated the Seventh Amendment in 2010.⁸⁷ This time it affected another opposition party, the JP, whose leader Lt Colonel HM Ershad, sponsored the amendment in 1986. Expectedly, the ruling AL Government did not appeal the judgment. Opposition parties, BNP and JP, criticised the judgment on political grounds.⁸⁸ In 2011, the Court invalidated the 13th Amendment.⁸⁹ Many argue that the Supreme Court did the ruling party AL's bidding in this case by prematurely invalidating the caretaker system.⁹⁰ The AL Government used the judgment to justify the discontinuance of the caretaker government.⁹¹

If all these incidents represent a government-court alliance of convenience, the 16th Amendment judgment created an opposite scenario. The original Constitution provided a parliamentary removal system for the Supreme Court judges.⁹² It was replaced with the Supreme Judicial Council system by the Fifth Amendment of 1979. Over time, the judges grew comfortable with the Supreme

⁸⁴ Nizam Ahmed, *Parliaments in South Asia: India, Pakistan and Bangladesh* (Routledge, 2020) 145–46.

⁸⁵ Ali Riaz, 'Bangladesh in 2005: Standing at a Crossroads' (2006) 46(1) *Asian Survey* 107, 111.

⁸⁶ Delwar Hossain (n 57).

⁸⁷ Siddique Ahmed (n 57).

⁸⁸ Halim (n 83).

⁸⁹ *Saleem Ullah v Bangladesh* (2005) 57 DLR 171 and *Abdul Mannan Khan v Bangladesh* (2012) 64 DLR (AD) 1.

⁹⁰ Md Abdul Halim, 'Judicial Policy Making in the Supreme Court of Bangladesh' in Ridwanul Hoque and Rokeya Chowdhury (eds), *A History of the Constitution of Bangladesh: The Founding, Development, and Way Ahead* (Routledge, 2023) 101.

⁹¹ Maimul Ahsan Khan, 'Constitutional disaster & "Legal" Impunity: Constitutional Amendments in Perspective' (*Asian Human Rights Commission*), available at www.humanrights.asia/resources/journals-magazines/article2/special-report-inexistent-rule-of-law-in-bangladesh/04-2/.

⁹² Asano Noriyuki and Minato Kazuki, 'Politicisation of the Appointment and Removal of Judges in a Declining Democracy: The Case of Bangladesh' (Institute of Developing Economies, Japan External Trade Organization (IDE-JETRO) Discussion Paper, 2019), available at <https://core.ac.uk/download/pdf/288469659.pdf>.

Judicial Council system. In 2005, the Court invalidated the Fifth Amendment but saved the supreme judicial council system labelling it good for judicial independence.⁹³ The Court revolted when the 16th Amendment (2014) sought to restore the parliamentary removal system. A defiant High Court judge passed a scathing rebuke of the Parliament.⁹⁴ The judgment contained some derogatory remarks on the character and disposition of the Parliament members in general. In a dramatic show of institutional tension, the ruling party MPs scrambled the floor and harshly criticised the Court for refusing to acknowledge the Parliament's power.⁹⁵ The Government appealed the decision. While the High Court judge's comments were already fueling the fire, the Chief Justice's judgment in the Appellate Division hurled further insult upon the parliamentarians. It put him in a straight hot seat. 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.⁹⁶ Scenes changed swiftly after that, and within months, the Chief Justice was forced to leave the country 'for treatment' and later resigned as the Chief Justice.⁹⁷ The Government's review petition against the Appellate Division judgment is still pending. The 16th Amendment remains in the printed text of the Constitution. So far, there has been no meeting of the Supreme Judicial Council. In the meantime, misconduct allegations arose against at least three supreme court judges. All of them were verbally told by the subsequent Chief Justice to refrain from sitting on the benches. So, it is not clear whether the Supreme Judicial Council stands or whether the parliamentary removal system is revived.⁹⁸

C. Debates on the Referendum System

As mentioned earlier, the Fifth Amendment introduced the referendum system in 1979. It was discarded in 2011. Currently, there are debates about whether the referendum system should be revived. This author has consistently argued that

⁹³ *Delwar Hossain* (n 57).

⁹⁴ *Advocate Asaduzzaman Siddiqui v Bangladesh* 2012 CLC (HCD) 41.

⁹⁵ 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), available at www.thedailystar.net/frontpage/hc-scraps-16th-amendment-1219480.

⁹⁶ New Nation Report, 'JS Will Again Pass 16th Amendment' *The New Nation* (Dhaka, 5 August 2017).

⁹⁷ DS Report, 'PM Critical of CJ's Remarks' *The Daily Star* (Dhaka, 22 August 2017); DS Report, 'AL Leaders Now Calling for CJ to Step Down' *The Daily Star* (Dhaka, 23 August 2017); DS Report, 'I am Completely Well, says Chief Justice SK Sinha as he Leaves Country' *The Daily Star* (Dhaka, 13 October 2017); DS Report, 'Chief Justice Steps Down' *The Daily Star* (Dhaka, 12 November 2017); DS Report, 'Forced to Quit: BNP, No Pressure: AL' *The Daily Star* (Dhaka, 12 November 2017). For a compendium of all the news on this incident, see www.thedailystar.net/tags/chief-justice-surendra-kumar-sinha.

⁹⁸ TBS Report, 'A Catch 22 for the Supreme Court' *The Business Standard* (Dhaka, 25 August 2019), available at <https://tbsnews.net/bangladesh/court/catch-22-supreme-court>.

the referendums might answer the fundamental questions surrounding the Basic Structure doctrine and eternity clauses.⁹⁹

The Basic Structure doctrine is based on ‘inherent’ or ‘implicit’ limits on the amendment power.¹⁰⁰ The Supreme Court draws the limits from the constitutional supremacy doctrine.¹⁰¹ According to this view, unlimited power of amendment would turn Bangladesh into a UK-like parliamentary supremacy which the framers never contemplated. However, as discussed earlier, amendment reviews by unelected judges have counter-majoritarian difficulty.¹⁰² Also, the Bangladesh Supreme Court’s reading of basic structures has a supremacist tone – some labelling it a ‘government by the court’.¹⁰³ A final say of the unelected judges in constitutional matters risks suppressing the people’s sovereign authority in deciding the nation’s political course.

Next, the legislative entrenchments through perpetual or eternity clauses – which Richard Albert calls ‘codified unamendability’¹⁰⁴ adds to the basic structure inspired by ‘interpretative unamendability’.¹⁰⁵ Eternity clauses, such as Article 7B of the Bangladesh Constitution, try to entrench core constitutional provisions by taking them away from future parliaments. It creates an unjustifiable dead hand problem for the inter-generational transformation of constitutional rules and norms. As Elkin argues,

‘fixation’ of constitutional norms will not guarantee its ultimate survival unless it accommodates a breathing space for public opinion and sentiment and intergenerational adaptability. Quite the opposite of the popular truism, a constitution’s survival has been empirically linked more to its flexibility than its rigidity.¹⁰⁶

Given the dilemma, Bangladesh’s discredited referendum system appears to be a good option to consider. The referendum system ensures better access and participation of the people in constitutional amendments. The legislatures initiate and pass the amendments in Japan, Australia and Ireland. All of them are then submitted to the people in a referendum or special election. People ratify or reject the amendment by a simple majority. The courts in these countries refuse to judicially review the constitutional amendments, highlighting the referendum

⁹⁹ M Jashim Ali Chowdhury, ‘Negotiating Article 142(1A) for the “Basic Structure”’ *The Daily Star* (Dhaka, 6 March 2010).

¹⁰⁰ Chowdhury (n 22) [603] (Justice ATM Afzal).

¹⁰¹ Article 7 of the Constitution of Bangladesh embodies the constitutional supremacy clause in following terms: ‘(1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution. (2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution and other law shall, to the extent of the inconsistency, be void.’

¹⁰² Luís Roberto Barroso, ‘Counter-majoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies’ (2019) 67(1) *The American Journal of Comparative Law* 109.

¹⁰³ Imtiaz Omar and Zakir Hossain, ‘Constitutionalism, Parliamentary Supremacy, and Judicial Review: A Short Rejoinder to Hoque’ *The Daily Star* (Dhaka, 26 November 2005).

¹⁰⁴ Albert (n 1).

¹⁰⁵ *ibid* 149.

¹⁰⁶ Elkins, Ginsburg and Melton (n 8) 99–103.

safety valve.¹⁰⁷ Bangladesh's 1979 model of the referendum was different. It did not require all constitutional amendments to be referred to the people. Only the amendments touching upon selected constitutional provisions, understandably an identified list of basic structures, were to be sent to the referendum. It had two pragmatic advantages.

First, it divided the constitutional amendments into two classes for judicial review. Amendments made through referendum involve the original or primary constituent authority – the people.¹⁰⁸ Hence those must be respected by the Court. On the other hand, amendments made through a mere two-thirds majority involve the delegated or secondary constituent authority.¹⁰⁹ The judicial review could come to the Constitution's rescue in these cases.

Secondly, the 1979-styled short listing of referendutable provisions could clarify the uncertainty and ambiguity problem surrounding the basic structure doctrine. It would relieve the judiciary from second-guessing the basics.¹¹⁰ The textual articulation of a basic structure list should be more acceptable than the unelected judges inventing basic structures on a case-by-case basis.¹¹¹ The 15th Amendment's eternity clause currently provides an extremely wide, textually settled list of basic structures. Also, it has kept the list open for the judiciary by referencing 'other basic structures'. So, the problem of uncertainty still remains. Revival of a 1979-styled short-listed referendum clause is therefore worth considering.

The referendum has stronger normative claims too. It fits within Richard Albert's 'escalated amendment structure'¹¹² and Dixon and Landau's 'Tiered Constitutionalism'.¹¹³ Albert argues that any 'dismembering amendment' – akin to Bui's replacement-type amendments – must go through 'an escalated amendment structure', unlocking the deadlocks of total unamendability.¹¹⁴ Landau and Dixon see the additional entrenchment of some core constitutional values as a middle ground between flexible and rigid constitutional models. They call it a tiered constitutional design which draws from the virtues of flexible and rigid constitutionalism. Tiered constitutionalism put the amendment reviews on a more sustainable footing.¹¹⁵ It also ensures popular participation in the process.¹¹⁶

¹⁰⁷ Gary Jeffrey Jacobsohn, 'An Unconstitutional Constitution? A Comparative Perspective' (2006) 4(3) *International Journal of Constitutional Law* 460, 467.

¹⁰⁸ Yaniv Roznai, 'Interview' (2018) 2 *Indian Journal of Constitutional and Administrative Law* 129, 132–33.

¹⁰⁹ Roznai (n 1).

¹¹⁰ Pratap Bhanu Mehta, 'The Inner Conflict of Constitutionalism: Judicial Review and the Basic Structure' in Zoya Hasan, Eswaran Sridharan and Ratna M Sudarshan (eds), *India's Living Constitution: Ideas, Practices and Controversies* (Anthem Press, 2002) 105, 110.

¹¹¹ Miriam Galston, 'Theocracy in America: Should Core First Amendment Values Be Permanent?' (2009) 37 *Hastings Constitutional Law Quarterly* 65, 121.

¹¹² Albert (n 1) 201–202.

¹¹³ David Landau and Rosalind Dixon, 'Tiered Constitutional Design' (2018) 86(2) *The George Washington Law Review* 438.

¹¹⁴ Albert (n 1) 201–202.

¹¹⁵ Landau and Dixon (n 113) 504.

¹¹⁶ *ibid* 507–508.

It facilitates the political enforcement of constitutions by increasing public attachment, ownership and attraction towards the Constitution.¹¹⁷

V. Conclusion

Bangladesh's history of amendments reflects an ongoing tension between constitutional stability and change. The original Constitution provided for amendments by a mere two-thirds parliamentary majority. The judiciary later imposed implicit limits on the amendment power. An eternity clause was also introduced in 2011. A referendum system introduced in 1979 was discarded in 2011, leaving the people without a say in the amendment process. Bangladesh struggles to balance the power of the political governments and the courts vis-à-vis the people.

Bangladeshi political parties have almost universally abused their amendment powers.¹¹⁸ Progressive amendments have been few, and retrogressive ones are abundant. The political parties subsequently mishandled and thwarted the purposes of the foundational amendment of 1992 (12th) and the constructive amendment of 1996 (13th). Three replacement-type amendments of 1975 (Fourth), 1979 (Fifth) and 2011 (15th) failed to settle the national identity question and other core constitutional values. As Hakim and Huque put it:

The objectives behind the amendments included the perpetration of individual and party positions, legitimisation of military intervention in politics, and tinkering with the political system for selfish ends. The attainment of consensus on major issues was never attempted [...]. As a consequence, the polity has not benefited, and its capacity has not been strengthened. On the contrary, frequent changes have further weakened the system and added to the confusion of the citizens.¹¹⁹

The judicial review of amendments is generally welcome by the people.¹²⁰ However, the amendment review attracts normative objections such as counter-majoritarian difficulties and dead hand problems. There are pragmatic objections too. Courts have controversially invalidated popular constitutional amendments, such as the High Court decentralisation amendment (1988). It remained tone-deaf over many abusive amendments involving the one-party system (Fourth), military usurpation

¹¹⁷ *ibid* 511.

¹¹⁸ Ridwanul Hoque, 'The Politics of Unconstitutional Amendments in Bangladesh' in Rehan Abeyratne and Ngoc Son Bui (eds), *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (Routledge, 2021).

¹¹⁹ Mohammad A Hakim and Ahmed Shafiqul Huque, 'Governmental Change and Constitutional Amendments in Bangladesh' (1995) 2(2) *South Asian Survey* 255, 269.

¹²⁰ Ridwanul Hoque, 'Implicit Unamendability in South-Asia: The Core of the Case for the Basic Structure Doctrine' (2018) 3 (Special Issue) *Indian Journal of Constitutional and Administrative Law* 23, 28.

(Fifth and Seventh), caretaker government (15th), etc, and would intervene only when the crises abated, and a favourable political government was in power.¹²¹ All these raise doubts about the effectiveness of amendment reviews in illiberal politics, where the ruling party's willingness to comply with the Court ultimately decides the fate of a judicial verdict.¹²² In such contexts, the courts often play the 'handmaiden of the government'¹²³ rather than pursue any liberal constitutional agenda.¹²⁴ In the 16th Amendment case, the Supreme Court's reckless adventure with basic structure doctrine invited confrontation with the political branch doing more harm than good. Facing an antagonistic Government's bullish reaction, the Chief Justice had to flee the country. If the fallout of the 16th Amendment judgment is any indication, the pragmatic challenges facing the courts and judges are real. In authoritarian and illiberal systems like Bangladesh, aggressive judicial reviews may harm more than benefit the constitutional system. Given the context, the referendum system might be perceived as a logical safeguard against abusive constitutional amendments and the democracy deficit in the judicial policing of those.

¹²¹ Halim (n 90).

¹²² Peter H Solomon, 'Courts and Judges in Authoritarian Regimes' (2007) 60(1) *World Politics* 122.

¹²³ Chowdhury Ishrak Ahmed Siddiky, 'Judicial Review and the Separation of Powers, in Hoque and Chowdhury (n 90) 111, 126.

¹²⁴ David Landau and Rosalind Dixon, 'Abusive Judicial Review: Courts Against Democracy' (2020) 53 *University of California Davis Law Review* 1313.