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The Purposive Entrenchment of Constitutional Identity: Insights from Bangladesh

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Abstract

The judicial review of a constitutional amendment and a constitutional amendment articulating the unamendable basic structures of the Constitution in the form of eternity clauses are fraught with the possibility of debilitating a polity. The lure of making aspirational normative ideals permanent often drives the judicial articulation of constitutional identity in the form of basic structure of the Constitution. On the other hand, the legislature may also wish to articulate the same through the constitutional amendments. This paper highlights the fallouts of such judicial and legislative articulation of constitutional identity in the form of the unamendable basic structures of the Constitution. The paper spotlights Bangladesh and the manner of declaration of unconstitutionality of the 13th constitutional amendment by the appellate division of the Bangladesh Supreme Court and argues that it was a flawed decision. The paper asserts that an indigenous and ethnographic articulation of constitutional identity by the constitutional court better serves a polity than simply aping such an articulation from the neighbouring country. The paper also problematises the popular understanding in the comparative constitutional law about the need of supermajority of a Constitution Court in declaring a constitutional amendment,

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unconstitutional. The need of supermajority is considered suitable in well-functioning democracies only. It is argued that the simple majority of the Court declaring a constitutional amendment unconstitutional may not be desirable in not so well-functioning democracies like Bangladesh. It further argues that the declaration of the unamendable eternity clause by the 15th constitutional amendment of Bangladesh is an unconstitutional constitutional amendment as it takes away the power of judicial review in respect of the identified eternity clauses and strips the future Parliament of its democratic power to amend the Constitution in respect of the provisions of the Constitution declared permanent by the eternity clause.

Keywords: Bangladesh; Basic Structure; Constitutional Amendment; Constitutional Identity; Eternity Clause, Supermajority

I. INTRODUCTION: A BACKGROUNDER TO CONSTITUTIONAL IDENTITY

1.1. Background

Constitution is regarded as an "essentially contested concept"[1] and a "slippery"[2] one. Tom Ginsburg sees the Constitution as "associated with the *narrower* and *empirically rarer* concept of constitutionalism"[3] that seeks to limit the powers of the State.[4] In that sense, Constitution plays a functional role in defining the powers of the State by providing the limitations on its power, but what if the State limits the Constitution? Parliaments of various states of the world have limited their Constitutions at some point in history by using the power of constitutional amendment[5], which may or may not have been reclaimed by the

[1] Sanford Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 1988), 124, quoting W. B. Gallie. See also David Collier, Fernando Daniel Hidalgo, and Andra Olivia Maciucean, "Essentially Contested Concepts: Debates and Applications," *Journal of Political Ideologies* 11, no. 3 (September 2006): 211–246.

[2] Tom Ginsburg, "Constitutionalism: East Asian Antecedents," *Chicago-Kent Law Review* 88 (March 2012): 11.

[3] Ginsburg, "Constitutionalism: East Asian Antecedents," 11.

[4] Kazuyaki Takahashi, "Why Do We Study Constitutional Laws of Foreign Countries, and Why?," in *Defining the Field of Comparative Constitutional Law*, ed. Vicki Jackson and Mark Tushnet (Westport: Praeger, 2002), 35–71. Takahashi highlights how constitutionalism–the idea that the government/ruler can be limited or bound by law–was an alien concept for Japan.

[5] For example, the Indian Parliament enacted the 24th Constitutional Amendment in 1971 to take away the power of substantive judicial review of a constitutional amendment from the constitutional courts in India, namely the Supreme Court and the High Courts. The Turkish Parliament also enacted the constitutional amendment in 1971 and took away the power of substantive judicial review of constitutional amendments from the Turkish Constitutional Court. The Constitution of Pakistan was amended in 1985 by a Presidential order (Order no. 14 of 1985) to prohibit the substantive judicial review of constitutional amendments. Likewise, the Hungarian Parliament also enacted the fourth amendment of the Basic law in 2013 and took away the power of substantive judicial review of constitutional amendments from the Constitutional Court.

constitutional courts of those states.[6] But whether a constitutional amendment can limit the Constitution in a way that cannot be challenged in a court of law? Whether Parliament can lock these limitations on their constitutions, via constitutional amendments, to eternity? Whether eternity clauses[7] inserted by a constitutional amendment alter the constitutional identity? The recent political revolution[8] in Bangladesh and political and social upheavals raise pertinent and complex questions. On the complexity that eternity clauses pose, Silvia Suteu notes, "Eternity clauses and judicially created doctrines of unamendability are paradoxical from the point of view of democratic constitutionalism. The tense relationship between constitutional precommitment and democracy is further strained if we take eternity clauses to be at the farthest end of a constitutional rigidity continuum." [9]

The judicial invocation of the constitutional identity keeps surfacing in the judgments of the Supreme Court of India[10] every now and then. According to Gary Jeffrey Jacobsohn, 'constitutional identity' represents "*a mix of aspirations and commitments expressive of a nation's past*", it also "*evolves in ongoing*

[6] The courts in places such as Sri Lanka, Malaysia, and Singapore have generally rejected the notion of judicially enforceable implicit unamendability of the basic structures of the Constitution. On the other hand, courts around the world, in countries such as India, Bangladesh, Kenya, Colombia, Peru, Taiwan, and Belize have endorsed the theory of implicit unamendability and held that the Constitutional Courts possess the power to enforce this unamendability. The concept of implicit unamendability recognises the inherent substantive limitations on the legislature to amend the Constitution and States that the fundamental constitutional identity in terms of the basic structures is unamendable. Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford: Oxford University Press, 2017), 516. See also Adfin Rochmad Baidhowah, "Defender of Democracy: The Role of Indonesian Constitutional Court in Preventing Rapid Democratic Backsliding," *Constitutional Review* 7, no. 1 (May 2021): 124; Mila Versteeg et al., "The Law and Politics of Constitutional Term Limits Evasion," *Columbia Law Review* 120, no. 1 (January 2020): 173.

[7] Several recent Constitutions include an 'eternity clause' in their Constitution included by the original drafters of the Constitution, which essentially are the unamendable provisions prohibiting even the legislative supermajorities either directly or indirectly from amending these unamendable provisions of the Constitution. One of the examples of the eternity clause is Article 79(3) of the German Basic Law, it voids any amendment that attempts to detract from the principles of Human Dignity, Federalism and Social Democracy. See Christopher J. Beshara, "Basic Structure Doctrines and the Problem of Democratic Subversion: Notes from India," *Law and Politics in Africa, Asia and Latin America* 48, no. 2 (April 2015): 99; S. Weintal, "The Challenge of Reconciling Constitutional Eternity Clauses with Popular Sovereignty," *Israel Law Review* 44, no. 3 (December 2011): 449; Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford: Oxford University Press, 2021).

[8] According to Hans Kelsen, a revolution is said to take place "whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way … not prescribed by the first legal order." See Gary Jeffrey Jacobsohn, "Theorising the Constitutional Revolution," *Journal of Law and Courts* 2 (March 2014): 1.

[9] Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford: Oxford University Press, 2021), 2.

[10] Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225; Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1; Minerva Mills v. Union of India, (1980) 2 SCC 591; Waman Rao v. Union of India, (1981) 2 SCC 362; S. R. Bommai v. Union of India, (1994) 3 SCC 1; I. R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1; M. Nagaraj v. Union of India, (2006) 8 SCC 212; Supreme Court Advocates on Record Association v. Union of India, (2016) 5 SCC 1.

political and interpretive activities occurring in courts, legislature and other public and private domains."[11] The legal determination of constitutional identity may consider the actual state of the society, but it will largely remain focused on the constitutional assertion of the identity to be gathered from the holistic reading of the Constitution.[12] Ashish Nandy, a noted Indian social theorist has argued that the identity of a polity is more rooted in the extra-constitutional factors such as religion and culture than in the aspirational constitutional value.[13] Therefore, there may be an aspirational constitutional identity and an empirical constitutional identity and, the empirical may be different in many respects from the aspirational.

The epochal affirmation of the constitutional identity principle came in the landmark *Kesavananda Bharti*[14] judgment of the Supreme Court in India in the form of the basic structure of the Constitution, identified by the court as the structures of the constitution that undergird it in such profoundly fundamental ways, that bereft of it, the constitutional loses its identity. The court declared, albeit by a slender 7:6 majority, that violations of the basic structure by a constitutional amendment would make the constitutional amendment unconstitutional. This was the recognition of implied limitations on the constitutional amendment power of the Indian Parliament as the Constitution of India does not have any explicit eternity clause and it only provides for the procedure[15] to amend the Constitution without specifying any content-based limitations on the exercise of amendment. In the recent past, there has been a shift in constitutional adjudications, led by the Supreme Court, where even when the constitutionality of a constitutional amendment is not to be examined by the court, the constitutional identity principle with a different name has been invoked. Constitutional morality and transformative constitutionalism are some of the illustrative examples evoking

[11] Gary Jeffrey Jacobsohn, "Constitutional Identity," *The Review of Politics* 68, no. 3 (July 2006): 361.
[12] Manwendra Kumar Tiwari, "Law, Politics, and the Erasure of the Secular Constitutional Identity of India," *Comparative Constitutional and Administrative Law* 7, no. 1 (January 2022): 18.
[13] Ashish Nandy, "The Politics of Secularism and the Recovery of Religious Toleration," in *Secularism and Its Critics*, ed. Rajeev Bhargava (Delhi: Oxford University Press, 1998), 364–365.
[14] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[15] Article 368 of the Constitution of India.

constitutional identity that have been invoked by the courts as the overarching principles providing anchorage to its constitutional interpretation.[16]

The resort to the basic structure principle is now entrenched as the bedrock of Indian constitutionalism. The invocation of this principle by the courts to decide the constitutionality of constitutional amendments is inevitable but the invoking of similar constitutional identity constructs as an interpretive praxis can be problematic, when the court is not asked to determine the constitutionality of a constitutional amendment.[17] The entrenchment of a construct is the primary cause that drives the articulation of constitutional identity and therefore, the judicial articulation of a construct as the inviolable constitutional identity isolates that construct from the scrutiny of politics. The obvious fluid nature of political articulations ensures that the construct remains open to political contestation. On the other hand, the judicial articulation sanitises the identified construct and entrenches it as a constitutional *fait accompli*.

The judicial articulation of the inviolable constitutional identity has given rise to an important conversation in the constitutional design, where the framers of the Constitution would mull over the articulation of the inviolable constitutional principles to be expressly articulated in the constitutional text, popularly referred to as the eternity clause of the Constitution. The rise in the eternity clauses in recent constitutional practices has been highlighted by scholars for their "greater and more insidious potential for abuse".[18] It has also been documented that express entrenchment of eternity clauses in the Constitution result in more constitutional amendments being declared unconstitutional.[19] However, if the process to amend the Constitution includes a compulsory nation-wide referendum requiring double majority of votes– first a nationwide majority and the second

[16] Bertus de Villiers, "Breathing Life into the Constitution: The Transformative Role of Courts to Give a Unique Identity to the Constitution," *Constitutional Review* 9, no. 1 (June 2023): 109.

[17] Aparna Chandra, "A Precious Heritage? The Construction of Constitutional Identity by Indian Courts," *Comparative Constitutional Studies* 1, no. 1 (January 2023): 140.

[18] Silvia Suteu, "Introduction: The Rise of Eternity Clauses in Democratic Constitutionalism," in *Eternity Clauses in Democratic Constitutionalism* (Oxford: Oxford University Press, 2021), 1.

[19] Michael Hein, "Do Constitutional Entrenchment Clauses Matter? Constitutional Review of Constitutional Amendments in Europe," *International Journal of Constitutional Law* 18, no. 1 (March 2020): 78.

majority among the majority of States, as is the case in Australia[20], the popular sovereignty doctrine may be invoked and, even a new constitutional identity may be legitimate. The application of the unconstitutional constitutional amendment doctrine will frustrate the commitment to popular sovereignty acquired through a successful referendum.[21]

The express articulation of the constitutional identity by the framers of the constitution may be problematic but the basis of the basic structure thesis remains associated with the theory of original intention[22], and therefore, it is onerous to contest its legitimacy, as the basic structure refers to the unamendable fundamentals of the original Constitution. The basic structure theory is not applicable against the provisions of the original Constitution as the original provisions cannot be considered to be contrary to the fundamental features of the Constitution which are also derived from the original provisions of the Constitution. A constitutional amendment may omit the original and substitute it with a new idea. The constitutionality of this change would depend on whether the omitted original was essential to the fundamental values derived from the original values of the Constitution as a whole or not.[23] This may sometimes result in the omitted original being termed a mistake committed by the framers of the Constitution.[24]

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[20] Michael Kirby, "Indian and Australian Constitutional Law," *Journal of the Indian Law Institute* 60, no. 1 (January 2018): 1.

[21] Rivka Weill, "The New Commonwealth Model of Constitutionalism Notwithstanding: On Judicial Review and Constitution-making," *The American Journal of Comparative Law* 62, no. 1 (January 2014): 127.

[22] The theory of original intent claims that the framers of the Constitution expected future interpreters to seek the meaning of the document in the framers' intent. See H. Jefferson Powell, "The Original Understanding of Original Intent," *Harvard Law Review* 98, no. 5 (March 1985): 885.

[23] However, the historicity of a State's journey as a polity may suggest that some constitutional amendments despite being constitutional dismemberments *i.e.* the amendments which are "self-conscious efforts to repudiate the essential characteristics of Constitution and to destroy its foundations" may still be constitutional and legitimate. See Abdurrachman Satrio, "Restoring Indonesia's (Un) Constitutional Amendments: Soepomo's Authoritarian Constitution," *German Law Journal* 24, no. 2 (February 2023): 402. "Constitutional Dismemberment" is a term coined by Professor Richard Albert. He argues that it "occupies the space between a constitutional amendment and a new Constitution". See Richard Albert, "Constitutional Amendment and Dismemberment," *Yale Journal of International Law* 43, no. 1 (January 2018): 1.

[24] Justice H. R. Khanna in *Kesavananda Bharati* while declaring that a constitutional amendment diluting the fundamental right to property as constitutional, suggested that it was a mistake on the part of framers to have ascribed this kind of seriousness to right to property. See Upendra Baxi, "A Known but an Indifferent Judge: Situating Ronald Dworkin in Contemporary Indian Jurisprudence," *International Journal of Constitutional Law* 1, no. 4 (October 2003): 557.

This conundrum, however, is amplified when a constitutional amendment attempts to articulate the unamendable parts or the unamendable principles of the Constitution. Constitutional validity of such a constitutional amendment has not been examined, so far. At a normative level the judicial challenge to such an amendment is possible but the real plausibility of the same remains doubtful. Whether the articulation of basic structure by the legislature through a constitutional amendment may result in violation of the basic structure of the Constitution is therefore a moot question.

1.2. Questions and Method

The paper examines the judicial reasoning in the judicial review of a constitutional amendment while identifying the unamendable constitutional identity in the form of the basic structure of a given Constitution. The second question examined in this paper is the permissibility of the unamendable eternity clauses in the constitution through the route of constitutional amendment. Both these questions have been examined in the following backdrop. First, the decision of the appellate division of the Bangladesh Supreme Court to declare the 13th constitutional amendment as unconstitutional and second, the15th constitutional amendment of Bangladesh Constitution which gave effect to the decision of the Supreme Court in the 13th constitutional amendment case and also added the unamendable eternity clauses to the Constitution of Bangladesh. A discursive doctrinal method has been used to examine these questions and the judicial approach of the Indian Supreme Court has been referred as a scaffolding being one of the primogenitors of the basic structure theory to examine the constitutionality of constitutional amendments. The judicial review of constitutional amendments and the decisions of unconstitutionality by slender majority give rise to the issue of the need for supermajorities in adjudication to declare a constitutional amendment unconstitutional. This question has also been examined in the backdrop of Bangladesh. Further, the question of limits of comparative constitutional law in identifying the basic structure has also been considered.

II. THE FOREGROUNDS OF THE RECENT EVENTS IN BANGLADESH

The role of shared histories, language, culture and religion in shaping the nation[25] and therefore the constitutional identity has been significantly highlighted by scholars. In the case of Bangladesh, religion and language have been pivotal in shaping the identity complex.[26] Scholars have also highlighted how the language, culture and political loyalties of the Bangladeshi people have led to an identity crisis.[27] The political, economic and social characteristics–such as decent economic growth, sound social indicators while poor indicators of governance–of Bangladesh sometimes showcases it as a paradox[28]. The inherent theoretical tensions between constitutional secularism[29] and Bangladeshi nationalism laid down the contemporary constitutional fault lines. Bangladesh's history has been marked by potentially confusing identities[30], also reflected in the constitution and constitutional amendments. The epitome of such a confusing identity is the constitutional fact of Bangladesh which states it to be a "secular" state but also provides for "religion of the State"[31]. In the near past, appropriation of political opponents, institutionalization of authoritarian practices, and "co-option of religious leaders" have contributed to the *competitive authorsitarian* identity of Bangladesh.[32]

The recent incidents that occurred in Bangladesh culminating in the extraordinary events that took place on 5th August 2024 leading to the ouster of the Prime Minister Sheikh Hasina Government and the Prime Minister fleeing Bangladesh to India in a tizzy, were also fuelled by the long-term discontent

[25] Amartya Sen, *Identity and Violence: The Illusion of Destiny* (London: Penguin Books, 2006).
[26] M. G. Kabir, "Religion, Language and Nationalism in Bangladesh," *Journal of Contemporary Asia* 17 (December 1987): 473.
[27] Tazeen M. Murshid, "Bangladesh: The Challenge of Democracy—Language, Culture and Political Identity," *Contemporary South Asia* 2, no. 1 (March 1993): 67.
[28] Selim Raihan, François Bourguignon, and Umar Salam, eds., *Is the Bangladesh Paradox Sustainable?* (Cambridge: Cambridge University Press, 2024).
[29] *See also* Wohab and Sandro Serpa, "'Secularism' or 'No-Secularism'? A Complex Case of Bangladesh," *Cogent Social Sciences* 7, no. 1 (January 2021).
[30] Sanjay K. Bhardwaj, "Contesting Identities in Bangladesh: A Study of Secular and Religious Frontiers," *Asia Research Centre Working Paper*, LSE no. 36 (2011): 1.
[31] "Bangladesh: A Secular State with a State Religion?" *OHCHR*, accessed August 27, 2024.
[32] Shafi Md. Mostofa and D. B. Subedi, "Rise of Competitive Authoritarianism in Bangladesh," *Politics and Religion* 14, no. 3 (September 2021): 431–59

of the masses against the lack of democratic legitimacy[33] of the incumbent government led by Sheikh Hasina. The Bangladesh judiciary led by the Supreme Court of Bangladesh was instrumental both in the immediate and long-term way, for this enormous public outcry. A political decision to scrap[34] the thirty per cent quota[35] in the Government jobs for the dependents of the 1971 freedom movement of Bangladesh, taken by the Sheikh Hasina Government in the year 2018, was revived by the High Court Division (*hereinafter* HCD) of the Bangladesh Supreme Court in July 2024. The HCD in its order released on 14 July 2024[36] declared the Government's decision contemptuous of the appellate court division judgment of the Supreme Court delivered in the year 2013, upholding the thirty per cent reservation. Later, the appellate division of the Supreme Court did some damage control by immediately suspending the judgment of the HCD and later scaling the quota down to five per cent. [37] But by this time, the HCD's order had given rise to an uprising, ably supported by the high-handedness of the Sheikh Hasina Government, trying to crush it.[38]

The Bangladesh Supreme Court has unintentionally played a role in exacerbating the long-term discontent among the people of Bangladesh, by adding to the democratic erosion. The appeal of the basic structure doctrine enunciated by the Supreme Court of India in the famous *Kesavananda Bharati* case[39] (1973) as a bulwark against the unconstitutional constitutional amendments, which may be passed by the democratic governments enjoying supermajority in the legislature, has been global[40]. Basic structure doctrine underscores that certain fundamental cores of the Constitution are unamendable and it

[33] The Hindu Data Team, "Bangladesh under Sheikh Hasina-Economic Progress but Democratic Regression," The Hindu, August 6, 2024.

[34] DD News, "Understanding the Unrest in Bangladesh," August 9, 2024

[35] On the quota reform movement's threat to authoritarianism and its significance as a 'mass grievance', see David Jackman, "Students, Movements, and the Threat to Authoritarianism in Bangladesh," *Contemporary South Asia* 29, no. 2 (June 2020): 181–97; Saikot Chandra Ghosh, "Conceptualizing Student Movements in Bangladesh Post-2013: A Qualitative and Comparative Case Study of the Quota Reform Movement and the Road Safety Movement," *Social Identities* 29, no. 6 (June 2023): 534–54.

[36] Al Jazeera, "What's Behind Bangladesh's Violent Quota Protests?" July 16, 2024.

[37] Al Jazeera, "Bangladesh Top Court Scraps Most Quotas That Caused Deadly Unrest," July 21, 2024.

[38] Al Jazeera, "Bangladesh Minister Defends Gov't Response to Protests Amid Calls for Probe," July 25, 2024.

[39] Anmol Jain, "50 Years of Kesavananda Bharti," *VerfassungsBlog*, May 11, 2024.

[40] Yaniv Roznai, "The Basic Structure Doctrine Arrives in Kenya: Winds of Change for Constitutionalism in Africa?" *VerfassungsBlog*, May 14, 2023.

consequently accords to the elected Parliament, a limited legislative power to amend the Constitution. The final word on what constitutes the core rests with the constitutional courts in India namely the Supreme Court and the provincial High Courts. This articulation of implied limits on the exercise of constitutional amendment power by the legislature has travelled across the world and has found acceptance by several constitutional courts.[41] The argument against the implied limitations doctrine, that it is undemocratic has remained on the margins and has not gained traction.[42]

Taking a cue from the Indian Supreme Court, the higher chamber of the Bangladesh Supreme Court i.e. the appellate division, established the basic structure doctrine in the year 1989 in the landmark case of *Anwar Hossain Chowdhury* v. *Bangladesh*[43] by invaliding the 8th Constitutional Amendment providing for the constitution of benches of the lower chamber of the Supreme Court called the HCD, which was enacted on the ground of public accessibility. The Supreme Court ruled that such diffusion is against the unitary character of the republic. The transition of Bangladesh to a constitutional parliamentary democracy happened in 1991 and, therefore, by 1989 the political environment was becoming congenial which ensured that there would not be fierce political backlash by the military rulers against this Supreme Court judgment.

Subsequently, the HCD of the Supreme Court in the year 2005 declared the 5th Amendment to the Constitution providing sanctity to the first martial rule from 1975 to 1979 to be unconstitutional, the appellate division of the Supreme Court upheld the same in the year 2010. The HCD further declared the 7th Constitutional Amendment bestowing legitimacy to the second martial rule from 1982 to 1986 as unconstitutional. This was also upheld by the appellate division in 2011. However, it was the invalidation of the 13th Constitutional Amendment by the appellate division in *Abdul Mannan Khan* v. *Bangladesh*[44] in the year

[41] Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford: Oxford University Press, 2017), 47–69.

[42] Madhav Khosla, "The Ninth Schedule Decision: Time to Define the Constitution's Basic Structure," *Economic and Political Weekly* 42, no. 31 (August 2007): 3203.

[43] Anwar Hossain Chowdhury v. Government of the People's Republic of Bangladesh and Ors., 1989 BLD (SPL) 1.

[44] *Abdul Mannan Khan v. Government of Bangladesh and Ors.*, (2012) 64 DLR (AD) 169.

2011 that put the electoral legitimacy of the national elections of Bangladesh in disarray. Scholars have also highlighted the transformation of Bangladesh from an electoral democracy to an electoral authoritarianism.[45] In the *Abdul Mannan Khan* judgment, the appellate division by a 4:3 majority declared the caretaker government (*hereinafter* CTG) system introduced by the 13th Amendment of the year 1996, unconstitutional.

The CTG system provided for a non-partisan caretaker government with the retired Chief Justice of the Supreme Court at the helm to conduct and oversee the national elections in Bangladesh during the 90 days of interregnum period between the two elected governments. The Court declared that an unelected government led by the retired Chief Justice violates the basic structure of democracy and independence of judiciary enshrined in the Constitution of Bangladesh. The court, however, held that the judgment shall operate prospectively after the next parliamentary elections and the one that will immediately follow it, namely the 10th and 11th parliamentary elections. Significantly, this appellate court judgment had come after the HCD had declared the 13th Amendment to be constitutional in the year 2004.[46] The HCD had held that the CTG system gave a fillip to democracy and it left the question of former Chief Justice as CTG head to the wisdom of the Parliament. Ridwanul Hoque, an expert on Bangladesh's constitutional law has observed that this decision of the appellate division ignored the local political context of Bangladesh.[47]

The alarming facts associated with the case are worth noting. Before giving its detailed judgement, the appellate division of the Supreme Court had passed a short order in 2011 declaring the 13th constitutional amendment unconstitutional by a slender majority of 4:3. The detailed judgment was delivered 14 months later in the year 2012. Strangely, Chief Justice A. B. M. Kahirul Haque retired after a few days of passing this short order and he wrote his final judgment 14

[45] Ali Riaz, "The Pathway of Democratic Backsliding in Bangladesh," *Democratization* 28, no. 1 (January 2021): 179.
[46] M. Saleem Ullah v. Bangladesh, (2005) 57 DLR (HCD) 171.
[47] Ridwanul Hoque, "The Judicialization of Politics in Bangladesh," in *Unstable Constitutionalism: Law and Politics in South Asia*, ed. Mark Tushnet and Madhav Khosla (Cambridge: Cambridge University Press, 2015), 261–90.

months after his retirement. During the interregnum between the short order and the final judgment, the 15th Constitutional Amendment was passed by the Bangladesh Parliament abolishing the CTG system. It is also alleged that the majority judgment was crafted to be in line with the 15th Constitutional Amendment.[48]

The CTG system had come following the demand by the Bangladesh Nationalist Party (*hereinafter* BNP), the opposition party when Sheikh Hasina's Awami League party was in power. Notably, the Awami League party government that enacted the 13th Constitutional Amendment, decided to implement the decision of the court and enacted the 15th Constitutional Amendment[49] eliminating the CTG system, within two months of the court's order, ignoring the strong opposition by the opposition political parties including the BNP. This gave rise to unprecedented violence[50] leading up to the 2014 national elections which was boycotted by the opposition, making the 2014 election, virtually a one-party election. Subsequently, in the 2018 national elections, where the main opposition party BNP contested elections, the Sheikh Hasina-led Awami League registered another landslide victory in the elections. The elections were marred by violence and it was widely considered by the international community and the opposition as rigged[51]. It is also significant to note that before the elections, the leader of the main opposition party Begum Khaleda Zia was convicted[52] in a corruption case which made her ineligible to contest the 2018 elections. Scholars have highlighted the various methods adopted in rigging the 2018 national election, including "creating a climate of fear, neutralising opposition candidates through imprisonment and confinement, disqualifying opposition candidates, limiting the effective oversight of the electoral process through denying international

[48] Hoque, "The Judicialization of Politics," 282.
[49] Maimul Ahsan Khan, "Constitutional Disaster & 'Legal' Impunity: Constitutional Amendments in Perspective," *Asian Human Rights Commission*, May 17, 2024.
[50] Adeeba Aziz Khan, "The Politics of Constitutional Amendments in Bangladesh: The Case of the Non-Political Caretaker Government," *International Review of Law* (May 2015).
[51] *Time*, "They Threaten Everyone.' Sheikh Hasina's Landslide Win in Bangladesh Marred by Voter Suppression," May 30, 2018.
[52] *NDTV World*, "Ex-Bangladesh PM Khaleda Zia Gets 7 Years in Jail in Corruption Case," August 2, 2024.

observers, and establishing control over media before the election day and ballot stuffing".[53]

In January 2024, the Awami League won another national election in a landslide manner winning 223 out of the 300 seats and together with the ally political parties, the Sheikh Hasina Government had control over the entire 300 seats[54]. This election was also boycotted by the main opposition parties including the BNP which demanded a CTG to conduct and oversee the elections.

Certainly, the appellate division of the Bangladesh Supreme Court did not contemplate the import of its judgment regarding the constitutionality of the 13th Amendment. The constitutional courts while adjudicating an issue which arguably is a political question, must factor the consequences of its action.[55] The appellate division of the Supreme Court's iteration that the judgment shall apply prospectively, certainly factored in the possible implications of its judgment but the court did not anticipate that its decision would give fillip and accord legitimacy to an immediate constitutional change eviscerating its decision about the prospective application of the judgment. The prospective application of the judgment is also irreconcilable with the central argument of the judgment. If CTG violates the basic structure of parliamentary democracy and independence of the judiciary, why should this unconstitutional mechanism be there to conduct the next two parliamentary elections[56]. The ideals of parliamentary democracy and independence of judiciary certainly cannot be forsaken by the courts but CTG remaining accountable to the President, while the national parliamentary elections are being held, being declared violative of parliamentary democracy is open to

[53] Ali Riaz and Saimum Parvez, "Anatomy of a Rigged Election in a Hybrid Regime: The Lessons from Bangladesh," Democratization 28, no. 4 (June 2021): 801. See also Mathilde Maîtrot and David Jackman, "Discipline, Development, and Duress: The Art of Winning an Election in Bangladesh," *Critical Asian Studies* 55, no. 3 (July 2023): 424.

[54] *Live Mint*, "Bangladesh Elections 2024 Highlights: PM Sheikh Hasina Re-elected for 5th Term in Office," March 17, 2024.

[55] Amal Sethi, "When Should Courts Invalidate Constitutional Amendments?" *Vienna Journal of International Constitutional Law* 18, no. 1 (March 2024): 25.

[56] In Golaknath v. State of Punjab, 1967 AIR 1643, the Supreme Court of India invalidated the constitutional amendments as unconstitutional but gave its judgment prospective operation, which effectively gave legitimacy to the constitutional amendments declared unconstitutional.

contestation. Similarly, the decision that a former Chief Justice of the Supreme Court heading the CTG and accountable to the President of Bangladesh violates the independence of the judiciary is again an equivocal claim. Even, the Indian Supreme Court in *Anoop Baranwal*[57] made the Chief Justice of India a nominee to the committee appointed by it to appoint the Chief Election Commissioner of India. The presence of the Chief Justice certainly instils confidence in the people about the process that she is part of. The Bangladesh Supreme Court ignored the fact that holding elections neutrally and ensuring a level playing field for the stakeholders has been a huge concern in Bangladesh, declaring the political consensus on the manner of holding the elections to be unconstitutional was a judgment bereft of the understanding of the realities of Bangladesh's politics.

III. THE BASIC STRUCTURE DOCTRINE - GLOBAL OR INDIGENOUS?

The acceptance of implied limits on the constitutional amendment power has travelled globally but whether the identification of implied limits must factor the local conditions or should it aspire for global constitutional ideals is another significant question. The decision of the Bangladesh Supreme Court in *Abdul Mannan Khan*[58] raises important questions about the need for the constitutional courts to understand the domestic needs and compulsions and not to be swayed by the lofty and celebrated constitutional values of democracies where the roots of electoral democracy and democracy, in general, are entrenched. The CTG system was based on an agreement between the two main political parties of Bangladesh, namely the Awami League and the BNP. Ensuring fairness and a level playing field for the political parties in Bangladesh has been a perennial concern. Therefore, simply scrapping it by declaring it to be inconsistent with the basic structure of the Constitution, amounts to throwing the baby out with the bathwater. Reading of implied limitations on the power of constitutional

[57] Anoop Baranwal v. Union of India [2023] 9 SCR 1.
[58] Abdul Mannan Khan v. Government of Bangladesh and Ors., (2012) 64 DLR (AD) 169.

amendment must factor the indigenous nature of the constitutional values and the consequences that the decision may give rise to in the domestic polity.[59]

The Indian Supreme Court has measured its decisions about the unconstitutional constitutional amendments. It has, in general, factored the political fallout of its decisions declaring a constitutional amendment unconstitutional.[60] In *Golaknath*[61] it chose prospective overruling, thereby ascribing legitimacy to the constitutional amendments declared unconstitutional in theory and hedged the displeasure to the government. Yet again, in *Kesavananda Bharti*[62], the majority that articulated the basic structure doctrine did not declare the constitutional amendments challenged in the case to be unconstitutional. Then the *Minerva Mills*[63] judgment invalidated the constitutional amendment after the government that enacted it had fallen. Though in the *Supreme Court Advocates on Record*[64] case, the court seems to have taken the gamble that it can ensure that the collegium system of appointment of judges to the High Courts and the Supreme Court[65] will continue and hence declared the 99th constitutional amendment of 2014 providing for a national judicial appointments commission,[66] unconstitutional on the ground that it violated the independence of judiciary. This constitutional amendment had the overwhelming support of the political class in India where both the *Bharatiya Janata Party* led Union government and the opposition led by the Indian National Congress had come together. Yet, a

[59] Kawser Ahmed, "Revisiting Constitutional Review of Constitutional Amendments in Bangladesh: Article 7B, the Assaduzzaman Case, and the Fall of Basic Structure Doctrine," *Israel Law Review* 56 (March 2023): 263.

[60] Nicola Tommasini, "Judicial Self-Empowerment and Unconstitutional Constitutional Amendments," *International Journal of Constitutional Law* 22, no. 1 (March 2024): 161.

[61] Golaknath v. State of Punjab, 1967 AIR 1643.

[62] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

[63] Minerva Mills Ltd. & Ors v. Union of India & Ors., 1980 AIR 1789.

[64] Supreme Court Advocates-on-Record Association and another v. Union of India, (2016) 5 SCC 1.

[65] In Re Special Reference No. 1 of 1998, (1998) 7 SCC 739, the Supreme Court of India declared that the judges of the Supreme Court and the provincial High Courts (constitutional courts in India) shall be appointed based on the recommendations made by the collegium of Supreme Court judges to the President of India, and the President is bound by the recommendations made if it is reiterated by the collegium after a request by the President for the reconsideration of the name suggested for appointment. For the Supreme Court judges' appointment, the collegium shall consist of the Chief Justice of India and the four senior-most judges of the court while for the High Court judges' appointment, the collegium shall consist of the Chief Justice of India and the two senior-most judges of the Supreme Court. The Supreme Court held this in the course of interpreting the constitutional provisions (Articles 124 and 217) which provided that judges of the Supreme Court and High Courts are to be appointed by the President of India in consultation with the Chief Justice of India.

[66] The National Judicial Appointments Commission Act, 2014, August 21, 2024.

constitution bench of the Supreme Court of India by a 4:1 majority declared the amendment as unconstitutional. The entrenched roots of the respect for the judiciary in India ensured that there is no avowed backlash from the executive.[67] Yet, the government's reluctance in being commanded by the collegium to appoint a certain person of its choice as judges of the constitutional court has been clear.[68] There are several instances where a name recommended and reiterated by the collegium for appointment as the judge of a High Court has not been acted upon by the Government.[69] The Supreme Court has not done anything substantially while hearing pleas on the judicial side about the non-implementation of the collegium's recommendation by the Government of India except for orally asking the Government lawyers in the court about the reasons for the Government's inaction.[70]

This again reflects the Supreme Court's awareness of a possible ugly fallout of such insistence which may bind the Government and therefore, an intelligent avoidance of it. If the collegium system of appointment is consistent with the independence of the judiciary which virtually excludes the executive from selecting judges, then certainly the act of the Government not notifying the names of persons recommended and reiterated by the collegium, violates the independence of the judiciary. This shows the limits of what can be achieved by the courts through the force of their judicial verdicts and the recognition of the same by the Supreme Court of India.[71] It also ensures that a dialogue

[67] Law Minister, Mr. Ravi Shankar Prasad's displeasure over the judgment. See *NDTV*, "Logic of Order over Judges Appointments "Flawed": Ravi Shankar Prasad," April 24, 2019.

[68] The then Union Law Minister of India, Kiren Rijiju, was strongly critical of the collegium system for its "opaqueness", "unaccountability to the union law minister". *The Hindu*, "As Law Minister, Kiren Rijiju took potshots at Indian judiciary," September 12, 2024. See also *LiveLaw*, "Collegium System Keeping Judges Extremely Busy, Adversely Affecting Their Duties: Union Law Minister Kiren Rijiju," June 24, 2024.

[69] Saurabh Kirpal, a senior advocate, was recommended by the collegium of the Supreme Court of India to be elevated as a Judge of the Delhi High Court. The Government did not accept the recommendation by stating his "openly gay" orientation as a reason for possible "bias". *Bar & Bench*, "Law Ministry Says Saurabh Kirpal Openly Gay, Could Be Biased if Made Judge; Collegium Objects, Says Kirpal Competent, Will Add Diversity," May 21, 2024; *Bar & Bench*, "Cannot Reject Candidature of Saurabh Kirpal Based on Sexual Orientation: Supreme Court Collegium," July 13, 2024.

[70] *LiveLaw*, "'Collegium System Is the Law of the Land, Must Be Followed': Supreme Court Tells Centre; Asks AG to Advise Govt of the Legal Position," August 16, 2024.

[71] Another instance could be the court's reluctance to enforce its judgment in *Sabarimala*. "Supreme Court refuses to Grant Early Hearing on Contempt Plea against Sabarimala Temple Chief Priest." See *The Hindu*, "Supreme Court Refuses to Grant Early Hearing on Contempt Plea Against Sabarimala Temple Chief Priest," August 16, 2024.

is ongoing between the Supreme Court and the Government and that the two have not reached a deadlock.

Judicialization of politics is inevitable in a divided polity but the constitutional courts while adjudicating the delicate questions involving deeply contested political issues, however the courts must be cognizant of the possible import of its adjudication. Deference to the political class in such matters is a better exercise of judicial authority and acumen. The basic structure doctrine must not be invoked in matters where a political issue is fiercely contested in a given polity. There must be a semblance of unequivocal*ness* about the identification of the basic structure of the Constitution and its application by the judiciary in a democratic polity. In the absence of the unequivocal character, deference to the political class is the sensible judicial approach. The Chief Justice of Bangladesh Supreme Court is a non-partisan position and the CTG system was a non-partisan mechanism directed to ensure probity and fairness in the elections. The Bangladesh example has important lessons for the constitutional courts outside Bangladesh and especially in the neighbouring countries about how not to apply the basic structure of the Constitution doctrine and what are the limits of the Judicialization of politics.

IV. THE ROOM FOR CONTESTATION AND THE NEED FOR SUPERMAJORITIES

The 4:3 majority in *Abdul Mannan Khan* also reflects the equivocal nature of these claims. However, the most popular system of constitutional adjudication across the world is the decision by simple majority.[72] Yet, when it comes to judging the constitutionality of legislation and the constitutionality of a constitutional amendment, the argument for the need for supermajorities for the declaration of unconstitutionality is gaining traction.[73] The argument for the need for a

[72] Cristóbal Caviedes, "A Core Case for Supermajority Rules in Constitutional Adjudication," *International Journal of Constitutional Law* 20, no. 3 (September 2022): 1162.

[73] Cristóbal Caviedes, "Is Majority Rule Justified in Constitutional Adjudication?" *Oxford Journal of Legal Studies* 41 (2021): 376; Yaniv Roznai, "Introduction: Constitutional Courts in a 100-Years Perspective and a Proposal for a Hybrid Model of Judicial Review," *Vienna Journal on International Constitutional Law* 14, no. 4 (2021): 355; Pablo Castillo-Ortiz, "The Dilemmas of Constitutional Courts and the Case for a New Design of Kelsenian Institutions," *Law and Philosophy* 39 (2020): 617.

supermajority in constitutional adjudication faces the following theoretical challenges – it will make a declaration of unconstitutionality difficult and it may lead to constitutional courts getting paralyzed and the possibility of the executive branches exerting undue influence over courts.[74] However, these claims have not been tested, empirically. A recent study in respect of Mexico suggests that specific mechanisms governing judicial appointments and staggered terms can effectively mitigate the risk of executive wielding undue influence on the courts and that the supermajorities do not paralyze the court.[75] A theoretical distinction between the need for supermajorities in judging the constitutionality of ordinary legislation and constitutional amendments exists in general. The need for supermajorities for the declaration of unconstitutionality of a constitutional amendment can also be espoused based on the generic need of supermajorities for the legislature to amend the Constitution. The requirement of supermajority for constitutional amendments raises the quotient of democratic legitimacy of the constitutional amendment, hence, a declaration of unconstitutionality by a simple majority in an adjudication cannot have the effect of making the amendment unconstitutional. It can be argued that the requirement of a simple majority in constitutional adjudication to declare legislation unconstitutional which is enacted by a simple majority in the legislature cannot be applied to a constitutional amendment which cannot be enacted by a simple majority in the legislature.

The argument in favour of a supermajority for a constitutional adjudication is stated to be more viable in "well-functioning democracies".[76] The reason is that in well-functioning democracies, the roots of constitutionalism are entrenched and the political class is not viewed as the entity from whom the Constitution needs protection. In this light, the decision of the Bangladeshi Supreme Court in *Abdul Mannan Khan* case[77], presents a curious example. Bangladesh, arguably, is not a "well-functioning democracy", yet the decision of the court declaring

[74] Mauro Arturo Livera Leon, "Control and Paralysis? A Context-Sensitive Analysis of Objections to Supermajorities in Constitutional Adjudication," *International Journal of Constitutional Law* 22, no. 1 (March 2024): 134.
[75] Leon, "Control and Paralysis," 134.
[76] Caviedes, "A Core Case for Supermajority," 1162.
[77] *Abdul Mannan Khan v. Government of Bangladesh and Ors.*, (2012) 64 DLR (AD) 169.

the fifteenth constitutional amendment to be unconstitutional by a simple majority of 4:3 unravels the perils of constitutional adjudication of constitutional amendments by simple majority. The Bangladesh example displays the limits of the argument about the viability of supermajorities in constitutional adjudication in well-functioning democracies only. It shows that this may not be an appropriate global prescription.

This leads us to a conundrum where the democratic credentials of a state may not necessarily lead us to decide about the need for a supermajority in constitutional adjudication. A different normative framework may be required to ascertain the constitutional identity of a given polity in constitutional adjudication in not-so-well functioning democracies. The judges of constitutional courts in not-so-well functioning democracies need to make a distinction of the '*aspirational constitutional identity*' from a '*workable constitutional identity*'. The theory of constitutional identity is not just limited to the normative prescriptions enshrined in a constitution.[78] It must factor in the descriptive realities of those normative prescriptions while probing a constitutional identity at a given point in time.[79] The majority of judges in *Abdul Mannan Khan* case[80] committed the mistake of striking down the 13th constitutional amendment on the parameters of the 'aspirational constitutional identity' by declaring the CTG system to conflict with the norms of parliamentary democracy and independence of the judiciary, ignoring the rare bipartisan political consensus on CTG that was germane to the 13th constitutional amendment in Bangladesh.

V. THE NAIL IN THE COFFIN: 15TH CONSTITUTIONAL AMENDMENT

The 15th Constitutional Amendment apart from abolishing the CTG system provided for a five-member Election Commission headed by the Chief Election

[78] Jacobsohn, "Constitutional Identity," 361.

[79] Tiwari, "Law, Politics, and the Erasure," 18. In the light of Indian Constitutional identity question, Tiwari argues "the rigidity underlying the continuity of constitutional identity as existential is hard to surpass, and therefore, the theory of constitutional identity cannot just confine itself to the textual promise of the constitutional text but must factor in the extent of acceptance of the constitutional promise within its fold."

[80] Abdul Mannan Khan v. Government of Bangladesh and Ors., (2012) 64 DLR (AD) 169.

Commissioner.[81] The 15th Constitutional Amendment inserted a provision in the form of Article 7B of the Constitution. It read as under,

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

The aforesaid provision, while making some of the identified parts and provisions of the Constitution unamendable, also contained a declaration about the unidentified basic structures of the Constitution that shall also remain unamendable. So, 7B provided for two sets of basic structures of the Constitution, the identified and unidentified. The unidentified basic structure kept the relevance of judicial articulation of basic structure while determining the validity of future constitutional amendments. The first part, however, was extraordinary. A constitutional amendment declaring provisions of the Constitution including the parts added by the same constitutional amendment unamendable, is unprecedented. It is also astounding that it prohibited amendments in the identified unamendable provisions and parts, even by *insertion*. An amendment by way of modification, substitution or repeal is understandable to the extent that the Parliament desired absolute protection for what is considered to be unamendable. But to prohibit future insertions through a constitutional amendment amounts to a categorical pre-emption the intelligence of future generations.

The identification of the parts and provisions of the Constitution as unamendable reflects not only an attempt to pre-empt a future judicial affirmation but also reflects the distrust in the ability and acumen of the judiciary to correctly articulate the basic structure of Bangladesh's Constitution. The important question to raise here is whether such a constitutional amendment which identifies basic structures by making them unamendable, be declared unconstitutional because it violates the basic structure of the Constitution. What possibly could

[81] Article 118 of the Constitution of Bangladesh as amended by the 15th Constitutional Amendment, September 1, 2024 at http://bdlaws.minlaw.gov.bd/act-details-367.html.

be the basic structure that it is violating? A constitutional amendment declaring the amendment to be part of the basic structure of the Constitution, clearly violates the power of judicial review of the constitutional courts which is the basis of the implied limitation on amendment power principle. In the absence of the constituent assembly providing for the unamendable basic structures or the eternity clauses of the Constitution, the same can only be identified by the judiciary while determining the constitutional validity of constitutional amendments in a petition challenging the constitutionality of the constitutional amendment. Identification of unamendable basic structure by a constitutional amendment is therefore unconstitutional, being contrary to the doctrine of separation of powers and exclusion of judicial review. The other possible basic structure that such a constitution may be declared violative of, is that, it curtails the will of the future Parliament. How can a Parliament declare its supremacy over all future Parliaments by declaring that what it considers unamendable in the Constitution, must remain untouched by the future Parliaments? This certainly is an unconstitutional prohibition on the legitimate future expression of the will of the Parliament.

Another fundamental flaw in provision 7B is that it considers provisions of the Constitution as the custodians of basic structure and not fundamental values of the Constitution. The Bangladesh Supreme Court adopted the basic structure doctrine from India and the Indian jurisprudence of basic structure is not about the provisions of the Constitution. In *Kesavanand Bharati*, Sikri C.J. wrote "every provision of this Constitution can be amended provided that the basic foundation and structure of the Constitution remains the same." Under Article 31C of the Constitution of India, a law made by the Parliament may violate Article 14[82], yet the law shall not be unconstitutional. The Supreme Court declared this to be constitutional in *Minerva Mills*.[83] The right to Equality is certainly the basic

[82] As inserted into the Constitution of India by The Constitution (25th Amendment) Act, 1971. Article 31C gives primacy to laws enacted for fulfilling the directives flowing from Articles 39(b) and 39 (c) of the Constitution of India providing for the equal distribution of wealth and non-concentration of wealth in the hands of few persons, over Article 14 which provides for the fundamental right to equality. The egalitarian equality embodied in these directives meant that Article 31C does not violate equality as a constitutional value.

[83] Minerva Mills Ltd. v. Union of India, (1980) 2 SCC 591.

structure of the Constitution of India but the text of Article 14 does not exhaust the concept of the right to equality and, therefore, the right to equality as a basic structure may remain intact, even though a law may tinker with the text of Article 14. This clearly shows that the basic structure of the Constitution of India are fundamental values that it espouses and therefore, all the provisions of the Constitution can be legitimately amended. Unlike this, Article 7B of Bangladesh's Constitution identifies the Parts and provisions of the Bangladesh Constitution as the unamendable basic structure. The identification of individual provisions of the Constitution as unamendable basic structure prohibits any room for the better articulation of the same idea espoused by the existing provision which is declared as the unamendable basic structure.

Further, a drafting flaw is that Article 7B starts with a non-obstante clause giving it precedence over Article 142, which provides for the power to amend the Constitution. Ironically, Article 142 states that, "*Notwithstanding anything contained in this Constitution- (a) any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of Parliament…*" Both Articles 7B and 142 were substituted by the 15th Constitutional Amendment. Logically, it seems that the Parliament wanted precedence of Article 7B over Article 142, but how the two provisions appear in the Constitution, brings the two provisions on a direct collision path.

5.1. Embodying eternity: Article 7A of the Constitution of Bangladesh

Another extraordinary provision inserted into the Constitution of Bangladesh by the 15th Constitutional amendment was Article 7A of the Constitution. The provision reads as under-

> "(1) If any person, by show of force or use of force or by any other unconstitutional means-
>
> (a) abrogates, repeals or suspends or attempts or conspires to abrogate, repeal or suspend this Constitution or any of its articles; or
>
> (b) subverts or attempts or conspires to subvert the confidence, belief or reliance of the citizens to this Constitution or any of its articles,

his such act shall be sedition and such person shall be guilty of sedition.

(2) If any person-

(a) abets or instigates any act mentioned in clause (1); or

(b) approves, condones, supports or ratifies such act,

his such act shall also be the same offence.

(3) Any person alleged to have committed the offence mentioned in this article shall be sentenced with the highest punishment prescribed for other offences by the existing laws."

One can argue that there is a historical context to this provision and it is directed against any attempt to replace the parliamentary democracy, as it had happened in the past when Bangladesh witnessed military rule. Yet, reading Article 7A along with Article 7B makes the implications of Article 7B more far-reaching than simply addressing the historical context of an armed or military coup. As per this provision, the suspension, abrogation or repeal of even a provision of this Constitution by unconstitutional means is a seditious act punishable with the highest punishment. This would mean that any future attempt to suspend, abrogate or repeal a provision declared unamendable basic structure by Article 7B would become an act of sedition under Article 7A. A constitutional amendment attempting to alter the eternity clause would make the resort to constitutional amendment an exercise of *unconstitutional means*. This could even encompass a judicial articulation declaring any of the inserted eternity clauses unconstitutional. Such a provision smacks of any semblance of democratic constitutionalism and brings to fore the arbitrary and whimsical nature of the exercise of brute majoritarian legislative power.

VI. CONCLUSION

The Bangladesh example reveals the extremes of what must not be done, both by the constitutional courts and legislature in respect of the constitutional amendments. It informs the constitutional courts to exercise restraint while dealing with the political class's action taken with rare consensus among the

government and the opposition. Insistence on aspirational constitutional identity emulating other State's polity where the democratic roots are entrenched is not always desirable. Judicial review of constitutional amendments must factor the consequences of the declaration of unconstitutionality. A rare political consensus on the mode of conducting elections in the country effected through a constitutional amendment cannot be termed unconstitutional on the equivocal yardsticks of parliamentary democracy and independence of judiciary. It was specifically argued before the appellate division of the Bangladesh Supreme Court that social and political values of a system inform the legal values and therefore, the Constitution cannot be interpreted independent of those social and political values.[84]

The manner of placing reliance on foreign judgment remains under-examined by the constitutional courts.[85] Following factors determine the weight and acceptability of foreign precedents - historical association, incidence of cognate legal system and the analogous nature of legal and particularly constitutional systems.[86] The acceptance of basic structure doctrine has crossed the historical and cultural barriers owing to the inherent appeal of the theory of implied limitation on the power of constitutional amendment. Nevertheless, the recognition of a basic structure to judge the constitutionality of a constitutional amendment must examine the historical and constitutional proximity of the two systems while placing reliance on a foreign judgment. It is here that an ethnographic identification of the constitutional identity is required. If the same calls for deference to the will of the legislature, then deference has to be accorded by the constitutional courts. The hindsight luxury enables us to state that the decision to declare the 13th constitution amendment of Bangladesh as unconstitutional was a blunder. However, a dispassionate inquiry, independent of the aftermath, can also reveal how the decision of the majority was flawed.

[84] Ridwanul Hoque, "The Evolution of the Basic Structure Doctrine in Bangladesh: Reflections on Dr. Kamal Hossain's Unique Contribution," *The Indian Journal of Constitutional Law* 10 (2023): 44.

[85] Madhav Khosla, "Inclusive Constitutional Comparative: Reflections on India's Sodomy Decision," *The American Journal of Comparative Law* 59, no. 4 (October 2011): 909.

[86] Pradyumna K. Tripathi, "Foreign Precedents and Constitutional Law," *Columbia Law Review* 57, no. 3 (May 1957): 319.

It therefore calls for an ethnographic[87] reading of constitutional identity, where legality of actions is construed in the backdrop of the history, culture and social support in a given polity.

The attenuated democratic pedigree of a constitutional amendment compared to the constituent power which stems from the 'primordial act of founding a political community'[88] means that the constitutional amendment cannot undo the essence of what has been constituted by the constituent power. A constitutional amendment therefore must not embark on the task of declaring the 'unamendables' in the Constitution. Such an exercise exhibits obvious distrust for the sagacity of the constitutional courts and at the same time, it presupposes the will and wisdom of the incumbent legislature to be superior to all future legislatures. It therefore suffers from the vice of being an unconstitutional constitutional amendment.

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