

**THE EVOLUTION OF THE BASIC STRUCTURE DOCTRINE IN BANGLADESH: REFLECTIONS ON  
DR. KAMAL HOSSAIN'S UNIQUE CONTRIBUTION**

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**Introduction**

The doctrine of basic structure needs no introduction to the reader of South Asian constitutional jurisprudence. For the doctrine's entrenchment in the South Asian law, much credit has been given to judges, especially the Indian constitutional judges. However, there are many people and institutions as well as public legal mobilizations that contributed to the doctrine's founding, growth, and achievements. Dr. Kamal Hossain, one of Bangladesh's finest jurists, is such a person. This tributary paper focuses on Dr. Hossain's unique contribution to the establishment and development of the doctrine of basic structure, which indeed is a protective tool for constitutionalism.

Dr. Kamal Hossain was the Chair of the Constitution Drafting Committee of the Constituent Assembly of Bangladesh in 1972. Dr. Hossain is also a renowned international lawyer with experiences of appearing before international courts and tribunals. As a constitutional lawyer, he has made an enormous contribution to the journey and survival of the Bangladeshi Constitution. His firm faith in constitutionalism is reflected in his preeminent constitutional law practice, beginning in the pre-1971 period when Bangladesh (the then eastern wing of Pakistan) experienced a situation of 'constitution-without-constitutionalism'.<sup>1</sup> After the emergence of Bangladesh, Dr. Hossain made significant contributions to Bangladeshi constitutionalism. He was involved in political and legal movements in a leading role, but his involvement in the famous *8<sup>th</sup> Amendment Case*, during an autocratic regime, when he fought for constitutional integrity, has been the most remarkable of his contributions. In that case, the Appellate Division of the Supreme Court of

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<sup>1</sup> On this concept, see Angelo Rinella, 'Constitutions Without Constitutionalism' (2017) 21 *Revista General De Derecho Público Comparado* 1-18; On constitutionalism in pre-1971 Pakistan with a bearing on East Pakistan politics, see G. W. Choudhury, *Constitutional Development in Pakistan* (Longmans 1959), G. W. Choudhury, *The Last Days of United Pakistan* (C. Hurst & Co 1975).

Bangladesh<sup>2</sup> accepted his argument that parliament lacks power to amend the Constitution in a way that destroys its basic features or essential cores. This is how the idea of ‘unconstitutional constitutional amendment’ or the doctrine of basic structure came to be entrenched into Bangladesh’s constitutional law.

### **Basic-structure doctrine**

It is not my objective here to give a detailed account of the birth and evolution of the basic-structure doctrine (BSD), on which the literature is now quite voluminous.<sup>3</sup> Instead, I will first briefly describe the contention of the doctrine and cite the Bangladeshi cases in which the doctrine has been used. Details of the BSD cases in which Dr. Kamal Hossain appeared as a counsel or *amicus curiae* will follow this section.

The doctrine theorises that the constitution of any nation is based on some basic or fundamental features that are not amenable to amendment by parliament. The underlying rationale is that since these core features form the basic “structure” of a constitution, the dismantling of any of them will lead to the very structure of the constitution falling apart. As such, parliament does not have power to demolish any basic structural pillar of the constitution even through the amendment procedure.

The logic underpinning the notion of unamendability is that the idea of limits on the amending powers of parliament is concomitant with the idea of the constitution itself, and hence need not be necessarily expressed. This is what may be called the ‘implied’ or ‘unwritten’ version of the

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<sup>2</sup> The Supreme Court of Bangladesh comprises two divisions: the High Court Division (HCD) and the Appellate Division (SCAD). The original jurisdiction of constitutional judicial review lies with the HCD, and any decision, order, or judgment of that Division is appealable to the SCAD.

<sup>3</sup> For Bangladesh, see Ridwanul Hoque, ‘Judicialization of Politics in Bangladesh: Pragmatism, Legitimacy, and Consequences’, in Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia* (New York: Cambridge University Press 2015); Rokeya Chowdhury ‘The Doctrine of Basic Structure in Bangladesh: From “Calf-path” to *Matryoshka* Dolls’ (2014) 14 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; and MJU Talukder, MJA Chowdhury ‘Determining the Province of Judicial Review: A Re-evaluation of “Basic Structure” of the Constitution of Bangladesh’, (2008) 2(2) Metropolitan University Journal 161; Muhammad Ekramul Haque, ‘The Concept of Basic Structure: A Constitutional Perspective from Bangladesh,’ (2005) 16:2 The Dhaka University Studies, Part F 123.

doctrine, first established in Bangladesh in *Anwar Hossain Chowdhury v Bangladesh* (1989), popularly known as the 8<sup>th</sup> Amendment Case.<sup>4</sup> Many constitutions in the world, however, expressly limit the parliament's power to amend certain basic provisions. This aspect of the doctrine may be called its 'written' or 'express' version, usually entrenched through an 'eternity clause'. For example, the German Constitution of 1949 (*the Basic Law*) provides that the principles of human dignity, federalism, democracy, and the socialist Republican character of the State cannot be amended (arts. 79(3), 1 & 20). The Constitution of Bangladesh entrenched this expressive version of the basic-structure doctrine into article 7B in 2011 via the 15<sup>th</sup> Amendment to the Constitution.<sup>5</sup>

The establishment of the implied or unwritten version of the doctrine in Bangladesh in the 8<sup>th</sup> Amendment Case was greatly informed of and influenced by the famous Indian decision in *Kesavananda Bharati v State of Kerala* (1973),<sup>6</sup> that first authoritatively established in South Asia and arguably the common law world, the doctrine of inviolability of constitutional basics. Before *Kesavananda*, however, several Indian decisions including *Golak Nath v State of Punjab* (1967)<sup>7</sup> (cited before the Bangladeshi courts by Dr. Hossain) expressed views that came close to entrenching the basic-structure doctrine. In such a context, India passed its 24<sup>th</sup> Constitutional Amendment, which laid down that parliament's amending power would be unrestricted, and also inserted the Kerala Land Reforms Act 1969 within the list of judicially non-reviewable statutes.

In *Kesavananda*, a religious leader from Kerala whose properties were acquisitioned under the 1969 Act challenged the vires of that Act and some constitutional amendments (24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup>). By a majority of 7:6, the Indian Supreme Court held that parliament's amendment power extended to all parts of the Constitution including its fundamental rights provisions, but not to "basic features" thereof. While most provisions of the challenged Amendments were held to be valid, the majority court struck down that part of the 26<sup>th</sup> Amendment that sought to exclude judicial review.<sup>8</sup> The Court held that judicial review was one of those "basic features" that could not be excluded

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<sup>4</sup> (1989) BLD (AD) (Spl) 1.

<sup>5</sup> For a critique of this eternity clause, see Ridwanul Hoque 'Eternal Provisions in the Constitution of Bangladesh: A Constitution Once and For All?', in Richard Albert and Bertil E Oder (eds), *An Unconstitutional Constitution?: Unamendability in Constitutional Democracies* (New York: Springer 2017).

<sup>6</sup> AIR 1973 SC 1461.

<sup>7</sup> AIR 1967 SC 1643 (controversially holding that fundamental rights are so 'sacrosanct' that parliament does not have power to amend any of those rights); *Golak Nath* ruling was fundamentally modified by *Kesavananda* (n 6).

<sup>8</sup> See Arun K. Thiruvengadam, *The Constitution of India: A Contextual Analysis* (Oxford: Hart Publishing 2017) 226.

by amendment, thereby introducing the basic-structure doctrine or theory of unconstitutional constitutional amendments in South Asian constitutionalism.

The implied constitutional doctrine of basic structure is now firmly established in Bangladesh, India, and Pakistan.<sup>9</sup> In Bangladesh, the doctrine has so far been invoked by the Appellate Division of the Supreme Court to strike down five Amendments, namely the 8<sup>th</sup> (partially), 5<sup>th</sup>, 7<sup>th</sup>, 13<sup>th</sup> and 16<sup>th</sup> Amendments, respectively in 1989, 2010, 2011, 2011 and 2017. A review of the Appellate Division's *16<sup>th</sup> Amendment decision*,<sup>10</sup> however, is awaiting a hearing at the time of writing this paper (July 2021).

The doctrine has also been unsuccessfully invoked in several cases to challenge certain constitutional amendments that provide for the reservation of seats for women in parliament. In *Farida Akhter v Bangladesh* (2007),<sup>11</sup> for example, the Appellate Division endorsed the 14<sup>th</sup> Amendment that renewed the provision of reserved seats for women and held that the system was not incompatible with the Constitution's "basic structure". Also, interestingly, the High Court Division in *Hamidul Huq Chowdhury v Bangladesh* (1981)<sup>12</sup> refused to declare the 4<sup>th</sup> Amendment void since (the court reasoned) the people had "not resisted it", and also because it was recognised by judicial authorities. The Court further reasoned that the Amendment could not be struck down because many parts of it were incorporated in the martial law regulations validated by the Constitution (Fifth Amendment) Act 1979. Curiously, however, the same court accepted the view that the Fourth Amendment (by changing, *inter alia*, the parliamentary system to a one-party Presidential system) "altered and destroyed" "the basic and essential features of the Constitution". The Court observed that "[i]t was, in our opinion, beyond the powers of Parliament [...] under a *controlled constitution* to alter the essential features and basic structures of the Constitution".<sup>13</sup> While making this observation, the Court was "in agreement with the views expressed in" the

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<sup>9</sup> The doctrine, although not uncontroversial, is increasingly gaining a hold in other civilian and common-law systems of constitutionalism, including in the UK where the doctrine of parliamentary sovereignty has the strongest roots, on which see *Jackson v Attorney General* [2006] 1 AC 62 (*per* Lord Steyn).

<sup>10</sup> *Bangladesh v Asaduzzaman Siddiqui* (2017) CLR (AD) (Spl) 1.

<sup>11</sup> (2007) 15 BLT (AD) 206.

<sup>12</sup> (1981) 33 DLR (HCD) 381.

<sup>13</sup> *Hamidul Huq Chowdhury*, *ibid*, at para. 17 (*per* Sultan Hossain Khan J, *emphasis mine*).

Indian Supreme Court's decisions in *Golak Nath v State of Punjab* (1967)<sup>14</sup> and *Minerva Mills Ltd. v Union of India* (1980).<sup>15</sup>

*Hamidul Huq Chowdhury*, though self-contradictory in reasoning, arguably provided the Supreme Court with the first but lost opportunity to engage with the question of unamendability of basic features of the Constitution. On appeal, the Appellate Division totally avoided the basic-structure arguments and observations of the High Court Division.<sup>16</sup>

Of the five basic-structure cases in Bangladesh, Dr. Hossain was involved in the 8<sup>th</sup>, 13<sup>th</sup>, and 16<sup>th</sup> *Amendment* cases. In the following sections, I take up these three cases to portray Dr. Hossain's role in the evolution of this doctrine. Before that, however, I begin with a pre-1971 case which is indeed the progenitor of the doctrine in South Asia, and which saw Dr. Hossain as a counsel.

### **South Asian genesis of the doctrine and Dr. Kamal Hossain's role**

During the hearing of *the 8<sup>th</sup> Amendment Case*,<sup>17</sup> Dr. Hossain emphasised that the idea of unamendability of basic constitutional features was not an alien concept in Bangladeshi constitutional jurisprudence. Rather, he pointed out, it was in the 1963 Dacca High Court case of *Muhammad Abdul Haque v Fazlul Quader Chowdhury*<sup>18</sup> that the doctrine's genesis was to be found. In this regard, one may quote Justice Shahabuddin Ahmed in the *8<sup>th</sup> Amendment Case*:

Dr. Kamal Hossain has emphasised that the doctrine of basic structure as applied by the Indian Supreme Court had originated from a decision of the then Dhaka High Court which was upheld in appeal by the Pakistan Supreme Court [...].<sup>19</sup>

Dr. Hossain appeared as a counsel for the petitioner in the aforementioned case, in which Mr. Haque, a member of National Assembly of Pakistan, challenged the legality of the respondents'

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<sup>14</sup> AIR 1967 SC 1643.

<sup>15</sup> AIR 1980 SC 1789.

<sup>16</sup> *Hamidul Huq Chowdhury v Bangladesh* (1982) 34 DLR (AD) 190.

<sup>17</sup> *Anwar Hossain Chowdhury* (n 4).

<sup>18</sup> (1963) 15 DLR (Dacca) 355.

<sup>19</sup> *ibid.*, at para. 309, p. 131.

membership of the Assembly after their appointment to the President's Council of Ministers, through a writ of *quo warranto* under art. 98 of the 1962 Constitution. Article 104(1) of the Constitution provided that a member of parliament would cease to be a member upon becoming a minister. Exceptionally, art. 224(3) empowered the President to issue Orders to make certain "adaptations" in order to remove any "difficulty" that may stand in the operation of the Constitution, in exercise of which the President promulgated an Order (No. 34 of 1962) that enabled members of parliament to be appointed as ministers. There is little doubt, therefore, that the Order was an executive constitutional amendment in disguise.

Mr. Haque brought this matter to the then Dacca High Court, in effect asking the Court to examine the compatibility of the Order with art. 104(1) of the Constitution. The Attorney-General opposed the court's jurisdiction to test the vires of any Presidential Order that was to remove any difficulty in the operation of the Constitution. Mr. Justice Murshed, with whom Siddiky and Chowdhury JJ agreed, dismissed the government's arguments and found the Order of the President not to be of the kind contemplated in the Constitution. The Court thus asserted its constitutional review power to scrutinize the validity of any law, including a constitutional instrument such as the Presidential Order.

Dr. Hossain appeared for the petitioner with senior counsel Mr. A.K. Brohi. Among other points, Mr. Brohi, and Dr. Hossain placed emphasis on the fundamental character of the provisions that established 'separation of powers' and argued that President's Order 34 was incompatible with that scheme.

Justice Murshed observed as follows:

Art. 104(1) and the allied articles relating to the same subject constitute one of the main pillars of the Constitution which envisages a sort of [p]residential form of [g]overnment where the Ministers are not responsible to the Legislative Assembly, but to the President himself. [...]. This concept of a separation of the executive body from the [l]egislature,

[...], is *the very basis* of present Constitution. *Mr. Brohi has aptly described it as the corner-stone which supports the arch of the Constitution.*<sup>20</sup>

His Lordship continued to say that “it is of the very essence of a written constitution that it is not susceptible of an easy change”, and regarded the impugned Order as a *de facto* constitutional amendment as it “wiped out” a vital provision of the Constitution without resorting to the special machinery of the amendment (at p. 382). In arriving at this conclusion, Justice Murshed also endorsed the opinion expressed by Justice Munir in a Presidential Reference (1957),<sup>21</sup> to the effect that the President cannot “destroy a basic or vital provision of the Constitution” while exercising the constitutional power to make “adaptations”.

The decision in *Haque* was appealed, but the Pakistani Supreme Court unanimously refused to accept the appeal. Affirming the Dacca High Court, Chief Justice Cornelius in *Fazlul Quader Chowdhury v Muhammad Abdul Haque* (1963)<sup>22</sup> held that the judicial power to examine the constitutionality of any law or Order was very “fundamental”, and that a constitutional provision could not be interpreted in isolation to negate that power. It was further observed that “franchise” and the “form of Government” were fundamental features not subject to alteration by a Presidential Order under the Constitution.

Two years later, in his partial dissent in *Sajjan Singh v State of Rajasthan* (1965)<sup>23</sup> Justice Mudholkar of the Indian Supreme Court approvingly cited Cornelius J’s above view in support of his reasoning that parliament’s amendment power was not unbridled as there might be certain ‘basic features’ of the Constitution which parliament may not violate through the exercise of its amendment power under article 368.<sup>24</sup> Chief Justice Gajendragadkar pronounced the majority opinion. Justice Mudholkar partially agreed with the Chief Justice’s view that parliament had the power to amend the constitution even if it were to lead to the violation of fundamental rights.

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<sup>20</sup> *Abdul Haque* (n 19) 382, para. 76 (emphasis added).

<sup>21</sup> (1957) 9 DLR (SC) 178.

<sup>22</sup> (1963) PLD (SC) 486.

<sup>23</sup> AIR 1965 SC 845.

<sup>24</sup> Thiruvengadam (n 8) 223.

However, he disagreed that the power could take away all fundamental rights or alter the Constitution's basic features.<sup>25</sup> Justice Mudholkar noted as follows:

If upon a literal interpretation of this provision an amendment even of the basic feature of the Constitution would be possible it will be a question of consideration as to how to harmonize the duty of allegiance to the Constitution with the power to make an amendment to it. Could the two be harmonized by excluding from the procedure for amendment, alteration of a basic feature of the Constitution? It would be of interest to mention that the Supreme Court of Pakistan has, in *Fazlul Quader Chowdhry v. Mohd. Abdul Haque*, 1963 PLD 483 (SC), held that franchise and form of government are fundamental features of a Constitution and the power conferred upon the President by the Constitution of Pakistan to remove difficulties does not extend to making an alteration in a fundamental feature of the Constitution.<sup>26</sup>

Arguably, Justice Mudholkar's dissenting voice in *Sajjan Singh* had a critical influence on the majority court's view in *Kesavananda* (7:6). In *Kesavananda*, the majority court cited Mudholkar J's views in *Sajjan Singh*,<sup>27</sup> but did not mention *Abdul Haque* of the Supreme Court of Pakistan or the then Dacca High Court.

As such, Dr. Hossain's claim that *Abdul Haque's Case* from the Dacca High Court sowed the seeds of the basic-structure doctrine in South Asia is an empirical one. Before this decision, the Indian Supreme Court passingly mentioned 'basic features' of the Constitution in *Re Berubari Union Reference* (1960),<sup>28</sup> but did not say anything about the parliament's amending power. As noted, Mudholkar J in *Sajjan Singh* was the first judge to question parliament's untrammled power to amend basic features. As such, *Abdul Haque* can be considered the first judicial reference to the concept of unamendability of basic features of the constitution.<sup>29</sup>

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<sup>25</sup> Ibid.

<sup>26</sup> AIR 1965 SC 845, 867. Scholars consider Justice Mudholkar's citation of *Abdul Haque* 'to be the first reference to the "basic structure" in Indian judicial history'. See Faizan Mustafa, 'Learning from a neighbour' *The Indian Express* (New Delhi, 12 February 2018), <<https://indianexpress.com/article/opinion/columns/learning-from-a-neighbour-mashal-khan-lynching-5061357/>> accessed 31 July 2021.

<sup>27</sup> See *Kesavananda* (n 6) paragraph 681.

<sup>28</sup> AIR 1960 SC 845.

<sup>29</sup> See Haque (n 3) 124 ('it appears that ultimately in Fazlul Qader Chowdhury case the concept of basic structure was recognized').

One might wonder how the *Abdul Haque's Case* can be regarded as the origin of the basic-structure doctrine in South Asia given that the case did not concern a constitutional challenge. The answer lies, *inter alia*, in the arguments of Mr. AK Brohi and Dr. Kamal Hossain as quoted above, where they showed that the impugned Order destroyed a basic structure of the then 1962 Constitution, namely the separation of executive and legislative power in a presidential form of government. It is true that the President's Order No. 34 was not an amendment in itself, but the Court clearly held that it effectively amended art. 104. Moreover, in this case, both courts annulled article 6 of the President's Order which (though not specifically challenged) "deprived the courts of the power to judge the validity of the Order".<sup>30</sup> By this, the two courts unanimously established the higher normativity of the principle of judicial review, and thus established the inalterability of judicial review. Lastly, the Court itself used phrases such as "vital" or "fundamental" provisions or features of the Constitution, thereby indicating their inalterability.

### ***The 8<sup>th</sup> Amendment Case (1989)***

#### **Facts and the judgment**

In its epoch-making decision in *Anwar Hossain Chowdhury v Bangladesh (1989)*,<sup>31</sup> the Appellate Division entrenched the doctrine of basic-structure when it declared part of the 8<sup>th</sup> Amendment "unconstitutional". The 8<sup>th</sup> Amendment established seven permanent benches of the High Court Division (HCD) that was (according to the original article 100) an integrated division of the Supreme Court. The Appellate Division held that parliament's amending power under art. 142 of the Constitution was 'limited' (being a 'derivative' as opposed to an 'original' constituent power) and hence could not be exercised to alter 'basic structures' of the Constitution.<sup>32</sup>

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<sup>30</sup> Ralph Braibanti, "Pakistan: Constitutional Issues in 1964" (1965) 5(2) Asian Survey 79-97.

<sup>31</sup> (1989) BLD (AD) (Special) 1.

<sup>32</sup> *Anwar Hossain Chowdhury*, *ibid.*, *per* Shahabuddin Ahmed J, at p. 143.

A brief narration of the facts would aid in better appreciating the associated legal arguments. After assuming power in 1982, the second military regime, through various martial law regulations, diffused the HCD into seven permanent benches (each composed of three judges), six being outside of Dhaka. Later, this change was codified by amending original art. 100 via the Constitution (Eighth Amendment) Act 1988. As a result, instead of one integrated HCD, there emerged 7 permanent benches with administratively defined territories, with pending cases having been transferred to the relevant regional permanent bench.

In the present case, the Commissioner of Affidavit refused to allow the appellant, Mr. Anwar Hossain Chowdhury, to affirm a counter-affidavit because the concerned writ petition stood transferred to the Sylhet Bench of the court pursuant to the Rules framed by the Chief Justice under art. 100(6) as amended by the 8<sup>th</sup> Amendment. Mr. Chowdhury then filed a writ petition (No. 1252 of 1988) challenging the vires of the 8<sup>th</sup> Amendment and the said Rules, arguing that the Amendment materially altered the basic-structure of the Constitution and hence was beyond the parliament's amendment power. The High Court Division, Dhaka Bench, summarily rejected his petition on 15 August 1988, against which Mr. Chowdhury appealed to the Appellate Division.

Dr. Kamal Hossain was engaged as the lead counsel of Mr. Chowdhury's appeal. There were two other proceedings seeking similar remedies, of which one was an appeal<sup>33</sup> and the other a civil petition for leave to appeal.<sup>34</sup> These two proceedings were heard jointly with Mr. Chowdhury's.

In a 3:1 majority, the Appellate Division adopted the basic-structure doctrine and declared as unconstitutional the 8<sup>th</sup> Amendment for breaching the unitary character of the Supreme Court, a basic feature of the Constitution. The Court accepted Dr. Hossain's lead arguments that (i) the HCD's plenary judicial power over the whole Republic was a part of the unamendable basic structure of the Constitution<sup>35</sup> and that (ii) a parliament with unlimited amending power would be incompatible with the notion of constitutional supremacy, another basic pillar of the Constitution. Even the lone dissenting judge, Justice A.T.M. Afzal, agreed that parliament cannot "destroy" the

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<sup>33</sup> *Jalaluddin v Bangladesh*, C.A. No. 43 of 1988.

<sup>34</sup> *Ibrahim Sheik v Bangladesh*, C.P.S.L.A. No. 3 of 1989.

<sup>35</sup> Chowdhury, Ahmed and Rahman JJ, at pp. 83, 156–7, & 174.

character of the Constitution in the name of amendment.<sup>36</sup> For Afzal J, a destruction by an amendment would occur if any of the three organs of the State (“structural pillars”) were “destroyed” or “emasculated [...] in such a manner as would make the Constitution unworkable”.<sup>37</sup>

### **Arguments of Dr. Hossain**

When the basic-structure doctrine theorises the unconstitutionality of a constitutional amendment, it points at two types of unconstitutionality, procedural and substantive. When any amendment breaches the amendment rules, it can be said to be procedurally unconstitutional. By contrast, an amendment that is procedurally constitution-compatible can yet be substantively unconstitutional when any basic constitutional feature or fundamental core is demolished. In his arguments,<sup>38</sup> Dr. Hossain captured both prongs of the doctrine.

First, on the procedural front, Dr. Hossain argued that the 8<sup>th</sup> Amendment did not comply with the amendment rule of the Constitution contained in art. 142, as the long title of the amendment bill did not set out the specific articles that were to be amended. It was argued that this requirement was a vital condition for the exercise of the amending power in the first place. As such, while amending art. 100, parliament by implication amended (or derogated from) several other articles and thus committed a *fraud on the Constitution*. This later argument was a mix of substantive and procedural unamendability arguments.

On the point of substantive unconstitutionality, the core of Dr. Hossain’s arguments was that parliament’s amending power is inherently limited. To press his point on the concept of implied limits on amendment power, it was submitted as follows:

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<sup>36</sup> *Anwar Hossain Chowdhury* (n 32) 212-13.

<sup>37</sup> *ibid.* See further Haque (n 3) 136.

<sup>38</sup> *Anwar Hossain Chowdhury* (n 32) 23-28. Also summarized as an eight-point argument in the opinion of Justice BH Chowdhury at pp. 47-48.

The amending power is a power within and under the Constitution and not a power beyond and above the Constitution. It does not empower Parliament to undermine or destroy any fundamental feature or 'structural pillar' of the Constitution. [...]

Any power of amendment under the Constitution is subject to limitations inherent in the Constitution. The structural pillars or basic structures of the Constitution established by framers of the Constitution cannot be altered by the simple exercise of amending power. The [notion of] Parliament's unlimited power of amendment is inconsistent with the concept of supremacy of the Constitution which is expressly embodied in the Preamble and Art. 7 of the Constitution and is undoubtedly a fundamental feature of the Constitution.<sup>39</sup>

Dr. Hossain then went on to focus on specific basic features of the Constitution, which he argued were irreparably damaged by the impugned amended article 100. First, Dr. Hossain submitted that the unitary character of the Republic was derogated from. Second, he argued that the independence of the judiciary as a basic feature was dismantled. He further argued that the provision of executive notifications under clause (5) of the amended art. 100 as well as the power of the Chief Justice to enact Rules under clause (6), both affecting the "structure, status, jurisdiction, independence and effectiveness of the High Court Division", were tantamount to the delegation of constituent power to the administration and the Chief Justice, and hence incompatible with the basic structure of the Constitution.<sup>40</sup> On the point of destruction of judicial independence, he argued as follows:

Introduction of transferability of Judges underlines the inconsistency of the amendment with the concept of the integrated Supreme Court and violates the provision of Art. 147(2) which provides that terms and conditions of service of Judges of the Supreme Court cannot be altered to their disadvantage during their tenure of office.<sup>41</sup>

One cannot but marvel at the craftsmanship of Dr. Hossain's above arguments, through which he projected the independence of the judicial organ generally, and the structural integrity of the

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<sup>39</sup> *Anwar Hossain Chowdhury* (n 32) 24.

<sup>40</sup> *Ibid.*, at 25.

<sup>41</sup> *Ibid.*, at 26.

Supreme Court in particular. The learned counsel also profitably relied on several constitutional provisions, including arts. 44, 94, 101, 102, 107, 108, 109, 110 and 111, to buttress his arguments.

Before proceeding to the next discussion, another aspect of Dr. Hossain's advocacy in *the 8<sup>th</sup> Amendment* case merits attention. This is the use of comparative constitutional law to help consolidate and entrench the basic-structure doctrine. As can be gleaned from his submission, he referred to 23 foreign judicial decisions, 2 Pakistan Supreme Court cases (of 1963 and 1968) and 8 scholarly writings. In order to substantiate his argument that parliament's amending power was impliedly limited by the Constitution itself, Dr. Hossain cited a 1978 piece by Professor Upendra Baxi on "the nature of constituent power" and a book by constitutionalist Walter F. Murphy titled *Constitutions, constitutionalism, and democracy* (1988). At a time when the validity of a constitutional amendment was being adjudicated for the first time in Bangladesh, not only was the basic-structure doctrine a relatively more controversial and nebulous idea than it is today, but it was also a daunting challenge for the court to extend its judicial review to a constitutional amendment, given the country's remarkably underdeveloped constitutional jurisprudence. Therefore, reliance on comparative constitutional material, especially the Indian doctrine of limited amending power of parliament, seemed a strategically profitable method. Although Dr. Hossain relied on the Constitution of Bangladesh in earnest, the borrowing of constitutional reasoning from comparative sources greatly helped him in his efforts to convince the judges to adopt the doctrine.

### *The 13<sup>th</sup> Amendment Case (2011)*

#### **The judgment and consequences**

In *Abdul Mannan Khan v Bangladesh* (2012),<sup>42</sup> the Appellate Division by split decision (4 to 3) in May 2011 prospectively invalidated the Constitution (Thirteenth Amendment) Act 1996 that introduced the neutral and apolitical interim Caretaker Government (CtG) system. The CtG was to be in power during the interregnum between two elected governments (i.e., ninety days),

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<sup>42</sup> (2012) 64 DLR (AD) 1.

principally to oversee a free and fair national election. Before the system was abolished in 2011, national elections were held under the CtG on three occasions (1996, 2001 and 2009). In striking down the 13<sup>th</sup> Amendment, the Court reasoned that the institution of CtG, being an unelected government and involving retired chief justices in the system, was against “democracy” and “judicial independence,” two elements of the basic structure of the Constitution.

*Abdul Mannan Khan* was an appeal against the HCD’s decision in *M Saleem Ullah v Bangladesh* (2004).<sup>43</sup> This case was filed as a public interest litigation by a lawyer on grounds that the CtG was incompatible with the Constitution’s basic structures. Dismissing the challenge, the HCD held that the CtG system, instead of destroying the democratic character of the polity, helped democracy to consolidate. In regard to the constitutionality of engaging a retired chief justice as head of the CtG, the Court preferred not to interfere with political wisdom, leaving it for parliament to seek a better option. The legality of the CtG had been challenged earlier in another judicial review petition, but the challenge was rejected summarily (25 July 1996) as the Court found “no unconstitutional action” on the part of the “legislature” in enacting the impugned Amendment to provide for the CtG system for a “limited period”.<sup>44</sup>

These rationales of the HCD, underpinned by a trait of judicial restraint over structural or political/policy issues, were brushed aside by the Appellate Division. I had earlier argued that the plurality Court misapplied the basic-structure doctrine in this case. The misapplication of the doctrine resulted from a merely textual interpretation of the Constitution, to the exclusion of the local socio-political context.<sup>45</sup> Further, the majority court implausibly turned down the arguments of six out of eight *amici curiae* including Dr. Kamal Hossain, who urged the Court to consider the validity of the Amendment in the compelling context of the then political crisis followed by consensus that culminated in the caretaker government formula.

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<sup>43</sup> (2005) 57 DLR (HCD) 171 (4 August 2004).

<sup>44</sup> *Syed Muhammad Mashiur Rahman v President of Bangladesh* (1997) 17 BLD (HCD) 55, 57.

<sup>45</sup> Ridwanul Hoque, ‘Judicialization of Politics in Bangladesh: Pragmatism, Legitimacy, and Consequences’ in Mark Tushnet and Madhav Khosla (eds.), *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge: CUP 2015) 261-290.

It is not surprising that the Appellate Division's *13<sup>th</sup> Amendment* decision had serious political implications. The decision effectively sharpened the then political crisis over the CtG issue. The Awami League government that assumed power following the 2009 elections earlier indicated that it would discard the CtG system. Within two months of the Court's "short order" on 10 May 2011, the government enacted the Constitution (Fifteenth Amendment) Act 2011 to eliminate the CtG system. This exclusion of the CtG was done without the concurrence of major political parties, including the main opposition party (the Bangladesh Nationalist Party). The opposition demanded the restoration of the CtG system, ultimately boycotting the January 2014 general election. Ironically, the unilateral and whimsical exclusion of the CtG system on the plea of its being "undemocratic" resulted in a distorted and illiberal democracy,<sup>46</sup> since the tenth parliament was a product of effectively a one-party election, with the Awami League once again in power but without any real opposition in parliament. Moreover, candidates in 153 constituencies (out of 300 general seats) were declared "elected" without contestation.<sup>47</sup> It has therefore been a widely held view that the 2014 elections were deficient in constitutional legitimacy.<sup>48</sup>

### **Arguments of Dr. Hossain**

In this case, Dr. Kamal Hossain appeared as an *amicus curiae*. His written submission, a copy of which I was kindly presented with, represents a classic essay in the law of judicial review of constitutional amendments. Dr. Hossain argued that the 13<sup>th</sup> Amendment or the system of an election-time caretaker government was not incompatible with the Constitution. His major points can be summarized as below:

- (i) The 13<sup>th</sup> Amendment was a result of a political consensus and hence not unconstitutional;

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<sup>46</sup> Hoque, 'Judicialization of Politics' (n 46) 281; Ridwanul Hoque, 'Deconstructing Public Participation and Deliberation in Constitutional Amendment in Bangladesh', (2021) 21(2) Australian Journal of Asian Law 7, 13-14.

<sup>47</sup> Hoque, 'Judicialization of Politics' (n 46) 289, esp fn 109.

<sup>48</sup> See Ali Riaz 'Shifting Tides in South Asia: Bangladesh's Failed Election', (2014) 25(2) Journal of Democracy 119; Ali Riaz 'The Legislature as a Tool, Executives' Power Grab, and Civilian Authoritarianism: The Bangladesh Case', in Irina Khmelko, Rick Stapenhurst, and Michael L Mezey (eds), *Legislative Decline in the 21st Century: A Comparative Perspective* (New York and London: Routledge 2020) (commenting that since the 2014 exclusionary elections, the legislature has used as a tool in Bangladesh for transitioning from democracy to civilian authoritarianism).

- (ii) It was not destructive of democracy, a basic feature of the Constitution, but an aiding mechanism to help democracy entrench itself and prosper; and
- (iii) The CtG system did not breach the independence of judiciary, as the appointment of a retired Chief Justice as the Chief Adviser was not the only option.

First, Dr. Hossain saw the Constitution as a political process that evolves along the life, experience, and the needs of a society. He aligned this functional/social concept of a constitution with the ability of the court to determine the legality of any amendment. For him, the validity of a constitutional amendment, “which was made based on consensus of major political parties (and sections [of the public] including civil society) and had been acted upon by them in each of the successive elections, should not be the subject matter of a challenge going to the root of its constitutionality”. “On a close analysis”, he continued, “it appears that the grievances [of the litigants] are in fact about the manner in which the provision has been applied in specific cases/events, in particular, the mode/manner in which the Chief Adviser discharged his responsibility in 2001, and the manner in which the Chief Adviser was appointed and a number of actions taken by him in 2006 have raised questions about his role [sic]”.<sup>49</sup>

Dr. Hossain drew from the historical evolution of the CtG system, demonstrating how inevitable it was in the context of the tendency in Bangladeshi politics of manipulation and engineering of elections by the party in power. The 13<sup>th</sup> Amendment was an important constitutional device, since it fulfilled the political demands for a caretaker government to ensure free and fair elections for the sake of the constitutionally mandated democratic political order.

Secondly, he asked the Court to adopt an approach of purposive or harmonious constitutional interpretation when defining democracy or adjudicating the *vires* of a constitutional amendment. Citing Mahmudul Islam’s *Constitutional Law of Bangladesh*,<sup>50</sup> Dr. Hossain argued that every “constitution is founded on some social and political values and legal rules are incorporated to

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<sup>49</sup> From the written submission of Dr. Hossain (para. 1.3) to the Court in the *13<sup>th</sup> Amendment Case*, a copy of which was sent to me by his Chambers.

<sup>50</sup> Mahmudul Islam, *Constitutional Law of Bangladesh* (Dhaka: Mullick Brothers 2012) (citing p. 29).

build a structure of political institutions aimed to realize and effectuate those values. Therefore, the legal rules incorporated in the body of a constitution cannot be interpreted in isolation from those social and political values and the purpose which emerges from the scheme of the constitution”.<sup>51</sup> The approach of the apex court thus ought “to recognize that the Thirteenth Amendment was made in the context of the situation created in 1996”.<sup>52</sup>

In the face of the argument that the CtG system was undemocratic, Dr. Hossain contended that the alleged constitutional inconsistency of the Amendment was misconceived. The foundation of democracy, he went on to say, is article 7 of the Constitution, that provides for popular sovereignty and constitutional supremacy. “The Thirteenth Amendment by seeking to supplement the Election Commission to ensure free and fair elections, thus, contributes to strengthening the electoral/democratic process”. To substantiate his argument Dr. Hossain quoted the following from Amartya Sen’s *The Argumentative Indian*:

Public reasoning includes the opportunity for citizens to participate in political discussions and to influence public choice. Balloting can be seen as only one of the ways – albeit a very important way – to make public discussions effective, when the opportunity to vote is combined with the opportunity to speak and listen, without fear. The reach – and effectiveness – of voting depend critically on the opportunity for open public discussion.<sup>53</sup>

To overcome the arguments of the petitioners that the CtG system, by involving the retired chief justices, breached the principle of independence of judiciary, Dr. Hossain made certain innovative and society-specific arguments. The maintenance of rule of law called for a truly independent judiciary, for which there needed to be a democratic government established by a fair and free election. Thus, the consensus about the retired Chief Justices’ involvement in an election-time government ought not to be considered a breach of the principle of judicial independence. Further, it was argued that the “[i]ndependence of the judiciary itself has to provide checks on the Caretaker Government to ensure that [that] independence is not infringed”. Relying on the famous *Masdar*

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<sup>51</sup> Dr. Hossain’s submission (n 52) para. 1.4.

<sup>52</sup> Dr. Hossain’s submission (n 52) para. 1.5.

<sup>53</sup> Amartya Sen, *The Argumentative Indian: Writings on Indian History, Culture and Identity* (London: Penguin Books 2006), citing p. 14.

*Hossain Case* (2000), in which the Appellate Division observed that they found “no provision in the Constitution which curtail[ed], diminish[ed] or otherwise abridge[d] this independence”,<sup>54</sup> Dr. Hossain argued that the Court by implication accepted the constitutionality of provisions of the CtG. Another opposing argument was that the incumbent government may seek to appoint and promote judges with the pre-determined objective of gaining undue advantage during elections from any judge so appointed. Dr. Hossain submitted that that would only depend on the integrity and inner strength of the judge concerned.

These arguments portray certain standards which a Court should adhere to when deciding a complex yet purely society-specific constitutional amendment. The most attractive of his arguments is that a constitutional amendment that reflects an overwhelming public demand and is based on sheer political consensus (reflected not necessarily in the voting in parliament) must not be seen as unconstitutional by mundanely looking at certain texts of the Constitution. I take this as having portrayed a ‘limited doctrine’ of basic-structure. In other words, Dr. Hossain’s arguments can also be interpreted as having shown the dangers of abuse of the doctrine. The plurality court in the *13<sup>th</sup> Amendment Case* did not, however, accept his arguments, and the nation has already witnessed unwholesome political consequences of this unwise refusal, as elections in Bangladesh have turned into a ploy at the hands of the incumbent government in power, leading to the boycott of the 2014 elections by all major political parties.<sup>55</sup>

Undeniably, however, Dr. Hossain’s arguments achieved remarkable success as three out of seven Justices accepted them. In his powerful dissent, Justice Muhammad Imman Ali, for example, reasoned that “the Thirteenth Amendment was neither illegal nor *ultra vires* the Constitution and does not destroy any basic structures of the Constitution.”<sup>56</sup> For Justice Ali, the republican and democratic character of the State was no more infringed on or after this Amendment than it had been before the care-taker government system was introduced. Ali, J further reasoned that in the aftermath of the 1996 political quagmire, the people chose the CtG system as a solution. Accordingly, the solution to the current crisis must come from the representatives of the people

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<sup>54</sup> *Secretary, Ministry of Finance v Md. Masdar Hossain* (2000) 52 DLR (AD) 82, 103.

<sup>55</sup> See Ridwanul Hoque, ‘Deconstructing Public Participation and Deliberation’ (n 47) 13.

<sup>56</sup> *Abdul Mannan Khan* (n 44) 472.

and ought to be worked out through dialogue in parliament. The other two dissenting judges, Justice Abdul Wahhab Mia and Madam Justice Nazmun Ara Sultana, also preferred to defer the issue to the people or the future.<sup>57</sup>

### *The 16<sup>th</sup> Amendment Case (2017)*

#### **Background and the judgment**

On 3 July 2017, the Appellate Division in *Bangladesh v Asaduzzaman Siddiqui* (2017)<sup>58</sup> invalidated the Sixteenth Amendment of 2014 that restored an original constitutional scheme regarding the parliamentary removal of Supreme Court judges. By this, the Court endorsed the HCD's 2:1 decision in *Asaduzzaman Siddiqui v Bangladesh* (2016).<sup>59</sup> Dr. Hossain appeared as an amicus curiae before both divisions of the Supreme Court, arguing that the Amendment was unconstitutional as it breached the principle of independence of judiciary.

I have argued elsewhere that the Appellate Division's decision was an inappropriate application of the basic-structure doctrine in as much as the 16<sup>th</sup> Amendment in effect restored an original constitutional system that the constituent people (by virtue of original constituent power) enacted in their 1972 Constitution.<sup>60</sup> I have also argued that the 16<sup>th</sup> Amendment was not a breach of judicial independence, as there remained an option, under clause (3) of art. 96, to introduce by law a peer-review process within the system of parliamentary removal of judges.<sup>61</sup> In this paper, however, I focus on the innovativeness of Dr. Hossain's arguments by which he successfully persuaded the Court that the 16<sup>th</sup> Amendment was unconstitutional in light of the changed political scenario in the country reflected in, among other things, the lack of independence of members of parliament and absolute parliamentary majoritarianism.

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<sup>57</sup> On this strategy of judicial deference to the future, see Rosalind Dixon and Samuel Issacharoff, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy' (2016) *Wisconsin Law Review* 683.

<sup>58</sup> (2017) CLR (AD) (Spl) 1.

<sup>59</sup> WP No. 9989 of 2014 (HCD, 5 May 2016).

<sup>60</sup> See Ridwanul Hoque, 'On Law, Politics and Judicialization: Sixteenth Amendment Judgment in Context', an unpublished paper present in BILIA Symposium on Law, Politics and Judicialization, Dhaka, August 2017. See also Ridwanul Hoque, 'Can the Court Invalidate an Original Provision of the Constitution?' (2016) 2 *University of Asia Pacific J Law & Policy* 13.

<sup>61</sup> Ridwanul Hoque, 'Can the Court invalidate an original provision of the Constitution?' (n 63).

Bangladesh's original Constitution (1972) provided, in art. 96(2), for the removal of a Supreme Court judge by an order of the President, pursuant to a resolution of parliament passed by a two-thirds majority, but only on the ground of proven misbehaviour or incapacity of the judge. Before this provision was ever tested, the Fourth Amendment (1975) had completely done away with it, by providing for the removal of judges merely by an order of the President. In August 1975, the Constitution itself was thwarted and a lingering period of extra-constitutional regimes installed. The first military regime extra-constitutionally amended the judicial removal clause to introduce a peer-driven removal process called the *Supreme Judicial Council* (hereafter 'SJC') composed of the Chief Justice and two other most senior judges.<sup>62</sup> The system (art. 96) provided that a judge could be removed by order of the President, if the SJC upon a hearing and inquiry recommended his or her removal. This judiciary-led process of SJC was later affirmed by the Fifth Amendment (1979), which was struck down by the Appellate Division in 2010.<sup>63</sup> The 5<sup>th</sup> Amendment decision of the Appellate Division, however, validated the SJC.

There was indeed no serious opposition to the system of SJC. Rather, the Supreme Court approved and appreciated the SJC. The government nevertheless replaced the SJC with the original scheme of parliamentary removal of Supreme Court judges. At first sight, the 16<sup>th</sup> Amendment's purpose seems to be honest insofar as it restored the original scheme. If one were to dig deeper into the background, however, the Amendment reveals itself as a product of a predatory and dominating politics. A couple of years before this Amendment was passed, senior ruling party leaders threatened in parliament to restore the power of parliament to remove judges of the Supreme Court. There emerged a tug of war between a particular judge of the HCD and the Speaker of the House of the Nation when the latter commented in the House that the judges were quite prompt in issuing decisions that concerned their own stake. The case centred around a decision of the HCD that involved the release of a government-owned property in favour of the Supreme Court. The leading judge in the concerned decision countered the Speaker's comments and warned that it might be regarded as seditious. This sparked a fierce debate in parliament regarding the alleged breach of

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<sup>62</sup> By virtue of the Second Proclamation (Tenth Amendment) Order 1977 (martial law proclamation), later internalised into the Constitution via the Fifth Amendment of 1979.

<sup>63</sup> *Khondker Delwar Hossain v Bangladesh Italian Marble Works Ltd.* (2010) 62 DLR (AD) 298.

the Constitution by the judge in question, and following further judicial and parliamentary exchanges, the issue seemingly faded away. It is in this background that the 16<sup>th</sup> Amendment was enacted.

### **Arguments of Dr. Hossain**

As indicated above, given the nature of originality of the provisions reinstated through the 16<sup>th</sup> Amendment and the fact that Dr. Hossain was the Chairman of the Constitution Drafting Committee, it was not an easy task for him to develop an argument that the 16<sup>th</sup> Amendment was unconstitutional. In successfully arguing that the removal of judges by parliament was unconstitutional, Dr. Hossain employed contextual and purposive theories of constitutional interpretation. Based on the ground that the independence of judiciary was an unalterable core, he submitted that the impugned unconstitutionality had to be judged in light of the preamble and, among others, arts. 7B, 94(4), 96, 116A and 147. Of these articles, art. 7B was enacted into the Constitution via the 15<sup>th</sup> Amendment, to provide that certain basic provisions of the Constitution could not be amended. Dr. Hossain's arguments were that the 16<sup>th</sup> Amendment created an atmosphere of arbitrary exercise of parliament's power to remove a judge. For him, the constitutional principle of independence of judiciary precludes any kind of partisan exercise of power by the legislature in relation to the judiciary, in particular the power to remove judges of the Supreme Court. As regards the originality of the reinstated art. 96, Dr. Hossain argued as follows:

In the original 1972 Constitution, removal of judges by impeachment was based on certain assumptions, which in the light of subsequent amendment[s] would appear to be difficult to sustain. The impeachment power was vested in the Parliament on the premise that the Parliament being constituted by elected representatives of the citizens would [...] exercise[e] their power conscientiously and independently, free from any party directive.<sup>64</sup>

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<sup>64</sup> From the written submission of Dr. Hossain (para. 1.3) to the Appellate Division in the *16<sup>th</sup> Amendment Case*, a copy of which was sent to me by his Chambers.

In other words, in the context of present-day politics in Bangladesh, the removal of judges through a peer-driven process, as was the case with the Supreme Judicial Council, became an unalterable basic structure of the Constitution, and hence unamendable under art. 7B that was introduced in 2011. This claim represents the crux of his arguments which the Appellate Division accepted as a forceful or meritorious argument.

Dr. Hossain also argued that the 16<sup>th</sup> Amendment made the judges “vulnerable” to political force or vengeance and made their tenure “insecure”. Hence, the argument went, the Amendment was unconstitutional.

## **Conclusions**

As this paper has shown, Dr. Kamal Hossain’s contribution to the emergence and consolidation of the basic-structure doctrine in Bangladesh is truly unique. The establishment of the doctrine during an undemocratic era was no ordinary task. It was due to Dr. Hossain’s indomitable and extraordinarily appealing arguments, among other things, that the Supreme Court could incorporate the doctrine into its constitutional jurisprudence. What underpinned the doctrine, in fact, was the future of the Constitution of Bangladesh. I continue to regard the *8th Amendment* decision adopting the doctrine as the boldest ever instance of judicial activism in defence of constitutionalism. Although one may disagree with one or more of the decisions in which the basic-structure doctrine was invoked, the doctrine on its own merits remains a powerful weapon against the destruction of constitutional identity. In that context, Dr. Hossain’s contribution to Bangladesh’s Constitution and constitutional politics should be valued and seen through the lens of his role in the establishment of the doctrine of basic structure.

In the *8th Amendment Case*, Dr. Hossain argued for the establishment of the doctrine, to preserve the “Constitution” or its identity. In the *13th Amendment Case*, he arguably developed a limited model of the doctrine when he submitted that a constitutional scheme, arising from a political consensus during a national crisis and aimed at strengthening democracy, can never be seen as unconstitutional. As mentioned, this author differs with him as regards the unconstitutionality of the 16<sup>th</sup> Amendment. It is, however, evident that his arguments in this case were truly innovative,

as he invoked the teleological approach to constitutional interpretation, expounding an original provision in the light of existing political realities and specificities. A petition by the government for review of the *16<sup>th</sup> Amendment decision* is pending before the Appellate Division. If the review-petition is dismissed, Dr. Hossain's arguments would then authoritatively lead to a new theory of unconstitutional constitutional amendments inasmuch as he explained, in that case, how original provisions reinstated into the Constitution after many years of their deletion can turn out to be unconstitutional in the particular context of exploitative parliamentary majoritarianism.