Promise and Perils of Basic Structure Doctrine in Bangladesh

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This Article argues that the court's use of the basic structure doctrine has upset its moral authority in ensuring the meaningful exercise of amending power in Bangladesh. While it accepts the "why" of the doctrine, recognizing its compatibility with constitutional democracy, this Article seeks to assess its desirability. In doing so, it focuses on how *the doctrine has been (mis)used and the ways it should be used in future constitutional cases in Bangladesh. Toward this end, it highlights the misjudgments woven into the doctrine and calls for a recalibration of its operational framework, arguing for both the inevitability and minimalism of the judicial role.*

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I. INTRODUCTION

A country's constitution is widely recognized as the fundamental law of the land. Yet, the notion of what "fundamental" truly means in this context often lacks clarity.[1] When discussing a written constitution, it typically suggests that any modifications must adhere to specific prerequisites and procedures. German constitutional theorist Carl Schmitt elaborates on various concepts of constitution and contends that such constraints on alteration significantly elevate the legal status of written constitutions. Such a view is also echoed by Sarifuddin Pirzada, who argues that constitutional law is fundamentally "paramount and permanent" because it can only be amended by the original authority that enacted it or through a clearly defined amendment process.[2] However, for Schmitt, the question of fundamentality is also central to the concept of the constitution in its absolute sense. He understands the constitution not merely as a legal framework, but as a politically inviolable foundation that embodies the unity of the political community and guarantees social order. This foundational character gives the constitution its authority and permanence.[3] Yet, even within this absolutist conception, the possibility of change is not entirely foreclosed, because social order inherently requires change and progress.[4] Therefore, both the normative and absolute

1. Carl Schmitt, *Constitutional Theory* 59 (Jeffrey Seitzer ed., Duke Univ. Press 2008).

2. Sharifuddin S. Pirzada, *Fundamental Rights and Constitutional Remedies in Pakistan* 1 (1966); *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803). Justice Marshall once observed:

> [t]he people have an original right to establish, for their future generation, such principles as, in their opinion, shall most conduce to their own happiness . . . . The exercise of this right is a great exertion: nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

3. Schmitt, *supra* note 1, at 94. Y.L. Tan also describes the word "constitution" as deriving from the Latin *constituere,* meaning "to stand together" or "to establish" a country's government and legal foundation of any society. *See* KEVIN Y.L. TAN, AN INTRODUCTION TO SINGAPORE'S CONSTITUTION 1 (2011).

4. A constitution's relationship to social changes is, however, found to be a complicated issue for the existence of two conflicting intellectual traditions. From one perspective, commentators have frequently claimed that a constitution inevitably changes or at least should change with the development of the society—a proposition traditionally exposed under the rubric of a "living constitution." From this point of view, changes in the society may thus require alteration in the constitution. The other view is founded upon the idea of permanence in constitutions. This view can well be understood with reference to the position of the framers and ratifiers of the American constitution, who "assumed that constitutions were to be unchanging and

concept of constitution recognize the need for stability in constitutional frameworks, while still embracing opportunities for change. However, the pursuit of profound social and political transformation alongside constitutional preservation often gives rise to a paradoxical challenge.[5] This complexity has led to the emergence of the basic structure doctrine, which seeks to resolve the tensions inherent in balancing these competing aspirations.

In a constitutional democracy, the principle of qualified alterability of the constitution is essential for balancing constitutional change, identity, and progress.[6] This principle empowers parliament to amend the constitution, but such power is governed by specific procedural requirements, including the necessity of direct public consent through a referendum.[7] Unfortunately, the constitutional histories of numerous democracies reveal a troubling gap between the execution of this amending power and the concerns of the populace. The rampant and often unchecked exercise of this power raises significant fears about undermining the constitution's original intent and identity, particularly evident in the context of South Asian constitutional practices. This growing public skepticism towards the amending authority underscores the urgent need for substantial restrictions on the democratic application of amendatory power. In the Indian context, this call for limitations was poignantly illustrated in the intricate relationship between a powerful parliament and a vigilant judiciary. The landmark ruling in *Kesavananda Bharati v. State of Kerala* ultimately clarified the judicial boundaries of parliament's amending authority, ensuring that the integrity of the constitution is upheld in the face of political pressures.[8]

The momentum created by the *Kesavananda Bharati* decision has led to the establishment of the basic structure doctrine, which serves as a crucial benchmark for assessing the constitutionality of constitutional amendments. At the heart of this doctrine lies the commitment to safeguard the fundamental promises of the Constitution that define its

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inflexible in response to social development." *See* Philip A. Hamburger, *The Constitution's Accommodation of Social Change,* 88 (2) MICH. L. REV. 239-327 (1989).

5. Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* xi (2009).

6. Carl Friedrich thus observed that every well drawn constitution should provide for its amendment is such a way as to forestall, as far as humanly possible, revolutionary upheavals. *See* CARL. J. FRIEDRICH, *Constitutional Government and Democracy* 13 (Oxford and IBH Indian ed., 1966).

7. The power of amendment is thus considered to be *sui generis* which means that it generates its own validity and does not have to meet the test with reference to any higher norm.

8. Kesavananda Bharati v. State of Kerala, (1973) 4 S.C.C. 225 (India).

core essence. This doctrine captures a thoughtful balance: It recognizes that a constitution is not "so holy" that it can never be altered, nor is it "so unholy" that it can be modified capriciously.[9] Thus, rather than denying Parliament's power to amend the Constitution, this doctrine plays a vital role in ensuring that the foundational substance of the Constitution remains intact against the dangers of arbitrary majoritarian rule.

Coming out as a tribute to constitutional essentialism, the judiciary received the doctrine overwhelmingly to examine the substantive suitability of constitutional amendments in India and beyond. However, such an approach of using the basic structure doctrine by the court has generated complex constitutional debate centered on the basis and limits of judicial authority to invoke its self-styled benchmarks of structural essentialism.[10]

The first challenge to the foundation of the doctrine was addressed in relation to its legal and political legitimacy.[11] Initially, it was thus argued that "the basic structure doctrine is anti-democratic in character, and that unelected judges have assumed vast political power not given to them by the constitution."[12] The legitimacy challenge to the basic structure doctrine was, however, countered by suggesting that such criticism is founded on an impoverished conception of democracy and the failure to understand the democratic conception of constitutionalism. Thus, this argument is followed by the claim that basic structure review is an independent and distinct form of constitutional judicial review with a sound and justifiable constitutional foundation.[13]

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9. "There is, therefore, nothing wrong in amending the constitution by an elected regime securing adequate mandate to bring about changes in the constitution of the state. What is rather important is to examine whether the changes brought out by a regime is consistent with the democratic principles of changing the constitution towards expending the rights of the citizens." *See* NURUL KABIR, *Correcting the Constitution to Legitimate the Incorrect,* THE NEW AGE, 20 July, 2011.

10. SATYA PRATEEK, *Today's Promise, Tomorrow's Constitution: 'Basic Structure', Constitutional Transformation and Future of Political Progress in India,* 1(3) NUJS L. REV. 420 (2008).

11. In 1974, Tripathi argued that the clusters of judgment in the *Kesavananda* case yielded no clear *ratio decidendi*. *See* P. K. Tripathi, Kesavananda Bharati v. State of Kerala*: Who Wins?, i*n FUNDAMENTAL RIGHTS CASE: THE CRITICS SPEAK 89-129 (Surendra Malik ed., 2012). Other critics pointed out that *Kesavananda* misunderstood the relationship between the parliamentary review and judicial review in the constitution and should thus be overruled. *See* R. Dhavan, SUPREME COURT AND PARLIAMENTARY SOVEREIGNTY (1976).

12. RAJU RAMACHANDRAN, *The Supreme Court and the Basic Structure,* in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 108 (B. N. Kirpal ed., 2000).

13. The response to the legitimacy challenge to the basic structure review has been elaborated with greater clarity in the work of Sudhir Krishnaswamy. In his work, *Democracy and*

Such a counter to the legitimacy argument signifies a studied shift in democratic faith from the legislature to the judiciary in determining the actual repository of constitutional power. In other words, the doctrinal promise of basic structure offers strategic leverage to the judicial authority over the parliament. Granville Austin has described this position by noting that

> In Kesavananda, the Court emerged victorious, in both confrontations, asserting its institutional role vis-à-vis Parliament in constitutional matters and strengthening its power of judicial review through the basic structure doctrine . . . The bench's glory was in its decision, not in the manner of arriving at it, which reflected an ill on itself and on the judiciary as an institution.[14]

Austin's perspective clearly illustrates how the legitimacy argument evolves into a compelling assertion that the doctrine serves to empower judicial overreach into constitutional authority.[15] The consequent challenge to the doctrine is thus directed to the fear that it will allow the judge to impose their own personal or political preference in determining the substantive suitability of constitutional amendment to such an extent as to ultimately negate the very meaning of constitution as a body of entrenched rules to guide the government and institutional action. In rigor and essence, such reaction to the doctrine is thus found to be derived from the following discontent that is foundational to the power of judicial review:

> Having connected its judgment to the mandates of the constitution, the Court acquired the dangerous potential to rule finally, even imperially, over both the popular will expressed in law, and more serious, over the people's constitution itself. And it has been exactly the problem—what to do about a Court superior to democratic politics and final in its constitutional decrees—that has so often challenged the minds of statesmen, jurists and scholars alike.[16]

Constitutionalism in India: A Study of the Basic Structure Doctrine, he argues that the doctrine rests on a sound and justifiable interpretation of the constitution and that it is legally, morally, and sociologically legitimate. *See* Krishnaswamy, *supra* note 5.

14. GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE 258 (1999).

15. It is argued that the invocation of this doctrine replaces parliamentary sovereignty with judicial sovereignty. As such the critics of the basic structure doctrine see it as the judicial usurpation of democratic sovereignty. *See* Pratap Bhanu Mehta, *The Inner Conflict of Constitutionalism: Judicial Review and the 'Basic Structure,* in INDIA'S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES, 202 (Zoya Hasan ed., 2006).

16. JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 78 (1984).

Since the basic structure doctrine significantly broadened the scope of judicial review, the possibility of the judiciary's overpowering role may decrease the doctrine's desirability in a constitutional democracy. In Indian constitutional polity, the invocation of the doctrine is thus debated to project an impetus to judicial over-activism. In other words, the basic structure doctrine is found to ground the breaches of constitutional boundaries by the judiciary on the pretext of judicial activism.[17] More importantly, the use of the doctrine by the court has led further to claims that it facilitates judicial tyranny in the guise of controlling legislative tyranny.[18] To the critic, the basic structure doctrine is, therefore, mostly projected as the prototype of autocracy—a framework founded upon the triumph of judicial power under the guise of constitutional supremacy.[19]

In Indian constitutional discourse, this critical reception of *Kesavananda* triggers constant refashioning of the doctrine to define its operational limits within a philosophically affluent framework of constitutional democracy. As Baxi describes, such refashioning contributes to bringing a "pilgrim's progress" in the attitude towards the doctrine in India.[20] Accordingly, under the guise of refashioning, the court's continued adherence to the doctrine highlights its enduring promise of constitutional compatibility both in India and beyond.

This fact should not, however, be taken as dismissing the peril of the doctrine to enfold the frightening consequence associated with the risk of judicial overreach, because the constitutional experience of Bangladesh for nearly a quarter century shows all the same that has been argued to be

17. KRISHNASWAMY, *supra* note 5, at xviii.

18. Apart from this, diverse strands of debates on the constitutional legitimacy of the doctrine have emerged in the last decade. *See, e.g.*, KRISHNASWAMY, *supra* note 5, at xvii.

19. The term "judocracy" has been used to refer to the phenomenon where the government is virtually run by the judiciary and the Supreme Court is considered to be the real repository of constitutional power. In his seminal work, *Justice, Judocracy and Democracy in India: Boundaries and Breaches,* Sudhanshu Ranjan clarifies the term judocracy to refer to the virtual taking over by the judiciary, under the guise of judicial activism. *See* SUDHANSHU RANJAN, JUSTICE, JUDOCRACY AND DEMOCRACY IN INDIA: BOUNDARIES AND BREACHES (2012). In this book, he throws light upon the instances and issues relating to the breach of boundaries by the judiciary and other organs of the government. In his earlier work, *Denigration of Legislature: Judocracy and Article 142,* (Mainstream, June 14, 1997), he used the term to describe the overpowering role of the judiciary in a democracy, without any accountability. Somewhat similar terms have been used by other scholars: V. R. Krishna Iyer has used the term "judgocracy." *See* V. R. Krishna Iyer, *Quality of Justice Is Not Strained,* THE INDIAN EXPRESS, 27 November 2003. Ran Hirschl used the term "juristocracy" to describe the consequence of such a tendency on constitutionalism. *See* Ran Hirschl*, Towards Juristocracy: The Origin and Consequences of the New Constitutionalism* 294 (2004).

20. *See* UPENDRA BAXI, *A Pilgrim's Progress: The Basic Structure Revisited,* 24 (1 & 2) INDIAN BAR REV. 53-72 (1997).

the "frightening consequences" of the basic structure doctrine. The genesis of this unpleasant fact lies in the so-called historic judgment of the *Eighth Amendment* case[21] which gave a misunderstood birth to the basic structure doctrine in Bangladesh. More importantly, the unprincipled application of this doctrine in some later cases, such as the Constitution's *Fifth Amendment* case,[22] singles a negative forecast for the judicial sustenance of the application of the basic structure doctrine. Moreover, the recent judicial invalidation of the Thirteenth Amendment of the Constitution on the grounds of violating the basic structure has been more sinister. Despite such discontent about the use of this doctrine in Bangladesh, this work has not, however, questioned its compatibility. To debate the doctrine in Bangladesh, it instead accepts the "why" of the doctrine from the perspective of constitutional essentialism and goes to assessing the desirability of its application by focusing on *how* it should be used with a proper understanding of its moral authority in the future constitutional cases of Bangladesh.[23]

This article is thus founded upon the assumption that the fallacy of the *Eighth Amendment* case, in formulating the basic structure doctrine in Bangladesh, has not faced any serious encounter—scholarly or institutional—and,[24] as such, the misunderstood birth of the doctrine has never been marked with significant attention.[25] The failure of combining the principled and pragmatic reasons can be noted with reference to

21. Anwar Hossain Chowdhury v. Bangladesh, (1989) 1 B.L.D. (S.C.) (Bangl.).

22. Khondoker Delwar Hossain & Others v. Bangladesh Italian Marble Works Ltd. & Others, (2010) 2 B.L.D. (S.C.) (Bangl.).

23. The domain of this work remains however confined again to the analysis of four major cases, where the doctrine of basic structure has been successfully invoked.

24. Justice Mustafa Kamal only argues slightly that the doctrine is founded on nebulous footing. See Justice Mustafa Kamal, *Bangladesh Constitution: Trend and Issues*, 107 (1994). Thus, unlike fierce debates that followed *Kesavananda* in India, this case attracted only nominal criticism. Recently, some allegations have however been made on some conceptual grounds, such as the ground that it violated the concept of popular sovereignty. *See* Imtiaz Omar & Z. Hossain, *Coup d'Etat, Constitution and Legal Continuity,* THE DAILY STAR, (Sept. 17 & 28, 2005). An important accusation has also been made against the decision by arguing that the decision reflected the elitist mindset of the courts, by making an "invisible" compromise between the judiciary and the Dhaka-based elite lawyers. *See* Mizanur Rahman, *Governance and Judiciary,* in UNVEILING DEMOCRACY: STATE AND LAW 31-68 (Mizanur Rahman ed., 1999).

25. Recently, Rokeya Chowdhury has advanced some principled and pragmatic arguments to criticize the approach and implications of applying this doctrine in Bangladesh. She critics the dubious stand of the court and argues that "following the crooked trail initiated by the EAC [*Eighth Amendment* case] the Constitution has reached a crossroad where one finds not a single constitution, rather many constitutions each smaller in breadth than the other . . ." *See* for detail, Rokeya Chowdhury, *The Doctrine of Basic Structure in Bangladesh: From 'Calfpath to Matryoshka Dolls,* 14 (N 1& 2) BANGL. J. L. (2014).

Dr. Ridwanul Hoque's writing on judicial activism in Bangladesh, where he has commented favorably on the application of basic structure doctrine in the *Eighth Amendment* case, totally disregarding the misjudgments that have been woven into the doctrine.[26] Without recognizing the court's failure to realize that the diffusion of the High Court division could be seen as a measure of nourishing the constitutional promise to bring justice to the people's doorsteps—arguably one of the most important basic features of the Constitution—Dr. Hoque goes on to comment that "[t]he Court was seemingly motivated to uphold the greater public interest and the nation's founding mottos of constitution and democracy."[27] This fact signifies that the doctrinal promise has yet to be understood in Bangladesh from a people's perspective.

In contrast, there is, however, a view that the burial of the basic structure doctrine in Bangladesh is really overdue.[28] In his work, *Leviathan and the Supreme Court: An Essay on the Basic Structure Doctrine*, Dr. Salimullah Khan has identified the danger in the doctrine and denied its necessity in Bangladesh.[29] It appears that this view is founded upon the negative experience of using this doctrine or on the fear of its future misapplication. It undermines the potential of the doctrine to bring philosophy and principles into action and thus work out the constitutional present and future in terms of its inheritance from the past. The claim for the total rejection of the doctrine is, thus, equally mistaken as the view of favoring its unconstrained application in constitutional adjudication.

There is no denying that the basic structure review has been developed as the legal check in political excess and as the mediator of our principles. This can be seen as an institutional check on power, yet as an institution that must be checked and watched. To find a place for basic structure review thus means to find a place for it within a delicate and

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26. Though he recognizes the shortcomings and ambivalence of the reasoning of the judges, he still says that the *Eighth Amendment* case continues to be the boldest assertion of constitutionalism and judicial activism. *See* Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* 11 INT'L J. OF CONST. L.112-118 (2011).

27. RIDWANUL HOQUE, *Constitutionalism and Judiciary in Bangladesh,* in COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA 314 (Sunilm Khilnani ed., 2013).

28. SALIMULLAH KHAN, *Leviathan and the Supreme Court: An Essay on the Basic Structure Doctrine,* 2 STAMFORD J. OF L. 87-107 (2011).

29. Dr. Khan's claim can be found to correspond directly with the observation of Raju Ramachandran who also claims the burial of the doctrine in Indian context by noting that "[t]he basic structure doctrine has served a certain purpose: it has warned a fledgling democracy of the perils of brute majoritarianism. Those days are however gone . . . The doctrine must now be buried. The nation must be given an opportunity to put half a century's experience of politics and economics into the Constitution." *See* Ramachandran, *supra* note 12, at 130.

complex system, to see it as an institution that is in tension with democratic rule while at the same time having the potential to help democracy by ruling itself constitutionally.

The major aim of this work relates to the argument to find this place between the two streams: between favoring the unconstrained application of the doctrine and the claim of its total rejection. This article, therefore, proceeds by weighing the critical contribution of the doctrine in the development of Indian democracy and constitutionalism and ends with the view that all that needs to be done is to restrain or refashion the doctrine and not to eliminate it. Therefore, it echoes Dixon and Landau's position in arguing the importance of limiting the doctrine.[30] Yet the present work is not interested in limiting the doctrine "by tying its use to transnational constitutional norms" as they offered. Instead, it suggests ways to prevent the doctrine's overuse by refashioning it, defining its moral limits, and ensuring that judges are guided by these limits in their application.

II. THE BASIC STRUCTURE DOCTRINE: THE TALE OF "CONSTITUTIONAL ESSENTIALISM"

The doctrine of the basic structure of the Constitution has evolved as an outcome of judicial innovation. As such, it is a non-textual or unwritten principle of constitutionality[31] that owes its recognition to the ratio of the majority judgment of the Indian Supreme Court in *Kesavananda Bharati v. State of Kerala*. This principle denies the unlimited power of the parliament to amend the constitution at will solely on the basis of the requisite voting majority. Instead, it affirms that the judiciary is important in overseeing constitutional amendments.[32] Evolving as a distinct form of judicial review, it establishes that the validity of all constitutional amendments must be tested on the touchstone of the basic structure of the Constitution. This claim of the judiciary is founded upon the premise that a few features of the constitutional structure are so fundamental that the Constitution cannot survive without them. Thus, the doctrine suggests that constitutional amendments cannot embrace the destruction of these fundamental features, without which the entire constitutional edifice will

30. Rosalind Dixon and David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13(3) INT'L J. CONST. L. 606-638 (2015).

31. S. P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS 83 (2002).

32. *See* Upendra Baxi*, Courage, Craft and the Contention: The Supreme Court in the Eighties* (1985).

crumble. The defining feature of the doctrine can be found in the following observation of Justice Hegde and Justice Mukherjea:

> Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy and every social philosophy like every religion has two main features, namely, basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed.[33]

It thus appears that the doctrine is devised to offer a tale of constitutional essentialism by speaking so much for preserving some constitutional essentials that are sacrosanct to the ideals of a political society. According to this doctrine, the amending power of the parliament must be guided by the demands of retaining the original constitutional promise and identity. As such, the doctrine does not negate the power of the parliament to amend the constitution; it just puts a substantive restriction on this amending power of the parliament.

The judiciary defined basic structure loosely and negatively. In the case of *Kashavanda Bharati*, Justice S.M. Sikri has observed: "[t]he true position is that every provision of the constitution can be amended provided that the basic foundation and structure of the constitution remains the same."[34] The basic structure doctrine was received in the same way in *Anwar Hossain Chowdhury v. Bangladesh*, where the court described the doctrine by observing that

> There can be no objection to the amending power to fulfill the needs of time and of the generation. But the power cannot be so construed as to turn the Constitution which is the scripture of hope of a living society and for its unfolding future, into a scripture of doom.[35]

This understanding of the doctrine represents that the basic structure doctrine, as enunciated by the judiciary, stems from undesirable constitutional amendments by effectively breaking the powers of Parliament to deface the Constitution under the pretext of amending it. Thus, it can be seen as a "savior to the judiciary to save the sanctity of the Constitution from the ever-encroaching executive and legislature."

33. *See* Kesavananda Bharati v. State of Kerala, (1973) 4 S.C.C. 225, ¶ 651 (India).
34. *Id.*, ¶ 294.
35. *Id.*, ¶ 294.

A. Evolution of Basic Structure Doctrine: The History of Fighting for the "Soul of the Constitution"

The basic structure doctrine evolved in the context of challenges to the constitutionality of land reform-related constitutional amendments in India.[36] The birth of the doctrine thus traces the evolving jurisprudence of fighting for the soul of the constitution in the turbulent backdrop following the reform-oriented atmosphere of the 1950s. The beginning of this journey is usually marked with the case of *Shankari Prasad Singh v. Union of India*,[37] where the petitioner challenged the power of Parliament to amend fundamental rights. In this case, the Court ruled that Article 368 grants Parliament the authority to amend the Constitution without any restrictions, including the fundamental rights, which are not excluded from its scope. As argued by Mody, "[t]he net effect of the Supreme Court's decision in *Shankari Prasad* was that amendments to the Constitution could not be reviewed by courts."[38]

The next significant case raising this issue of the validity of constitutional amendments is *Sajjan Singh v. State of Rajasthan*.[39] This case concerns the validity of the Constitution (Seventeenth Amendment) Act by which several statutes impacting property rights were included in the Ninth Schedule of the Constitution, effectively exempting them from judicial review. The constitutionality of this amendment was questioned on the grounds of its unpleasant effect on the scope of judicial review as well as on the inviolability of fundamental rights. In this case, the court followed in the footsteps of *Shankari Prasad* and rejected the argument in the ratio of three-to-two. The majority made a distinction between ordinary legislative power and constituent power, rejecting the idea that fundamental rights were outside the reach of the amending power.

However, the minority view, comprising of the observations of Justice Hidayatullah and Justice Mudholkar, expressed strong reservations regarding this. Justice Mudholkar's general argument was that every constitution has certain basic features that could not be changed. At this point, it is interesting to note that Justice Mudholkar referred to a 1963 decision of then Dhaka High Court in *Md. Abdul Haque v. Fazlul Qader Chowdhury* in support of his proposition that amending power could not be exercised to destroy the basic features of the

36. KRISHNASWAMY, *supra* note 5, at 1.
37. Shankari Prasad Singh Deo v. Union of India, A.I.R. 1951 S.C. 458 (India).
38. ZIA MODY, 10 JUDGMENTS THAT CHANGED INDIA 6 (2013).
39. Sajjan Singh v. State of Rajasthan, A.I.R. 1965 SC 845.

constitution.[40] Thus, it is often claimed that the basic structure doctrine, as developed in the Indian jurisdiction, originated from the above-mentioned decision of the Dhaka High Court.[41] The relevance of Justice Mudholkar's observation in Sajjan Singh has been described by Mody as follows

> In fact, Justice Mudholkar also sowed the seeds for the basic structure doctrine adopted in Kesavananda when he referred to the "intention of the Constituent Assembly to give permanency to the basic futures of the Constitution," and said: "it is also a matter of consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution."[42]

However, the first attempt by the Court to salvage its review power came in 1967 in *Golaknath v. State of Punjab,*[43] where the same question of amenability of fundamental rights was raised before the court. In this case, most judges found that the fundamental rights are inviolable and beyond the reach of amending power. In deciding on this, the concept of basic structure was not discussed by the judges, and in fact, there was no pronouncement directly on recognizing this doctrine by the majority in this case. It is, however, worth mentioning that the phrase "basic structure" was introduced by M.K. Nambiar and other counsels while arguing for the petitioners in the *Golaknath* case. Thus, the decision of this case is still thought to pave the way for recognizing the doctrine of basic structure as it has somehow restricted the amending power, which is the major premise of the basic structure theory.[44]

The decision of *Golaknath* stirred great controversy regarding the limit of amending power in particular and the scheme of power distribution between the court and parliament in general.[45] To avoid the implications of this decision, the parliament passed the Constitution Twenty-Fourth Amendment Act. This amendment introduces some basic things, declaring that the amending power of the constitution is

40. *Id.*; Md. Abdul Haque v. Fazlul Quader Chowdhury, PLD 1963 Dacca 669 (Pak.).

41. Dr. Kamal claims this of the *Eighth Amendment* case. *See* Muhammad Eqramul Haque, *The Concept of Basic Structure: A Constitutional Perspective from Bangladesh,* XVI THE DHAKA UNIVERSITY STUDIES PART-F 123-124 (2005).

42. MODY, *supra* note 38, at 6-7.

43. I.C. Golaknath v. State of Punjab, A.I.R. 1967 S.C. 1643.

44. *Haque*, *supra* note 41, at 128.

45. Mody argues that, "[i]n Golaknath, for the first time, the Supreme Court based its decision purely on political philosophy. On legal principles, Golaknath received little acceptance from constitutional scholars. Both academic research and public opinion were driven against the Supreme Court's argument." *See* Zia Mody, *supra* note 38, at 9.

"constituent power," and that Parliament can amend any part of the constitution, including the provisions regarding fundamental rights. Such an approach of the parliament created a constitutional showdown with the judiciary, which eventually came to a head in the landmark decision of *Kesavananda Bharati v. State of Kerala*.[46] To resolve the outcry between the parliament and judiciary, the court, in this case, has offered a conscious compromise: In favoring the parliamentary demand, it overruled *Golaknath* by allowing the amenability of fundamental rights, but in a bare seven-to-six majority, it was held that although fundamental rights could be amended, a certain "basic structure" to the Constitution could not. Thus, in this case, the concept of basic structure surfaced for the first time in the text of the apex court's verdict.

By recognizing the doctrine of basic structure, the majority view of this case took a limited import of the term "amendment" and decided that the parliament's constituent power to amend the constitution is subject to inherent limitation: The parliament cannot use its amending power to destroy the basic structure of the constitution.[47] From this perspective, it is often argued that the basic structure doctrine pronounced by the court in the *Kesavananda* case was a continuum of the doctrine of unamendability of the fundamental rights put forward in *Golaknath*. Thus, the doctrine of basic structure is considered an improvement over the *Golaknath* doctrine. [48] Mody describes the fact by noting that

> While the Supreme Court's decision in *Golaknath* was the first significant sign of judicial supremacy in constitutional interpretation, Kesavananda firmly established that the Supreme Court was unmatched in authority when it came to constitutional matters. In Kesavananda, the Supreme Court made a strategic retreat over amendments to fundamental rights, but significantly broadened the scope of its judicial review by assuming the power to scrutinize all constitutional amendments—not just those affecting fundamental rights. If the Parliament had an unfettered right to amend the Constitution, the Supreme Court had a coextensive power to review and invalidate any amendment that destroy its basic structure.[49]

The decision of *Kesavananda* was first affirmed in the case of *Indira Nehru Gandhi v. Raj Narain*,[50] where the Supreme Court successfully used the shield of basic structure to strike down an unscrupulous

46. Kesavananda Bharati v. State of Kerala, (1973) 4 S.C.C. 225 (India).
47. *Haque*, *supra* note 41, at 129.
48. SATHE, *supra* note 31, at 78.
49. MODY, *supra* note 38, at 15-16.
50. Indira Nehru Gandhi v. Raj Narain, A.I.R. 1975 SC 2299.

constitutional amendment. Surprisingly, the government then went for another constitutional amendment (the Forty-Second Amendment) to undo the effect of *Kashavananda* to regain and confirm its unlimited power of amending the constitution. By this amendment, it was categorically claimed under clauses (4) and (5) of Article 368 that "there shall be no limitation whatsoever on the constituent power of the parliament" to amend the constitution. Again, this amendment was challenged in *Minerva Mills Ltd. v. Union of India*.[51] In this case, the court strikes down the impugned amendment by reiterating the doctrine of basic structure as follows:

> Since the Constitution had conferred a limited amending power on the parliament, the parliament cannot under the exercise of that limited power enlarge the very power into an absolute power. Indeed, a limited amending power [itself] is one of the Basic Features of our Constitution, and therefore, the limitations on that power cannot be destroyed.[52]

Since then, the doctrine of basic structure has been used sparingly by the Indian Supreme Court.[53] The cases of *Waman Rao v. Union of India*[54] and *A. K. Roy v. India*[55] can be cited as early examples where the concept of basic structure has been recognized. At this point, it is important to note that the impact of the *Kesavananda* has also influenced the constitutional jurisprudence of many other jurisdictions. The doctrine of basic structure, as propounded by the majority decision of *Kesavananda*, has been migrated to Bangladesh. In the case of *Anwar Hossain Chowdhury v. Bangladesh*, the court successfully applied the doctrine to invalidate the Eighth Amendment of the constitution.

Over time, the application of this doctrine in Indian jurisdiction has, however, undergone an interesting departure. In *Kesavananda*, the court observed that the doctrine of basic structure would be invoked only to examine the validity of constitutional amendment and not of any ordinary

51. Minerva Mills Ltd. v. Union of India, A.I.R. 1980 SC 1789.

52. *Id.*

53. Because, it is found that "[w]hile the Kesavananda decision may have represented one of the boldest assertions of judicial authority, it ultimately imperiled judicial independence and power, by leading to the supersession of the three senior most justices and elevation of the pro-government justice A. N. Ray to chief justice. The decision also indirectly led to the declaration of emergency rule, during which the government enacted the Thirty-Ninth and Forty-Second Amendments. These amendments dramatically curbed the powers of judicial review and overturned the Court's decision in Kesavananda." *See* Manoj Mate, *Priests in the Temple of Justice,* in FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY: THE POLITICS OF THE LEGAL COMPLEX 134 (Terence C. Halliday ed., 2012).

54. Waman Rao v. Union of India, A.I.R. 1981 SC 271.

55. A. K. Roy v. India, A.I.R. 1982 SC 710.

statute. However, the doctrine is now used as a distinct type of constitutional judicial review that applies to all forms of state actions to ensure that such action does not destroy the very soul of the Constitution.[56] There is growing tension in Indian jurisdiction regarding the test of applying the basic structure doctrine in the constitutional amendment context and beyond.

B. Basic Structure Doctrine and the "Quicksand of Kesavananda*": Is the Doctrine Built on a Mistake?*

As mentioned earlier, the basic structure doctrine represents an unwritten constitutionality norm developed by the judiciary. The fact that there is no express recognition of the doctrine in the constitution has thus been grounds for questioning the constitutional basis of the basic structure review. In applying the doctrine, the court has, however, tried to identify some fundamental constitutional features by taking recourse to a structural interpretation of the constitution. The term "structural interpretation" suggests a teleological, as opposed to the literal or positivist, interpretation of the Constitution.[57] In this respect, Sathe has observed that the emergence and development of basic structure doctrine can indeed be seen as the result of the court's movement from a positivist to structural mode of interpretation.[58]

From this perspective, it is thus argued that the basic structure doctrine, like other types of constitutional judicial review, possesses a sound constitutional basis. Sudhir Krishnaswamy has pointed out that between 1951 and 1971, the court accepted two separate arguments for judicial review of constitutional amendment: First, constitutional amendments are subject to judicial review under Article 13 (corresponding to Article 26 of the Bangladesh Constitution), and second, constitutional amendments are subject to a basic structure review. He termed the first kind of review as an "express limit" on amending power and the second as an "implied limit." The first argument has been employed in *Sankari Prasad* and *Golaknath*, which rests on the claim that the express limits on all forms of state actions to comply with fundamental rights in the constitution should be extended to include constitutional amendment.[59] This argument is further associated with the extended scope

56. KRISHNASWAMY, *supra* note 5, at xv.

57. In structuralism, the constitution is interpreted liberally, as a totality, in the light of the spirit pervading it and the philosophy underlying it. It is in that sense result-oriented.

58. S. P. SATHE, *India: From Positivism to Structuralism,* in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 226 (J. Goldsworty ed., 2006).

59. KRISHNASWAMY, *supra* note 5, at 2-3.

of judicial review, which would require the court to read the restriction of amending power concerning the preamble of the constitution, constituent documents, and the respective constitutional provisions.

On the other hand, when understood as an implied limit on the power of amendment under Article 368 (corresponding to Article 142 of the Bangladesh Constitution), the basic structure review offers an alternative constitutional basis for judicial review of a constitutional amendment. It thus seems to be founded on Tribe's proposition of considering the Constitution as the touchstone for evaluating the substantive appropriateness of any constitutional amendment: "[t]he Constitution does provide guidance of a sort—not decisive, but suggestive—for assessing the appropriateness of proposed amendment."[60] This argument presupposes a structural understanding of the constitution:

> The constitution, then, can surely be understood as unified, although not wholly coherent, by certain underlying political ideals: representative democracy, federalism, separation of powers, equality before the law and procedural fairness. There obviously is a connection between all of them and that link becomes clear once the constitution is understood as a whole in the context of political purpose and resources. If seen as such, the constitution does indeed act as a good guide in deliberating upon the suitability of constitutional amendments.[61]

Thus, the constitutional basis of the basic structure doctrine can be found in a structural interpretation of the provisions of the constitution, granting amending executive and legislative power that relies on multi-provisional implications drawn from other important provisions of the constitution. By advancing this view, Krishnaswamy has further argued that the basic structure review stands independently of the fundamental rights review and provides comparatively a sounder constitutional basis for the judicial review of a constitutional amendment.[62]

Implied constitutional meaning plays a significant role in describing the constitutional basis of the basic structure doctrine. The process of interpretative implication or implied meaning of the constitution has been argued differently in basic structure cases, and the doctrine of implied limitation is only a form of such argument.[63] The doctrine of implied

60. LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 25 (Indian Reprint, 2000).

61. PRATEEK, *supra* note 10 at 492.

62. KRISHNASWAMY, *supra* note 5 at 3.

63. Manoj Mate states that "[t]he origins of the basic structure doctrine can be traced to German constitutional law." Dieter Conrad, a German scholar and head of the law department at the South Asia Institute of the University of Heidelberg, first introduced the concept of the basic structure in the lecture "Implied Limitations of the Amending Power" to the Banaras Hindu

limitation represents a rule of administrative law relating to jurisdiction, which presupposes that the nature of the grant explicitly and implicitly limits every grant of power. In the *Kesavananda* Case, the counsel put forward this doctrine with the conviction that the principle of implied limitation should apply to the parliament's power to amend the Constitution. This argument was accepted by the six majority judges led by Justice Sikri. However, Justice Khanna and the other six minority judges of the case rejected the doctrine of implied limitation by observing that the doctrine has no foundation in the Constitution. The rejection of the doctrine of implied limitation in the *Kesavananda* case signifies that it does not provide decisive or convincing reasons on which the basic structure doctrine may legitimately rest.

The constitutional basis of the basic structure doctrine is inferred from the implied constitutional meaning, not under the guise of implied limitation, but in the course of structural interpretation of the constitution.[64] Thus, the basic structure review introduces a "novel and independent enterprise" to constitutional interpretation and maintains a functional dichotomy with the common law doctrine of implied limitation.

> The basic structure doctrine aims to put forth an interpretive approach that is distinct from the ones that we typically associate with the task of constitutional interpretation; it is an approach that asks what values and principles must exist for constitutionalism itself to exist. Constitutions cannot provide for their own validity. Just as constitutionalism itself must rest on presuppositions that are not internal to a constitution document, the process of a constitutional amendment too can be understood as operating at a level antecedent to the formal prescribed criterion.[65]

The important point to note here is that the basic structure doctrine provides a distinct kind of protection to the Constitution independently from the provisions providing for some unalterable features of the Constitution.[66] This position is justified by Laurence Tribe when he

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University Law Faculty in February 1965. Conrad based his lecture on insights drawn from civil law and the German Constitution—the Basic Law of 1949. *See* for detail about the origin of the basic structure doctrine, Manoj Mate, *supra n*ote 51, at 134.

64. KRISHNASWAMY, *supra* note 5, at 177-178.

65. MADHAV KHOSLA, *Constitutional Amendment,* in THE OXFORD HANDBOOK OF INDIAN CONSTITUTION 250 (Sujit Choudhri ed., 2016).

66. The concept of providing special protection against amendments of basic principles of the Constitution was not entirely unknown before the emergence of the basic structure doctrine. In the European tradition, it can be found that the constitution itself provides for some unalterable features of the constitution. In this respect, Article 79 (3) of the German Basic Law can be referred

argues that "[i]n addition to such substantive criteria of amendment appropriateness as the Constitution's specific provisions may suggest, the structure and character of the document as a whole impose certain functional constraints."[67] To understand whether the doctrine has been built on a mistake, it is thus important to explore whether this distinction has been blurred in the *Kesavananda ratio*, which gave birth to the basic structure doctrine.

In the *Kesavananda* case, most judges, except Justice Khanna, viewed certain features embedded in the particular provisions of the Constitution as unamendable. As suggested by Raju Ramachandran, Justice Khanna's concept of basic structure differed from that of the other majority judges because he did not speak for some "basic features" of the constitution. He observed differently by arguing that the "basic structure or framework" of the constitution cannot be destroyed. This fact has led to an argument that two distinct versions of the basic structure doctrine were announced in *Kesavananda*—the "basic feature version" and the "structural version" of the basic structure doctrine.[68]

In the *Kesavananda* majority, the basic feature version ultimately got prominence over Justice Khanna's concept of structural features of the constitution. Arguably, the basic structure doctrine was thus built on a mistake, mainly because it blurs the distinction between the concept of unalterable features and structural features of the constitution. This mistake was evident immediately after the birth of the doctrine when Justice Chanrachud set forth a different approach to identifying basic features of the Constitution in the *Indira Gandhi* case. More importantly, this fact was clarified in the case of *R. Ganpatrao v. Union of India*,[69] where the court seemingly refashions the doctrine by observing that the basic features protected are not embodied in the concrete language of the particular provisions or forms; instead, the court should identify the basic features as those moral, legal, or political principles which are the foundational normative core on which the rest of the constitution was built.[70]

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to as an example, which provides for some unalterable feature of the constitution. *See* Goerlich, Helmut, *Concept of Special Protection for Certain Elements and Principles of the Constitution Against Amendments and Article 79 (3), Basic Law of Germany,* 1 NUJS L. REV. 398 (2008). Interestingly, the Fifteenth Amendment of the Constitution in Bangladesh has also introduced under newly inserted Article 7B the similar concept of an unalterable constitution.

67. TRIBE, *supra* note 58, at 26.

68. KRISHNASWAMY, *supra* note 5, at 135.

69. Ganpatrao v. Union of India, A.I.R. 1993 72n5.

70. Principally, the basic structure doctrine is conceived in terms of certain basic principles or values underlying the basic document, namely, the Constitution. What are these

Indeed, this observation reflects Justice Khanna's concept of basic structure and thus is clearly compatible with the philosophical promise of the basic structure review. Ironically, our country's judges have not been aware of this "refashioned view" of the basic structure review. In the following chapters, we will present how the judiciary in Bangladesh has made the mistake of the *Kesavananda ratio* and misapplied the basic structure doctrine in constitutional cases.

III. BASIC STRUCTURE DOCTRINE IN BANGLADESH: THE USE AND MISUSE OF CONSTITUTIONAL CONSTRAINT

The discussion in the preceding part primarily focuses on the doctrinal domain of basic structure, concentrating mainly on the evolving jurisprudence of the basic structure review from the perspective of the Indian judicial and academic outlook. The present part is designed to demonstrate how the theory of basic structure has been received in the tapestry of constitutional jurisprudence of Bangladesh. Undoubtedly, the viability of applying for the basic structure review in constitutional cases is contingent upon the courts' success in avoiding the inherent perils of the doctrine as identified; Ashok Desai has argued that "[t]he formulation of the doctrine has not been precise and it is tempting for the judge with the best of intentions to invoke it and try to mold the Constitution in his own image."[71]

This part examines the experience of applying the basic structure doctrine in Bangladesh concerning this test. It establishes that the failure of the judges to grasp the promise of the doctrine from people's perspective leads to enduring discontent as to the applicability of this doctrine in Bangladesh. In so doing, the discussion of this chapter will, however, be confined only to the analysis of four major cases on constitutional amendment where the doctrine of basic structure was successfully invoked.

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principles or values on the basis of which the structure of the Constitution itself has been raised? By implication, such principles or values may be termed as "preconstitutional." A similar view has been expressed by the German constitutional court in the *Southwest* case*:* "there are constitutional principles that are so fundamental and to such extent an expression of law that precedes the constitution that they even bind the framers of the constitution." (1 Bverf GE 14 1949).

71. ASHOK DESAI, *Constitutional Amendment and the "Basic Structure" Doctrine,* in DEMOCRACY, HUMAN RIGHTS AND RULE OF LAW 90 (Krishna Iyer ed., 2000).

A. The Eighth Amendment Case and the Misunderstood Birth of Basic Structure Doctrine in Bangladesh

In the late 1980s, the famous *Eighth Amendment* case introduced the concept of basic structure in Bangladesh's constitutional jurisprudence.[72] In this case, the country's apex court declared the Eighth Amendment to the Constitution unconstitutional, holding that the parliament's amendatory power is subject to the inalterability of the basic structure of the Constitution.[73] This case arose from the diffusion of the High Court Division into seven permanent branches, which was constitutionalized by amending Article 100 of the Constitution. The constitutionality of this amendment was long challenged on the ground that it was a countervailing step against the unity and independence of the Supreme Court and thus destroying the basic structure of the Constitution.

In this case, the petitioner successfully challenged that the unity of the Supreme Court exercising plenary judicial power over the whole republic is one of the structural pillars of the Constitution, which could not be changed even by a constitutional amendment.[74] The apex court of the country accepted the major premise that the amendatory power of the parliament granted in the constitution is a limited power, and the amendment in question was invalidated by a three-to-one majority on the grounds of violating the basic structure of the constitution. In invoking the basic structure doctrine, the court held that the power of the parliament to amend the constitution is "limited," being a "derivative constituent power." Hence, it cannot be exercised to destroy or alter the basic structure of the constitution.[75]

The dissenting judge in this case did not, however, agree with the argument that the diffusion of the High Court Division actually destroyed the plenary judicial power of the Supreme Court or, for that matter, any other essential features of the basic structure of the Constitution.[76] The major fallacy of the judgment of the *Eighth Amendment* case lies in this disagreement between the majority and minority views. While the majority view accepted the argument that the unitary form of the Supreme Court being part of a unitary state is an essential feature of the constitution, the dissenting judge seemed to reject this view on the point

72. Anwar Hossain Chowdhury v. Bangladesh, 41 D.L.R. (A.D.) 165 (Supreme Court of Bangladesh 1989).

73. Ridwanul Hoque, *supra* note 27, at 314.

74. *Id.*

75. *Id.*

76. KHAN, *supra* note 28, at 87-102.

that a particular form of government or state organ cannot be considered as an essential feature or basic structure of the constitution. Such an objection of the dissenting judge becomes evident when he further argues that the presidential form of government cannot be said to form the basic structure of the constitution.[77]

This signifies that the majority view has failed to understand the fundamental promise of the basic structure doctrine from people's perspective. This proposition can be supported by several arguments: First, a closer look at the structure of our constitution will reveal that the guarantee and promotion of access to justice constitutes a basic premise of our constitution. The diffusion of the High Court Division could thus be seen as a measure of nourishing this constitutional promise to bring justice to the doorsteps of the people.[78] The merit of this argument is reflected in the recent reform proposals prepared by the Bangladesh Constitution Reform Commission, which recommended *decentralizing the judiciary by establishing permanent High Court benches in divisional cities.*[79] *Interestingly, the Commission noted that this decentralization should be implemented while preserving the unitary nature of the state.*

However, the majority view wrongly accepted the unitary structure of the Supreme Court as a basic feature and thereby undermined the constitutional promise of ensuring access to justice, arguably one of the most important basic features of the Constitution. Second, by the Twelfth Amendment of the Constitution, the nation did move or return to the parliamentary form of government just two years after the pronouncement of this judgment. In effect, this parliamentary amendment has altered the presidential form of government, which was previously claimed, in this case, to be a basic feature of the constitution. Seen as such, it can be argued that the basic structure doctrine has been formulated by the majority judges so poorly that the doctrine could stand in the way of popular constitutional reform.

Apart from these, the majority judgment of the *Eighth Amendment* case seems to suffer from methodological defects regarding comparative constitutional materials. Undoubtedly, the judges of this case were greatly informed and influenced by the famous Indian decision of the *Kesavananda* case. In identifying the basic features of the constitution, the judges extensively followed the dicta of *Kesavananda*. Interestingly,

77. *See* paragraph 553 in the judgment.

78. *See* RAHMAN, *supra* note 24 at 31-68.

79. Khondker Rahman, *The Bangladesh Constitution Reform Recommendations, 2024 Processes, Proposals and Follow Up*, S. ASIA J. (Jan. 18, 2025), https://southasiajournal.net/the-bangladesh-constitution-reform-recommendations-2024-processes-proposals-and-follow-up/.

they accepted the unitary form of state as a basic feature of our constitution in a similar fashion to the federal form, which was received in the case of India. It seems that the judges have been motivated to identify the unitary form of state as the basic feature of our constitution without inquiring into the rationale of the Indian decision to favor the federal structure of the constitution. In the context of India, the need for federal structure is so vital for the preservation of the unity and integrity of India that Austin has called it one of the elements of the "seamless web," which animates the Indian constitution.[80]

By imitating the Indian decision, the judges of the *Eighth Amendment* case have thus made two mistakes: First, unlike the federal feature of the Indian constitution, the unitary form of state is not so essential as to be considered a basic feature of our constitution. Second, the court has used the Indian decision in the way of a particularist conception of constitutional interpretation.[81] If the court reasoned dialogically with this Indian decision and used it as an interpretative foil to identify, reframe, and enforce the premises of our constitution, then it would clearly realize the growing relevance of federalism in the context of Bangladesh, and, thus, would not create a roadblock for its adoption.

In entrenching basic structure doctrine, all the judges, including the lone dissenting judge, rightly agreed to accept that there is indeed a built-in limitation in the word "amend," and thus, the power of the parliament to amend the constitution is a limited power subject to the unalterability of the basic structure of the constitution. Of course, such an understanding of the judges deserves appreciation to the extent that they found a parliament with unlimited power as anathema to constitutional democracy, a basic pillar of the constitution. However, they made the doctrine miserable by offering a rigid doctrinaire approach to identifying the basic features of the Constitution, being quite unmindful of the democratic needs and constitutional promise. The critic thus comes to criticize this position by arguing that

> It was not incumbent for the Court to decide or enlist basic features; a minimalist approach to restricting the basic structures of the Constitution

80. Though Justice Khanna was among the majority judges, his reasoning was different.

81. According to particularist conception, constitutional interpretation constitutional interpretation should be situated or particular and should rely on sources internal to a specific political and legal system. Sujit Choudhury argues that a particularist conception of comparative constitutional jurisprudence stands at odds with the dominant understanding of constitutionalism and is therefore unsound. *See* Sujit Choudhury, *How to Do Comparative Law in India,* Naz Foundation*, Same Sex Rights, and Dialogical Interpretation,* in COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA 45-85 (Sunilm Khilnani ed., 2013).

> to certain fundamental propositions would have strengthened the decision. The problem of the judgment was not so much in holding amendment as law or the difference regarding basic features, but the inconsonance as to the yardstick or the root of the doctrine, which is due to a fallacious view of the past.[82]

However, the lone dissenting judge thus opposed such a doctrinaire approach by arguing that the court should not create a roadblock in the way of popular constitutional reform. Arguably, the observation of the dissenting judge, in all respects, seems to be more illuminating and quite close to the major promise of the basic structure doctrine. We have argued earlier that if *Kesavananda* were formulated solely in line with the reasoning of Justice Khanna, the doctrine of basic structure would be less problematic. The same is true for us: If the view of Justice A.T.M. Afzal were a majority view, the birth of the doctrine in Bangladesh would, of course, be less miserable.

B. The Fifth Amendment Case and the Failure of Restructuring the "Basic Structure"

The so-called historic judgment of the *Fifth Amendment* case,[83] is another instance of invoking the basic structure doctrine to invalidate a somewhat controversial amendment to the constitution of Bangladesh. The Fifth Amendment to the Constitution was actually made to give constitutional protection to the first martial law regime, its actions, and laws. Accordingly, it comes to constitutionalizing the changes made to the constitution by various martial law proclamations, regulations, and orders. Of all the changes, the most notable is the alteration of the character of the fundamental principles of state policy: It introduces the notion of Bangladeshi nationalism, qualifies the meaning of socialism, and transforms the secular statehood of Bangladesh into a theocratic state by replacing the term "secularism" with "absolute faith and trust in almighty Allah." Thus, one of the major objections to the constitutionality of this amendment comes from the fact that it has drastically altered the basic structure of the Constitution.

Apart from this, the most crucial argument against the legality of this amendment was that Parliament can amend the Constitution under Article 142, but it cannot render the Constitution subservient to any martial law proclamations, thereby legitimizing any illegitimate activity. This

82. Chowdhury, *supra* note 25, at 66. [Citation omitted].

83. Khondoker Delwar Hossain and Others v. Bangladesh Italian Marble Works Ltd and Other, 2 B.L.D 2010 SC.

argument actually flourished concerning a strong commitment to democracy and constitutionalism. In invalidating this amendment, the apex court of the country took recourse to some inviolable democratic features of the constitution and held that

> [T]he Fifth Amendment ratifying and validating the Martial Law Proclamations, Regulations and Orders not only violated the supremacy of the Constitution but also the rule of law and by preventing judicial review of the legislative and administrative actions, also violated two other more basic features of the Constitution, namely, independence of judiciary and its power of judicial review. As such we hold that the Fifth Amendment is also illegal and void.[84]

Interestingly, the application of the basic structure doctrine in the case of invalidating the Fifth Amendment to the Constitution has not, however, been devoid of any controversy. The major controversy animated by the judgment can be found in the HCD's deferential treatment of the Fourth Amendment of the Constitution. The judgment has overlooked the logical link between preserving constitutional identity and restoration of constitutional promise, and thus ironically observed:

> The pretexts to amend the Constitution in the above manner in the garb of repealing the undemocratic provisions of the Constitution incorporated therein by the Constitution (Fourth Amendment) Act, 1975, was altogether misconceived. Firstly because the Fourth Amendment of the Constitution, whatever its political merits or demerits, was brought about by the representatives of the people by an overwhelming majority members of a sovereign Parliament.[85]

The judge's deferential treatment towards the Fourth Amendment seems to result in under-enforcing the doctrine of basic structure. Thus, it is arguable that such observation of the judge stands as a contradiction because it seems to justify the non-application of the doctrine on the ground that the amendment in question is "brought about by the representatives of the people by overwhelming majority members of a sovereign Parliament."[86]

Another controversial feature of this judgment lies in the fact that the determination of the basic structure of the constitution solely based on constitutional text or context of our liberation war has led the court to misjudgment. This fact is made evident when the judge, in this case, has

84. *Id.* at 121.
85. *Id.* at 153-154.
86. *Id.*

categorically observed that "the secular Bangladesh was transformed into a theocratic State and thereby not only changed one of the most basic and fundamental features of the Constitution, but also betrayed one of the dominant causes for the war of liberation of Bangladesh."[87] By contrast, there is an argument that the Constitution's basic features should be determined based on those elementary principles that even bind the framers of the Constitution. This will require searching for the "very soul" of the Constitution by going beyond its textual articulation and a dispassionate reading of history fighting for such soul.[88] From this perspective, it can be argued that the judges in the *Fifth Amendment* case failed to take advantage of the opportunity to "restructure" the basic structure of our constitution.[89]

C. The Thirteenth Amendment Case and the "Political View" of Basic Structure Review

The most frightening consequence of the application of the basic structure doctrine in Bangladesh comes with the *Thirteenth Amendment* case.[90] In this case, the court invalidated the Thirteenth Amendment to the Constitution, which incorporated the system of caretaker government, on the grounds of violating the Constitution's basic structure. The NCG was intended to be composed of a group of neutral, unelected individuals. Consequently, one of the reasons for declaring this amendment invalid was that an unelected interim government undermines the principle of democracy, arguably the Constitution's most fundamental feature.[91] In other words, the major argument in invalidating this amendment was that the concept of a caretaker government virtually runs contrary to the principles and ideals of democracy, arguably the most important basic feature of the Constitution.

In this judgment, the court repeatedly contended that democracy and the representative character of the republic, cannot be sacrificed even for a moment in the functioning of the government, as they are the basic

87. *Id.*

88. *See Ganptrao* case*, supra* note 67.

89. Many scholars think that secularism does not possess any deep root in the constitutional journey of Bangladesh.

90. Md. Abdul Mannan Khan v. Bangladesh, Civil Appeal No. 139 of 2005 (with Civil Petition for Leave to Appeal No. 596 of 2005) (Bangladesh). This case arises out of the HCD judgment in *M Sallem Ullah v. Bangladesh* 57 D.L.R. (2005) HCD 171.

91. M A SAYEED, LIMA AKTAR, "*Constitutional Dismemberment*" *and the Problem of Pragmatism in Siddiqui: A Reply to Po Jen Yap and Rehan Abeyratne*, 20 INT'L. J. OF CONST. L., 890-904 (2022).

features of the Constitution. Interestingly, the court found that the opportunity for the judges to be appointed as the advisers of the caretaker government is a threat to the independence of the judiciary, another basic feature of the constitution. [92]Considering all these concerns, most judges held that the Thirteenth Amendment of the Constitution is *ultra vires* the Constitution. In holding so, they observed that the caretaker system, if adopted by the parliament, must comprise elected representatives.[93]

This case was decided by a four-to-three majority. Among the minority judgments, Justice M. A. Wahhab Mia and Justice Nazmun Ara Sultana supported the caretaker system, while Justice M. Imam Ali left the matter to be decided by the parliament. Moreover, seven out of eight amici curiae favored retaining the caretaker system.[94] Thus, it seems that the judgment is generated from serious disagreement, thereby creating an enduring concern about its implications for democracy and constitutionalism.[95]

The primary objection to this judgment is found in the *ratio* of the HCD's judgment, which accepted that the caretaker government system was incorporated in the constitution as a result of national consensus arising out of widespread political movement. On the question of constitutionality, the judges of the HCD found that this system was introduced "in aid of democracy, not in derogation of democracy as

92. *Id.*

93. *Id.*

94. Rokeya Chowdhury has summarized the point of agreement or disagreement among the amicus curiae as follows:

> All but one of the eight amicus curiae appointed by the Court opined for retention of the CTG [care taker government] considering it to be a priori for free, fair and peaceful election. Four of them opined that the appointment of the Chief Justice as the Chief of the CTG is violative of the independence of the judiciary, but two among them suggested for reform of the CTG excluding appointment of judges. Of the rest, two abstained from commenting on this issue, one said there is no alternative to the CTG and the other opined that since appointment is made from the retired judges the independence of the judiciary is not harmed in any manner.

See Chowdhury, *supra* note 25, at 66.

95. RIDWANUL HOQUE, *Judicialization of Politics in Bangladesh: Pragmatism, Legitimacy, and Consequences*, in UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA 261 (Mark Tushnet & Madhav Khosla eds., 2015); Ali Riaz, *The Pathway of Democratic Backsliding in Bangladesh*, 28 DEMOCRATIZATION, 179 (2021); Adeeba Aziz Khan, *The Politics of Constitutional Amendments in Bangladesh: The Case of the Non-Political Caretaker Government*, 9 INT'L REV. L. 1 (2015).

enshrined in the constitution."[96] In concurring with this view, Justice Mirza Hussain Haidar has thus given his reason by commenting that

> The people have accepted the concept of Non Party Caretaker Government which has given the real meaning of democracy and the democratic process as a whole; the thirteenth Amendment has actually strengthened and improved the system of holding free, fair, and impartial elections by which the people can exercise their fundamental rights freely in electing the government. So, if democracy is taken as a basic structure of the Constitution "the Thirteenth Amendment cannot be said to be *ultra vires.*[97]

It appears that the rationale of the CTG as articulated by the HCD has been reflected in the judgment of Justice Md. Abdul Wahhab Mia, when he observed in the Appellate Division that "[t]he Thirteenth Amendment has become a constitutional necessity."[98] Interestingly, a similar understanding can also be found in the arguments of Gowher Rizvi, who evaluates the system of CTG by taking note of the constitutional complex out of which it emerges in the country. In the article, *Holding the State Accountable: Building Institutions of Democratic Accountability*, Dr. Rizvi comments favorably on the system of CTG by calling it "one of the best innovations and contribution of Bangladesh to the development of constitution."[99] Though he speaks here about reforming the system of the composition of the caretaker government to prevent manipulation, he still does not stand for abolishing the system as a whole. In this respect, his observation is thus worth mentioning:

> The caretaker government that was created to provide a transition between governments and to ensure free and fair election was one of the best innovations and contributions of Bangladesh to the development of constitution. The recent experience of the BNP government manipulating the system to manipulate the outcome of the elections has rendered the system quite ineffective. It will require the reform of the composition and the process by which the caretaker government is established in the future. New mechanisms have to be developed to prevent partisan manipulation of the caretaker administration by the outgoing government. The entire

96. *See* the judgment of Justice Md. Awlad Ali in *M. Saleem Ullah v. Bangladesh,* where he cemented favorably on the system of CTG by also observing that the Thirteenth Amendment is the outcome of the consensus of the political parties and thus is theoretically based on the will of the people or popular demand.

97. *Id.*

98. *Id.*

99. GOWHER RIZVI, *Holding the State Accountable: Building Institutions of Democratic Accountability,* 56(1-2) J. OF THE ASIATIC SOC'Y. OF BANGL. 23-52 (2011).

> process of the choice, composition, role and powers of the caretaker government needs to be thought through.[100]

From this perspective, many writers may thus find that the *Thirteenth Amendment* case reflects an inappropriate application of the doctrine of basic structure. More importantly, it is found that, in upholding democracy as a basic feature of the constitution, the court has seriously failed to reason dialogically with the assumption underlying the democratic order and distinct constitutional identity of this country. The judgment of this case thus signifies the court's failure to contextualize the meaning of democracy. This point leads one author to comment: "the recent judicial invalidation of the 13th Amendment to the constitution . . . can be seen as an inappropriate application of the [basic structure] doctrine resulting from the court's misreading the constitution properly, excluding the specificities of local politics."[101] Furthermore, the judgment has not escaped political criticism. The NCG system was introduced as a pragmatic response to the problem of election rigging and to ensure free and fair elections. The abolition of the NCG led to widespread violence across the country and three contentious elections, which seem to have caused more significant harm to democracy than permitting an unelected government to govern during a transitional period.[102] Therefore, it is widely argued that this judgment was delivered to execute a premeditated political agenda of the ruling party, the Bangladesh Awami League (BAL).[103] This is why, in the post-BAL regime, the Supreme Court is set to review its previous ruling while scrapping the Fifteenth Amendment to the constitution that abolished the NCG.[104]

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100. *Id.*

101. RIDWANUL HOQUE, *supra* note 27, at 317.

102. *See* Riaz, *supra* note 95. *See also*, Jane Dalton, *Bangladesh Election Marred by "Vote-Rigging," Deadly Violence and Fears of Media Crackdown*, INDEPENDENT (Dec. 30, 2018, 1:38 PM), www.independent.co.uk/news/world/asia/bangladesh-election-parliament-latest-polls-vote-rigging-violence-hasina-internet-a8704146.html; Syed Zafar Mehdi, *Level of Mass-Rigging in Bangladesh Polls Unprecedented in History of the Country*, TEHRAN TIMES (Jan. 12, 2019), www.tehrantimes.com/news/431758/Level-of-mass-rigging-in-Bangladesh-pollsunprecedented-in-history.

103. *See id.*

104. *Bangladesh High Court Reinstates Caretaker Government System*, ANI NEWS (Dec. 17, 2024, 3:22 PM), https://www.aninews.in/news/world/asia/bangladesh-high-court-reinstates-caretaker-government-system20241217152233/.

D. The Sixteenth Amendment Case and the "Textualization" of the Basic Structure Doctrine

Lastly, in the *Sixteenth Amendment* case, the misconception of the basic structure doctrine has reached its most dangerous level.[105] In this case, the court has rightly identified the judiciary's independence as one of the Constitution's basic features. However, in doing so, the court wrongly relied on the textualized version of the basic structure doctrine while grounding it in Article 7B of the Constitution. It is because the immediate Fifteenth Amendment has incorporated this new Article 7B, which entrenched many of the fundamental provisions of the Constitution. Interestingly, this article also constitutionalized the basic structure of the constitution, which any subsequent parliament cannot amend. Thus, under the new constitutional arrangement, the basic structure of the constitution can be located only in relation to Article 7B, unlike its previous forms (established judicial pronouncements), where the doctrine was considered an extratextual form of judicial review. Therefore, by this amendment and the court's subsequent affirmation, the misappropriation of the doctrine has reached its next level by changing its very fundamental promise. This is because the basic structure will then be considered, including a particular constitutional provision (Article 7B), as opposed to the overall reading of the constitution, which was the fundamental promise of the doctrine. In this case, the Court grounded the authority of basic structure doctrine on the "literal interpretation" of Article 7B. The court deployed it in the following words:

> Whenever a constitutional matter comes before this court, the meaning of the provisions of the constitution comes for interpretation. Though there is no implied limitation on the power of Parliament to amend the constitution but by insertion of article 7B, the power is circumscribed by limitations. An amendment will be invalid if it interferes with or undermines the basic structure.[106]

We contend that, although the court in that case has rightly invoked the BSD, it surprisingly misunderstood the nature or formulation of the doctrine by grounding its authority on the textual provision of the constitution, which in the present case is Article 7B. Such a stand taken by the apex court of Bangladesh creates confusion regarding the theoretical formation of the doctrine as opposed to what has been

105. *Government of Bangladesh and Others v. Advocate Asaduzzaman Siddiqui and Others,* Civil Appeal No. 06 of 2017 (AD) 347 (2017) (Bangl.).

106. *Id.*

established in the EAC. This also frustrates the very promise of the BSD as an independent review mechanism, on which it was founded in the EAC. As such, this confusing relationship between BSD and Article 7B has also driven others to undertake the concept wrongly. For example, in their writing, Po Jen Yap and Rehan Abeyratne praised, while defending and celebrating the *Sixteenth Amendment* case, the Fifteenth Amendment in relation to Article 7B by saying that "[t]his was momentous change that firmly entrenched constitutional democracy and enshrined the BSD in the constitutional text for the first time in the nation's history."[107] Their argument is based on the reasoning that, since the Fifteenth Amendment has legalized the BSD, the court in the *Sixteenth Amendment* case has rightly identified the unconstitutionality of the concerned amendment by invoking the doctrine in relation to Article 7B. They also claimed that the position of BSD was initially a mere decision of the court, and after the Fifteenth Amendment, it got its firm footing. They pondered in the following way: "Furthermore, the BSD now bore the formal imprimatur of the Fifteenth Amendment as, prior to this amendment, the doctrine was merely a judge made implied gloss on the Constitution."[108]

This is a clear, misleading statement about the nature and authority of the basic structure review, stating that the BSD is meant to be unwritten and identified without any specific provisions yet with the constitutional text. About this, Kawser Ahmed also expresses his concerns about such dependency of the court on a norm (Article 7B) to determine and identify the BSD—another norm. Criticizing it as a reflection of the court's formalistic approach, he argues that "[s]ince the CJ has relied on article 7B in deciding the validity of the 16th Amendment, it would have been rather thoughtful on his part to examine whether article 7B is itself a valid constitutional amendment."[109] This point has come to the fore in the changing political-constitutional landscape in Bangladesh. In its rulings on two separate writ petitions, the High Court of the Bangladesh Supreme Court has invalidated Article 7B of the Constitution, declaring it null and unconstitutional.[110] Interestingly, this decision recognized that Article 7B itself was violative of the basic structure of the Constitution, thus

107. PO JEN YAP AND REHAN ABEYRATNE, *Judicial Self-Dealing and the Unconstitutional Constitutional Amendment in South Asia,* I•CON 5 (2021).

108. *Id.* at 6.

109. KAWSER AHMED, *Revisiting the Majority Opinion in the 16th Amendment Cas*e, THE DAILY STAR, Sept. 2018).

110. Ashutosh Sarkar & Asifur Rahman, *15th Amendment to Constitution: HC Scraps Part that Abolished Caretaker System*, THE DAILY STAR (Dec. 18, 2024, 2:47 PM), https://www.thedailystar.net/news/bangladesh/news/15th-amendment-constitution-hc-scraps-part-abolished-caretaker-system-3778971.

demonstrating yet again how the doctrine had been misapplied in the previous cases.

IV. DESIRABILITY OF BASIC STRUCTURE DOCTRINE IN BANGLADESH: DEFINING THE DOMAIN OF OPTIMISM

In India, the court's persistence with the basic structure doctrine in testing the validity of constitutional amendment as well as a wide range of state actions is found to receive both positive and negative responses. This position of the doctrine is reflected in the observation of Krishnaswamy, when he states that "[m]uch of the recent criticism concedes that the basic structure doctrine did play an important role at a particular juncture in India's constitutional history but then goes on to argue that in our present political and economic context the doctrine hinders rather than advances our development." [111] In general, there is, however, a consensus that the positive role of the doctrine has outlived its negative impacts because it has served the country very well during turbulent times when parliament was in the mood to resort to Article 368 recklessly. Sathe has thus come to comment favorably on the judiciary's role in bringing this result by saying that "the court has been stabilizing the Constitution and deepening people's commitment to the basic structure doctrine."[112]

By contrast, the judiciary's role in applying the doctrine in Bangladesh has been found to forecast a negative signal about its impact, thereby making the doctrine difficult to argue from a positive point of view. Theoretically, the recognition of the doctrine in the constitutional jurisprudence of Bangladesh has, however, offered some illuminating features that could not be overlooked. One of the major positive impacts of the basic structure doctrine in Bangladesh is that it established the non-exclusivity of amending the power of the parliament. By holding that the amending power in Article 142 is circumscribed by "a built-in limitation," the court denies that the parliament has an exclusive authority to amend the constitution. Without undermining the democratic principle or power of the people to amend the constitution, this concept of limited amending power thus introduces a meaningful genre of constitutional democracy in Bangladesh. This position can be rightly described concerning what Krishnaswamy says about the doctrine in the context of India:

> The basic structure doctrine is best understood as a rejection of a monist and fundamentalist democratic model and an endorsement of the dualist

111. KRISHNASWAMY, *supra* note 5, at 226-227.

112. *Id.*

> democratic model, whereby the courts scrutinize proposals for radical constitutional change to ensure that they comply with the deep deliberative requirements necessary for radical constitutional change.[113]

Another important point that may be emphasized as a positive import of the basic structure doctrine in Bangladesh is the concept of shared sovereignty, which requires that state institutions respect democratic conditions. According to this concept, the constitution "must embrace an institutionally dispersed concept of sovereignty which is legal and political in character and is composed of multiple and unranked sources of sovereign power."[114] The basic structure doctrine recognizes this because it presupposes a logical distinction between legal and popular sovereignty. This position has been clarified in *Indira Gandhi v. Raj Narain*, where Justice Chandrachud proposes that "sovereignty of the people" is best understood to be about political sovereignty, while legal sovereignty is entrusted by the people to the three organs of the Sovereign Democratic Republic to exercise on their behalf.[115] By drawing a distinction between legal and political sovereignty, the basic structure doctrine thus introduces the concept of shared sovereignty and thereby secures a pan-institutionalized commitment to aspects of people's power apart from majority rule.

These positive imports are, however, confined to justify the institutional capacity of the judiciary to use the doctrine in delimiting the amendatory power of the parliament. The fact that the doctrine was born of a perceived necessity to save the constitution from an ever-encroaching parliament cannot, therefore, be understood to justify the frightening consequence of using the doctrine as a roadblock in the way of popular constitutional change in Bangladesh. In *Kesavananda* and *Golaknath*, the judiciary, weary of the parliament undermining India's constitutional and democratic structure, defines certain parts of the Constitution as basic, indestructible, and immune even from constitutional amendments. It ruled that these parts of the Constitution bind successive parliaments in perpetuity.[116] This does not mean that the *Kesavananda* judgment has eliminated the possibility of accommodating any change in constitutional polity. The following proposition can be noted to substantiate this claim:

> [. . .] the power to determine the parts of the Constitution that qualify as "basic" rests with the Supreme Court, whose interpretation is fluid—the

113. *Id.* at 198.
114. *Id.* at 211.
115. Indira Nehru Gandhi v Raj Narain, A.I.R. 1975 SC 2299.
116. Kesavananda Bharati v State of Kerala, (1973) 4 S.C.C. 225 (India).

> court being a perpetual and indissoluble institution. It is through this interesting arrangement that the stability of basic values is tinged with a little flexibility, and the Supreme Court becomes the safety valve that decides when stability is shaken too much for the well being of the nation.[117]

Ironically, this promise has not been reflected in applying the basic structure doctrine in Bangladesh. The court takes a rigid doctrinaire approach to applying the basic structure principle, thereby hindering the natural flow of constitutional development. This fact can be evident in the decisions of all four major cases, where this doctrine was successfully invoked to invalidate some radical constitutional amendments. In the *Eighth Amendment* case, the lone dissenting judge rightly questioned the judiciary's doctrinaire approach.[118] In support of the flexible application of this doctrine, he argues that

> [a]ny doctrinaire approach as to the basic structure, in my opinion, will amount to turning a blind eye to our constitutional evolution and further will not be in the interest of the country. I shall give one example. To-day a basic feature of our constitution is the Presidential form of government . . . Why a roadblock be created by the court, if people choose to send the members of those political parties to the Parliament, against amending the constitution providing for Parliamentary system.[119]

Apart from this, the major problem of using the doctrine—being essentially counter-majoritarian in nature—is reflected in its failure to prevent the court from positing its normative choices on the constitutional institutions in Bangladesh. It appears that the judges in Bangladesh have been motivated to use this doctrine to endorse their normative or political choices on the fabric of constitutional identity. More importantly, the use of the judiciary by the executive as a tool to accomplish the political plan has made the situation more sinister. The birth of the basic structure doctrine in the *Eighth Amendment* case and the recent decision of the apex court of Bangladesh invalidating the Thirteenth Amendment to the constitution reflect the truth of this claim. Because the court has, in all the cases, failed to understand the ideal that Pratap Bhanu Mehta has articulated to describe the failure of the Indian court to understand the doctrinal promise of the basic structure that "[w]hat the court ought to

117. MODY, *supra* note 38, at 17-18.

118. Interestingly, this view of the dissenting judge seems to get prominence in reality, when a switchover from presidential to parliamentary form of government was made by another parliamentary amendment in 1991.

119. *See* the observation of Justice ATM Afzal in paragraph 553.

have done was to explain more clearly the rationale of the basic structure doctrine and entrenchment of the values they comprise . . . Any interpretation of the constitution must be such that it is acceptable to free and equal persons reasoning publicly."[120] This fact, however, shows that the enduring tension in the evolving jurisprudence of the basic structure doctrine is confined to ensuring judicial accountability in using the doctrine from people's perspectives. To put it another way, the desirability of the doctrine in Bangladesh is contingent upon the degree to which this concern of judicial accountability is overcome.

By describing the basic structure doctrine as the inarticulate premise of the Supreme Court of India, Sathe argues: "[i]t will become delegitimized if the court over-exercise it or does not exercise it. The court will have to steer clear of trigger-happy activism as well as judicial passivism."[121] This argument of Sathe can be taken to inform the necessity of ensuring judicial integrity and self-restraint as a precondition to using the doctrine. Without this, the possibility of encountering unresponsive judicial conduct in the future can allay many of the fears associated with the nature, authority, and methodology of basic structure review.[122] In what follows, the present work is thus advanced to examine the desirability of applying the doctrine in Bangladesh in line with Sathe's proposition of finding a philosophically affluent framework, allowing a sufficient interplay of judicial activism and self-restraint.

The first principle to fit this framework is the idea of separating the domain of basic structure review from the policy concerns that belong to the exclusive province of the legislative enterprise. In this respect, Ronal Dworkin's proposition of principle-policy dichotomy may provide one way to do this. According to Dworkin, while judicial review focuses on the substance of constitutionalism principles, particularly the people's basic rights, the legislature is concerned with policy. Thus, the principle-policy dichotomy would suggest that the matters of policy should be entrusted to parliament and matters of principles to the Supreme Court. More specifically, it means that the court should not interfere with the choice of policy unless such a choice goes against the basic structure of the Constitution. This position has been rightly realized by the dissenting judge of the *Eighth Amendment* case, who found the question challenging decentralization couched as a policy issue:

120. MEHTA, *supra* note 15, at 202.

121. SATHE, *supra* note 31, at 85.

122. Sandeep Mishra & Hiren Ch. Nath, *Judicial Review of the Constitutional Amendment—An Analytical Study*, 9 INT'L J. RSCH. & ANALYTICAL REVS. 272 (2022).

> Whether the decentralization of the High Court Division is justified on principle or not, whether it is in the interest of the administration of justice or not, whether the results shown so far are productive or not are all matters relating to policy and consequence of the measure . . . .But in this processing we are called upon to examine the extent of the power of the Parliament under Art. 142 in making amendment to the Constitution. In ascertaining this power, the policy behind, or consequence of any amendment, are settled on high authorities and are not to be looked into by the Court.[123]

In arguing against the diffusion of the courts in the same case, Justice Badrul Haidar Chowdhury, however, ignored the dichotomy between principle and policy and noted that "the State can never encourage litigation by setting up mash-room courts" as it allows the growth of "touts, hanger-ons, and middlemen."[124] Similarly, it can be found that the court in the *Thirteenth Amendment* case has invalidated the caretaker system, which seems more to be a matter of policy and not a principle. It seems that the court has wrongly approached the domain of the legislature, thereby seriously impairing the ideals of democracy. Thus, it is arguable that to make applying the basic structure doctrine more desirable, the court should maintain the principle-policy dichotomy by creating possibilities for cooperation between the court and the parliament to solve the question of how to sustain the basic structure doctrine.

The second principle to ensure the constructive use of the doctrine can be found in the concept of shared sovereignty, which essentially presupposes the possibilities of democratic dialogue between the courts and the other branches of government. Krishnaswamy argued that this process has served well in India: "the court has tentatively used remedies in basic structure review cases to foster a democratic dialogue around key constitutional principles between the institutions of government, thereby deepening our constitutional culture without reserving to itself the 'last word' on these matters."[125] In the context of Bangladesh, this goal has not been attained because the court has taken a disproportionate entitlement in deciding the matter of constitutional amendment. In the *Thirteenth Amendment* case, the court became quite unmindful of public debate and sentiment, thereby disregarding the need for democratic dialogue. Seen in this light, it can be argued that we need to go further to refashion the basic structure review by advancing a dynamic model where the court's

123. *See* the observation of Justice ATM Afzal in paragraph 635.

124. *Eighth Amendment* case*, cited* in Chowdhury, *supra* note 25 at 62.

125. KRISHNASWAMY, *supra* note 5, at 215.

findings will trigger public debate about the basic features of the constitution and ensuing dialogue between the institutions of government. In writing in the context of India, Satya Prateek prescribes the nature and extent of such dialogue by proposing the following scheme:

> This structural adjustment is important for the unique way in which it seeks to prevent irresponsive judicial and parliamentary behavior. The scheme contributes in a manner where its checks are directed not at the Parliament alone *but* also against the judicial politics, and in a much more significant manner. Since the judicial interpretations would manifest themselves in the Constitution by way of a constitutional amendment, each one of such interpretations could be scrutinized on the "basic structure doctrine" . . . In realizing this scheme, the Parliament's amending power would be reasserted, judicial interpretation would be legitimized and the "basic structure" of the Constitution preserved.[126]

It seems that this possibility of public dialogue may give birth to an "amendment culture," to borrow Tom Ginsburg and James Melton's concept, that entails constitutional designers seeing their task not "as that of creating an amendment rule that achieves a particular degree of amenability, but one that facilitates the greatest degree of popular deliberation and participation in constitutional change."[127]

Apart from this, the most crucial point to test the desirability of applying the basic structure review in Bangladesh relates to curbing judicial discretion in matters relating to the operation of the basic structure doctrine. In a republican democracy, this aim can be achieved by providing a value-laden framework for using the doctrine, where the court shall never appear to be acting as a supra-legislature. Instead, it shall act "as a censor of the constituent power to preserve the most enduring values of the Constitution."[128] This condition of ensuring the valued-laden exercise of the doctrine will, however, depend upon attaining clarity about the nature and character of the basic features of the constitution. In fashioning or reasoning the doctrine, the court has failed to identify such character, which Pratap Bhanu Mehta criticizes as a problem by noting that "[t]he very nature of these lists suggests that the court has not quite thought through the constitutional principle behind the basic structure doctrine. Rather, they picked items from the text of the Constitution

126. PRATEEK, *supra* note 10, at 492.

127. Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty,* 13(3) INT'L J. CONST. L. 686-713 (2015).

128. SATHE *supra* note 31, at 93.

without specifying why. It is almost as if the Supreme Court takes the view that we recognize the basic structure as when we see it".[129] Applying the basic structure doctrine in Bangladesh reflects the same problem that becomes subject to persistent criticism on the ground that it speaks for the open-ended nature of the basic feature catalog. In identifying the basic feature of the Constitution, this situation became more sinister again for the mistake that they still search for the very soul of the Constitution solely relying on the concrete language of particular articles, taking them in isolation with "the foundational normative core on which the rest of the constitution is built."[130]

Concerning the disagreements over an amendment's "fit" within the substantive framework of constitutional law, Tribe feels that "[a]ll constitutional interpretation contains some elements of indeterminacy: the Constitution itself cannot dictate, in a manner that frees its user's responsibility for the choice, how it is to be approached."[131] It seems that, in the *Indira Gandi* case, Justice Chandrachud has tried to explore how the "choice of basic feature" is to be approached by arguing that "one has perforce to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequence of its denial on the integrity of the Constitution as a fundamental instrument of countries government."[132] This formula of identifying the basic structure of the constitution denies the courts' power to rob the constitution of its flexibility by making any provision as part of the basic structure of the constitution. In addition, it can also be found to accommodate the possibilities of popular constitutional reform carried out by the people that can "undo" the basic structure of the constitution.[133] To Mark Tushnet, this possibility of a nation's decision to amend a purportedly unamendable part of the constitution as an exercise of the right of revolutionary displacement is consistent with the concept of constituent power that lies in the heart of popular sovereignty.[134] Given

129. MEHTA, *supra* note 15, at 201.

130. *Id.*

131. TRIBE, *supra* note 58, at 25.

132. *Indira Nehru Gandhi v. Raj Narain,* cited in Krishnaswamy *supra* note 5, at 149.

133. With reference to *Indra Sawney v. India,* Sathe has pointed out how political demand may put a limitation on the application of the basic structure doctrine. In Bangladesh, the Twelfth Amendment to the constitution allowing the switchover from the presidential to the parliamentary form of government signifies that the desirability of the application of the basic structure doctrine in Bangladesh will depend upon the degree of people's engagement in testifying the correctness of a constitutional measure.

134. MARK TUSHNET, *Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power*, 13(3) INT'L J. CONST. L. 639–654 (2015).

this, it is thus arguable that the success of preventing the overuse and underuse of the doctrine—a condition set to testify the sustenance of the doctrine—will depend upon the task of its refashioning in line with the reasoning that the *Indira Gandhi* or *Ganpatrao* cases have adopted to find its soul in Austin's "seamless web."

V. CONCLUSION

A democratic interpretation of constitutionalism necessitates a careful balance between honoring our historical foundations and envisioning future possibilities.[135] In other words, "it cannot give too much faith to the past, nor can it rush too quickly into the pursuit of some future objective, thereby disregarding what has been conventionally built up."[136] This Article shows that the basic structure doctrine is not only in harmony with this vital principle but also strengthens the commitment to constitutional democracy itself.

It accepts the argument that the doctrine possesses a sound constitutional basis to work as an independent form of judicial review and endorses the view that the "court's wading into the deep waters of limiting parliamentary amendments was perhaps an inevitable result of legislative dysfunction" in Indian constitutional polity. Therefore, Manoj rightly claimed that "[t]hrough the development and articulation of the basic structure doctrine, the Indian legal complex helped the Court assume a "guardian" role."[137]

This Article asserts that the application of legal doctrine has not consistently served to advance constitutionalism. The conflation of "basic structure" with the "basic features" of the constitution has resulted in significant misinterpretations of the doctrine. This problem is particularly evident in Bangladesh, where the misuse of this doctrine has had alarming repercussions. By analyzing four key cases in which the basic structure doctrine was "successfully invoked," this article highlights that judges in Bangladesh have often misinterpreted or misapplied the true intent of basic structure. Bangladesh has received the basic structure review with all the misjudgments woven into the doctrine since its inception, and as

135. The need for balancing the "constitutional adherence" (to the past and future elements) can also be found in Ronald Dworkin's view of the "law as integrity" which would suggest us taking constitutional law as a combination of, in his words, "backward-looking factual reports of conventionalism" and "forward-looking instrumental programs of legal pragmatism." *See* Ronald Dworkin*, Law's Empire* 225 (1985).

136. M. A. Sayeed, *Constitutional Pendulum Should Not Be Swinging Back,* THE DAILY STAR, November 2011.

137. MANOJ MATE, *supra* note 51, at 144.

such, its application has, in the long run, been counter to the greater public interest and the nation's ongoing mottos of constitutionalism and democracy.

It is against this backdrop this Article has assessed the desirability of the application of the doctrine with a key difference: It argues that if the misapplication of the doctrine happened mainly for the lack of judicial insights and integrity, then it will be wise not to go for the complete burial of the doctrine, but to put a limit on the judiciary to counter the possibilities of unresponsive judicial conduct. This argument is based on the optimism that "the judiciary would always be alive to the moral authority of the doctrine and the consequences that an uncaring attitude may bring for its integrity."[138] This position is reached to fit neatly with the following observation that is made to address the desirability of the doctrine in the context of India:

> The success of the basic structure doctrine turns on the judiciary's capacity to claim that it can protect the conditions for the expression of sovereignty more reasonably than the parliament. This task is easier within the Indian constitutional framework than in some others, for it is easier to make competing representative claims in situations where amendments are not enacted by the people themselves (unlike, say, in cases where the people may amend the constitution directly through a referendum or plebiscite). But the formal rules of the amendment power can only help so much. Ultimately, whether the basic structure doctrine remains an integral and vibrant feature of Indian constitutionalism will depend neither on the technical distinction between sovereignty and government, nor the rules for amending the Constitution, but quite simply on how persuasively the doctrine is applied. The authority of courts will turn on how the use of their power is received.[139]

This Article strongly aligns with Khosla's perspective, reinforcing the critical themes of judicial integrity and self-restraint. These principles are essential in promoting a normative application of the basic structure doctrine, ensuring it is employed effectively while respecting its boundaries within and beyond the Constitution. It, therefore, speaks for a value-laden framework of constitutional democracy, balancing the responsibilities of parliament and the Supreme Court in protecting the identity and promise of the Constitution. Towards this end, it further calls for an intelligent shift in the attitude of political and judicial institutions

138. PRATEEK, *supra* note 10, at 420.

139. KHOSLA, *supra* note 63, at 250.

towards understanding the promise of the doctrine with reference to the postulate that

> it will be dangerous if we try to ignore the constitutional postulates of the past, but it will be more dangerous and, in the long run, irreconcilable with the interest of the nation if we take the constitution just as a "closed texture", and fail to lay present postulates over the constitutional practice to show the best route to a better future.[140]

To conclude, it is worth reflecting on the metaphor of brakes, as used by Upendra Baxi to explain the emergence of the basic structure doctrine: "If you do not apply brakes [of amendment], the engine of amending power would soon overturn the Constitution." In the Indian constitutional context, Baxi's proposition has shaped the debate around determining what types of brakes are necessary and whether the basic structure doctrine can maintain the ground below constitutionalism's feet.[141] However, in Bangladesh, the brake itself has malfunctioned to such an extent that it has destabilized the constitutional structure. Thus, the doctrine's desirability in Bangladesh hinges on its careful recalibration to ensure it serves its intended moral and philosophical purpose.

140. SAYEED, *supra* note 115.

141. KHOSLA, *supra* note 63, at 248-249.