AMENDMENT POWER IN BANGLADESH: ARGUMENTS FOR THE REVIVAL OF CONSTITUTIONAL REFERENDUM

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Abstract

The recent constitutional trend in divided societies and relatively unstable democracies has seen an increased use of perpetuity clauses as a tool to foster constitutional stability. Propriety and effectiveness of making certain part or parts of constitution totally unamendable either by insertion of some perpetuity clauses or by judicial articulation of perpetual norms (basic structure) has been doubted by many. The Supreme Court of Bangladesh tested the way of judicial articulation of certain perpetual norms as back as 1989. The 2011 amendment to the constitution of Bangladesh has included a very widely framed perpetuity clause and, also, a very vague reference to the basic structure doctrine. This article considers the fragilities of these two parallel tracks to unamendability and shows how a median line could be drawn by installing a system of popular referendum in the constitution amendment process. Considering the qualitative questions over Referendum as a tool of deliberative democracy, the paper would argue for a reformulated version of the referendum system that was introduced in Bangladesh in 1979 but scrapped by the amendment of 2011.

Keywords: Constituent Power, Amendment Power, Basic Structure, Unamendability, Referendum, Judicial Review.

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1. Introduction

A typical constitutional supremacy clause characterizes the constitution as the 'highest law' of a country. Again, pitched against the concept of popular sovereignty, constitutions often occupy a lower designation, as 'higher law'.[1] Constitutional supremacy clauses however accommodate a slippery concept of the peoples' sovereignty. A claim of supremacy here rests on constitution's embodiment of the will of the people. Seen this way, a constitution's supremacy remains subject to the 'highest' will of the people. The biggest problem with this approach is that 'will of the people' is a theoretical concept not capable of perfect subtraction into a legal concept. It is hard to pinpoint exactly when the 'will of the people' changes and a "constitutional moment"[2] knocks on the door. Added to this is the near impossibility to discern what exactly the 'will' itself is. Hence, a more accommodating alternative might be to take the constitution as the 'legal highest' and leave the will of the people – the 'political highest' - aside.

Yet this would not solve the problem altogether. The 'legal' and 'political' highest, are not norms in isolation. They constantly interact, influence and saturate each other. Instability in one destabilizes the other. Therefore, possible instability in the highest 'law' needs be checked by taming instability in the peoples' highest 'will'. Constitutions try to do this by defining the amendment process with the best possible precision. Amendment clauses give constitutions the height necessary to remain above the nitty-gritty of 'presentist'[3] tendencies of the peoples' will. They also provide necessary leeway for intra and inter-generational adaptability of the constitutional texts and principles.[4]

Amendment power and process is laced with complexity. Constitutional provisions may be 'comparatively hard', 'particularly hard', or even 'impossible' to amend. Many constitutions choose *comparatively hard* amendment processes and require a qualified majority of two-thirds or three-fourths in the legislature for a constitutional amendment. Some constitutions, the United States' being the most prominent, chose a *particularly hard* process of amendment and require some additional steps like ratification and concurrent action by institutions apart the legislature. Though no constitution so far has claimed *strict unamendability* for all of its contents, some jurisdictions have attempted such strategy for parts of their constitutions by introducing eternity or perpetuity clauses and, as Roznai shows, the trend is growing in this direction.[5] This trend of

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1 J. M, Balkin, *Living Originalism*, 59 (1st ed., 2011).

2 B. Ackerman, *We the People, Volume 2: Transformations*, 17-26 (1st ed., 1998).

3 J. Rubenfeld, *The Moment and the Millennium*, 66 George Washington Law Review 1085, 1089 (1998). Jed Rubenfield explained Thomas Jefferson's thesis on living constitutionalism - "the earth belongs to the living" - as making "the priority of the present into an axiom of self-government, such that self-government would have to be conceived as *governance by present popular will* and governance under old laws would have to be regarded as antithetical to political freedom." [Emphasis supplied].

4 C. J. Friedrich, *Constitutional Government and Democracy theory and practice in Europe and America*, 137-38 (4th ed., 1974).

5 Y. Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers*, Thesis submitted to the Department of Law of the London School of Economics for the degree of Doctor of Philosophy, 27 (2014), available at: http://etheses.lse.ac.uk/915/, last seen on 08/06/2020. (As Roznai's groundbreaking dissertation notes, "between 1789 and 1944, only 17% of world constitutions enacted in this period included unamendable provisions (52 out of 306), whereas between 1945 and 1988, 27% of world constitutions enacted in those years included such provisions (78 out of 286). Out of the constitutions which were enacted between 1989 and 2013 already more than half (53%) included

legislative entrenchments through perpetual or eternity clauses – which Richard Albert calls "codified unamendability"[6] is an addition to the judicially articulated "interpretative unamendability"[7] under the so-called doctrine of basic structure.

Both the eternity clause and the basic structure doctrine involve controversies. With the court, a facially "counter-majoritarian"[8] institution, pressing for perpetuity of an unidentified set of basics, democracy's basic arraignment of representation, institution, power and principles face a new challenge. Basic structure denies political forces and the people the scope to anticipate and react to in the judicial interpretation of constitutional text and principles. Inconsistent interpretation leads to an ever-fluctuating list of unamendable basic structures. Codified eternity clauses, on the other hand, create a highly problematic dead hand rule – ideals of the foregone generation binding the present generation - within the constitutional landscape.

This paper aims to address the dilemmas of the eternity clause and the basic structure doctrines in the context of Bangladesh. The 2011 constitutional amendment in Bangladesh that purports to accommodate both the legislative articulation of unamendable constitutional basics and the judicial articulation of basic structure unamendability forms the principal case study of this paper. Part II presents a general introduction to the Bangladeshi constitutional regime regarding amendment power and process. Part III offers a brief analysis of the doctrinal issues associated with the eternity clauses and the basic structure doctrine. Part IV deals with the problems of basic structure doctrine in Bangladesh with occasional references to other south Asian jurisdictions, particularly the India and Pakistan. Part V argues for qualified entrenchment of constitutional basic structure provisions subject to popular participation in the process through referendum. Part VI considers some of the confusions associated with the concept of referendum and argues for modified reintroduction of the referendum clause that was introduced in Bangladesh in 1979 but discontinued in 2011.

2. Amendment Power in Bangladesh: Trichotomy of Basic Structure, Unamendability and Referendum

The Parliament of Bangladesh is given both plenary legislative power[9] and the power of constitutional amendment.[10] The original constitution of 1972 contained no limitation whatever on the parliament's power of amendment. Amendment could be made through a Bill passed by two-thirds majority of the members of Parliament. Article 142 being the sole repository of amendment

unamendable provisions (76 out of 143). In total, out of 735 examined constitutions, 206 constitutions (28%) include or included unamendable provisions").

6 R. Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, 140 (1st ed., 2019).

7 Ibid, at 149.

8 A. M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 16-18 (2nd ed., 1986).

9 Art. 65, the Constitution of Bangladesh (Subject to the Constitution, the legislative power of the Republic is vested in Parliament).

10 Art. 142, the Constitution of Bangladesh (Parliament is empowered to amend the constitution by of addition, alteration, substitution or repeal subject to the procedure and conditions laid down in this Article).

power, there could be no extra-constitutional route to amendment.[11] The military regimes of 1975-79 and 1982-1986 however, frequently took the extra-constitutional routes.

A series of martial law orders, regulations and proclamations amended the constitution as per the sweet will of the martial law administrators. Thereafter all those 'amendments' were placed as two packages before second and third parliaments which approved the packages though the Fifth and Seventh Amendments respectively.[12] In the Fifth Amendment, a system of referendum was installed within the amendment process.[13] As per the new formula, amendments in the Preamble or some other articles consolidating the presidential system vis-a-vis the Prime Minister and cabinet and the parliament,[14] would require referendum in addition to a two-thirds majority in parliament. Though it was not told expressly, the newly installed referendum system treated some articles, some of which were controversial[15], as more 'fundamental' than the other articles of the constitution.

Later, the Fifth Amendment was invalidated by the Supreme Court of Bangladesh. The High Court Division judgement in the Fifth Amendment case specifically dealt with the referendum clause:

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11 See R. Albert, *Constitutional Amendment by Stealth*, 60 McGill Law Journal 673, 678 (2015). Amendment by stealth has been defined as 'an informal, obscure and irregular method of constitutional amendment that by-passes the process of public deliberation through formal, transparent and predictable procedures designed to express the informed aggregated choices of political, popular and institutional actors.'. Though there is global awareness of a process of 'amendment by stealth' through different informal politico-administrative processes short of formal amendment, its implication for Bangladesh remains unexplored or under researched so far. 'Amendment by stealth' therefore falls beyond the ambit of this paper which deals with formal and express amendments regulated by article 142 and judicially reviewed within the basic structure framework.

12 M. J. A. Chowdhury, *An Introduction to the Constitutional Law of Bangladesh*, 76-86 (1st ed., 2010).

13 Clause 1A was first added to Article 142 by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order no IV of 1978).

14 Second Schedule of the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978 enlisted the provisions that were to be brought into the ambit of the referendum clause. The enlisted provisions were the Preamble, Arts. 8 (status of fundamental principles of state policies), 48 (president), 56 (prime minister), 58 (tenure of the prime minister and cabinet), 80 (president's control over legislative process), 92A (president's power to dissolve a parliament which fails to approve the budget proposed by the government) and 142 itself. Later the Constitution (Twelfth Amendment) Act 1991 (Act No. XXVIII of 1991) amended the referendum list. Under the 1991 amendment, the Preamble, articles 8, 48, 56 and 142 would require referendum. With a change of the presidential system into a parliamentary one, articles 58, 80 and 92A relating to presidential powers became redundant and hence got omitted from the list.

15 The 1978 list of referendum articles included the provisions like presidential authority to dissolve a parliament failing to approve the government's budget proposal, presidential superiority vis-à-vis the prime minister and the cabinet and also the distortion in the preamble (which now introduced a state religion, deleted the secularism, distorted the Bangalee nationalism and limited the meaning of socialism – all of the four founding principles of the original constitution). The 1978 list was controversial because it apparently sought to entrench the presidential system of government as well as other politico-legal philosophies of the military regime capturing power after the killing of the Father of the Nation Bangabandhu Sheikh Mujibur Rahman and acting in direct defiance of the founding principles of the liberation war of 1971 – secularism, socialism, *Bangalee* nationalism and representative democracy in the form of parliamentary government. See S. Lition, *The Depth of 5th Amendment*, The Daily Star (22/07/2010), available at https://www.thedailystar.net/news-detail-147758 , last seen on 09/06/2020.

> Addition of clause (1A) was craftily made. In the one hand the President and the Chief Martial Law Administrator was not only merrily making all the amendments in the Constitution of the People's Republic of Bangladesh according to his own whims and caprices by his order…but at the same time, made provision in Article 142 itself in such a manner so that the amended provisions cannot be changed even by the two thirds majority members of the parliament short of a referendum. In short[,] by *executive order of one person, amendment of the Constitution can be made at any time and in any manner* but even the two thirds majority of the representative of the people cannot further amend it. We are simply charmed by the *sheer hierocracy of the whole process.*[16] (Emphasis supplied)

It seems that the High Court Division was questioning the *hierocratic manner* in which the referendum clause was inserted and entrenched in the constitution, *i.e.,* through a military chief's orders and proclamations etc. While the High Court Division did not test the substantive concept of referendum *as such*, the Appellate Division judgment on the Fifth Amendment also did not deal with the referendum clause specifically. It did however approve the High Court Division's nullification of the referendum clause.[17] The Fifteenth Amendment Act of 2011, which followed the Supreme Court verdict in the Fifth Amendment case, deleted the referendum clause and revived the original format of Article 142 i.e., amendment through two-thirds majority only.[18]

The Fifteenth Amendment, however created another problem of its own. By inserting a new Article 7B in the constitution, it made a large part of the constitution totally unamendable. Prior to that, the doctrine of basic structure was explicitly embraced by the Supreme Court of Bangladesh in its 1989 *Anwar Hossain Chowdhury* decision.[19] The doctrine claims that certain provisions and principles constitute the basic structures of the constitution and are therefore

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16 Bangladesh Italian Marble Works Ltd v. Bangladesh, 14 (2006) BLT (Spl) (HCD) 1, 199 (High Court Division of Bangladesh Supreme Court). See M. J. A. Chowdhury, *Negotiating article 142(1)(A) for Basic Structure*, The Daily Star 12 (Dhaka, 06/03/2010).

17 Khandkar Delware Hossain v. Bangladesh Italian Marble Works Ltd, Civil Leave to Appeal Petition 1044-45/2009, 182; Full text of the judgment available at http://www.dwatch-bd.org/5th%20Amendment.pdf , last seen 09/06/2020. (As it appears, the High Court Division's declaration of unconstitutionality of the referendum clause was based on *the hierocracy of the* process of its insertion. Apparently, the substantive concept of referendum *as such* was not tested for constitutionality. Interestingly, the Constitution (Twelfth Amendment) Act 1991 (Act No. XVIII of 1991), passed after the country's democratic transition in 1991 and with unanimous bi-partisan support, amended the referendum clause and thereby substantively endorsed the system of referendum *as such*. Given the renewed entrenchment of the referendum clause through the 1991 amendment, it may be asked whether the High Court Division could judge it in 2005 on the ground of a procedural *hierocracy* of 1978 (For a brief history of the Twelfth Amendment See M. A. Hakim & A. S. Hoque, *Governmental Change and Constitutional Amendments in Bangladesh*, 2(2) South Asian Survey 255, 268-69 (1995).

18 Like the question over the High Court Division's invalidation of the referendum clause, it may also be asked whether the parliament could remove the referendum clause in 2011 by a mere two-thirds majority while the twelfth amendment of 1991 required a further referendum to amend the referendum clause. While these fundamental issues require elaborate theoretical and doctrinal exposition, scope of the present article confines us to the effect of the fifth amendment judgement and the fifteenth amendment act rather than process and rationality of those.

19 Anwar Hossain Chowdhury v. Bangladesh, (1989) 18 CLC (AD) 1.

unamendable. Now, the Fifteenth Amendment has added a large number of specific articles in the unamendability list. It also included other unspecified 'basic structures' to list of unamendability.

Article 7B is titled as "Basic provisions of the Constitution are not amendable". It has made the Preamble, all articles of Part I, II and III (subject to the emergency provisions), Article 150 and "all the provisions of articles relating to the basic structures of the Constitution" unamendable by way of insertion, modification, substitution, repeal or by any other means. The vague reference to "all provisions of articles relating to basic structure of the constitution" in article 7B seems problematic. While entrenchment of core constitutional values through eternity clause like this one is not totally unknown in global constitutional literature, there is an obvious danger in unnecessarily widening the breadth of unamendability. Common understanding of eternity clause jurisprudence suggests that only the higher values of constitutional order – the "constitutional cores"[20] – should be entrenched. Extensive listing of unamendable articles is likely to constraint the peoples' primary constituent power.[21] Seen in this light, the Fifteenth Amendment of 2011 is "extremely wide"[22] and susceptible to future disregard.

As will be argued subsequently in this paper, the discarded system of referendum, though having a problematic origin, if retained through necessary modification, could have solved most of the problems associated with the eternity clause and basic structure doctrines.

3. Understanding Amendment Power vis-à-vis the Unamendable Clauses

There are debates as to whether amendment power is a 'constituent' power or a 'constituted' one.[23] Constituent power is the highest political sovereignty that works as an extra-legal grundnorm whose legitimacy is taken for granted.[24] Constituted power on the other hand is secondary and derivative. It draws its authority from the constituent power and must conform to it. Amendment power has been inconsistently described as 'constituent power' and/or 'constituted power'. Holmes and Sunstein write that amendment power:

> … inhabits a twilight zone between authorizing and authorized powers. ... The amending power is simultaneously framing and framed, licensing and licensed, original and derived, superior and inferior to the

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20 R. Hoque, *An unamendable constitution? Eternal Provisions in the Constitution of Bangladesh: A Constitution Once and for All?*, 195, 222 in *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Richard Albert and Bertil Emrah Oder., 1st ed., 2018).

21 M. Abdelaal, *Entrenchment illusion: the curious case of Egypt's constitutional entrenchment clause*, 16(2) Chicago-Kent Journal of International and Comparative Law 1 (2016).

22 Supra 20, at 218.

23 *Carl Schmitt's Constitutional Theory*, 71-75, 141-46 (Jeffrey Seitzer, 2008); M. Loughlin, *On Constituent Power,* 151, in *The Political Construction of the State* (Michael W. Dowdle and Michael A. Wilkinson, 2017); Sieyes, *What is the Third Estate?*, 124 (1963)*;* C. Pfenninger, *Reclaiming Sovereignty: Constituted and Constituent Power in Political Theory*, E-International Relations, available at https://www.e-ir.info/2015/01/12/reclaiming-sovereignty-constituted-and-constituent-power-in-political-theory/CHRISTIAN PFENNINGER, last seen on 09/06/2020.

24 J. Raz, *Kelsen's Theory of the Basic Norm,* 19(1) The American Journal of Jurisprudence 94, 95 (1974).

constitution.[25]

Sieyes claimed that constituent power is unlimited, unrestricted and free from all prior bondages and is always subject to reclamation.[26] Doyle argues that constituent power should be seen as a capacity (power) rather than an entity (bearer of power).[27] Entity based understanding of constituent power insists that only one entity - the people, can exercise it.[28] Capacity based understanding, on the other hand, would look for whether an entity (revolutionary force, legislature or military for example) can successfully create a new constitution by breaching the existing one. If the new constitution so brought forth is perceived by the people as serving their interest, there should be no reason to deny that the concerned entity has exercised its constituent power. On this count, exercise of amendment power may qualify as a constituent power in suitable cases e.g., where the legislature drastically alters its own sphere of competence.[29]

A contrary view of the amendment power, however, describes it as a *constituted* power. According to this view, the constituent power is laid to rest once its job of constituting the original constitution is over. Thereafter, every entity works under the constituted system.[30] Since the legislature's amendment power is part of the system as constituted, it cannot claim an authority beyond its boundary. On this basis, Schmitt argues that an amendment cannot eliminate the constitution nor can it annihilate the constitution by stripping off its essential identities.[31] Tribe also echoes the tune that amendments may not alter fundamental values of the constitution to such an extent that may tantamount to regime change or revolution or create inconsistency within the regime.[32]Amar also recognizes 'a seemingly paradoxical exception' to amendability and claims that the 'inner logic' of the constitution calls for entrenchment of certain [U.S. first amendment, for example] values.[33] Entrenchments of constitutional norms through eternity clauses (explicit limits on amendment power) or basic structure doctrines (implicit limits on amendment power) or transnational norms (supra-constitutional limits on amendment power) are therefore not devoid of reasoning.[34]

One of the contemporary thinkers on the unamendability doctrine, Roznai however takes a conciliatory approach and tries to find out a middle ground in the debate. Roznai perceives the amendment power as a constituent one subject to a further classification within – Primary

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25 S. Holmes, and C.R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, 275, 276 in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Sanford Levinson, 1995).

26 Y. Roznai, *Towards a Theory of Unamendability*, New York University Public Law and Legal Theory Working Paper Series, 8, Working Paper Number 515, New York University School of Law (2015).

27 O. Doyel, *Populist Constitutionalism and constituent power*, 20(2) German Law Journal 161, 166-71 (2019).

28 Ibid, at 169.

29 Ibid, at 170.

30 U. K. Preuss, *The Exercise of Constituent Power in Central and Eastern Europe,* 220 in *The Paradox Of Constitutionalism: Constituent Power And Constitutional Form* (M. Loughlin and N. Walker., 1st ed., 2007).

31 C. Schmitt, *Legality and Legitimacy* 150, 151 (1st ed., 2004).

32 H L Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 Harvard Law Review, 433, 441 (1983).

33 A. R. Amar *Philadelphia Revisited: Amending the Constitution Outside*, 55 University of Chicago Law Review 1043, 1072 (1988).

34 Y. Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* 124-26 (1st ed., 2017).

Constituent (constitution making) and Secondary Constituent (constitution amending) Power.[35] Primary constituent power is not only original but also a principal one. He relies on Max Radin's idea of real and minor sovereignty. Real sovereignty is exercised by revolutionary authority and 'minor or lesser sovereignty' is exercised by the constituted authority.[36] Amendment power, though exercised by a constituted authority, is 'almost sovereign' and stands above all other functions of governance.[37] It is 'almost' sovereign because its authority is derivative, not original.[38] Working further on this, Roznai asserts a 'principal-agent' relationship between the primary constituent power and secondary constituent (amendment) power. Amendment is more than constituted power and less than original constituent power. It is a delegated power to be exercised by a special constitutional agent e.g., parliament. Its power is neither unlimited nor severely limited.[39] As regards the unamendable eternal clauses, Roznai applies his delegation theory in the following terms:

> Unamendability limits the delegated amendment power, which is the secondary constituent power, but it cannot block the primary constituent power from its ability to amend even the basic principles of the constitutional order.[40]

The people would reserve their primary constituent power and use it *de novo*[41] when the secondary constituent authority (legislature) attempts a change 'contrary to their fundamental values'.[42] Seen in this light, the secondary constituent authority is debarred from unilaterally entrenching some of provisions of its liking. Here again, involvement of the primary constituent authority (the people) is inevitable.

If this position of Roznai is considered from a practical perspective, there should be a place of public participation in the amendment process through devices like referendum which we argue for in this paper. Our argument for participatory amendment process can also be justified in terms of Joel Colón-Ríos's "five concepts of constituent power".[43] First, Rios' ideas locate the constituent power in a Westminster styled 'sovereign' parliament. Second, the constituent power may be delegated from the Crown to the legislatures (e.g., the colonial legislatures in the wake of the decolonization) who would reconstitute the system a fresh. Third, the constituent power may lie with the peoples' right to revolt and alter the existing system. Fourth, within a participatory democracy framework, the constituent power may mean the power of the people to instruct their representatives who would remain bound by the instruction. Fifth, the constituent power may be channeled through the fundamental law in such a way as to institutionalize the "normally extra-legal- exercise of the people's constitution-making power".[44] While Rios' first two senses of Westminster parliamentary sovereignty and colonial deregulation fall outside the scope of this

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35 Ibid, at 122.
36 M. Radin, *The Intermittent Sovereign*, 39 Yale Law Journal 514, 525 (1930).
37 Ibid, at 526.
38 Supra 26, at 15-18.
39 Ibid, at.19-20.
40 Supra 34, at 124-26.
41 Ibid, at 128.
42 Ibid, at 134.
43 J. Colón-Ríos, *Five conceptions of constituent power*, Law Quarterly Review 306 (2014).
44 Ibid, at 308.

investigation, the third concept of revolutionary constituent power remain is essentially extra-legal. Rios' fourth and fifth concepts allocate the "true constituent power"[45] in the people and projects the institutional mechanisms *e.g.,* the legislature as formal and legal proxies of popular sovereignty.[46] As will be seen in Part V of this paper, our argument for referendum based participatory amendment process draws on popular sovereignty and representative responsibilities of the legislature.

Roznai's classification of primary-secondary constituent power also runs in line with the Indian and Bangladeshi Supreme Courts' approaches to amendment power as well. The *Kesavananda Bharati v. State of Kerala*[47] and *Anwar Hossain Chowdhury v. Bangladesh*[48] courts have perceived amendment power as a power limited by essential norms of the constitution i.e., the basic structures of the constitution. Both the judgments distinguish between the adoption of a new constitution and the 'derivative power' of amending the existing one and took the view that amendment of the Constitution does not mean its abrogation or destruction or a change resulting in the loss of its identity and character. The Indian Supreme Court in *Keshavananada Bharati* observed:

> The word 'amendment' postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alteration. [S]ubversion or destruction cannot be described as amendment of the Constitution as contemplated by Article 368 [of the Indian Constitution].[49]

Similarly, all the four Appellate Division judges, including the dissenting judge, sitting in *Anwar Hossain Chowdhury v Bangladesh* have agreed that amendment power is a limited power, though they varied on the question whether amendment power is a constituent power or not. Justice Badrul Haider Chowdhury apparently refused the constitutional amendment any higher status in terms of its 'constituent' character. Relying on the constitutional supremacy clause in Article 7(1) of Bangladesh constitution, Justice Chowdhury would see the constituent power, if there be any, belonging only to the 'people':

> All powers in the republic belong to the people. This is a concept of Sovereignty of the people. *Sovereignty lies with the people not with*

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45 Ibid, at 333.

46 At this juncture, it is useful to refer to Japanese scholar Yasuo Hasebe who argues against dragging the narrative of constituent power in the discussion of constitution making and amendment. Hasebe argues that constitutions and amendments would thrive if their outcome are acceptable to the people and in conformity with university principles of political morality, not because those are allegedly enacted by a particular generation of people exercising their constituent power (See Y. Hasebe, *On the Dispensability of the Concept of Constituent Power*, 3 Indian Journal of Constitutional Law, 39, 46, 49, 50 (2009)). This paper however deals with the procedural and institutional issues, rather than Hasebe's substantive considerations, of constitutional amendment which makes it imperative to locate the power and authority of amendment to its precision.

47 Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

48 Supra 19.

49 Kesavananda Bharati v. State of Kerala quoted in S. K. Chakraborty, *Constitutional Amendment in India: An Analytical Reconsideration of the Doctrine of 'Basic Structure'*, 11 Social Science Research Network Electronic Journal, 1, 9 (2011), available at http://ssrn.com/abstract=1745439, last seen on 28/02/2019.

> *executive, legislature or judiciary* - all these three are creations of the Constitution itself.[50] (Emphasis supplied)

While finding that amendment power was not a constituent power, Justice Chowdhury did not specifically say whether it is a constituted power instead. Amendment power is elevated from the ordinary law-making power in so far as article 142 of the constitution 'enables' it to bring changes in, short of swallowing up, the constitution:

> [Article 142] merely confers enabling power for amendment but by interpretative decision that clause cannot be given the status for swallowing up the constitutional fabric.[51]

Similarly, Justice M H Rahman would not articulate the amendment power as either constituent or constituted one. He would rather see the amendment power as one limited by the constitutional fabric e.g., the rule of law:

> I am, however, striking down the amendment not on the ground of uncertainties or irreconcilability of the existing provisions with the amended provisions as such, but on the ground of the amendment's irreconcilability with the rule of law, as envisaged in the preamble, and, in furtherance of which, Articles 27, 31,32,44,94 to 116A were particularly incorporated in the Constitution.[52]

Compared to Justice Chowdhury and Justice Rahman, Justice Shahabuddin Ahmed's view on amendment power is more explicit. Justice Shahabuddin was reluctant to accept the amendment power as a constituent power in its primary or original sense. He would rather accept it as derivative constituent power at best:

> As to the 'constituent power', that is power to make a Constitution, it belongs to the people alone. *It is the original power. It is doubtful whether it can be vested in the Parliament, though opinions differ.* People after making a Constitution give the Parliament power to amend it in exercising its legislative power strictly following certain special procedures. … *Even if the 'constituent power' is vested in the Parliament the power is a derivative one* and the mere fact that an amendment has been made in exercise of the derivative constituent power will not automatically make the amendment immune from challenge.[53] (Emphasis supplied)

Justice Badrul Haider Chowdhury's endorsement of amendment power as *derivative constituent power* was picked up by the dissenting judge Justice ATM Afzal. Justice Afzal rejected the argument of one of the lawyers who asked the court to see the parliament's amendment power at par with its *constituted power* of law making:

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50 Supra 19, at ¶ 166 (Justice Badrul Haider Chowdhury).
51 Ibid, at ¶ 184 (Justice Badrul Haider Chowdhury).
52 Ibid, at ¶ 523 (Justice M. H. Rahman).
53 Ibid, at ¶ 381 (Justice Shahabuddin Ahmed).

> It become[s] difficult to agree with him having regard to the views expressed by judges and [J]urists as to the position and quality of a law which is *enacted under the constituent power* of a Parliament *even though it is a derivative power* and [also] the position of Constitutional law, in relation to ordinary law made under ordinary legislative process.[54] (Emphasis supplied)

Concluding the discussion of this part, it appears reasonable to say that the basic structure judgments of both the Indian and Bangladeshi Supreme Courts see amendment powers as *secondary or derivative constituent power* which is higher than the legislature's constituted power of ordinary law making but lower than the peoples' original constituent power of *repealing or replacing* the constitution or altering its essential basic characteristics.

4. Problems of the Basic Structure Doctrine

The doctrine of basic structure drags the judiciary into the constitution amendment process. The judiciaries in South Asia claimed a responsibility to protect the constitutional edifice from the peril of an invincible parliamentary super-majority. The argument is that certain structural pillars of the constitution cannot be dislodged by parliament while amending it.[55] Though *Keshavananda Bharati* is identified as the progenitor of the doctrine, it started shaping up in an earlier case named *Golak Nath v. State of Punjab*.[56] In *Golok Nath* the Indian Supreme Court held that fundamental rights occupy a transcendental position in the Indian constitution and are therefore unamendable.[57] *Keshavananda* elaborated the argument towards all other provisions forming 'basic structure' of the constitution. Justice Khanna held:

> If the Basic Structure is retained, the old Constitution would be considered to be continuing even though other provisions have undergone change. On the contrary if the Basic Structure is changed, mere retention of some articles of the existing Constitution would not warrant a conclusion that the existing Constitution continues or survives.[58]

Golak Nath and *Keshavananda Baharati* were decided at a time when Indira Gandhi, then Prime Minister of India, was "using emergency powers, jailing opposition leaders, curtailing property rights of the elites and moving the country in a sharply socialist direction."[59] Hence the public complacency with the activist zeal of the Indian Supreme Court was understandable. The

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54 Ibid, at ¶ 594 (Justice A.T.M. Afzal).

55 J. U. Talukder and M. J. A. Chowdhury, *Determining the Province of Judicial Review: A Re-evaluation of Basic Structure of the Constitution of Bangladesh*, 2(1) Metropolitan University Journal 161, 163 (2008).

56 Golak Nath v. State of Punjab, AIR 1967 SC 1643.

57 Supra 49, at 4-5.

58 Ibid, at 8.

59 E. Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 Columbia Journal of Law and Social Problems 251, 269 (1996).

parliament however reacted sharply and appointed a parliamentary committee to study the new doctrine. It came out with a proposal for an amendment in the constitution that would confirm that parliament's amendment power was unrestrained.[60] Though the 42nd amendment to that affect was passed, it was later held unconstitutional by the Supreme Court using the same basic structure doctrine.[61]

The Supreme Court of Bangladesh adopted the doctrine in 1989 in *Anwar Hossain Chowdhury*.[62] It invalidated the Eighth Amendment of 1988 to the constitution which sought to create some out-of-capital circuit benches of the High Court Division of the Supreme Court. The Court was of the opinion that unitary character of the republic was a basic structure of the constitution. Therefore, there could be only one Supreme Court with its sole site in the capital. Popular reaction to the decision was massively favorable.[63] The invalidation of a constitutional amendment passed by a military led government, was seen by all as a victory for judicial independence and activism. Problematic aspects of the doctrine, however, did not get much attention.[64] Unlike the Indian legislature, the parliament of Bangladesh did not question the

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60 Supra 49, at 14-18.

61 Minerva Mills Ltd. and Ors. v. Union of India and Ors, AIR 1980 SC 1789.

62 Though *Anwar Hossain Chowdhury* is hailed as the first case to endorse Basic Structure doctrine, the doctrine was either argued by the parties or invoked by the court, implicitly though, in at least three cases previous cases. First one was in undivided Pakistan - Muhammad Abdul Haque v Fazlul Quader Chowdhury (1963) 15 DLR (Dacca) 355 (Dhaka High Court of undivided Pakistan) and Fazlul Quader Chowdhury v Muhammad Abdul Haque (1966) 18 DLR SC 69 (Federal Supreme Court of undivided Pakistan). In *Fazlul Quader Chowdhury*, Justice Mahboob Morshed of Dacca High Court denounced (and the Pakistan Supreme Court agreed with him) one of President Ayub Khan's orders allowing the ministers to retain their seat in Pakistani legislative assembly. Justice Morshed's view was that the allowing the ministers to be the members of the legislature would violate the separation of power structure of a presidential system – a 'major change' in the constitution (See R. Braibanti, *Pakistan: Constitutional Issues in 1964*, 5:2 Asian Survey, 79, 82-83 (1965)). The second case in the series was AKM Fazlul Hoque v. State 26 DLR (1974) (SC) 11 (Federal Supreme Court of undivided Pakistan). In this case the Provisional Constitutional Order (1972) of newly independent Bangladesh was challenged on the ground that the president's law-making power under the 1971 Proclamation of Independence did not extend to the introduction of 'fundamental changes' in the constitutional system. The argument was not however accepted as the Court found the war time Proclamation of Independence granting unlimited legislative authority to the President – the power to "do all other things that may be necessary to give to the people of Bangladesh orderly and just Government" (See M. Kamal, *Bangladesh Constitution: Trends and Issues*, 9 (1st ed., 1994)). The third case implicating a possible basic structure argument was Hamidul Huq Chowdhury v. Bangladesh, (1981) 33 DLR (HCD) 381 (High Court Division of Bangladesh Supreme Court). It was a challenge to the fourth amendment of 1975 which abolished the multi-party democracy and introduced a one-party system instead. Given the subsequent endorsement of some of its features (e.g., presidentialism) and nullification of some other (e.g., one party system) by the fifth amendment of 1979, the court refused to declare the amendment unconstitutional. It however passed an observation that the fourth amendment destroyed some 'basic and essential features' of 1972 constitution and the parliament's authority in doing so was doubtful (See R. Hoque, *Implicit Unamendability in South-Asia: The Core of the case for the Basic Structure Doctrine*, 3 (Special Issue) Indian Journal of Constitutional and Administrative Law 23, 28 (2018)).

63 K. Ahmed, *The Supreme Court's Power of Judicial Review in Bangladesh: A Critical Evaluation* presented in the Seminar titled 'Celebrate the 40th Anniversary of the Constitution of Bangladesh' on 20 October 2012. available at: http://dx.doi.org/10.2139/ssrn.2595364, accessed on 26/06/2020.

64 For a critical evaluation of the Anwar Hossain Chowdhury v. Bangladesh see R. Chowdhury, *The Doctrine of Basic Structure in Bangladesh: From Calfpath to Matryoshka Dolls*, 14 Bangladesh Journal of Law 33 (2014); S. Khan, *Leviathan and the Supreme Court: An Essay on the 'Basic Structure' Doctrine*, 2 Stamford Journal of Law, 89 (2011).

limitedness of its amendment power. The government reprinted the constitution by omitting the invalidated eighth amendment. Though the opportune moments of political adversity helped both *Keshavananda Bharati* and *Anwar Hossain* become a "*cause celebre*"[65] in the constitutional jurisprudence of both the countries, confusions started appearing soon.

First and foremost, the judiciary got an apparently unlimited authority in defining basic structure which makes the concept an unpredictable and consequently bad. It further provided judges with leeway to introduce their own ideological leanings into constitutional discourse. The fluidity of basic structures allowed the judges to pick and choose provisions that appeared 'basic' and strike down whatever did not.

The Indian Supreme Court in a 1988 case held that the secular character of the Union of India was a basic structure. The case, *S.R. Bommai v. Union of India*[66] concerned the dismissal by the central government of four state governments led by the *Hinduism* based Bharatiya Janata Party (BJP). The action was taken in the context of a communal riot following the destruction of a fourteenth century mosque by the *Hindu* extremists. The Supreme Court upheld the action of the central government on the ground of the BJP led state governments' failure to uphold the 'secular' character of the Republic. Now, if someone in India approaches the Court today for dismissal of a particular government on account of its capitalist policies that contradicts 'socialism' which happens to be another fundamental principle of the Indian constitution[67], the Court might end up in something completely inconsumable. Capitalism and market economy being firmly rooted in Indian economy, a socialism-oriented verdict may be doctrinally right but politically futile.

The Pakistani Supreme Court also made a mess with the doctrine in two of its early 'Pervez Musharraf' cases: *Zafar Ali Shah v. General Parvez Musharraf*[68] and *Wasim Sajjad v. Pakistan*.[69] These related to challenges to the unconstitutional usurpation of power and whimsical changes in the constitution by the then military chief General Parvez Musharraf. Pakistan has a checkered history of military forces capturing the state power and the court succumbing to the dictators. However, the judiciary has been known to reverse this position once the military rulers are toppled and political government is established.[70] Though the Pakistani Supreme Court did not endorse the

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65 Zakir Hossain and Imtiaz Omar, *Coup d' etat, constitution and legal continuity*, The Daily Star, 8 (Dhaka, 17/09/2005 and 24/09/2005).

66 S.R. Bonmai v. Union of India, (1994) 3 SCC 1.

67 St. Xavier College v. State of Gujarat, AIR 1974 SC 1389. See M. Nelson, *Indian Basic Structure Jurisprudence in the Islamic Republic of Pakistan: Reconfiguring the Constitutional Politics of Religion*, 13 Asian Journal of Comparative Law, 333 (2018).

68 Zafar Ali Shah v. General Parvez Musharraf 2000 PLD SC 869.

69 Wasim Sajjad v. Pakistan 2001 PLD SC 233.

70 State v. Dosso, 11 DLR (SC) 1 (validating President Eskander Mirza's martial law proclamation in 1956); Asma Jilani v. The Government of Punjab, PLD 1972 SC 139 (Invalidating President Yahya Khan's capture of power after his fall in 1972); Begum Nusrat Bhutto v. Chief of Army Staff, 1977 PLD (SC) 657; Malik Ghulam Jilani v. Province of Punjab, PLD 1979 Lahore 564 (validating President Zia Ul Hoque's martial law and presidency in mid 1970s); Zafar Ali Shah v. General Parvez Musharraf, PLD 2000 SC 869 (validating President Parvez Musharraf's usurpation of power in 1999); Pakistan Lawyer's Forum v. Federation of Pakistan, PLD 2005 SC 71 (validating the seventeenth amendment and his continuance in both presidency and military chief); Iftikhar Muhammad Chaudhry v. Pervez Musharraf, PLD 2010 SC 61 (invalidating Pervez Musharraf's suspension and harassment of Chief Justice Iftikhar Muhammad in March 2007 in the face widespread public protest); Tikka Iqbal Muhammad Khan v. General Pervez Musharraf, PLD 2008 SC 178 (again validating General Musharraf's second declaration of emergency and suspension of constitution

basic structure doctrine as such till then, *Zafar Ali Shah* case upheld the usurpation of power by General Parvez Musharraf and his martial law proclamation order, subject to a condition that Pervez Musharraf could not change the 'salient features' of Pakistan constitution.[71] It appears as if democratic governance was not a salient feature of Pakistani constitution in 1999. Could anything more 'basic' remain while an unconstitutional usurper made the constitution itself subservient to his sweet will?

Later, the Pakistani Supreme Court bypassed an invitation to endorse basic structure doctrine in *Nadeem Ahmed v. Federation of Pakistan.*[72] In the 2015 decision of *District Bar Association, Rawalpindi v Federation of Pakistan,* [73] it acknowledged some implied limits on amendment power, noting that "certain features mentioned in the Preamble of the Constitution cannot be abrogated".[74] However, it ended up in cherry picking its judicial review power vis-a-vis parliamentary amendment of the constitution[75] and shredding other basics like the peoples' fundamental right to fair trial vis-a-vis the martial law courts.[76]

Examples of cherry picking 'basic structures' are also recorded in Bangladesh. The fifth and sixteenth amendment judgments of the Supreme Court of Bangladesh, so far as they relate to appointment and removal of supreme court judges, are criticized for aggrandizing the independence of judiciary over the principle of separation of power and judicial accountability.[77] Similarly, the thirteenth amendment judgement is criticized for pitching the 'non-representative' character of caretaker governmental irreconcilably against the people's right to free fair and election on the first place.[78]

Secondly, constitution being a document of fundamental importance, it appears extremely difficult, if not impossible, to classify several provisions of the constitution as basic and some others as peripheral. Hence the list of 'basic structures' is an ever-expanding one. In *Anwar*

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in November 2007 under a servile Chief Justice Hameed Dogar); lastly, Sindh High Court Bar Association v. Federation of Pakistan, PLD 2009 SC 879 (decided after the demise of Musharraf presidency, invalidating his November 2007 emergency proclamation and condemning the military coup). For details see T. A. Qureshi, *State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan*, 35(2) North Carolina Journal of International Law and Commercial Regulation, 485 (2009).

71 S. A. Ghias, *Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf*, 35(4) Law & Social Inquiry, 985 (2010).

72 Nadeem Ahmad v. Federation of Pakistan, PLD 2010 SC 1165 avoided declaring the eighteenth amendment (judicial appointment commission and parliamentary appointment committee) unconstitutional on the basis of basic structure of independence of judiciary. The amendment was rather was referred to the legislature with some recommendations. Parliament later passed the 19th amendment (See S. Ijaz, *Judicial Appointments in Pakistan: Coming Full Circle*, 1(1) LUMS Law Journal, 86 (2014)).

73 District Bar Association, Rawalpindi v. Federation of Pakistan PLD 2015 SC 401.

74 Ibid, at 867

75 Ibid, at 858.

76 For a case comment on *District Bar Association Rawalpindi* see W. Mir, *Saying Not What the Constitution is … But What It Should be: Comment on the Judgment on the 18th and 21st Amendments to the Constitution*, 2 LUMS Law Journal 64, 69 (2015).

77 M J. A. Chowdhury and N. K. Saha, *Advocate Asaduzzaman Siddiqui v. Bangladesh: Bangladesh's Dilemma with Judges' Impeachment,* 3 Comparative Constitutional and Administrative Law Quarterly, 7 (2017).

78 R. Hoque, *Judicialization of Politics in Bangladesh: Pragmatism, Legitimacy and Consequences*, 261, 287 in *Unstable Constitutionalism* (Mark V. Tushnet and Madhav Khosla, 2015).

Hossain Chowdhury itself, Justice Shahabuddin Ahmed gave a list of seven basic features.[79] Justice Mohammad Habibur Rahman added another one to the list.[80] Justice Badrul Haider Chowdhury felt that there were twenty-one 'unique features' in the constitution out of which 'some' were basic.[81]

Thirdly, the judicially imported immutability in the constitution was apparently against the intention of the framers of Indian, Bangladeshi and Pakistani constitutions. The framers intended an amendable constitution by all means. Nothing more than a qualified majority in the floor was required by the 1950 constitution of India,[82] 1972 constitution of Bangladesh[83] and 1973 constitution of Pakistan.[84] No substantive limits whatever was placed on the amendment power of parliament.[85] Moreover, it was never explained how the court could assume for itself a constituent power which was not vested in it. In *District Bar Association, Rawalpindi v Federation of Pakistan* The Pakistani supreme court quite extra-ordinarily held that the judicial review of constitutional amendment is an inherent privilege of the judiciary but at the same time simply overlooked the fact that the Pakistani constitution clearly bars such judicial review on "on *any* ground whatsoever".[86]

Fourthly, the institutional consideration is even more problematic. The doctrine of 'basic structure' arguably enables the judiciary to have a final say over the parliamentary amendment power. In one sense, the Bangladeshi version of the doctrine was more extreme than the Indian one. While the Indian constitution could be amended by the parliament alone, the Bangladeshi constitution, on the other hand, could be amended either by parliament acting in itself or by parliament acting in conjunction with popular referendum. The Supreme Court of Bangladesh in 1989 did not note this distinctive process of amendment. It simply held that basic structure could not be destroyed. Had the Eighth Amendment been passed through a popular referendum, could the Supreme Court have placed itself above the people – the ultimate sovereign in the Republic and declare the amendment invalid?

Fifthly, it is questionable as to whether a mere likelihood of parliamentary abuse of amendment power may serve as an excuse for introducing judicial review.[87] The Sixteenth Amendment judgement in Bangladesh shows that the Supreme Court may, in fact, venture this path and invalidate an amendment on a suspicion that judges may be harassed by the parliamentarians sitting over their appointment and removal.[88] What happens, if the judiciary, as

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79 Supra 19, at ¶ 416 (Justice Shahabuddin Ahmed enlisted Supremacy of the Constitution as the solemn expression of the people, Democracy, Republican Government, Unitary State, Separation of Powers, Independence of the Judiciary and Fundamental Rights as basic structures of Bangladesh constitution).

80 Ibid, at ¶ 496 (Justice Habibur Rahman added The Preamble to the list).

81 Ibid, at ¶ 292.

82 Art. 368, the Constitution of India requires either simple majority or special majority in the floor of the central parliament (Lok Sabha) or special majority in the central parliament coupled with ratification in required number of state legislatures.

83 Art. 142, Bangladesh Constitution requires a two-thirds majority in the floor of the House.

84 Art. 239, Pakistan Constitution vested a shared responsibility on each House of the central legislature (subject to two-thirds majority requirement in both the houses) and the provincial legislatures (simple majority or two-thirds majority in suitable cases).

85 Supra 49, at 14-15.

86 Pakistan Constitution, Art. 239(5).

87 Supra 59, at 267-68.

88 Supra 77.

an institution, transgresses its limit and starts abusing the power?[89] How could the legislature and populace check counter-majoritarian body acting in unison? Vulnerabilities of democracies like Bangladesh to their own representatives[90] does not seem to offer a strong justification of 'basic structure' in the way it is preached by their judiciaries. These and other considerations have led even some pro-basic structure scholars to concede the 'minimal legitimacy'[91] of the doctrine and argue for scarce and limited application of the doctrine.[92]

5. A Place for Constitutional Referendum

As the discussion so far suggests, the doctrine of basic structure also faces charges of both judicial usurpation and uncertainty over its contents. This part will show that the unamendability doctrine also is full of uncertainties on the reach and breadth of the legislature's amendment power. Both the devices, unless very delicately articulated, are likely to clog the inter-generational adaptability of constitutions. It is argued that installation of a referendum requirement within the amendment process might answer many of the concerns involved with these doctrines.

5.1 The Institutional Issues

As suggested earlier, the eternity clause (article 7B) of Bangladesh offers almost no solution to institutional question posed above. It purports to entrench the core constitutional provisions by taking them away from the clutch of a super majority in parliament. Yet it leaves open a scope for the judiciary to meddle in the process. In contrast, the referendum provision under the Fifth Amendment of 1979 had answers to these institutional conflicts. A similar system of combined legislative and popular action works well in Japan where a two-thirds majority of the House of Representatives and House of Councilors of the National Diet initiates and passes an amendment. It is then submitted to the people in a referendum or special election. People ratify or reject the amendment by a simple majority.[93] Bangladesh's Fifth Amendment mechanism involved a similar process except that the referendum would apply only to the amendments of selected provisions.

This provision, if kept in operation, would have solved the institutional questions in two different ways. First, the four corners of the legislature's amendment power would have been drawn more clearly. Second, much of the democratic deficit of judicial review would have been addressed. For the reasons discussed below, mere parliamentary amendments effected through two-thirds majority could be judicially reviewed, while amendments effected through the referendum may be put outside the ambit of judicial review.

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89 R. Stith, *Unconstitutional Constitutional Amendments: The extraordinary power of Nepal's Supreme Court*, 11 American University Journal of International Law and Policy, 47, 73 (1996).

90 Anuranjan Sethi, *Basic Structure Doctrine: Some Reflections*, 41 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=835165, last seen on 10/07/2020.

91 S. Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine*, xxxii (1st ed., 2009).

92 R. Dixon and D. Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13(3) International Journal of Constitutional Law, 606, 623 (2015).

93 Supra 59, at 257.

5.2 Demarcation of the Amendment Power

As discussed earlier, much of the debate on the nature and limits of amendment power has been narrowed down by Roznai who accepted it as a constituent power but conditioned it with a theory of delegation and a principal-agent relationship between the original constituent power *i.e.*, the revolutionary authority or the people and the secondary constituent power, *i.e.*, the parliament. Roznai's amendment theories may be shaped into a Triple Floor Model of constituent and constituted power shown in the diagram below:

Now, if we consider the structure of the constitution of Bangladesh, it appears that the constitution recognizes a meta-distinction between constituent power of amendment and constituted power of legislation. It treats the secondary or derivative constituent power of amendment differently from the plenary legislative power. The power of amendment in Article 142 is not articulated in the Part V of the constitution that deals with composition, plenary legislative powers (Article 65) and functions of the Parliament. Thus, the distinction between constituent and constituted power being agreed upon, we get the lowest floor and the upper floor demarcated.

Now, Article 142 uncoupled with a referendum clause will remain uninformed of the possible distinction between the top two floors of the proposed Triple Floor Model. If the amendment power is sweepingly claimed as a constituent power, as the government lawyers in the eighth amendment case did,[94] the ground reality would become unexplainable. The Supreme Court of Bangladesh has time and again refused the claim of sole and pervasive 'constituent' amendment power. Like *Anwar Hossain Chowdhury*, a series of precedents have held that the amendment power is 'inherently' limited.[95] The Supreme Court did not offer any explanation as to how and from where these inherent limitations flow. All it offered is a justification based on the constitutional supremacy clause.[96] According to this view, unlimited power of amendment would

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94 Supra 19, at ¶¶ 553-54 (argument by Barrister M. Amir Ul Islam and Barrister Syed Ishtiaq Ahmed).

95 Ibid, at ¶ 603 (Justice A.T.M. Afzal).

96 Article 7 of the Constitution of Bangladesh embodies the constitutional supremacy clause in following terms: '(1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution.(2) This Constitution is, as the solemn

turn Bangladesh into a British like parliamentary supremacy which was never contemplated by the framers. It appears that such a literal reading of the constitutional supremacy clause would suppress the exercise of the peoples' sovereign authority in deciding the nation's political course. Constitutions are supreme because they reflect the will of the people. If the popular will cannot be injected in the constitution through amendments, since there is no other way of doing this, the Supreme Court and its basic structure doctrine would stand between the people and a change they are looking for. This would lead the Republic towards a judicial supremacy or 'government by the court'.[97] Definitely, that was also was not contemplated by the framers.

Given the situation, if we introduce a referendum in the amendment process, amendments get separated into two distinct classes. Amendments of fundamental or basic principles made through referendum would directly involve the original or primary constituent authority – the people.[98] Referendum-based amendments would possess the necessary authority to make all sorts of fundamental changes in the constitution including permanent entrenchments of basic structures. On the other hand, amendments made through a two-thirds majority would mark a secondary or derivative constituent power and be subject to the principal-client relationship with the original constituent power. Now, the upper two ceilings of the Triple Floor Model become clear.

5.3 Boundaries of Judicial Review

Institutional issues with judicial reviews are more complex. While judicial review of laws passed by parliament is marked as a precursor of constitutional supremacy, judicial review of the constitutional amendments is seen with both "reverence and suspicion".[99] The typical arguments disputing the judicial review of constitutional amendment are twofold. First, judiciary should protect the Constitution as it is and check that ordinary laws do not violate the Constitution as it is. It should not define how the Constitution should or should not be.[100] If the court ventures this path, it would amount to a judicial supremacy or government by the court. Secondly, constitutional amendments being matters of political choice, the judiciary should remain disinterested in them.[101]

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expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution and other law shall, to the extent of the inconsistency, be void.'

97 Imtiaz Omar and Zakir Hossain, *Constitutionalism, parliamentary supremacy, and judicial review: A short rejoinder to Hoque*, The Daily Star 12 (Dhaka, 26/11/2005).

98 While commenting on Article 7B of Bangladesh constitution, Roaznai argues: "Limitations upon the delegated secondary constituent power can solely be imposed by the higher authority from which it is derived – the primary constituent power. Unamendable amendments may lose their validity when they face a conflicting valid norm that was formulated by the same authority. Accordingly, provisions created by the amendment power could subsequently be amended by the amendment power itself. Because both amendments are issued by a similar hierarchical authority, their conflict is governed by the principle of *lex posterior derogat priori*. Therefore, I claimed that an 'implicit limit' exists, according to which a constitutional amendment cannot establish its own unamendability. Accordingly, two possible solutions exist: attempting to get the approval of the the people " to such a constitutional amendment, for example, through a national referendum (after its formal enactment in Parliament), which would provide a legitimation elevator to such unamendability in a "constitutional moment". Alternatively, and perhaps more practically, such an amendment can simply be regarded not as constitutive but as declarative of an already limited legal power" (See *Interview of Yaniv Roznai*, 2 Indian Journal of Constitutional and Administrative Law, 129, 132-3 (2018)).

99 M. Kamal, *Bangladesh Constitution: Trends and Issues*, 139 (1st ed., 1994).

100 Supra 55, at 161, 165.

101 Supra 97.

The Supreme Court, however, has rejected these arguments. In the context of the volatility of Bangladesh politics, it is argued that the notion of constitutional supremacy requires its extra-ordinary entrenchment. The requirement of two thirds majority is just one of the many other ways to ensure this. The judiciary as a "guardian of the constitution"[102] should have a say in this process of constitutional amendment. Some believe that this argument is extremely relevant in the intensely politicized environment of Bangladesh. Once elected, it has been argued that the parliamentarians do not acquire a blanket power, to do everything they wish until they are de-elected in the next election.[103] Just as Ely seeks judicial intervention to rescue the "discreet and insular minority" that is often systematically sidelined by the political process,[104] the Supreme Court of Bangladesh here seems to have a role in rescuing the constitution from viciousness of politics. Absent judicial involvement in the process, the constitution runs the risk of being a plaything in the hands of the party ridden parliament leading towards an unguarded parliamentary supremacy.[105]

The next argument for judicial review of constitutional amendments seeks to refute the political question argument. Amendments do have political motives. However, is this also not the case with almost every law passed by the parliament? Does law-making by a particular ruling party not reflect its political ideology and convenience? So, if political question is not evoked to refute judicial review of ordinary laws, why should it be preached for the constitutional amendments? With a concept of limited government in place, none can transgress this limit by hiding under a cloak of political question.[106] The Appellate Division of the Bangladesh Supreme Court had earlier rejected the political question doctrine straightforwardly when it remarked:

> There is no magic in the phrase 'political question'. While maintaining judicial restraint the Court is the ultimate arbiter in deciding whether it is appropriate in a particular case to take upon itself the task of undertaking a pronouncement on an issue which may be dubbed as a political question.[107]

In fact, judicial review of constitutional amendments has already become an accepted norm in Bangladesh. The Supreme Court has adjudged the validity of the Fifth Amendment in *Bangladesh Italian Marble Works Ltd*,[108] Seventh Amendment in *Siddik Ahmed Chowdhury v. Bangladesh*,[109] part of the Eighth Amendment in *Anwar Hossain Chowdhury v. Bangladesh*,[110]

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102 Secretary of Ministry of Finance v. Masder Hossain, (2000) 20 BLD (AD) 104 (Appellate Division of Bangladesh Supreme Court).

103 R. Hoque, *On coup d' etat, constitutionalism, and the need to break the subtle bondage with alien legal thought: A reply to Omar and Hossain*, The Daily Star 11 (Dhaka, 29/10/2005).

104 G. R. Stone, *Constitutional Law*, 524 (2nd ed., 2009), quoting J. H. Ely, *Democracy and Distrust* (1st ed., 1980).

105 Ibid at 525.

106 M. Islam, *Constitutional Law of Bangladesh*, 456 (4th ed., 2012).

107 Special Reference No 1 of 1995 (1995) 47 DLR (AD) 111 (Appellate Division of Bangladesh Supreme Court).

108 Bangladesh Italian Marble Works Ltd v. Bangladesh 14 (2006) BLT (Spl) (HCD) 1 (High Court Division of Bangladesh Supreme Court) and Khandker Delwar v. Bangladesh Italian MW 15 MLR (AD) 1 (Appellate Division of Bangladesh Supreme Court).

109 Writ Petition No 696 of 2010 before the High Court Division of Bangladesh Supreme Court. Full Text of the Judgment available at www.supremecourt.gov.bd, last seen on 19/04/2018.

110 Supra 19, at ¶ 78.

and Thirteenth Amendment in *Abdul Mannan Khan v Bangladesh*,[111] Tenth Amendment in *Dr. Ahmed Hossain v. Bangladesh*[112] and *Fazle Rabbi v. Election Commission*,[113] part of the Fourteenth Amendment in *Farida Akter v. Bangladesh*[114] and lastly, the Sixteenth Amendment in *Bangladesh and Others v Advocate Asaduzzaman Sidddiqui*.[115] Though most of these judicial review decisions have been hailed, the courts in Fifth, Seventh, Thirteenth and Sixteenth amendment cases, involving fundamental and policy changes in the constitution, have been accused of adventurously meddling into the political process.[116]

While a constitutional supremacy-based argument is offered and taken for granted in all of the above exercises, the charges of democratic deficit and counter-majoritarian usurpation by the court never received serious attention from the Court. Judicial non-consideration of an issue, however, should not mean that it is dead. The democratic deficit in judicial decision-making is bound to be an issue of constant relevance and an initiative towards perpetual entrenchment of constitutional provisions cannot ignore the phenomenon. While advocates of Basic Structure like Krishnaswamy invite us to consider the 'overall moral, political and sociological legitimacy'[117] of basic structure doctrine - which he claims the doctrine has attained over the years of Indian legal history,[118] he concedes that 'sociological legitimacy' of the doctrine would flow from its potential to enhance "the degree of political participation in radical expansive constitutional change by requiring a higher level of deliberative decision-making to support such constitutional amendment".[119] It appears that, in a clientelist political system like Bangladesh,[120] a brute parliamentary majority is less likely to deliberate an amendment more rigorously in anticipation of possible judicial nullification of such amendment. Instead, the Triple Floor Model proposed in this paper would be more within the socio-political reality here. Amendments made by referendum, being the exercise of original constituent power, stay above judicial review.[121] On the other hand, amendments made by parliament being the exercise of derivative constituent power, the courts

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111 Abdul Mannan Khan v. Bangladesh 64 DLR (AD)(2012) 1007 (Appellate Division of Bangladesh Supreme Court); Mashihur Rahman v. Bangladesh (1997) 17 BLD (HCD) 55 (High Court Division of Bangladesh Supreme Court) and M Saleem Ullah v. Bangladesh (2005) 57 DLR (HCD) 171 (High Court Division of Bangladesh Supreme Court).

112 Dr. Ahmed Hossain v. Bangladesh (1992) 44 DLR (AD) 109 (Appellate Division of Bangladesh Supreme Court).

113 Fazle Rabbi v. Election Commission (1992) 44 DLR (HCD) 14 (High Court Division of Bangladesh Supreme Court).

114 Farida Akter v. Bangladesh (2006) 11 MLR (AD) 237 (Appellate Division of Bangladesh Supreme Court).

115 Bangladesh and others v. Advocate Asaduzzaman Siddqui (2017) CLR (Spl) 1 (High Court Division of Bangladesh Supreme Court); Advocate Asaduzzaman Siddiqui v. Bangladesh and others, 2012, 41 CLC (HCD) (High Court Division of Bangladesh Supreme Court).

116 R. Hoque, *Can the Court Invalidate an Original Provision of the Constitution?*, 2(2) University of Asia Pacific Journal of Law & Policy, 13 (2016).

117 Supra 91, at 165.

118 Ibid, at 223-227.

119 Ibid, at 228.

120 M. M. Islam, *The Toxic Politics of Bangladesh: A Bipolar Competitive Neopatrimonial State?*, 21(2) Asian Journal of Political Science, 148-168 (2013).

121 Supra 34, at 175. "[T]he more an amendment process contains inclusive and deliberative democratic mechanisms, the more closely it resembles 'the people's' primary constituent power. Congruently, since primary constituent power is by its nature unlimited, popular secondary powers, which present a fuller – while still limited – presence of the people's sovereignty, should be allowed greater latitude when it comes to constitutional changes."

must see whether or not the principal-agent trusteeship has been respected. This formulation would explain and justify the previous judgments of Bangladesh Supreme Court except the ones on the Fifth, Seventh and Thirteenth amendments.

5.4 Delimiting the breadth of 'basic structures'

While there is no denying of the existence of certain fundamental and basic principles in the constitution, a certainty about the list of such basics will solve the problem of ambiguity. The legislature and judiciary may also be relieved of the duty of second guessing the basics.[122] The textual entrenchment of specific basic structures through referendum would possess "more institutional legitimacy than would be the case for implicit substantive constraints announced by the judiciary."[123] As mentioned in Part II of this paper, the Fifteenth Amendment of 2011 provides a textually settled list of basic structures but keeps it open by inserting a vague reference to other basic structures at the end. Revival of the referendum clause in Article 142 and omission of the broad eternity clause in article 7B would solve the dilemma significantly.

5.5 Elimination of the 'Dead Hand'

Installation of the system of referendum would serve another important purpose. Both the entrenched unamendable rule and a judicially articulated doctrine of basic structure have a common problem of dead hand and perpetual fixation. Constitutions then become a "stale and hollow"[124] instrument. Now, if the task of enlisting the basic structures is left to the political opinion of the people expressed through referendum and not to the legislators and judges, it can probably offer a better and practical solution to the dead hand problem. The initial entrenchment list shall not foreclose the list of basics. If any new basic structure emerges in future, a legislative amendment along with a popular referendum shall add that new provision in the entrenchment list. Any basic structure provision becoming redundant later on will likewise be deleted from the list.

While politics remain the most influential arbiter of public opinion, the characteristic restlessness of Bangladeshi politics remains a concern here as well. The public opinion may be tailored through populist regimes to propose and successfully pass frequent referendums. The common-sense trend of politics, however, does not lend much support for the proposition that fundamental changes in the constitution through popular amendment will be as frequent as the regular changes effected through parliamentary two-thirds majority-based amendment process.[125]

6. Problems of Referendum

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122 P.B. Mehta, *India's Living Constitution: Ideas, Practices and Controversies*, 105, 110 in *The inner conflict of constitutionalism: Judicial review and the Basic Structure* (E. Sridharan, 1st ed., 2002).

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

124 Shamima Sultana Seema v. Bangladesh (2005) 57 DLR (HCD) 201 (High Court Division of the Supreme Court of Bangladesh), ¶ 108 (Justice A.B.M. Khairul Huq).

125 In this regard, Professor Bruce Ackerman's thesis on 'fundamental moments of constitutional change' in the U.S. context might offer an interesting insight to the proposition that overwhelming popular consensus is infrequent and hard to come by (See B. Ackerman, *We the People: Volume 1: Foundations*, 40-50 (1st ed., 1991)).

Referendum being pressed as viable alternative in the eternity clause and basic structure dilemma, the question for consideration now is - to what extent and how would referendums deliver in terms of democratic legitimacy? While referendum has been a very useful contemporary tool of deliberative democracy in modern day constitutional processes, there are questions about the quality of the process followed, the actual deliberation that follows it, and level of understanding the citizens have on the critical constitutional issues involved. The referendum system that was devised for Bangladesh in 1979 was a post legislative formality where a question would be put to universal suffrage as to whether people would agree to the parliamentary amendment made or not. Roznai has rightly termed it as "a mere acclamation – a soccer-stadium democracy".[126]

Understandably, the aye or nay type participation that was introduced by the military rulers in 1979 was a manifestation of the acclamatory constitution-making technique followed by the military dictators of erstwhile undivided Pakistan.[127] While the referendum clause in the fifth amendment was about constitutional changes, Bangladesh had experienced two referenda arranged for the purpose of legitimizing the military coup of General Ziaur Rahman (1977) and General Ershad (1985). With exceptionally high voter turn-out, above 85 percent in both cases, those opposition less referenda resulted in more than 90 percent support for the military rulers.[128] It has been a lived experience of the Asian continent that referendum is used by the rogue rulers as a manipulative tool more convenient than a competitive election.[129] Keeping Bangladesh's consistent problem with electioneering in mind,[130] any proposal for electoral participation of the people in the democratic process must be well articulated beyond a one-time participation over a craftily devised referendum question. A meaningful participation of the people would therefore require an engagement before, during and after the formal amendment process.[131] In this scenario, the 1979 formula of post legislative referendum could be seen as one of the, and not the only, important instrument of public participation in the process. For the amendment of constitutionally entrenched basic structures, such as those agreed upon in the twelfth amendment or even some found in the current article 7B eternity clause, special mechanisms like calling of constitutional convention may supplement the post legislative referendum method. Recommendation for introduction of such supplementary devices within the amendment process may be justified in terms of Albert's "escalating structure" framework whereby the deadlocks of codified unamendability is sought to be overcome by ensuring an escalated rigidity in the amendment process.[132]

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126 *Interview of Yaniv Roznai*, 2 Indian Journal of Constitutional and Administrative Law, 129, 133 (2018).

127 M Jashim Ali Chowdhury, *Pre-emptive(!) hartal: Ill-legal if not illegal*, The Daily Star 12 (Dhaka, 29/05/2010).

128 T. B. Smith, *Referendum Politics in Asia*, 26(7) Asian Survey, 793 (1986).

129 M. Rashiduzzaman, *Bangladesh in 1977: Dilemmas of the Military Rulers,* 18(2) Asian Survey, 126 (1978); S. Ali and S. Kamaluddin, *Bangladesh: A Margin of Surprise*, 128 Far Eastern Economic Review, 20 (1985).

130 N. Ahmed, *Non-Party Caretaker Governments and Parliamentary Elections in Bangladesh: Panacea or Pandora's Box?*; 11(1) South Asian Survey, 49 (2004); A. S. Hoque and M. A. Hakim, *Elections in Bangladesh: Tools of Legitimacy,* 19(4) Asian Affairs: An American Review, 248 (1993); M. J. Ali Chowdhury, *Elections in Democratic Bangladesh,* in *Unstable Constitutionalism*, 192 (Mark V. Tushnet and Madhav Khosla, 2015).

131 Y. Roznai, *"We the People", "Oui, the People", and the Collective Body: Perceptions of Constituent Power*, 295-316 in *Comparative Constitutional Theory Research Handbooks in Comparative Constitutional Law series* (Gary Jacobsohn and Miguel Schor, 1st ed, 2018).

132 Supra 6, at 201-202.

Within the referendum process itself, Tierney has argued for introduction of plural modes and multiple stages of deliberation within the referendum process so that referendums do not fail to foster meaningful participation.[133] Tierney seeks to see the referendum as comprising a series of three stages (initiation, issue framing and deliberation generated at the campaign stage) and envisaging two theatres for deliberation (micro level and macro level).

A 'deliberative referendum' could be deliberated at the micro level (expert level) by checking the populist reasoning through considered reasoning of constitutional experts and jurists in bodies specially designated towards that end.[134] A special consultative authority given to the Swiss Federal Assembly in initiating referendum might be a good example to look at.[135] Again at the macro level, the desired level of deliberation might be achieved through rules like fixation of a minimum lowest percentage of voter turn-out in the referendum beyond the support of merely 50 per cent plus 1 of those who turn out to vote.[136]

As regards the generation of informed and enlightened public deliberation, there might be several ways like vesting the electoral responsibility in an independent commission, introducing public information campaigns for better informing the voters about the options and issues at hand. The 2011 experiment of online public drafting of the referendum question, whereby an earlier draft of the referendum question was put in an online consultation process, in Iceland might provide a good example to look at.[137]

7. Conclusion

The constitutional supremacy clause of the Constitution of Bangladesh is, in essence, a popular sovereignty clause. It makes the Constitution a "solemn expression of the will of the people" and "the supreme law of the Republic." It is therefore quite logical that all the sovereign organs - Parliamentary, Judicial or Executive – must give way to the supremacy of the people. The Referendum-based entrenchment suggested in this paper is better served to give expression to the will of the people. There is a need to guard constitutional coherence from both the day to day scratches of political rivalry, hence judicial review of constitutional amendments cannot be rejected outright. Again, the need for inter-generational adaptability of the foundational pillars of constitution requires that both codified and interpretative unamendability to be discouraged. The system of referendum has the potential of achieving all these together. While the referendum has some problems of its own, it is suggested that it might be accompanied by other devices, such as within a broader 'escalating structure' of amendment process.

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133 S. Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation*, 185-225 (1st ed., 2012).

134 Ibid, at 226-259.

135 Art. 139(5), the Swiss Constitution (As per the art. 139(5), the Federal Assembly has the power to react to any popular initiative for referendum by issuing a recommendation or a counter proposal over the issue at hand).

136 Supra 133, at 260-283.

137 H. L. Kong, *Deliberative Constitutional Amendments*, 41 Queen's Law Journal,105, 142 (2015).

Interestingly, support for the referendum-based amendment process can be found in *Anwar Hossain Chowdhury* itself. Mohmmad Habibur Rahman J, one of the occurring judges in the case, stood in a marked contrast to the other judges.[138] He agreed in the result of the case but offered a unique reasoning. He did not claim a permanent immutability for the so-called basic structures but rather asserted that the Parliament cannot *'by itself* impair or destroy the fundamental aim of our society.'[139] This impliedly leads us to the system of referendum. After all, 'fixation' of constitutional norms will not guarantee its ultimate survival unless it accommodates a breathing space for public opinion and sentiment and intergenerational adaptability. Quite opposite to the popular truism, a constitution's survival has been empirically linked more to its flexibility than to its rigidity.[140]

138 Supra 99, at 109.
139 Supra 19, at ¶ 496.
140 Z. Elkins, T. Ginsburg and J. Melton, *The Endurance of National Constitutions*, 99-103 (1st ed., 2009).