Israel Law Review (2023), **56**, 263–287
doi:10.1017/S0021223721000297

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

Revisiting Judicial Review of Constitutional Amendments in Bangladesh: Article 7B, the *Asaduzzaman* Case, and the Fall of the Basic Structure Doctrine

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(First published online 16 January 2023)

Abstract

In 1989, the Supreme Court of Bangladesh, in the *Anwar Hossain Chowdhury* case, first embraced implicit unamendability or interpretative unamendability of the Constitution – that is, the basic structure doctrine. Since then, the basic structure or the basic feature doctrine has been recognised as the theoretical premise underpinning judicial review of constitutional amendments in Bangladesh. In 2011, the Parliament adopted Article 7B of the Constitution, which introduced explicit or codified unamendability of a substantial number of provisions of the Constitution. This article argues that with the adoption of Article 7B, the basic structure doctrine has lost its relevance as the most important normative tool for determining the validity of future constitutional amendments, and this was confirmed in the *Asaduzzaman* case, in which the parliamentary mechanism for the removal of Supreme Court judges was held unconstitutional on the basis of Article 7B of the Constitution. It is also argued that the reasoning provided in the majority opinion of the *Asaduzzaman* case is not entirely flawless.

Keywords: Bangladesh Constitution; *Asaduzzaman* case; Article 7B; basic structure doctrine; constitutional unamendability

1. Setting the context

In *Government of Bangladesh and Others v Advocate Asaduzzaman Siddiqui and Others*[1] (the *Asaduzzaman* case), the Appellate Division of the Bangladesh

[1] Civil Appeal No 06 of 2017, [2019] 71 DLR (AD) 52 (*Asaduzzaman* case).

Supreme Court[2] put the final nail in the coffin of the sixteenth constitutional amendment and reinstated the Supreme Judicial Council as the mechanism for the removal of judges of the Supreme Court. All seven judges of the Appellate Division of the Supreme Court unanimously dismissed the appeal and upheld the judgment of the High Court Division that the sixteenth constitutional amendment was repugnant to the Constitution.

To put the background facts of the case into perspective, the Constitution – as originally adopted in 1972 – provided for a parliamentary mechanism for the removal of Supreme Court judges.[3] In 1975, the power to remove such judges was vested in the President by the fourth constitutional amendment. The Supreme Judicial Council was first incorporated in the Constitution as the mechanism for the removal of judges by the Second Martial Law Proclamation (Tenth Amendment) Order (1977). In 1979, the Constitution (Fifth Amendment) Act 1979 was adopted to ratify and reaffirm, among others, the Second Martial Law Proclamation as valid. In 1989, the Appellate Division of the Supreme Court in *Anwar Hossain Chowdhury and Others v Bangladesh* (the *Anwar Hossain Chowdhury* case) broke new ground for judicial review of constitutional amendments and declared the Constitution (Eighth Amendment) Act 1988 to be unconstitutional for violating the basic structures of the Constitution.[4] In 2010, the Constitution (Fifth Amendment) Act 1979 was held to be repugnant to the Constitution by the High Court Division of the Supreme Court in *Bangladesh Italian Marble Works Ltd v Bangladesh*.[5] The Appellate Division, however, provisionally condoned the provisions relating to the Supreme Judicial Council until 31 December 2012 in order to enable the Parliament to make necessary amendments to the Constitution to avoid any legal ramifications.[6] Shortly afterwards, the Parliament by the Constitution (Fifteenth Amendment) Act 2011 reinstated, inter alia, the Supreme Judicial Council.[7] By the same amendment, the Parliament also adopted Article 7B, which explicitly prohibits amendments to a large number of provisions of the Constitution.[8] In 2014, the Parliament adopted the Constitution (Sixteenth Amendment) Act 2014, which reinstated the parliamentary mechanism for removal of Supreme Court judges in place of the Supreme Judicial Council.[9] In the same year, Mr Asaduzzaman Siddiqui, a member of the Bar, filed a lawsuit challenging the validity of the aforesaid

[2] The Supreme Court of Bangladesh is made up of two Divisions: the High Court Division and the Appellate Division.

[3] The original Article 96(2) of the Bangladesh Constitution provided for the assent of a minimum of two-thirds of the total members of Parliament for removing any Supreme Court judge on the grounds of proved misbehaviour or incapacity.

[4] *Anwar Hossain Chowdhury and Others v Bangladesh* [1989] BLD (SPL) 1 (*Anwar Hossain Chowdhury* case).

[5] *Bangladesh Italian Marble Works Ltd v Bangladesh* [2010] 62 DLR (HCD) 70.

[6] *Bangladesh v Bangladesh Italian Marble Works Ltd and Others*, Civil Review Petition Nos. 17–18 of 2011, Judgment delivered on 29 March 2011.

[7] The Constitution (Fifteenth Amendment) Act 2011, s 31.

[8] ibid s 7.

[9] The Constitution (Sixteenth Amendment) Act 2014, s 2.

https://doi.org/10.1017/S0021223721000297 Published online by Cambridge University Press

constitutional amendment. The High Court Division of the Supreme Court struck down the impugned sixteenth constitutional amendment with the effect of restoring the Supreme Judicial Council.[10] A review petition filed by the government of Bangladesh as a result of the dismissal of the appeal against the judgment of the High Court Division is currently pending before the Appellate Division.[11]

Against this backdrop, this article provides an analysis of how the basic structure doctrine, with the enactment of Article 7B and its subsequent application in the *Asaduzzaman* case, has lost relevance as the most important normative tool for determining the validity of post-Article 7B amendments to the Constitution. The article begins with a brief taxonomical overview of the forms and jurisdictional basis of judicial review of constitutional amendments in Bangladesh. It then provides a theoretical exposition of the basic structure doctrine as enunciated in the *Anwar Hossain Chowdhury* case. In this case the Supreme Court laid down the substantive compatibility test as a normative corollary of the unamendability of the basic structures to determine the validity of constitutional amendments. The next section discusses how the newly adopted Article 7B, by incorporating explicit or codified constitutional unamendability in the Constitution, has dispensed with the need for the substantive compatibility test. A critical analysis of the majority opinion in the *Asaduzzaman* case will follow, especially to show that while the Court relies on Article 7B in holding the sixteenth constitutional amendment ultra vires, its reasoning in this respect is not entirely flawless. Lastly, the article observes that the normative effect of Article 7B is unlikely to dissipate even if the Appellate Division modifies or overturns its decision rendered in the *Asaduzzaman* case in the pending review proceedings.

2. Judicial review of constitutional amendment in Bangladesh

The Constitution of Bangladesh, as originally adopted in 1972, was silent on the issues of unamendability as well as judicial review of constitutional amendments. These issues were first raised in the *Anwar Hossain Chowdhury* case – which ultimately resulted in the judicial recognition of implicit unamendability or interpretative unamendability of the Constitution – that is, the basic structure doctrine.[12] Later, in 2011, constitutional unamendability was explicitly codified through the incorporation of Article 7B in the Constitution.[13] While this article theoretically endorses judicial review of amendments as a

[10] [2016] 8 ALR (HCD) 161, Writ Petition No. 9989 of 2014, Judgment delivered on 5 May 2016.

[11] Civil Review Petition No. 751 of 2017.

[12] On implicit unamendability and the basic structure doctrine, see Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017) 39–49. On interpretative unamendability and the basic structure doctrine, see Richard Albert, *Constitutional Amendments: Making, Breaking and Changing Constitutions* (Oxford University Press 2019) 149–53.

[13] According to Albert, codified unamendability refers to a rule that is formally entrenched in the text of a Constitution: Albert (n 12) 139–41. Roznai referred to codified unamendability as explicit unamendability: Roznai (n 12) 15–18.

https://doi.org/10.1017/S0021223721000297 Published online by Cambridge University Press

normative corollary of constitutional unamendability,[14] it nevertheless holds that the successful vindication for exercising such power in any jurisdiction depends on the factors specific to the legal system concerned.[15] In view of the above, this section aims to explain the modalities of judicial review of constitutional amendments in Bangladesh.

There are two fundamental issues to begin with: (i) on what grounds a constitutional amendment can be held repugnant, and (ii) how the court should justify the exercise of its judicial power to hold a constitutional amendment repugnant.[16] To put it another way, on what method of scrutiny the Court should rely for deciding the validity of a constitutional amendment, and how the Court should account for its jurisdiction in deciding the validity of such an amendment. In Bangladesh, a constitutional amendment can be adjudged repugnant on at least three grounds: (i) lack of legislative competence, (ii) lack of procedural compliance, and (iii) lack of substantive compatibility.[17] In the current constitutional normative framework of Bangladesh, lack of legislative competence refers to a situation when any legislative body or authority brings in a constitutional amendment despite having no power to do so. Examples would include the promulgation of an ordinance by the President seeking to amend the Constitution.[18] Similarly, adopting a constitutional amendment bill by a simple majority of the members of Parliament will exemplify a lack of procedural compliance. Lack of substantive compatibility can be said to occur if any constitutional amendment stands so much at odds with the constitutional normative framework or introduces so many changes that even any magnitude of harmonious interpretation cannot rub down their mutual incongruences.[19]

[14] There is a vast amount of legal literature critical of judicial enforcement of constitutional unamendability on grounds such as separation of powers, counter-majoritarian effect, democratic legitimacy, constituent/derivative power, political question, supremacy of the judiciary. To obtain an overview of the criticism and responses thereto, see Roznai (n 12) 186–96; see further, Richard Albert, 'Counterconstitutionalism' (2008) 31(1) *Dalhousie Law Journal* 1; Richard Albert, 'Constitutional Handcuffs' (2010) 42 *Arizona State Law Review* 663; Yaniv Roznai, 'Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability' in Richard Albert and Bertil Emrah Oder (eds), *An Unconstitutional Constitution? Unamendability in Constitutional Democracies* (Springer 2018) 29; David Landau, 'Abusive Constitutionalism' (2013) 47 *UC Davis Law Review* 189; Rosalind Dixon and David Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13 *International Journal of Constitutional Law* 606.

[15] Uddin and Nabi made a comparative analysis of jurisdiction-specific factors contributing to recognition or non-recognition of judicial review of constitutional amendments in the United States, India and Bangladesh: Mohammad Moin Uddin and Rakiba Nabi, 'Judicial Review of Constitutional Amendments in Light of the "Political Question" Doctrine: A Comparative Study of the Jurisprudence of Supreme Courts of Bangladesh, India and the United States' (2016) 58 *Journal of the Indian Law Institute* 313, 328–34.

[16] Kawser Ahmed, 'The Supreme Court's Power of Judicial Review in Bangladesh: A Critical Evaluation', 1 April 2015, http://dx.doi.org/10.2139/ssrn.2595364.

[17] Kawser Ahmed, 'Review of a Constitutional Amendment: What Does Legally Matter?', *The Daily Star* (Dhaka), 29 May 2018, 14.

[18] ibid.

[19] ibid.

https://doi.org/10.1017/S0021223721000297 Published online by Cambridge University Press

The aforementioned grounds came into discussion before the Court in several cases concerning the validity of constitutional amendments. For example, the Supreme Court annulled the fifth[20] and the seventh[21] constitutional amendments on the grounds of lack of legislative competence and procedural compliance. Similarly, the matter in issue in the cases concerning the validity of the eighth[22] and the thirteenth[23] constitutional amendments was mainly substantive compatibility. Among all, determining the substantive compatibility of a constitutional amendment vis-à-vis the Constitution appears to be a relatively more difficult task for the reason that a constitutional amendment is also a part of the Constitution. Therefore, determining the validity of a constitutional amendment vis-à-vis the Constitution necessitates a special and convincing tool. The Supreme Court resolved this issue in the *Anwar Hossain Chowdhury* case[24] by laying down a test for determining substantive compatibility of a constitutional amendment vis-à-vis the Constitution; this became famously known as 'the basic feature doctrine' or 'the basic structure doctrine'.[25]

In many respects, the *Anwar Hossain Chowdhury* case can be designated the most important case in the history of constitutionalism in Bangladesh. One obvious reason is that it marked the beginning of the judicial review of constitutional amendments in Bangladesh. Besides, the court, in the *Anwar Hossain Chowdhury* case, explained the legal basis of its jurisdiction to review the validity of a constitutional amendment.[26] In particular, Justice Chowdhury observed that the authority to decide the constitutionality of any laws, including a constitutional amendment, lies with the Supreme Court by virtue of Article 7(2) of the Constitution.[27] Justice Chowdhury's reasoning was later reaffirmed in subsequent cases in which the Supreme Court declared a number of constitutional amendments to be invalid.[28]

It should be mentioned that the majority judges in the *Anwar Hossain Chowdhury* case drew heavily on jurisprudence from Indian jurisdiction[29] in

[20] *Bangladesh Italian Marble Works Ltd* (n 5).

[21] *Siddique Ahmed v Bangladesh* [2011] 63 DLR (HCD) 565.

[22] *Anwar Hossain Chowdhury* case (n 4).

[23] *Abdul Mannan Khan v Bangladesh* [2012] 64 DLR (AD) 169 (*Abdul Mannan* case).

[24] *Anwar Hossain Chowdhury* case (n 4).

[25] Ridwanul Hoque, 'The Judicialization of Politics in Bangladesh: Pragmatism, Legitimacy, and Consequences' in Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015) 261, 278–79.

[26] Kawser Ahmed, 'Misreading or Leapfrogging? SC's Power to Review Constitutional Amendment', *The Daily Star* (Dhaka), 22 August 2017, 12.

[27] *Anwar Hossain Chowdhury* case (n 4) 85 para 150.

[28] *Bangladesh Italian Marble Works* (n 5) 113–14 para 135; *Siddique Ahmed* (n 21) 612 paras 242–43; *Abdul Mannan* case (n 23) 257 paras 614–15; *Asaduzzaman* case (n 1) 86–87 para 77.

[29] *IC Golaknath and Others v State of Punjab and Another* [1967] AIR 1643, [1967] SCR (2) 762; *Kesavananda Bharati Sripadagalvaru and Others v State of Kerala and Another* [1973] 4 SCC 225, [1973] AIR SC 1461. See further Nafiz Ahmed, 'The Intrinsically Uncertain Doctrine of Basic Structure' (2022) 14 *Washington University Jurisprudence Review* 307, 318–25; Muhammad Ekramul Haque, 'The Concept of "Basic Structure": A Constitutional Perspective from Bangladesh' (2005) 16(2) *The Dhaka University Studies – Part F* 123, 125–33. Some scholars, notably from India, have recently studied the influence, if any, of Dworkin's scholarship on the basic structure doctrine;

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moulding their ideation of the basic structure doctrine in the Bangladesh context.[30] Pertinently, Dr Kamal Hossain, in his submission, pointed out that the idea of unamendability was first pleaded before the then Dacca High Court in *Muhammad Abdul Haque v Fazlul Quader Chowdhury*.[31] It was later affirmed in *Fazlul Quader Chowdhury v Muhammad Abdul Haque*[32] by the Pakistan Supreme Court.[33] In the *Anwar Hossain Chowdhury* case, at least one judge observed that the Constitution of Bangladesh also did contain some tangible hints on the basis of which an indigenous basic structure doctrine could be viably developed and substantiated to accommodate judicial review of constitutional amendments.[34] For instance, Article 26 of the original Constitution (as adopted in 1972) unqualifiedly provided that laws that were inconsistent with the fundamental rights would become void and no laws would be made that were inconsistent with such rights. By the second constitutional amendment, a new clause was inserted into Article 26 providing that the earlier two clauses (Article 26(1) and (2) of the same provision) would not apply to any constitutional amendment.[35] The later provision included in Article 26(3) implies that constitutional amendments are susceptible to judicial review and can be held repugnant for being inconsistent with the Constitution. A careful consideration of this new clause demonstrates that the legislators did not view constitutional amendments on a par with the Constitution itself and, for the same reason, they exempted constitutional amendments from judicial review in case they turned out to be inconsistent with the fundamental rights.[36] Justice Chowdhury clarified such position of law as follows:[37]

see, eg, Abhishek Sudhir, 'Discovering Dworkin in the Supreme Court of India: A Comparative Excursus' (2014) 7 *NUJS Law Review* 1; Upendra Baxi, '"A Known but an Indifferent Judge": Situating Ronald Dworkin in Contemporary Indian Jurisprudence' (2003) 1 *International Journal of Constitutional Law* 557.

[30] Roznai (n 12) 47.

[31] [1963] 15 DLR (Dacca) 355. Dr Kamal Hossain was the lead counsel for the appellant in the *Anwar Hossain Chowdhury* case; see Ridwanul Hoque, 'The Evolution of the Basic Structure Doctrine in Bangladesh: Reflections on Dr. Kamal Hossain's Unique Contribution' (2021) 10 *The Indian Journal of Constitutional Law* 1, 5–9, https://ijcl.nalsar.ac.in/wp-content/uploads/2021/11/Hoque_IJCL_volume10_2021.pdf.

[32] [1963] PLD (SC) 486.

[33] Ridwanul Hoque, 'Implicit Unamendability in South-Asia: The Core of the Case for the Basic Structure Doctrine' (2018) 3 *Indian Journal of Constitutional & Administrative Law* 23, 25–26. Haque (n 29) 123–25.

[34] Ahmed (n 17).

[35] Article 26 of the Bangladesh Constitution provides: '(1) All existing law inconsistent with the provisions of this Part shall, to the extent of such inconsistency, become void on the commencement of this Constitution. (2) The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void. (3) *Nothing in this article shall apply to any amendment of this Constitution made under article 142*' (emphasis added).

[36] Ahmed (n 17). See Rokeya Chowdhury, 'The Doctrine of Basic Structure in Bangladesh: From "Calfpath" to *Matryoshka* Dolls' (2014) 14 (1&2) *Bangladesh Journal of Law* 43, 64–65.

[37] *Anwar Hossain Chowdhury* case (n 4) 88–89 para 166. Contrariwise, Justice Ahmed and Justice Rahman argued that a constitutional amendment could not be labelled as 'law' after incorporation of Article 26(3) in the Constitution: *Anwar Hossain Chowdhury* case (n 4) 142, 167, paras 339, 421–23. We will discuss this point in Section 3.

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> The constituent power is here with the people of Bangladesh and Article 142(1A) expressly recognises this fact. If Article 26 and Article 7 are read together the position will be clear. The exclusiduary [*sic*] provision of the kind incorporated in Article 26 by amendment has not been incorporated in Article 7. That shows that the 'law' in Article 7 is conclusively intended to include an amending law. An amending law becomes part of the Constitution but an amending law cannot be valid if it is inconsistent with the Constitution.

3. The *Anwar Hossain Chowdhury* case: Rolling out the basic structure doctrine

During the Second Martial Law regime in Bangladesh (1982–86), the High Court Division of the Supreme Court was fragmented into seven permanent benches in 1982 via several martial law regulations. Among these seven benches, six were situated outside the capital. This diffusion was later formalised by amending original Article 100 of the Constitution by the Constitution (Eighth Amendment) Act 1988.[38] In consequence, seven permanent benches were established in place of one unified High Court Division of the Supreme Court. Each bench had separate territorial jurisdiction and, thus, all pending cases were transferred to the relevant regional benches.[39] The Commissioner of Affidavit in Dhaka refused to allow one individual, Anwar Hossain Chowdhury, to affirm a counter affidavit on the grounds that the writ petition concerned was transferred to the permanent bench in Sylhet Division according to the Supreme Court (High Court Division) Establishment of the Permanent Benches Rules 1988, framed under the amended Article 100 of the Constitution.[40]

Against this backdrop, two writ petitions were filed challenging the Constitution (Eighth Amendment) Act 1988 and the Rules made thereunder as ultra vires.[41] The main ground for the challenge was that the unified High Court Division of the Supreme Court, with plenary judicial power over the republic, was a basic structure of the Constitution, which could not be altered or damaged by any constitutional amendment.[42] The Dhaka High Court Division bench summarily rejected the petition. Leave was granted by the Appellate Division to file appeals against the judgment of the High Court Division.[43]

While disposing of the appeal, although the majority judges of the Appellate Division clearly relied on the basic structure doctrine to determine the validity of the impugned amendment to Article 100 of the Constitution, they did not

[38] Mustafa Kamal, *Bangladesh Constitutions: Trends and Issues* (University of Dhaka 1994, reprint 2001) 92–94.

[39] Hoque (n 31) 10.

[40] *Anwar Hossain Chowdhury* case (n 4) 46 para 2.

[41] Writ Petition Nos 1252 and 1176 of 1988, Judgment delivered on 15 August 1988: ibid para 1.

[42] Kamal (n 38) 95.

[43] *Anwar Hossain Chowdhury* case (n 4) 46 para 5.

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seem much inclined to provide any detailed theoretical exposition of the doctrine.[44] Even then, it is still possible to work out the conceptual premises on which the doctrine rests.[45] The first premise on which the judges relied is that the constitutional normative framework rests on certain basic structures, which cannot be amended in the exercise of the amending power of the legislature.[46] The second premise is that an amendment to the Constitution is valid subject to retention of the Constitution's basic structures, and can be declared void if adjudged inconsistent therewith. According to Justice Ahmed: '[Constitutional] [a]mendment is subject to the retention of the basic structures. The Court therefore has power to undo an amendment if it transgresses its limit and alters a basic structure of the Constitution'.[47]

The above propositions, if dovetailed, give rise to the observation that amendments to the Constitution are permissible in so far as they are not inconsistent with its basic structures.[48] As may be discerned, the Parliament's power to amend the Constitution of Bangladesh in this way becomes implicitly limited even in the absence of any explicit eternity clause.[49] This line of reasoning also allowed the Court to find a way to strike a fine balance between the original intent of the framers of the Constitution and the normative development through judicial decisions.[50]

Essentially, the preceding discussion begs the question of what are the intrinsic attributes of the basic structures of the Constitution. The majority judges in the *Anwar Hossain Chowdhury* case provided rather an analogical exposition of their conception of the basic structure doctrine. For example, Justice Ahmed compared the basic structures of the Constitution with the

[44] ibid 111 paras 255–57 (Justice Chowdhury); ibid 151, 156–57 paras 361, 378 (Justice Ahmed); ibid 171, 179 paras 443, 483 (Justice Rahman). The Appellate Division allowed the appeal by a 3:1 decision.

[45] Kawser Ahmed, 'What is Actually the Basic Feature Doctrine?', *The Daily Star* (Dhaka), 5 June 2018, 15.

[46] '[S]ome of the aforesaid features are the basic features of the Constitution and they are not amenable by the amending power of the Parliament': *Anwar Hossain Chowdhury* case (n 4) 111 para 255 (Justice Chowdhury); 'These are structural pillars [basic structures] of the Constitution and they stand beyond any change by amendatory process': ibid 156 para 377 (Justice Ahmed).

[47] ibid 157 para 378.

[48] 'An amending law becomes part of the Constitution, but an amending law cannot be valid if it is inconsistent with the Constitution': ibid 88 para 166 (Justice Chowdhury); 'There is however a substantial difference between Constitution and its amendment. Before the amendment becomes a part of the Constitution it shall have to pass through some test, because it is not enacted by the people through a Constituent Assembly': ibid 143 para 341 (Justice Ahmed).

[49] Roznai (n 12) 49. In the opinion of Aharon Barak, the basic structure doctrine signifies an implied eternity clause that protects the basic structure of the Constitution: Aharon Barak, 'Unconstitutional Constitutional Amendments' (2011) 44 *Israel Law Review* 321, 336–38. On a related note, Wright thinks that the idea of implied substantive limitations on constitutional amendments can be found in natural law thinking: R George Wright, 'Could a Constitutional Amendment Be Unconstitutional?' (1991) 22 *Loyola University Chicago Law Journal* 741, 756.

[50] Kamal Hossain, Chairman of the Constitution Drafting Committee, categorically stated before the Constituent Assembly that any provisions of the Constitution, from Articles 1 to 153, as well as those of the schedules, are amendable: Kawser Ahmed (ed), *Proceedings of the Constituent Assembly of Bangladesh: Debates on the Making of the Constitution*, vol 2 (Pencil Publications 2022) 243.

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pillars of a building,[51] while Justice Chowdhury referred to the basic structures as the unalterable fabric of the Constitution.[52] To be precise, the majority judges viewed the basic structures as the core ideological notions of the Constitution.[53] The basic structures are basic in the sense that any untoward changes to these notions will result in a breakdown of the constitutional normative system. Teleologically, the majority judges thought that the doctrine would serve as an effective measure against frequent amendments to the Constitution for the sake of party interest but at the cost of democracy.[54] The judges noted that amendments should be intended either for removing defects or making improvements to the Constitution.[55] This observation signifies a tacit indication of willingness on the part of the judges to take up 'quality' as a matter in issue in deciding the compatibility of a constitutional amendment vis-à-vis the Constitution in appropriate circumstances.[56]

At this point, a question arises as to how the Constitution and the basic structures are related to each other: whether the Constitution needs to be aligned with the basic structures, or the basic structures are embedded in the Constitution. The majority judges in the *Anwar Hossain Chowdhury* case adopted the latter approach.[57] Arguably, the reason is if the Constitution is required to be aligned with the basic structures, it then follows that the Constitution and the basic structures are two separate and asymmetrically related concepts. In accordance with this paradigm, the Constitution assumes a deuterocanonical status; therefore, any constitutional provision, be it original or an amendment, if it does not ostensibly appear to be in conformity with the basic structures, will entail a compatibility issue (this approach would even warrant scrutiny of original constitutional provisions of the Constitution if they appear to be inconsistent with the basic structures).[58] Alternatively, if the basic structures are regarded as embedded in the Constitution, it means that they are part and parcel of the Constitution. Accordingly, any inconsistency with the basic structures will eventually come to be regarded as inconsistency with the Constitution. According to this paradigm, only constitutional amendments could be held invalid in the event that they fail to be consistent with the basic structures.[59] The majority judges in the *Anwar Hossain Chowdhury* case well understood the problem associated with the first paradigm because if the Constitution is regarded as a follow-on from the basic structures, not only does it lose its autochthonous

[51] *Anwar Hossain Chowdhury* case (n 4) 155–56 para 376.

[52] ibid paras 152, 166, 195.

[53] Ahmed (n 45). Ridwanul Hoque termed the basic structures as the fundamental cores of the Constitution and/or the fundamental constitutional cores: Ridwanul Hoque, 'Eternal Provisions in the Constitution of Bangladesh: A Constitution Once and for All' in Albert and Oder (n 14) 195, 197–200.

[54] *Anwar Hossain Chowdhury* case (n 4) 156 para 377.

[55] ibid paras 192, 334–36, 378.

[56] Ahmed (n 45).

[57] *Anwar Hossain Chowdhury* case (n 4) 109–11, 155–56 paras 254, 376.

[58] Ahmed (n 45).

[59] ibid.

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status[60] but it also ceases to be the supreme law of the country. The Supreme Court is then logically stripped of its authority to invalidate any inconsistent constitutional amendment for the reason that the Court owes to the Constitution for its existence and is mandated to uphold the Constitution, and nothing else.[61] The foregoing analysis attests that the basic structures of the Bangladesh Constitution were thought to have been derived from the Constitution itself and not from any supra-constitutional or universal values or principles.[62] Until now, this position has remained unchanged in Bangladesh.

The next issue down the line is how one can identify the basic structures of the Constitution. The majority judges in the *Anwar Hossain Chowdhury* case did not identify the basic structures with the text of any provisions of the Constitution. Rather, they were of the view that the basic structures should be inferred from the text of the Constitution. In the words of Justice Ahmed:[63]

> There is no dispute that the Constitution stands on certain fundamental principles which are its structural pillars and if these pillars are demolished or damaged the whole constitutional edifice will fall down. It is by construing the constitutional provisions that these pillars are to be identified.

For example, it is not the text of Article 1, but the notion of the unitary republic as embodied in Article 1 that is a basic structure.[64] This understanding will have to be reached by construing the text of Article 1 in the context of the entirety of the Constitution.[65] Accordingly, the text of Article 1 can be amended; however, the notion that Bangladesh is a unitary republic cannot be changed.[66] It should be noted that as the basic structures are to be inferred from the text of the Constitution, it is necessary that they be understood, explained and applied in exactly the same way as they have been set out in the Constitution. This observation makes sense at least for the simple reason that the text of an amendment would naturally be linguistically inconsistent with the constitutional provision that it seeks to repeal, replace or modify.[67] The test therefore, first of all, is not about how much the text of an impugned amendment is linguistically inconsistent with any existing constitutional provision; rather, how inconsistent is the change caused by such an amendment

[60] *Anwar Hossain Chowdhury* case (n 4) 59–60 para 51.

[61] Ahmed (n 45).

[62] In this respect I agree with Roznai's view that the supra-constitutional limitations are better described by explicit or implicit limitations within the Constitution itself: Yaniv Roznai, 'The Theory and Practice of "Supra-Constitutional" Limits on Constitutional Amendments' (2013) 62 *International and Comparative Law Quarterly* 557.

[63] *Anwar Hossain Chowdhury* case (n 4) 155–56 para 376.

[64] Article 1 of the Bangladesh Constitution provides: 'Bangladesh is a unitary, independent, sovereign Republic to be known as the People's Republic of Bangladesh'.

[65] Barak (n 49) 337.

[66] Ahmed (n 45).

[67] ibid.

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with any given core ideological notion of the Constitution – that is to say, a basic structure.[68] In his opinion in the *Anwar Hossain Chowdhury* case, Justice Ahmed recognised democracy, republican government, unitary state, separation of powers, independence of the judiciary, fundamental rights and so on as the basic structures, and held that the Constitution cannot be amended to make the republic a monarchy, to replace democracy with oligarchy, or to abolish the judiciary, although there is no express bar to that effect in the Constitution.[69] In a similar vein, Justice Chowdhury argued that the Constitution had made Parliament the repository of legislative power and the Parliament cannot amend the Constitution to deprive itself thereof.[70] Thus, the court's task is to find out to what extent any basic structure of the Constitution has been infringed by the change introduced by an amendment under scrutiny. The advantage of this approach is that it even allows scrutiny of amendments by which brand new provisions are freshly incorporated in the Constitution without repealing, replacing or modifying any existing provisions thereof.[71]

In sum, the *Anwar Hossain Chowdhury* case recognises a twofold basic structure doctrine: (i) identification of the basic structures as the immutable ideological core of the Constitution, and (ii) judicial scrutiny to determine if any given constitutional amendment is substantively compatible with those basic structures. By analogy, the method of scrutiny as applied in the *Anwar Hossain Chowdhury* case could be compared with solving a jigsaw puzzle. If the entire Constitution were imagined as a jigsaw picture, each of its provisions could then be likened to a puzzle piece. In order to replace an existing puzzle piece, the new one should be able to fit into, and make up, the picture not only completely but also satisfactorily. If any new puzzle pieces are to be added, they should create no anomaly in the existing puzzle picture, but rather complement it.[72] For example, the majority judges in the *Anwar Hossain Chowdhury* case explained how the eighth amendment had created functional incongruities in giving effect to the other constitutional provisions. Justice Ahmed elaborately discussed how the impugned amendment of Article 100 had rendered the application of Article 102 (judicial review), Article 108 (Supreme Court as a court of record), Article 109 (superintendence and control over subordinate courts), Article 110 (transfer of cases from subordinate courts to the High Court Division), Article 111 (binding effect of Supreme Court judgments) either compromised or nugatory.[73] Justice Chowdhury also held a similar view that the impugned amendment was inconsistent with Articles 44, 94, 101 and

[68] ibid.

[69] *Anwar Hossain Chowdhury* case (n 4) 156 para 377.

[70] ibid 111 para 255.

[71] Ahmed (n 45).

[72] ibid. Jacobsohn sees a constitutional amendment as a new chapter in an ongoing constitutional story and proposes that how well it fits the existing narrative should be a factor in assessing its quality: Gary Jeffrey Jacobsohn, 'An Unconstitutional Constitution? A Comparative Perspective' (2006) 4 *International Journal of Constitutional Law* 460, 485.

[73] *Anwar Hossain Chowdhury* case (n 4) 155 para 375.

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102, and rendered Articles 108, 109, 110, 111 and 112 of the Constitution nugatory.[74]

An important point to note is that the majority judges in the *Anwar Hossain Chowdhury* case were divided in their opinions on the issue of the Supreme Court's jurisdiction to adjudge the validity of constitutional amendments. Relying on the definition of 'law' in Article 152(1), Justice Chowdhury argued that a constitutional amendment, being an Act of Parliament, should be designated as 'law' under the Constitution.[75] He went on to conclude that any amendment that would contravene the Constitution could be declared void by the judiciary based on Article 7(2),[76] the supremacy clause of the Constitution.[77] Justice Ahmed and Justice Rahman, however, differed from Justice Chowdhury on the question of whether a constitutional amendment should rank as a law. Justice Ahmed and Justice Rahman argued that a constitutional amendment did not qualify as a 'law' under Article 7 of the Constitution.[78] They appear to have espoused the implicit power of the Supreme Court to address the validity of constitutional amendments.[79] As mentioned above, Justice Chowdhury's line of reasoning was reaffirmed in later cases concerning the validity of constitutional amendments.[80] The jurisdiction of the Supreme Court is clearly stipulated in the Constitution;[81] therefore, any lack of explicit reasoning about the Court's jurisdictional basis to determine the validity of constitutional amendments will prompt criticism about the legitimacy of its decision. In addition, if the definition of 'Act of Parliament' in the General Clauses Act 1897 is taken into consideration, there remains no doubt that a constitutional amendment which is brought forth by an Act of Parliament and proposed as a Bill before the Parliament falls squarely under the definition of law.[82] Notably, both judges considered

[74] ibid 85, 111–12, paras 151, 258.

[75] Article 152(1) of the Bangladesh Constitution defines the term, 'law' as any Act, ordinance, order, rule, regulation, by-law, notification, or other legal instruments, and any custom or usage, having the force of law in Bangladesh.

[76] Article 7(2) provides that any law inconsistent with the Constitution shall be void to the extent of its inconsistency.

[77] *Anwar Hossain Chowdhury* case (n 4) 85 para 150.

[78] ibid 142–43 paras 340–42 (Justice Ahmed); 166–67 paras 416–23 (Justice Rahman).

[79] By way of example, Justice Ahmed mentioned that the Indian Supreme Court declared the supremacy of the Indian Constitution even if there was no provision therein like Article 7 of the Bangladesh Constitution: ibid para 340. Justice Rahman stated that the Court's power to decide the validity of constitutional amendments was a settled issue: ibid 165 para 409. Rostow expressed a similar view that the power of constitutional review is implicit in the conception of a written constitution: Eugene V Rostow, 'The Democratic Character of Judicial Review' (1952) 66 *Harvard Law Review* 193, 195.

[80] See sources at n 28.

[81] Constitution of the People's Republic of Bangladesh 1972, arts 101, 103.

[82] Article 152(2) of the Constitution provides that the General Clauses Act 1897 shall apply in relation to the Constitution as it applies in relation to an Act of Parliament. s 3(1A) of the General Clauses Act 1897 provides that an Act of Parliament shall mean an Act passed by Parliament and shall include any Act passed or made by any legislature or any person having authority to legislate under any Constitutional instrument in force in Bangladesh or any portion thereof.

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'constituent power' in the sense of the power to make the Constitution as belonging to the people[83] and did not treat a constitutional amendment at the same level as the Constitution.[84]

The resultant effect of the basic structure doctrine, as elucidated in the *Anwar Hossain Chowdhury* case, did not remain confined to the outcome of this case only. The Supreme Court later applied the jigsaw puzzle test again in the *Abdul Mannan* case.[85] The judges in this case recognised, among others, democracy and the parliamentary system of government as the basic structures of the Constitution, and discussed how the provisions related to caretaker government in one way or another negated these basic structures. In particular, Justice Sinha (he was not the Chief Justice at the time) explained in detail in this case how the impugned thirteenth amendment was both theoretically and functionally inconsistent with the basic structures of the Constitution. He reasoned that the system of caretaker government incorporated in Chapter IIA of Part IV of the Constitution, via the impugned thirteenth amendment, introduced a kind of presidential system of government as opposed to the parliamentary system of government, and created a few other functional anomalies.[86] The opinion of Justice Sinha in this case constitutes a perfect example of the application of the basic structure doctrine as illustrated in the *Anwar Hossain Chowdhury* case.

4. Article 7B: From basic structures to basic provisions

Article 7B was incorporated into the Bangladesh Constitution by the Constitution (Fifteenth Amendment) Act, 2011. It has introduced what scholars have termed explicit unamendability or codified unamendability into the Constitution of Bangladesh.[87] The English text of Article 7B reads as follows:

> **Basic provisions of the Constitution are not amendable**
> 7B. Notwithstanding anything contained in article 142 of the Constitution, the preamble, all articles of Part I, all articles of Part II, subject to the provisions of Part IXA all articles of Part III, and the provisions of articles relating to the basic structures of the Constitution including article 150 of Part XI shall not be amendable by way of insertion, modification, substitution, repeal or by any other means.

[83] 'The constituent power is here with the people of Bangladesh and Article 142(1A) expressly recognises this fact': *Anwar Hossain Chowdhury* case (n 4) 88 para 166 (Justice Chowdhury); 'As to the "constituent power", that is [the] power to make a Constitution, it belongs to [the] people alone. It is the original power': ibid 143 para 342 (Justice Ahmed).

[84] 'The laws amending the Constitution are lower than the Constitution and higher than the ordinary laws': ibid 96 para 195 (Justice Chowdhury); 'There is, however, a substantial difference between the Constitution and its amendment. Before the amendment becomes a part of the Constitution it shall have to pass through some test, because it is not enacted by the people through a Constituent Assembly': ibid 143 para 341 (Justice Ahmed).

[85] *Abdul Mannan* case (n 23)

[86] ibid paras 1223–31.

[87] See n 13 and texts related thereto.

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Article 7B provides that the Preamble, Parts I, II and III, Article 150, and all other provisions that relate to the basic structures of the Constitution are not amendable by way of insertion, modification, substitution, repeal or by any other means.[88] In short, Article 7B prohibits amendments to certain provisions protected thereunder as well as other provisions which constitute the basic structures of the Constitution.[89] Thus, Article 7B marks a significant departure from the basic structure doctrine as expounded in the *Anwar Hossain Chowdhury* case. As may be recalled, in this case the basic structures were understood as the ideological core of the Constitution and were not identified with the text thereof.[90] The majority judges, in this case, did not put an absolute prohibition on amending any provisions of the Constitution (unless they adversely affect the basic structures of the Constitution). The judges rather held that amendments to the constitutional provisions are permissible in so far as they do not impinge on the basic structures of the Constitution.[91] Conversely, Article 7B identifies certain provisions of the Constitution as the basic structures and provides that amendment to any of these protected provisions is absolutely prohibited in any manner whatsoever. To sum up, Article 7B has transposed the conception of basic structures from the sphere of core ideological notions to the text of the Constitution. The underlying approach of Article 7B, evident from its heading, can be rightly called 'the basic provision doctrine'.[92]

In the light of the foregoing, it is possible to assess the impact of Article 7B on the Constitution. Article 7B has severely affected the application of at least two provisions: Articles 142[93] and 7[94] of the Constitution.[95] For example, Article 7B has taken away much of the Parliament's power to amend the

[88] It should be noted that the English translation of Article 7B appears to be somewhat different from the Bengali text. The Bengali text of Article 7B suggests that Parts I, II and III and Article 150 of the Constitution are unamendable because they constitute basic structures. Article 153(3) of the Constitution provides that the Bengali text shall prevail over the English text in the event of any conflict between them.

[89] Hoque (n 53) 215–16.

[90] *Anwar Hossain Chowdhury* case (n 4) 155–56 para 376.

[91] Kawser Ahmed, 'Article 7B, Or the Death of the Basic Feature Doctrine?', *The Daily Star* (Dhaka), 12 June 2018, 12.

[92] ibid. For the opposite view see Roznai (n 12) 49.

[93] Article 142 of the Bangladesh Constitution provides: 'Notwithstanding anything contained in this Constitution – (a) any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of Parliament: Provided that – (i) no Bill for such amendment shall be allowed to proceed unless the long title thereof expressly states that it will amend a provision of the Constitution; (ii) no such Bill shall be presented to the President for assent unless it is passed by the votes of not less than two thirds of the total number of members of Parliament; (b) when a Bill passed as aforesaid is presented to the President for his assent he shall, within the period of seven days after the Bill is presented to him assent to the Bill, and if he fails so to do he shall be deemed to have assented to it on the expiration of that period'.

[94] Article 7(2) of the Bangladesh Constitution provides: 'This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void'.

[95] Kawser Ahmed, 'Revisiting the Majority Opinion in the 16th Amendment Case', *The Daily Star* (Dhaka), 25 September 2018, 12.

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Constitution. The relationship between Article 7 and Article 7B is more complex. Article 7 declares the Constitution to be the supreme law to the effect that any law (including a constitutional amendment), if inconsistent with the Constitution, will be void.[96] Thus, Article 7 contemplates that the Constitution in its entirety is the supreme law and all of its provisions have a prima facie co-equal status.[97] On the other hand, Article 7B, by making unamendable at least more than one-third of the provisions of the Constitution,[98] gives rise to the impression that certain constitutional provisions are superior to others. While Article 7 envisages a horizontally configured Constitution, Article 7B introduces hierarchy among the constitutional provisions.[99] The net result is that Article 7B has created severe barriers to constitutional progress.[100]

Furthermore, Article 7B has modified the application of Article 26(3) in a noticeable manner. Article 26(3) excepts constitutional amendments from judicial review, even if they are inconsistent with Part III of the Constitution. As Parts I, II and III can no longer be amended because of Article 7B, the application of Article 26(3), so far as it relates to these parts, has been reduced to redundancy.[101] As Article 26(3) itself is included in Part III, the same cannot be deleted or modified by way of amendment.[102] Adding to the complexity, Article 7B itself cannot be amended as it falls under Part I of the Constitution. Ironically, being a constitutional amendment, Article 7B shuts the door to subsequent amendments despite the fact that it does not make any ostensible claim of superiority over other constitutional amendments in any respect.[103]

More importantly, Article 7B has brought in significant changes in the method of scrutiny to determine the validity of future amendments to the Constitution. As discussed earlier, the basic structure doctrine laid down a substantive compatibility test for determining the validity of constitutional amendments.[104] Now, in view of Article 7B, any amendments to Parts I, II and III, Article 150, as well as provisions relating to the basic structures of the Constitution will simply be void for the reason that the Parliament will exceed its power if it passes such amendments.[105] As a result, the court's task has come down to ascertaining whether an amendment in question has

[96] The term 'any law' in Article 7 includes a constitutional amendment: *Anwar Hossain Chowdhury* case (n 4) 85, 87 paras 150, 166.

[97] Ahmed (n 95).

[98] Hoque (n 53) 215–16.

[99] Ahmed (n 95).

[100] Roznai is of the view that unamendability should permit a certain level of flexibility by allowing constitutional amendments to enable constitutional progress on the one hand, and shield the core features of the constitution from amendment on the other: Roznai (n 12) 218. See also Hoque (n 53) 219.

[101] Ahmed (n 91).

[102] ibid.

[103] ibid.

[104] Ahmed (n 17).

[105] Ahmed (n 91).

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in any way amended any of those constitutional provisions placed under the protection of Article 7B. Unlike the basic structure doctrine, Article 7B thus dispenses with the need for any substantive compatibility test of a constitutional amendment coming within its purview.[106] Although Article 7B makes as if to give legislative endorsement of the basic structure doctrine, it actually moderates, if it does not negate entirely, the significance of previous authorities like the *Anwar Hossain Chowdhury* case and the *Abdul Mannan* case.[107]

To sum up, the constitutionality of Article 7B can be seriously questioned for curbing drastically the Parliament's power to amend the Constitution. It flies in the face of the *Anwar Hossain Chowdhury* case, which endorsed, in general, the Parliament's power of amendment 'subject to the retention of the basic structures' of the Constitution. Borrowing Justice Chowdhury's reasoning, it can fairly be argued that the Constituent Assembly[108] in 1972 invested the Parliament with the power to amend the Constitution and the Parliament cannot amend the Constitution to deprive itself of it.[109] Moreover, Article 7B has changed the method of judicial scrutiny for determining the validity of future amendments to the constitutional provisions protected by itself. Since the Parliament has been made incapacitated to amend provisions protected by Article 7B, what used to be the substantive compatibility test of an amendment vis-à-vis the basic structures has now been reduced to an issue of legislative competence. We will see in the next section that the Appellate Division of the Supreme Court, as a result of Article 7B, applied a new method of scrutiny in place of the substantive compatibility test in determining the validity of the sixteenth constitutional amendment in the *Asaduzzaman* case. It will help to epitomise the argument that the substantive compatibility test that was laid down as a *sine qua non* of the basic structure doctrine in the *Anwar Hossain Chowdhury* case has lost its significance in determining the validity of the post-Article 7B amendments.

5. Revisiting the majority opinion in the *Asaduzzaman* case

Following the disposal of two civil petitions for leave to appeal[110] and, subsequently, two civil review petitions[111] – all arising from the *Bangladesh Italian Marble Works* case,[112] which declared the fifth constitutional amendment ultra vires the Constitution – a special committee consisting of 15 members was formed in July 2010 to amend the Constitution.[113] Of note, although the

[106] ibid.

[107] ibid.

[108] The Constituent Assembly was established under the Constituent Assembly of Bangladesh Order, 1972, for the purposes of adopting a Constitution for Bangladesh.

[109] *Anwar Hossain Chowdhury* case (n 4) 111 para 255.

[110] Civil Petition for Leave to Appeal Nos 1044 & 1045 of 2009, reported as *Khondker Delwar Hossain and Another v Bangladesh Italian Marble Works Ltd and Others* [2010] 62 DLR (AD) 298.

[111] *Bangladesh v Bangladesh Italian Marble Works Ltd and Others* (n 6).

[112] ibid.

[113] See Legislative and Parliamentary Affairs Division, *The Constitution of the People's Republic of Bangladesh* (2011) i–ii.

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provisions relating to the Supreme Judicial Council were covered by the fifth constitutional amendment, the special committee decided to recommend their retention without any modification.[114] Based on the committee's report, the Constitution (Fifteenth Amendment) Act 2011 was adopted on 30 June 2011 by a 291:1 vote[115] and published in the *Official Gazette* on 3 July 2011.[116] The Parliament again replaced the Supreme Judicial Council with the parliamentary mechanism for removal of Supreme Court judges by the Constitution (Sixteenth Amendment) Act 2014.[117] Shortly thereafter, nine advocates of the Supreme Court, affiliated with the non-governmental organisation Human Rights and Peace for Bangladesh (HRPB), filed a writ petition before the High Court Division of the Supreme Court challenging the constitutionality of the sixteenth amendment.[118] The High Court Division, by a majority of 2:1, declared the sixteenth amendment unconstitutional.[119] The Government of Bangladesh appealed against this judgment, which was dismissed by a 7:0 majority.[120] In the Appellate Division, the opinion of Chief Justice Sinha (CJ) became the mainspring of the Court's approach and received support from all his fellow judges. The rationale of the CJ's opinion (the majority opinion) is analysed critically below.

5.1. The rationale of the majority opinion

During hearings of the *Asaduzzaman* case before the Appellate Division, the government, among others, argued that the High Court Division erred in its majority view in declaring the sixteenth constitutional amendment ultra vires because:

- the Supreme Court, as one of the organs of the republic, ought to be made accountable to the people and the power to remove Supreme Court judges should be returned to the representatives of the people;
- the sixteenth amendment did not truncate the independence of the judiciary;
- the amendment did not violate Article 7B of the Constitution;
- the said amendment restored the original Article 96 and did not interfere with any basic structures of the Constitution.[121]

While formulating the majority opinion in the *Asaduzzaman* case, the CJ noted that the only issue he thought worth considering was whether the

[114] ibid para 121.
[115] ibid.
[116] *Asaduzzaman* case (n 1) 129–30 paras 122–23.
[117] *Gazette* notification published on 22 September 2014: ibid 194 para 376.
[118] M Jashim Ali Chowdhury and Nirmal Kumar Saha, '*Advocate Asaduzzaman Siddiqui v. Bangladesh*: Bangladesh's Dilemma with Judges' Impeachment' (2017) 3(3) *Comparative Constitutional Law and Administrative Law Quarterly* 7, 11.
[119] Writ Petition No 9989 of 2014 (n 10).
[120] Civil Appeal No 06 of 2017.
[121] *Asaduzzaman* case (n 1) 93 para 101.

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sixteenth constitutional amendment had violated any of the basic structures of the Constitution.[122] This observation gives rise to a few questions, for example: (i) with which basic structure(s) the CJ thought the sixteenth constitutional amendment was inconsistent; (ii) the method of scrutiny that the CJ applied for determining such inconsistencies; (iii) the role that Article 7B played in the outcome of this case, etc. In the majority opinion, the CJ addressed the aforesaid issues in only a handful of sentences, which are as follows:[123]

> In [the] [F]ifth Amendment case, this Court observed that the Supreme Judicial Council mechanism is a provision that reinforces the independence of judiciary. The Supreme Judicial Council is not only a part of the independence of judiciary but it ensures the independence of judiciary. In the constitution there was no definition of basic structure nor thus [did] article 7B identify the articles that contain provisions relating to the basic structure of the constitution. The judges removal mechanism by the Supreme Judicial Council has already been interpreted by this Court. *Therefore, when one reads article 7B and comes to the expression 'the provision of Articles relating to the basic structure of the Constitution ... shall not be amendable ...', it becomes inescapable that article 7B prohibits amendment of article 96 embodying the provisions of the Supreme Judicial Council. More so, by the Fifteenth Amendment this Supreme Judicial Council mechanism has been retained and by this Amendment, article 7B embodying the doctrine of 'basic structures' of the constitution as an express provision, also retained article 96 embodying the Supreme Judicial Council.*

To summarise the CJ's reasoning, the independence of the judiciary is a basic structure of the Constitution and Article 96, embodying the Supreme Judicial Council, reinforces the notion of independence of the judiciary. As Article 7B bars amendments to the provisions relating to the basic structures of the Constitution, the sixteenth amendment is repugnant because, in violation of Article 7B, it has amended Article 96 (the Supreme Judicial Council), which embodies a basic structure of the Constitution – the independence of the judiciary. The CJ provided a detailed account of why he thought the Supreme Judicial Council was more conducive to some of the notions of judicial independence.[124] What is worth noting is that, unlike the *Abdul Mannan* case, the CJ did not apply the substantive compatibility test (jigsaw puzzle test) in the *Asaduzzaman* case;[125] rather, the mainstay of the CJ's reasoning is based on the literal interpretation of Article 7B of the Constitution. It exemplifies how the method of scrutiny for reviewing constitutional amendments has shifted from the substantive compatibility test to the legislative competence test, with the incorporation of explicit or codified unamendability – Article 7B of the Constitution. Given that more than one-third of the provisions of

[122] ibid para 7.
[123] ibid 189 para 356 (emphasis added).
[124] ibid 189–90 para 358.
[125] Ahmed (n 95).

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the Constitution are now being protected by Article 7B,[126] one may validly infer that the constitutionality of most future amendments is more likely to be tested by the touchstone of Article 7B.

5.2. Not entirely 'flawless' reasoning of the Chief Justice

The above-mentioned reasoning based on Article 7B will, however, appear too simplistic if the relationship between the independence of the judiciary (as a basic structure) and the Supreme Judicial Council (SJC) is considered in the context of a change of system of government over the course of time. In Bangladesh the parliamentary system of government and the parliamentary mechanism for removal of Supreme Court judges featured in the original Constitution of 1972. The Constituent Assembly unanimously adopted the draft text of Article 96 of the Constitution Bill as it was and without any change. Clearly, the framers of the Constitution thought that the parliamentary mechanism for the removal of judges stood in line with both the parliamentary system of government and the independence of the judiciary (both of which later came to be regarded as the basic structures of the Constitution). The provision that Supreme Court judges could be removed by a two-thirds majority of members of Parliament was thought to be an effective safeguard against interference of the executive in the judiciary.[127] After the introduction of the presidential system of government by the fourth constitutional amendment in 1975, the parliamentary mechanism for the removal of judges was replaced with a more president-centric mechanism. Later, while the presidential system of government was continuing, the SJC was introduced, in which the President had a predominant role.

In 1991, the country switched back to the parliamentary system of government, but the parliamentary mechanism for the removal of judges was not reinstated.[128] Rather, the SJC continued to exist as the mechanism for removing judges. After the restoration of the parliamentary system of government, the Prime Minister (PM) has become the single depository of almost all the executive power of government and the President has assumed the role of nominal head of the government. The Constitution makes the President act exclusively on the advice of the PM in all matters except appointing the PM, and the Chief Justice has put the SJC predominantly under the control and influence of the PM.[129] This means that although the formal authority to set the SJC in motion to conduct an inquiry against any judge lies with the President, in order to trigger any such inquiry, the President will still have

[126] See Hoque (n 53) 215–16.

[127] See the Constituent Assembly's debate on Article 96 held on 3 November 1972: Government of Bangladesh, *The Proceedings of the Constituent Assembly*, vol 2 (1972) 431–32.

[128] The parliamentary system of government was reinstated by the Constitution (Twelfth Amendment) Act 1991.

[129] Article 48(3) of the Constitution unequivocally provides that the President shall act under the advice of the Prime Minister in the exercise of all his functions save only that of appointing the Prime Minister and the Chief Justice.

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to look to the approval of the PM.[130] As regards the removal of Supreme Court judges, it may be argued that the recommendation of the SJC should serve as finality because no judge will be removed unless so recommended by the said Council.[131] Nevertheless, whether the President can remove a judge pursuant to the SJC's recommendation alone without the PM's advice remains an open question.

In this context, the issue of whether the SJC is in tune with the parliamentary system of government should have been scrutinised objectively by the Court in depth.[132] One might argue that the SJC was already designated as a basic structure in the *Anwar Hossain Chowdhury* case.[133] However, this argument does not fare well because when this case was decided the country had a presidential system of government, and the issue of whether the SJC was compatible with the parliamentary system of government had never been addressed.[134] Now, this particular issue, if looked at from the angle of the system of government, presents a classic example of the situation when one norm is simultaneously consistent and inconsistent with two different basic structures – for instance, the SJC might seem consistent with judicial independence, and inconsistent with the parliamentary system of government.[135]

Additionally, the majority opinion in the *Asaduzzaman* case did not address the issue of the application of the SJC for the removal of incumbents from non-judicial offices. The Constitution envisaged that the mechanism for the removal of judges should apply also to certain non-judicial offices: for example, the Election Commissioners, the Comptroller and Auditor General, and the Chairman and members of the Public Service Commission.[136] Besides, the same mechanism has been adopted for the removal of incumbents from several statutory non-judicial offices (such as the Chairman and members of the National Human Rights Commission, the Anti-Corruption Commission).[137] Certainly, the legislature, in passing the sixteenth amendment, had no less of an intention to bring in changes to the mechanism applicable for the removal of incumbents from non-judicial offices than it had for Supreme Court judges. Hence, the CJ's opinion should have explained why he thought that it would suffice to stick solely to the argument of judicial independence in determining the validity of the sixteenth constitutional amendment, especially in view of the fact that the scope of the said amendment was intended to cover way beyond the removal of Supreme Court judges.

[130] Article 96(5) of the Constitution was inserted by s 31 of the Constitution (Fifteenth Amendment) Act 2011.

[131] Article 96(6) of the Constitution was inserted by s 31 of the Constitution (Fifteenth Amendment) Act 2011.

[132] *Asaduzzaman* case (n 1) 128–29 para 118.

[133] *Anwar Hossain Chowdhury* case (n 4) 109–11 paras 254–55 (Justice Chowdhury); 151, 156 paras 365, 377 (Justice Ahmed).

[134] Ahmed (n 95).

[135] ibid.

[136] Constitution of the People's Republic of Bangladesh 1972, arts 118(5), 129(2) and 139(2).

[137] National Human Rights Commission Act 2009, s 8(1); Anti-Corruption Commission Act 2004, s 10(3).

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The government did not effusively raise all these points discussed above while making its argument before the Court during the appeal hearing of the *Asaduzzaman* case. The main thrust of the government's argument was that the sixteenth constitutional amendment, by reinstating the original provisions contained in Article 96, did not impinge on the basic structures of the constitution; therefore, it could not be held unconstitutional.[138] In addressing the above argument, the CJ mentioned that the original Article 96 was substituted by the fourth constitutional amendment, which invested in the President the power to remove judges on the grounds of misbehaviour or incapacity after affording an opportunity to show cause. The mechanism for removal of judges was again substituted with the SJC by the fifth constitutional amendment. When this constitutional amendment was held unconstitutional in 2010 in *the Bangladesh Italian Marble Works* case, the Parliament re-enacted the SJC in the Constitution by the fifteenth constitutional amendment.[139] The CJ opined:[140]

> [T]he Parliament in its wisdom has restored the original provision but there is nothing to show that the judicial review is not available against such legislative amendment if such amendment will impair the independence of judiciary or if the court finds that such obsolete procedure introduced about 42 years ago will not be suitable in the present context.

Apparently, the CJ's argument is that an original provision of the Constitution that has been validly replaced with a subsequent amendment will not have precedence over the amending provision.[141] Elsewhere in the judgment, he stated, the SJC is more in consonance with the spirit of our constitutional scheme.[142]

Notably, the argument that the sixteenth constitutional amendment reinstated an original provision of the Constitution was also not adequately addressed by the High Court Division earlier.[143] As the above argument prima facie concerns the constitutionality of an original constitutional provision, the majority opinion in the *Asaduzzaman* case should have addressed a few crucial questions, the most important of which are: (i) whether an original provision of the Constitution is amenable to judicial review or under what circumstances the judiciary is permitted to review an original constitutional

[138] Ridwanul Hoque, 'Can the Court Invalidate an Original Provision of the Constitution?' (2016) 2 *The University of Asia Pacific Journal of Law and Policy* 13, 20. To get a glimpse of the arguments of all sides before the High Court Division (the petitioner, the respondents, and the *amici curiae*) see Chowdhury and Saha (n 118).

[139] *Asaduzzaman* case (n 1) 128–29 para 118.

[140] ibid 183 para 333.

[141] Notably, Article 7B does not make an exception for any amendment reinstating an original provision of the Constitution.

[142] *Asaduzzaman* case (n 1) 130–31 para 126.

[143] Hoque vehemently criticised the High Court Division's judgment on this point and those criticisms also apply *mutatis mutandis* to the majority opinion in the *Asaduzzaman* case: Hoque (n 138) 20–27.

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provision; (ii) whether a re-enacted provision of the original Constitution can still be regarded as an original provision; (iii) whether a re-enacted provision of the original Constitution entails the same significance as an unamended original provision; (iv) whether the re-enactment of an original provision can impinge on the basic structures of the Constitution; (v) whether judicial review is legally permissible in respect of an amendment reinstating any original provision.[144] Regrettably, the Appellate Division did not answer these questions despite their high legal importance, leaving room for criticism of the legitimacy of the majority opinion.

Understandably, the government neither could take the position that Article 7B was unconstitutional, and therefore the sixteenth constitutional amendment should not have to go through the basic provision test, nor could it flatly dismiss the SJC as unconstitutional for being inconsistent with the parliamentary system of government because the self-same government had re-enacted it by way of the fifteenth constitutional amendment.[145] Under the circumstances, the Attorney General seems to have been left with very few options to make out a case for the sixteenth constitutional amendment. Perhaps the Attorney General could have argued that the SJC is just another method for the removal of judges, which, after the restoration of the parliamentary system of government, has lost its relevance as an element of the independence of the judiciary. For this reason, an amendment thereto would no longer be controlled by Article 7B. Alternatively, the Attorney General could have pressed for a narrow teleological interpretation of Article 7B to the effect that its purpose was limited to preventing unconstitutional amendments at the threshold point.[146]

The *Asaduzzaman* case is the first case to have witnessed the first-ever application of Article 7B of the Constitution – the basic provision doctrine.[147] As the CJ relied on Article 7B in deciding the validity of the sixteenth amendment, it would have been rather thoughtful on his part to check if Article 7B is itself a valid constitutional amendment.[148] One might, of course, make the counter-argument that the constitutionality of Article 7B never came into question at any stage of the *Asaduzzaman* case; hence, it did not call for any scrutiny by the court. To counteract this argument, it should be sufficient to ask whether a sound judicial decision is at all possible to come by without resolving the validity issue of the norm on which the court relies to gauge the validity of another norm.[149] In fact, Article 7B has curtailed the Parliament's

[144] On the unconstitutionality of the original constitutional provisions see generally David Landau, Rosalind Dixon and Yaniv Roznai, 'From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras' (2019) 8 *Global Constitutionalism* 40.

[145] Ahmed (n 95).

[146] ibid.

[147] cf Nafiz Ahmed (n 29) 329.

[148] Ahmed (n 95).

[149] For example, in *Marbury v Madison*, the then US Chief Justice John Marshall scrutinised the Judiciary Act of 1789, although the Act was not called into question by the parties to the case: *Marbury v Madison* 5 US (1 Cranch) 137 (1803).

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power to amend the Constitution so much so that it is *ipso facto* amenable to judicial scrutiny.

6. Review: *Quo vadis*?

Lastly, one may raise the question that the *Asaduzzaman* case has not yet become a final decision as a review petition against the appellate judgment is already pending before the Court.[150] Given the Court's trend in disposing of review petitions, three possible outcomes could be suggested. Firstly, the Appellate Division may dismiss the review petition, finding no merit in it. The Court has the power to review its own judgments passed in civil proceedings on the grounds of discovery of new and important matters or evidence having decisive weight,[151] or for correcting errors apparent on the face of the record.[152] Moreover, an error of law has been held not to be such a discovery.[153] In practice, the Appellate Division in most cases has adopted a very narrow approach in considering review petitions. In a landmark case it held:[154]

> A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected. A review lies where an error apparent on the face of the record exists. It is not a re-hearing of the main appeal. Review is not intended to empower the Court to correct a mistaken view of law, if any, taken in the main judgment. It is only a clerical mistake or mistake apparent on the face of the record that can be corrected by the leave but it does not include the correction of any erroneous view of law taken by the Court.

The second possible outcome of the review proceedings in connection with the *Asaduzzaman* case could be that the Court modifies its earlier decision without interfering with the holding on the main issue in dispute. For example, the Appellate Division, in disposing of the review petitions filed in the *Bangladesh Italian Marble Works* case, modified the operative part of the judgment passed earlier in the appeal, leaving untouched its holding on the main issue of the case.[155] Lastly, in a very rare move, the Appellate Division

[150] Civil Review Petition No 751 of 2017. See Constitution of the People's Republic of Bangladesh 1972, art 105.

[151] *Halima Jaman v Bangladesh* (1998) 50 DLR (HCD) 352.

[152] The Supreme Court of Bangladesh (Appellate Division) Rules 1988, Order XXVI, Rule 1.

[153] Mahmudul Islam and Probir Neogi, *The Law of Civil Procedure*, vol 2 (Mullick Brothers 2006) 1779. See also *Dewan v Gulab* [1973] 77 CWN 566.

[154] *Secretary, Ministry of Finance v Md Masdar Hossain* (2001) 21 BLD (AD) 126, para 12. Similar decisions have been made by the Appellate Division in *Ekushey Television Ltd v Dr Chowdhury Mahmood Hasan* (2003) 55 DLR (AD) 26, 31 para 24; *Girilal Garwala v Collector of Customs, Chittagong* (2006) 58 DLR (AD) 45, 46 para 4.

[155] *Bangladesh v Bangladesh Italian Marble Works Ltd and Others*, Civil Review Petition Nos 17–18 of 2011, Judgment delivered on 29 March 2011.

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may overturn its decision in the *Asaduzzaman* case on the basis of entirely new reasoning. For example, in *Ataur Mridha alias Ataur v The State*, it held that imprisonment for life would mean imprisonment for the rest of the life of the convict.[156] Later, on review, it reversed its earlier decision and held that imprisonment for life should be deemed equivalent to imprisonment for 30 years unless the convict was specifically sentenced to *imprisonment for life till natural death* by the Court.[157]

Considering the Appellate Division's usual stance on review matters as discussed above, it seems unlikely that it will overturn its own earlier 7:0 majority decision in the *Asaduzzaman* case. Notably, the case did not address any disputed issue of fact; therefore, any discovery of decisive new evidence seems fairly out of question. Even if the Appellate Division modifies or overturns its decision on review – similar to what happened in *Bangladesh v Bangladesh Italian Marble Works Ltd and Others*[158] or *Ataur Mridha*[159] as the case may be – the normative significance of Article 7B in deciding the validity of future constitutional amendments will not fall away. Article 7B enshrines the concept of explicit or codified unamendability of the Constitution, which is why the Court will be bound to take account of it when confronted with the question of the validity of constitutional amendments in an appropriate context. In other words, as long as Article 7B remains in the Constitution, its importance will be inescapable for the Court in determining the validity of constitutional amendments. On a related note, the Appellate Division will not have any scope to declare Article 7B unconstitutional in the pending review proceedings against the judgment in the *Asaduzzaman* case as its constitutionality was not an issue in dispute in the original writ proceedings before the High Court Division.

7. Conclusion

Although at the heart of the *Asaduzzaman* case lies the crux of choosing a constitutionally valid mechanism for the removal of Supreme Court judges, its judgment has left a transcendent effect which went beyond the subject matter and stirred up heated legal and political debates across society. Jurisprudentially, it marks a culminating point in the history of judicial review of the constitutional amendments in Bangladesh. The *Anwar Hossain Chowdhury* case laid down the basic structure doctrine as a normative tool for determining the substantive compatibility of a constitutional amendment vis-à-vis the Constitution. By introducing explicit or codified unamendability of a vast number of constitutional provisions, Article 7B has effectively allowed the Court to dispense with the substantive compatibility test as a method of scrutiny for determining the validity of future constitutional amendments. Judging the

[156] Criminal Appeal Nos 15–16 of 2010, Judgment delivered on 14 February 2017.

[157] *Ataur Mridha alias Ataur v Bangladesh*, Criminal Review Petition No 82 of 2017, Judgment delivered on 1 December 2020.

[158] *Bangladesh v Bangladesh Italian Marble Works Ltd and Others* (n 155).

[159] ibid.

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constitutionality of post-Article 7B amendments will now become a question of legislative competence per se in most of the cases. In this way Article 7B has brought in a paradigm shift to the understanding and relevance of the basic structure doctrine in the constitutional normative framework of Bangladesh. The majority opinion in the *Asaduzzaman* case evidences this paradigm shift.

Acknowledgements. The author wishes to thank the anonymous reviewers as well as Professor Yaël Ronen and the student editorial team of the *Israel Law Review* for their elaborate and insightful comments. The author also acknowledges the encouragement and helpful assistance of Md Jahid-Al-Mamun and Md Azhar Uddin Bhuiyan.

Funding statement. Not applicable.

Conflict of interest. The author declares none.

Cite this article: Ahmed K (2023). Revisiting Judicial Review of Constitutional Amendments in Bangladesh: Article 7B, the *Asaduzzaman* Case, and the Fall of the Basic Structure Doctrine. *Israel Law Review* **56**, 263–287. https://doi.org/10.1017/S0021223721000297