IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 10356 OF 2024

IN THE MATTER OF:

An application under Article 102 of the Constitution of the People's Republic of Bangladesh.

-AND-

IN THE MATTER OF:

Mohammad Saddam Hossen and others

.... Petitioners

-Versus-

Bangladesh represented by the Secretary, Legislative and Parliamentary Affairs Division, Ministry of Law, Justice and Parliamentary Affairs, Bangladesh Secretariat, Abdul Gani Road, Dhaka-1000 and others

......Respondents

Mr. Mohammad Shishir Manir, Advocate
.....For the petitioners

Mr. Md. Asaduzzaman, Attorney General with
Mr. Aneek R. Haque, Additional Attorney General with
Mr. Md. Asad Uddin, DAG with
Mr. Mohammad Mehedi Hasan, DAG with
Ms. Mohsina Khatun, DAG with
Mr. Sheikh Naser Wahed (Shemon), AAG with
Mr. Junaed Hossen Khan, AAG with
Ms. Kazi Kamrunnessa Munni, AAG with
Ms. Nusrat Jahan (Shanta) AAG
....For the respondents

Dr. Mahiuddin, Advocate
....For the Interveners
Mr. Ahsanul Karim, Senior Advocate
......For the Intervener (In person)

Dr. Sharif Bhuiyan, Senior Advocate
.... Amicus Curiae

Heard on: 23.04.2025, 24.04.2025, 29.04.2025, 30.04.2025, 07.05.2025, 08.05.2025, 21.05.2025, 22.05.2025, 25.06.2025, 26.06.2025, 02.07.2025 03.07.2025, 16.07.2025, 17.07.2025, 04.08.2025,

06.08.2025, 07.08.2025, 11.08.2025, 12.08.2025 and 13.08.2025.

Judgment on: 02.09.2025.

Present:

Mr. Justice Ahmed Sohel
-And-
Mr. Justice Debasish Roy Chowdhury

Ahmed Sohel, J:

This writ petition has been sent by the Hon'ble Chief Justice of Bangladesh by constituting a Special Bench for hearing and disposal of the matter.

The instant writ petition is filed in adherence to Article 102, in conjunction with Article 44 of the Constitution of the People's Republic of Bangladesh, in the nature of public interest litigation challenging the constitutional validity of Article 116 as amended by the Fourth and Fifteenth Amendments to the Constitution and also the disciplinary Rules for the subordinate judiciary. Beside that the petitioners also seek a declaration with consequential relief for the establishment of the Supreme Court Secretariat within the premises of the Supreme Court by restoring Article 116 to its original form as envisaged in the Constitution of 1972. This Court, having found prima facie substance, issued the instant Rule Nisi in the following terms:

> *"Let a Rule Nisi be issued calling upon the respondents to show cause as to why the substitution of the word 'Supreme Court' with the word 'President' in Article 116 of the Constitution of the People's Republic of Bangladesh by the Constitution (Fourth Amendment) Act, 1975 and the substitution of Article 116 of the Constitution of the People's Republic of Bangladesh by the Constitution (Fifteenth Amendment) Act, 2011 shall not be declared ultra vires the Constitution and also, as to why Bangladesh Judicial Service (Disciplinary) Rules, 2017 shall not be declared ultra vires the Constitution and also, as to why the respondents concerned shall*

not be directed to establish a separate Judicial Secretariat for the Supreme Court of Bangladesh at the Supreme Court premises and or such other or further order or orders passed as to this court may seem fit and proper."

At the time of issuance of the Rule, the respondent No. 3 was directed to submit a progress report regarding the establishment of a separate Judicial Secretariat in pursuance of the decision dated 06.09.2012 taken by the Supreme Court of Bangladesh within a prescribe period of time.

Pursuant thereto, the Registrar General of the Supreme Court of Bangladesh submitted a progress report before this Court regarding the steps taken for the establishment of a Separate Judicial Secretariat for the Supreme Court of Bangladesh.

Subsequently, several interveners came forward with applications seeking permission to intervene and to assist this Court for proper adjudication of the constitutional issues involved. Upon due consideration, such prayers were allowed by passing necessary orders.

At the commencement of the hearing, this Court requested the learned Senior Advocate, Dr. Sharif Bhuiyan, to assist the Court as Amicus Curiae, which he graciously accepted.

During the course of hearing, the petitioners, on 08.05.2025, filed a supplementary affidavit, wherein, specific sections of the impugned constitutional amendments were incorporated mentioning that the substitution of the word 'Supreme Court' with the word 'President' in Article 116 of the Constitution of the People's Republic of Bangladesh by Section 19 (section 20 of the English version) of the Constitution (Fourth Amendment) Act. 1975 (Act. No. II of 1975) and amendment of Article 116 of the Constitution by Section 39 of the

Constitution (Fifteenth Amendment Act, 2011 (Act. XIV of 2011) may kindly be declared ultra vires the Constitution. The said supplementary affidavit was made part of the main writ petition.

The writ petitioners being the conscious citizens of the country and specially being the lawyers in profession have filed the instant writ petition by way of public interest litigation. It is contented by the petitioners that a solemn duty is cast upon the lawyers, being the officers of the Court to ensure the onward march for our constitutional journey to its desired destination. The petitioners, therefore, have a stake in the establishment of the rule of law in the country and possess the requisite *locus standi* to file this writ petition in the nature of Public Interest Litigation (PIL), and as such, the writ petition is very much maintainable.

Therefore, the first issue before us to determine whether the petitioners have *locus standi* to file the present writ petition by way of Public Interest Litigation or not. Public Interest Litigation is that class of litigation where the public in general are interested, perceiving that public interest has been undermined by arbitrary or perverse executive action, which requires vindication of some right or the enforcement of some public duty.

Public interest litigation (PIL) has proved to be a valuable tool enabling the Court to deliver landmark judgments for the protection of the rights of citizens, the environment, and other public interests affected by administrative actions and inactions. In *Dr. Mohiuddin Farooque v Bangladesh* reported in *49 DLR (AD) (1997),* the Supreme Court expanded the scope of writ jurisdiction through which any organisation or individual, without any personal interest in a particular case, could challenge the validity of an administrative action/inaction affecting the public interest.

Since then, PIL has been invoked on numerous occasions to challenge laws and constitutional amendments, thus, PIL has served as a vehicle for judicial intervention where constitutional violations are alleged. Consequently, PIL has a significant role in maintaining the balance of separation of powers, with the Court safeguarding its constitutional domain by emphasizing the supremacy of the constitution. In the case of *Neetu Vs. State of National Council for Civil Liberties Vs. Union of India and others, reported in AIR 2007 SC 2631*, the Indian Supreme Court observed that when an issue of great public importance is involved then public interest litigation can be entertained by the court.

Therefore, considering the basic cause of grievance of the writ petitioners it is the considered view of this Court is that the petitioners being the public minded citizens of the country have sufficient locus standi to invoke writ jurisdiction by detecting dereliction of constitutional or statutory obligations that have injured public interest at large.

Legislative Evolution of Article 116:

On 04.11.1972, the Constituent Assembly incorporated Article 116 in the Constitution of the People's Republic of Bangladesh (hereinafter referred to as 'the Constitution') provided that the control (including posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions *shall vest in the Supreme Court*. Subsequently, on 25.01.1975, the Parliament, by the Constitution (Fourth Amendment) Act, substituted the words 'Supreme Court' with the word 'President' in Article 116.

Thereafter, by the Second Proclamation (Fifteenth Amendment) Order 1978, a phrase 'and *shall be exercised by him in consultation with the Supreme*

Court' (emphasis added) was inserted after the word 'President' in Article 116 of the Constitution. On 25.06.2011, the Parliament, by the Constitution (Fifteenth Amendment) Act, substituted Article 116 by reproducing the provision as it stood since 1978.

It is the heart of the assertion of the writ petitioners is that by such substitution or amendment, the judicial officers of the subordinate Courts continue to remain under the sway and influence of the Executive. The control, including posting, promotion, leave, and discipline of persons employed in the judicial service, being exercised by the President implies that the final authority in matters relating to the subordinate judiciary does not vest exclusively in the Supreme Court.

From a consideration of various landmark judgments of the Apex Court, it is evident that substitution of the word *'Supreme Court'* with the word *'President'* in Article 116 of the Constitution of the People's Republic of Bangladesh by the Constitution (Fourth Amendment) Act, 1975 (Act No. II of 1975); the subsequent amendment of Article 116 of the Constitution and insertion of the phrase 'and shall be exercised by him in consultation with the Supreme Court' after the word 'President', by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation No. IV of 1978) and the later substitution of the same provision by the Constitution (Fifteenth Amendment) Act, 2011 (Act XIV of 2011) are ultra vires the Constitution, as these changes frustrated the independence of judiciary and violated the doctrine of separation of powers.

Moreover, such constitutional violations were further entrenched on 11.12.2017 through the promulgation of the 'Bangladesh Judicial Service (Disciplinary) Rules, 2017', whereby the Executive was vested with the final

authority over the matters, including posting, promotion, leave and discipline of persons employed in the Judicial Service.

It has further been contended that Article 255 of the Government of India Act, 1935 and Article 235 of the Constitution of India categorically provide that the control over district courts and courts subordinate thereto, including matters of posting, promotion, and grant of leave to persons belonging to the judicial service of the State and holding any post inferior to the post of a District Judge, shall vest in the High Court. Similar provisions are found in Article 111F of the Constitution of Singapore, Article 154 of the Constitution of Nepal and Article 111H of the Constitution of Sri Lanka.

These comparative constitutional provisions demonstrate that welfare-oriented democratic States have incorporated safeguards analogous to the original Article 116 of our Constitution to ensure the independence of the Judiciary.

Separation of judiciary from the executive and independence of judiciary are basic structure of the constitution, and original article 116 of the Constitution is the cornerstone of judicial independence.

It has further been stated that the Constitution envisages a clear separation of powers among the three organs of the State. Each organ is required to function strictly within the limits prescribed by the Constitution. Neither the Executive nor the Legislature can encroach upon or curtail the powers and functions of the Judiciary by enacting laws or constitutional amendments that are inconsistent with the doctrine of separation of powers. The Apex Court of the country has consistently emphasized the necessity of restoring Article 116 to its original form to ensure the effective separation of powers and the true independence of the Judiciary.

In this backdrop, the petitioners have challenged the vires of the Constitution (Fifteenth Amendment) Act, 2011 and the Constitution (Fourth Amendment) Act, 1975, insofar as they relate to Article 116 of the Constitution, as well as the *Bangladesh Judicial Service (Disciplinary) Rules, 2017*, by which final authority over posting, promotion, leave, and disciplinary matters of judicial officers has been conferred upon the Executive.

Mr. Mohammad Shishir Manir, learned Advocate appearing on behalf of the petitioners, submits that Article 116 of the Constitution, as originally adopted on 04.11.1972, unequivocally vested the control and discipline of judicial officers in the Supreme Court. However, by the Constitution (Fourth Amendment) Act, 1975, the word *"Supreme Court"* was replaced by *"President"*, thereby transferring such control to the Executive. The Second Proclamation (Fifteenth Amendment) Order, 1978 subsequently introduced the requirement that these powers be exercised by the President *"in consultation with the Supreme Court"*. The Constitution (Fifteenth Amendment) Act, 2011 retained this provision without modification.

He then submits that these successive amendments clearly demonstrate a shift of control over the subordinate judiciary from the Supreme Court to the Executive. Although, the provision of consultation with the Supreme Court was introduced, but the ultimate authority continues to rest with the President. Consequently, matters relating to posting, promotion, leave, and discipline of judicial officers remain subject to executive control, thereby, undermining the independence of the subordinate judiciary and eroding the constitutionally mandated separation between the Judiciary and the Executive.

He further submits that this constitutional infirmity has been aggravated by the *Bangladesh Judicial Service (Disciplinary) Rules, 2017*, which confers final

decision-making authority upon the Executive in matters concerning posting, promotion, leave, and discipline of judicial officers.

Mr. Manir then goes to submit that the Constitution has eloquently enshrined the doctrine of separation of powers among the three organs of the State. Each organ must operate within its constitutionally assigned sphere. Any legislative or executive action that seeks to abridge or usurp the powers of the Judiciary is constitutionally impermissible. The Apex Court has consistently held that restoration of Article 116 to its original form is essential to ensuring the genuine independence of the Judiciary and the effective functioning of the separation of powers.

He next submits that the parliamentary debates (Hansard) of the Constituent Assembly in 1972 reveal that no member opposed the provisions of Article 116, which vested control, including posting, promotion, grant of leave, and discipline of judicial officers and magistrates, in the Supreme Court. On the contrary, several members emphasized the critical role of Article 116, read with Article 22, in ensuring judicial independence. Notable among them were Mr. Syed Nazrul Islam, the Deputy Leader of the Assembly; Mr. Khondkar Abdul Hafiz, Member from Jashore-7; Mr. Ahsan Ulla, Member from Kushtia; Mr. Abdul Muntakim Chowdhury, Member from Sylhet-5; and Dr. Kamal Hossain, President of the Constitution Committee. Ultimately, Article 116 was adopted without amendment, as reflected in the parliamentary Hansard.

At this juncture, referring the case of *Anwar Hossain v. Bangladesh*, reported in *41 DLR (AD) 165*, Mr. Manir submits that the Appellate Division unequivocally held that the independence of the Judiciary is a basic structure of the Constitution. Similarly, in *Secretary, Ministry of Finance v. Masdar Hossain*, reported in *20 BLT (AD) 234, at paragraph 44*, it was held that judicial

independence is one of the fundamental pillars of the Constitution and cannot be demolished, diluted, curtailed, or diminished except in accordance with the Constitution itself. Subsequently, in *Khondker Delwar Hossain, Secretary, BNP & another v. Bangladesh Italian Marble Works Ltd. and others*, reported in *62 DLR (AD) 298, at paragraph 236*, the Apex Court categorically observed that unless Articles 115 and 116 are restored to their original positions, the independence of the Judiciary cannot be fully realized. In paragraph 239 of the same judgment, the Court expressed its earnest hope that Articles 115 and 116 would be restored to their original form by Parliament at the earliest opportunity.

Mr. Manir then vehemently argues that for the true independence of the Judiciary, its complete separation from the Executive is an imperative necessity. Although, Article 22 of the Constitution provides for such separation and has been implemented to a considerable extent through the judgment in *Masdar Hossain's case*, but full and effective separation cannot be achieved unless Article 116 of the Constitution is restored to its original form.

In this context, reference is made to the judgment delivered on 25.02.2009 by Mr. Justice Md. Abdul Matin in *Bangladesh, represented by the Secretary, Ministry of Justice and Parliamentary Affairs and others v. Md. Idrisur Rahman, Advocate and others*, reported in *17 BLT (AD) 231* (popularly known as the *Judges' Case*), wherein His Lordship observed:

> *"We agree, with approval, with Justice Bhagwati and add further that although Article 22 has been implemented to a great extent through the judgment of this Court in Masdar Hossain's case, until and unless the unamended Articles 115 and 116 of the Constitution are restored, vesting control of the subordinate judiciary in the Supreme Court, the separation of the judiciary will remain a distant cry and a music of the distant drum."* ***(paragraph 166)***.

Therefore, he submits that the earnest desire of the Apex Court to see Article 116 restored to its original form is manifest from the above observation. Furthermore, on 03.07.2017, in the *Sixteenth Amendment Case* (*Government of Bangladesh v. Advocate Asaduzzaman Siddiqui and others*), the Hon'ble Appellate Division once again deliberated extensively on this issue and reaffirmed that complete judicial independence is indispensable for the preservation of the Constitution and the rule of law.

EFFECT OF STRIKING DOWN THE IMPUGNED CONSTITUTIONAL AMENDMENTS:

Mr. Manir submits that a question may arise regarding the effect and consequences of declaring unconstitutional the substitution of the word *"Supreme Court"* with *"President"* in Article 116. This issue is neither novel nor unsettled, having been conclusively addressed in both our jurisdiction and the Indian jurisdiction.

He submits that in *Kesavananda Bharati Sripadagalvaru vs. State of Kerala*: *AIR 1973 SC 1461*, the Supreme Court of India declared the latter part of Article 31C unconstitutional. Parliament subsequently amended the earlier part of Article 31C through the Forty-second Amendment, extending its protection to laws giving effect to any directive principles under Part IV of the Constitution. In *Minerva Mills Ltd. v. Union of India*, *(1980) 3 SCC 625,* that amendment was struck down, and subsequent decisions, including *Waman Rao* v. Union of India (1980) 3 SCC 587 as well as *Sanjeev Coke Manufacturing* v. Bharat Coking Coal, 44 were adjudicated on the assumption that the original Article 31C stood automatically revived. In *Supreme Court Advocates-on-Record Association vs. Union of India*, *(2016) 5 SCC 1,* the Indian Supreme Court reaffirmed that striking down an unconstitutional amendment results in the revival of the prior unamended

provision. Similarly, in *Property Owners' Association vs. State of Maharashtra*, *2024 (13) SCALE 107, [2024] 11 SCR 1,* it was held that upon invalidation of an amendment, the original provision revives unless a contrary legislative intent is clearly expressed.

He further submits that in our jurisdiction, the Hon'ble Appellate Division, in the *Eighth Amendment Case* (*Anwar Hossain Chowdhury v. Bangladesh*), reported in *1989 BLD (Spl.) 1*, and in the *Sixteenth Amendment Case* (*Bangladesh v. Asaduzzaman Siddiqui*), reported in *71 DLR (AD) 52*, upon declaring the respective constitutional amendments unconstitutional, restored the earlier versions of Articles 100 and 96 respectively.

Accordingly, he submits that if the Fourth and Fifteenth amendments replacing the word *"Supreme Court"* with *"President"* in Article 116 are declared unconstitutional, the original Article 116 will automatically revive, thereby, restoring control over posting, promotion, leave, and discipline of judicial officers and magistrates to the Supreme Court.

UNCONSTITUTIONALITY OF THE BANGLADESH JUDICIAL SERVICE (DISCIPLINARY) RULES, 2017:

Mr. Manir submits that the *Bangladesh Judicial Service (Disciplinary) Rules, 2017* vests final authority over supervision, discipline, transfer, and promotion of judicial officers in the Executive, which is directly contrary to the principles laid down in *Masdar Hossain* Case (52 DLR (AD) 82) and inconsistent with Article 116 of the Constitution. Such executive dominance undermines the independence of the Judiciary and violates the basic structure of the Constitution. As such, the impugned Rules are liable either to be struck down or fundamentally

amended. The pervasive role of the Executive throughout the Rules renders the doctrine of severability inapplicable.

The doctrine of severability postulates that if an unconstitutional portion of a statute can be severed from the valid portion, the latter may survive. However, this is permissible only where the remaining provisions are independent, workable, and consistent with legislative intent. Where the valid and invalid provisions are inextricably interlinked and form part of an indivisible scheme, the entire law must fall. Eminent jurists, including Mahmudul Islam, N.S. Bindra, and Thomas M. Cooley, have affirmed that the determinative test is whether the remaining provisions can function independently and fulfill the legislative purpose. In the *Eighth Amendment Case*, this Court declined to apply the "blue-pencil" doctrine, holding that the provisions were inseparable. Similarly, in *Kunnathat Thathunni Moopil Nair v. State of Kerala, (AIR 1961 SC 552)*, the Indian Supreme Court struck down an entire statute upon finding its core provisions unconstitutional and inseverable.

He submits that, as discussed hereinabove, the very object of the impugned Rules is to vest control of subordinate judicial officers in the Executive. The Rules, taken as a whole, negate the doctrine of separation of powers and impair the independence of the Judiciary, which is a basic feature of the Constitution. Consequently, the entire *Bangladesh Judicial Service (Disciplinary) Rules, 2017* are liable to be struck down.

ESTABLISHMENT OF A SEPARATE JUDICIAL SECRETARIAT:

Mr. Manir in this respect submits that supervision, discipline, control, transfer, and promotion of judicial officers ought to be vested exclusively in the High Court Division, Supreme Court of Bangladesh. For that purpose, the

establishment of a separate secretariat for the Judiciary is indispensable. On 06.09.2012, the Supreme Court of Bangladesh resolved to establish such a Secretariat, and a letter was sent to the Prime Minister's Office on 19.09.2012 seeking a date for its inauguration. No response was received. Subsequently, on 23.11.2012, the then Chief Justice, Mr. Justice Muzammel Hossain, unveiled a name plaque of the Secretariat at Sarak Bhaban. However, for reasons unknown, the name plaque was removed in 2018, and the initiative has remained dormant to date, as reported in a national daily on 01.11.2019.

In this regard, Mr. Manir emphasizes that Articles 22, 107, 109, and 116, read together, unequivocally mandate the separation of the Judiciary from the Executive and vest superintendence, control, and discipline in the Supreme Court. Referring Masdar Hossain's case, the learned Counsel submits that one of the core findings of that Judgment was that:

> *"The judicial service is a service of the Republic within the meaning of Article 152(1) of the Constitution, but it is functionally and structurally distinct and separate from the civil executive and administrative services of the Republic and cannot be amalgamated, abolished, replaced, mixed up or tied together with such services."*

From the foregoing, it is apparent that the Judiciary is constitutionally, functionally, and structurally an independent organ of the State. To realize the true meaning of judicial independence and separation of powers, the Judiciary cannot function under the umbrella of the Executive or be amalgamated with it. The establishment of a separate judicial secretariat is, therefore, not a matter of discretion but of constitutional necessity. The earlier it is established, the more effective will be the administration of justice.

Accordingly, it is prayed that the impugned amendments i.e. substitution of the word *"Supreme Court"* with the word *"President"* in Article 116 of the Constitution of the People's Republic of Bangladesh by Section 19 (section 20 of the English version) of the Constitution (Fourth Amendment) Act, 1975 (Act No. II of 1975), and the substitution of Article 116 by section 39 of the Constitution (Fifteenth Amendment) Act, 2011 (Act No. XIV of 2011), be declared ultra vires the Constitution. It is further prayed that the *Bangladesh Judicial Service (Disciplinary) Rules, 2017* be declared ultra vires the Constitution, being inconsistent with the original Article 116 and destructive of the independence of the Judiciary, and that necessary order or orders be passed for the establishment of a separate Judicial Secretariat for the Supreme Court of Bangladesh at the Supreme Court premises, so as to give full effect to the constitutional mandate of separation of the Judiciary from the Executive.

On the other hand, Mr. Md. Asaduzzaman, Senior Advocate, the learned Attorney General for Bangladesh, appearing on behalf of respondent No. 1, contested the Rule by filing an affidavit-in-opposition. The case of respondent No. 1, as set out in the affidavit-in-opposition, in brief, is that on 25.01.1975 the Parliament passed the Constitution (Fourth Amendment) Act, 1975 (Act No. II of 1975), whereby Article 116 of the Constitution was amended by substituting the word "Supreme Court" with the word "President".

Subsequently, Article 116 was further amended through the Fifth Amendment, whereby after the word "President" the phrase "and shall be exercised by him in consultation with the Supreme Court" was inserted. Although the Fifth Amendment was later declared ultra vires the Constitution, Article 116 was not interfered with. After the Fifteenth Amendment, Article 116 of the Constitution was also retained by Parliament. Thereafter, the Fifteenth

Amendment was declared ultra vires the Constitution in Writ Petition No. 12431 of 2024; however, the High Court Division did not interfere with Article 116 of the Constitution.

Then the learned Attorney General takes us through Article 116, which reads as follows:

> "116. The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President and shall be exercised by him in consultation with the Supreme Court."

It is pertinent to mention that the then Parliament also inserted a new Article 116A in the Constitution through the Fourth Amendment, which provides that:

> "Judicial officers to be independent in the exercise of their functions— Subject to the provisions of this Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions."

This provision further ensures the independence of the judiciary by allowing persons employed in the judicial service to act independently in the exercise of their judicial functions.

It is further stated that by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation No. IV of 1978), Article 116 of the Constitution was amended by inserting, after the word "President", the phrase "and shall be exercised by him in consultation with the Supreme Court". Thereafter, on 06.04.1979, Parliament passed the Constitution (Fifth Amendment)

Act, 1979 (Act No. I of 1979), whereby the said Proclamation, along with others, was ratified and confirmed.

Furthermore, he contends that by the Fifth Amendment, the Supreme Court was given a consultative role; however, the independence of the judiciary was not in any way compromised. Although, the Fifth Amendment was declared ultra vires the Constitution in *Khandker Delwar Hossain, Secretary, BNP and another vs. Bangladesh Italian Marble Works Ltd. and others*, reported in *62 DLR (AD) 298*, but the Appellate Division did not interfere with Article 116 of the Constitution.

He then goes to contend that after the Fifteenth Amendment, Article 116 continued to read in its amended form, which clearly shows that Article 116 solely deals with the power of posting, promotion, grant of leave, and discipline of persons employed in the judicial service and magistrates exercising judicial functions. The provision empowers the President to act in consultation with the Supreme Court in respect of the aforesaid matters. Thereafter, although the Fifteenth Amendment was declared ultra vires the Constitution in Writ Petition No. 12431 of 2024, the High Court Division again did not interfere with Article 116. As such, Article 116 remains in force in the form amended through the Fifth Amendment and has remained unchanged since 1978, having not been interfered with by the Apex Court in several constitutional amendment cases. Thus, it is contended, ensures that the executive does not exercise unfettered control over the judiciary.

In support of his contention, the learned Attorney General relies upon the case of *Government of Bangladesh vs. Idrisur Rahman*, reported in *1999 BLD (AD) 203*, where the Appellate Division held that all postings of persons exercising judicial functions not made in consultation with the Supreme Court are unlawful. In *Bangladesh vs. Md. Abu Bakar*, reported in *57 DLR (AD) 186*, the

Appellate Division reiterated the mandatory nature of consultation with the Supreme Court under Article 116, holding that when disciplinary action is sought to be taken against a magistrate exercising judicial functions, consultation with the Supreme Court is a must. In the process of consultation, primacy must be given to the views and opinions of the Supreme Court, which the executive cannot disregard, as it is the Supreme Court, and not the political executive, that is the best judge of judicial matters and judicial officers (*Secretary, Ministry of Finance vs. Masdar Hossain*, *2000 BLD (AD) 104)*. Therefore, Article 116 operates as a mechanism of checks and balances between the judiciary and the executive.

It is further contended that the Bangladesh Judicial Service (Disciplinary) Rules, 2017 were framed under Article 133 of the Constitution. Article 133 has not been challenged, nor has any argument been advanced as to why the said Rules of 2017 should be declared ultra vires the Constitution. Article 133 authorizes Parliament to regulate, by law, the appointment and conditions of service of persons employed in the service of the Republic. Until such law is enacted, the President may frame rules in this regard, which shall operate subject to any law enacted by Parliament (*Bangladesh vs. Shafiuddin*, *50 DLR (AD) 27)*.

Article 133 begins with the phrase "Subject to the provisions of this Constitution", meaning that its application is limited where specific constitutional provisions exist. Articles 62, 79, 113, and 115 provide such specific provisions. Article 62 relates to defence services. Article 79 provides that Parliament may, by law, and in the absence of such law, the President, in consultation with the Speaker, may regulate by rules the terms and conditions of service of persons appointed to the Secretariat of Parliament. Article 113 provides that appointments to the staff of the Supreme Court shall be made by the Chief Justice or by such Judge or officer of the Court as the Chief Justice may direct, in accordance with

rules made by the Supreme Court with the prior approval of the President. Article 115 provides that the President shall, by rules, regulate the appointment of members of the judicial service and magistrates exercising judicial functions. This power of the President is plenary and not dependent upon the absence of any Act of Parliament, and Parliament cannot legislate on matters covered by Article 115 (*Secretary, Ministry of Finance vs. Masdar Hossain*, supra).

The Appellate Division has held that Article 115 covers not only pre-appointment matters but also suspension and dismissal of judicial officers and magistrates exercising judicial functions. However, once appointed, the other terms and conditions of service of such officers are governed by law or rules framed under Article 133, subject to consistency with Article 115. Since neither Article 133 nor Article 115 has been challenged in the writ petition, and the impugned Rules of 2017 were framed under Article 133, the same cannot be challenged through judicial review.

Moreover, in Civil Review Petition No. 147 of 2025, the Appellate Division, by order dated 29.06.2025, granted leave and stayed the order dated 03.01.2018 passed in Civil Appeal No. 79 of 1999, which means that the Bangladesh Judicial Service (Disciplinary) Rules, 2017 are presently stayed by the Appellate Division and the matter is sub-judice.

Mr. Asaduzzaman then contends that judicial independence refers to the institutional independence of the subordinate judiciary, particularly from the Parliament and the executive. It requires freedom to decide matters of administration directly bearing upon the exercise of judicial functions. Article 116A guarantees such independence. The judiciary must be free from actual or apparent interference, especially from the executive branch of the Government, as well as from non-governmental influences such as corporate pressure, pressure

groups, media, or political forces. Since the High Court Division exercises control and supervision under Article 109, and the Supreme Court has a consultative role under Article 116 in relation to the subordinate judiciary, Article 116 does not confer unfettered power upon the President. Rather, it mandates consultation with the Supreme Court, thereby ensuring checks and balances among the organs of the State.

Next he goes to argue that Article 22 aims at ensuring the separation of the judiciary from the executive. Article 116 does not relate to the separation of the judiciary from the executive organs of the State. By incorporating the requirement of consultation with the Supreme Court, Article 116 serves as a balancing provision. Moreover, Article 22 is a Fundamental Principle of State Policy and is not judicially enforceable, as held by the Appellate Division in *Kudrat-e-Elahi Panir vs. Bangladesh*, reported in *44 DLR (AD) 319*.

Furthermore, he contends that the instant Rule is defective and misconceived. To challenge any Article of the Constitution, the petitioners must necessarily challenge the law by which the said Article was enacted or amended, along with the particular provision in question. The present form of Article 116 was substituted by the Constitution (Fifteenth Amendment) Act, 2011 (Act No. XIV of 2011), particularly section 39 thereof. But the petitioners did not challenge the Constitution (Fifteenth Amendment) Act, 2011 (Act No. XIV of 2011), section 39; rather, they only challenged the propriety of the substitution of the word “Supreme Court” with the word “President” in Article 116 of the Constitution. Without challenging the said amending law, Article 116 cannot revert to its historical position as it stood in 1972. Hence, the Rule is not maintainable, being misconceived and defective, and is liable to be discharged for the ends of justice.

At this juncture, taking through the Rule, the learned Attorney General submits that giving effect to the Rule in the manner sought may lead to absurdity, rendering the provision meaningless. Then he takes us through Article 116, as amended by the Constitution (Fourth Amendment) Act, 1975, which reads as follows:

> *"20. Amendment of article 116 of the Constitution—In the Constitution, in article 116, for the words 'Supreme Court', the word 'President' shall be substituted."*
>
> *After the Fourth Amendment, the full text of Article 116 stood as follows:*
>
> *"Article 116—The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President."*

Therefore, he submits if the substitution of the word "President" with the word "Supreme Court" is declared ultra vires, the text of Article 116, as per the Constitution (Fourth Amendment) Act, 1975, would still read as follows:

> *"Article 116—The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the ~~President~~."*

So, if the Rule issued by this Court is given effect in accordance with the relief sought, the position of Article 116 as per the Constitution (Fifteenth Amendment) Act, 2011, would be as follows:

> *"Article 116—The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in ~~the President~~ and shall be exercised ~~by him~~ in consultation with the Supreme Court."*

Accordingly, he contends, if the Rule be given effect in this manner, Article 116 would become meaningless. It has been held in *KBC Authority vs. Hashwani S&S Ltd.*, reported in *PLD 1993 SC 210*, that Courts, while interpreting statutes, must apply the maxim *ut res magis valeat quam pereat*, meaning that the provision should be interpreted so as to make it operative rather than void. Where a provision becomes meaningless, the Court must endeavour to save the law.

Article 116, as amended by the Fourth Amendment, is a repealed provision, and a repealed constitutional provision is not amenable to judicial review. The Fourth Amendment lost its legal force long ago and was repealed through the Fifth Amendment. The issue raised is therefore, hypothetical and academic, namely, whether the substitution of the word "President" with the word "Supreme Court" was ultra vires. It is well settled that abstract or theoretical questions of merely academic importance are not to be decided by the Court.

In this connection, he contends that Article 7(2) of the Constitution provides that if any other law is inconsistent with the Constitution, that other law shall, to the extent of the inconsistency, be void. The expression "law" as used in Article 7(2) necessarily means a law that is in force. Article 152 of the Constitution defines "law" as follows:

> *"'Law' means any Act, ordinance, order, rule, regulation, bye-law, notification or other legal instrument, and any custom or usage, having the force of law in Bangladesh."*

The question whether a repealed law can be subjected to judicial review was settled in *Kudrat-e-Elahi Panir vs. Bangladesh*, reported in *(1992) 44 DLR (AD) 319*. Since the Fourth Amendment has lost its force, it is no longer a "law" within the meaning of the Constitution and cannot be said to violate any constitutional provision. Consequently, it is not subject to scrutiny by this Court.

In that view, the writ petitioners raise a purely hypothetical question regarding the vires of a repealed law, which has ceased to exist.

He then submits that there is no dispute that this Division has the power to declare any provision of the Constitution ultra vires if it violates the basic structure of the Constitution. However, this Court cannot legislate. By seeking substitution of the word "President" with the word "Supreme Court", the petitioners are, in effect, inviting the Court to legislate. Legislation is the exclusive domain of Parliament. This Court can interpret the law but cannot enact or amend it.

In this context, referring the case of *Kudrat-e-Elahi Panir vs. Bangladesh*, supra; *Secretary, Ministry of Finance vs. Masdar Hossain*, *2000 BLD (AD) 104*, the learned Attorney General contends that it is a settled principle, as laid down by the Apex Court, that while the judiciary cannot legislate or direct Parliament to enact laws or the President to frame rules, it is within the jurisdiction of the judiciary to require Parliament and the executive to act in accordance with the Constitution.

Furthermore, a repealed law cannot be declared ultra vires in the context of its enforcement, as it no longer exists in the legal framework. The doctrine of ultra vires applies only to laws that are presently in force. Once a law is repealed, it is obliterated from the statute book and cannot be subjected to further judicial scrutiny. Any legal argument must be founded upon existing law. In the case of *State of U.P. vs. Hirendra Pal Singh*, *[2011] 5 SCC 305*, it was held that upon repeal, the earlier provisions stand abrogated and wiped out. It is further settled that even an amendment has the effect of repeal to the extent of inconsistency (AIR 1988 SC 740). Accordingly, the Rule is liable to be discharged.

While elaborating his submission, Mr. Asaduzzaman further contends that a constitutional provision may be challenged either in its entirety or to the extent of inconsistency with Article 7(2) of the Constitution by applying the doctrine of severability. However, a single word of a constitutional provision cannot be challenged in isolation as ultra vires. If the word "President" is removed from Article 116 as amended by the Fourth Amendment, the provision becomes incomplete and meaningless.

In both the Fourth and Fifteenth Amendment Acts, Article 116 was amended by way of substitution. The term "amendment" has a wide amplitude under Article 142 of the Constitution. In *Farida Akter vs. Bangladesh*, reported in *15 BLT (AD) 206*, it was held that the incorporation of the expressions "addition, alteration, substitution or repeal" has widened the scope of amendment. These expressions are merely different modes of amendment.

In view of above, he submits substitution is therefore a recognized mode of amendment. An amendment implies a change in an existing provision and operates as a repeal to the extent of the change. Once substitution takes place, the original words or text cease to exist and lose all legal force. There is thus no scope to contend that the substituted word or text continues to survive. Accordingly, the Rule is liable to be discharged.

The doctrine of basic structure postulates that the Constitution of a sovereign State contains certain fundamental features which cannot be abrogated, destroyed, or altered by the legislature, even through constitutional amendment. This doctrine, as developed through judicial pronouncements, seeks to preserve the core identity and essential character of the Constitution from being undermined by excessive or overreaching amendments. It places an inherent

limitation on the amending power of Parliament by prohibiting changes that fundamentally distort the constitutional framework.

In this regard, referring the case of *Anwar Hossain Chowdhury vs. Bangladesh*, reported in *41 DLR (AD) 165* (Eighth Amendment Case), Mr. Asaduzzaman submits that, in that case, the Appellate Division held that Articles 7, 94, 100, 101, and 102 constitute basic pillars of the Constitution. In the present case, the petitioners have failed to identify any specific basic feature or pillar of the Constitution with which Article 116 is alleged to be inconsistent. Although, the petitioners have asserted that Article 116 is ultra vires the Constitution, they have not demonstrated how or why it violates the basic structure. The petitioners have thus failed to establish that Article 116, in its present form, infringes upon any identified component of the basic structure of the Constitution.

Moreover, the petitioners have not challenged the vires of Article 115 of the Constitution, which governs the appointment of persons employed in the subordinate judiciary. Rather, they have challenged the vires of Article 116, which relates to the control (including posting, promotion, and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions. It is pertinent to note that officers of the subordinate judiciary are appointed by the President. Consequently, matters relating to posting, promotion, and discipline are constitutionally vested in the President, subject to the requirement of consultation with the Supreme Court, which ensures checks and balances among the organs of the State.

He further contends that the Apex Court has consistently refrained from interfering with Articles 115 and 116 of the Constitution. In *Khandker Delwar Hossain vs. Bangladesh Italian Marble Works Ltd.*, reported in *62 DLR (AD) 298* (Fifth Amendment Case), the Appellate Division expressed the hope that

Parliament would restore Articles 115 and 116 to their original form. However, the Court was mindful that these Articles were not violative of the basic structure of the Constitution and therefore, left the matter within the legislative domain. Similarly, in *Bangladesh vs. Md. Idrisur Rahman*, reported in *17 BLT (AD) 231*, the Appellate Division left the issue to the wisdom of Parliament. In *Asaduzzaman Siddiqui vs. Bangladesh*, reported in *8 ALR (2016) (2) 161* (Sixteenth Amendment Case), the High Court Division reiterated that it is the legislature which must act to restore Articles 115 and 116, if so advised.

Therefore, in none of these decisions did the Apex Court hold that Article 116 is ultra vires the Constitution. The functions contemplated under Article 116 are purely administrative in nature and do not encroach upon judicial functions. The judicial independence of subordinate courts is expressly guaranteed by Article 116A of the Constitution. Therefore, administrative control under Article 116 does not undermine the basic structure of the Constitution, particularly the independence of the judiciary; rather, it reinforces institutional independence by ensuring effective checks and balances among the organs of the State.

Finally, with regard to the prayer for a direction to establish a separate Judicial Secretariat, for the Supreme Court of Bangladesh, Mr. Asaduzzaman submits that the State has adopted a concrete policy to establish a separate judicial secretariat with adequate logistical support. The State further submits that it has no objection to the establishment of such a secretariat and is willing to render all necessary assistance in this regard.

Accordingly, he prays for discharge of the Rule.

Submissions of the Interveners:

Dr. Mahiuddin, the learned Advocate appearing for the Interveners, submits that upon issuance of the *Rule Nisi* at the instance of learned Advocates Mr. Uba Thuai Marma and Mr. Morshedul Islam, he duly applied *pro interesse suo*, asserting locus standi and advancing cogent grounds, seeking leave to intervene and assist this Hon’ble Court. Being satisfied as to the bona fides and juridical necessity of such intervention, this Court was pleased to grant him leave and accord him the status of an Intervener. Thereafter, Dr. Mahiuddin advanced submissions in support of the writ petition on several juridical grounds, including those already set out therein.

Dr. Mahiuddin submits that the post-amendment form of Article 116 relegates the Supreme Court to a merely consultative role with respect to posting, promotion, and disciplinary control of officers of the subordinate judiciary and tribunals, while substantive authority vests in the President, who, by virtue of Article 48(3) of the Constitution, is bound to act on the advice of the Prime Minister. In practice, this authority is exercised through the Law and Justice Division of the Ministry of Law, Justice and Parliamentary Affairs, headed by a political executive, thereby, subjecting the subordinate judiciary to executive control. Such an arrangement, he contends, runs contrary to the principles enunciated in *Secretary, Ministry of Finance vs. Masdar Hossain*, reported in *52 DLR (AD) 82*, and is inconsistent with the constitutional mandate of judicial independence.

The learned Advocate further submits that in the absence of an express repeal of the Fourth Amendment in conformity with Article 142 of the Constitution and Rule 99 of the Rules of Procedure of Parliament, the Fifteenth Amendment cannot be construed as having validly repealed the earlier amendment

in respect of Article 116. He argues that "substitution" does not necessarily amount to "repeal", as they are distinct modes of constitutional amendment. The principle laid down in *Kudrat-e-Elahi Panir vs. Bangladesh*, reported in *44 DLR (AD) 319*, is therefore inapplicable, as that case dealt with the repeal of an ordinary statute rather than constitutional amendment. Accordingly, the legal effect of the Fourth Amendment in respect of Article 116 continues to subsist, and thus, the issue of challenging a repealed provision does not arise.

Mr. Dr. Mahiuddin then elaborating his submission upon the juridical significance and persuasive authority of *obiter dictum* refers the case of *Bangladesh v. Asaduzzaman Siddiqui*, *77 DLR (AD) 134 [2025],* at paragraph 89, where the Appellate Division of the Supreme Court of Bangladesh has *authoritatively enunciated* that an *obiter dictum* does not constitute *stare decisis* or binding precedent, but is endowed with persuasive force only, and may, *si quid*, be invoked solely in subsequent litigations. Where it was observed:

> *"So from the above discussion, it is quite clear that the obiter dictum does not have any authority or binding force on other courts, but it can be cited as persuasive authority in future litigation."*

The learned Advocate further submits that Article 48(3) of the Constitution of Bangladesh substantially attenuates the classical doctrine of checks and balances. By its tenor, the President—save for the appointments of the Prime Minister and the Chief Justice is constitutionally obliged to discharge all other functions strictly in accordance with, and upon, the advice of the Prime Minister. Consequently, the judiciary, conceived as a coequal organ of the State, is rendered, in practice, constitutionally subordinate and subservient to the Executive. The Constitution of Bangladesh contains no express provision, ex proprio vigore, expressly enshrining the doctrine of checks and balances.

The learned Advocate further contends that Article 116 of the Constitution constitutes an indispensable pillar of the separation of powers and the independence of the judiciary and, ex necessitate rei, stands as an incontrovertible and non-derogable component of the Constitution's basic structure (structura fundamentalis).

He submits that Articles 115 and 133 of the Constitution are matrix provisions conferring plenary rule-making authority and, by necessary implication, stand beyond the necessity of direct challenge or impugnment.

Dr. Mahiuddin further contends that it is the judiciary which safeguards civil rights and liberties. If the judiciary is weakened in any nation, the authority and prerogatives of the Executive and the Legislature inevitably expand. In this context, Mark Tushnet, William Nelson Cromwell Professor of Law at Harvard Law School and a leading authority on constitutional jurisprudence, observed:

> *"A weak form of review clearly should enhance the role that the legislature and executive officials play in constitutional interpretation and development." [Mark Tushnet,* Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, p. 79 (Princeton University Press, 2008)].*

He further cited the French Déclaration des Droits de l'Homme et du Citoyen of 1789 (French Declaration of the Rights of Man and of the Citizen of 1789). Considering the international or comparative landscape, John Roberts, Chief Justice of the United States, has admonished the judiciary to maintain vigilantia perpetua in the exercise of oversight. At a judicial conference convened in Buffalo, his directives to the Bench were reported in The New York Times on 7 May 2025 under the headline: "Court Must Check the Excess of Congress and the President."

With regard to the legal framework governing the Supreme Court Secretariat, Dr. Mahiuddin submits that in *Marbury v. Madison* (1803), the Supreme Court of the United States held that judicial review is the quintessential function of the judiciary, ensuring that no statute or executive action may stand if it is repugnant to the Constitution. Pursuant to Articles 22, 107, 109, 114, 115, 116, and 116A of the Constitution of the People's Republic of Bangladesh, the establishment of a Supreme Court Secretariat may be effectuated through the promulgation of an Ordinance, the framing of Rules, or the amendment of the existing Bangladesh Supreme Court (High Court Division) Rules, 1973. This proposition finds strong jurisprudential support in *Secretary, Ministry of Finance v. Masdar Hossain*, *52 DLR (AD) 82*, as well as in the judgment of the Appellate Division concerning the Sixteenth Amendment.

Significantly, the Constitution of Bangladesh contains no express provision governing the establishment of a Supreme Court Secretariat. Such legislative silence creates a permissible space for judicial creativity, as recognised in *(2021) 2 SCC 209*, paragraph 7. The Supreme Court of India in the case of *Shrimantha Balasaheb Patil v. Karnataka Legislative Assembly* [(2020) 2 SCC 595, *paragraph 145],* where Justice Ramana observed:

> *"Viewed from a different angle, although the Constitution may not say everything, this Court is mandated to expound the unsaid."*

In such circumstances, the respondents may be directed to establish the Supreme Court Secretariat and to enact appropriate laws in that regard.

The principle of pragmatic interpretation has been authoritatively recognized by the Hon'ble Appellate Division in *Bangladesh v. Abdul Mazid*, 10 CLR (AD) 51 (2022), as well as in the observations of Justice Stephen Breyer of the United States Supreme Court, in his commentary entitled *Reading the*

Constitution: Why I Chose Pragmatism, Not Textualism, at page 183, wherein he underscores that the final portion of the first paragraph of the Constitution must be construed with a pragmatic lens, giving effect to the *mens et verba* of the constitutional text.

The same is reproduced as follows:

> *"Since then, that court, with a few exceptions (involving, for example, military and foreign affairs has had the last word as to just what most of the words in the constitution mean and how they are applied."*

The learned Advocate further submits that every constitution inherently embodies certain eternity clause provisions of immutable or inalienable character. Such eternity clause is enshrined in Articles 7(2), 8(2), 26(2), and 142 of the Constitution of Bangladesh.

Regarding the concept of the eternity clause, the Supreme Court of Sri Lanka, in the Constitutional 19th Amendment Case (2002) 3 SRI.L.R. 85, at p.95, observed:

> *"The fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all organs of government and shall not be abridged, restricted or denied save in the manner and to the extent hereinafter provided."*

The supremacy of the Constitution constitutes a *principium imperativum* in adjudicating upon the fundamental principles of State policy, the procedure for constitutional amendments, and the inviolability of fundamental rights. These elements, embodied in the aforementioned Articles, collectively constitute the eternity clause of the Constitution of Bangladesh. Accordingly, any purported constitutional amendment that seeks to curtail or abridge these entrenched provisions is, in law, untenable.

He submits that the doctrine of abusive constitutionalism is an emergent and nuanced phenomenon in contemporary constitutional jurisprudence. According to Black's Law Dictionary (8th edition), the term abusive denotes conduct that is "characterized by wrongful or improper use." Meanwhile, the Oxford Advanced Learner's Dictionary of Current English defines constitutionalism as "a belief in constitutional government." Abusive constitutionalism, therefore, connotes the perversion or exploitation of constitutional mechanisms under the guise of fidelity to constitutional governance.

Judges, as the sentinels of constitutional propriety, are vested with the solemn duty to thwart such perversions. In this context, Lord Denning, in his seminal work, 'What Next in the Law' (p. 318), observed that judges are the essential guardians of the Constitution, regardless of whether that constitution is written (as in US) or unwritten (as in UK). He asserts that judiciary has a fundamental duty to determine validity and to prevent misuse of Constitutional mechanisms.

Further, Lord Denning, in the case of *Pickin vs British Railways Board and another* 1973 AC 219**,** further observed:

> *"Allowing the appeal that the question whether the Court was competent to go behind a private act of parliament and investigate a responsible plea that it had been improperly obtained by misleading parliament was a triable issue, supported by House of Lords authority in the 18th Century. Accordingly, the plea should remain on the record, and if at the trial, it were proved, there has been an abuse of parliamentary procedure whereby this person had been deprived of proprietary rights without compensation, the court might be under a duty to report the matter to parliament.*

In support of this doctrine, Professor Erwin Chemerinsky, Dean and Distinguished Professor of Law, University of California, Irvine, in his book

'Constitutional Law, Principles and Policies', 5th edition, at p.358, quoted the following:

> *"Therefore, in evaluating the constitutionality of any act of Congress, there are always two questions. First, does Congress have the authority under the Constitution to legislate? Second, if so, does the law violate another constitutional provision or doctrine, such as by influencing the separation of powers or interfering with individual liberties? In Contrast, when evaluating the constitutionality of state law, there is a single question… Does the legislation violate the Constitution?"*

In the case of *Abdus Samad Azad and Others vs. Bangladesh*, *44 DLR (1992) 354 para 12*, the Hon'ble High Court Division echoed a comparable sentiment that-

> *"In a written constitution, there is no such absolute right, and it is limited by the Constitution. This limited sovereignty of Parliament in making the law is an essential feature of the working of the government under a written constitution. Yet, the fact remains that the legislature is yet to be the only law-making authority, though restricted by the provision of the Constitution."*

In this regard, Dr. Mahiuddin submits that the contested constitutional amendment, effectuated through the majoritarian leverage of the legislature under the façade of constitutional legitimacy, constitutes a paradigmatic instance of abusive constitutionalism. This legislative stratagem has culminated in the promulgation of enactments that flagrantly subvert the principles of justice and the right of access to legal recourse, particularly as they pertain to the petitioners herein.

He further submits that, pursuant to Article 112 of the Constitution, both Executive and Judicial authorities are enjoined to act *in auxilium* of the Supreme Court. The Apex Court of Bangladesh has consistently maintained the stance that

Article 116 ought to be restored to its original form, as delineated in paragraph 9 of the Writ Petition. Absent such restoration, the independence of the judiciary would remain *theoretical* rather than *substantive*, contrary to the original constitutional intent. *Ergo*, the substitution of the term “Supreme Court” with “President” in Article 116 by the Constitution (Fourth Amendment) Act, 1975, the subsequent substitution under the Constitution (Fifteenth Amendment) Act, 2011, and the enactment of the Bangladesh Judicial Service (Disciplinary) Rules, 2017, ought to be declared *ultra vires* the Constitution.

Furthermore, in consonance with the mandate of Article 112, the Respondents should be directed to establish a separate independent Judicial Secretariat within the precincts of the Supreme Court of Bangladesh.

He submits that the basic structure of the Constitution is *inamendabilis*, that is, incapable of amendment. The separation and independence of the judiciary constitute a foundational pillar of the Constitution’s basic structure, as conclusively settled by the Appellate Division in the Eighth Amendment Case, and are therefore *inalterable*. Notwithstanding this settled position, both the Fourth and Fifteenth Amendments to Article 116 have transgressed the basic structure of the Constitution and are accordingly liable to be declared ultra vires.

It is further submitted that the Rule of Law is one of the basic features of the Constitution, as affirmed in the Eighth Amendment Case at paragraph 496 [41 DLR (AD) 165], wherein it was held:

> *“The impugned amendment is to be examined in the light of the Preamble. One of the fundamental aims of our society is to secure the Rule of Law for all citizens, and in furtherance of that aim, Part VI and other provisions were incorporated in the Constitution.”*

He further contends that if Article 116 is allowed to subsist in its present form, as altered by the Fourth and Fifteenth Amendments, the constitutional dictum that the Rule of Law is enshrined in the Preamble would be rendered nugatory. In such circumstances, *regula per legem* (rule by law), exercised by the Executive, would supplant the Rule of Law (*regula juris*), thereby undermining its constitutional supremacy. In *R v. Secretary of State for the Home Department [2002] 4 All ER 1089, at p. 1090*, the House of Lords observed:

> *"The complete functional separation of the judiciary from the Executive was fundamental, since the Rule of Law depended upon it."*

On the basis of the foregoing, it is emphasised that the impugned amendments are inconsistent with, and destructive of, the doctrine of the Rule of Law.

Dr. Mahiuddin further submits that the debates of the Constituent Assembly concerning the supremacy of the Constitution constitute the foundational pillars of the constitutional order. The supremacy of the Constitution and the Rule of Law are core founding values, comparable to those enshrined in section 1 of the Constitution of South Africa. In *New Nation Movement NPC and others v. President of South Africa*, *CCT 110/19, at paragraph 85*, the Constitutional Court of South Africa observed:

> *"Ours is a constitutional order that puts a premium on the founding values contained in section 1 of the Constitution."*

By reason of the impugned amendments, the pre-eminence and sacrosanct supremacy of the Constitution and its founding values have been egregiously undermined, thereby negating Article 7 of the Constitution.

Supporting this contention, Dr. Mahiuddin referring section 224 of the Government of India Act, 1935, submits that in India the administrative superintendence and control of the subordinate judiciary has been vested in the Federal Court. Analogous provisions were incorporated in the Constitutions of Pakistan of 1956 and 1962. He further submits that the impugned amendments have curtailed the authority of superintendence and control vested in the High Court Division over all subordinate courts and tribunals under Article 109 of the Constitution.

It is further contended that the impugned amendments are antithetical to the doctrine of separation of the judiciary. Under Articles 7 and 8(2) of the Constitution, the State is obliged to enact laws and constitutional amendments in strict conformity with the Constitution, read as a whole. Article 22 mandates that the State ensure the separation of the judiciary from the Executive. The Constitution wisely incorporates the doctrine of separation of powers among the three organs of the State, each of which must operate strictly within the limits prescribed by the Constitution. In this context, the High Court of Australia in *The Queen v. Kirby; Ex parte Boilermakers' Society of Australia*, 94 CLR 254 (at p. 261), observed:

> *"The Constitution separates the functions of government into legislative, executive and judicial, but apart from the actual provisions of the Constitution, the doctrine of separation of powers has no legal consequences in the courts."*

In *Bangladesh v. Asaduzzaman Siddique*, *77 DLR (AD) 134 (2025)*, at paragraph 55, the Hon'ble Appellate Division held:

> *"Under the scheme of the Constitution of the People's Republic of Bangladesh, all three organs are of equal significance and importance. None is subordinate to the others. All three must act harmoniously to serve*

and protect the people, who are the supreme authority of the land. Through the Sixteenth Amendment, however, the judiciary was rendered subservient to the other organs, which is ipso facto unconstitutional, undesirable and unacceptable."

Therefore, the Executive and the Legislature cannot usurp the powers and functions of the judiciary by enacting laws or constitutional amendments that contravene the doctrine of separation of powers enshrined in the Constitution.

In *Somesh Chaurasia v. State of Madhya Pradesh and others*, AIR 2021 SC 3563, at paragraph 42, the Supreme Court of India observed:

"Our Constitution specifically envisages the independence of the District Judiciary. This is implicit in Article 50 of the Constitution, which mandates the separation of the judiciary from the executive in the public services of the State. The District Judiciary functions under the administrative supervision of the High Court, which must secure and enhance its independence from external influence and control."

In *State of Rajasthan and others v. Ramesh Chandra Mundra and others [(2020) 20 SCC 163, at paragraph 22]*, the Supreme Court of India observed:

"An integral part of the independence of the judiciary as a constitutional value is institutional independence, namely the aspect concerning financial autonomy which the judiciary must possess and enjoy. Effective involvement of the judicial branch in budgeting, staffing, and infrastructure has also been recognised by the international community."

He further submits that discriminatory legislation is expressly prohibited under Articles 28 and 29 of the Constitution. The State is constitutionally barred from discriminating against any citizen and is under an obligation to ensure equality of opportunity for all citizens in respect of employment or office in the service of the Republic. To eradicate such discrimination, the establishment of a separate Secretariat for the judiciary is imperative. Such a Secretariat would not

only serve as a cornerstone for the effective governance of the subordinate judiciary but would also constitute a *sine qua non* for the genuine separation of powers within the judicial branch.

At this juncture, it is argued that in accordance with the Rules of Business made under Article 55(6) of the Constitution, read in conjunction with the সচিবালয় নির্দেশমালা ২০২৪, a distinct Secretariat has been constituted for the executive. Article 79(1) also mandates the Parliament to possess its own Secretariat. Accordingly, জাতীয় সংসদ সচিবালয় আইন ১৯৯৪ has been enacted for its independent identity.

Apart from the above enactment, the provision of section 3 of নির্বাচন কমিশন সচিবালয় আইন-২০০৯ provides for the constitution of a separate Secretariat for the Election Commission free from Govrnment control. However, since the coming into force of the Constitution on 4 November 1972, no such independent Secretariat has been established for the judiciary. This disparity constitutes an affront to members of the judicial service and violates Articles 28 and 29 of the Constitution. It further offends the doctrine of substantive unamendability embodied in Article 26 of the Constitution. Despite prior salutary endeavours undertaken by the Supreme Court in this regard, the anomaly persists.

He further submits that adherence to Article 48(3) of the Constitution, the President is bound to act on all functions in harmony with the advice of the Prime Minister, save for the appointments of the Prime Minister and the Chief Justice.

Therefore, the President is constitutionally compelled to discharge his functions under Article 116 in accordance with the advice of the Prime Minister. As a result, the Executive, acting through such advisory control, has effectively subjugated the judiciary, thereby, infringing the petitioners fundamental rights. It

is therefore contended that Article 116 must be restored to its original form as enacted in the Constitution of 1972.

Dr. Mahiuddin emphasizes that the impugned amendment is *ultra vires* (beyond the powers) of the Constitution by virtue of procedural constitutional unamendability. He then refers to the authoritative opinion of eminent constitutional scholars. Professor Richard Albert of the University of Texas at Austin observed:

> *"Constitutional provisions may also be unamendable in procedural terms"* (*An Unamendable Constitution? Unamendability in Constitutional Democracies* – Richard Albert and Bartil Emrahoder, at page 11).

The 'doctrine of procedural constitutional unamendability' epitomizes an emergent paradigm within constitutional jurisprudence. Article 142(a)(i) of the Constitution, in conjunction with Rule 99 of the Rules of Procedure of Parliament, stipulates that, notwithstanding anything contained in this Constitution, any provision thereof may be amended by way of addition, alteration, substitution, or repeal by Act of Parliament, provided that no bill for such amendment or repeal shall be permitted to proceed unless the long title thereof expressly states that it will amend a provision of the Constitution as per Article 142(a)(i) of the Constitution.

Regarding constitutional amendment, the provision of Rule 99 of the Rules of Procedure of Parliament is reproduced as follows:

> Rule 99. In respect of a Bill seeking to amend any provision of the Constitution, the following special rules shall apply in addition to the rules relating to other Bills, so far as they are not inconsistent with any provisions of these rules, namely-

'No Bill seeking to amend any provision of the Constitution shall be allowed to proceed unless the long Title thereof expressly states that it will amend a provision of the Constitution';

Importantly, the Constitution (Fifteenth Amendment) Bill, 2011, and the Constitution (Fourth Amendment) Bill, 1975, conspicuously *deficiunt* (lack the requisite long title as *mandatum* (mandated). This procedural transgression exemplifies the doctrine of procedural constitutional unamendability, rendering the amendments to Article 116 of the Constitution *in iure* (in law) juridically untenable.

He also submits that the impugned amendment is *void et ultra vires* (null and beyond the powers) by virtue of the doctrine of *supra-constitutional unamendability* (*inamendabilitas supra constitutionem*). In support of his contention he refers to the authoritative opinion of the eminent constitutional scholar, Professor YanivRoznai, who observed as follows:

> *"For example, supra-constitutional unamendability may be explicit. This is the case with the Constitution of Switzerland of 1999, according to which, when there is a partial or even total revision of the Constitution, the mandatory provisions of international law must not be violated [Article 193(4), 194(2)]. Similarly, Article X(2) of the Constitution of Bosnia Herzegovina of 1995 specifically provides that amendment cannot culminate or diminish any of the rights and freedoms set in the European Convention for the protection of Human Rights and fundamental freedoms, as referred to in Article 2(2)" [Unconstitutional Constitutional Amendments:* The Limits of Amendment Powers – YanivRoznai, Page 71].

The *doctrina supra-constitutionalisinamendabilitatis* (doctrine of supra-constitutional unamendability) posits that certain norms transcend the ordinary constitutional framework and possess the inherent authority to delineate what may or may not be enshrined within the Constitution. This doctrine also elucidates the

concept of unconstitutional amendments. Article 25 of the Constitution mandates that international law and the United Nations Charter shall constitute the *fundamentum* (bedrock) of international relations. The Preamble of the UN Charter explicitly avers that:

> *"The peoples of the United Nations are determined to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."*

Therefore, as a member of the United Nations, Bangladesh is duty-bound to actualize the imperatives of the UN Charter, thereby, ensuring the establishment of conditions conducive to justice. Consequently, any executive encroachment upon the judiciary, facilitated through constitutional fourthand fifteenth amendments, is inherently incompatible with the doctrine of supra-constitutional unamendability. Such amendments to Article 116 of the Constitution are thus juridically untenable, as they contravene the doctrine of supra-constitutional unamendability.

Dr. Mahiuddin further submits that the control of the Supreme Court over the subordinate judiciary constitutes one distinct constitutional concept, whereas vesting such authority in the President represents an entirely different concept. The consultative role of the Supreme Court, he contends, is a separate matter altogether. He emphasizes that distinct constitutional concepts cannot be amalgamated or inserted into the Constitution by way of amendment; such an exercise amounts to *reformatio constitutionalis* (constitutional reform), which Article 142 of the Constitution does not sanction.

In support of his contention, he refers to the observations of the eminent Irish constitutional law scholar Oran Doyle, who remarked:

> *"Some conceptual approaches on how amendment is different from revision or replacement. For instance, Murphy has argued that the word 'amend' cannot mean to deconstitute and reconstitute or to replace one system with another or abandon its primary principles. Such changes, for Murphy, would not be amendments at all but revisions or transformations." (The Foundations and Traditions of Constitutional Amendment, p. 77)*

He further submits that the Constitution of Paraguay (1992) makes a clear distinction between 'reform' and 'amendment': reform may be undertaken after ten years of promulgation, while amendments may be made after three years, pursuant to Articles 289 and 290 respectively. Reform and amendment are thus distinct in nature, reform being the incorporation of a new constitutional concept.

According to him, the amendments in question epitomize 'conceptually unconstitutional constitutional amendments'. The term 'amend' cannot be construed to mean 'deconstitute and reconstitute' or to supplant one constitutional system with another. Article 142 of the Constitution does not confer upon the legislature the authority, under the guise of amendment, to metamorphose the nature of the Constitution, alter its procedural ethos, or reconfigure its systemic paradigm. Such profound changes fall outside the permissible scope of amendment and amount to revision or transformation, which is unequivocally proscribed by the Constitution.

He further places reliance on recent United Nations documents. Referring to the United Nations Human Rights Office Fact-Finding Report titled *Human Rights Violations and Abuses Related to the Protests of July and August 2024 in Bangladesh*, he draws attention to the recommendation concerning the institutional framework of the judiciary at paragraph 345 of the Report, regarding essential steps to ensure the independence and impartiality of the judiciary as both institutional and individual levels.

Accordingly, he prays for making the Rule absolute, with a direction upon the respondents to establish a separate Secretariat for the Supreme Court of Bangladesh.

On the other hand, Mr. Ahsanul Karim, learned Senior Advocate, appearing as an intervener in person, submits that the writ petition has been filed impetuously, without due consideration of its legal consequences. In the first phase of the Rule, the petitioners seek a declaration that the substitution of the word 'Supreme Court' with the word 'President' in Article 116 of the Constitution by the Fourth Amendment is ultra vires. Such a prayer, he submits, is not legally sustainable for three fundamental reasons.

Firstly, Article 116 as it stood after the Fourth Amendment is a repealed constitutional provision, and a repealed provision is not amenable to judicial review. Secondly, a constitutional provision may be challenged either in its entirety or to the extent it is inconsistent with Article 7(2) of the Constitution by invoking the doctrine of severability; however, a single word in a constitutional provision cannot be challenged in isolation as ultra vires. If the word 'President' is removed from Article 116 as amended by the Fourth Amendment, the provision becomes incomplete and devoid of meaning. Thirdly, Article 116 is not a basic pillar of the Constitution and, therefore, cannot be declared ultra vires on the ground of violation of the basic structure.

He further submits that the second part of the Rule, seeking a declaration that the present Article 116 of the Constitution is ultra vires, is hypothetical. If Article 116 is declared ultra vires, the repealed Article 116 as it stood after the Fourth Amendment would revive, which is admittedly not the intention of the petitioners. Moreover, Article 116 of the Constitution is not contrary to the basic structure of the Constitution. He adds that, as the Fifth Amendment of the

Constitution was declared ultra vires, any declaration striking down Article 116 would result in the revival of the earlier provision. Therefore, the instant Rule lacks any solid foundation warranting interference by this Court.

Doctrine of Separation of Powers:

The separation of powers, together with the rule of law and parliamentary sovereignty, is the key to a sustainable democracy. It is a doctrine which is fundamental to the organizations of a state. This theory propagates that the appropriate allocation of power and the limits of those powers are to different institutions. The concept of separation of powers has played a major role in the formation of the Constitution. The extent to which the power can be, and should be, separate and distinct was a central feature in formulating, for example, both the American and French constitutions. In any state, three essential bodies exits; the executive, the legislature, and the judiciary. It is the relationship between these bodies which must be evaluated against the framework of the principle. The essence of the doctrine is that there should be, ideally, a clear demarcation of personnel and functions between the legislature, executive and judiciary in order that none should have excessive power and that there should be in place a system of checks and balances between the institutions.

Historical Development:

The identification of the three elements of the constitution derives from Aristotle (384-322 BC). In the Politics, Aristotle proclaimed that: "There are three elements in each Constitution in respect of which every serious lawgiver must look for what is advantageous to it; if these are well arranged, the Constitution is bound to be well arranged, and the differences in Constitutions are bound to correspond to the differences between each of these elements. The three are, first, the deliberative, which discusses everything of common importance; second, the

officials; and third, the judicial element." (Aristotle, The Politics, 1962, Sinclair, TA (trans), Harmondsworth: Penguin)

The Constitutional seeds of the doctrine were thus sown early, reflecting the need for government according to and under the law, a requirement encouraged by some degree of a separation of functions between the institutions of the state.

The Constitutional historian FW Maitland traces the separation of powers in England to the reign of Edward I (1272-1307): "In Edward's day all becomes definite there is the Parliament of the three estates, there is the King's Council, there are the well known courts of law." (Maitland, FW, the Constitutional History of England, 1908, Cambridge: CUP, p-20).

Viscount Henry St John Bolingbroke (1678-1751), in Remarks on the History of England, advanced the idea of the separation of powers. Bolingbroke was concerned with the necessary balance of powers within a Constitution, arguing that the protection of liberty and security within the state depended upon achieving and maintaining an equilibrium between the Crown, Parliament and the people. Addressing the respective powers of the King and Parliament, Bolingbroke observed that: "Since this division of power, and these different privileges constitute and maintain our government, it follows that the confusion of them tends to destroy it. This proposition is therefore true; that, in a constitution like ours, the safety of the whole depends on the balance of the parts." (Bolingbroke, H, Remarks on the History of England, 3rd Edition, 1748, London: Francklin, pp. 80- 83).

Baron Montesquieu (1689-1755, living in England from 1729-31) stressed the importance of the independence of the judiciary in De l'Esprit des Lois (1748): "When the legislative and executive powers are united in the same person, or in

the same body of magistrates, there can be no liberty... Again, there is no liberty if the power of judging is not separated from the legislative and executive. If it were joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. If it were joined to the executive power, the judge might behave with violence and oppression. There would be an end to everything if the same man, or the same body, whether of the nobles or the people, were to exercise those three powers, that of enacting laws, that of executing public affairs, and that of trying crimes or individual causes." (Montesquieu, C, De l'Esprit des Lois (1748), 1989, Cambridge: CUP).

Here is the clearest expression of the demand for a separation of functions. It has been remarked that Montesquieu's observations on the English constitution were inaccurate at the time, representing more a description of an idealized state than reality (Vile, MJC, Constitutionalism and the Separation of Powers, 1967, Oxford: Clarendon). Moreover, it should not be assumed that Montesquieu's-preferred arrangement of a pure separation of powers is uncontroversial. Throughout history, there has been exhibited a tension between the doctrine of separation of powers and the need for balanced government, an arrangement depending more on checks and balances within the system (as emphasized by Bolingbroke) than on a formalistic separation of powers. Sir Ivor Jennings has interpreted Montesquieu's words to mean not that the legislature and the executive should not influence the other, but rather that neither should exercise the power of the other (Jennings I (sir), The Law and the Constitution, 5th edn, 1959, London: Hodder & Stoughton (1959b). Sir William Blackstone, a disciple of Montesquieu, adopted and adapted Montesquieu's strict doctrine, reworking his central idea to incorporate the theory of mixed government. While it was of central importance to Blackstone that, for example, the executive and legislature should be sufficiently separate to avoid 'tyranny', he nevertheless viewed their total separation as

potentially leading to dominance of the executive by the legislature (Commentaries on the Laws of England (1765-69), V-1. Thus, partial separation of powers is required to achieve a mixed and balanced constitutional structure.

The Contemporary Doctrine:

The modern understanding of the separation of powers does not envisage that the three organs of the State should function in complete isolation. An absolute separation would be impracticable and could lead to constitutional deadlock. Under a democratic constitutional framework, a degree of interaction among the organs is inevitable and necessary.

Rather than insisting upon a rigid division, the contemporary doctrine emphasizes the clear allocation of primary functions, coupled with effective checks to prevent one organ from encroaching unduly upon the domain of another. A well-designed system of checks and balances ensures accountability, prevents abuse of power, and preserves constitutional equilibrium.

Checks and Balances:

Checks and balances constitute an essential feature of constitutional democracy. They prevent the concentration of power, enhance the quality of governance, and provide mechanisms for restraining and remedying the abuse of authority.

The erosion of checks and balances is widely regarded as a symptom of democratic backsliding. These mechanisms distribute power across different institutions, ensuring that no single organ exercises unfettered control. While the concepts of ‘checks’ and ‘balances’ are often used together, they serve distinct yet overlapping purposes: checks enable one organ to restrain or review the actions of

another, while balances ensure that diverse interests and viewpoints are represented within the constitutional system.

Although, the terminology is most commonly associated with the constitutional systems of the United Kingdom and the United States, the underlying principle is intrinsic to all democratic constitutions.

Why Checks and Balances Matter:

Checks and balances serve two fundamental purposes. First, they restrain the power of the majority from acting without due regard to the views or interests of minorities. They ensure that dissenting perspectives are represented in the decision-making process, for example, by guaranteeing that opposition voices are heard during the legislative process. Secondly, from a practical standpoint, they ensure that policies are rigorously tested and that conduct is subject to supervision. This, in turn, improves the quality of decision-making and prevents conduct that may undermine the integrity or credibility of the political system.

In a healthy democracy, these competing considerations are carefully balanced so that effective checks and balances are preserved without unduly obstructing essential governmental action. In contrast, in states experiencing democratic backsliding, those in power often weaken the institutional constraints upon their authority. Such erosion may occur gradually and in subtle forms, rather than through the outright abolition of institutions. By way of example, in Hungary, constitutional reforms enacted under the government of Viktor Orbán curtailed the powers of the courts and enhanced state control over electoral regulation and the media. Although constitutional structures formally remained intact, their capacity to restrain executive authority was significantly diminished.

Key Mechanisms of Checks and Balances:

There is no single or definitive test for determining the existence of checks and balances. Rather, a range of institutions collectively operate to maintain equilibrium among the organs of the State. In the United Kingdom, Parliament traditionally provides a central check upon the exercise of executive authority, while the judiciary performs a vital supervisory and adjudicatory role.

UK Perspective:

In England, the executive formulates policy and is responsible for its execution. The sovereign is the head of the executive, and the Prime Minister, Cabinet and other ministers are elected Members of Parliament. The Queen/King is the sovereign law-making body in the United Kingdom. Formerly expressed, Parliament comprises the King, the House of Lords and the House of Commons. All Bills must be passed by each House and receive royal assent. The Parliament is bicameral, that is to say, there are two chambers, each exercising a legislative role although not having equal power, and each playing a part in ensuring the accountability of the government. The judiciary is that branch of the state which adjudicates upon conflicts between state institutions, between the state and individuals and between individuals. The judiciary is independent of both Parliament and the executive. It is the feature of judicial independence which is of prime importance both in relation to government according to law and in the protection of liberty of the citizen against the executive. As Blackstone observed in his Commentaries-

> *"... in this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removed at pleasure by the Crown, consists one main perspective of the public liberty which cannot subsist long in any state unless the administration of common justice be in*

some degree separated both from the legislative and from the executive." (Blackstone, W, Commentaries on the Laws of England (1765-69), 2001 ed, Morrison, W (ed), London: Cavendish Publishing)

It is apparent, however, that whilst a high degree of judicial independence is secured under the constitution, there are several aspects of judicial function which reveal an overlap between the judiciary, Parliament and the executive.

The Lord Chief Justice, Master of the Rolls, President of the Queen's Bench Division, President of the Family Division or Chancellor of the High Court, Lords Justices of Appeal and puisne judges of the High Court are appointed by the Queen (Section 10 (1), (2) of the Senior Courts Act, 1981).

The Lord Chief Justice is the head of the Judiciary, assuming the additional title of President of the courts of England and Wales and Head of the Judiciary of England and Wales. The Lord Chief Justice of England and Wales, the Lord Chief Justice of Northern Ireland and the Lord President of the Court of Session in Scotland may make written representations to Parliament on matters relating to the judiciary or the administration of justice.

In the United Kingdom, judges are expected to interpret legislation in line with the intention of Parliament and are also responsible for the development of common law. Judges in the High Court have a life tenure which protects their independence. The resolution of both Houses is needed to remove a High Court Judge from office, while judges of a lower level can only be removed under disciplinary proceedings. Judges are also protected by immunity from legal action taken in relation to the judicial functions and absolute privilege in relation to their judicial proceedings. Conventionally, Judges are subordinate to the Parliament, and may not challenge the validity of an act of Parliament (Pickin V British Railways Board [1974] AC 765).

There is an element of judicial lawmaking in the evaluation of common law. In *Magor and St. Mellons Rural District Council Vs. Newport Corporation, [1952] AC 189*, the House of Lords rejected the approach of Lord Denning, who had stated that where gaps are apparent in legislation, the court should fill those gaps.

United States Perspective:

In the United States of America, the doctrine of checks and balances is expressly embedded within the constitutional framework. Legislative power is vested in Congress, executive power in the President, and judicial power in the Supreme Court and inferior federal courts. While Congress enacts laws, the President may veto legislation, subject to override by a supermajority of the legislature. The judiciary, in turn, possesses the power of judicial review and may declare legislative or executive acts unconstitutional.

Congress exercises additional checks over the executive through its powers to approve presidential appointments, control public expenditure, and initiate impeachment proceedings. The President may issue executive orders having the force of law, yet such orders remain subject to judicial scrutiny. Judges of the federal courts are nominated by the President and confirmed by the Senate, and they may be removed from office through impeachment by Congress.

Checks and Balances Doctrine by the Apex Court in Bangladesh:

Our Apex Court, in the case of *Bangladesh vs. Asaduzzaman Siddique* reported in *77 DLR (AD) 134*, has emphasised in checks and balances as follows-

> *"53. However, the independence of the judiciary does not connote that a Judge will be immune from any responsibility for whatever he does. Judicial independence without accountability may be fruitless, and*

therefore, judicial independence essentially involves the concept of judicial accountability of the Judges. In order to ensure accountability of the Supreme Court Judges, a Code of Conduct was formulated at casual intervals. Removal of a Judge from his office for proven misconduct and misbehaviour falls to a great extent within the purview of judicial accountability. Removal of a Judge from his office has a proximate nexus with the independence of the judiciary since in most of the cases Judges have to work in a critical situation and their righteous act may even incur criticism from vested quarters. To establish effective checks and balances between the independence of the judiciary and judicial accountability provisions for removal of judges from their office, a unique one so that the independence of the judiciary is ensured while removing judges who are in violation of their oath or become physically or mentally unfit to perform as judges. Clause 2 of Article 96 of the Constitution as substituted by section 2 of the Constitution (Sixteenth Amendment) Act, 2024 articulates that a Judge shall not be removed from his office except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of members of Parliament, on the ground of proved misbehavior of incapacity. This provision may not address the situation where misbehaviour or incapacity of a Judge has been proved, but the Parliament failed to pass a resolution supported by a majority of not less than two-thirds of the total members of the Parliament. It is because of the political rivalry prevalent in our country that a resolution for the removal of a Judge of the Supreme Court may not be passed simply because of political considerations. Independence of the Judiciary may seriously be questioned if the Judge with proven misbehaviour or incapacity continues in office for failure of Parliament to take a resolution. The establishment of the Supreme Judicial Council for enquiring into the incapacity or misconduct of a Judge of the Supreme Court for his removal by the President for proved misconduct or incapacity accords more with the constitutional scheme of Separation of Powers."

In regard to the present writ petition, Mr. Karim submits that the Rule issued by this Court is totally misconceived. The High Court Division may declare any provision of the Constitution ultra vires if the same is against

the basic structure of the Constitution. Refuting the arguments of the writ petitioners, he submits that this Division cannot declare ultra vires of a repealed Constitutional provision which is not in existence. The fourth amendment has lost its life long before and had been repealed long ago. It is now a hypothetical question and academic question as to whether the substitution of the word "President" with the word "Supreme Court" was ultra vires or not. It is well settled that an abstract theoretical question is not to be decided by any court, as those are only of academic importance. Article 7(2) provides that if any other law is inconsistent with the Constitution, that other law shall, to the extent of the inconsistency, be void. The connotation of law as it appears in Article 7(2) necessarily means that the law must be in force.

Whether a repealed law can be judicially reviewed was answered in the famous case *Kudrat-e-Elahi Panir V Bangladesh (1992) 44 DLR (AD) 319*. The fourth amendment, having lost its force, is no longer a law and cannot be said to be violative of any provision of the Constitution, and, as such, is not subject to scrutiny by this court. In the writ petition, a pure hypothetical question has been raised that the fourth amendment made in Article 116 vide the Constitution (Fourth Amendment) Act, 1975, is ultra vires, but its vires cannot be challenged as the same cease to be a law.

This court cannot legislate any provision. By way of seeking substitution of the word "President" with the word "Supreme Court," the petitioners in fact invited this court to legislate. It is the legislature that can only legislate; this court can only give an interpretation of a law, but it has no power to legislate.

In this connection the Apex court in plethora of judgments have settled this principle that just as judiciary cannot legislate, the judiciary cannot give direction to Parliament to make laws or to the President to make rule but the judiciary is within its jurisdiction to bring back Parliament and the executive to follow the Constitutional course by making or amending laws or rules *(Kudrat-e-Elahi Panir V Bangladesh (1992) 44 DLR (AD) 319, Secretary, Ministry of Finance V Masdar Hossain. 2000 BLD (AD) 104)*.

Effect of Repealed law:

He then submits that a previously repealed law cannot be declared ultra vires in the context of its enforcement. The legal standing of a repealed law is that it no longer exists in the legal framework and thus cannot be subjected to a declaration of being ultra vires. The rationale why a previously repealed law cannot be declared ultra vires, as it no longer holds any legal standing. The declaration of ultra vires applies only to existing laws that are currently in effect. Once a rule is repealed, it is effectively removed from the legal framework and cannot be subjected to further legal scrutiny regarding its validity. Any legal action or interpretation that relies on repealed or ultra vires provisions may lead to invalid outcomes. Thus, any legal arguments or claims have to be based on current law *(State of UP Vs. Hirendra Paul Singh [2011] 5 SCC 305)*.

In the above case, it was held that on repeal, the earlier provisions stand obliterated, abrogated/wiped out wholly, i.e. pro tanto repeal. It is submitted that even an amendment of a law has the effect of repeal (AIR 1988 SC 740).

Whether the Petitioners have been able to establish a violation of the Basic Structure of the Constitution:

He also goes to argue that the petitioners have utterly failed to identify any specific basic pillar of the Constitution with which Article 116 is allegedly inconsistent. Although they have asserted that Article 116 is ultra vires the Constitution, they have not articulated how or why the said provision violates the basic structure. In order to strike down Article 116 as it presently stands, the petitioners were required to demonstrate, with precision, that the provision offends one or more recognised basic features of the Constitution.

By the Constitution (Fifteenth Amendment) Act, 2011, particularly under section 39 thereof, no individual word was substituted; rather, the entirety of Article 116 was replaced. For ready reference, Article 116, as amended by the said Act, reads as follows:

> *"116. Control and discipline of subordinate courts.— The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President and shall be exercised by him in consultation with the Supreme Court."*

Doctrine of Basic Structure:

The doctrine of basic structure, he submits, postulates that the Constitution of a sovereign State possesses certain fundamental characteristics which cannot be abrogated or destroyed by legislative amendment. The doctrine operates as a limitation upon the constituent power of Parliament, ensuring that amendments do not alter the core identity or essential features of the Constitution. Developed through judicial interpretation, the doctrine serves as a safeguard against constitutional amendments that may otherwise undermine foundational constitutional principles.

Apex Court's verdict on which provisions are the basic structure:

In *Anwar Hossain Chowdhury vs. Bangladesh [41 DLR (AD) 165]* (Eighth Amendment Case), the Apex Court held that Articles 7, 94, 100, 101 and 102 are basic pillars of the Constitution. Therefore, it is submitted that Article 116 is not the basic pillar of the Constitution.

Meaning of Independence of Judiciary:

He next submits that an independent and impartial judiciary is a precondition of the rule of law. In *Secretary, Ministry of Finance Vs. Masdar Hossain, 2000 BLD (AD) 104,* the Appellate Division referred to three essential conditions of independence of judiciary listed by the Canadian Supreme Court in *Walter Valente Vs. Queen [1985] 2 SCR 673*, which are security of tenure, security of salary and other remunerations and institutional independence to decide on its own matters of administration bearing directly on the exercise of its judicial functions. In a later decision in *British Columbia Vs. Imperial Tobacco Canada Ltd. [2005] 2 SCR 473* Canadian Supreme Court held:

> *"[44] Judicial independence is a 'foundational principle' of the Constitution reflected in s.11(d) of the Canadian Charter of Rights and Freedoms, and in both ss.96-100 and the preamble to the Constitution Act, 1867....... It serves to safeguard our constitutional order and to maintain public confidence in the administration of justice.*
>
> *[45] Judicial independence consists essentially in the freedom 'to render decisions based solely on the requirements of the laws and justice'... It requires that the judiciary be left free to act without improper 'interference from any other entity' i.e., that the executive and legislative branches of government not 'impinge on the essential authority and function of the court'....*
>
> *[46] Security of tenure, financial security and administrative independence are the three 'core characteristics' or 'essential conditions' of judicial*

independence. It is a precondition to judicial independence that they be maintained, and be seen by 'a reasonable person who is fully informed of all the circumstances' to be maintained...

[47] However, even where the essential conditions of judicial independence exist, and are reasonably seen to exist, judicial independence itself is not necessarily ensured. The critical question is whether the court is free, and reasonably seen to be free, to perform its adjudicative role without interference, including interference from the executive and legislative branches of government...."

The provisions of Articles 94(4), 96, 116A, and 147 of the Constitution ensure the independence and impartiality of the judges of the judiciary. The writ petitioners have emphasised Article 22 of the Constitution, which provides that the state shall ensure the separation of the judiciary from executive organs of the state. The rationale of Article 22 is that the judiciary must be separated from the executive organs of the state. The rationale of Article 22 of the Constitution is that the executive must not have judicial functions. The government has already taken away the power of executive magistrates and the power to exercise judicial functions to a great extent. Article 116 of the Constitution provides a check and balance between the executive and judiciary, as the power exercised by the President must be in consultation with the Supreme Court. In *Secretary, Ministry of Finance Vs. Masdar Hossain, 2000 BLD (AD) 104*, it was ruled that any consultation under Article 116 of the Constitution, the views and opinions of the Supreme Court shall have primacy and give further direction to ensure the independence in the functioning of the subordinate judiciary.

Furthermore, Article 116A provides that subject to the provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions. In *Secretary, Ministry of*

Finance Vs. Masdar Hossain, 2000 BLD (AD) 104, the Appellate Division observed and directed as follows-

1. The judicial service is a service of the Republic within the meaning of art. 152(1), but it is fundamentally and structurally distinct and separate from the civil executive and administrative services of the Republic, with which the judicial service cannot be placed on par on any account, and it cannot be amalgamated, abolished, replaced, mixed up and tied together with the civil executive and administrative services.

2. The word "appointments" in art. 115 means that it is the President who under art. 115 can create and establish a judicial service and also a magistracy exercising judicial functions, make recruitment rules and all pre-appointment rules on that behalf, make rules regulating their suspension and dismissal, but Article 115 does not contain any rule-making authority with regard to other terms and conditions of service and articles. 133 and 136, and the Service (Re-organisation and conditions) Act, 1975, have no application to the above matters in respect of judicial service and magistrates exercising judicial functions.

3. The creation of B.C.S. (Judicial) cadre along with other B.C.S, executive and administrative cadres by Bangladesh Civil Service (Re-organisation) Order, 1980, with the amendment of 1986, is ultra vires the Constitution and Bangladesh Civil Service Recruitment Rules, 1981, are inapplicable to the judicial service.

4. The government is directed to take necessary steps forthwith for the President to make rules under Article. 115 to implement its provisions, which is a constitutional mandate and not a mere enabling power. The nomenclature of the judicial service shall follow the constitutional language and shall be designated as the Judicial Service of Bangladesh or Bangladesh Judicial Service. Either by legislation or by executive order, having the force of rules, the Judicial Services Commission is to be established forthwith, with a majority of members from the Senior Judiciary of the Supreme Court and the subordinate courts for recruitment to the judicial service on merit, to achieve equality between men and women in the recruitment.

5. Under Article. 133 law or rules or executive orders having the force of rules relating to posting, promotion, grant of leave, discipline (except suspension and removal), pay, allowances, pension (as a matter of right, not favour) and other terms and conditions of service, consistent with arts, 116 and 116A, as interpreted by the Appellate Division, be enacted or framed or made separately for the judicial service and magistrates exercising judicial functions keeping in view the constitutional status of such service.

6. The orders impugned in the writ petition imposing conditions are declared to be ultra vires the Constitution, and the government is directed to establish a separate Judicial Pay Commission forthwith as a part of the rules to be framed under Article. 115 (sic) to review the pay, allowances and other privileges of the judicial service, which shall convene at stated intervals to keep the process of review a continued one. The pay, etc., of the judicial service shall follow the recommendations of the Commission.

7. In exercising control and discipline over persons employed in the judicial service and magistrates exercising judicial functions under Article. 116 views and opinion of the Supreme Court shall have primacy over those of the executive.

8. The essential condition of judicial independence in art. 116A, elaborated in the judgment, namely, (1) security of tenure, (2) security of salary and other benefits and pension and (3) institutional independence from Parliament and the executive shall be secured in the law or rules made under Article. 133 or in the executive orders having the force of rules.

9. The executive government shall not require the Supreme Court of Bangladesh to seek their approval to incur any expenditure on any item from the funds allocated to the Supreme Court in the annual budgets, provided the expenditure incurred falls within the limit of the sanctioned budgets, as more fully explained in the body of the judgment. Necessary administrative instructions and financial delegations to ensure compliance with this direction shall be issued by the government to all concerned by 31.5.2000.

10. The members of the judicial service are within the jurisdiction of the administrative tribunal.

11. The declaration by the High Court Division that, for the separation of the subordinate judiciary from the executive, no further constitutional amendment is necessary is set aside. If Parliament so wishes, it can amend the Constitution to make the separation more meaningful, pronounced, effective and complete.

12. Until the Judicial Pay Commission gives its first recommendation, the salary of judges in the judicial service will continue to be governed by the status quo ante as on 8.1.1994 vide paragraph 3 of the Order of the same date and also by further directions of the High Court Division in respect of Assistant Judges and Senior Assistant Judges. If pay increases are effected in respect of other services of the Republic before the Judicial Pay Commission gives its first recommendation, the members of the judicial service will get an increase in pay, etc., commensurate with their special status in the constitution and in conformity with the pay, etc. that they are presently receiving.

In *Secretary, Ministry of Finance Vs. Masdar Hossain, 2000 BLD (AD) 104*, the Apex court further held that suspension and dismissal of judicial officers and magistrates exercising judicial functions should be dealt with in rules framed under Article 115, and it logically follows that all other matters relating to discipline would come under the purview of Article 133. If Articles 115 and 116 are read together, it can be seen that the aspect of discipline has been dealt with separately from appointment.

He then submits that Article 116 is not a basic pillar of the Constitution. It also does not clash with Article 22 of the Constitution. Article 116 makes it obligatory that the President shall have consultation with the Supreme Court. Therefore, any posting and promotion of and disciplinary action against a judicial officer exercising judicial functions without consultation with the Supreme Court will be void.

The Appellate Division in *Government of Bangladesh Vs. Idrisur Rahman 1999 BLD AD 203* held that all postings of all persons exercising judicial functions not made in consultation with the Supreme Court are unlawful. In *Bangladesh Vs. Md. Abu Bakar, [2005] 57 DLR (AD) 186*, the Appellate Division reiterated the mandatory nature of consultation with the Supreme Court as provided in Article 116, holding that in view of Article 116 of the Constitution, when a disciplinary action is sought to be taken against a magistrate exercising judicial functions, consultation with the Supreme Court is a must. Therefore, Article 116 acts as a check and balance between the judiciary and the executive.

Consultation with the Supreme Court is necessary not only when a judicial officer is promoted or transferred to another post of judicial service, but also when he is promoted or transferred to a post outside the judicial service (*Md. Aftabuddin Vs. Bangladesh (1996) 48 DLR 1*). The consultation with the Supreme Court under Article 116 must be a real and effective one (*AIR 1982 SC 1579*), and the Supreme Court must be given full weight (*AIR 1980 SC 1426, 1430*). It is not sufficient under Article 116 that the Supreme Court has given its views in the matter and the government is posted with all the facts. Consultation is not complete or effective before the parties thereto make their respective views known to the other and discuss and examine the relative merits of their views. If one party proposes to the other who has a counter proposal in his mind which is not communicated to the proposer, the direction to give effect to the proposal without anything more, cannot be said to have been done after consultation (*AIR 1970 SC 370, 375; AIR 1982 SC 1579*).

In the process of consultation, the result shall be the primacy of the views and opinion of the Supreme Court which the executive shall not disregard, for it is the Supreme Court, not the political executive, which is the best judge of judicial

matters and judicial officers (*Secretary, Ministry of Finance Vs. Masdar Hossain, 2000 BLD (AD) 104*).

He further goes to submit that judicial independence is the institutional independence of the subordinate judiciary, especially from the parliament and executive. It must be free to decide its own matter of administration bearing directly on the exercise of its judicial functions. Article 116A guarantees this independence. The judiciary must be free from actual and apparent interference, or dependence upon the executive arms of the government. It must be free from powerful governmental interference, like pressure from corporate giants, business or corporate bodies, pressure groups, media, political pressure, etc. As the High Court Division has controlling and supervisory role and the Supreme Court has consultative role connected with subordinate judiciary, independence of subordinate judiciary requires financial independence of the Supreme Court which can be secured if the funds allocated to the Supreme Court in the annual budget are allowed to be disbursed within the limits of sanctioned budget by the Chief Justice without any interference by the executive (*Secretary, Ministry of Finance Vs. Masdar Hossain, 2000 BLD [AD]104*). Therefore, there is no scope to argue that Article 116 is contradictory to the basic pillar of the Constitution; of course, this is not the contention of the petitioners.

Supervisory Power of the High Court Division:

He further submits that Article 109 of the Constitution confers an additional constitutional power upon the High Court Division, providing that it shall have superintendence and control over all courts and tribunals subordinate to it. This power is comparable to the revisional jurisdiction under section 115 of the Code of Civil Procedure and section 439 of the Code of Criminal Procedure. While statutory supervisory power extends only to judicial matters, constitutional

supervisory power under Article 109 extends to both judicial and administrative matters in the case of *AT Mridha vs. State* reported in 25 DLR 335. Moreover, statutory supervision is confined to courts, whereas Article 109 encompasses both courts and tribunals subordinate to the High Court Division. In *Hosne Ara Begum Vs. Islami Bank Bangladesh* (*53 DLR (AD) 9*), the Appellate Division observed that where a statute bars the entertainment of a revision, the exercise of supervisory power under Article 109 is not available.

The power under Article 109 is distinct from that under Article 102. The latter may be exercised only upon an application by an aggrieved party, whereas the former may be exercised *suo motu* by the High Court Division without any application case of *Fazal-E-Haq, Accountant-General, West Pakistan vs. The State* reported in *12 DLR (SC) 254*. Furthermore, Article 102 jurisdiction may be invoked irrespective of whether the court or tribunal is subordinate to the High Court Division, whereas Article 109 applies only to courts and tribunals subordinate to it namely, those from whose decisions an appeal or revision lies to the High Court Division.

Therefore, the purport of Article 116 is in no manner inconsistent with Article 109. Neither provision is supplementary to the other. Appointment, promotion, or disciplinary control exercised by the President in effective consultation with the Supreme Court does not in any way curtail or interfere with the supervisory powers of the High Court Division under Article 109. The High Court Division remains fully empowered to exercise even *suo motu* jurisdiction to examine judicial orders and to supervise administrative functions of subordinate courts and tribunals. There is no instance on record where executive action has obstructed the exercise of authority under Article 109. The contention that Article 116 impedes Article 109 is, therefore, purely hypothetical.

Apex Court's Decision on Articles 115 and 116:

Supporting his contention, Mr. Karim refers the case of *Khandker Delwar V Italian Marble Works reported in 62 DLR (AD) 298* (Fifth Amendment case), where the Appellate Division expressed its hope that the Parliament will restore articles 115 and 116 to their original position. In the writ petition vires of Article 115 have not been challenged. The Apex court, while pronouncing judgment in the Fifth Amendment case, expressed its hope that Articles 115 and 116 would be restored to their original position. The Apex court, while pronouncing the judgment, was mindful that articles 115 and 116 of the Constitution are not against the basic structure of the Constitution and therefore, it expressed its hope that the Parliament would take necessary steps in this regard. The Apex court rightly left the matter of articles 115 and 116 of the Constitution in the hands of the Parliament, which indeed is the actual authority to amend the said provisions according to its own wisdom.

In *Bangladesh Vs. Md. Idrisur Rahman reported in 17 BLT (AD) 231*, the Apex court, in a similar fashion, left the matter in the hands of the Parliament.

In *Asaduzzaman Siddiqui Vs. Bangladesh, reported in 8 ALR 2016(2)* (Sixteenth Amendment case), the High Court Division also provided that the legislature is the authority to restore the original articles 115 and 116 of the Constitution.

In *Bangladesh Vs. Asaduzzaman Siddiqui reported in 71 DLR (AD) 52* (Sixteenth Amendment case), there is a difference of opinion with respect to Article 116 of the Constitution. The presiding judge, Mr. Justice Surendra Kumar Sinha, made his observation as follows-

> *"334. The independence of the judiciary is the foundation stone of the constitution, and as contemplated by Article 22, it is one of the fundamental*

principles of State policy. The significance of an independent judiciary, free from the interference of the other two organs of the government as embodied in Article 22, has been emphasised in Articles 94(4), 116A and 147 of the Constitution. There has been a historic struggle by the people of this country for independence of the judiciary, to uphold the supremacy of the constitution and to protect the citizens from violation of their fundamental rights and from the exercise of arbitrary power. In Anwar Hossain (supra) this court observed that "Democracy, Republican Government, Unitary State, Separation of Powers. Independence of the Judiciary, Fundamental Rights are basic structures of the Constitution" (emphasis supplied), Therefore, the constitutional principle of independence of judiciary precludes any kind of partisan exercise of power by the Parliament in relation to the judiciary, in particular, the power of the Parliament to remove the Judges of the Supreme Court."

However, Mr. Justice Hasan Foez Siddique disagreed with the observation of Mr. Justice SK Sinha, hold that-

"778. I find myself unable to agree with the findings and observations made by the learned Chief Justice in respect of the provisions of Article 116 of the Constitution."

At paragraph No. 290, however, Mr. Justice SK Sinha held that *"If articles 7, 22, 94(4), 102, 112 are read together, it becomes clear that the Supreme Court is independent, separate and is the guardian of the Constitution, and it is an organ of the state. It is not merely a court, and if this position is taken to be true, the Parliamentary removal mechanism introduced by the Sixteenth Amendment would be an embargo upon the judges to uphold the supremacy of the constitution, as well as create an imbalance between the organs of the state and thereby jeopardise the independence of the judiciary."*

In the given context, he goes to argue that in none of the judgments did the Apex court ever arrive at the view that Article 116 of the Constitution is ultra vires constitution. At best, Article 116, as amended vide 4th amendment, revived in its original position as 5th amendment has been declared ultra vires vide *Khandker*

Delwar V Italian Marble Works reported in 62 DLR (AD) 298 (Fifth Amendment case).

Can the Court change the word of the Constitution:

Next he submits that an argument may be placed that if fourth amendment, as revived, the court would change the word President with the word Supreme Court. However, this court has no jurisdiction to legislate, and therefore, the original wording as made effective in 4th amendment would revive in its entirety as discussed earlier. The court cannot lay its hand on 4th amendment in the light of the decision of *Kudrat-e-Elahi Panir V Bangladesh (1992) 44 DLR (AD) 319*.

Between the 4th Amendment and the 15th Amendment with respect to Article 116, the 15th Amendment is in a better position. This court, in judicial review, cannot hold Article 116 to go to its original position overstepping 4th amendment of the Constitution.

Maintainability of the prayer relating to the impugned Rules, 2017:

Regarding the Rules, 2017, Mr. Karim submits that the impugned *Bangladesh Judicial Service (Disciplinary) Rules, 2017* have been framed under Article 115 of the Constitution. Article 115 itself has not been challenged, nor has any argument been advanced as to why the said Rules of 2017 are liable to be struck down. Furthermore, the Rules were promulgated in consultation with the Supreme Court. No specific ground has been shown as to why the said Rules, 2017, should be declared ultra vires the Constitution.

Accordingly, he prays for discharge of the Rule, while supporting the establishment of a separate Secretariat for the Supreme Court of Bangladesh.

Thereafter, Mr. Mohammad Shishir Manir, the learned Advocate for the petitioner further submits that in the course of the hearing of the instant writ petition, it was argued on behalf of the learned Attorney General as well as by the Intervener, Mr. Ahsanul Karim that the terms of the Rule are misconceived. He added that the Petitioners did not challenge the specific section of the Constitution (Fourth Amendment) Act, 1975 and the Constitution (Fifteenth Amendment) Act, 2011. Hence, Rule Nisi cannot be made absolute in the said terms. In reply, Mr. Manir submits that in the 5th, 7th, 8th, and 16th Amendment cases, the Apex Court made the Rule absolute and granted remedies that went beyond the relief originally sought. Furthermore, on 08.05.2025, the Petitioners filed a supplementary affidavit and specifically submitted that the substitution of the word *'Supreme Court'* with the word *'President'* in Article 116 of the Constitution of the People's Republic of Bangladesh by the section 19 (section 20 of the English Version) of the Constitution (Fourth Amendment) Act, 1975 (Act No. II of 1975) and the substitution of Article 116 of the Constitution by the section 39 of the Constitution (Fifteenth Amendment) Act, 2011 (Act XIV of 2011) may kindly be declared *ultra vires* the Constitution and further Bangladesh Judicial Service (Disciplinary) Rules, 2017 may also be declared *ultra vires* the Constitution being inconsistent with the original Article 116 of the Constitution and conflicting with the independence of judiciary and pass necessary Order/Orders for establishing a separate Judicial Secretariat for the Supreme Court of Bangladesh at Supreme Court premises to give full meaning to the Separation of Judiciary from the executive. Thereafter, this Hon'ble Court vide its Order dated 08.05.2025 was pleased to make the supplementary affidavit as part of the original record.

Doctrine of Eclipse and Revival:

Mr. Manir further submits that it is well settled in both Indian and Bangladeshi constitutional jurisprudence that when a constitutional amendment is declared unconstitutional, the earlier valid provision automatically revives.

This doctrine has been consistently applied in our jurisdiction. In *Anwar Hossain v. Bangladesh (41 DLR (AD) 165*) and again in the *Sixteenth Amendment Case (71 DLR (AD) 52),* the Appellate Division declared the impugned amendments unconstitutional and restored the prior constitutional provisions.

Accordingly, if the Fifteenth Amendment text of Article 116 is struck down, the Court must necessarily examine the validity of the Fourth Amendment substitution. If that substitution is also found unconstitutional, the original Article 116 of 1972 Constitution—vesting control of the subordinate judiciary in the Supreme Court—will revive automatically.

Notably, the Intervener's own reliance on the doctrine of eclipse supports the petitioners' case. By citing *Asaduzzaman Siddiqui (77 DLR (AD) 134)* and 27 DLR (HC) 1 (paragraph 23), the Intervener concedes that when a constitutional amendment is struck down, the earlier provision revives automatically without judicial legislation. This is precisely the petitioners' position. The contention that the Rule is "hypothetical" or "academic" stands contradicted by the order of the Appellate Division dated 29.06.2025, whereby the Rule was expressly preserved for final adjudication. The issue is thus live and substantive, and the alleged "absurdity" is nothing but the natural constitutional consequence already applied in the Eighth and Sixteenth Amendment cases.

Practical Necessity of Judicial Review:

If the Attorney General/Intervener's contention were accepted—that the Fourth Amendment substitution is repealed and immune from challenge—then striking down the Fifteenth Amendment would result in a constitutional vacuum in Article 116. It is a settled principle that constitutional courts do not permit such a vacuum. Judicial review of the Fourth Amendment substitution is, therefore, unavoidable to preserve the coherence and continuity of the constitutional scheme.

Further Submissions Regarding the Basic Structure Argument

The Intervener further contends, relying on *Anwar Hossain v. Bangladesh* (Eighth Amendment Case), that Articles 7, 94, 100, 101, and 102 themselves constitute the basic pillars of the Constitution.

In rebuttal, the petitioners submit that a careful reading of the majority opinions reveals otherwise. In the Eighth Amendment Case, Mr. Justice Shahabuddin Ahmed identified the basic structural pillars of the Constitution as foundational principles—namely, sovereignty of the people, supremacy of the Constitution, democracy, republican form of government, unitary character of the State, separation of powers, independence of the Judiciary, and fundamental rights. His Lordship did not treat specific Articles as immutable; rather, he emphasized the principles embodied therein.

Justice Shahabuddin Ahmed observed:

> *"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 are basic structures of the Constitution… These are structural pillars of the Constitution and they stand beyond any change by the amendatory process."*

Likewise, Mr. Justice Badrul Haider Chowdhury and Mr. Justice M.H. Rahman held that the amendment to Article 100 undermined the rule of law and the integrated judicial structure envisaged in Articles 94 to 116A. Their emphasis, too, was on the preservation of foundational constitutional principles, not on freezing the textual form of individual Articles as permanently unalterable.

Accordingly, he prays for making the Rule absolute and for issuing a direction upon the respondents to establish an independent and separate Secretariat for the Supreme Court of Bangladesh.

Dr. Sharif Bhuiyan, the learned Senior Advocate appearing as an Amicus Curiae, submits that:

Rules of interpretation applicable to a Constitution:

The process of interpretation of a constitution differs fundamentally from that of a statute. When interpreting constitutional provisions, the court must consider the broader social, political, and historical context in which those provisions operate. Therefore, in assessing the constitutionality of the amendments to Article 116 made by the Fifteenth and the Fourth Amendments, the court must carefully consider the political and historical background of these changes as well as the consequences of the amendments. These consequences include the erosion of the independence of the judiciary, which eventually resulted in the failure of democracy and the rule of law.

About the interpretation of the Constitution, the Appellate Division of the Supreme Court of Bangladesh in *Anwar Hossain Chowdhury v. Government of the People's Republic of Bangladesh BLD (Spl) (1989) 1* (hereinafter the "*Eighth Amendment Case*") observed as follows:

*Munir, C.J., in the Reference by the President (9 DLR SC 178=1957 PLD 215), referring to an observation of an Ohio Judge, stated that the "pole star" in the construction of a constitution is the intention of its makers and adopters. He laid down four rules of construction; one is that whenever there is a particular enactment and a general enactment in the same statute, the particular one should be preferred. In the instant case, this rule is not applicable. Another rule is that the amendment, being the last will of the Legislature, should prevail over the earlier provisions. This is also not attracted here, for if it is accepted and the amendment stands, all other existing provisions on this subject shall be taken as repealed or drastically amended, with the result that the High Court Division as one and single entity will cease to exist. In such a situation, the principle as to the consequence of a particular construction, as stated in Maxwell's Interpretation of Statutes and also expounded by Lord Atkinson in Vacher & Sons Vs. London Society of Compositors and Lord Reid in Gartside Vs. IRC (1968) AC, 574 deserves consideration; the construction which avoids any evil consequences should be preferred(**paragraph 374**).*

Thus, the consequences of a particular interpretation are important, and if a construction leads to an *evil consequence,* that construction must be avoided. While determining the constitutionality of the amendments of Article 116 by the Fourth and the Fifteenth Amendments, the court must take into consideration the "consequences" of the amendments.

While describing the rules of construction of the Constitution, the Appellate Division observed in the *Eighth Amendment Case* as follows:

Now it is to be seen what is the necessity of an amendment of a constitution when it is "intended to last for all ages to come", as observed by Marshal, C.J. The answer has been given by himself when he added "and consequently to be adapted to various crises of human affairs". Holmes, J., observed that the Constitution should be "interpreted according to the felt necessities of the time. Brandies observed in "United States Vs Moreland, 258 US 433 (1922) as

*quoted in "The Judicial Process" by J. Abraham: "Our Constitution is not a straitjacket. It is a living organism. As such, it is capable of growth, of expansion, and of adaptation to new conditions. Growth implies changes, political, economic and social. Growth which is significant manifests itself rather in intellectual and moral conceptions than in material things" Woodrow Wilson said "Living political constitutions must be Darwinian in practice", if they are to be a "vehicle of life". Jefferson observed: "Each generation has a right to determine the law under which it lives... the earth belongs in usufruct to the living; the dead have neither powers nor right over it". John Stuart Mill says, no Constitution can expect to be permanent unless it guarantees progress as well as order. Wills says that change and growth in constitutional law should not be stopped with the present. Ivor Jennings is of the view that it is impossible for the framers of a constitution to "foresee the conditions in which it would apply and the problems which will arise." From these wise sayings as well as on experience, it may be taken that though a constitution is intended to last forever, it is necessary to keep it in agreement with the spirit of the time without impairing its fundamental principles (**paragraph 333**).*

The Supreme Court of Pakistan *in Farooq Ahmed Khan Leghari v. Federation of Pakistan 51 PLD (SC) (1999) 57*, observed as follows:

… a constitution is an organic document designed and intended to cater for the needs for all times to come. It is like a living tree; it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people. Thus, the approach, while interpreting a Constitutional provision, should be dynamic, progressive and oriented with the desire to meet the situation which has arisen, effectively. The interpretation cannot be narrow and pedantic. But the court's efforts should be to construe the same broadly, so that it may be able to meet the requirements of everchanging society. The general words cannot be construed in isolation, but the same are to be construed in the context in which they are employed. In other words, their colour and contents are

> *derived from their context. [I have held so in the case of Al Jehad Trust (PLD 1996 SC 324)]* ***(paragraph 93****).*

The High Court Division in *AKM Shafiuddin Vs. Bangladesh 64 DLR (HCD) (2012) 508*, relying upon the aforesaid observations of the Supreme Court of Pakistan, stated as follows:

> *Before the discussion of the issues, it is relevant here to quote a passage from the case of Farooq Ahmed Khan Leghari vs Federation of Pakistan reported in PLD 1999 SC 57, which is, "Constitution is an organic document designed and intended to cater for the needs for all times to come. It is like a living tree; it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people. Thus, the approach, while interpreting a constitutional provision, should be dynamic, progressive and oriented with the desire to meet the situation which has arisen, effectively. The interpretation cannot be narrow and pedantic. But the court's efforts should be to construe the same broadly, so that it may be able to meet the requirements of everchanging society. The general words cannot be construed in isolation, but the same are to be construed in the context in which they are employed. In other words, their colour and contents are derived from their context"* ***(paragraph 17****).*

About the difference between the rules of interpretation of statutes and of the Constitution, the Supreme Court of Canada in *Hunter et al.v.Southam Inc.2 SCR (1984) 145*observed as follows:

> *At the outset, it is important to note that the issue in this appeal concerns the constitutional validity of a statute authorising a search and seizure. It does not concern the reasonableness or otherwise of the manner in which the appellants carried out their statutory authority. It is not the conduct of the appellants, but rather the legislation under which they acted, to which attention must be directed.*

As is clear from the arguments of the parties as well as from the judgment of Prowse J.A., the crux of this case is the meaning to be given to the term "unreasonable" in the s. 8 guarantee of freedom from unreasonable search or seizure. The guarantee is vague and open. The American courts have had the advantage of several specific prerequisites articulated in the Fourth Amendment to the United States Constitution, as well as a history of colonial opposition to certain Crown investigatory practices from which to draw out the nature of the interests protected by that Amendment and the kinds of conduct it proscribes. There is none of this in s. 8. There is no specificity in the section beyond the bare guarantee of freedom from "unreasonable" search and seizure; nor is there any particular historical, political or philosophic context capable of providing an obvious gloss on the meaning of the guarantee.

It is clear that the meaning of "unreasonable" cannot be determined by recourse to a dictionary, nor, for that matter, by reference to the rules of statutory construction. The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will lest it become one.

The need for a broad perspective in approaching constitutional documents is a familiar theme in Canadian constitutional jurisprudence. It is contained in Viscount Sankey's classic

> formulation in *Edwards v Attorney General for Canada,* [1930] A.C. 124, at p. 136, cited and applied in countless Canadian cases.
>
> The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada… Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation.
>
> More recently, in *Minister of Home Affairs Vs. Fisher,* [1980] A.C. 319, dealing with the Bermudian Constitution, Lord Wilberforce reiterated at p. 328 that "*a constitution is a document "sui generis, calling for principles of interpretation of its own, suitable to its character*", and that as such, a constitution incorporating a Bill of Rights calls for:
>
> … a generous interpretation avoiding what has been called "the austerity of tabulated legalism," suitable to give individuals the full measure of the fundamental rights and freedoms referred to.
>
> Such a broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects, is also consonant with the classical principles of American constitutional construction enunciated by Chief Justice Marshall in *M'Culloch v Maryland,* 17 U.S. (4 Wheat.) 316 (1819). It is, as well, the approach I intend to take in the present case (pages 154-156).

While determining the constitutionality of the amendments of Article 116 by the Fifteenth and the Fourth Amendments, the court's approach should be dynamic, progressive and oriented to meet the situation that has arisen following the said amendments and meeting the needs of the ever-changing society (Sharif Bhuiyan, Revolutionary Constitutionalism and Why it was Essential to Declare the Fifteenth Amendment Unconstitutional (Dhaka: The University Press Limited, 2025, pages 15-20).

Reasons for which a constitutional amendment can be unconstitutional:

A constitutional amendment can be unconstitutional for two reasons: firstly, procedural, and secondly, substantive. When an amendment is adopted in violation of the procedural rules applicable to constitutional amendments, it will be unconstitutional for procedural reasons. When an amendment is compatible with the procedural requirements but is inconsistent with other provisions of the Constitution or impairs the basic structure of the Constitution, the amendment will be unconstitutional for substantive reasons. The amendments of Article 116 by the Fifteenth and the Fourth Amendments are both procedurally and substantively unconstitutional(Sharif Bhuiyan, Revolutionary Constitutionalism and Why it was Essential to Declare the Fifteenth Amendment Unconstitutional (Dhaka: The University Press Limited, 2025) page 20).

Basic structure doctrine:

The basic structure doctrine is grounded in the idea that legislative power under the Constitution is limited. Legislative power is derivative—it is granted by, or derived from the Constitution and must operate within its framework. In contrast, constituent power refers to the authority to create or fundamentally alter a constitution. This power resides with the people themselves.

Under Article 142 of the Constitution of Bangladesh, Parliament holds the power to amend the Constitution. However, this is a derivative power and therefore, subordinate to the Constitution. As such, it cannot be used to alter the basic structure, which constitutes the inviolable core of the Constitution.

The purpose and scope of the basic structure doctrine were discussed by the Appellate Division in the *Eighth Amendment Case* as follows:

> *"The main objection to the doctrine of basic structure is that it is uncertain in nature and is based on unfounded fear. But in reality,*

*the basic structures of a constitution are clearly identifiable. "Sovereignty" belongs to the people, and it is a basic structure of the Constitution. There is no dispute about it, as there is no dispute that this basic structure cannot be wiped out by the amendatory process. However, in reality, people's sovereignty is assailed or even denied under many devices and 'cover-ups' by holders of power, such as by introducing 'controlled democracy', basic democracy or by superimposing thereupon some extraneous agency, such as a council of elders or of wisemen. If by exercising the amending power, people's Sovereignty is sought to be curtailed, it is the constitutional duty of the Court to restrain it, and in that case, it will be improper to accuse the Court of acting as "super-legislators". Supremacy of the Constitution as the solemn expression of the people, Democracy, Republican Government, Unitary State, Separation of Powers, Independence of the Judiciary, Fundamental Rights are basic structures of the Constitution. There is no dispute about their identity. By amending the Constitution, the Republic cannot be replaced by a monarchy, Democracy by Oligarchy or the Judiciary cannot be abolished, although there is no express bar to the amending power given in the Constitution. The principle of separation of powers means that the sovereign authority is equally distributed among the three Organs, and as such, one Organ cannot destroy the others: These are structural pillars of the Constitution, and they stand beyond any change by amendatory process. Sometimes it is argued that this doctrine of bar to change of basic structures is based on the fear that the unlimited power of amendment may be used in a tyrannical manner so as to damage the basic structures. In view of the fact that "power corrupts and absolute power corrupts absolutely, I think the doctrine of bar to change of basic structure is an effective guarantee against frequent amendments of the Constitution in sectarian or party interest in countries where democracy is not given any chance to develop (**paragraph** 377)."*

The doctrine of basic structure is one growing point in constitutional jurisprudence. It has developed in a climate where the executive,

> *commanding an overwhelming majority in the legislature, gets snap amendments of the Constitution passed without a Green Paper or White Paper, without eliciting any public opinion, without sending the Bill to any select committee and without giving sufficient time to the members of the Parliament for deliberation on the Bill for amendment. Examples may be found both at home and abroad. In India, the thirty-ninth amendment to Article 329 A (4) of the Indian Constitution was ratified in three days during a period of emergency when freedom of speech was suspended, and there was hardly any time for debate on the Constitutional implications of that amendment. See H.M. Seervai, Constitutional Law of India (Third Edition) Vol. II at pp. 2659-2660* ***(paragraph 435)****."*

There is, however, a substantial difference between the Constitution and its amendments. 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. Test is that the amendment has been made after strictly complying with the mandatory procedural requirements, that it has not been brought about by practicing any *deception or fraud* upon statutes and that it is not so repugnant to the existing provision of the Constitution that its coexistence therewith will render the Constitution unworkable, and that, if the doctrine of bar to change of basic structure is accepted, the amendment has not destroyed any basic structure of the Constitution (**paragraph 341**).

The Appellate Division in the *Eighth Amendment Case* stated that the doctrine of basic structure "has developed in a climate where the executive, commanding an overwhelming majority in the legislature, gets snap amendments of the Constitution passed … without eliciting any public opinion without sending the Bill to any select committee and without giving sufficient time to the members of the Parliament for deliberation on the Bill for amendment (paragraph 435)". When the process of passing the Fifteenth and the Fourth Amendment is

examined, it is evident that what the Appellate Division indicated in the *Eighth Amendment Case*actually happened in relation to both of these constitutional amendments. Both the Fifteenth and the Fourth Amendments were passed by the executive, commanding an overwhelming majority in the legislature, without public opinion and against public interest. (Sharif Bhuiyan, Revolutionary Constitutionalism and Why it was Essential to Declare the Fifteenth Amendment Unconstitutional (Dhaka: The University Press Limited, 2025), pages 21-26).

The following test for an amendment to become a part of the Constitution was set out by the Appellate Division in the *Eighth Amendment Case*:

> *There is ... a substantial difference between the Constitution and its amendments. 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. Test is that the amendment has been made after strictly complying with the mandatory procedural requirements, that it has not been brought about by practicing any deception or fraud upon statutes and that it is not so repugnant to the existing provision of the Constitution that its coexistence therewith will render the Constitution unworkable, and that, if the doctrine of bar to change of basic structure is accepted, the amendment has not destroyed any basic structure of the Constitution (para 341 of the Eighth Amendment Case; see further, Sharif Bhuiyan, Revolutionary Constitutionalism and Why it was Essential to Declare the Fifteenth Amendment Unconstitutional (Dhaka: The University Press Limited, 2025) page 23).*

Substantive unconstitutionality of the Fifteenth and the Fourth Amendments:

The amendments of Article 116 by the Fifteenth and the Fourth Amendments are against the basic structure of the Constitution.

The scheme of the Constitution, in particular, original Article 116, read with Article 109, ensured the “independence of judiciary”. Article 116, before amendments provided as follows:

"116. The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the Supreme Court."

Article 22 imposes an obligation on the State to ensure the separation of the judiciary from the executive organs of the State.

The Hon'ble Appellate Division has, in a series of judgments, held that the "independence of the judiciary" and the "separation of powers" form part of the basic structure of the Constitution.

Article 116, as amended by the Fourth and Fifteenth Amendments, vests control over judicial service officers—including postings, promotions, and leave—as well as disciplinary authority, in the President. Consequently, the Fourth Amendment, to the extent that it altered the original Article 116, compromised the independence of the judiciary and the separation of powers. These principles are part of the Constitution's basic structure and cannot be amended under Article 142. Therefore, both the Fourth and Fifteenth Amendments are ultra vires the Constitution.

The amendments of Article 116 by the Fourth and the Fifteenth Amendments are in direct conflict with other existing Articles of the Constitution.

The amendments of Article 116 by the Fourth and the Fifteenth Amendments are contrary to Articles 109, 22 and 8(2) of the Constitution.

Article 109 provides as follows:

"109. The High Court Division shall have superintendence and control over all courts and tribunals subordinate to it."

While in accordance with Article 109, the High Court Division has superintendence and control over all subordinate courts and tribunals, the Executive's control under Article 116 over posting, promotion, and disciplinary actions limits the High Court Division's ability to effectively oversee officers of the subordinate courts. Consequently, the Fourth and Fifteenth Amendments, to the extent they amended Article 116, render Article 109 inoperative.

Article 22 states as follows:

> *"The State shall ensure the separation of the judiciary from the executive organs of the State."*

Article 8(2) states as follows:

> *"The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens, but shall not be judicially enforceable."*

Article 22 provides for the "separation of the judiciary" from the executive organ of the State. Article 8(2) of the Constitution provides that the principles set out in Part II "shall be a guide to the interpretation of the Constitution". Thus, Article 22 (i.e. separation of judiciary from the executive) is a guide to the interpretation of the Constitution. Accordingly, Article 109 and the original Article 116 will have to be interpreted with reference to Article 22. If the amendments to Article 116 are interpreted in light of Article 22, it is clear that the amendments undermined the separation of the judiciary and destroyed a basic structure of the Constitution. Accordingly, the Fourth and the Fifteenth Amendments are ultra vires the Constitution.

Article 8(2) of the Constitution states that the "principles set out in this Part [i.e. Part II] … shall be applied by the State in the making of laws". Thus, as per Article 8(2), the State, by making laws, can seek to achieve the objectives of Article 22, i.e. ensure separation of the judiciary from the executive. The State cannot undermine the separation of the judiciary. Since the State, by amending Article 116, undermined the separation of the judiciary, a basic structure of the Constitution, the amendments of Article 116 by the Fourth and the Fifteenth Amendments violate Article 8(2) of the Constitution.

Amendments to Article 116 cannot be considered valid amendments of the Constitution because they are so repugnant to Articles 22 and 109 that, if the amendments are retained, Articles 22 and 109 will become meaningless and unworkable. Accordingly, the amendments to Article 116 fail to meet the test laid down in the Eighth Amendment Case for an amendment to become a part of the Constitution.

In order to ensure the independence of the judiciary, the amendments of Article 116 by the Fourth and Fifteenth Amendments are required to be declared ultra vires the Constitution.

In light of the above, argument of the learned Attorney General, appearing for the Respondent No. 1 (hereinafter referred to as the "Respondent") that Article 116 is not a basic structure is wrong and unsustainable.

Evolution of Article 116:

The table below shows how Article 116 has evolved.

Original Constitution 1972	**Fourth Amendment 1975**	**Fifth Amendment 1979**	**Fifteenth Amendment 2011**
116. The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the	116. The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the ~~Supreme Court~~	116. The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President and shall be	116. The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President and shall be

Original Constitution 1972	Fourth Amendment 1975	Fifth Amendment 1979	Fifteenth Amendment 2011
Supreme Court. (page 37 of W.P.)	President. (Section 20 of the Constitution (Fourth Amendment) Act 1975, page 52 of W.P.)	exercised by him in consultation with the Supreme Court. (Section 26 of the Second Proclamation (Fifteenth Amendment) Order 1978 (page 73 of W.P.), which was ratified, confirmed and validated by section 2 of the Constitution (Fifth Amendment) Act 1979, page 77 of W.P.)	exercised by him in consultation with the Supreme Court. (Section 39 of the Constitution (Fifteenth Amendment) Act, 2011, page 90 of W.P.)

In the original 1972 provision, the control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions were vested in the Supreme Court. This version does not provide for any consultation. It simply states that the control and discipline shall vest in the Supreme Court. This was the provision that was framed by the Constituent Assembly in exercise of constituent power.

The constituent power and legislative power are different. Legislative power is given by the Constitution. Likewise, judicial power is given by the Constitution. The Hon'ble High Court Division exercises power under the Constitution. All three organs, the executive, legislature and judiciary operate

under the Constitution. These organs are the creations of the Constitution; therefore, they cannot violate the Constitution.

According to Article 7, the Constitution represents the solemn expression of the will of the people. It is the supreme law of the land. Everyone in the republic is under the Constitution, except collectively the people. People are sovereign, whereas the executive, legislature and judiciary operate under the constitution. The legislative power is also under the Constitution. The legislative power is a derivative power. The basic structure doctrine originated from that idea. In Article 142, the Parliament is given the power to amend the Constitution which is derived from the Constitution. This power is not a power above the Constitution.

Due to the limitations on its amending power, Parliament cannot fundamentally alter the Constitution. For example, the Constitution establishes a democratic republic, and Parliament cannot amend it to create a monarchy or a one-party system. The doctrine of the basic structure recognises that while Parliament has the power to amend the Constitution, it cannot use that power to change its fundamental features. However, Parliament is free to make changes that do not affect these core elements.

Original Article 116 was framed by the constituent assembly in exercise of the constituent power. This is an exercise of the people's constituent power through the constituent assembly. Further amendments to the original Article 116 are under the Constitution made in exercise of the legislative power given by the Constitution. The further amendments would have to be tested on the basis of the basic structure doctrine and other requirements for validity, such as consistency with other existing Articles. The relevant basic features in this context are the independence of the judiciary and the separation of powers.

The original Constitution vested the power of control and discipline in the Supreme Court. Later, by the Fourth Amendment, the Supreme Court's authority was taken away and vested in the President, which cannot be done. By the Fourth Amendment, the basic features of the Constitution relating to independence of the judiciary and the separation of powers have been destroyed. Therefore, the Fourth Amendment is unconstitutional.

Article 116 was again amended by the Fifth Amendment. The Fifth Amendment attempted to slightly improve the situation by adding the provision that the authority shall vest in the President but the President shall exercise it in consultation with the Supreme Court. Although the Fifth Amendment improved the position, the unconstitutional part was still there, i.e. the authority remained vested in the President. Thus, the Fifth Amendment is also unconstitutional.

The Fourth Amendment initially undermined two basic features of the Constitution: the independence of the judiciary and the separation of powers. The Fifth Amendment partially improved the situation by requiring consultation with the Supreme Court, but it did not restore the authority originally vested in the Supreme Court by the Constitution. That authority remains absent. This is because Article 116, as amended by the Fifth Amendment, was retained in the Constitution through the Fifteenth Amendment. Although the Fifteenth Amendment substituted the text of Article 116, it merely reinstated the version that existed after the Fourth and Fifth Amendments. Accordingly, the Fifteenth Amendment is also unconstitutional.

In the *Fifth Amendment Case*, the Hon'ble Appellate Division declared the entire Fifth Amendment unconstitutional. According to established judicial principles, when a provision is struck down as unconstitutional, the previous version is automatically revived. As a result, when the Fifth Amendment was

invalidated, the version of Article 116 introduced by the Fourth Amendment was automatically restored. This is why the Fifteenth Amendment reinserted the same wording into Article 116. Since the Fifth Amendment has already been declared unconstitutional, the amendments at issue in the present case are the Fourth and Fifteenth Amendments. Therefore, there is no need for the Hon'ble Court to re-declare the unconstitutionality of the Fifth Amendment.

The Fifth Amendment ratified, confirmed and validated all martial law proclamations issued between 15 August 1975 and 9 April 1979. Among these, Section 26 of the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978) (hereinafter "Second Proclamation Order 1978"), amended Article 116. In the Fifth Amendment Case, the Hon'ble Appellate Division declared the entire Fifth Amendment unconstitutional, thereby invalidating all such martial law proclamations, subject to certain savings. However, the savings did not include Section 26 of the Second Proclamation Order. Consequently, following the Fifth Amendment Case, Article 116 as amended by that provision—and ratified by the Fifth Amendment—ceased to have legal effect. Therefore, the Hon'ble Court is not required to reconsider the constitutionality of Article 116 as amended by the Fifth Amendment.

The only two amendments the constitutionality of which is at issue in the present case are the Fifteenth and the Fourth Amendments. Therefore, the argument that the Fourth Amendment is a repealed law and cannot be challenged is wrong.

The Respondent and the Second Intervener (Respondent No. 6), Mr. Ahsanul Karim argue that the Fourth Amendment is a repealed law, and therefore cannot be challenged. However, neither the Respondent nor the Second Intervener have provided any explanation in support of this position. As a result, it remains

unclear on what basis they assert that the Fourth Amendment is beyond judicial scrutiny.

One possible rationale for their position may be that Article 116 of the Constitution was entirely substituted by Section 39 of the Fifteenth Amendment. The Fifteenth Amendment introduced a completely new provision, effectively replacing the previous text of Article 116. If this is the underlying reasoning, then their argument appears to rest on the assumption that the insertion of a new provision repeals the previous one. This interpretation seems to be the only way to make sense of the argument made by the Respondent and the Second Intervener.

The legal principle is that if a law is declared unconstitutional, the previous version gets automatically restored. Accordingly, when the Hon'ble Appellate Division declared the Fifth Amendment unconstitutional, the Fourth Amendment version of Article 116 got automatically revived. When the Fifteenth Amendment inserted a fresh version of Article116, the Fourth Amendment version was substituted. Hence, the Fourth Amendment can be considered as a repealed law.

With regard to the *Fifth Amendment Case* a question can arise as to why the Hon'ble Appellate Division has not declared the Fourth Amendment unconstitutional. Although, the Hon'ble Appellate Division knew that once the Fifth Amendment's version of Article 116 is declared unconstitutional, the Fourth Amendment will revive automatically, i.e. the authority will again vest in the President. However, the Hon'ble Appellate Division did not do anything about the Fourth Amendment. The reason was that the Fourth Amendment was not challenged in the Fifth Amendment Case. In other words, the Fourth Amendment was not an issue in the *Fifth Amendment Case*.

For ease of understanding, a description of how Article 116 was amended by the Fifth Amendment is provided below.

Section 26 of the Second Proclamation Order 1978 made the following changes to Article 116:

> “২৬।১১৬ অনুচ্ছেদে, "ন্যস্ত থাকিবে” শব্দগুলির পর "এবং সুপ্রীম কোর্টের সহিত পরামর্শ ক্রমে রাষ্ট্রপতি কর্তৃক তাহা প্রযুক্ত হইবে" শব্দগুলি সন্নিবেশিত হইবে।“

The Fifth Amendment ratified, confirmed and validated the martial law proclamations made between 15th August 1975 and 9th April 1979, which included Section 26 of the Second Proclamation Order 1978. The Fifth Amendment inserted paragraph 18 to the Fourth Schedule to the Constitution, which is set out below:

> “2. Amendment of Fourth Schedule to the Constitution.-
>
> In the Constitution of the People’s Republic of Bangladesh, in the Fourth Schedule after paragraph 17, the following new paragraph 18 shall be added, namely:-
>
>> *“18. All Proclamations, Proclamation Orders, Martial Law Regulations, Martial Law orders and other laws made during the period between the Fifteenth August 1975, and the 9th April 1979 (both days inclusive) all amendments additions, modifications, substitutions and omissions made in this Constitution during the said period by any such Proclamation, all orders made, acts and things done, and actions and proceedings taken, or purported to have been made, done or taken by any person or authority during the said period in exercise of the powers derived or purported to have been derived from any such Proclamation, Martial Law Regulation, Martial Law order or any other law, or in execution of or in compliance with any order made or sentence passed by any Court, tribunal or authority in the exercise or purported exercise of such powers, are hereby ratified and confirmed and are declared to have been validly made, done or taken and shall not be called in question in or before any Court, tribunal or authority on any ground whatsoever.”*

In the Fifth Amendment Case, only the Fifth Amendment was challenged, and the Fourth Amendment was not an issue before the Court. The Hon'ble High Court Division in *Bangladesh, Italian Marble Works Ltd. v Government of Bangladesh and others,* 62 DLR (2010) 70 ("Fifth Amendment HCD Case") in paragraph 187 of its judgment sets out a list of all the proclamations that were under consideration in the case.

One of the proclamations was the Second Proclamation Order 1978, which, by Section 26, amended Article 116 of the Constitution. This amendment was later confirmed and validated by the Fifth Amendment through the insertion of paragraph 18 into the Fourth Schedule of the Constitution.

The Hon'ble High Court Division declared the entire Fifth Amendment unconstitutional. Accordingly, insertion of paragraph 18 to the Fourth Schedule became invalid. Paragraph 18 included all the proclamations made between 15th August 1975 and 9th April 1979, which included, among others, the Second Proclamation Order 1978. Therefore, Article 116, as amended by section 26 of the Second Proclamation Order 1978, which was ratified by the Fifth Amendment, became unconstitutional and invalid.

While declaring all proclamations issued between 1975 and 1979 unconstitutional, the Hon'ble High Court Division nevertheless preserved certain provisions and matters as past and closed transactions—for example, Article 95 as amended by the Second Proclamation Order No. IV of 1976.

On appeal, in the Fifth Amendment case, the Hon'ble Appellate Division modified the judgment of the Hon'ble High Court Division.

Everything that was validated by the Fifth Amendment became unconstitutional and invalid, except for some savings. The savings do not include the amendment made to Article 116 by section 26 of the Second Proclamation

Order 1978. The Hon'ble Appellate Division only saved "the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978) so far it related to substituting Bengali text of Article 44". Accordingly, Article 116, as amended by section 26 of the Second Proclamation Order 1978, which was ratified by the Fifth Amendment, ceased to be a part of the Constitution.

Scope of the Fifth Amendment Case:

The foregoing judgments of both the Hon'ble High Court Division and the Hon'ble Appellate Division demonstrate that the constitutional issue before the Court was the validity of the Fifth Amendment, and more specifically, the insertion of paragraph 18 into the Fourth Schedule of the Constitution. The constitutionality of Article 116 as amended by the Fourth Amendment was not in issue. Since the Fourth Amendment was not under challenge, neither the Hon'ble High Court Division nor the Hon'ble Appellate Division adjudicated upon the constitutionality of Article 116 as amended by the Fourth Amendment.

Doctrine of Eclipse:

With respect to the submissions advanced by the second intervenor regarding the "doctrine of eclipse," no legal basis has been shown to support the contention that the Hon'ble Court is precluded from examining the constitutionality of the Fourth Amendment. Accordingly, those submissions are liable to be rejected. In any event, since the petitioners have challenged both the Fifteenth Amendment and the Fourth Amendment, the Hon'ble Court is fully competent to adjudicate upon the constitutionality of both amendments.

In accordance with the settled principle of restoration of the previous law, a declaration by this Court that the Fifteenth Amendment is unconstitutional would

result in the revival of Article 116 as amended by the Fourth Amendment. Upon such revival, the Hon'ble Court would be fully empowered to examine and, if warranted, declare unconstitutional the amendment to Article 116 made by the Fourth Amendment.

No authority has been cited by the second intervenor to suggest any limitation on the powers of this Court in this regard. Moreover, the position adopted herein is supported by the judgment in the Eighth Amendment Case, which affirmed that a constitutional interpretation avoiding harmful consequences should be preferred. Acceptance of the second intervenor's submission would vest control over the judiciary in the executive, thereby striking at a core feature of the Constitution's basic structure, namely, the independence of the judiciary.

Automatic restoration of the old law:

When a law is declared unconstitutional, the old law automatically and immediately stands revived.

> In the *Eighth Amendment Case*, the Hon'ble Appellate Division held as follows:
>
> > *"380. In view of this decision, the impugned Amendment will go off the Constitution, and the old Article 100 will stand revived along with its provision for holding of Sessions…."*
> >
> > …
> >
> > *419. In the result, I allow the appeals and dispose of the leave Petition. I hold the Impugned Amendment void and declare it ultra vires of the Constitution; this invalidation will not, however, affect the previous operation of the Article. The old Article 100 consequently stands revived along with the provision of holding Sessions outside the capital."*

The above legal principle was reaffirmed by the Hon'ble Appellate Division in the Sixteenth Amendment Case. In that case, the Appellate Division

rejected the argument that, if the Sixteenth Amendment—relating to the process for removal of judges—were declared ultra vires the Constitution, the previous removal procedure would not automatically be revived without further enactment by Parliament. The Hon'ble Appellate Division held as follows:

> *"377. Learned Attorney General argued that even if this amendment is declared ultra vires the constitution, if the Parliament does not restore the earlier provision of the Judges removal mechanism by the Supreme Judicial Council, a deadlock would be created in the removal process of the higher judiciary. Secondly, he submits that the earlier provision of the Supreme Judicial Council mechanism for the removal of Judges was non-functional in the absence of the prescribed Code of Conduct.*
>
> *378. This judge's removal mechanism was made by substituting the old provision. In section 2 of the Act, it is said, 'In the Constitution, in Article 96, for clauses (2), (3), (4), (5), (6), (7) and (8), the following clauses (2), (3), and (4) shall be substituted.' As per the law, if a substituted provision is declared void or repealed, the former provision shall be effective immediately. This court in Ful Chand Das V. Mohammad Hamad, 34 DLR (AD) 361, held that when a provision of law is repealed by a statutory provision which is declared ultra vires the constitution, the former provision is automatically revived on such declaration. If the amended statute is wholly void, the statute sought to be amended is not affected but remains in force. Where the law was amended, but subsequently the amendment was repealed, the amendment has to be completely ignored, and the provisions of the law as they stood prior to the amendment are to be taken into consideration. (Mir Laik Ali V. Standard Vacuum Oil Co., 16 DLR (SC) 287."*

The judges' removal process through the Parliament was enacted by the Sixteenth Amendment by substituting previous provisions conferring the power of removing judges on the Supreme Judicial Council.

The principle established by the Hon’ble Appellate Division, as explained above, is that “if a substituted provision is declared void or repealed, the former provision shall be effective immediately”.

If the Hon’ble Court declares the Fifteenth Amendment to Article 116 unconstitutional in the present case, the Fourth Amendment will be revived with immediate effect. Consequently, the Hon’ble Court is also empowered to declare the Fourth Amendment unconstitutional. Since the Rule Nisi has been issued with respect to both Amendments, the Hon’ble Court may declare both the Fifteenth and Fourth Amendments unconstitutional in a single judgment.

The issue before the Hon’ble Court is the constitutionality of both the Fifteenth Amendment and the Fourth Amendment. Thus, Hon’ble Court is competent to declare, first, the Fifteenth Amendment unconstitutional, and then, since the Fifteenth is unconstitutional and the Fourth Amendment automatically stands as revived with immediate effect, the Hon’ble Court can also declare the Fourth Amendment unconstitutional. Once the Hon’ble Court declares the Fifteenth Amendment and the Fourth Amendment unconstitutional, the original Article 116 will automatically stand revived, without the need for any enactment by the Parliament.

Accordingly, the Respondent’s argument that the Hon’ble Court cannot deal with a repealed law is not correct and should be disregarded.

Hon’ble Appellate Division’s observations regarding restoration of Articles 115 and 116 to their original form do not preclude the Hon’ble High Court from deciding the writ petition.

The Respondent and the second intervener (Respondent No. 6) take a position that the Hon’ble Appellate Division had opportunities in the Fifth Amendment Case and the Sixteenth Amendment Case to declare Article 116 as

amended by the Fourth Amendment unconstitutional, but the Hon'ble Appellate Division refrained from doing so, and therefore, this Hon'ble Court also should not declare the Fourth Amendment unconstitutional.

To address the above argument, it is essential to understand what the Hon'ble Appellate Division actually decided in the Fifth Amendment Case and the Sixteenth Amendment Case, why it did not declare the amendment of Article 116 by the Fourth Amendment unconstitutional, and whether, in light of the Hon'ble Appellate Division's observations, this Hon'ble Court is precluded from determining the constitutionality of both the Fourth and Fifteenth Amendments.

While dealing with Article 116, the Hon'ble Appellate Division in the *Fifth Amendment Case*, observed as follows:

> *"240. It is our earnest hope that Articles 115 and 116 of the Constitution will be restored to their original position by the Parliament as soon as possible."*

The fact that the constitutionality of Article 116 was not an issue before it has been specifically stated by the Hon'ble Appellate Division in the *Sixteenth Amendment Case*:

> *"548. The scope of this appeal is limited to the certificate granted by the High Court Division under Article 103(2)(a) of the Constitution. Constitutionality of Article 116 of the Constitution and the validity of laws made during the martial law period and ratification thereof by Acts VI and VII of 2013 are not at all issues of the present appeal. Therefore, there is no scope to make any decision on those issues or other issues not covered by the certificate granted by the High Court Division."*
>
> *...*
>
> *586:- It may be noted here that in the Fifth Amendment case, this Division also said as follows:*

'It is our earnest hope that Articles 115 and 116 of the Constitution will be restored to their original position by the Parliament as soon as possible.'

However, in the case before us, only Article 96 is a live issue, and Articles 115 and 116 are not in issue; hence, I do not consider it relevant to discuss the same here."

The Hon'ble Appellate Division thus unequivocally stated that the constitutionality of Article 116 was not an issue before it and that there was, therefore, no scope to render any decision on that question.

In the present writ petition, however, the constitutionality of Article 116 as amended by both the Fifteenth Amendment and the Fourth Amendment is directly in issue. Accordingly, this Hon'ble Court is fully competent to adjudicate upon and determine the constitutionality of Article 116 as amended by the Fifteenth Amendment and the Fourth Amendment.

The contention advanced by the Respondent and the second intervener—that because the Hon'ble Appellate Division refrained from deciding the constitutionality of Article 116, this Hon'ble Court should also refrain from declaring the Fourth Amendment unconstitutional—is therefore misleading and legally untenable.

Irrelevance of authorities cited on repealed laws:

The authorities relied upon by the second intervener concerning repealed laws are not applicable to the present writ petition.

The second intervener submits that the constitutionality of the Fourth Amendment cannot be challenged because it has ceased to be law or has been

repealed. In support of this contention, reliance has been placed on the following cases:

(i) *Kudrat-E-Elahi Panir v. Bangladesh*, 44 DLR (AD) 319;
(ii) *State of U.P. and Others v. Hirendra Pal Singh and Others*, 2011 (1) ADJ 86; and
(iii) *Bhagat Ram Sharma v. Union of India and Others*, AIR 1988 SC 740.

These cases are considered below.

Kudrat-E-Elahi Panir v. Bangladesh (44 DLR (AD) 319)

During the martial law regime of General Hussain Muhammad Ershad, the Upazila Parishads were created under the Local Government (Upazila Parishad and Upazila Administration Reorganisation) Ordinance, 1982. These local government bodies consisted of elected chairmen, nominated members, and official members, and were entrusted with specific responsibilities relating to local administration and development, with funding provided by the Government.

The first election under this system was held in 1985, followed by a second election in 1990. The appellants were elected Chairmen of the Sonargaon and Gazipur Upazila Parishads in the 1990 election, with terms of office extending for five years. However, within less than a year, the Government promulgated the Bangladesh Local Government (Upazila Parishad and Upazila Administration Reorganisation) (Repeal) Ordinance, 1991, abolishing the existing Upazila Parishads. The Ordinance was subsequently enacted by Parliament as the Bangladesh Local Government (Upazila Parishad and Upazila Administration Reorganisation) (Repeal) Act, 1992.

The appellants challenged the constitutional validity of the Repeal Ordinance and the Repeal Act by filing a writ petition, contending that the same were inconsistent with Articles 9, 11, 59, and 60 of the Constitution and was therefore void under Article 7(2) of the Constitution.

The word *"Repeal"* formed part of the short title of the law in question. Its use did not imply that the law itself had been repealed by any subsequent enactment, nor did it suggest that the petitioners were challenging a repealed law.

The issues decided by the Hon'ble Appellate Division in that case were:

(i) whether the Repeal Ordinance or the Repeal Act was unconstitutional for violating Articles 9, 11, 59, and 60 of the Constitution;

(ii) whether Upazila Parishads qualified as local government institutions within the meaning of Article 59 of the Constitution;

(iii) whether the Repeal Ordinance was ultra vires the President's power under Article 93 of the Constitution and had circumvented the law-making procedure of Parliament; and

(iv) whether the Repeal Ordinance or the Repeal Act constituted colourable legislation.

It is evident that the (i) *Kudrat-E-Elahi* case did not raise the question of whether an earlier constitutional amendment Act, repealed by a subsequent constitutional amendment Act, can be subjected to judicial review.

(ii) *State of U.P. and Others v. Hirendra Pal Singh and Others*, *2011 (1) ADJ 86*

("State of U.P. Case")

In this case, the appellants filed appeals against interim orders passed by the High Court of Allahabad (Lucknow Bench) in certain writ petitions, whereby the High Court stayed the operation of the amended provisions of the U.P. Legal Remembrancer Manual (hereinafter referred to as the *L.R. Manual*) and further directed the State Government to consider applications for renewal of all District Government Counsel whose terms had already expired, on the basis of the

unamended provisions of the L.R. Manual, allowing them to continue in service until attaining the age of 62 years.

The amendments to the L.R. Manual introduced two changes: (1) the requirement of consultation with the District Judge by the District Magistrate before sending any proposal or recommendation to the State Government for appointment of District Government Counsel was dispensed with; and

(2) the maximum age was reduced from 62 years to 60 years.

While disposing of the appeals, the Supreme Court of India observed, inter alia, as follows:

> *"In Firm A.T.B. Mehtab Majid and Co. v. State of Madras and Another, MANU/SC/0352/1962 : AIR 1963 SC 928, this Court, while dealing with a similar issue, held:*

Once the old rule has been substituted by the new rule, it ceases to exist, and it does not automatically get revived when the new rule is held to be invalid."

The Court further observed:

> *"Therefore, it is evident that under certain circumstances, an Act which stood repealed may revive in case the substituted Act is declared ultra vires or unconstitutional by the Court on the ground of legislative competence, etc. However, the same shall not be the position in the case of subordinate legislation. In the instant case, the L.R. Manual consists of executive instructions, which can be replaced at any time by another set of executive instructions (vide Johri Mal) (Supra).*
>
> *Therefore, the question of revival of the repealed clauses of the L.R. Manual, in case the substituted clauses are struck down by the Court, would not arise. In view of this, the interim order would amount to*

substituting legal policy by a judicial order and is thus not sustainable.” ***(paragraph 24)***

In the *State of U.P. Case*, the legal instrument in question was the U.P. Legal Remembrancer Manual, which constitutes subordinate legislation in the nature of executive instructions. Moreover, the Supreme Court of India, while discussing the repeal of one Act of Parliament by another, observed that *“an Act which stood repealed may revive in case the substituted Act is declared ultra vires or unconstitutional by the Court on the ground of legislative competence, etc.”*

Therefore, the position advanced by the second intervener—that an earlier provision cannot be revived after repeal—does not accurately reflect the ratio of the *State of U.P. Case*. As explained above, the decision is confined to subordinate legislation such as rules, regulations, or executive instructions.

Accordingly, this case is wholly irrelevant to the present writ petition.

(iii) *Bhagat Ram Sharma v Union of India (UOI) and Ors.* AIR 1988 SC 740(“Bhagat Ram Case”)

In this case, the appellant sought pension benefits as both a retired Member of the Punjab State Public Service Commission and a former Member of the Punjab Legislative Assembly. The appellant sought a pension under regulation 8(3) of the Punjab State Public Service Commission (Conditions of Service) Regulations, 1958, read with the proviso to Sub-section (1) of Section 6B of the Himachal Pradesh Legislative Assembly (Allowances and Pension of Members) Act, 1971. Regulation 8(3) was a new provision, which was added to the aforesaid Regulations by way of amendment, which came into effect from 10 August 1972. However, the appellant sought pension retrospectively from 2 January 1959, the date of his retirement. The issue before the Court was whether legislative

amendments providing pension benefits applied retrospectively to the appellant and the jurisdictional boundaries regarding the State of Himachal Pradesh.

The Punjab and Haryana High Court partly allowed the writ petition and ordered the State Government of Punjab to pay a pension of Rs. 400 per month to the appellant with effect from 10 August 1972, the date when the said provision was first introduced and disallowed the appellant's claim for payment of pension from 2 January 1959. The Punjab and Haryana High Court disallowed the appellant's claim for pension as a Member of the State Legislative Assembly under the proviso to Sub-section (1) of Section 6B of the Himachal Pradesh Legislative Assembly (Allowances and Pension of Members) Act, 1971 on the ground that no part of the cause of action against the State of Himachal Pradesh arose within the territorial jurisdiction of the High Court under Article 226 of the Constitution.

The Supreme Court of India upheld the judgment of the Punjab and Haryana High Court and dismissed the appeal. It declined to give the new law retrospective effect, in the absence of any clause in the legislation providing for such operation, and observed, among other things, as follows:

> *"... It is therefore manifest that the newly added Regulation 8(3), in the absence of any provision giving it a retrospective operation, cannot prima facie bear a greater retroactive effect than intended* ***(paragraph 16).***
>
> *It is a matter of legislative practice to provide, while enacting or amending a law, that an existing provision shall be deleted and a new provision substituted. Such deletion has the effect of repealing the existing provision. Such a law may also provide for the introduction of a new provision. There is no real distinction between 'repeal' and an 'amendment'. ...* ***(paragraph 17).***

We therefore find no justification to interfere with the judgment of the High Court. The appeal must accordingly fail and is dismissed. There shall be no order as to costs ***(paragraph 21****).”*

Therefore, the Bhagat Ram Case did not involve the question of whether a constitutional amendment Act, that has been repealed by another constitutional amendment Act, can be judicially reviewed or not.

The second intervener, while referring to the above cases, which are irrelevant in the present writ petition, completely disregarded the legal principle established by our own Hon'ble Appellate Division in the *Eighth Amendment Case* and the *Sixteenth Amendment Case* that when a substituted provision of the Constitution is declared void by the Court, the old or former provision automatically and immediately stands revived (paragraphs 380 and 419 of the *Eighth Amendment Case* and paragraphs 377 and 378 of the *Sixteenth Amendment Case*).

None of the above cases addresses the question of whether, in challenging the constitutionality of an existing constitutional amendment, a petitioner is precluded from also challenging a prior amendment that would automatically and immediately be revived under the principle of automatic restoration if the existing amendment is declared ultra vires.

Accordingly, the aforementioned cases, as well as the submissions based on them, are not relevant to the issues raised in the present writ petition.

Procedural unconstitutionality of the Fifteenth and the Fourth Amendments:

The Fifteenth and the Fourth Amendments were enacted in violation of Article 142(1) of the Constitution, as the respective amendment Bills did not contain any long title.

Undoubtedly, the contents of a Bill must be covered by its long title. In the case of a constitutional amendment Bill, the long title must contain an express reference to all Articles of the Constitution that the Bill seeks to amend. But the Fifteenth and the Fourth Amendment Bills did not contain any long title in the manner mandated by Article 142 of the Constitution. Accordingly, both amendments suffer from non-compliance with a mandatory procedural requirement of Article 142, namely the requirement of a long title, and are therefore void.

Neither the Rule nor the prayer is defective for not challenging the constitutionality of amendments to Article 115

The fact that the petitioners have not challenged the amendments of Article 115 does not prevent the Hon'ble Court from deciding the constitutionality of amendments to Article 116.

The evolution of Article 115 is set out below:

Original Constitution 1972	Fourth Amendment 1975	Fifth Amendment 1979	Fifteenth Amendment 2011
115. (1) Appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President- a) in the case of district	115. Appointments of persons to offices in the judicial service or as magistrates exercising judicial	115. Appointments of persons to offices in the judicial service or as magistrates exercising judicial	115. Appointments of persons to offices in the judicial service or as magistrates exercising judicial

judges, on the recommendation of the Supreme Court; and b) in the case of any other person, in accordance with rules made by the President on that behalf after consulting the appropriate public service commission and the Supreme Court. (2) A person shall not be eligible for appointment as a district judge unless he— a) is at the time of his appointment in the service of the Republic and has, for not less than seven years, held judicial office in that service; or b) has for not less than ten years been an advocate.	functions shall be made by the President in accordance with rules made by him for that behalf.	functions shall be made by the President in accordance with rules made by him in that behalf.	functions shall be made by the President in accordance with rules made by him in that behalf.

The above table demonstrates that, from the inception of the Constitution, Article 115 vested the power of appointment to offices in the judicial service or as magistrates exercising judicial functions in the President. Under the original constitutional framework, therefore, the President was the appointing authority under Article 115, while the powers relating to posting, promotion, leave, and discipline were vested in the Supreme Court under Article 116. This constitutional arrangement is logically coherent and institutionally sound.

The fact that the President is the appointing authority does not preclude the vesting of control and disciplinary powers in the Supreme Court.

The original Article 115(1) contained additional procedural safeguards, namely that the appointment of district judges was to be made on the recommendation of the Supreme Court, and that appointments of other judicial officers were to be made in accordance with rules framed by the President after consultation with the appropriate Public Service Commission and the Supreme Court. Original Article 115(2) prescribed qualifications for appointment as a district judge. These provisions were omitted by subsequent constitutional amendments.

Following the amendments, the President continues to be the appointing authority, with the additional stipulation that appointments shall be made in accordance with rules framed by the President in that behalf.

The question that arises is whether Article 115, in its present form, can coexist with the original Article 116. This question has been raised by the Respondent and the second intervenor, who contend that if Article 116 is restored to its original position, it cannot coexist with the existing version of Article 115. On that basis, it has been argued that the Rule and the prayer are defective. This contention is untenable.

Article 115 in its present form can coexist with the original Article 116, as the President was the appointing authority even under the original version of Article 115. Under the existing Article 115, the President remains the appointing authority. Constitutionally, the President must remain the appointing authority, and no other functionary can assume that role. Even the Judges of the Supreme Court, including the Hon’ble Chief Justice, are appointed by the President.

The additional conditions that existed in the original version of Article 115 are not essential to the concurrent operation of Articles 115 and 116. Such

conditions may be incorporated by an Act of Parliament, included in rules framed by the President under the existing Article 115, or provided for in rules made by the Supreme Court.

Accordingly, it was neither necessary nor required for the petitioners to challenge the constitutionality of the amendments to Article 115. The argument that the Rule and the prayer are defective merely because Article 115 has not been challenged is wholly misconceived. The existing Article 115 and the original Article 116 are capable of operating concurrently without any constitutional inconsistency.

The existing Article 116 is not its best version and the "checks and balances" argument of the Respondent is misconceived:

The Respondent's contention that the existing Article 116, which provides only a consultation role for the Supreme Court, represents its best version and that it "enriches" the judiciary by ensuring checks and balances is misconceived and untenable.

The second intervener made extensive submissions relying on legal and political philosophy, including the writings of Montesquieu, Aristotle, F. W. Maitland, and others. However, the second intervener failed to demonstrate how those philosophical texts are relevant to the determination of the constitutionality of the Fifteenth and Fourth Amendments. While such texts may assist in understanding abstract concepts such as separation of powers and checks and balances in a general sense, they do not resolve the precise constitutional issues before this Hon'ble Court.

The issues before this Hon'ble Court are specific and concrete, namely: the constitutionality of Article 116 as amended, and the power of this Court to declare

constitutional amendments unconstitutional. Abstract philosophical discourse does not assist in resolving these particular questions.

The Respondent's submission that the consultation role of the Supreme Court under the existing Article 116 ensures checks and balances between the Executive and the Judiciary is erroneous.

The expression "checks and balances" has a technical and constitutional meaning. According to Black's Law Dictionary, it refers to the separation of governmental powers among the three branches of the State—namely, the Executive, the Legislature, and the Judiciary. It does not mandate any particular form of consultation of one organ by another, as suggested by the Respondent. It is a far broader constitutional doctrine.

The doctrine of separation of powers is itself the constitutional doctrine of checks and balances, designed to protect constitutional governance and the rights of the people. The expression "checks and balances" is, in effect, another way of describing the doctrine of separation of powers. Accordingly, the expression must be understood within that constitutional framework.

Checks and balances are achieved through a clear separation of powers. Restoring Article 116 to its original position ensures genuine checks and balances and preserves the separation of powers between the Executive and the Judiciary. Retaining Article 116 in its current form cannot ensure checks and balances in their true constitutional sense.

Masdar Hossain Case:

In support of their argument on checks and balances, the Respondent relied upon a submission made by the late Syed Ishtiaq Ahmed in *Secretary, Ministry of*

Finance and Others v. Md. Masdar Hossain and Others, 52 DLR (AD) (2000) 82 ("*Masdar Hossain Case*"), decided in 1999. The Hon'ble Appellate Division recorded that submission in paragraph 48 of the judgment, which reads as follows:

> *"48. We now come to consider Article 116 of the Constitution. It has been vigorously argued on behalf of the respondents by both Mr. Amir-Ul Islam and Syed Ishtiaq Ahmed that the word "control" in Article 116, read with Article 115, includes the rule-making power of the President in consultation with the Supreme Court in respect not only of posting, promotion, grant of leave and discipline but also of the entire gamut of terms and conditions of service of persons employed in the judicial service and magistrates exercising judicial functions. Syed Ishtiaq Ahmed has additionally argued that Article 109 of the Constitution, having provided that the High Court Division shall have superintendence and control over all Courts and tribunals subordinate to it, the word "control" used in both Articles 109 and 116 has to be reconciled. The first step is to take out the subordinate judiciary from the ambit of Part IX of the Constitution, and the second step is to interpret the word "control" to mean not only control over the Courts and tribunals but also over their presiding officers. Article 109, he submits, is a departure from the Constitution of Pakistan of 1962 to ensure independence of the higher judiciary. The habitat of Article 109 is in the Chapter of the Supreme Court. Its habitat is higher, and it is a charter of independence of the higher judiciary exercising control over not only the Courts and tribunals but also over their presiding officers. Syed Ishtiaq Ahmed goes on to argue that Article 116 is merely formalistic in view of Article 48(3) of the Constitution which requires the President to act in accordance with the advise of the Prime Minister in the exercise of all his functions, save only that of appointing the Prime Minister and the Chief Justice and also in view of Article 55(2) of the Constitution providing that the executive power of the Republic shall, in accordance with this Constitution, be exercised by or on the Authority of the Prime Minister. Syed Ishtiaq Ahmed submits that in the amended Article 116, the control has been*

vested formally in the President but actually and in reality in the Prime Minister, who is the executive head. The real saving is the provision of consultation with the Supreme Court, and if Articles 109 and 116 are read together, they mean that the real control over both the Courts and tribunals and their presiding officers will be exercised by the Supreme Court. Necessarily, therefore, he submits, rules have to be framed under Article 116 covering the entire terms and conditions of service of persons employed in the judicial service and magistrates exercising judicial functions. Otherwise, he submits, Articles 116 and 116A will only be mocking birds, and the subordinate judiciary will be denuded of the guarantee of independence enshrined in Article 116A."

In the *Masdar Hossain Case*, the constitutionality of Article 116 was not challenged. Consequently, the learned counsel attempted—through interpretation of Article 116 in conjunction with other provisions, including Article 109—to attribute substantive authority to the Supreme Court while accepting Article 116 in its existing form. This interpretative approach was advanced as a pragmatic solution necessitated by the unchallenged status of Article 116.

The late Syed Ishtiaq Ahmed argued that unless the Supreme Court was accorded a binding and effective role, rather than a purely formal consultative role, Articles 116 and 116A would be rendered illusory and the independence of the subordinate judiciary would be compromised.

The Hon'ble Appellate Division, however, did not accept these submissions and expressly rejected them, holding as follows:

"49. We find the following reasons for not agreeing with the above submissions of the learned Counsels for the respondents"

The Hon'ble Appellate Division thereafter set out detailed reasons for disagreeing with the submissions recorded in paragraph 48 of the judgment.

This Hon'ble Court cannot rely upon or follow arguments of counsel that have been expressly rejected by the Hon'ble Appellate Division. What is binding is the ratio decidendi of the Appellate Division, not the rejected submissions of counsel.

While rejecting those submissions, the Hon'ble Appellate Division held that, under Article 116, the views and opinions of the Supreme Court would have primacy over those of the Executive. This was a judicially crafted solution necessitated by the fact that Article 116 itself was not under challenge in the *Masdar Hossain Case*.

The *Masdar Hossain Case* was decided in 1999. Since then, the jurisprudence of the Hon'ble Appellate Division concerning the scope and effect of the consultation role of the Supreme Court under Article 116 has evolved significantly. In subsequent decisions, the Hon'ble Appellate Division has unequivocally held that Article 116, in its present form, is incapable of ensuring the independence of the judiciary.

In the *Sixteenth Amendment Case*, decided in 2017, the Hon'ble Appellate Division observed as follows:

> *"362. Article 116 was also amended by the Fourth Amendment, and by this amendment, the word 'President' was substituted for the words 'Supreme Court'. By this amendment, the control, including posting, promotion, leave, and discipline of persons employed in the judicial service are to be exercised by the President. Though there was a provision for consultation in exercising this power practically this consultation is meaningless if the Executive does not cooperate with the Supreme Court. More so, this amendment is in direct conflict with Article 109, which provides that the High Court Division shall have superintendence and control over all courts and tribunals subordinate to it. If the High Court Division has*

superintendence and control over the lower judiciary, how shall it control the officers performing judicial works if the Executive controls the posting, promotion and discipline, disciplinary action is not clear to me."

The Hon'ble Appellate Division observed in 2017 that, in practice, the consultation role of the Supreme Court has become meaningless.

In 1999, while rejecting the arguments advanced by the late Syed Ishtiaq Ahmed, the Hon'ble Appellate Division explained the scope of consultation with the Supreme Court under Article 116. After eighteen years, the Appellate Division revisited the issue and unequivocally held that such consultation is practically meaningless and that Article 116, in its present form, is in direct conflict with Article 109 of the Constitution. This constitutes the opinion of the Hon'ble Appellate Division. Accordingly, this Hon'ble Court is required to decide the present writ petition on the basis of paragraph 362 of the judgment in the Sixteenth Amendment Case, inasmuch as this Court is bound by the opinion expressed by the Hon'ble Appellate Division.

Contrary to the observations made by the Hon'ble Appellate Division in the Sixteenth Amendment Case, the Respondent submits that the consultation provision is "beautiful," that it ensures checks and balances, and that it has "enriched" the judiciary, contending that Article 116 is now in its best form. This Hon'ble Court is not required to decide the present writ petition on the basis of such submissions of the Respondent; rather, it must adjudicate the matter in light of what the Hon'ble Appellate Division has categorically stated in paragraph 362 of the Sixteenth Amendment Case.

There is no dispute that the aforesaid observation of the Hon'ble Appellate Division constitutes *obiter dicta*. Nevertheless, as the Hon'ble Appellate Division

has expressed a clear and unambiguous view regarding the scope of consultation under Article 116, this Hon'ble Court is obliged to follow that interpretation. The Hon'ble Appellate Division was required to examine the scope of consultation but could not adjudicate upon the constitutionality of the amendments to Article 116, as that issue was not before it in the Sixteenth Amendment Case.

In the Sixteenth Amendment Case, the Rule Nisi was issued solely in relation to the Supreme Judicial Council. Therefore, it was beyond the judicial authority of the Hon'ble Appellate Division to declare the amendments to Article 116 unconstitutional by travelling beyond the scope of the Rule Nisi. A court may decide only those disputes that are properly brought before it. For instance, while this Hon'ble Court is presently seized of the constitutionality of Article 116, it cannot adjudicate upon the constitutionality of Article 70, which is not in issue before it. Since the matter before the Hon'ble Appellate Division in the Sixteenth Amendment Case concerned the Supreme Judicial Council, the Court confined its decision to that issue, while making observations regarding Article 116 as it currently stands. For this reason, the observations of the Hon'ble Appellate Division concerning Article 116 are *obiter dicta*. However, even within such *obiter dicta*, the Hon'ble Appellate Division has clearly articulated how the existing Article 116 is to be interpreted. Consequently, when this Hon'ble Court interprets the existing Article 116 for the purpose of determining the constitutionality of the amendments thereto, it is bound to adopt the interpretation laid down by the Hon'ble Appellate Division. This Hon'ble Court has no alternative in this regard.

In the Fifth Amendment Case, decided in 2010, the Hon'ble Appellate Division also expressed the view that Article 116 constitutes an impediment to judicial independence. Despite such consistent observations in various judgments.

the Hon'ble Appellate Division could not declare the amendments to Article 116 unconstitutional, as the constitutionality of Article 116 was not directly in issue before it. This fact was expressly noted by the Hon'ble Appellate Division in the Sixteenth Amendment Case, as discussed above.

> Coordination between the Supreme Court and the executive can be addressed in the rules to be framed for the establishment of the Supreme Court Secretariat or in other rules, such as service rules or disciplinary rules.

The Respondent submits that coordination between the Supreme Court and the Executive branch of the Government is necessary and that, for this reason, Article 116 should be retained in its present form.

However, if this Hon’ble Court declares the amendments to Article 116 unlawful and thereby restores Article 116 to its original position, such restoration will not impede cooperation between the Supreme Court and the Ministry of Law. Mechanisms for cooperation may be incorporated in the rules to be framed for the establishment of the Supreme Court Secretariat or in other applicable rules, including service or disciplinary rules. Moreover, one or more committees comprising representatives of both the Supreme Court and the Ministry of Law may be constituted to ensure effective coordination. Such measures would adequately ensure that the views of the Government are duly considered in appropriate matters.

Accordingly, the purported issue of coordination does not preclude this Hon’ble Court from examining the constitutionality of the amendments to Article 116 introduced by the Fourth and Fifteenth Amendments.

The Respondent further submits that, without consultation with the Supreme Court, the Executive—namely, the Ministry of Law—cannot even transfer an Assistant Judge. If this assertion is correct, there should be no impediment to restoring Article 116 to its original form, as such restoration would merely constitutionalise what is already being followed in practice.

The Respondent argues that the “grounds” stated in the writ petition do not disclose how the amendments to Article 116 impair the basic structure of the Constitution. However, on perusal of the grounds of the writ petition, it is evident that the petitioners have discussed elaborately how the amendments to Article 116 impair the basic structure of the Constitution. Accordingly, sought declarations that the Fourth Amendment and the Fifteenth Amendment are *ultra vires* the Constitution. They have further sought a declaration that the Bangladesh Judicial Service (Disciplinary) Rules, 2017 are also *ultra vires* the Constitution.

The writ petition clearly sets out the core issues upon which learned counsel for the petitioners, as well as other learned counsel, have made extensive submissions.

Accordingly, it is respectfully submitted that this Hon’ble Court may proceed to decide the writ petition on the grounds pleaded therein and declare that the Fourth Amendment, the Fifteenth Amendment, and the Bangladesh Judicial Service (Disciplinary) Rules, 2017 are *ultra vires* the Constitution.

Terms of the Rule:

The Respondent has raised certain technical objections concerning the wording of the Rule.

One of the principal purposes of issuing a Rule is to define the scope and terms of reference for adjudication by the Court. Another important purpose is to

provide adequate notice to the respondents so as to enable them to respond meaningfully. The Rule issued in the present writ petition sufficiently fulfils both of these purposes.

It may be that the Rule could have been framed differently, or that the prayer in the writ petition might have been more elaborately worded. Nevertheless, the fundamental objectives of the Rule have been achieved, namely, identification of the dispute and provision of adequate notice to the respondents, the parties, and the public at large. It has been evident to all concerned—not only to learned counsel but also to members of the press and the public—that the proceedings involve questions relating to the independence of the judiciary, the implications of Article 116, and whether control over the subordinate judiciary should vest in the President or in the Supreme Court. There has been no ambiguity regarding the subject matter of the writ petition. In this respect, the Rule is sufficient.

In any event, this Hon'ble Court is empowered to pass an effective and dispositive order even if such order does not strictly conform to the precise terms of the Rule, provided that the issues decided fall within the scope of the controversy brought before the Court.

In *Hasan Imam Chowdhury v. Government of Bangladesh and others***,** *1981 BLD (AD) 283*, the Hon'ble Appellate Division held that a court may deviate from the main issue to the extent that such deviation involves an issue ancillary to the main issue, but it cannot raise a wholly new issue requiring adjudication on facts for which no foundation has been laid by the parties.

In that case, the petitioner challenged an order of termination. The Rule was heard by the High Court Division and was made absolute with, *inter alia*, the following direction:

> *"In this connection it may be further mentioned that in view of the setting aside the impugned order the petitioner though considered to remain in service shall be treated as on extra-ordinary leave without any pay from the data of passing of the impugned order, that is, on 20-11-75 till his rejoining in service of the Water Development Board, when such Board may again pass a necessary regular order as mentioned therein (**paragraph 2**)."*

The petitioner preferred an appeal challenging the above direction, contending, among others, that the High Court Division made the Rule absolute by holding that the termination order was passed without any lawful authority and was of no legal effect, and in view of such an order, the rest of the direction was without jurisdiction and was liable to be struck down.

The Hon'ble Appellate Division observed as follows:

> *"Any declaration or direction or order to be given must be ancillary to the main relief, but in doing so, the superior courts had always placed a self-imposed limitation for not raising any new issue which requires adjudication on proper facts for which no foundation was laid by the parties in the writ proceeding. Keeping in mind these well-settled principles of law, the opinion is that, in the facts and circumstances of the case, it cannot be said that the direction is pregnant with any new issue which requires adjudication in separate proceedings.*
>
> *In this view of the matter, the appeal is dismissed without any order as to costs **(paragraph 6)**."*

Applying the aforesaid principles, if necessary, this Hon'ble Court may deviate from the precise wording of the Rule in order to address technical objections raised by the Respondent. Any such deviation would not amount to

raising a new issue requiring adjudication on facts outside the pleadings. Rather, it would be confined solely to addressing technical aspects of the Rule, where the central issue remains the constitutionality of the amendments to Article 116—an issue on which all parties have been fully heard. Consequently, while declaring the amendments to Article 116 unconstitutional, this Hon'ble Court may pass appropriate and effective orders within the framework of the Rule issued in the present case.

Separate Secretariat:

With regard to the prayer seeking a direction for the establishment of a separate secretariat, the Respondent submits that the Government has no objection to such establishment.

If Article 116 continues in its present form, the authority of control and discipline over the subordinate judiciary will remain vested in the President, which, in effect, means the Prime Minister, inasmuch as Article 48(3) mandates that the President shall act in accordance with the advice of the Prime Minister. Moreover, the Hon'ble Appellate Division, in the Sixteenth Amendment Case, has already held that consultation with the Supreme Court under Article 116 is practically meaningless.

By expressing willingness to establish a separate secretariat, the Government seeks to present its position in a favourable light and to persuade this Hon'ble Court that the judiciary should be satisfied with such an arrangement. This is, however, nothing more than an attempt to create an illusion of reform, since the Government simultaneously seeks to retain Article 116 in its present form, thereby preserving executive control over the judiciary.

It must not be overlooked that the opportunity to address this issue arises against the backdrop of immense sacrifices made by the people of Bangladesh in pursuit of change, including the loss of nearly one thousand lives and grievous injuries suffered by many others. The Court owes a duty to honour those sacrifices by ensuring that the constitutional promise of judicial independence is not compromised. Retaining Article 116 in its current form runs contrary not only to the Government's own stated positions in various reform commission reports but also to the spirit underlying the sacrifices of the people. Most importantly, it would amount to a betrayal of the higher judiciary, the subordinate judiciary, members of the Bar, all stakeholders in the justice delivery system, and ultimately, the nation itself.

Accordingly, this Hon'ble Court ought not to abdicate its constitutional responsibility to examine and declare the amendments to Article 116 unconstitutional merely on the basis of an assurance regarding the establishment of a separate secretariat. In the absence of restoring Article 116 to its proper constitutional position, such a secretariat would, in reality, be nothing more than a physical structure devoid of substantive authority.

Disciplinary Rules:

In relation to the Disciplinary Rules, relevant portion of the order dated 29 June 2025 passed by the Hon'ble Appellate Division in Civil Review Petition No. 147 of 2025 is set out below:

> *The Order dated 03.01.2018 passed by this Division in Civil Appeal No. 79 of 1999, to the extent that it accepted the Bangladesh Judicial Service (Disciplinary) Rules, 2017, is hereby stayed until further order(s).*

By way of abundant caution, it is further observed that the aforesaid Order of stay shall not, in any manner, impair or be construed to impair the continued operation of the Disciplinary Rules, 2017 in the meantime.

Furthermore, nothing in this Order shall operate to the prejudice of the continued prosecution of the Rule Nisi in Writ Petition No. 10356 of 2024 and its due substantive and final disposal by the specially constituted Bench of the High Court Division presently in seisin of the matter."

Legal effect of the Order dated 29 June 2025:

The foregoing demonstrates that the Hon'ble Appellate Division granted leave on four distinct grounds and stayed the Order dated 03.01.2018 passed in Civil Appeal No. 79 of 1999 insofar as it accepted the Bangladesh Judicial Service (Disciplinary) Rules, 2017. The Order dated 29.06.2025 is, therefore, interlocutory in nature and not a final determination of the issues.

Since the legality of the Order dated 03.01.2018 remains pending consideration in *Civil Review Petition No. 147 of 2025*, the legality of the Disciplinary Rules, 2017 is presently *sub judice* before the Hon'ble Appellate Division.

Significantly, the Hon'ble Appellate Division has expressly clarified that nothing in its Order dated 29.06.2025 shall prejudice the continued prosecution and final disposal of the Rule Nisi in *Writ Petition No. 10356 of 2024* by the specially constituted Bench of the High Court Division. Accordingly, this Hon'ble Court is not precluded from examining the constitutionality of the Disciplinary Rules in the present writ petition.

However, even if this Hon'ble Court were to strike down the Disciplinary Rules, their constitutionality would still be subject to final adjudication by the

Hon'ble Appellate Division, inasmuch as the Rules were earlier accepted by the Appellate Division.

Options available to this Hon'ble Court:

In view of the above, this Hon'ble Court has two options:

First, the Court may refrain from adjudicating upon the constitutionality of the Disciplinary Rules on the ground that the matter is presently *sub judice* before the Hon'ble Appellate Division in Civil Review Petition No. 147 of 2025.

Second, the Court may exercise the liberty expressly granted by the Hon'ble Appellate Division and proceed to decide the issue itself. If the Court adopts this course, it is submitted that a declaration striking down the Fourth and Fifteenth Amendments as unconstitutional—thereby restoring Article 116 to its original form—would necessarily render the Bangladesh Judicial Service (Disciplinary) Rules, 2017 unconstitutional. The existing Rules were framed under the then-operative Article 116, which vested control and discipline of the judiciary in the President. Upon restoration of Article 116 to its original position, such control and discipline would vest exclusively in the Supreme Court. Consequently, the Disciplinary Rules would become unworkable and unsustainable in law, leaving no alternative but to declare them unconstitutional.

Respondent's Position on Article 116 vis-à-vis the Government's Position:

The Respondent's stance on Article 116 is inconsistent with the position taken by the Government itself.

The Respondent's submission that Article 116, in its present form, represents the best possible arrangement is untenable and contrary to the Government's own publicly stated position.

The current interim Government assumed responsibility for governance in an extraordinarily complex and tragic context, marked by the loss of nearly one thousand lives—including many young people and children—and grievous injuries suffered by countless others. The legitimacy of the interim Government arises not from ordinary electoral processes but from the profound sacrifices made by the people. Its legitimacy is, therefore, of a distinct and exceptional character.

One of the first actions undertaken by the interim Government upon assuming office was the formation of six reform commissions, followed subsequently by additional commissions.

Among the initially constituted bodies, both the Constitution Reform Commission and the Judiciary Reform Commission submitted their respective reports.

The Constitution Reform Commission, in its Report dated January 2025, recommended that control—including the powers of posting, promotion, and grant of leave—and disciplinary authority over persons employed in the judicial service and magistrates exercising judicial functions should be vested in the Supreme Court. The Commission provided detailed justifications in support of this recommendation.

The Government has effectively endorsed those reports by subsequently forming the National Consensus Commission ("NCC") to implement the recommendations made by various commissions.

The recommendations of the Constitution Reform Commission and the Judiciary Reform Commission emerged from the great sacrifice that this nation has suffered and witnessed, and the government did not reject those recommendations. The government is trying to implement those recommendations through NCC even before the next parliamentary election. The government is fully subscribing to the recommendations of the Constitution Reform Commission and the Judiciary Reform Commission. As stated above, both the Commissions have clearly recommended reform of Article 116.

The respondent's position does not reflect the aforesaid position, which is the government's position.

Keeping Article 116 in the present form, it is not even possible to establish a proper separate secretariat in the Supreme Court or ensure the independence of the Judiciary.

The Hon'ble Appellate Division consistently took the view that with Article 116 in its existing form, independence of the judiciary cannot be ensured.

Authority must vest in the Supreme Court. Only where the Supreme Court deems it necessary should it seek the approval of the President or, for that matter, the Executive. This reflects the proper understanding of the doctrine of checks and balances, as recognised by the Reform Commissions. Such an arrangement cannot be reversed. While consultation and discussion may take place, ultimate authority must reside in the judiciary—not in the Executive—to preserve judicial independence. Accordingly, the Respondent's reliance on the concept of checks and balances to justify presidential or executive control is misconceived.

The purpose of referring to the reports of the Constitution Reform Commission and the Judiciary Reform Commission is to demonstrate to this

Hon’ble Court that the Government’s position is that Article 116, in its present form, does not ensure the independence of the judiciary and is not framed in its optimal form. Rather, control must vest in the Supreme Court to secure judicial independence. This is the Government’s stated position, and it is actively pursuing this objective through legal reform.

The National Consensus Commission Report dated 8 August 2025 states as follows:

> **“২৬) বিচারকদের চাকরির নিয়ন্ত্রণ : অধস্তন আদালতের বিচারকদের চাকরির নিয়ন্ত্রণ সম্পূর্ণভাবে সুপ্রিমকোর্টের উপর ন্যস্ত করার জন্য সংবিধানের অনুচ্ছেদ ১১৬ ও সংশ্লিষ্ট বিধিমালা সংশোধন করা হবে। [৩১ টি দল এক মত] |”**

Where there is a note of dissent by political parties regarding a reform proposal of the NCC, such dissent is expressly recorded. In respect of Proposal No. 26, no note of dissent has been recorded by any political party. Therefore, the assertion that Article 116 requires no reform and represents the best possible formulation does not reflect the position of the Government, the political parties, or the people.

None of the aforesaid reports was placed before this Hon’ble Court by the Respondent. The submissions advanced by the Respondent must therefore be examined in light of the position of the Government, the Reform Commissions, the National Consensus Commission, the political parties, and the people—positions that cannot be disregarded. The reality is that Article 116 is not in its best form, contrary to the submissions made by the Respondent.

It should be noted that the Respondent has travelled far beyond the principal issue before this Hon’ble Court. The central issue concerns the constitutionality of the two constitutional amendments, namely the Fourth

Amendment and the Fifteenth Amendment. Submissions were made, inter alia, regarding the necessity of a dialogue between the Supreme Court and the President and the form such dialogue should take. However, all these matters can be resolved once Article 116 is placed in its proper constitutional position. These ancillary issues may be addressed through Rules, by-laws, or, if necessary, by Acts of Parliament.

The core question is where Article 116 ought to be located within the constitutional framework. It is known where the Government intends to place it through the legislative or reform process. The petitioners, however, seek to ascertain whether Article 116 can be placed in its proper position through a judicial process. It is evident that Article 116, in its present form and placement, is not situated appropriately.

The present writ petition does not concern checks and balances in the manner argued by the Respondent. The petitioners have approached this Hon'ble Court to determine the most appropriate formulation of Article 116 and whether, in the exercise of judicial authority, it may be placed in its proper position. If such correction cannot be achieved through judicial authority, the responsibility would rest with the Legislature. It is respectfully submitted that this Hon'ble Court possesses the judicial authority to place Article 116 in its proper constitutional position.

International Legal Instruments on the Independence of the Judiciary:

The Basic Principles on the Independence of the Judiciary, endorsed by the United Nations General Assembly, were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan from 26 August to 6 September 1985, and subsequently endorsed by

General Assembly Resolutions 40/32 and 40/146 in the same year. With regard to judicial independence, the Basic Principles, *inter alia*, states as follows:

"Independence of the Judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary (page 1).

…

Discipline, Suspension and Removal

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.
19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct (page 3).

Commonwealth (Latimer House) Principles on the Three Branches of Government

The Commonwealth (Latimer House) Principles on the Three Branches of Government ("Latimer House Principles") were developed through a collaborative initiative of:

(i) the Commonwealth Parliamentary Association,

(ii) the Commonwealth Magistrates and Judges Association,

(iii) the Commonwealth Lawyers Association, and

(iv) the Commonwealth Legal Education Association.

These organisations met at Latimer House in Buckinghamshire in June 1998 to draft the initial guidelines. The final Principles were adopted by 38 Commonwealth Heads of Government at the Abuja Meeting in December 2003.

The Latimer House Principles, *inter alia*, provide as follows:

Foreword:

"…But every Commonwealth member must continuously ask itself the question: how well does it observe the separation of powers? Do our Executives respect the freedom of the Legislature and the Judiciary to discharge their responsibilities? The Executive, of course, faces the greatest temptation to jettison these Principles—and there was a time, perhaps a generation ago, when many Legislatures and Judiciaries wilfully complied with overreaching Executives. In other words, they did not properly believe in their own independence and authority as a key element of the sharing of power." (page 3)

…

Parliament and the Judiciary

5. While dialogue between the judiciary and the government may be desirable or appropriate, in no circumstances should such dialogue compromise judicial independence.

…

VI. Accountability Mechanisms

I. Judicial Accountability

(a) Discipline

(i) "In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence, and to be judged by an independent and impartial tribunal. Grounds for removal of a judge should be limited to:

(A) inability to perform judicial duties; and

(B) serious misconduct."

(ii) In all other matters, the process should be conducted by the Chief Judge of the courts.

…

2.2.2 Judicial Accountability and Confidence-Building

The independence of the judiciary is a vital guarantee of a democratic society and rests upon public confidence. Accordingly, adequate observance of

principles of accountability in judicial processes, professional ethics, and conduct of judicial officers and court officials is essential. Peer review mechanisms by members of the profession, appropriate criticism through the media, and legislative reversal of judicial precedent and case law may be considered.

In view of the above, if the petitioners' prayer, or the Rule, regarding the unconstitutionality of the amendments to Article 116 succeeds, this Hon'ble Court would have no option but to declare the relevant Disciplinary Rules unconstitutional as well. With regard to the establishment of a separate secretariat, this prayer also merits acceptance.

In view of the foregoing submissions, he prays for making the Rule absolute with a direction to establish a separate Secretariat for the Supreme Court of Bangladesh.

We have considered the submissions of the learned Advocate for the petitioners, the learned Attorney General, the Interveners, and the learned Amicus Curiae. We have also examined the relevant provisions of law and carefully perused the writ petition along with the annexures appended thereto.

To resolve the issues involved, it is necessary to examine the intent of the framers of the Constitution of 1972, concerning the independence of the judiciary and its separation from the executive.

It is evident from the parliamentary debates of the Constituent Assembly in 1972 that no member opposed the vesting of control, including posting, promotion, grant of leave, and disciplinary authority over judicial officers and magistrates exercising judicial functions in the Supreme Court under Article 116. On the contrary, several members emphasised the importance of Articles 116 and 22 in realising the true independence of the judiciary.

In this regard, Mr. Syed Nazrul Islam, Deputy Leader of the Assembly, stated:

"মাননীয় স্পিকার সাহেব, গণতন্ত্রের সবচেয়ে বড় কথা হচ্ছে separation of judiciary from the executive, অর্থাৎ আইনের শাসন এমনভাবে প্রবর্তন করতে হবে, যেন আইনবিভাগ পরিপূর্ণভাবে নিরপেক্ষ থাকে এবং মর্যাদা এবং স্বাধীনতার সঙ্গে তার কর্তব্য পালন করতে পারে। এই শাসনতন্ত্রে আমাদের আইনবিভাগকে শুধু আলাদা করাই নয়, তাকে পরিপূর্ণ মর্যাদা দেওয়ার জন্য যে ব্যবস্থা গ্রহণ করা হয়েছে, তাতে আইনের শাসন সম্বন্ধে আমাদের মনে কোনো সংশয় থাকা বাঞ্চনীয় নয়।"

Mr. Khondkar Abdul Hafiz, Assembly Member from Jashore-7 Constituency Speaks of the independence of the judiciary as follows:

"স্যার, আপনি জানেন যে, আমাদের দেশে যে সংবিধান হয়েছে, তার পূর্বে আমরা বহুবার বহু সাংবিধানিক ব্যবস্থা প্রবর্তিত হতে দেখেছি। ১৯৩৫ সালে ভারতীয় আইন পাশ করার পর থেকে তৎকালীন সমস্ত ভারতবর্ষে একটা আন্দোলনের সৃষ্টি হয়েছিল যে, বিচার বিভাগকে নির্বাহী বিভাগ থেকে পৃথক করতে হবে। এ দেশে বহু আইনজীবী, বহু মনীষী, সমস্ত ছাত্র-সমাজ প্রতিবাদে মুখর হয়ে উঠেছিল যে, বিচার বিভাগকে নির্বাহী বিভাগ থেকে সম্পূর্ণভাবে পৃথক করতে হবে। আমরা তখন শুনেছি, কিন্তু তারা কিছুই করতে পারেনি। আর আজ যখন আমরা নিজেরাই সংবিধান তৈরি করতে যাচ্ছি, তখনই আমরা চেষ্টা করেছি বাংলাদেশের সংবিধানের মধ্যে বিচার বিভাগকে executive body থেকে সম্পূর্ণরূপে আলাদা করার জন্য।

স্যার, এ সম্পর্কে দুইটা উদাহরণ আমি দিতে চাই। আমাদের সংবিধানের ২২ এবং ১১৬ অনুচ্ছেদ। ২২ অনুচ্ছেদের অন্তর্গত মৌলিক অধিকারে বলা হয়েছে যে, বিচার বিভাগের পৃথকীকরণ রাষ্ট্র নিশ্চিত করবেন। আর, যাতে কোনোদিন কোনো মানুষের মনে সন্দেহের সৃষ্টি না হয়, সেই জন্য ১১৬ অনুচ্ছেদে বলা হয়েছে, বাংলাদেশের সুপ্রীম কোর্টের অধীনে হাইকোর্ট থাকবে। হাইকোর্টে নিযুক্ত ব্যক্তিদের এবং বিচার বিভাগীয় দায়িত্বপালনে রত ম্যাজিস্ট্রেটদের নিয়ন্ত্রণ, কর্মস্থল নির্ধারণ, পদোন্নতিদান ও ছুটি-মঞ্জুরিসহ সকল বিষয় ও শৃঙ্খলা সুপ্রীম কোর্টের উপর ন্যস্ত থাকবে। সুতরাং এখানে এটা পরিষ্কার হয়ে গিয়েছে যে, বাংলাদেশে স্বাধীনতার মাত্র দশ মাস পরে যে একটা সংবিধান দেওয়া হচ্ছে, তাতে পরিষ্কারভাবে লিপিবদ্ধ করা হয়েছে যে, বিচার বিভাগ নির্বাহী বিভাগ থেকে এই সংবিধান কার্যকর হওয়ার পর থেকে সম্পূর্ণ পৃথক হয়ে যাবে। সুতরাং, এ ব্যাপারে আর কোনো সন্দেহ থাকতে পারে না।"

Mr. Ahsan Ullah, Assembly Member of Kushtia describes the significance of Article 116 of the Constitution along with other provision as the following:

> "বিচার বিভাগ সম্বন্ধে আমি কিছু বলতে চাই । আমাদের অনেক দিনের দাবি ছিল বিচার বিভাগ থেকে প্রশাসন বিভাগকে আলাদা করতে হবে । পাকিস্তান আমলে সরকার বিচার বিভাগকে প্রশাসন বিভাগ থেকে আলাদা করে নাই এই ভয়ে যে, প্রশাসন বিভাগ দুর্বল হয়ে পড়বে, সরকার দেশ শাসন করতে পারবে না। কিন্তু আমাদের এই সংবিধানে বিচার বিভাগকে প্রশাসন বিভাগ হতে সম্পূর্ণভাবে আলাদা করা হয়েছে।
>
> আমি সংবিধানের ১১৫ ও ১১৬ অনুচ্ছেদের উল্লেখ করছি। সেখানে বলা হয়েছে যে, বিচার বিভাগীয় পদে নিয়োগ, পদোন্নতি ইত্যাদি সমস্ত বিষয় সুপ্রীম কোর্টের এখতিয়ারভুক্ত করা হবে। আর ২২ অনুচ্ছেদে বলা হয়েছে রাষ্ট্রের প্রশাসন বিভাগ থেকে বিচার বিভাগকে পৃথকীকরণের ব্যবস্থা নিশ্চিত করা হবে। আমি এটুকু বলতে চাই, আমাদের যে অধিকার দেওয়া হয়েছে, সেই অধিকার প্রতিষ্ঠা নিশ্চিত করবার জন্য বিচার বিভাগকে সম্পূর্ণ সার্বভৌম ক্ষমতা দেওয়া হয়েছে।"

Mr. Abdul Muntakim Chowdhury, Assembly Member from Sylhet-5 constituency speaks of the following:

> "এই সংবিধানে আমরা ২২ অনুচ্ছেদের মাধ্যমে নির্বাহী বিভাগ থেকে বিচার বিভাগকে পৃথক করেছি। আমাদের প্রতিবেশী-রাষ্ট্র ভারত ২৩৫ অনুচ্ছেদের মাধ্যমে এটা করতে চেয়েছে । কিন্তু সুনির্দিষ্টভাবে তা করতে পারেনি। শুধু ভবিষ্যতের জন্য একটা ব্যবস্থা রেখেছে। কিন্তু আমরা আজকে এটাকে সম্পূর্ণরূপে পৃথক করে দিয়েছি।"

Dr. Kamal Hossain, the President of the Constitution Committee, describes the separation of judiciary from the executive and the independence of judiciary as the following:

> বিচার বিভাগ সম্বন্ধে আর একটা কথা বলতে হয়। নির্বাহী বিভাগ থেকে বিচার বিভাগকে পৃথক করার কাজটা সরাসরিভাবে আমরা করে দিয়েছি। প্রশ্ন তোলা হয়েছে যে, আমরা তা করিনি । কিন্তু আমরা প্রথম দিকে মূলনীতির মধ্যে তা করে দিয়েছি । তারপর, আবার যদি একটু কষ্ট করে ১১৪ এবং ১১৫ অনুচ্ছেদ তাঁরা দেখেন, তাহলে বুঝতে পারবেন যে, এটার বিধান করা হয়েছে ।

দু' জায়গায় করলাম কেন, এ প্রশ্ন উঠতে পারে। ভবিষ্যতে যে আইন করা হবে, তা যেন এই বিধান অনুসারে করা হয়, সেজন্য এই ব্যবস্থা। অধস্তন আদালত এবং ফৌজদারি আদালতের ম্যাজিস্ট্রেটদেরকে আমরা সুপ্রীম কোর্টের আওতায় নিয়ে এসেছি ।

নির্বাহী বিভাগ থেকে বিচার বিভাগকে পৃথক করার দাবি আমাদের বহুদিন আগের পুরনো দাবি। আমরা অতীতে দেখেছি, নির্বাহী বিভাগের অধীনে বিচার বিভাগ থাকার ফলে কীভাবে তাঁদের প্রভাবিত করা হয়েছে, কীভাবে ভয় দেখানো হয়েছে।

আইয়ুবের আমলে আমার মনে আছে, একজন জেলা-জজ সরকারের বিরুদ্ধে একটা 'ইনজাংশন দিয়েছিলেন। সেজন্য তাঁকে সন্দ্বীপে বদলি করা হয়। কাজেই এ দেশের জাগ্রত জনতা নির্বাহী বিভাগ থেকে বিচার বিভাগের পৃথকীকরণের দাবি তুলেছেন।

কীভাবে অতীতে বিচার বিভাগের স্বাধীনতা থর্ব করা হয়েছে, তার বহু নজির আছে। সেজন্য আইনজীবী ছাড়াও এ দেশের জনসাধারণ দিনের পর দিন বিচার বিভাগকে নির্বাহী বিভাগ থেকে পৃথক করার দাবি জানিয়ে এসেছেন। আমরাই সে দাবি করেছি এবং এখন যেহেতু সুযোগ পেয়েছি, তাই সে দাবি আমরা মেনে নিয়েছি। দাবি-দাওয়া আমরাই করতাম। তখন আমরা দাবিদাওয়া মেনে নেওয়ার সুযোগ পাইনি। এতদিন পরে আমরা এসব দাবিদাওয়া পূরণ করার সুযোগ পেয়েছি। আমার মনে হয়, কোনো-না-কোনো সদস্য এর উপর একটা-না-একটা প্রস্তাব পাস করেছেন। তাই আজকে আমরা মেনে নিলাম যে, নির্বাহী বিভাগ থেকে বিচার বিভাগকে পৃথক করা হোক।

সংবিধানের ১১৪ এবং ১১৫ অনুচ্ছেদে এটা করে দেওয়া হয়েছে। তা সত্ত্বেও কেউ কেউ বলেছেন যে এটা করা হয়নি। তাঁরা শুধু মূলনীতি দেখে এ কথা বলছেন । বাকিটুকু তাঁরা দেখেননি। সেটা ছাড়াও বিচার বিভাগের পরিচ্ছেদ দেখুন । সেখানেও আমরা সে ব্যবস্থা করে দিয়েছি ।

এখানে আমি শুধু এটুকু বলতে চাই যে, কীভাবে আমরা এত অবিলম্বে এটা করতে পেরেছি, তাও বিচার করা দরকার। অন্যান্য দেশে এটা করতে অনেক সময় লেগেছে। ইন্ডিয়া যখন এটা গ্রহণ করে, তখন ২৩৫ এবং ২৩৭ অনুচ্ছেদে

একটা বিধান করা হয়েছিল ম্যাজিস্ট্রেট সম্পর্কে। ১৯৭০ সাল পর্যন্ত সংশোধিত ভারতীয় সংবিধানের ২৩৭ অনুচ্ছেদ:

Application of the provisions of this Chapter to certain classes of Magistrates:

"The Governor may, by public notification, direct that the foregoing provisions of this Chapter and any rules made thereunder shall, with effect from such date or dates as may be fixed by him in that behalf, apply in relation to any class or classes of Magistrates in the States."

Article 235 of the Constitution of India provides as follows:

> ***"Control over subordinate courts.****—The control over district courts and courts subordinate thereto, including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of District Judge, shall be vested in the High Court."*

It appears from the above that, while in India control over subordinate courts was clearly vested in the High Court, the issue of the magistracy was left to be addressed at a future point of time, as indicated by the relevant constitutional and statutory provisions.

In contrast, under our Constitution, Articles 114 and 115 unequivocally provide that the subordinate judiciary shall be under the control of the Supreme Court. Appointment of judicial officers is to be made on the recommendation of the Supreme Court, and their posting, transfer, promotion, and disciplinary control are also vested in the Supreme Court. The Constitution thus expressly mandates the separation of the judiciary from the executive.

Eventually, Article 116 was passed in the Constituent Assembly without any amendment, as is evident from the parliamentary debates, which read as follows:

জনাব স্পিকার, ১১৬ নম্বর অনুচ্ছেদে কোনো সংশোধনী নাই। অতএব,

পরিষদের সামনে প্রশ্ন হচ্ছে—

"১১৬ অনুচ্ছেদ এই বিলের অংশে পরিণত হোক।"

যাঁরা এই প্রস্তাবের পক্ষে আছেন, তাঁরা 'হাঁ' বলুন।

[ধ্বনি-ভোট গ্রহণের পর]

আর যাঁরা এর বিপক্ষে আছেন, তাঁরা 'না' বলুন।

[ধ্বনি-ভোট গ্রহণের পর]

আমার মনে হয়, 'হাঁ' জয়যুক্ত হয়েছে, 'হাঁ' জয়যুক্ত হয়েছে, 'হাঁ' জয়যুক্ত হয়েছে।

অতএব, প্রস্তাবটি গৃহীত হলো এবং ১১৬ নম্বর অনুচ্ছেদ সংবিধান-বিলের অংশে পরিণত হলো।

From the speeches of our Constitution-makers, it is abundantly clear that ensuring the independence of the judiciary and its complete separation from the executive were among the foremost intentions of the framers of the Constitution.

These foundational principles have been repeatedly reaffirmed by our Apex Court in, inter alia, the *Masdar Hossain* case, the Ten (10) Judges' case, the 15th Amendment case, the 7th Amendment case, the 13th Amendment case, and the 16th Amendment case.

We shall now examine the constitutionality of the amendments to Article 116 brought about by the Fourth Amendment and the Fifteenth Amendment, which constitute the core issues in the present writ petition.

Grounds on which a Constitutional Amendment may be declared unconstitutional:

A constitutional amendment may be declared unconstitutional on two grounds: procedural and substantive.

An amendment will be unconstitutional on procedural grounds if it is adopted in violation of the procedure prescribed for constitutional amendments. Even if an amendment satisfies procedural requirements, it may still be unconstitutional on substantive grounds if it is inconsistent with other provisions of the Constitution or if it destroys or impairs the basic structure of the Constitution.

Before examining the impugned amendments to Article 116, it is necessary to understand the doctrine of basic structure.

The Basic Structure Doctrine:

The basic structure doctrine is founded on the principle that legislative power under the Constitution is limited. Such power is derivative in nature, being derived from the Constitution itself, and must operate within the constitutional framework. Constituent power, on the other hand, refers to the authority to create or fundamentally alter a Constitution, which resides with the people.

The doctrine postulates that if Parliament enacts any law, including a constitutional amendment, which destroys or damages the basic structure of the Constitution, such law shall be declared invalid to the extent of such violation.

Under Article 142 of the Constitution of Bangladesh, Parliament is empowered to amend the Constitution. However, this power being derivative, it remains subordinate to the Constitution itself and, therefore, cannot be exercised to alter or destroy its basic structure, which forms the inviolable core of the Constitution.

This doctrine was first authoritatively articulated in the landmark decision of the Supreme Court of India in *Kesavananda Bharati v. State of Kerala (1973)*.

Following this principle, our Appellate Division, in *Anwar Hossain Chowdhury v. Bangladesh, reported in 41 DLR (AD) 165 (the Eighth Amendment Case),* elaborately discussed the concept of basic structure, particularly in paragraphs 377, 435, and 341, holding that independence of the judiciary, separation of powers, and the rule of law constitute basic structures of the Constitution.

The principal criticism of the basic structure doctrine is that it is uncertain and based on unfounded apprehensions. However, in reality, the basic structures of a Constitution are clearly identifiable. Sovereignty belongs to the people, and it is unquestionably a basic feature of the Constitution. Likewise, supremacy of the Constitution, democracy, republican government, unitary state, separation of powers, independence of the judiciary, and fundamental rights are all integral components of the basic structure.

By the exercise of amendatory power, a republic cannot be transformed into a monarchy, democracy into oligarchy, nor can the judiciary be abolished, even in the absence of an express prohibition in the Constitution. These are the structural pillars of the Constitution and lie beyond the reach of the amendatory process.

The doctrine of basic structure is founded on the apprehension that an unlimited amending power may be exercised in a tyrannical manner so as to damage or destroy the fundamental framework of the Constitution. Bearing in mind, the maxim that *"power corrupts and absolute power corrupts absolutely"*, it has been observed that the doctrine barring changes to the basic structure operates as an effective safeguard against frequent constitutional amendments made to serve sectarian or partisan interests, particularly in countries where democracy has not been afforded a genuine opportunity to develop **(paragraph 377).**

The doctrine of basic structure represents a growing and evolving principle in constitutional jurisprudence. It has developed in circumstances where the executive, commanding an overwhelming majority in the legislature, has secured the passage of snap constitutional amendments without the issuance of a Green Paper or White Paper, without eliciting public opinion, without referring the bill to a select committee, and without allowing sufficient time for parliamentary deliberation. Instances of such practices may be found both domestically and internationally. In India, for example, the Thirty-Ninth Amendment, relating to Article 329A(4) of the Indian Constitution, was ratified within three days during a period of emergency when freedom of speech stood suspended, leaving little or no scope for debate on its constitutional implications. Reference may be made to H.M. Seervai, *Constitutional Law of India* (Third Edition), Vol. II, pages 2659–2660 **(paragraph 435).**

The Appellate Division, in the *Eighth Amendment Case*, observed that the doctrine of basic structure *"has developed in a climate where the executive, commanding an overwhelming majority in the legislature, gets snap amendments of the Constitution passed… without eliciting any public opinion, without sending the bill to any select committee, and without giving sufficient time to the members of Parliament for deliberation on the bill for amendment"* **(paragraph 435).**

Upon examining the process through which the Fourth Amendment and the Fifteenth Amendment were enacted, it becomes evident that what the Appellate Division apprehended in the Eighth Amendment Case in 1989 has indeed materialised in respect of both amendments. Both amendments were passed by an executive enjoying an overwhelming parliamentary majority, without seeking public opinion and in disregard of public interest.

The Appellate Division, in the Eighth Amendment Case, laid down the following test for determining whether a constitutional amendment can validly become part of the Constitution:

> *"There is a substantial difference between the Constitution and its amendments. Before an amendment becomes a part of the Constitution, it must pass certain tests, since it is not enacted by the people through a Constituent Assembly. These tests are that the amendment must be enacted in strict compliance with mandatory procedural requirements; that it must not be the result of deception or fraud upon the statute; that it must not be so repugnant to existing constitutional provisions as to render the Constitution unworkable; and that, if the doctrine barring alteration of the basic structure is accepted, the amendment must not destroy any basic feature of the Constitution* ***(paragraph 341 of the Eighth Amendment Case)****."*

Upon examination of the Fourth and the Fifteenth Amendments, it appears that they were enacted in violation of Article 142(1) of the Constitution, in particular due to the absence of a long title in the respective amendment Bills.

With regard to the requirement of a "long title" and the consequence of its absence in a constitutional amendment Bill, Article 142(a)(i) of the Constitution provides as follows:

> *"No Bill for such an amendment shall be allowed to proceed unless the long title thereof expressly states that it will amend a provision of the Constitution."*

Therefore, Constitutional amendment Bills must include a 'long title' to be valid under Article 142 (a) (ii). This title must specifically name every provision being changed. If an amendment Bill seeks to amend only one provision, the long title must expressly state that specific provision. For instance, if a Bill intends to amend Article 20, the long title must read: *'A Bill to amend Article 20 of the*

Constitution.' However, if a Bill covers to amend several Articles, like Articles 21, 22, and 23, the long title must list all of them explicitly to comply with constitutional requirements. Under Article 142 (a) (i) of the Constitution of Bangladesh, the 'long title' is a mandatory procedural requirement. If this mandatory requirement is not complied with, the Bill shall not be allowed to proceed.

The United Kingdom Parliament, on its official website, defines a "long title" as follows:

> *"The long title of a Bill is the wording at the start of a Bill that begins 'A Bill to…' and then lists its purposes, sometimes at great length. The content of the Bill must be covered by the long title, and if the content of the Bill changes before it is passed, the long title may also need to be changed.*
>
> *Bills also have a short title, which is the more convenient name by which the Bill will usually be known."*

Black's Law Dictionary (9th edn., West 2009) defines "long title" as:

> *"The full, formal title of a statute, usually containing a brief statement of legislative purpose."*

It has been observed:

> *"The first Acts of Parliament did not have titles. The first time that an Act of Parliament was given a title was about 1495. Even when the long title came to be added to each Act of Parliament as a matter of course, as it did from about 1513, the long title was not regarded as part of the Act of Parliament itself. Today, however, the position is different; the long title is part of the Act of Parliament."*
>
> — D.J. Gifford & John Salter, *How to Understand an Act of Parliament* 19 (1996).

Further:

"Because Parliament clerks, rather than Parliament, provided the titles of Acts, the traditional rule has been that the title could not be used for interpretive purposes. This is no longer the practice in most English-speaking jurisdictions, for the long title, and often a short title as well, are part of the legislative Bill from the very beginning. In the United States, most state constitutions require the legislative enactment to have a title that gives accurate notice of the contents of the law."

— William N. Eskridge Jr. & Elizabeth Garrett, *Legislation* 831 (2001).

In certain cases, a Bill's purpose may be extensively detailed within a preamble. For instance, the *Enforcement of Certain Ordinances Promulgated Between the Period from 24 March 1982 to 11 November 1986 (Special Provisions) Act, 2013* sets out a long title in the form of a preamble.

It is apparent that the Fifteenth and the Fourth Amendment Bills did not contain a long title formatted according to the requirements of Article 142.

Consequently, it is our position that both Amendments are procedurally flawed. They failed to comply with the mandatory standards set by Article 142 regarding the inclusion of a proper long title, rendering these Amendments void on that basis alone.

Substantive unconstitutionality of the Fourth and the Fifteenth Amendments:

The constitutional scheme, particularly original Article 116 read with Article 109, ensured the independence of the judiciary by vesting control, including posting, promotion, and grant of leave and disciplinary authority over judicial officers and magistrates exercising judicial functions in the Hon'ble Supreme Court.

Article 22 of the Constitution further mandates the separation of the judiciary from the executive.

The Hon’ble Appellate Division has consistently held, in numerous decisions, that the independence of the judiciary and the separation of powers constitute fundamental features forming part of the basic structure of the Constitution.

The relevant portions of the ***Eighth Amendment*** **Case** are set out below:

"308. It is on the doctrines of basic structure and implied and inherent limitation on the amending power under Article 142 that most of the arguments of the parties have been concentrated. Dr. Kamal Hossain, whose argument has been adopted by Mr. Ishtiaq Ahmed and Mr. Amir-ul-Islam, has contended that there is an implied limitation on the power of amendment and that the Constitution cannot be abrogated or basically altered by amendment merit. He has said that the 'basic structures of the Constitution' mean structural pillars on which the Constitution rests and that if these structural pillars are demolished, the entire constitutional framework will crumble. It is the intention of the framers of the Constitution, as expressed in the Preamble, the Directive Principles of State Policy, its Part II and the whole scheme of the Constitution, including Articles 1 and 7, which make it clear that the basic structures are beyond the power of amendment, he has further argued. According to the learned Counsel, Sovereignty of the people, Supremacy of the Constitution as the solemn expression of people's will, unitary character of the State, as an independent sovereign Republic, Democratic form of Government, Separation of powers between the three organs of the state, Executive, Legislature and Judiciary along with the rule of law and judicial review, Independence of Judiciary and Fundamental Human Rights are the basic structures of our Constitution.

...

328. The learned Attorney-General does not dispute that people's Sovereignty, Democracy, Independence of the Judiciary and the Principle as to separation of powers are basic structures of the Constitution and says that no question arises as to their destruction or abolition. But he contends that in all other respects, the basic structure concept is vague and uncertain. He argues that in the absence of a full catalogue of these basic structures, neither the citizens nor the Parliament will know the limit of the power of amendment of the Constitution. In this connection, he has referred to the minority views in Kesavananda's case, where it has been said that the Parliament will never be able to know what amendment it can make in the Constitution and what it cannot, and that to "find out essential or nonessential features of the Constitution is an exercise in imponderables...". The Learned Attorney-General has submitted further that in the case of Indira Gandhi Vs. Raj Narain, it has been observed that "the theory of basic structure has to be considered in each individual case and not in the abstract.

377. The main objection to the doctrine of basic structure is that it is uncertain in nature and is based on unfounded fear. But in reality basic structures of a Constitution are clearly identifiable. "Sovereignty" belongs to the people, and it is a basic structure of the Constitution. There is no dispute about it, as there is no dispute that this basic structure cannot be wiped out by the amendatory process. However, in reality, people's sovereignty is assailed or even denied under many devices and 'cover-ups' by holders of power, such as by introducing 'controlled democracy', basic democracy or by superimposing thereupon some extraneous agency, such as a council of elders or of wisemen. If by exercising the amending power, people's Sovereignty is sought to be curtailed, it is the constitutional duty of the Court to restrain it, and in that case, it will be improper to accuse the Court of acting as "super-legislators". Supremacy of the Constitution as the solemn expression of the people. Democracy, Republican Government, Unitary State, Separation of Powers, Independence of the Judiciary. Fundamental Rights are basic structures of the Constitution.......”

The Hon’ble Appellate Division, in *Khondker Delwar Hossain, Secretary, BNP & another v. Bangladesh Italian Marble Works Ltd. & others***,** *reported in 62*

DLR (AD) 404 (the *Fifth Amendment Case*), referring to the *Masdar Hossain* case, held that the independence of the judiciary is a basic structure of the Constitution. The relevant portion of the judgment is set out below:

> *"237. It appears that, Mustafa Kamal, CJ was emphatic in respect of the independence of the judiciary in Secretary of Finance vs Masdar Hossain 2000 BLT (AD) 234 wherein he held in Para 44, page 257, 258 as follows:*
>
> *44. The independence of the judiciary, as affirmed and declared by Articles 94(4) and 116A, is one of the basic pillars of the Constitution and cannot be demolished or whittled down. Curtailed or diminished in any manner whatsoever, except under the existing provision of the Constitution. It is true that this independence, as emphasised by the learned Attorney-General, is subject to the provision of the Constitution, but we find no provision in the Constitution which curtails, demolishes, or otherwise abridges this independence...... However, we are of the view that the words, "but we find no provision in the Constitution which curtails, demolishes or otherwise abridges this independence" do not depict the actual picture because unless Articles 115 and 116 are restored to their original position, independence of the judiciary will not be fully achieved."*

The Hon'ble Appellate Division, in *Government of Bangladesh & others v. Advocate Asaduzzaman Siddiqui & others*, *reported in 71 DLR (AD) 52* (the *Sixteenth Amendment Case*), reiterated that the independence of the judiciary constitutes a basic structure of the Constitution. The relevant portion of the judgment reads as follows:

> *"584. The facts of the instant case disclose a somewhat different scenario, as far as the Supreme Judicial Council is concerned. It is true that the concept of the Supreme Judicial Council was introduced by Martial Law Proclamation Order No. 1 of 1977. In the Fifth Amendment case this Division held that the Fifth Amendment ratifying and validating the Martial Law Proclamations, Regulations and Orders not only violated the supremacy of the Constitution but also the rule of law and by preventing judicial review of the legislative and administrative actions, also violated*

two other more basic features of the Constitution, namely, independence of the judiciary and its power of judicial review. However, this Division condoned several past actions taken under Martial Law, including the provision of the Supreme Judicial Council introduced by Martial Law Proclamation in Article 96 of the Constitution....."

The above decisions demonstrate that the Hon'ble Appellate Division has consistently recognised certain concepts and principles as constituting the basic structure of the Constitution, including the supremacy of the Constitution, democracy, republican government, unitary State, separation of powers, independence of the judiciary, and fundamental rights. Each of these basic structures is reflected in, and supported by, several provisions of the Constitution.

These cases further indicate that the basic structure is not defined by reference to any single Article of the Constitution; rather, it is a constitutional concept to which various Articles are related. For example, Articles 116 and 109 are intrinsically linked to the independence of the judiciary, while Article 22 embodies the principle of separation of the judiciary from the executive.

Furthermore, the Fourth and Fifteenth Amendments, insofar as they amended Article 116, are in direct conflict with existing provisions of the Constitution. Article 109 provides that the High Court Division shall have superintendence and control over all courts and tribunals subordinate to it. Where, on the one hand, the High Court Division is vested with such superintendence and control, and, on the other hand, the Executive is empowered to control posting, promotion, leave, and disciplinary matters of judicial officers, there remains no effective scope for the High Court Division to exercise control over subordinate judicial officers. As a result, the amendments to Article 116 render Article 109 ineffective.

Article 22 mandates the separation of the judiciary from the executive organ of the State. Article 8(2) further provides that the principles set out in Part II of the Constitution shall serve as a guide to the interpretation of the Constitution. Accordingly, Article 22 must guide the interpretation of Articles 109 and the original Article 116. When the amendments to Article 116 are interpreted in the light of Article 22, it becomes evident that they undermine the separation of the judiciary and thereby destroy a basic structure of the Constitution. For this reason both the Fourth and Fifteenth Amendments are ultra vires the Constitution.

Moreover, Article 8(2) stipulates that the principles contained in Part II shall be applied by the State in the making of laws. Thus, the State is constitutionally obliged, through legislative action, to advance the objective of separating the judiciary from the executive, as envisaged in Article 22. The State cannot, by legislative or constitutional amendment, undermine this separation. Since the amendments to Article 116 have the effect of undermining the separation of the judiciary—a recognised basic structure of the Constitution—the Fourth and Fifteenth Amendments, insofar as they relate to Article 116, also violate Article 8(2) of the Constitution.

In view of the foregoing, the amendments to Article 116 cannot be regarded as valid constitutional amendments, as they are so repugnant to Articles 22 and 109 of the Constitution that, if retained, those provisions would be rendered meaningless and unworkable. Accordingly, the amendments to Article 116 fail to satisfy the test laid down in the Eighth Amendment Case for an amendment to become a valid part of the Constitution.

The Appellate Division, in the Eighth Amendment Case, held that *"before an amendment becomes a part of the Constitution, it must pass through certain tests,"* one of which is that *"the amendment must not be so repugnant to the*

existing provisions of the Constitution that its coexistence therewith would render the Constitution unworkable."

In the Sixteenth Amendment Case, the Hon'ble Appellate Division categorically observed that if the control and disciplinary mechanism of officers of the subordinate judiciary remain vested in the Executive, the judiciary cannot be independent. The relevant portion of the judgment, appearing at paragraph 365, is reproduced below:

> *"The scheme of the constitution itself shows that the lower judiciary is totally independent and that its control shall be with the High Court Division. The change of the system of government will not make any difference. There were twelve amendments in the Constitution after the Fourth Amendment. None of the governments took any step in this regard despite the observations by this court in Fifth, Eighth and Thirteenth Amendment cases. Keeping the control and disciplinary mechanism of the officers of the lower judiciary with the Executive, the judiciary cannot be independent, and this provision is not only inconsistent with Article 109, but it is also inconsistent with Article 116A, which has also been substituted by the Constitution's Fourth Amendment. Under this provision, it is said that all persons employed in the judicial service and all Magistrates shall be independent in the exercise of their judicial functions. There cannot be any independence in the judiciary if the disciplinary mechanism including the power of appointment, posting and promotion of the officers of the lower and higher judiciary are kept in the hands of the Executive, inasmuch as, there is no mechanism under the scheme of the constitution as to how the Executive shall control the power of posting, promotion and discipline of persons employed in the judicial service and the higher judiciary* ***(paragraph 365)****."*

In light of the foregoing discussion, we can safely conclude that the argument advanced by the learned Attorney General and the learned Intervener (Respondent No. 6), Mr. Ahsanul Karim that Article 116 does not form part of the basic structure of the Constitution is wholly misconceived and unsustainable.

Originally, Article 116 of the Constitution vested the control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and Magistrates exercising judicial functions in the Supreme Court. This provision, as framed by the Constituent Assembly in 1972, did not contemplate any form of consultation; it unequivocally vested such authority in the Supreme Court.

It is pertinent to note that constituent power and legislative power are not identical. Legislative power, like judicial power, is derived from and conferred by the Constitution. All three organs of the State—the Executive, the Legislature, and the Judiciary—are creations of the Constitution and operate strictly within its framework. Consequently, none of these organs can act in violation of the Constitution.

Article 7 of the Constitution proclaims that the Constitution is the solemn expression of the will of the people and the supreme law of the land. All authorities of the Republic, except the people themselves, are subject to the Constitution. The people are sovereign, and the powers exercised by the Legislature are derivative in nature. It is from this principle that the doctrine of basic structure has evolved. Although, Article 142 empowers Parliament to amend the Constitution, that power is itself derived from the Constitution and is not a power superior to it.

Since the Constitution is the creator of Parliament and the Parliament cannot amend the Constitution in a manner that destroys or alters its basic structure. The creation cannot be greater than the creator. Therefore, Parliament lacks the authority to enact amendments that abrogate the fundamental features of the Constitution. This constitutes the theoretical foundation of the doctrine of basic structure.

The original Article 116 was enacted by the Constituent Assembly in exercise of the constituent power of the people. Subsequent amendments to Article 116, being exercises of power under the Constitution, must be tested against the doctrine of basic structure and other constitutional requirements to determine whether they have altered or destroyed any basic features. The relevant basic features in this context include, *inter alia*, the independence of the judiciary and the separation of powers.

Article 116 thus forms an integral part of the constitutional scheme ensuring the separation of powers and the independence of the judiciary and, as such, constitutes an undeniable element of the Constitution's basic structure. Its provisions do not admit of dilution or derogation, thereby unequivocally negating the submissions advanced by the respondents.

Under the original Constitution, the power of control and discipline was vested in the Supreme Court. By the Fourth Amendment, however, this power was taken away from the Supreme Court and vested in the President, which is constitutionally impermissible. Through the Fourth Amendment, the basic features of the Constitution relating to the independence of the judiciary and the separation of powers were destroyed. Accordingly, amendment of Article 116 of the Fourth Amendment was unconstitutional.

Article 116 was subsequently amended by the Fifth Amendment, which sought to marginally improve upon the Fourth Amendment by providing that the President would exercise such authority in consultation with the Supreme Court. Although, this represented an improvement, the fundamental constitutional infirmity remained, as the power continued to vest in the President rather than the Supreme Court. Consequently, the Fifth Amendment in this respect was also unconstitutional.

The destruction of the basic features of judicial independence and separation of powers commenced with the Fourth Amendment. While the Fifth Amendment attempted to mitigate the damage by introducing the requirement of consultation, the substantive power vested in the Supreme Court by the original Constitution was not restored. This situation persisted because Article 116, as amended by the Fifth Amendment, was later repealed by the Fifteenth Amendment, which nevertheless retained the same substituted text.

The reason for this continuity lies in the fact that the Fifth Amendment was declared unconstitutional by the Hon'ble Appellate Division in the Fifth Amendment Case. The settled principle of constitutional law is that when a provision is declared unconstitutional, the immediately preceding provision automatically revives. Consequently, upon the declaration of unconstitutionality of the Fifth Amendment, the Fourth Amendment stood revived. This explains why the Fifteenth Amendment reinserted verbatim the same text of Article 116.

Since the Fifth Amendment has already been declared unconstitutional, the amendments presently under challenge before us are the Fourth and Fifteenth Amendments, and there is no necessity to declare the Fifth Amendment unconstitutional once again.

It is also relevant to note that the Fifth Amendment ratified and validated the martial law proclamations issued between 15 August 1975 and 9 April 1979. Section 26 of the Second Proclamation (Fifteenth Amendment) Order, 1978 (Proclamation Order No. IV of 1978) effected the changes to Article 116. The Hon'ble Appellate Division, in the Fifth Amendment Case, declared the entire Fifth Amendment unconstitutional, subject to certain savings. Significantly, those savings do not include section 26 of the Second Proclamation (Fifteenth Amendment) Order, 1978. Therefore, following the Fifth Amendment Case, the

constitutionality of Article 116, as amended by the Fourth and Fifteenth Amendments, alone falls for consideration.

Accordingly, the only amendments requiring adjudication in respect of Article 116 are the Fifteenth and Fourth Amendments to the Constitution.

Substitution is not repeal — The Fourth Amendment remains open to challenge:

One of the principal arguments advanced by the learned Intervener (Respondent No. 6) and the learned Attorney General is that since the Fourth Amendment was "repealed", it is no longer open to challenge. Reliance has been placed on *Kudrat-e-Elahi Panir v. Bangladesh (44 DLR (AD) 319)* and *State of U.P. v. Hirendra Singh Pal* (2011) 5 SCC 205, where it was held that once an Act is repealed, it must be treated as if it had never existed.

However, we are unable to accept this contention.

A careful scrutiny of the Constitution (Fourth Amendment) Act, 1975 reveals that it was not a repeal in respect of Article 116, but a substitution. Article 142 of the Constitution recognises four distinct modes of amendment—addition, alteration, substitution and repeal. The Fourth Amendment did not repeal Article 116; rather, it substituted the word "Supreme Court" with the word "President." That substituted text has continued in force and remains embedded in Article 116, including through the Fifteenth Amendment.

Therefore, what is under challenge before this Court is not a dead or repealed provision, but a continuing textual alteration introduced in 1975 and still operative today.

Substitution cannot be equated with repeal. A repealed law ceases to exist; a substituted provision continues in force in altered form. Accordingly, the vires of the substitution made by the Fourth Amendment remains fully open to judicial review.

Constitutional Amendments are distinct from ordinary Statutes:

The reliance on *Kudrat-e-Elahi Panir* and *Hirendra Singh Pal* is misplaced.

Both cases concerned ordinary legislation, President's Orders in the former and a State enactment in the latter, which had been expressly repealed. The settled principle in such cases is that once an ordinary statute is repealed, it ceases to exist and ordinarily cannot be challenged.

A constitutional amendment, however, stands on an entirely different footing. When a constitutional amendment is struck down, the Court does not apply the logic of repeal. Rather, it safeguards the supremacy and continuity of the Constitution.

This distinction was firmly established in *Kesavananda Bharati v. State of Kerala* (AIR 1973 SC 1461), where the Supreme Court of India held that constitutional amendments are subject to the basic structure doctrine, unlike ordinary statutes.

Our Appellate Division, in the Eighth Amendment case (*Anwar Hossain Chowdhury v. Bangladesh*, *41 DLR (AD) 165)*, invalidated the amendment and restored the earlier version of Article 100. Such restoration would have been impossible if constitutional amendments were treated as repealed statutes incapable of revival.

Accordingly, the principle laid down in *Kudrat-e-Elahi Panir* and *Hirendra Singh Pal* applies only to repealed ordinary legislation and has no application to constitutional amendments.

Doctrine of Eclipse and Revival:

Under the constitutional jurisprudence of India and Bangladesh, it is a settled principle that if a constitutional amendment is declared unconstitutional, the earlier valid provision automatically restored. This Doctrine of Revival has been consistently applied in our jurisdiction.

In the Eighth Amendment case (41 DLR (AD) 165) and again in the Sixteenth Amendment case (71 DLR (AD) 52), the Appellate Division declared the impugned amendments unconstitutional and restored the previous constitutional framework.

Thus, if the amendment of Fifteenth Amendment text of Article 116 is struck down, it becomes necessary to examine the validity of the amendment of Fourth Amendment substitution. If that too is found unconstitutional, the original Article 116 of the 1972 Constitution—vesting control of the subordinate judiciary in the Supreme Court—stands automatically revived.

Significantly, the learned Intervener (Respondent No. 6) himself concedes, relying on *Asaduzzaman Siddique (77 DLR (AD) 134) and 27 DLR (HC) 1 (para 23)*, that when a constitutional amendment is struck down, the earlier provision revives automatically without the Court engaging in legislation. This is infact, precisely the petitioners' case.

The contention that the Rule is "hypothetical" or "academic" cannot be sustained, particularly in view of the order of the Appellate Division dated

29.06.2025 preserving the Rule for final disposal. The issue is live and substantial. We are of the view that the so-called "absurdity" suggested by the Intervener is merely the natural constitutional consequence consistently applied in the Eighth and Sixteenth Amendment cases.

Judicial Precedents affirm the continuing effect of the Fourth Amendment:

Our Apex Court has repeatedly treated the amendment of the Fourth Amendment substitution in Article 116 as a continuing constitutional alteration, not as a repealed or extinct law.

In *Khondker Delwar Hossain v. Italian Marble Works Ltd. (62 DLR (AD) 298)*, the Appellate Division observed that unless Articles 115 and 116 are restored to their original position, full independence of the judiciary would not be achieved. This observation clearly recognises the continuing operation of the Fourth Amendment substitution.

In the Ten Judges Case (17 BLT (AD) 231), the Court reiterated that without restoring Articles 115 and 116 to their 1972 form, separation of the judiciary would remain incomplete.

Similarly, in the Sixteenth Amendment case (71 DLR (AD) 52), the Court expressly acknowledged the constitutional tension created by substituting "President" in place of "Supreme Court" in Article 116.

These judicial pronouncements unmistakably demonstrate that the Fourth Amendment has been consistently treated as alive and operative—not as a repealed enactment.

Automatic restoration of the earlier Constitutional provision:

The principle of automatic revival has been clearly articulated.

In the Eighth Amendment case, the Appellate Division held in **paragraph 380**:

> *"In view of this decision, the impugned Amendment will go off the Constitution, and the old Article 100 will stand revived along with its provision for holding of Sessions..."*
>
> ....
>
> *In the result, I allow the appeals and dispose of the leave Petition. I hold the Impugned Amendment void and declare it ultra vires of the Constitution; this invalidation will not, however, affect the previous operation of the Article. The old Article 100 consequently stands revived along with the provision of holding Sessions outside the capital."*

This principle was reiterated in the Sixteenth Amendment case, where the Appellate Division rejected the submission of the learned Attorney General that, upon invalidation of the amendment concerning the removal of judges, the earlier mechanism would not revive automatically. The Court affirmed that revival flows as a constitutional consequence of invalidation.

We therefore hold:

The Fourth Amendment substitution in Article 116 was not a repeal but a continuing amendment by substitution; the doctrine applicable to repealed ordinary statutes does not apply to constitutional amendments; Constitutional amendments, being subject to judicial review under the basic structure doctrine, remain open to challenge so long as their effects continue; Upon invalidation of an unconstitutional amendment, the prior constitutional text automatically revives.

Accordingly, the argument that the Fourth Amendment is a repealed law immune from challenge is devoid of merit and stands rejected.

The constitutional issue before this Court is the validity of amendment of the Article 116 of both the Fifteenth and the Fourth Amendments. The Court is therefore competent to declare, first, the Fifteenth Amendment unconstitutional; upon such declaration, the Fourth Amendment automatically revives, and the Court is further competent to declare the Fourth Amendment unconstitutional on both procedural as well as substantive grounds, as discussed earlier. Once both the Fifteenth and Fourth Amendments are declared unconstitutional, the original Article 116 of the Constitution of 1972 automatically stands revived without any requirement of parliamentary enactment.

Accordingly, the submissions of the learned Attorney General and the learned Intervener (Respondent No. 6) that this Court cannot examine or invalidate a repealed law do not represent the correct legal position and are therefore rejected.

Observations of the Appellate Division on Article 116:

In the *Fifth Amendment Case*, the Hon'ble Appellate Division offered specific observations regarding Article 116:

> *"It is our earnest hope that Articles 115 and 116 of the Constitution will be restored to their original position by the Parliament as soon as possible."*

In the *Fifth Amendment Case*, the constitutionality of the Fourth Amendment, insofar as it related to Article 116, was not an issue before the Court. It is an established legal rule that a court cannot adjudicate upon an issue that is not before it. Consequently, the Hon'ble Appellate Division did not, and could not, decide upon the constitutionality of Article 116 as amended by the Fourth

Amendment. Instead, it expressed a constitutional hope that Articles 115 and 116 would be restored to their original position by Parliament.

This position was expressly clarified by the Hon'ble Appellate Division in the Sixteenth Amendment Case, wherein it was observed:

> *"548. The scope of this appeal is limited to the certificate granted by the High Court Division under Article 103(2)(a) of the Constitution. Constitutionality of Article 116 of the Constitution and the validity of laws made during the martial law period and ratification thereof by Acts VI and VII of 2013 are not at all issues of the present appeal. Therefore, there is no scope to make any decision on those issues or other issues not covered by the certificate granted by the High Court Division."*
>
> ...
>
> *586 It may be noted here that in the Fifth Amendment case, this Division also said as follows:*
>
> *'It is our earnest hope that Articles 115 and 116 of the Constitution will be restored to their original position by the Parliament as soon as possible."*
>
> *However, in the case before us, only Article 96 is a live issue, and Articles 115 and 116 are not in issue; hence, I do not consider it relevant to discuss the same here."*

The Hon'ble Appellate Division clearly stated that the constitutionality of Article 116 was not an issue before them, and hence, there was no scope to make any decision on the constitutionality of Article 116.

However, in the present writ petition, the constitutionality of Article 116 as amended by the Fifteenth and Fourth Amendments is directly in issue. Accordingly, it is our considered view that Article 116, as amended by the Fifteenth and Fourth Amendments, is ultra vires the Constitution both for procedural and substantive grounds.

The argument advanced by the learned Attorney General and the learned Intervener that, since the Hon'ble Appellate Division refrained from deciding the constitutionality of Article 116, this Court should likewise abstain from doing so, is devoid of merit and is therefore rejected.

Coexistence of Articles 115 and 116:

Another submission advanced by the learned Attorney General and the learned Intervener is that if Article 116 is restored to its original position, it cannot coexist with Article 115 in its present form. On that basis, it is argued that, since the constitutionality of the amendments to Article 115 has not been challenged, the Rule and the prayers are defective.

However, we are unable to accept this submission

In our considered view, Article 115, as it presently exists, can coexist with the original Article 116. Under the original version of Article 115, the President was the appointing authority for judicial officers, and under the present version of Article 115, the President continues to remain the appointing authority. The appointing authority must necessarily remain the President; even Judges of the Supreme Court, including the Hon'ble Chief Justice, are appointed by the President.

The presence or absence of additional conditions that existed in the earlier version of Article 115 does not impede the harmonious operation of the present Article 115 with the Article 116. Any such conditions may validly be incorporated through legislation enacted by Parliament, rules framed by the President under original Article 115, or rules framed by the Supreme Court pursuant to Article 116.

Accordingly, we hold that it was neither necessary nor required to challenge the constitutionality of Article 115, and the contention that the Rule and the prayers are defective has no basis. The existing Article 115 and the original Article 116 are capable of coexisting within the constitutional framework.

Another argument advanced by the learned Attorney General and the learned Intervener is that the existing Article 116, with the consultation requirement of the Supreme Court, represents the “best form” of the provision and ensures an appropriate system of checks and balances. We are unable to agree with this submission as well.

The expression **"checks and balances"** is a technical term, and it has technical use. This expression "checks and balances" actually refers to the separation of powers between the three branches of the government, i.e. executive, judiciary and the legislature. This expression does not mean that there must be a particular type of consultation, as suggested by the learned Attorney General. The expression is a much broader concept. Thus, the theoretical arguments that are advanced by the learned Attorney General and by Mr. Ahsanul Karim as intervener cannot address the particular issues in dispute.

Black's Law Dictionary defines the expression "separation of powers" as follows:

"Separation of powers. (1896)

The division of governmental authority into three branches of government, legislative, executive, and judicial, each with specified duties on which neither of the other branches can encroach; a constitutional doctrine of checks and balances designed to protect the people against tyranny."

Black's Law Dictionary defines the expression "checks and balances" as follows:

"Checks and balances. (18c)

The theory of governmental power and functions whereby each branch of government has the ability to counter the actions of any other branch, so that no single branch can control the entire government. For example, the executive branch can check the legislature by exercising its veto power, but the legislature can, by a sufficient majority, override any veto."

The doctrine of "separation of powers" is known as the constitutional doctrine of "checks and balances, which is designed to protect the people and the constitution.

The doctrine of separation of powers and the doctrine of checks and balances are often used interchangeably. In essence, the doctrine of checks and balances is another way of expressing the doctrine of separation of powers. Black's Law Dictionary defines the doctrine of separation of powers as the division of governmental power accompanied by a system of checks and balances. Therefore, the expression "checks and balances" cannot be understood literally in isolation; rather, it must be construed in light of its accepted constitutional meaning, namely, the division of powers among the organs of the State with appropriate checks.

Accordingly, it is our considered view that checks and balances necessarily presuppose a clear separation of powers. If the expression "checks and balances" is to be given effect, there must exist a distinct and meaningful separation of powers among the Executive, the Judiciary, and the Legislature. Restoration of Article 116 to its original form would ensure such checks and balances and preserve the separation of powers between the Executive and the Judiciary. Conversely, if Article 116 remains in its present form, it cannot ensure checks and balances or the separation of powers in their true constitutional sense, as explained above.

Further, under the constitutional scheme of our country, the President is the constitutional Head of the State. Article 48 of the Constitution provides as follows:

"48. (2) The President shall, as Head of State, take precedence over all other persons in the State, and shall exercise the powers and perform the duties conferred and imposed on him by this Constitution and by any other law.

(3) In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of Article 56 and the Chief Justice pursuant to clause (1) of Article 95, the President shall act in accordance with the advice of the Prime Minister:

> *Provided that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be inquired into in any court.*"

Thus, under Article 48(3) of the Constitution, except in the cases of appointment of the Prime Minister and the Chief Justice, the President is constitutionally bound to act in accordance with the advice of the Prime Minister in the exercise of all his functions. Moreover, the Constitution expressly bars judicial inquiry into whether any advice was tendered, or the nature of such advice.

In the democratic form of government prevailing in our country, the President is formally vested with the executive power of the State; however, in practice and in law, such power is exercised by the Council of Ministers, as the President is required to act on ministerial advice led by the Prime Minister. In this regard, Article 55(1) and (2) of the Constitution is relevant and is reproduced below:

"55. (1) There shall be a Cabinet for Bangladesh having the Prime Minister at its head and comprising also such other Ministers as the Prime Minister may from time to time designate.

(2) The executive power of the Republic shall, in accordance with this Constitution, be exercised by or on the authority of the Prime Minister."

It is, therefore, manifest that the consultative role of the Supreme Court becomes illusory and meaningless if Article 116 is not restored to its original form.

There are numerous instances where the Hon'ble Appellate Division has expressed concern that Article 116, in its amended form, poses a serious impediment to judicial independence. In the Fifth Amendment Case (decided in 2010), the Hon'ble Appellate Division observed as follows:

"238. In this regard, Matin, J., in *Judges Case*, 17 BLT (AD) 231, observed as follows:

'It is true that "consultation" was considered in the light of Article 116 of the Constitution; nevertheless, the same principle applies all the more in the matter of appointment of Judges of the Supreme Court under Articles 95 and 98 of the Constitution, because without the independence of the Supreme Court there cannot be any independence of the subordinate courts, and without consultation and primacy, the separation of judiciary from the Executive will be empty words…'"

It was further observed:

"239. We agree, with approval, with Justice Bhagwati and add further that although Article 22 has been implemented to a great extent through the judgment of this Court in Masdar Hossain's case, until and unless the

unamended Articles 115 and 116 of the Constitution are restored, vesting the control of the subordinate judiciary in the Supreme Court, the separation of judiciary will remain a distant cry and a music of a distant drum. It may be noted here that among the twelve directions given in Masdar Hossain's case, one was to the effect that Parliament would, in its wisdom, take necessary steps regarding this aspect of judicial independence."

"240. It is our earnest hope that Articles 115 and 116 of the Constitution will be restored to their original position by Parliament as soon as possible."

Despite such categorical observations in various judgments, the Hon'ble Appellate Division could not declare the amendments to Article 116 unconstitutional, as the constitutionality of Article 116 itself was not directly in issue in those cases. This limitation was expressly acknowledged by the Appellate Division, *inter alia*, in the Sixteenth Amendment Case.

In the case of *Dr. Badiul Alam Majumdar and others vs. Government of Bangladesh and others* (Known as Fifteenth Amendment Case) the High Court Division in its judgment dated 17.12.2024 refrained from making any observation in respect of Article 116 of the Constitution as the legality of Article 116 has already been challenged in Writ Petition No. 10356 of 2024.

Now, in light of the principles laid down in the above decisions, if we declare the amendments i.e. substitution of the word "Supreme Court" with the word "President" in Article 116 by Section 39 of the Constitution (Fifteenth Amendment) Act, 2011 and the Article 116 by Section 19 (section 20 of the English Version) of the Constitution (Fourth Amendment) Act, 1975 unconstitutional, the original Article 116 will automatically revive. Consequently,

the control (including posting, promotion, and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the Supreme Court, as originally envisaged by the Constitution of the People's Republic of Bangladesh.

Non-Constitutionality of the Bangladesh Judicial Service (Disciplinary) Rules, 2017:

Before considering the issue relating to the Bangladesh Judicial Service (Disciplinary) Rules, 2017, it is necessary to examine the relevant order of the Hon'ble Appellate Division.

By order dated 29 June 2025, passed in Civil Review Petition No. 147 of 2025, arising out of Civil Appeal No. 79 of 1999, the Hon'ble Appellate Division held as follows:

> *"The order dated 03.01.2018 of this Division in Civil Appeal No. 79 of 1999, to the extent of this Division's acceptance of the Bangladesh Judicial Service (Disciplinary) Rules, 2017, is hereby stayed until further order(s) to the contrary.*
>
> *By way of abundant caution, it is further observed that the aforesaid order of stay shall not in any manner impair, or be construed to impair, the continued operation of the Disciplinary Rules, 2017 in the meantime.*
>
> *Furthermore, nothing in this order shall operate to the prejudice of the continued prosecution of the Rule Nisi in Writ Petition No. 10356 of 2024 and its due substantive and final disposal by the specially constituted Bench of the High Court Division presently in seisin of the matter."*

Since the Hon'ble Appellate Division has expressly granted liberty to determine the constitutionality of the Disciplinary Rules, 2017, we proceed to exercise that liberty.

The arguments advanced by the learned Attorney General that without challenging Articles 115 and 133 of the Constitution, the vires of the Disciplinary Rules 2017 cannot be challenged. In this regard, our view is that Articles 115 and 133 of the Constitution are the parent provisions conferring rule-making authority. By their nature, these provisions do not, per se, infringe upon judicial independence or the separation of powers. Accordingly, no challenge to these provisions is necessary in the present writ petition, as rightly argued by the learned Advocate for the petitioners.

Now, the President of the People's Republic of Bangladesh formulated 'Bangladesh Judicial Service (Disciplinary) Rules, 2017' and made the Executive the final authority to decide on the matters over supervision, discipline, control, transfer and promotion of the judicial officers. Here, উপযুক্ত কর্তৃপক্ষ অর্থ রাষ্ট্রপতি বা তৎকর্তৃক সংবিধানের ৫৫(৬) অনুচ্ছেদ অনুসারে প্রনীত Rules of Business এর আওতায় সার্ভিস প্রশাসনের দায়িত্বপ্রাপ্ত মন্ত্রণালয় বা বিভাগ i.e. [Ministry of Law Justice & Parliamentary Affairs].

Some provisions of this Rules, which are violative of basic structures i.e. independence of judiciary and separations of powers are as follows:

(জ) "উপযুক্ত কর্তৃপক্ষ" অর্থ রাষ্ট্রপতি বা তৎকর্তৃক সংবিধানের ৫৫(৬) অনুচ্ছেদ অনুসারে প্রণীত Rules of Business এর আওতায় সার্ভিস প্রশাসনের দায়িত্বপ্রাপ্ত মন্ত্রণালয় বা বিভাগ:

(ধ) "সার্ভিস ত্যাগ" অর্থ সার্ভিসের কোন সদস্যের নিম্নরুপ যে কোন কাজ, যথাঃ (১) উপযুক্ত কর্তৃপক্ষের বিনা অনুমতিতে ৬০ (ষাট) দিন বা তদুর্ধ্ব সময়ব্যাপী কর্ম হতে অনুপস্থিত থাকা, অথবা (২) কর্ম হইতে অনুমোদিত অনুপিস্থিতির ধারাবাহিকতায় উপযুক্ত কর্তৃপক্ষের পুনঃঅনুমতি ব্যাতিরেকে ৬০ (ষাট) দিন বা ততোধিক সময় অনুপস্থিত থাকা, অথবা (৩) উপযুক্ত কর্তৃপক্ষের বিনা অনুমতিতে দেশ ত্যাগ এবং তৎপর ৩০ (ত্রিশ) দিন বা ততোধিক সময় বিদেশে অবস্থান

করা, অথবা (৪) উপযুক্ত কর্তৃপক্ষের অনুমতিসহ দেশত্যাগ করিবার পর অনুমোদিত সময়ের অতিরিক্ত ৬০ (ষাট) দিন বা ততোধিক সময় উপযুক্ত কর্তৃপক্ষের পুনঃঅনুমতি ব্যাতিরেকে বিদেশে অবস্থান করাঃ

৩। অনুসন্ধান ও বিভাগীয় মামলার কারণসমূহ।-

(৩) উপ-বিধি (১) এ উল্লিখিত কোনো কারণে অভিযোগ উত্থাপিত হইলে বা গ্রহণযোগ্য সুনির্দিষ্ট তথ্য পাওয়া গেলে এবং উক্তরূপ অভিযোগ উপযুক্ত কর্তৃপক্ষের নিকট আপাতঃদৃষ্টে যৌক্তিক বলিয়া মনে হইলে বিষয়টির উপর পরামর্শ গ্রহণের জন্য সুপ্রীমকোর্টের নিকট প্রেরণ করিবে।

(৪) উপ-বিধি (২) অনুসারে প্রাপ্ত অভিযুক্ত কর্মকর্তার লিখিত বক্তব্য (যদি থাকে) বিবেচনার পর, উপযুক্ত কর্তৃপক্ষ যদি মনে করে যে বিষয়টি সম্পূর্ণ আনুষ্ঠানিকভাবে অনুসন্ধান প্রয়োজন, তাহা হইলে সুপ্রীমকোর্টের পরামর্শক্রমে অনুসন্ধান কর্মকর্তা নিয়োগ করিবে কিংবা একাধিক কর্মকর্তা সমন্বয়ে অনুসন্ধান কমিটি গঠন করিবে; তবে শর্ত থাকে যে, সার্ভিসের কোনো সদস্য প্রেষণে কর্মরত থাকাকালে অনুসন্ধানের প্রয়োজন দেখা দিলে উপযুক্ত কর্তৃপক্ষ প্রাথমিক অনুসন্ধানের মাধ্যমে বিষয়টি নিরুপনের চেষ্টা করিবেন।

অভিযোগের প্রাথমিক সত্যতা পাওয়া গেলে, বিষয়টিতে পূর্ণাঙ্গ তদন্তের জন্য উপযুক্ত কর্তৃপক্ষ সুপ্রীমকোর্টের পরামর্শ গ্রহণক্রমে তদন্তের জন্য প্রয়োজনীয় ব্যবস্থা গ্রহণ করিবেন।

৪। অনুসন্ধান ইত্যাদি শুরুর বিষয়ে সুপ্রীমকোর্টের উদ্যোগ। (১) এই অধ্যায়ের অন্যান্য বিধানে যাহা কিছুই থাকুক না কেন, সংশ্লিষ্ট আইন অনুসারে হাইকোর্ট বিভাগের কোনো বিচারক বা অভিযুক্ত কর্মকর্তার উর্দ্ধতন পর্যায়ের কোনো বিচারক কর্তৃক কোনো আদালত বা আদালতের অফিস পরিদর্শনের রিপোর্ট বা সুপ্রীমকোর্টের নিকট গ্রহণযোগ্য অন্যবিধ তথ্যের ভিত্তিতে সুপ্রীমকোর্ট স্বতঃপ্রনোদিত হইয়া কোনো সদস্যের বিরুদ্ধে প্রাথমিক সত্যতা নিরুপনের লক্ষ্যে-

(ক) সুপ্রীমকোর্ট উপযুক্ত কর্তৃপক্ষ কে বিষয়টি অবহিত করিয়া এই বিষয়ে প্রয়োজনীয় ব্যবস্থা গ্রহণের জন্য পরামর্শ প্রদান করিবেন;

(খ) উপযুক্ত কর্তৃপক্ষ বর্ণিত বিষয়ে অভিযুক্ত কর্মকর্তাকে আনীত অভিযোগ বা তথ্য বিষয়ে অনধিক ১৫ (পনের) দিনের মধ্যে তাহার লিখিত বক্তব্য প্রদান করিতে নির্দেশ দিবে:

(গ) অভিযুক্ত কর্মকর্তার লিখিত বক্তব্য (যদি প্রদান করে) বিবেচনা করিয়া উপযুক্ত কর্তৃপক্ষ যদি মনে করে যে, বিষয়টি সম্পর্কে আনুষ্ঠানিক অনুসন্ধানের প্রয়োজন রহিয়াছে, তাহা হইলে তিনি অভিযুক্ত কর্মকর্তার লিখিত বক্তব্যসহ বিষয়টিতে সুপ্রীমকোর্টের পরামর্শ গ্রহণের জন্য প্রেরণ করিবে;

(ঘ) সুপ্রীমকোর্টের পরামর্শ প্রাপ্তির পর উপযুক্ত কর্তৃপক্ষ বিধি ৩ বা ক্ষেত্রমত বিধি ৬ ও অন্যান্য বিধান অনুসারে প্রয়োজনীয় ব্যবস্থা গ্রহণ করিবে।

It appears that the final authority to decide the matters stated above, namely those arising under Article 55(6) of the Constitution and the Rules of Business framed thereunder, vests in the service-controlling Ministry, that is, the Ministry of Law, Justice and Parliamentary Affairs (Law and Justice Division).

These Rules are plainly contradictory to the directions issued in *Secretary, Ministry of Finance vs. Masdar Hossain*, reported in *52 DLR (AD) 82*, as well as to the mandate of Article 116 of the Constitution. The scheme of the Bangladesh Judicial Service (Disciplinary) Rules, 2017 has been framed in such a manner that the Law and Justice Division of the Ministry of Law, Justice and Parliamentary Affairs has been vested with authority over supervision, discipline, control, transfer, and promotion of judicial officers. Consequently, the Rules are destructive of judicial independence and strike at the basic structure of the Constitution. They are, therefore, liable to be struck down in their entirety, or, in the alternative, amended to conform to the original Article 116 of the Constitution.

Since we have already decided to declare Article 116, as amended by the Fourth and Fifteenth Amendments unconstitutional, and consequently, Article 116 stands restored to its original form and therefore, the Disciplinary Rules, 2017 cannot survive. These Rules were framed on the basis of the amended Article 116, which vested control and disciplinary authority in the President and designated the President as the competent authority. Upon restoration of Article 116 to its original position, such control and disciplinary authority vest exclusively in the Supreme Court.

Accordingly, the provisions of the Disciplinary Rules, 2017 become inoperative and unenforceable. There remains no alternative but to declare the Bangladesh Judicial Service (Disciplinary) Rules, 2017 unconstitutional.

During the course of hearing, the question arose whether the doctrine of severability could be applied to the Disciplinary Rules, 2017, or whether the Rules must be struck down in their entirety. The submission on behalf of the petitioners was that selective severance is not possible, as the executive's authority is embedded throughout the Rules, and the impugned provisions cannot be disentangled from the rest of the scheme.

In the Book titled 'Constitutional Law of Bangladesh' by Mahmudul Islam, Third Edition, it is written regarding the application of the doctrine of severability as follows:

> *"When a part of a law is found invalid, and the invalid part is separable from the valid part, that is, the nature or object or the structure of the law would not be changed by the omission of the invalid part, only the invalid part of the law is to be declared void, leaving the rest to be operative. The intention of Parliament is the determining factor in ascertaining whether the invalid part is separable from the valid part, and the question is whether Parliament would have enacted the valid part without the invalid part. When a valid part of the law is inextricably bound up with the part found invalid so that the valid part cannot independently survive, or upon a whole review of the matter, it is seen that Parliament would not have enacted at all that which survives without enacting the part found ultra vires, the whole legislation is to be struck down. Even when the valid parts are 3 distinct and separate, but the valid and invalid parts form part of a single scheme intended to operate as a whole or even though the invalid part is separate and not part of a single scheme if what is left after omitting the invalid part is so thin or truncated as to be in substance different*

> *from what emerged after enactment by Parliament or if after omitting the invalid part, the valid part cannot be enforced without making alterations or modifications, the entire law must be declared void."*

Further, in the Book Titled 'Interpretation of Statutes' by NS Bindra, 12th Edition, Page 542), it is written as follows:

> *"Where a bad portion of an enactment can be separated from the good portion, the good portion can still be enforced. But where the bad portion cannot be so separated and it is inextricably mixed up, then the whole enactment becomes bad. Where a statute is in part void, it would be enforced as regards the rest, if this is severable from what is invalid."*

In the 8th Amendment case, the Court declared the Eighth Amendment Act unconstitutional and held as follows:

> *"No argument was advanced directly, though, but an attempt was made to see whether, by running a blue pencil, the Court would sever the bad part from the good part of the enactment. The answer is in the negative, because what is the purpose of this amendment? Namely, to set up permanent Benches with full jurisdiction, powers and functions of the High Court Division. The other provisions in the amended Article are so interwoven with the scheme that they cannot be separated. Therefore, the full Article is liable to be declared ultra vires."[(1989) BLD (SPL)1,* ***para 259(9)]***

Applying the above principles, it is evident that the object of the impugned Disciplinary Rules is to vest the Executive with control over judicial officers of the subordinate courts. The Rules, taken as a whole, negate the doctrine of separation of powers and gravely impair judicial independence, which forms part of the basic structure of the Constitution. Consequently, the Bangladesh Judicial

Service (Disciplinary) Rules, 2017, in their entirety, are *ultra vires* the Constitution and void.

Establishment of a Separate Secretariat:

It is contended that supervision, discipline, control, transfer, and promotion of judicial officers must lie with the High Court Division, thereby necessitating the establishment of a separate judicial secretariat. On 06.09.2012, the Supreme Court of Bangladesh resolved to create such a Secretariat and, by letter dated 19.09.2012, requested the Prime Minister's Office to fix a date for its inauguration, however, no response was received.

Subsequently, on 23.11.2012, the then Hon'ble Chief Justice of Bangladesh, Mr. Justice Muzammel Hossain, inaugurated the Secretariat by unveiling a name plaque at Sarak Bhaban, selecting two buildings for this purpose. However, for reasons unknown, the name plaque was removed in 2018, and the initiative has since remained dormant. This matter was reported in a national daily on 01.11.2019. However, till date no steps have been taken by the respondents to establish an Independent Secretariat for the Supreme Court of Bangladesh in light of the decision of *Masdar Hossain* Case.

Now, if Articles 22, 107, 109, and 116 of the Constitution are read together, they unequivocally mandate the separation of the Judiciary from the Executive and vest superintendence, control, and discipline of the subordinate judiciary in the Supreme Court. In *Masdar Hossain* case, one of the categorical direction was issued:

> *"It is declared that the judicial service is a service of the Republic within the meaning of Article 152(1) of the Constitution, but it is*

> *functionally and structurally distinct and separate from the civil executive and administrative services of the Republic…"*

It is, therefore, manifest that the Judiciary is constitutionally, functionally, and structurally an independent organ of the State. To function independently and to give meaningful effect to the separation of powers, it cannot operate under the umbrella of the Executive nor be amalgamated with it. Accordingly, the establishment of a separate Secretariat for the Judiciary is not a matter of executive discretion but a constitutional imperative. The sooner such a Secretariat is established, the greater will be the improvement in the administration of justice.

It is, therefore, imperative that an independent and separate Secretariat for the Judiciary be established to ensure the true separation of the Judiciary from the Executive.

At this juncture, it is apposite to examine relevant international legal instruments concerning the independence of the judiciary.

UN Basic Principles on the Independence of the Judiciary, as adopted by the General Assembly in 1985:

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary, should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the judiciary:

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, based on facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason,

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Commonwealth (Latimer House) Principles on the Three Branches of Government:

Adopted by Commonwealth Heads of Government in 2003, these Commonwealth (Latimer House) Principles are a set of guidelines that define the relationship between the three branches of government-the Executive, Legislature, and Judiciary to ensure good governance, the rule of law, and human rights.

Core Tenets of the Latimer House Principles are as follows:

Separation of Powers: Each branch must exercise responsibility and restraint, staying within its constitutional sphere without encroaching on the others.

Judicial Independence: The judiciary must be free from interference, with secure tenure and adequate resources to interpret and apply the law impartially.

Parliamentary Sovereignty: The legislature has the primary responsibility for law-making and should be free from unlawful interference while carrying out its functions.

Accountability and Transparency:

The Executive is accountable to Parliament through mechanisms like committee structures and independent audits.

The Judiciary is accountable to the Constitution, with disciplinary proceedings that must be fair and objective.

Ethical Governance: All public office holders should adopt codes of conduct to address conflicts of interest and enhance public confidence.

Rule of Law and Human Rights: The principles aim to entrench fundamental values, ensuring that government actions are open to judicial scrutiny.

Here, it is also pertinent to refer the **UK's Constitutional Reform Act 2005**, which is a significant piece of legislation in the United Kingdom that aimed to enhance the separation of powers between the judiciary and the legislature. It was introduced against a backdrop of concerns regarding the historical overlap of legislative, judicial, and executive powers, particularly within the House of Lords.

(1) Establishment of the Supreme Court. The Act created the Supreme Court of the United Kingdom, which took over the appellate jurisdiction previously held by the House of Lords. This change aimed to provide a clearer separation of powers and reduce the potential for political influence in judicial matters.

(2) Reform of the Office of the Lord Chancellor:

The Act substantially redefined the role of the Lord Chancellor, who had historically combined judicial, executive, and legislative functions. The reforms ensured that the Lord Chancellor would no longer act as a judge, thereby reinforcing judicial independence. The Act also introduced statutory qualifications for the office, requiring relevant legal experience.

(3) Judicial Appointments Commission:

The Act established the Judicial Appointments Commission as an independent body responsible for selecting candidates for judicial appointments in England and Wales. This reform ensured that appointments would be based on merit, free from political considerations.

(4) Judicial Independence:

For the first time, the principle of judicial independence was expressly enshrined in law, guaranteeing that judges may discharge their functions without interference from the executive or other political authorities.

Implications:

The Constitutional Reform Act, 2005 brought about a significant transformation of the United Kingdom's constitutional framework. By establishing a separate Supreme Court and reforming the office of the Lord Chancellor, the Act enhanced judicial impartiality and strengthened the rule of law. It also addressed concerns regarding compatibility with the European Convention on Human Rights, particularly the right to a fair trial.

In sum, the Act stands as a landmark reform that reshaped the UK's judicial landscape by promoting a clearer separation of powers and reinforcing judicial independence.

Now, it is relevant to mention here the reports of the Constitution Reform Commission and Judicial Reform Commission:

The Constitution Reform Commission, in its Report dated February 2025, recommended that control, including posting, promotion, grant of leave, and discipline—of persons employed in the judicial service and magistrates exercising judicial functions be vested in the Supreme Court. The Commission also provided detailed justifications in support of its recommendations, which are reproduced below:

সুপারিশ

৫১। কমিশন সুপারিশ করছে যে, স্থানীয় আদালতের বিচার বিভাগীয় কর্মকর্তাদের নিয়োগ, পদায়ন, পদোন্নতি, ছুটি এবং শৃঙ্খলা সুপ্রিম কোর্টের কাছে ন্যস্ত থাকবে। এই উদ্দেশ্যে কমিশন সুপ্রিম কোর্টের তত্ত্বাবধানে একটি বিচারিক সচিবালয় প্রতিষ্ঠার সুপারিশ করছে।

৫২। সংযুক্ত তহবিলের অর্থায়নে বিচারিক সচিবালয় স্থানীয় আদালতের প্রশাসনিক কার্যক্রম, বাজেট প্রণয়ন এবং মানবসম্পদ ব্যবস্থাপনার ওপর পূর্ণ নিয়ন্ত্রণ বজায় রাখবে। এর মাধ্যমে বিচার বিভাগ আর্থিক ও প্রশাসনিক ক্ষেত্রে সরকারের নির্বাহী বিভাগ থেকে সম্পূর্ণ স্বাধীনতা লাভ করবে।

সুপারিশের যৌক্তিকতা

৫৩। বিচার বিভাগের পূর্ণ স্বাধীনতার বিষয়টি রাজনৈতিক বক্তব্যে 'ভদ্র স্বীকৃতি' পেলেও, নির্বাহী বিভাগের নিয়ন্ত্রণ থেকে এর প্রকৃত পৃথকীকরণ প্রধান রাজনৈতিক শক্তিসমূহের মূল এজেন্ডা হিসেবে বিবেচিত হয়নি। স্থানীয় আদালতসমূহ ন্যায়বিচার নিশ্চিত করার মৌলিক ভিত্তি, কারণ এগুলো সাধারণ নাগরিকদের জন্য বিচারব্যবস্থায় প্রবেশের প্রথম ধাপ। *All India Judges' Association v. Union of India* (1992) মামলায় সুপ্রিম কোর্ট মত দিয়েছেন যে, ন্যায়পরায়ণতা ও নিরপেক্ষতা নিশ্চিত করতে বিচার বিভাগের সকল স্তরের বিচারকদের স্বায়ত্তশাসন থাকা আবশ্যক। স্থানীয় আদালতের কার্যক্রমে পক্ষপাতিত্ব, অদক্ষতা বা বহিরাগত হস্তক্ষেপের ধারণা জনগণের আস্থা বিনষ্ট করে।

৫৪। পদায়ন, পদোন্নতি ও শৃঙ্খলার জন্য একটি কেন্দ্রীভূত ও স্বাধীন ব্যবস্থার অনুপস্থিতি স্বেচ্ছাচারিতা, পক্ষপাতিত্ব ও অকার্যকারিতার জন্ম দিতে পারে। যদিও স্থানীয় আদালতের বিচারকগণ সাংবিধানিক ম্যান্ডেট অনুসরণ করেন, তবু প্রশাসনিক নিয়ন্ত্রণের কারণে তারা প্রায়ই নির্বাহী প্রভাবের শিকার হন। সুপ্রিম কোর্টের তত্ত্বাবধানে বিচারিক সচিবালয়ের মাধ্যমে প্রশাসনিক নিয়ন্ত্রণ প্রতিষ্ঠিত হলে নির্বাহী হস্তক্ষেপের কোনো সুযোগ থাকবে না, যা সকল স্তরের বিচারিক স্বাধীনতাকে সুসংহত করবে (pages 271–272).

Effect of Article 116 and the Rules of Business:

The report of the Judicial Reform Commission reveals that serious difficulties arise in the application of the Rules of Business unless Article 116 is restored to its original form. If the Rules of Business are not adhered to, a separate Secretariat would remain merely a physical structure devoid of functional independence.

If the existing form of Article 116 continues, the power of control and discipline would remain vested in the President, which in effect means the Prime Minister, since under Article 48(3) of the Constitution the President is required to act in accordance with the advice of the Prime Minister. Furthermore, in the *Sixteenth Amendment Case*, the Hon'ble Appellate Division has already held that consultation with the Supreme Court in such matters is rendered meaningless.

Proposed Draft of Article 116:

The Judicial Reform Commission proposed the following draft amendment to Article 116:

"বিচার-কর্মবিভাগের সদস্যদের নিয়ন্ত্রণ ও শৃঙ্খলা

১১৬। (১) বিচারবিভাগীয় দায়িত্বপালনকারী ম্যাজিস্ট্রেটগণসহ বিচার-কর্মবিভাগের সদস্যদের নিয়ন্ত্রণ (কর্মস্থল-নির্ধারণ, পদোন্নতিদান ও ছুটি মঞ্জুরিসহ) ও শৃংখলাবিধান সুপ্রীম কোর্টের উপর ন্যস্ত থাকিবেঃ

তবে শর্ত থাকে যে, পদোন্নতিদান ও এই সংবিধানের ১৩৫ অনুচ্ছেদের (১) দফায় উল্লেখিত দণ্ড আরোপের ক্ষেত্রে সুপ্রীম কোর্ট রাষ্ট্রপতির অনুমোদন গ্রহণ করিবেন।

(২) দফা (১) এর উদ্দেশ্য পূরণকল্পে সুপ্রীম কোর্টের পরামর্শক্রমে রাষ্ট্রপতি প্রয়োজনীয় বিধিসমূহ প্রণয়ন করিবেন।

কারণ: বিচার কর্ম-বিভাগকে নির্বাহী বিভাগের নিয়ন্ত্রণ ও প্রভাবমুক্তকরণ এবং মাসদার হোসেন মামলার রায়ের আলোকে প্রণীত বিধিমালার সাথে সঙ্গতিপূর্ণ করার লক্ষ্যে ১১৬ অনুচ্ছেদ সংশোধন প্রস্তাব করা হয়েছে। তবে সংশোধিত ১১৬ অনুচ্ছেদ এর আলোকে ইতিপূর্বে দ্বৈতশাসন ব্যবস্থার প্রতিফলন সম্বলিত বিধিমালায় কিছু সংশোধন প্রয়োজন হবে। (page 104)"

Government Position and National Consensus:

The purpose of referring to the reports of the Constitution Reform Commission and the Judicial Reform Commission is to demonstrate that the Government itself acknowledges that Article 116, in its present form, does not

ensure judicial independence. Rather, effective independence requires vesting control and discipline in the Supreme Court.

The National Consensus Commission's Report dated 8 August 2025 further states:

> **"২৬)** বিচারকদের চাকরির নিয়ন্ত্রণ এবং অধস্তন আদালতের বিচারকদের চাকরির নিয়ন্ত্রণ সম্পূর্ণভাবে সুপ্রিম কোর্টের উপর ন্যস্ত করার জন্য সংবিধানের ১১৬ অনুচ্ছেদ ও সংশ্লিষ্ট বিধিমালা সংশোধন করা হবে। **[৩১টি দল একমত]"**

UN Human Rights Commission Recommendation:

United National Human Rights Office Fact-Finding Report (Human Rights Violations and Abuses related to the Protests of July and August, 2024 in Bangladesh stipulates, regarding frame work of the Supreme Court Secretariat which reproduces as follows:

> *"345. Ensure the independence and impartiality of the judiciary at the institutional and individual level, in law and in practice, by ensuring that a genuinely independent mechanism is responsible for the recruitment, suspension, removal and discipline of judges; protecting judges against intimidation and harassment; preventing inappropriate or unwarranted interference including politically motivated interference and corruption; and ensuring adequate remuneration and guaranteed tenure until retirement or expiration of judges' term of office. Undertake appropriate training, including in human rights, so that magistrates can diligently and independently carry out their oversight functions, in particular in relation to arrest and detention and use of force by the security forces."*

From the above discussion, it is evident that the constitutional journey of Article 116 starkly illustrates how constituted power may overstep its limits and dismantle a foundational pillar erected by the constituent power.

The original Article 116 formed an integral part of the constitutional design, vesting exclusive control— including posting, promotion, and discipline— of the subordinate judiciary in the Supreme Court. This was not a mere administrative arrangement but a structural guarantee of judicial independence and separation of powers. The constituent power of 1972 made a conscious and deliberate choice: the Judiciary must remain the master of its own domain, insulated from executive influence.

The fourth constitutional Amendment shattered this vision by stripping the Supreme Court of this power and vesting it in the President, an organ of the executive. It violated the core principle of judicial independence, which is indispensable to the synthesis of democracy and constitutionalism that forms Bangladesh's constitutional identity. From a constituent power perspective, this amendment was an act of a constituted body (Parliament) rewriting a fundamental directive of its creator (the people). It was, therefore, both procedurally invalid in its passage but substantively unconstitutional in its effect.

The present version of Article 116, which requires the President to act "in consultation with the Supreme Court," fails to cure this constitutional infirmity. This formulation, introduced through the Fourth and Fifteenth Amendments, establishes a system of ostensible dual authority, which, in practice, entrenches executive dominance. All proposals concerning judicial officers originate from the executive through the Ministry of Law, reducing the Supreme Court to a reactive role. The term "consultation" thus conceals a structural imbalance in which the Executive retains the decisive voice.

This arrangement subjects the Judiciary to subtle but persistent executive influence, undermining the institutional independence required for it to function as

an effective check against executive overreach. By weakening the Judiciary's autonomy, these amendments erode the constitutional mechanism designed to safeguard the substantive democracy promised under Article 11 of our Constitution.

The question before the nation is not one of administrative convenience, but of constitutional fidelity. To persist with the current framework of Article 116 is to acquiesce in a compromised judiciary and an unfulfilled constitutional promise. Restoration of Article 116 to its original form is, therefore, a structural necessity for the preservation of judicial independence and the rule of law.

Reinstating the original provision would constitute an act of profound constitutional restoration. It would honour the framers' vision and reaffirm the fundamental choice made by the people in 1972 to establish an independent Judiciary, free from executive control.

Further, the doctrine of checks and balances has no effective operation where, under Article 48(3) of the Constitution, the President is constitutionally obliged to act—save in the limited cases of appointing the Prime Minister and the Chief Justice—solely on the advice of the Prime Minister. Such advice is expressly insulated from judicial scrutiny. This constitutional arrangement nullifies the doctrine of checks and balances at the very inception of executive action, rendering the Judiciary structurally subordinate to the Executive in matters governed by Article 116.

In *Shrimantha Balasaheb Patil v. Karnataka Legislative Assembly [(2020) 2 SCC 595, para 145]*, Justice Ramana of the Supreme Court of India observed:

> *"Viewed from a different angle, although the Constitution may not say everything, this Court is mandated to expound the unsaid."*

The Executive's Inaction in the mandatory role to act in Aid of the Supreme Court violated:

It appears that pursuant to the provision of Article 112 of the Constitution, the Executive and Judicial authority shall act in aid of the Supreme Court. There has been a consistent stance taken by the Apex Court of the country for the restoration of Article 116 of the Constitution to its original form as stated in Para 9 of the Writ Petition. Without this restoration, the independence of the judiciary will remain merely theoretical, rather than substantive, as originally intended. In the case of *Md. Nurun Nabi Bhuiya vs Md Abdullah Al Masud 21 ADC 761 (2024)*, Hon'ble Appellate Division observed:

> *"In aid of all its powers given under the constitution, in order to ensure the authoritative status of the Supreme Court, the Constitution provides in Article 112 that all authorities - executive and judicial in the Republic shall act in aid of the Supreme Court (6)."*

Further, if Article 116 remains as it is as an outcome of the 15th Amendment and 4th Amendment, in that situation, the A.V. Dicay's dictum, Rule of law embodied in the preamble of the constitution shall not exist. Under such circumstances, Rule by law by the executive will replace the Rule of law. In RV Secretary of State for the Home Department [2002] 4 ALLER 1089, relevant page 1090, the House of Lords observed:

> *"The complete functional separation of the judiciary from the Executive was fundamental since the Rule of law depended on it."*

In the premises above, the contentions that the amendment is inconsistent with the doctrine of the Rule of Law as well.

In the case of the *Bangladesh- Vs- Asaduzzaman Siddique 77 DLR (AD) 134 (2025)*, *in para 55* Hon'ble Appellate Division observed, which reproduced as follows:

> *"Under the scheme of the Constitution of the People's Republic of Bangladesh, all three organs are of equal significance and importance. None is subordinate to the others. All three organs must act harmoniously in order to serve and protect the people who are the supreme authority of the land. But through the Sixteenth Amendment, the judiciary was made subservient to the other organs, which is ipso facto unconstitutional and is also undesirable and unacceptable."*

In the case of *Somesh Chaurasia vs State of MP and ors AIR 2021 (SC) 3563 para 42*, the Supreme Court of India observed-

> *"Our constitution specifically envisages the independence of the District Judiciary. This is implicit in Article 50 of the Constitution, which provides that the State must take steps to separate the judiciary from the executive in the public service of the State. The District Judiciary operates under the administrative supervision of the High Court, which must secure and enhance its independence from external influence and control."*

Further, it is settle principle of law that discriminatory legislation is expressly prohibited pursuant to Articles 28 and 29 of the Constitution. The State is constitutionally prohibited from discriminating against any citizen and is mandated to ensure equality of opportunity for all citizens with respect to employment or office within the service of the Republic. To obliterate such discrimination, the establishment of a separate Secretariat for the judiciary is imperative. It serves not only as a cornerstone for the efficacious governance of the subordinate judiciary but also as a sine qua non for the genuine separation of powers within the judiciary. In accordance with the Rules of Business made under Article 55(6) of the Constitution, read in conjunction with the সচিবালয় নির্দেশমালা ২০২৪, a

distinct Secretariat has been constituted for the executive. Article 79(1) mandates that Parliament shall possess its own Secretariat and জাতীয় সংসদ সচিবালয় আইন ১৯৯৪ and নির্বাচন কমিশন সচিবালয় আইন are enacted for its independent identity "জাতীয় সংসদ সচিবালয় আইন ১৯৯৪ এর ৩ ধারা

৩।(১) সংবিধানের ৭৯ অনুচ্ছেদ অনুযায়ী সংসদের নিজস্ব সচিবালয় থাকিবে।

(২) সংসদ সচিবালয় সরকারের কোন মন্ত্রণালয়ে, বিভাগ বা দপ্তরের প্রশাসনিক আওতাধীন থাকিবে না।

(৩) সংসদ সচিবালয় বিধি দ্বারা নির্ধারিত পদ্ধতিতে নিযুক্ত কর্মকর্তা ও কর্মচারীগনের সমন্বয়ে গঠিত হইবে।"

Apart from above enactment the provision section 3 of নির্বাচন কমিশন সচিবালয় আইন, ২০০৯ provides constitution of separate Secretariat for the election commission free from Govt. control which is follows:

"৩। (১) নির্বাচন কমিশনের একটি নিজস্ব সচিবালয় থাকিবে এবং উহা নির্বাচন কমিশন সচিবালয় নামে অভিহিত হইবে।

(২) নির্বাচন কমিশন সচিবালয় সরকারের কোন মন্ত্রণালয়, বিভাগ বা দপ্তরের প্রশাসনিক আওতাধীন থাকিবে না।

(৩) নির্বাচন কমিশনের পক্ষে আইন প্রণয়ন সম্পর্কিত বিষয়াদি আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয় কর্তৃক সম্পাদিত হইবে।

(৪) নির্বাচন কমিশন সচিবালয় বিধি দ্বারা নির্ধারিত পদ্ধতিতে নিযুক্ত একজন সচিব এবং অন্যান্য কর্মকর্তা ও কর্মচারীগণের সমন্বয়ে গঠিত হইবে।"

However, despite the Constitution having come into force on 4 November 1972, no such independent Secretariat has been constituted for the judiciary. This disparity amounts to an institutional inequity and constitutes a violation of Articles 28 and 29 of the Constitution. Such deprivation also offends the doctrine of substantive unamendability embodied in Article 26 of the Constitution.

The core concept of judicial independence is the theory of separation of powers: that the judiciary should function independently of the legislative and executive arms of government.

The concept of judicial independence has many elements, but generally they fall under the headings of security of tenure, financial security, institutional administrative independence. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law. without any restrictions, improper influences, inducements, pressures, threats of interferences, direct or indirect, from any quarter or for any reason. There shall not be any inappropriate or unwarranted interference with the judicial process. Only where an independent judiciary exists, can judges decide cases impartially and justly, because "the rule of law" requires that a judge not be apprehensive of repercussions or retaliation from outside influences.

The history of the judiciary around the world demonstrates that the greatest danger of interference comes from other government institutions or political parties. An independent judiciary must not only be independent of these and other influences, but also it must appear to be independent. This is so because a court can only be truly accepted as a just one if it has the confidence of the public that it is just and fair. This concept gives rise to the famous adage *"justice must not only be done, but also must be seen to be done."* As the late Justice Thurgood Marshall of the US Supreme Court once said:

> *"We must never forget that the only real source of power that we as judges can tap is the respect of the people.*

It is important to emphasise that judges do not claim to be special people, but they do claim to hold a special office to which is assigned the function of guarding, separate and independent from other government institutions, which can only be achieved through complete independence of judiciary.

If a court or an individual judge is subject to, or even appears to be subject to, inappropriate pressure or interference by the executive or administrative arm of government, that is considered to be an inappropriate interference with judicial independence.

It is, of course, inevitable that there be some dealings between the courts and the executive branch for financial and administrative purposes. But there must be to limit the formal interaction between these two branches of government to only the extent necessary to provide security and the necessary financial and administrative support to the courts.

The principal role of an independent judiciary is to uphold the rule of law and to ensure the supremacy of the law. If the judiciary is to exercise a truly impartial and independent adjudicative function, it must have special powers to allow it to "keep its distance" from other governmental institutions, political organisations, and other non-governmental influences, and to be free of repercussions from such outside influences.

It is the expectation of every citizen of any independent nation or country that the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. We must not forget that judicial independence is essential to the strength of the democracy. The principle of judicial independence preserves the rule of law, protects our democratic values and fosters public confidence in our institutions.

The restoration of Article 116 to its original form is not a matter of political preference but a constitutional imperative necessary to realign the state with the

foundational will of the people and thereby preserve the democratic soul of this country.

In our view that true judicial independence requires abolition of the dual governance system i.e. the joint authority of the Supreme Court and the Ministry of law must be dismantled to facilitate a separate secretariat under the Supreme Court of Bangladesh. The establishment of a separate secretariat is necessary to ensure the judiciary's autonomy and integrity.

With regard to the prayer for issuance of a direction to establish a separate Secretariat along with all necessary logistical support, the learned Attorney General has fairly submitted that the State has no objection to the establishment of such a Secretariat.

In the above circumstances, this Court is of the view that a direction may lawfully and appropriately be issued upon the Respondents to establish an Independent Supreme Court Secretariat within the precincts of the Supreme Court.

We believe that the proposed secretariat would enhance transparency in judicial policy making, ensure proper budget allocation and infrastructure development, and bring clarity to the transfer and promotion of judges. An independent judiciary can only function effectively when the institutional independence of the judiciary is ensured through establishing an independent judicial secretariat.

It is worthwhile to mention here, Lord Denning's observation in his seminal work What Next in the Law (p. 318), wherein, he profoundly observed:

> *"To my mind, the judges are the guardians of our constitution, here just as they are in the United States. The only difference is that our*

> *constitution is unwritten, theirs is written. The judges can - or at any rate, should be able to pronounce on the validity of his convention. They should be able to interfere if they are misused or abused."*

Lord Denning's remarks clearly imply that the judiciary in a constitutional state serves as a vital safeguard against the abuse of power. As the final avenue for justice, the Courts must operate with total impartiality and automy.

The judiciary is the last resort for redress of grievances. It must function without fear or favour and respond independently. Such independence is possible only through a genuine separation of the judiciary from the executive.

We firmly believe that the judiciary shall not remain independent merely on paper, but be independent in spirit, in function, and in the perception of the citizens of this country.

From the discussions made above and in the facts and circumstances of the case, we have no hesitation in holding that the Amendments made to Article 116 of the Constitution are ultra vires the Constitution. So, we find merit in the Rule and accordingly, the Rule is made absolute without any order as to costs.

Therefore, we sum up as follows:

a) i. The Amendment of Article 116 of the Constitution by Section 39 of the Constitution (Fifteenth Amendment) Act, 2011 (Act XIV of 2011) is hereby declared ultra vires the Constitution and void.

ii. Accordingly, the Amendment of Article 116 of the Constitution by Section 19 (section 20 of the English version) of the Constitution (Fourth Amendment) Act, 1975 (Act No. II of 1975) is also declared ultra vires and void.

b) Further, in view of declaring the aforesaid Amendments to Article 116 ultra vires the Constitution and in accordance with the decisions in the 8th and 16th Amendment cases, Article 116 as contained in the 1972 Constitution of Bangladesh shall automatically stand revived and restored. Article 116 of the original 1972 Constitution of Bangladesh is hereby restored as follows:

   "116. The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the Supreme Court."

c) The Bangladesh Judicial Service (Disciplinary Rules) 2017, are hereby declared ultra vires the Constitution as they are inconsistent with the restored Article 116 of the Constitution, and do not conform to the guidelines for judicial independence established in the *Masdar Hossain* Case reported in *52 DLR (AD) 82*.

d) Furthermore, the respondent Nos. 1-3 are hereby directed to establish an Independent Separate Secretariat for the Supreme Court of Bangladesh as proposed by the Supreme Court authority, within 03(three) months from date.

The learned Counsel for the respondent-Government has prayed for the issuance of a certificate in the instant matter. Accordingly, pursuant to Article 103 (2) (a) of the Constitution, we hereby certify that this case involves a substantial question of law as to the interpretation of the Constitution.

Before we part, we would like to extend our deep appreciation to the members of the Bar representing the petitioners, learned Attorney General and his

team of the Attorney General's office who represented the Government; Interveners and Amicus Curiae, for assisting this Bench towards proper disposal of the case.

Communicate the judgment and order to all concerned.

Debasish Roy Chowdhury, J:

I agree.