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

***WRIT PETITION NO.9935 of 2024***
***with***
***WRIT PETITION NO.12431 of 2024***

IN THE MATTER OF:

Applications under Article 102 of the Constitution of the People's Republic of Bangladesh

And

IN THE MATTER OF:

***Dr. Badiul Alam Majumdar and others***
***... Petitioners in writ petition No.9935 of 2024***
***Md. Mofazzal Hossain (Freedom Fighter)***
***....Petitioner in writ petition No.12431 of 2024***

-Vs-

***Government of Bangladesh and others***
***... Respondents in both the writ petitions.***

And

Dr. Sharif Bhuiyan, Senior Advocate with
Mr. Reduanul Karim, Advocate
.... For the petitioners in writ petition No.9935 of 2024
Mr. Fida M. Kamal, Senior Advocate with
Mr. A.S.M. Shahriar Kabir, Advocate
..... For the petitioner in writ petition No.12431 of 2024.
Mr. Md. Asaduzzaman, Attorney General with
Mr. Asad Uddin, D.A.G with
Mr. Tanim Khan, D.A.G with
Ms. Syeda Shajia Sharmin, D.A.G with
Mr. Ashadullah Al Galib, A.A.G with
Mr. Md. Zasidul Islam (Jony), A.A.G with
Mr. Arif Khan, A.A.G with
Mrs. Maria Tanjimath, A.A.G with
Mrs. Kazi Tamanna Ferdaus, A.A.G
Mr. Md. Muzahedul Islam (Shahin), A.A.G with
Ms. Shadia Afrin, A.A.G, and
Mr. Siddiqur Rahman, A.A.G
....For the Respondent Nos.1-3 in both the writ petitions
Mr. Mohammad Shishir Manir, Advocate with
Mr. Mohammad Saddam Hossen, Advocate with
Mr. Abdullah Sadiq, Advocate and
Mr. Md. Mizanul Hoque, Advocate
.... For the intervener No.4 in writ petition No.9935 of 2024
Mr. Mostafa Asgar Sharifee, Advocate in person.

.... For the intervener No.5 in writ petition No.9935 of 2024
Mr. Mohammad Jamiruddin Sircar, Senior Advocate with
Mr. Zainul Abedin, Senior Advocate with
Mr. Md. Bodruddoza, Senior Advocate with
Mr. Md. Ruhul Quddus (Kazal), Senior Advocate with
Mr. Muhammad Nawshad Zamir, Advocate with
Mr. Farzana Sharmin, Advocate with
Mr. Mohammad Masum Billah, Advocate
.... For the intervener No.6 in writ petition No.9935 of 2024
Mr. Subrata Chowdhury, Senior Advocate with
Mr. Mohiuddin Abdul Kadir, Advocate
.... For the intervener No.7 in writ petition No.9935 of 2024
Ms. Ishrat Hasan, Advocate with
Mr. Md. Abdur Rouf, Advocate
.... For the intervener No.8 in writ petition No.9935 of 2024
Mr. Ehsan Abdullah Siddique, Advocate with
Mr. Mohammed Belayet Hossain, Advocate
.... For the intervener No.9 in writ petition No.9935 of 2024
Mr. Junayed Ahmed Chowdhury, Advocate
.... For the intervener Nos.10, 11, 12 and13 in writ petition No.9935 of 2024
Mr. A B M Hamidul Mishbah, Advocate in person
.... For the intervener No.14 in writ petition No.9935 of 2024
Ms. Sonia Zaman Khan, Advocate
.... For the intervener No.15 in writ petition No.9935 of 2024
Mr. Abdul Momen Chowdhury, Advocate in person
.... For the intervener No.16 in writ petition No.9935 of 2024

***Heard on: 30.10.2024, 06.11.2024, 07.11.2024, 13.11.2024, 14.11.2024, 20.11.2024, 27.11.2024, 28.11.2024, 01.12.2024, 04.12.2024, 05.12.2024***
***And judgment on : 17.12.2024***

***Present:***

*Mrs. Justice Farah Mahbub.*
*And*
*Mr. Justice Debasish Roy Chowdhury*

***Farah Mahbub, J:***

Instant Rules Nisi in connection with writ petitions bearing Nos.9935 and 12431 both of 2024 involve common question of law and facts as such, those have been heard together and are being disposed of by this single judgment.

In writ petition No.9935 of 2024 the petitioners as being the conscious citizens of the country filed the application under Article 102 of

the Constitution of the People's Republic of Bangladesh (in short, the Constitution) in the nature of public interest litigation challenging the Constitution (Fifteenth Amendment) Act, 2011 ( Act No. 14 of 2011) to be declared *ultra vires* the Constitution. At the same time, the petitioners sought for a direction as to why the previous actions and deeds done or taken in any manner whatsoever in pursuance of the said Fifteenth Amendment Act, 2011 should not be condoned as transactions past and closed.

This Court having found *prima-facie* substance issued a Rule Nisi accordingly.

Subsequently, respective interveners have come forward with their prayers to assist the Court on the issues in question for proper dispensation of justice, which were duly allowed by passing necessary orders.

Subsequent to the issuance of the earlier Rule Nisi another writ petition has been filed bearing No.12431 of 2024 by the respective petitioner also, in the nature of public interest litigation challenging particular provisions of the Constitution (Fifteenth Amendment) Act, 2011, namely, Sections 2, 4, 5, 7, 8, 16, 20, 21, 22, 39, 42, 44, 47, 50, 53 and 55 of the Act No. 14 of 2011 to be declared *ultra vires* the Constitution; hence, void whereupon a Rule Nisi was issued by this Court.

***Locus Standi: Do the petitioners have respective standing to maintain the instant writ petitions ?***

It is, however, the established principle of law that in order to maintain respective writ petitions, filed in the nature of public interest litigation, the petitioners need to overcome the threshold of *locus standi.*

In this regard, in ***Dr. Mohiuddin Faroque v. Bangladesh*** reported in ***49 DLR (AD)1***, *para-48 Mostafa Kamal, J.* observed: "*.....The traditional view remains true, valid and effective till to-day in so far as-individual rights and individual infraction thereof are concerned. But when a public injury or public wrong or infraction of a fundamental right affecting an indeterminate number of people is involved, it is not necessary, in the scheme of our Constitution, that the multitude of individuals who has been collectively wronged or injured or whose collective fundamental rights have been invaded are to invoke the jurisdiction under Article 102 in a multitude of individual writ petitions, each representing his own portion of concern. In so far as it concerns public wrong or public injury or invasion of fundamental rights of an indeterminate number of people, any member of the public, being a citizen, suffering the common injury or common invasion in common with others or any citizen or an indigenous association, as distinguished from a local component of a foreign organization, espousing that particular cause is a person aggrieved and has the right to invoke the jurisdiction under Article 102."*

In the said case *B.B. Roy Chowdhury, J* observed*: "In this backdrop the meaning of the expression "person aggrieved" occurring in the aforesaid clauses (1) and (2) (a) of Article 102 is to be understood and not in an isolated manner. It cannot be conceived that its interpretation should be purged of the spirit of the Constitution as clearly indicated in the Preamble and other provisions of our Constitution, as discussed above. It is unthinkable that the framers of the Constitution had in their mind that the grievances of millions of our people should go unredressed, merely because they are unable to reach the doors of the court owing to abject*

*poverty, illiteracy, ignorance and disadvantaged condition. It could never have been the intention of the framers of the Constitution to outclass them. In such harrowing conditions of our people in general if socially conscious and public-spirited persons are not allowed to approach the court on behalf of the public or a section thereof for enforcement of their rights the very scheme of the Constitution will be frustrated. The inescapable conclusion, therefore, is that the expression "person aggrieved" means not only any person who is personally aggrieved but also one whose heart bleeds for his less fortunate fellow beings for a wrong done by the Government, or a local authority in not fulfilling its constitutional or statutory obligations. It does not however, extend to a person who is an interloper and interferes with things which do not concern him. This approach is in keeping with the constitutional principles that are being evolved in the recent times in different countries."*

The issues, being raised in the instant writ petitions by the public spirited and conscious citizens of the country including the respective political parties, are embedded in democracy and rule of law which are, among others, basic principles of our Constitution, which are claimed to have been clouded, shrinking the right to franchise being blatantly snatched away from the mass people. It raises question of *malafide* exercise of power by the Legislature and also, of transparency in promulgating the Constitution (Fifteenth Amendment) Act, 2011 and thereby destroying the core concept "*we, the people of Bangladesh*", which is the embodiment of the will of the people, as enshrined in Article 7 of the Constitution. They have come forward seeking judicial intervention to ensure prevention of illegal and unconstitutional encroachments upon the guaranteed civil and

fundamental rights of an indefinite number of people of Bangladesh and to uphold the rule of law; and most importantly, being supported by the respondent government.

Public interest litigation is to be used as an effective weapon in the armory of law for delivering social justice to the citizens: ***Neetu Vs. State of Panjab and others: AIR 2007 SC 758***. It is entertained when an issue of great public importance is involved, presenting element of infraction of one or the other fundamental rights as contained in Part III of the Constitution: ***National Council for Civil Liberties Vs. Union of India and others***: ***AIR 2007 SC 2631.*** The law is a social auditor and this audit function can be put into action only when someone with real public interest ignites the jurisdiction. In a society like ours activism is considered essential for participative public justice for which risks were considered to be taken by affording more opportunities for the public minded citizens to rely on the legal process and not to be repelled from it by narrow pedantry now surrounding *locus standi*: ***Fertilizer Corporation Kamagar (Regd.), Sindri and others V. Union of India and others: AIR 1981 SC 344***.

Considering the nature of grievances being agitated before this Court the petitioners including the interveners, however, do not appear to be either officious bystander or interlopers or busy body to invoke writ jurisdiction under Article 102 of the Constitution.

Accordingly, it is our considered view that these are *probono publico litigations* and the petitioners being persons aggrieved within the meaning of Article 102 of the Constitution have *locus standi* to invoke writ jurisdiction.

In both the writ petitions, the categorical assertions of the petitioners are that the impugned Act No. 14 of 2011 and/ or the respective provisions of the said Act are squarely repugnant to and are inconsistent with the basic structures of our Constitution and that said Act and/or the respective provisions of the Act of 2011 is /are beyond the amending power of the Parliament as provided under Article 142 of the Constitution; as such, is / are liable to be knocked down.

The people of Bangladesh having proclaimed independence on the 26th day of March, 1971 and through a historic war for national independence established the independent, sovereign People's Republic of Bangladesh [Article 1 of the Constitution]. The Constitution of Bangladesh, adopted on 16th December, 1972, demonstrates the people as the dominant actors and it is the manifestation of what is called *"the people's power"*: ***Dr. Mohiuddin Farooque*** vs. ***Bangladesh, represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and others (1997) 49 DLR (AD) 1, Para-41.***

Relevant part of the said para is quoted below:

> *"As to (i) above, it is wrong to view our Constitution as just a replica with local adaptations of a Constitution of the Westminster model among the Commonwealth countries of Anglo-Saxon legal tradition. This Constitution of ours is not the outcome of a negotiated settlement with a former colonial power. It was not drawn upon the consent, concurrence or approval of any external sovereign power. Nor is it the last of an oft-replaced and oft-substituted Constitution after several Constitutions were tried and failed, although as many as 13 amendments have so far been made to it. It is the fruit of a historic war of independence, achieved*

> *with the lives and sacrifice of a telling number of people for a common cause making it a class part from other Constitutions of comparable description. It is a Constitution in which the people features as the dominant actor. It was the people of Bangladesh who in exercise of their own self-proclaimed native power made a clean break from the past unshackling the bondage of a past statehood and adopted a Constitution of its own choosing. The Constitution, historically and in real terms, is a manifestation of what is called "the People's Power". The people of Bangladesh, therefore, are central, as opposed to ornamental, to the framing of the Constitution."*

The framers of the Constitution spelt out the objectives of the Constitution through its Preamble declaring the high ideals of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice; to establish a socialist society through the democratic process, which shall be free from exploitation, in which rule of law, fundamental human rights and freedom, equality and justice, political, economic and social will be secured for all the citizens; to maintain the supremacy of the Constitution as the embodiment of the will of the people of Bangladesh so that the people may prosper in freedom keeping with the progressive aspirations of mankind *[Preamble of the Constitution].* Article 7, which has been termed by our Appellate Division in the case of ***Anwar Hossain Chowdhury and others Vs. Bangladesh: 41DLR(AD)165, para-57, p-197*** as the *"pole star of our Constitution"* declaring the people to be the source of power and their exercise on behalf of the people shall be effected only under, and by the authority of the Constitution*[Article 7(1)]*. This Constitution is the solemn expression of

the will of the people, the supreme law of the land. If, however, any other law is inconsistent with this Constitution that other law shall, to the extent of inconsistency, be void *[Article 7(2)]*.

In ***A. T. Mridha Vs. State*** reported in ***25 DLR (HCD) pp-335*** *and* ***344*** it has been observed, *inter-alia*, "*The Constitution is the supreme law and all laws are to be tested on the touch-stone of the Constitution (Article 7). It is the supreme law because it exists; it exists because the will of the people is reflected in it. History of mankind is replete with instances when a Constitution ceased to exist because the will of the people was either not reflected in it or the support was withdrawn ultimately."*

While observing on the jurisdiction or power of the Constitutional Court to consider the validity of law the Appellate Division found in ***Anowar Hossain Chowdhury case (supra) p-214, para-167:***

> *"Law as defined in Article 152 means any Act, ordinance, order, rule and regulations by law, notification or other legal instruments and any custom or usage having the force of law in Bangladesh. Article 7 says that if any law is inconsistent with the Constitution that law shall to the extent of inconsistency be void. When Article 26 says about the inconsistency of any law with the fundamental rights to be void, Article 7 operates in the whole jurisdiction to say that any law and that law includes also any amendment of the Constitution itself because Article 142 says that amendment can be made by Act of Parliament. Therefore, if any amendment which is an Act of Parliament contravenes any express provision of the Constitution that amendment Act is liable to be declared void. So says Article 7. But by whom this declaration is to be made ? It is the executive which initiates the proposal for law. It is the legislature that passes the law.*

*Then who will consider the validity or otherwise of the law- obviously the judiciary"*

***The Constitution is a living organism capable of growth with the passage of time.***

*"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 crisis of human affairs". Holmes, J. observed that 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 straight jacket. 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. .... 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 for ever, it is necessary to keep it in agreement with the spirit of the time without impairing its fundamental principles."* ***Anowar Hussain Chowdhury Case (supra)1989 BLD (Spl)1, para-333.***

The Constitution is the very framework of the body policy: its life and soul; it is the fountainhead of all its authority, the main spring of all its strength and power. The executive, the legislature and the judiciary are all its creation, and derive their sustenance from it. It is unlike other statutes, which can be at any time altered, modified or repealed. Therefore, the

language of the Constitution should be interpreted as if it were a living organism capable of growth and development if interpreted in the broad and liberal spirit, and not in a narrow and pedantic sense.

The Constitution is not merely concerned with the present and the past; but is built for the future. We cannot but presume that in the normal course, they must have peeped into the future *"far as human eye could see"* or as far as human intellect could probe, and foreseen these contingencies: ***State of Rajasthan Vs. Shamlal: AIR 1960 Raj 256, pp 265-266.*** The Constitution and the statute in a way emanate from the same source, that is, the people, but there is difference in the mode of their enactment. While the Constitution is the direct mandate of the people themselves, the statute is an expression of the will of the legislature only, though the legislature is also the representative of the people. ***Opp Cotton Mills Vs. Administrator; 85 LEd 624, p.636, 312 US 126, per Stone, J***. It is a living and organic thing and must adopt itself to the changing situations and pattern in which it has to be interpreted: ***N.S. Bindra's Interpretation of Statutes, Tenth Edition, pp 1261-1262.***

It is proper to assume that a Constitution is intended to meet and be applied to new conditions and circumstances as they may arise in the course of the progress of the community: ***Ashok Kumar Gupta and another*** Vs. ***State of Uttar Pradesh and others: (1997) 5SCC 201.***

The judges, therefore, should respond to the human situations to meet the felt necessities of the time and social needs; make meaningful the right to life and give effect to the Constitution and the will of the legislature. The Supreme Court as the vehicle of transforming the nation's life should respond to the nation's needs, interpret the law with pragmatism

to further public welfare to make the constitutional animations a reality and interpret the Constitution broadly and liberally enabling the citizens to enjoy the rights: ***Ashok Kumar Gupta's case (supra).***

A Constitution is not just a document in solemn form, but a living framework for the government of the people exhibiting a sufficient degree of cohesion and its successful working depends upon the democratic spirit underlying it being respected in letter and in spirit: ***SR Choudhuri Vs. State of Punjab and others: (2001) 7SCC 126***. In ***Naveen Jindal*** *Vs*. ***Union of India: AIR 2004 SC 1559,*** the court observed that the Constitution being a living organ, its ongoing interpretation is permissible.

We are to remember that it is a Constitution, a mechanism under which laws are to be made, and not merely an Act which declares what the law is to be: ***Attorney General for NSW Vs. Brewery Employees Union of NSW, 6CLR 469, pp. 611-612.***

In this regard, *Marshall C.J.* in his famous judgment in ***McCulloch*** Vs. ***Maryland: 4 Wheat 316, 407,*** expressed in these words: *"In considering this question, then we must never forget that it is a Constitution we are expounding"*.

***<u>The doctrine of basic structure, as embedded in the Constitution.</u>***

What constitutes basic structure is not like "a twinkling star up above the Constitution". It does not consist of any abstract ideals to be found outside the provisions of the Constitution. The permeable, no doubt, enumerates great concepts embodying the ideological aspirations of the people but these concepts are particularised and their essential features delineated in the various provisions of the Constitution. It is these specific provisions in the body of the Constitution which determine the type of

democracy which the founders of that instrument established; the quality and nature of justice, political, social and economic which they aim to realise, the content of liberty of thought and expression which they entrenched in that document and scope of equality of status and of opportunity which they enshrined in it. These specific provisions enacted in the Constitution alone can determine the basic structure of the Constitution. These specific provisions, either separately or in combination, determine the content of the great concepts set out in the Preamble. It is impossible to spin out any concrete concept of basic structure out of the gossamer concepts set out in the Preamble. The specific provisions of the Constitution are the stuff from which the basic structure has to be woven- ***Indira Nehra Gandlhi Vs. Raj Narain, 1975 Supp SCC 1.***

Fact remains, a Constitution, unlike other statutes, is intended to be paramount and is to endure for ages. If the ordinary rule of contemporary meaning were given to a Constitution it would be to command the race to halt in its progress: ***Borgins V. Falk: (1911) 147 WIS 327.***

The concept of basic structure giving coherence and durability to a Constitution has certain intrinsic force. The development of this doctrine is the emergence of the constitutional principles in their own right. It is not based on literal wording. Some of these principles may be so important and fundamental, as to qualify as *"essential features"* or part of the *"basic structure"* of the Constitution, that is to say, they are not open to amendment. The basic structure concepts limit the amending power of the Parliament. For a constitutional principle to qualify as an essential feature, it must be established that the said principle is a part of the Constitutional law binding on the Legislature. Only thereafter, the second step is to be

taken, namely, whether the principle is so fundamental as to bind even the amending power of the Parliament, i.e. to form a part of the basic structure. This is the standard of judicial review on the amendment of Constitution in the context of the doctrine of basic structure: ***M. Nagaraj and others Vs. Union of India and others: AIR 2007 SC 71.***

Therefore, the existence of the power of the Parliament to amend the Constitution at will, with requisite voting strength, so as to make any laws that excludes Part III including the power of judicial review is incompatible with the doctrine of basic structure: ***M. Nagaraj's case (supra).*** Such an exercise if challenged has to be tested on the touchstone of basic structure of the Constitution: ***R. Coelho (dead) by L. Rs. Vs. State of Tamil Nadu: AIR 2007 SC 86.***

The doctrine of basic structure has its origin in ***Muhammad Abdul Haque Vs. Fazlul Qader Chowdhury: PLD 1963 Dacca, para-61, p-669*** (referred to as ***Dhaka High Court Case*****).** In the said case, while examining the legality of the authority of the respondents by which they still claimed to be the members of the National Assembly in spite of the fact that shortly after their election to the above mentioned Assembly, they were appointed to the President's Council of Ministers, the High Court of Dacca made observations on the concept of basic provisions of the Constitution. Relevant part is quoted as below:

> *" In PLD 1957 SC (Pak.) 219 = (1957) 9 DLR (SC) 178 on a reference made by the President of Pakistan, Munir, C.J., in delivering the opinion of the Supreme Court of Pakistan, repelled the contention that the President, in the exercise of his power under Article 234 of the 1956 Constitution, could destroy a basic or vital provision of the Constitution. At page*

*238 [corresponds to para. 34 of DLR (SC)] of the report, his Lordship has observed thus:*

> *The Constitution defines qualifications which a candidate for election to the Provincial Assembly, or a voter in a constituency for such Assembly must possess; but Mr. Manzur Qadir would give to the President under Article 234 the power to destroy, though for a temporary period, the very basis of the new Constitution by claiming for him the power to form the constituencies and to order the preparation of electoral rolls in direct violence of the Constitution merely to implement the decision of a Governor.*

*The aforesaid dictum of the Supreme Court of Pakistan is a pointer that in the case before us the power of "adaptation" does not extend to the wiping out of a vital provision of the Constitution to implement a decision of the members of the Assembly who were invited to be Ministers".*

On appeal, the Supreme Court of Pakistan in ***Fazlul Quader Chowdhury and others Vs. Muhammad Abdul Haque: 18 DLR SC (1966) 69, para-24 and 86*** affirmed the recognition of basic provisions of the Constitution. Relevant part runs as follows:

> *"The aspect of the franchise, and of the form of Government are fundamental features of a Constitution, and to alter them, in limine in order to placate or secure the support of a few persons, would appear to be equivalent not to bringing the given Constitution into force, but to bringing into effect an altered or different Constitution. .....*
>
> *The further limitation inherent in the terms of this clause appears to be that the difficulty must be such that could be removed by way of an adaptation which can, under no canon of construction, be held to extend to the making of even radical amendments or alterations in the main fabric of the Constitution.*

While resolving the validity of the Constitution (Seventeenth Amendment) Act, 1964, *Mudholkar J.* of the Indian Supreme Court in ***Sajjan Singh Vs. State of Rajasthan: AIR 1965 SC 845, para-63*** citing the aforesaid decision of the Pakistan Supreme Court, observed as follows:

> *" On the other hand under Art. 368 a procedure is prescribed for amending the Constitution. If upon a literal interpretation of this provision an amendment even of the basic features of the Constitution would be possible it will be a question for consideration as to how to harmonise the duty of allegiance to the Constitution with the power to make an amendment to it. Could the two be harmonised by excluding from the procedure for amendment, alteration of a basic feature of the Constitution? It would be of interest to mention that the Supreme Court of Pakistan has, in Mr. Fazlul Quader Chowdhry v. Mr. Mohd. Abdul Haque (1963 P.L.D. 486) held that franchise and form of government are fundamental features of a Constitution and the power conferred upon the President by the Constitution of Pakistan to remove difficulties does not extend to making an alteration in a fundamental feature of the Constitution."*

In ***Kesavananda Bharati Sripadagalvaru and others Vs. State of Kerala: AIR 1973 SC 1461, para-658*** the Supreme Court of India while referring to *Sajjan Singh's case* in connection with the amending power of the Constitution observed as under:

> *" The question whether there is any implied limitation on the amending power under Article 368 has not been decided by this Court till now. That question did not come up for consideration in Sankari Prasad's case. In Sajjan Singh's case neither the majority speaking through Gajendragadkar C.J. nor Hidayatullah J. (as he then was) went into that question. But Mudholkar J. did foresee the importance of that aspect. He observed in the course of his judgment:*

> *We may also have to bear in mind the fact that ours is a written Constitution. The Constituent Assembly which was the repository of sovereignty could well have created a sovereign Parliament on the British model. But instead it enacted a written Constitution, created three organs of State, made the Union executive responsible to Parliament and the State executive to the State legislatures, erected a federal structure and distributed legislative power between Parliament and the State Legislatures; recognised certain rights as fundamental and provided for their enforcement, prescribed forms of oaths of office or affirmations which require those who subscribe to them to owe true allegiance to the Constitution and further require the members of the Union judiciary and of the Higher judiciary in the States, to uphold the Constitution. Above all, it formulated a solemn and dignified preamble which appears to be an epitome of the basic features of the Constitution. Can it not be said that these are indicia of the intention of the Constituent Assembly to give a permanency to the basic features of the Constitution? It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of Article 368?*"

Thus, it is apparent from the above that the doctrine of basic structure of the Constitution has its root in *Fazlul Quader's* C*ase*, which originated from *Dhaka High Court Case*. However, in ***Kesavananda's case*** the Indian Supreme Court while elaborating the features of basic structure of the Constitution further goes to observe as follows:

> *"The learned Attorney General said that every provision of the Constitution is essential; otherwise it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same. The basic structure may be said to consist of the following features: (1) Supremacy of the Constitution; (2) Republican and Democratic form of Government; (3) Secular character of the Constitution; (4) Separation of powers between the Legislature, the executive and the judiciary;(5)Federal character of the Constitution. [Para 302]. ..... the above structure is built on the basic foundation, i.e., the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed."[Para 303].*

Our Appellate Division has recognized the doctrine of basic structure of the Constitution while dealing with the constitutional validity of the Constitution (Eighth Amendment) Act, *1988*, known as the 8th Amendment, so far it related to Article 100 of the Constitution. Said Article of the Constitution was challenged in the case of ***Anowar Hossain Chowdhury (supra)*** on the assertion that the impugned amendment was beyond the amending power of the Parliament under Article 142 of the Constitution and that by this amendment a basic structure of the Constitution was destroyed. However, while discussing the purpose and scope of the doctrine of basic structure the Appellate Division observed, *inter-alia:*

> *"The doctrine of basic structure is one growing point in the 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 of the Bill for amendment. ....."* ***1989 BLD (Special Issue) 1, para-435, p-169.***

If we give a glance at our Constitution for the purpose of amendment, it would be apparent that this is not at all a rigid Constitution. It has undergone several amendments since its birth; however, those were measured on the touchstone of the basic structures of the Constitution in order to be mandated as justified amendments. It is, therefore, the nature of invasion which attracts the doctrine of basic structure, which has now become an established principle and recognised by the Constitution itself.

Considering the history of our Construction, its scheme and framework, embodiment of the respective provisions, in particular Articles 7 and 142 there is no manner of doubt to find that the Constitution of Bangladesh is never intended to be static. It is a living organism capable of growth with the passage of time in order to meet the demand of the people, who are supreme and exercise the ultimate power of the Constitution.

However, after *8th Amendment Case* (by a majority views) it is now settled that the power of the Parliament to amend the Constitution is not unlimited. The Parliament could not under Article 142 expand its amending power to damage its essential features or to destroy its basic structure. However, if any changes are brought about by amendments destroying the basic structures of the Constitution, such amendments would be void, as being *ultra vires* the Constitution.

***The Constitution (Fifteenth Amendment) Act, 2011: Is it ultra vies the Constitution?***

Vide "সংবিধান (পঞ্চদশ সংশোধন) আইন, ২০১১" the Constitution (Fifteenth Amendment) Act, 2011 (Act No. 14 of 2011) (in short, the Act, 2011) the 9th Parliament brought amendment in 55 different provisions of the Constitution including its Preamble.

As stated above, the petitioners of writ petition No.9935 of 2024 have challenged the Constitution (Fifteenth Amendment) Act, 2011 in its entirety to be declared *ultra vires* the Constitution. On the other hand, the petitioner of writ petition No.12431 of 2024 has challenged respective provisions of the Act No.14 of 2011 as being *ultra vires* the Constitution.

Prior to placing respective arguments in support of the Rule Nisi in connection with writ petition No.9935 of 2024 Mr. Sharif Bhuiyan, the learned Senior Advocate appearing for the petitioners at the very outset submits that he will not press the 2nd part of the Rule so far it relates to seeking condonation of the previous actions and deeds done or taken in any manner whatsoever pursuant to the impugned Act, 2011.

However, in order to have the impugned Act No. 14 of 2011 struck down the first line of argument being placed by Mr. Sharif is the process of enacting the Constitution (Fifteenth Amendment) Act, 2011.

In this regard, his categorical contention is that pursuant to the proposal so made by the then head of the erstwhile government a 15 members Special Parliamentary Committee was formed on 21.07.2010 under Rule 266 of the Rules of Procedure of Parliament headed by 2(two) senior and renowned parliamentarians of the then ruling party. Even, the then head of the executive was involved in the said process. However, the

only term of reference of the said committee was "*amendment of the Constitution*", i.e. to recommend what amendments to the Constitution were to be made. During the course of proceeding the Parliamentary Special Committee took recommendations from 104 distinguished citizens - including a former president, the incumbent prime minister, three former chief justices, political leaders, editors and civil society members. The recommendations of the said committee had represented a consensus amongst the politicians, civil society and the citizens and were in favor of retaining Non Party Caretaker Government system (in short, NPCG system).

Meanwhile, the Hon'ble Appellate Division passed the short order on 10 May 2011 declaring the NPCG system prospectively illegal. Following the short order, the Parliamentary Special Committee held several meetings and prepared a unanimous recommendation report on 29 May 2011 with recommendation to amend the Constitution by retaining the NPCG system.

On 30 May 2011, i.e. the day following the finalization of the unanimous recommendations, members of the Parliamentary Special Committee met the then Prime Minister. Subsequently, the Chairperson and Co-chairperson held a meeting with the Prime Minister, which led to a change in the committee's previous recommendation. Accordingly, the Parliamentary Special Committee prepared and submitted final report on 5 June 2011 recommending abolition of the NPCG system.

After the meeting with the Prime Minister, the Committee prepared a report containing 51 recommendations which was approved by the Cabinet on 20 June 2011. On 25 June 2011 the 15th Amendment Bill was presented

to the Parliament. On the same day, i.e. 25 June 2011, the Bill was sent to the Parliamentary Standing Committee for its scrutiny, and was given 14 (fourteen) days to review the Bill. The Parliamentary Standing Committee, with a recommendation to add four sub-articles, submitted the Bill containing 55 Articles to the Parliament on 29 June 2011. The next day, i.e. on 30 June 2011, the Bill was passed in the Parliament.

Thus, he submits, the day on which the Bill was presented to the Parliament, it was sent to the Parliamentary Standing Committee. So, the Parliament had zero days. There was no debate on any Article of the Fifteenth Amendment in the Parliament. The Parliamentary Standing Committee, although had 14 (fourteen) days to scrutinize the Bill, it used 4(four) days only and did not make any comment on any Article, it only recommended to add four sub-articles. The Parliamentary Standing Committee submitted the Bill to the Parliament on 29 June 2011, and the Bill was passed on 30 June 2011. Again, there was no discussion or debate on any article. So, the Parliament had zero role in passing the Bill which contained 55 sections, out of which Section 1 contains short title of the Bill. The remaining 54 amending sections contained different natures, the review of which would have taken a considerable amount of time, definitely a number of days, but no discussions took place about the Bill. The aforesaid sequence of events goes to show that the Fifteenth Amendment was passed in an unusually hasty manner.

Said assertion of facts are not disputed by the respondent-government by filing any affidavit-in-opposition.

In this regard, referring to Article 78(1) of the Constitution Mr. Sharif goes to argue that though vide the said provision of law the validity

of the proceedings in Parliament shall not be questioned in any court but in the present case the procedure as provided in the Rules of Procedure of Parliament has been violated in passing the Act No.14 of 2011 insofar as the Parliamentary Special Committee was constituted for a specific purpose, i.e. to provide recommendations in relation to the amendment of the Constitution. Said committee provided its recommendations on 29 May 2011. However, due to the interference of the then head of the government the Committee changed its recommendations, which impairs the basic structure of the Constitution inasmuch as the interference by the executive with the work of the Parliamentary Special Committee is against the doctrine of separation of power, a basic structure of the Constitution.

Furthermore, he contends, the Supreme Court of Bangladesh in ***Government of Bangladesh and others. Vs. Md. Masud Rana and others: 15LM (AD) 2023, p-616, para 24*** held, *inter-alia:*

> *"…. Courts power of judicial review on the proceedings of Parliament is not absolutely ousted. In certain facts and circumstances, in particular on the grounds of lack of jurisdiction or it being a nullity for some reasons such as gross illegality, irrationality, violation of constitutional mandate, mala fides, non-compliance with rules of natural justice and perversity, Court has the jurisdiction to exercise its power under judicial review."*

In view of the said observations of the Appellate Division, he submits, this Hon'ble Court is empowered under judicial review to look into the proceedings of Parliament that was followed in enacting the Fifteenth Amendment. In support he has relied upon the case of ***Farzand Ali Vs. West Pakistan (1970) 22DLR SC 203, para 56,*** where the Supreme Court of Pakistan considered the scope of Article 111 of the Pakistan

Constitution and held that the absence of the words “on the ground of any alleged irregularity of procedure” does not indicate that the scope of the immunity has been enlarged. The relevant part is quoted as follows:

> *“In this connection I may also point out that the learned Attorney General appearing in response to a notice issued to him under Order XLV rule 2 of the Supreme Court Rules, very frankly conceded that if total strangers or intruders, without any color of right, had participated in the Assembly, that proceeding would not be a valid proceeding and the courts would be entitled to question the validity of such a proceeding notwithstanding the provisions of article 111. If this be so, then it is obvious that the bar created by clause (1) of Article 111 notwithstanding the omission of the words "on the ground of any alleged irregularity of procedure", which occurred in sections 41 (1) and 48 (1) of the Government of India Act, 1935, was not an absolute bar.”*

He also relies upon the case of ***Justice K.S. Puttaswamy and others Vs. Union of India and others: 255 (2018) DLT 1, para-61*** where the Indian Supreme Court held that courts are not prohibited from exercising their power of judicial review to examine any illegality or unconstitutionality in the procedure of Parliament.

Accordingly, he submits that since there was clear violation in the Rules of Procedure of the Parliament and was done with *mala fide* intention; hence, the privilege under Article 78(1) will not be applicable. Consequently, Act No.14 of 2011 must be held void in its entirety.

In support of the said contentions Mr. Fida M. Kamal, the learned Senior Advocate appearing with Mr. A.S.M. Shahriar Kabir, the learned Advocate on behalf of the petitioner of writ petition No.12431 of 2024

submits that every successful revolution gives the citizen a right to challenge the act and omissions of the previous autocratic regimes. After the glorious August revolution, he goes to argue, the power of the people, the rule of law and judicial independence were restored, and the petitioner accordingly, challenged the Constitution (Fifteenth Amendment) Act, 2011.

In *Marbury vs Madison,* as he submits, it was held that "*We are under a Constitution, but the Constitution is what the judges say it is*". In ***Anwar Hossain Chowdhury Case (supra),*** it was established that Article 102 of the Constitution is the fabric of the Constitution. In this regard he goes to submit that a constitutional amendment can be adjudged repugnant on at least three grounds:(i) lack of legislative competence; (ii) lack of procedural compliance and (iii) lack of substantive compatibility. In the said case, it was observed by our apex court that the authority to decide the constitutionality of any laws, including a constitutional amendment, lies with the Supreme Court of Bangladesh by virtue of Article 7(2) of the Constitution, which was affirmed by the Hon'ble Appellate Division in ***Government of Bangladesh and others.*** **Vs.** ***Advocate Asaduzzaman Siddiqui and others:71 DLR (AD) (2019) 52 (****popularly known as 16th Amendment Case)* finding, *inter-alia,* that removal of judges through the Supreme Judicial Council became a part of the basic structure of the Constitution as it reinforces and ensures a basic structure namely, the "*independence of judiciary*". Accordingly, the Appellate Division declared the Constitution (Sixteenth Amendment), Act, 2014, which sought to amend the provision relating to Supreme Judicial Council, unconstitutional.

He accordingly, submits that the constituent power lies with the people of Bangladesh, and Article 142(1A) expressly recognises this fact. Judges are by their oath of office bound to preserve, defend and protect the Constitution and in exercise of this power and function they shall act without any fear or favour and be guided by the dictates of conscience and the principle of self-restraint. Thomas Paine, a French revolutionary and a political philosopher stated that all power exercised by a State must have some beginning and that beginning is the constituent power, and it really means that the power delivered by the citizens to the State is for promulgation of a Constitution.

The Provisional Constitution of Bangladesh Order, 1972 was promulgated on 11th January 1972 which, no doubt, is the constituent power for promulgation of the Constitution. The Constitution Assembly adopted and enacted the Constitution on the 4th November, 1972; however, the constituent power dies at the time of promulgation of Constitution. The constituted power on the other hand, is a creature of the Constitution, and that power must be exercised within the boundary of the Constitution. The Constitution of Bangladesh was given constituted power for making constitutional amendment along with the power to promulgate laws. Article 142 of the Constitution is the source to exercise constituted power for amending the Constitution.

While describing the test for an amendment to become part of the Constitution, our Appellate Division has observed in ***Anwar Hossain Chowdhuiry (supra) para- 380, p-253:***

> *"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."*

While elaborating the extent of power of the Legislature to amend the Constitution by an Act of Parliament our Appellate Division further observed:

*"Our Constitution is not only a controlled one but the limitation on legislative capacity of the Parliament is enshrined in such a way that a removal of any plank will bring down the structure itself. For this reason, the Preamble, Article 8, had been made unamendable-it has to be referred to the people! At once Article 7 stares on the face to say: "All power in the Republic belongs to the people", and more, "their exercise on behalf of the people shall be effected only under, and by the authority, of this Constitution" To dispel any doubt it says: "This Constitution is as the solemn expression of the will of the people" You talk of law?-it says: it is the Supreme law of the Republic and any other law inconsistent with this Constitution will be void. The Preamble says "it is our sacred duty to safeguard, protect, and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh". The constituent power is here with the people of Bangladesh and Article 142(1A) expressly recognises this fact. If Article 26 and Article 7 are read together the position will be clear. The exclusiduary provision of the kind incorporated in Article 26*

*by amendment has not been incorporated in Article 7. That shows that the 'law' in Article 7 is conclusively intended to include an amending law. An amending law becomes part of the Constitution but an amending law cannot be valid if it is inconsistent with the Constitution. The contention of the Attorney General on the non-obstante clause in Article142 is bereft of any substance because that clause merely confers enabling power for amendment but by interpretative decision that clause cannot be given the status for swallowing up the constitutional fabric. In may be noticed that unlike 1956 Constitution or Sree Lanka Constitution there is no provision in our Constitution for replacing the Constitution. [Para 166]*

*.....*

*What the people accepted is the Constitution which is baptised by the blood of the martyrs. That Constitution promises 'economic and social justice' in a society in which 'the rule of law, fundamental human right and freedom and equality and justice' is assured and declares that as the fundamental aim of the State. Call it by any name-'basic feature' or whatever, but that is the fabric of the Constitution which can not be dismantled by an authority created by the Constitution itself-namely the Parliament. Necessarily, the amendment passed by the Parliament is to be tested as against Article 7 [para 195].*

*.....*

*The word "amendment" is a change or alteration, for the purpose of bringing in improvement in the statute to make it more effective and meaningful, but it does not mean its abrogation or destruction or a change resulting in the loss of its original identity and character. In the case of amendment of a constitutional provision, "amendment" should be that which accords with the intention of the makers of the Constitution [para-336]*

*.....*

*As to the 'constituent power', that is power to make a Constitution, it belongs to the people alone. It is the original*

*power. It is doubtful whether it can be vested in the Parliament, though opinions differ. People after making a Constitution give the Parliament power to amend it in exercising its legislative power strictly following certain special procedures. Constitutions of some countries may be amended like any other statutes following the ordinary legislative procedure. Even if the 'constituent power' is vested in the Parliament the power is a derivative one and the mere fact that an amendment has been made in exercise of the derivative constituent power will not automatically make the amendment immune from challenge. In that sense there is hardly any difference whether the amendment is a law, for it has to pass through the ordeal of validity test. [para-342]*

.....

*The Constitution of Bangladesh is a controlled one because a special procedure and a special majority-two thirds of the total strength of the Parliament-are required for its amendment. Besides, further limitation has been imposed by amending Article 142 which requires a referendum in certain matters". [para-346]*

In the light of the above observations, the manner that was adopted by the Legislature prior to enactment of the Constitution (Fifteenth Amendment) Act, 2011 and not disputed by the respondents-government, no doubt, raises serious question as to the strict compliance of the Rules of Procedure of the Parliament. Thus, makes the intention of the framers of the Act No. 14 of 2011 doubtful. In addition, there is no long title in the amendment Bill of the said Amendment Act, as is required under Article 142(1)(a)(i), which provides as under:

*"[১৪২। এই সংবিধানে যাহা বলা হইয়াছে, তাহা সত্ত্বেও-*

*(ক) সংসদের আইন-দ্বারা এই সংবিধানের কোন বিধান সংযোজন, পরিবর্তন, প্রতিস্থাপন বা রহিতকরণের দ্বারা সংশোধিত হইতে পারিবেঃ*

*তবে শর্ত থাকে যে,*

*(অ) অনুরূপ সংশোধনীর জন্য আনীত কোন বিলের সম্পূর্ন শিরনামায় এই সংবিধানের কোন বিধান সংশোধন করা হইবে বলিয়া স্পষ্টরূপে উল্লেখ না থাকিলে বিলটি বিবেচনার জন্য গ্রহণ করা যাইবে না;*

*.....”*

*“[142. Notwithstanding anything contained in this Constitution-*

*(a) any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of Parliament :*

*Provided that-*

*(i) no Bill for such amendment shall be allowed to proceed unless the long title thereof expressly states that it will amend a provision of the Constitution;*

*.....”*

In view of the above, if the amendment Bill intends to amend more than one Article the long title of the Bill must state the contents of all the Articles, i.e. the long title of the Bill is required to contain reference to all the articles which the Bill intends to amend. The Fifteenth Amendment Bill lacks a long title, as provided under Article 142; thus, has occasioned non-compliance of the mandatory procedural requirement of Article 142.

However, fact remains that vide Article 96 of the Constitution, as it stands pursuant to Constitution (Fifteenth Amendment) Act, 2011, Supreme Judicial Council has been restored which was subsequently replaced by the Sixteenth Amendment. Later, in 2017 in a landmark judgment our apex court has struck down the Sixteenth Amendment declaring it unconstitutional. Said findings have further been reasserted by the Appellate Division with the dismissal of the review petition, which was filed earlier by the State to overrule the earlier findings. Accordingly, with the restoration of Supreme Judicial Council, autonomy of the judiciary, one of the basic structures of the Constitution, has been re-affirmed.

Further, among others, vide Sections 12, 13 and 14 respectively of the Constitution (Fifteenth Amendment) Act, 2011 the State has been bestowed with the responsibility to provide protection and improve the

environment and to preserve and safeguard the natural resources, bio-diversity, wet lands, forests and wild life for the present and future citizens of the country [Article 18A]; to ensure equality of opportunity and participation of women in all spheres of national life [Article 19(3)]; and to take steps to protect and develop the unique local culture and tradition of the tribes, minor races, ethnic sects and communities [Article 23A].

In view of the said context, this Court is not inclined to declare Act No. 14 of 2011, i.e. the Constitution (Fifteenth Amendment) Act, 2011 void in its entirety considering its procedural flaw.

***Non-Party Caretaker Government System: Not in the original Constitution of 1972, but is the outcome of the will of the people of Bangladesh who are supreme.***

As has been observed by the Appellate Division in ***Anowar Hossain Chowdhury's case: 41 DLR (AD) 165, pp 213, 216***:

> *"It does not need citation of any authority that the power to frame a Constitution is a primary power whereas a power to amend a rigid constitution is a derivative power derived from the constitution and subject at least to the limitations imposed by the prescribed procedure. Secondly, laws made under a rigid constitution, as also the amendment of such a constitution can be ultra vires if they contravene the limitations put on the law-making or amending power by the Constitution, for the Constitution is the touchstone of validity of the exercise of the powers conferred by it.[para -161]*
>
> *..... The amending power is but a power given by the Constitution to Parliament; it is a higher power than any other given to Parliament but nevertheless it is a power within and not outside of the Constitution.[para-162]*
>
> *Our Article 7 has reflected the wisdom of the past and the learning of the history. ..... [para-166]*

> *..... The amendment therefore recognised the distinction between an ordinary law and a constitutional amendment. ..... Our Constitution is not only a controlled one but the limitation on legislative capacity of the Parliament is enshrined in such a way that a removal of any plank will bring down the structure itself. .....*
>
> *..... The contention of the Attorney-General on the non-obstante clause in Article 142 is bereft of any substance because that clause merely confers enabling power for amendment but by interpretative decision that clause cannot be given the status for swallowing up the constitutional fabric. .....*
>
> *..... The Constitution power is here with the people of Bangladesh and Article 142(1A) expressly recognises this fact." [para-184]*

As it reflects from record, in order to fill up a vacancy in the Fifth Parliament a by-election was held in Magura district. The opposition parties, however, alleged massive rigging in the election and started movement for holding election under a non-party caretaker government. Resultantly, they refrained from contesting in the election of the Sixth Parliament and claimed the constitution of the Sixth Parliament to be illegal. In the face of the movement for holding parliamentary election under a non-party interim government, the Sixth Parliament promulgated the Constitution (Thirteenth Amendment) Act, 1996 and thereby introducing a non-party caretaker government consisting of one Chief Adviser at its head along with not more than ten Advisers. Said government was to function for a limited period during which parliamentary election was to be held. During the said period the affairs of the government should be run by neutral persons so that no political party could utilise the governmental machinery and resources, monetary or

otherwise with a view to influencing the parliamentary election. The care-taker government should function as an interim government and should discharge its routine functions; it should not take any policy decision unless it became necessary for the purpose of carrying out the routine functions: ***Idrisur Rahman Vs. Bangladesh (2008) 60 DLR 714*** (*By majority views*).

However, on 10.05.2011 the Appellate Division declared the system of Non-Party Caretaker Government *ultra vires* the Constitution prospectively. Nevertheless, the Court vide short order allowed for continuance of the said system for the next 2(two) parliamentary election.

The short order passed by the Appellate Division on 10.05.2011 is quoted below:

> *"It is hereby declared:*
>
> > *(1) The appeal is allowed by majority without any order as to costs.*
> >
> > *(2) The Constitution (Thirteenth Amendment) Act, 1996 (Act 1 of 1996) is prospectively declared void and ultra vires the Constitution.*
> >
> > *(3) The election of the Tenth and the Eleventh Parliament may be held under the provisions of the above mentioned Thirteenth Amendment on the age old prinicples, namely, quod alias non est licitum, necessitas licitum facit (That which otherwise is not lawful, necessity makes lawful), salus populi suprema lex (safety of the people is the supreme law) and salus republicae est suprema lex (safety of the State is the supreme law).*
> >
> > *The parliament, however, in the meantime, is at liberty to bring necessary amendments excluding the provisions of making the former Chief Justices of Bangladesh or the Judges of the Appellate Division as the head of the Non-Party Care-taker Government.*
> >
> > *The Judgment in detail would follow.*

*The connected Civil Petition for Leave to Appeal No.596 of 2005 is accordingly, disposed of."*

In this regard, it is pertinent to note that said short order was passed by the Appellate Division on 10.05.2011 and detailed judgment was published on 16.09.2012, i.e. 16 months later. However, the Constitution (Fifteenth Amendment) Act, 2011 was promulgated by the Parliament on 30.06.2011**.** Fact remains, when the Parliament enacted Fifteenth Amendment Act on 30.06.2011, abolishing the entire Thirteenth Amendment Act vide Sections 20 and 21, had completely ignored the legal position that the short order passed by the Appellate Division dated 10.05.2011 allowing to continue with the Non-Party Caretaker Government system for the next 2(two) terms, i.e. Tenth and Eleventh parliamentary election, was in operation. Moreover, while promulgating the said Act it gave no reference to the judgment and order passed by the apex court to that effect.

Thus, there is no doubt to find that the Constitution (Fifteenth Amendment) Act, 2011 is squarely contradictory and in violation of the short order passed by the Appellate Division.

It is, however, well settled that the basic features of our Constitution are neither amendable nor alterable by the amending power of the Parliament, as has been observed by our apex in ***Anowar Hussain Chowdhury case, 41DLR (AD) 165, para-293, p-231,*** *(By majority views),* which runs as under*:*

*"Now, some of the aforesaid features are the basic features of the Constitution and they are not amendable by the amending power of the Parliament. In the scheme of Article 7 and therefore of the Constitution the structural pillars of*

> *Parliament and Judiciary are basic and fundamental. It is inconceivable that by its amending power the Parliament can deprive itself wholly or partly of the plenary legislative power over the entire republic.*"

With this perspective, it is pertinent to quote the observations made by the Appellate Division in the said case while terming "*the sovereignty of the people"* as one of the basic structures of the Constitution, which runs below:

> *"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 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 super-imposing thereupon some extraneous agency, such as 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 will 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 Monarchy. Democracy by Oligarchy or the Judiciary cannot be abolished, although there is no express bar to the amending power given in the Constitution. 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 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" **[1989 BLD (Spl) 1, para-377, p-156]***

Mr. Sharif Bhuiyan, in this regard substantiates his arguments by asserting that the basic structure doctrine as established by the 8*th Amendment Judgment* are structural pillars of the Constitution and they stand beyond any change by amendatory process. According to the *8th Amendment judgment*, he submits, *"democracy"* is one of the basic structures. People's power or sovereignty of people is another basic structure. The only way these words can be put into practice is by way of free and fair election and peaceful transfer of power. In this connection referring to the results of election being conducted under NPCG system he submits that the elections which were held under the NPCG were accepted as being transparent and free and fair; whereas the other elections which were held not under NPCG system became questionable. Interesting names were given to those elections such as, auto-pass elections, midnight elections and dummy elections.

In the given context, he goes to argue that when the Hon'ble Appellate Division in the *8th Amendment judgment* held that the basic structure of the Constitution cannot be wiped out by the amendatory process under Article 142 and that democracy is one of the basic structures

of the Constitution including the right to vote in public election and of the form of government are fundamental features of the Constitution: ***[Fazlul Kader Chowdhury* v. *Mohammad Abdul Hoque (1963) PLD (SC) 486]*** as such, there is no doubt to say that Non-Party Caretaker Government system has become one of the important structural pillars of the basic structures of the Constitution.

While reflecting on the consequence of abolishing the NPCG system by the Fifteenth Amendment he submits that following the abolition of the NPCG system, the nation experienced three consecutive failed elections in 2014, 2018 and 2024. These failed elections ultimately led to the July 2024 students-mass revolution which overthrew the then government on 5 August 2024. In this regard he submits that the entire tragedy that has unfolded in the political arena for the last 15 years and recently, in July-August 2024 following the Fifteenth Amendment is significantly relevant while interpreting the Constitution, because of the principle that the Constitution is a living, organic and evolving document and is like a living tree as it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people: ***A.K.M. Shafiuddin* Vs. *Bangladesh and others: 64 DLR (2012) 508, para- 16*.**

He again contends that a combined reading of the Preamble, and Articles 8 and 11 shows that effective participation of the people in administration can only be ensured if they can elect their representatives through free and fair election. A system that can ensure free, fair, impartial and credible election, which is the foundation and *sine qua non* for democracy. In other words, a system of free and fair election and democracy are integral part of each other.

The NPCG system was incorporated in the Constitution, he goes to argue, for the purpose of ensuring free and fair election and for strengthening democracy and people's power. Said system represented the "*will of the people*" and a "*political consensus and settlement*", as it was enacted in the context of the demand of major political parties and the public including the civil society. Thus, when it was included in the Constitution in 1996 it became a "part of the basic structure", and a "fundamental" feature of the Constitution because it ensured free and fair election. Accordingly, as per the basic structure doctrine, the NPCG system cannot be abolished by exercising the amendment power under Article 142 of the Constitution.

He also contends that admittedly NPCG system was not in the original Constitution and was introduced through an amendment, for which it cannot be prevented from becoming a part of the basic structure of the Constitution. Likewise, removal of judges through Supreme Judicial Council was not in the original Constitution. It was introduced by the Second Proclamation (Tenth Amendment) Order, 1977 (martial law proclamation) and was, later incorporated into the Constitution by the Fifth Amendment of 1979. However, the Hon'ble Appellate Division in ***Government of Bangladesh and others. Vs. Advocate Asaduzzaman Siddiqui and others (supra)*** held that removal of judges through the said Council became a part of the basic structure of the Constitution as it reinforces and ensures a basic structure, namely, the "*independence of judiciary*".

He also goes to contend that in accordance with the *8th Amendment judgment* this Hon'ble Court can consider the consequences of abolishing

the NPCG system by the Fifteenth Amendment in determining the constitutionality of the said amendment. Accordingly, in interpreting the Constitution or any of its provision, the consequence of the interpretation is very important. Moreso, if the Hon'ble Court construes the NPCG system as unconstitutional, it will also have to consider the consequence, i.e. what is the consequence of holding the NPCG system as unconstitutional. In this regard, the Hon'ble Court has to keep in mind that it is not about merely reading the text and stating that NPCG does not fit well with the constitutional framework. The Hon'ble Court must consider the wider political context, the political consensus, consensus of the citizens and the civil society that was behind the NPCG system and also, the consequences which the nation has experienced since the abolition of the NPCG by the Fifteenth Amendment Act, 2011. While interpreting the Constitution the Hon'ble Court needs to take into account the events that took place in the social and the political arena. The Hon'ble Court cannot ignore the fact that 1,500 people had to sacrifice their lives and thousands more have become physically disabled, just for a change of government.

He again submits that all powers belong to the people and they are supposed to have government of the people, by the people and for the people. Yet, they had to sacrifice their lives to that end! How has the nation got there? The nation got there because of the abolition of the NPCG system by the Fifteenth Amendment. While interpreting the constitutionality of the NPCG system, the Hon'ble Court needs to take the above context into account, requires to interpret the Constitution as a living and evolving document, and must take an approach that is dynamic,

progressive and oriented with an objective to meet the demand of the people for restoration of NPCG system.

Article 7 ensures the supremacy of the Constitution, as he submits and that the Supreme Court is not only an independent organ of the State, but it also acts as the guardian of the Constitution. It is the Supreme Court that ensures that any law that is inconsistent with the Constitution will be declared void in exercise of the power of judicial review by reference to Article 7(2) of the Constitution. Since Fifteenth Amendment is inconsistent with the Constitution, i.e. the basic structure of the Constitution, this Hon'ble Court is empowered to declare the Fifteenth Amendment void and without any legal effect by reference to Article 7(2) of the Constitution.

In this regard, Mr. Fida M. Kamal goes to contend that the Fifteenth Amendment is a colourable legislation due to the fact that the power of the Parliament is limited by the Constitution, and the Parliament is prohibited from passing any laws which are contradictory to the basic structure. At the time of passing the Fifteenth Amendment Act, 2011, he argues, the Parliament transgressed the limits placed by the Constitution and thereby has achieved an object which was prohibited by the Constitution. The erstwhile government introduced the autocratic system under a colourable legislation and a colourable legislation is void on the principle that what cannot be done directly, cannot also be done indirectly. In *Asaduzzaman Case* it was held that the Legislature cannot overstep the field of its competence by adopting an indirect means and adoption of such an indirect means to overcome the constitutional limitations is called – fraud on the Constitution ***[71 DLR (AD) 193, para-371]***. The Legislature enjoys the

discretion to pass any laws, but *malafide* exercise of discretionary power vitiates everything, and *malafide* act is a nullity.

Supporting the contentions of Mr. Sharif, he goes to argue that omitting the Non-Party Caretaker government system in violation of the apex Court's order and holding the general election in 2014, 2018 and 2024 proves the dishonest intention or corrupt motive in the exercise of power or a deliberate malicious or fraudulent purpose on the part of the Legislature and therefore, taking off the Non-Party Caretaker Government system is an admitted fact of fraud committed on the Constitution ***[71 DLR (AD) 193, para 372-374].*** Furthermore, he submits, the amendment which touches the basic structure of the Constitution is beyond the constitutional power of the Parliament and therefore, should be discarded as a fraud on the Constitution **[*71 DLR (AD) 243, para-506].*** In ***Anwar Hossain Chowdhury Case, para-355,*** as he contends, it was observed that intention of the makers of a statute is of fundamental importance, considering the enactment. Moreso, in ***Sixteenth Amendment Case,*** it was held that the intention of the framers of the Constitution must be ascertained at the time of judicial review and the Hon'ble Court is empowered to interpret and expound the Constitution. In the said case, it was also held that in a democratic country and under a written Constitution, an amendment is made by the Parliament and not by the Law Minister.

In support of the contentions of the petitioners, Mr. Md. Asaduzzaman, the learned Attorney General appearing for the respondent government submits that during the course of hearing of these Rules a question has been raised to the effect that since the Thirteenth Amendment review petition is pending before the Hon'ble Appellate Division, this

Division cannot hear the Caretaker Government issue. Raising of such question is a misconceived one, for, he submits, even if the Appellate Division holds that Caretaker Government is *intra vires*, it will not washed out the amendment so made by the Fifteenth Amendment. In other words, even if the Appellate Division holds that Caretaker Government is *ultra vires*, even then this Court has the jurisdiction to give decision on the Fifteenth Amendment Act independently inasmuch as the impugned Act No.14 of 2011 does neither refer the Thirteenth Amendment issue, nor it relies on the Appellate Division judgment passed on the *Thirteenth Amendment case*.

In order to fortify his argument he goes to submit that in *Thirteenth Amendment Case*, the Appellate Division framed two key issues: (a) whether the 13th Amendment was *intra vires* or *ultra vires*; and (b) whether the next two terms would be held under the existing Caretaker Government system or not. On the first issue as to whether the Caretaker Government system is *intra vires* or *ultra vires,* out of 7 (seven) Hon'ble judges, 4 (four) said that the Thirteenth Amendment was *ultra vires*, while the other 3 (three) judges found it to be *intra vires*. On the second issue as to whether the next two elections would be held under the Caretaker Government or not, it appears from para 2(3) of the *Thirteenth Amendment Case* that primarily, all the 7 (seven) judges applied the doctrine of necessity and said that next two elections would be held under the Caretaker Government [***64 DLR (AD) (2012) p-169, para- 2(3);*** 16 (sixteen) months later the judgment of the *Thirteenth Amendment case* had been finally published. However, prior to publication of the final judgment, the Constitution (Fifteenth Amendment) Act, 2011 was promulgated by the

Parliament. In the said final judgment, it was found that 3 (three) Hon'ble judges gave verdict to the effect that the next two elections would be held under the Caretaker Government, but the method would be decided by the Parliament. Among the other 4 (four) judges, earlier 3 (three) judges declared it *intra vires*, and the remaining judge being Mr. Justice Surendra Kumar Sinha dissented with his earlier four piers stating that the next two elections would be held under the Caretaker Government excluding judiciary. Thus, on this issue, he submits, the majority decision affirmed that the next two elections would be held under the Caretaker Government. In consequence whereof, the whole nation suffered and have been disenfranchised.

Accordingly, he goes to contend, the *pro-tanto* Fifteenth Amendment is *ex facie* a colorable legislation. Moreso, omitting Articles 58A-58E is an act of commission of fraud resulting to hit the basic structure of the Constitution being the rule of law, democracy, human rights and even, touching the independence of judiciary.

In this regard, he further goes to argue that the political history in Bangladesh from 1982 to 1990 can be described as the revolutionary period for Caretaker Government system in order to strengthen democracy. In 1970, there was a Parliament under the Constitution of Pakistan and elections were held under the said Constitution. However, during the liberation war of Bangladesh, people rejected Pakistan and its Constitution. People wanted their own territory, they demanded their freedom, human rights, rule of law and independence of judiciary. In the election held in 1970, the people of Bangladesh voiced these aspirations and ultimately, fulfilled their demand by way of liberation war. Finally, the Constitution of

Bangladesh was crafted in 1972 referring the "*will of the people*", as its core foundation. The first election to liberate Bangladesh was held in 1973 under this Constitution. From 1982 to 1990, Bangladesh was ruled under the marshal law suspending/abrogating the Constitution by the military power. During this period, figures like Jafar, Zaynal, Dipali Saha, Kanchan, Rawfun, Bosunia, Nur Hossain, Jihad, Dr. Milon and so on became symbols of resistance; the streets of Dhaka were painted with their fresh blood, they stood before the army's vehicle and on 27.11.1990, when Dr. Milon died during protests against the military regime, the people of Bangladesh determined under which law they would be governed. In this way, he contends, the concept of the Caretaker Government came up through the street movement of the people in 1990. The people on the street made it clear that they were united in their desire for a neutral, free and fair election process. Barrister Syed Istiak Ahmed gave a formula that if the will of people would be taken into consideration and they would have formed a consensus, it would be possible to term an interim government and it should be part of the constitutional structure. Having regard to the said concept, for securing the people's right, political parties came to a consensus that a free, fair and neutral election should be conducted by a neutral government comprised of neutral persons headed by the then Chief Justice of Bangladesh. With the consensus of all, the then Chief Justice resigned, the Hon'ble President appointed him as the Chief Adviser and after conducting election, he would go back to the chair of the Chief Justice. Accordingly, it happened.

All these were absent in the Constitution, he submits, but basing on the people's will on the street to materialise the utterance of the people's

heart gave birth to the concept of Caretaker Government system to ensure their voting right which is not merely a fundamental right but a constitutional right through a free, fair and neutral election within 3 (three) months. Subsequently, all these systems were ratified by the next Parliament with retrospective effect.

In this connection he also submits that voting right through a free and fair election is an integral part of the basic structure as well as to the sovereignty of Bangladesh. The respective Caretaker Governments, introduced in Bangladesh, have conducted 4 (four) elections and all these elections were above criticism and controversy.

He also submits that abolishing the Caretaker Government system vide the Fifteenth Amendment Act, 2011 has caused bleeding injuries to the hearts of the people at large. With the repeal of this system, the sovereignty of Bangladesh has been shaken down, the election process has been made a subject matter of external affairs, resulted in the erosion of the constitutional supremacy. Constitutional rule has been gravely compromised, democracy has been destructed and the fundamental rights of the people and rule of law have been severely affected. In consequence whereof the judiciary has been perceived to be controlled by the executive. It has led to political violence and sufferings, the land of this country is stained with the blood of the people. Several national and international human rights reports suggest that around 700 (seven hundred) people were subjected to enforced disappearances, around 4,000 (four thousand) citizens had been killed extra-judicially, around sixty lac people became accused/victims of political persecution. This horrific situation reflects the devastating consequences of the Fifteenth Amendment Act.

He further goes to contend that the Caretaker Government system was introduced in the Constitution in order to codify, substantiate, promote and develop our democratic fabric, to strengthen democracy, to bring harmony in the society, to save the constitutional supremacy, to ensure the rule of law and to make the Parliament and government accountable to the people. Fifteenth Amendment Act, specially omitting the Caretaker Government system *ex facie* hits the basic structure of the Constitution. It is an amendment that suffers from *malice in law.* If this amendment is kept in the Constitution, it will be a betrayal with the spirit of the liberation war of Bangladesh in 1971 and the people's uprising in 1990. It would be completely contrary to the July-August revolution in 2024.

He accordingly, submits that the Fifteenth Amendment Act, 2011 has been promulgated only with a view to prolonging fascism and nothing else and in order to prolong it, the Legislature has involved themselves in committing "*crime against humanity*'' and as such, the impugned Fifteenth Amendment Act, 2011 may kindly be declared *ultra vires* the Constitution.

Mr. Mohammad Jamiruddin Sircar, the learned Senior Counsel appearing with Mr. Zainul Abedin, the learned Senior Advocate on behalf of the Intervener, Bangladesh Nationalist Party (BNP) submits that it is the people who provide legitimacy to the Constitution and the Parliament. Therefore, the Parliament, being the representative of the will of the people, shall have the absolute authority to amend the Constitution without any limitation whatsoever. However, the problematic aspect is that this concept is misapplied when the Parliament is not truly sovereign in its decisions but rather is acting upon the ambitions of some non-democratic

authoritarian forces, illegitimately constituted or prejudicial to the common welfare.

In this regard, he goes to argue that the Constitution (Fifteenth Amendment) Act, 2011, enacted by the Parliament on 30.06.2011, abolished the Non-Party Caretaker Government system, which was initially incorporated in the Constitution by the Constitution (Thirteenth Amendment), Act, 1996 to ensure free and fair general elections by a non-partisan interim government. However, the Appellate Division of the Supreme Court of Bangladesh while passing the short order dated 10.05.2011 in *Asaduzzaman case* though declared the Caretaker Government system unconstitutional but allowed its operation for 2(two) more electoral cycles in order to ensure smooth transition of power. However, the full judgment, providing detailed reasoning and legal foundations pursuant to the short order was released on 03.07.2012. In other words, he submits, Act No. 14 of 2011 was promulgated while the short order of the Appellate Division was in operation and in complete derogation thereof.

In this connection, he goes to contend that the role of judiciary is to interpret the law and ensure that legislative actions conform to the Constitution. Thus, by enacting the Fifteenth Amendment Act, 2011 before publishing the full judgment, the Parliament has acted *malafide*, without the benefit of the comprehensive judicial insights into the constitutionality and implications of the Caretaker Government system. This premature legislative action can be seen as undermining the authority of the judiciary and its role in constitutional interpretation, potentially leading to a breach of the constitutional balance of power. Moreso, he submits that the

enactment of the Fifteenth Amendment Act prior to release of the full judgment of the Appellate Division can be viewed as unconstitutional. It disregards the essential judicial feedback which was necessary for informed legislative decision-making and undermines the principle of separation of powers among the executive, legislative and judicial branches and are critical to the integrity and functionality of the state's constitutional and democratic processes.

The doctrine of separation of powers, as he submits, is a core feature of the constitutional framework of Bangladesh. The caretaker government system, in its original form, was introduced to ensure impartial election oversight, with the judiciary playing a critical role. By removing this safeguard, the Fifteenth Amendment effectively impairs the power of the judiciary and its capacity to act as a check on the executive. Moreover, abolition of the Caretaker Government system significantly affects the democratic process by removing an established mechanism for conducting impartial elections. In a parliamentary democracy, free and fair elections are the cornerstone of governance. The amendment, therefore, raises serious question regarding the constitutional right of the citizens to participate in a fair electoral process. In support he has referred the decision of the case of ***Amiya Bala Paul V. Bangladesh (2013)*** where court reiterated that the right to free and fair election is fundamental to a democratic society. Any legislation or amendment that compromises this principle could be considered unconstitutional. Also, in ***Mohammad Hossain v. Chief Election Commissioner (2005) Case*** this Hon'ble court affirmed the necessity of impartial election oversight, particularly in a polarized political environment. It established a precedent for the role of

Caretaker Government in preserving electoral integrity, as political influence often compromised election credibility. Accordingly, he submits, the abolition of the Caretaker Government system reduces transparency and undermines the people's right to choose their representatives in an impartial setting.

He also submits that Article 7 of the Constitution establishes that all power is vested in the people and that the Constitution is the supreme law of the land. The removal of the caretaker government provision, which was a response to public demand for free and fair elections, can be seen as a violation of the fundamental rights guaranteed to the people of Bangladesh. Referring to the observations so made in ***Bangladesh Italian Marble Works Ltd. V. Government of Bangladesh (2010)*** he submits that in the said case this Hon'ble Court reinforced that any constitutional amendment must not infringe upon the people's fundamental rights. It is implied that any legislation or amendment, if found to be inconsistent with the people's rights, can be declared void.

Accordingly he submits that the Fifteenth Amendment, by removing the Caretaker Government system has disregarded the people's right to elect their representatives through a fair and impartial process and thereby has undermined Article 7 of the Constitution; hence, it is liable to be declared *ultra-vires* the Constitution.

Mr. Mohammad Shishir Manir, the learned Advocate appearing on behalf of the Intervener, Bangladesh Jammaat-e-Islami opened his argument with the following quote of Mr. Ronald Reagan, the 40$^{th}$ President of the United States of America,

> *"Our Constitution is a document in which We the People tell the government what it is allowed to do. We the People are free."*

Keeping in view of the core concept of democracy "*we, the people*" he submits that after the fall of former Ershad government, the concept of Non-Party Caretaker Government was introduced with the consensus of the people. The origin of the demand for Non-party Caretaker Government in Bangladesh can well be found in *"নব্বইয়ের স্বৈরাচার বিরোধী আন্দোলনে তিন জোটের রূপরেখা (১৫, ৭, ও ৮ দলীয় ঐক্যজোট কর্তৃক প্রচারিত প্রচারপত্র, তারিখঃ ২১ নভেম্বর, ১৯৯০)* and the same was given legal validity by the Constitution (Eleventh Amendment) Act. Thus, it is apparent that demand for Non-Party Caretaker Government had attained people's consensus and it is a proof that though constituent power was absent, will of the people was reflected in the constitution amendment. Subsequently, through the Constitution (Thirteenth Amendment) Act, 1996 provision relating to Non-party Caretaker Government was formally inserted in the Constitution.

However, in 2012, he submits the Hon'ble Appellate Division in ***Abdul Mannan Khan vs Government of Bangladesh: 64 DLR (AD) (2012) 169*** (famously known as 13th Amendment case) abolished the Non-Party Caretaker Government. However, the Hon'ble Judges of the 13th Amendment Case has failed to weigh the consequences that may follow from their decision. As a result of their failure our people have suffered irreparable loss for the last 15 years. Every constitutional institution has been shattered. There was no free election, there was news that even dead people had reborn to cast vote, no democracy, no freedom of expression, speech or freedom of media, independence of judiciary has been

destructed, Election Commission was made puppet of the government, numerous political persecutions occurred, corruption was at its peak, administrative institutions stopped functioning, "আয়নাঘর" was created. To bring democracy in the country, to stop the dictator and bring the authoritarian regime down, more than thousand people had to sacrifice their lives. The root of all these destruction lies in the abolishment of Caretaker Government. Otherwise, after every five years government would have changed and there would have been a check and balance in the power and nobody could have become a dictator. In the Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly in 1948, Article 21(3) states:

> *"The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."*

He lastly submits that the Constitution (Fifteenth Amendment) Act, 2011 was promulgated to establish authoritarianism in the country. On a plain reading of this amendment it becomes abundantly clear that the amendments were brought into action with motive to serve the purpose of the then ruling party who wanted to convey certain ideology to the people.

Accordingly, he submits that free and fair election is an inseparable part of democracy and democracy is the basic structure of the Constitution. The Non-Party Caretaker Government being corollary to democracy has attained the status of the basic structure since 1996 and that for free and fair election, Non-Party Caretaker Government has become a dire need of the country.

Mr. Subrata Chowdhury, the learned Senior Advocate appearing with Mr. Mohiuddin Abdul Kadir, the learned Advocate on behalf of the Intervener, Gano Forum, however, submits that the regime that was removed on 5th August by the citizen's uprising led by the students was a regime which was established in violation of the Constitution as there was no free and competitive elections held in 2014, 2018 and 2024 respectively. The citizens' uprising, therefore, did not remove a legal government but removed an illegal and unconstitutional government in order to liberate the nation from an authoritarian, undemocratic and illegal regime and to return to the people of Bangladesh their rights guaranteed by the Constitution.

In this regard, he goes to contend that the Preamble to the Constitution of Bangladesh records the historical back ground of the Constitution, the dream of the people and a solemn covenant to fulfil said dream to be achieved by the Constitution. However, it is a matter of great sadness that even after more than half a century of adopting the Constitution the nation failed to achieve the dream of the martyrs who made the ultimate sacrifice dreaming of a prosperous and progressive country with prestige in the international arena. Many of us fail to realize that we break the solemn covenant when we indulge in corruption, discrimination, selfish partisan activities and that is how we tear up and throw away a Constitution which has been described in the case of *Anwar Hossain Chowdhury as: "Basic feature' or whatever, but that is the fabric of the Constitution which cannot be dismantled by an authority created by the Constitution itself-namely, the Parliament. Necessarily, the amendment passed by the Parliament is to be tested as against Article 7. Because the amending power is but a power given by the Constitution to Parliament, it*

*is a higher power than any other given by the Constitution to Parliament, but nevertheless it is a power within and not outside the Constitution"*

He also goes to argue that in a country where there is a written Constitution prescribed by the 'constituent power' it is the Constitution which is the supreme law of the country and the power is distributed equally to three separate branches, namely, the legislature, judiciary and the executive and the power exercised by all the three branches is "constituted power". The Parliament in Bangladesh is not sovereign and any constitutional amendment made in exercise of the constituted power can be challenged as unconstitutional either for not complying with the procedural requirements for amendment prescribed in the Constitution prior to passing of the Bills or for not complying with the various substantive constitutional limits inherent in the Constitution.

In the present case, he submits, the Fifteenth Amendment Act, 2011, no doubt, was passed on 30.06.2011in direct violation of the short order passed by the Appellate Division. However, fact remains, no writ petition was filed challenging the constitutionality of the unconstitutional amendment due to the fear of persecution by the executive and also, due to the loss of faith of the people in the judiciary when the final judgment was passed deviating totally, by majority views, from the short order passed earlier by the apex court. He also submits that the Fifteenth Amendment did not comply with the codified provisions for constitutional amendment as was required under the Constitution prior to 30 June 2011.

He substantiated his arguments by submitting further that the Fifteenth Amendment Bill could not be considered for passing by the Parliament as it did not contain the long title as is required under Article

142 of the Constitution. There was also a requirement under Article 142(1B) and (IC) of the Constitution for holding a referendum before the President assented to the Fifteenth Amendment Bill. Due to such clear non-compliance with the requirements, as laid down in Article 142(IA)-142(IC) of the Constitution it is liable to be declared void, non-est and *ultra vires* the Constitution.

He further submits that the 13th Amendment was incorporated in the Constitution for the purpose of ensuring free and fair election and for strengthening democracy, which is the basic feature of our Constitution. In this regard, he goes to submit that there was a consensus of opinion in Bangladesh that free and fair elections cannot be held under the government in power in Bangladesh. The Appellate Division of the Supreme Court declared the 13th Amendment, which made provisions of caretaker government, as prospectively void and following the abolishment of the caretaker government the elections held in 2014, 2018 and 2024 were all marred by corruption and gross irregularity. Consequently, the people did not get a chance to vote.

Accordingly, he submits that evidently the 15th Amendment Act, 2011has all the hallmarks of questionable provisions which are against the basic features of the Constitution. It has been passed without complying the mandatory requirements as provided under Article 142(1A),(1B) and 1(C) of the Constitution; hence, it is liable to be declared *ultra-vires* in view of Article 7 of the Constitution.

Mr. Ehsan Abdullah Siddique appearing with Mr. Mohammed Belayet Hossain, the learned Advocates on behalf of Centre for Law Governance and Policy, the Intervener, submits that the Non-Party

Caretaker Government (NCG) reinforced the democratic structure of the Constitution of Bangladesh, which is a basic structure of the Constitution; thus, making it's repeal impermissible. In the *Sixteenth Amendment Case*, he submits, the Appellate Division held that amendments reinforcing basic structures, such as judicial independence, cannot be repealed as doing so would weaken the basic structure of the Constitution. This principle applies to the NCG, as it safeguarded free and fair elections involving broad political participation and strengthening democratic processes. Election without the NCG such as, those which were held in 2014, 2018 and 2024, faced significant controversies, underscoring the NCG's role in upholding democratic integrity.

In this regard, he also goes to argue that in *Bangladesh v Asaduzzaman Siddiqui,* the Appellate Division struck down the Sixteenth Amendment as it had removed the provisions of Supreme Judicial Council and restored the provisions of the original Constitution of 1972. The Appellate Division further held that the amendments introducing the Supreme Judicial Council even though introduced by a martial law amendment, had reinforced a basic structure and could not be repealed. Thus, he submits that the foundations of a legal development which postulates that amendments to the Constitution which bolster or reinforce cannot be repealed.

In the *Eighth Amendment Case, he submits,* democracy has been held to be a basic structure of our Constitution. However, the position of democracy as a feature was reiterated by our apex Court in *Asaduzzaman Siddiqui Case* in the following words:

> *"From the constitutional scheme of our Constitution as discussed above, we can safely conclude that democracy, judicial independence, rule of law among others are the basic structures of the Constitution."*

Accordingly, he submits that the NCG has reinforced the basic structure, i.e. democracy. Hence, following the ratio of the Sixteenth Amendment case, the NCG provisions of the Constitution can no longer be repealed.

He further goes to submit that the Non-Party Caretaker Government (NCG) has evolved into a constitutional convention in Bangladesh. Even a single precedent, if rooted in a significant reason, can create such a convention, as affirmed by the Appellate Division. This convention has historically been the basis for the most widely accepted elections. Conversely, failed elections after the NCG's repeal led to the 2024 mass uprising, demonstrating the essential role of caretaker governance. The current interim government, however, mirrors the NCG model, underscoring the enduring nature of this convention even post-repeal. The Non-Party Caretaker Government (NCG) provisions, he submits, enacted in 1996 are the integral part of the Constitution which was created through constituent power-marked by widespread consensus and mass mobilization and since then it has become a part of the basic structure of the Constitution. In the *Sixteenth Amendment Case*, the Appellate Division reiterated its earlier views in the *Eighth Amendment Case* and held as follows:

> *"As to the constituent power, that is, power to make a Constitution it belongs to the people alone. It is the original power."*

This view is supported by scholars of constituent power such as, Ernst-wolfgang Bockenforde, a former judge of the Federal Constitutional Court of Germany and academic Joel Colon-Rios.

In this regard Bockendforde observes:

> *"….only the people can be considered the bearer (subject) of the constituent power."*

He further observes:

> *"Once a constitution is constituted and the constituent power has accomplished its task, a constitutional organ-the amendment authority-is granted with the legal competence of revising the constitution. What happens to the constituent power? Since constitutions are embedded within the idea of populism-the liberty of people to shape and reshape their society, the presupposition is that the people always retain the power to establish and change their constitutional order. Therefore, constituted organs, including the amendment process, do not consume the constituent power which is neither exhausted nor bound by the existing constitutional limitations-including explicit or implicit unamendability."*

Joel Colon-Rios also argues that original constituent power always remains with the people and can be exercised at the appropriate time, when necessary:

> *"Moreover, both derived and original constitution power can be exercised at any time, and whether to activate the later is harder than to exercise the former (or vice versa) is not necessarily related to their nature ……. A point of distinction between these two notices may be that the exercise of the original constituent power would normally take place in times of popular agitation for constitutional change and through highly participatory procedures. That is to say, the exercise of the derived constituent power merely requires the meeting of certain formalities, while that of the original*

> *constituent power requires that any formalities are accompanied by mass mobilization. ”*

The doctrine of basic structure, he submits, which protects essential elements like democracy, implies that removing these provisions would destabilize the Constitution. Historical and legal perspective from Indian and European jurisprudence support this view, suggesting that once a constitutional pillar like the NCG is removed, it leads to crisis and undermines democratic integrity. Referring to *Eighth Amendment Case*, he argues that the NCG provision meets the criteria for basic structure by ensuring constitutional stability and orderly power transfer, showing that without them, the Constitutional risks collapse. Thus, according to Joel Colon-Rios, the amending power can be exercised by observing the formalities of Article 142 and respecting the basic structure of the Constitution. But for an amendment to the Constitution, to be made in exercise of constituent power, “mass mobilization” is necessary.

He also submits that the contention of the exercise of constituent power in the framing of the NCG provisions is also supported by Bockenforde’s view of constituent power. According to Bockenforde, constituent power arises as a result of special historical-political processes; such as, the massive demand for the NCG in 1996. He observes:

> *“……. Constitutional history shows, it [constituent power] is brought forth in a specific historical-political process, it is born and shaped by specific forces, and, at times, also abolished by them.”*

In this regard, he also goes to argue that the historical-political process prevailing at the time, i.e. 1996 justified the exercise of constituent power in pursuance of which the NCG provisions were framed. Having

concluded that the NCG provisions were framed in exercise of constituent power, these provisions now has the same status as the provisions of the original Constitution. The only thing left to be determined is, he contends, whether the NCG provisions having been framed in exercise of constituent power now, have the status of a basic structure of the Constitution. The Appellate Division has already concluded that democracy is basic structure and over the years the NCG has proved to be a structural pillar. When this pillar was removed, the constitutional process of transfer of power was damaged. There was constitutional chaos and massive loss of life. In this regard, he referred to the tests of *Sahabuddin Ahmed, J* for determining the basis structures, where he holds:

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

Accordingly, he submits that demolishing the NCG has resulted in the constitutional edifice falling down and has caused the constitutional crises that we are facing today; *Shahabuddin Ahmed J's* tests for describing the NCG as a basic feature are satisfied; the NCG provisions of the Constitution are one of its basic structures which is unamendable and hence, cannot be repealed under Article 142 of the Constitution.

Mr. Abdul Momen Chowdhury as being the conscious citizen of Bangladesh as well as a Senior Advocate of the Supreme Court of Bangladesh has come forward as a Intervener to assist the Court. He submits that the people of Bangladesh have experienced bitter consequence because of the 15th Amendment which has created the foundation of

authoritarianism, opened platform for plundering, looting, creating chaos and confusion, indulging in unauthorized torture and killing, controlling all the State machineries including the highest court of the country.

He also submits that the impugned 15th Amendment of the Constitution has made the Constitution a family statute for glorifying the slain President by incorporating his speech; it has created scope for interference of the foreign country in the internal affairs of the country. Consequent to the 15th Amendment the election of the Parliament held in 2014, 2018 and 2024 has been polluted in such a manner that it gave continuity to the fascist regime. He further submits that the revolution of Russia, China and Cuba headed by Lenin, Mao Tse Tung and Ho Chi Minh made revolutionary change in the Constitution incorporating the people's aspiration. He accordingly, contends that the tragedy of July and August' 2024 that befell upon the people of the country is the result of people's representatives' authoritarian behavior which caused mischief to such an extent that it cannot be recorded by simple, ordinary and prudent person in a simple book. It will require persons with outstanding ability and expertise to comprehend the massacre, treason, genocide, chaos, confusion and anarchy etc., which were made to happen due to enormous dictatorial power given to the then Prime Minister vide the impugned Act, 2011. Hence, it needs to be declared *ultra-vires* the Constitution.

Mr. Junayed Chowdhury, the learned Advocate has appeared representing four individuals as being the conscious citizens of the country who have been impleaded as Interveners. He, however, submits that under the theory of constitutionalism, there are some "unwritten fundamental values" that must be upheld during any constitutional exercise and in a

democratic constitutional setting, one of the "unwritten fundamental values" is democracy: ***Reference re Secession of Quebec [1998] 2 S.C.R.217 at para. 49, 51, 61 and 64***. Failure to uphold these "unwritten fundamental values" like democracy results in substantive unconstitutionality, which means the "result", i.e. "what" is amended will be declared unconstitutional: *The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada*, *Richard Albert, (2015) 41:1 Queen's LJ 143 at p.190.*

Mr. Chowdhury in this regard submits that the Constitution of Bangladesh, in fact, makes democracy an express fundamental value (Article 8) and declares the Republic to be a democracy (Article 11). Therefore, any constitutional exercise in Bangladesh like holding elections, which is a precondition to the "*due Constitution of Parliament"* under Article 124 must always uphold democracy, which has been held by our apex court as one of the basic structures of the Constitution in *Anwar Hossain Chowdhury case (supra).*

He also submits that the Constitution does not define the idea of democracy or its meaning. By citing the Canadian case of ***Reference re Secession of Quebec [1998] 2 S.C.R. 217 at para. 65***, he submits that in constitutional law, democracy is described as the process of representative and responsible government and the right of citizens to participate in the political process as voters. Therefore, in a democratic constitution like Bangladesh, what is to be achieved is creating an orderly framework within which people may make political decisions.

Based on the above backdrop, he submits that the Fifteenth Amendment Act, 2011 is in violation of the interveners' fundamental right

of freedom of expression guaranteed under Article 39(2)(a) of the Constitution.

To substantiate his said argument he submits that the right to vote, even if not a fundamental right, is certainly a constitutional right, as this right originates from and is mandated in Article 122(1) of the Constitution. This right to vote is shaped by the statute, namely, the Representation of the People Order, 1972. In other words, there is a distinction between the statutory right to vote *simpliciter* and the culmination of that right to vote in the final act of expressing choice towards a particular candidate by means of ballot. Therefore, although the initial right to vote is not a fundamental right but, at the stage when the voter goes to the polling booth and casts his vote, his freedom to express arises, and this casting of vote in favour of one of the election candidates is tantamount to expression of his opinion and preference and that final stage in the exercise of voting right marks the accomplishment of freedom of expression under Article 39(2)(a) of the Constitution. In support he cites the Indian Supreme Court case of ***People's Union of Civil Liberties v. Union of India: AIR 2003 SC 2363.***

He also submits that a State has a compelling interest in preserving the integrity of its election process and the peoples' right to vote. This means that confidence in the integrity of the electoral processes is essential to the functioning of a participatory democracy. In other words, voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. In support of this submission, Mr Chowdhury cites the US Supreme Court case of ***Purcell v. Gonzalez 549 US 1 (2006) at p. 4.***

Accordingly, he submits that the State has a compelling interest in rooting out the mere "appearance of corruption" in the political process and

even if there is an allegation of electoral fraud or corruption (like rigged election), which is left to fester without a robust mechanism to test and disprove it, then it would also drive honest citizens out of the democratic process and breed distrust of the government. In support, he refers the US Supreme Court case of ***Jake Corman v. Pennsylvania 592 US (2021)*** **at** ***p-9*** citing ***Purcell v. Gonzalez 549 US 1 (2006).***

He again goes to contend that the repeal of Non-Party Caretaker Government system through the Fifteenth Amendment Act, especially of Article 58A and Chapter IIA and amendment of Article 123(3) has allowed the political treachery to creep into Bangladeshi politics, which is evidenced by the questionable general elections held in 2014, 2018 and 2024. By referring to European Parliamentary Research Service Briefing titled "*Bangladesh and the 2024 elections from 'basket case' to rising star"* on December 2023 (under the European Parliament), the Final Report of the European Union Election Expert Mission on the 07 January, 2024 Parliamentary Election, the US Department of State Press Statement dated 08.01.2024, the statement dated 08.01.2024 of the Foreign, Commonwealth and Development Office (FCDO) of the UK Government following the 2024 election, the Press Statement dated 10.01.2024 of the Australian Government on the 2024 general election, and the 2021 Annual Review of DFID, the UK Government's donor arm, under its Project titled *Strengthening Political Participation in Bangladesh, Phase 2 (SPP2),* Mr. Chowdhury highlights the fact that the general elections of 2014, 2018 and 2024 were questionable.

Thus, he argues that the above state of affairs in the 2014, 2018 and 2024 general elections clearly shows that through the Fifteenth

Amendment Act, the people of Bangladesh were deprived of their right to participate in the political process as voters, thereby creating distrust of the government which was amplified by the overthrow of the previous government through the student-led mass protest of July-August 2024 and violating one of the basic structures of the Constitution, i.e. democracy and also, violating the fundamental right of freedom of expression under Article 39(2)(a) of the Constitution.

He accordingly, submits that once it is shown that Article 39(2)(a) is violated by the removal of the Non-Party Caretaker Government through the Fifteenth Amendment Act, the provisions of Article 26(2) of the Constitution is triggered under which the State (includes the Parliament under Article 152) shall not make any law inconsistent with any provisions of Part III dealing with the fundamental rights, and any law so made shall, to the extent of such inconsistency, be void.

Furthermore, as he contends, if this Hon'ble Court declares the Fifteenth Amendment Act to be unconstitutional, then it must formulate a remedy which is commensurate with the extent of the violation. In this regard, he submits that a just and appropriate remedy is to reinstate the Non-Party Caretaker Government system because said system meaningfully vindicates the people's right to vote and freedom to engage in participatory democracy; said system, being a Caretaker Government, is legitimate within the framework of the constitutional democracy of Bangladesh. Moreso, the Non-Party Caretaker Government system is a judicial remedy which vindicates the people's constitutional right to democratic participation while invoking the powers and function of this Hon'ble Court under Article 102 of the Constitution; and that the Non-

Party Caretaker Government system is fair to the incumbent government to hold a free and fair election.

Mr. Chowdhury concludes his submissions by inviting this Court to remember that the student-led mass protest of July-August 2024, like the Pandora's Box, has engulfed the country with tremendous amounts of anger, dissatisfaction and demands. But, like the last element that came out of the Pandora's Box is that the entire nation now looks to 'hope' – the hope that Bangladesh will one day come out of this political turmoil and recognise one of the most basic constitutional rights of her citizens' - the right to vote in a safe environment under a free and fair election, the result of which will remain beyond reproach.

Mr. Mostafa Asgar Sharifee, the learned Advocate-Intervener (In person), however, submits that a Constitution is a formal agreement among individuals in a society to form a State and to establish its organs defining their powers, obligations, and limits, reflecting the collective will to secure mutual benefits like order, security, and justice. From this perspective, a Constitution embodies the terms of social contract, where citizens surrender certain freedoms to the State in exchange for protection of their rights and promotion of the common good. From the perspective of social contract theory, the Preamble and Article 7 of the Constitution of Bangladesh are pivotal in articulating the agreement among the people to establish a sovereign state, define the terms of governance, and ensure the government operates with their consent. Social contract theory, as envisioned by thinkers like Hobbes, Locke, and Rousseau posits that individuals collectively agree to establish a sovereign state, surrendering certain freedoms in exchange for protection of rights.

He further goes to submit that it is high time to reassess the doctrine of basic structure after the successful uprising occurred in July 2024. If the basic structure doctrine had not been adopted in *Anwar Hossain Chowdhury Case* constitutional amendments and developments would have occurred through political processes within Parliament. This would have enabled democratic institutions to evolve naturally in line with changing societal values, allowing for a more organic and representative constitutional development. However, judicial supremacy, one of the basic structures of the Constitution, contradicts Article 7, i.e. people's power. As such, the court should reject this doctrine to enable reforms that align with the uprising's vision of a politically responsive Constitution.

He further contends that the cost of July 2024 uprising, with approximately 2,000 lives lost and thousands permanently disabled, was a direct consequence of the judiciary's invalidation of the ***8th Amendment, 5th Amendment*** and ***13th Amendment cases***, which enabled the 15th Amendment's authoritarian measures and a fascist regime's 15-year rule. This violation of popular sovereignty under Article 7, by undermining democratic consent through electoral fraud, necessitated the people to revolt in order to restore their constitutional authority. Continued judicial reliance on the basic structure doctrine risks enabling future authoritarian regimes to exploit similar rulings, leading to prolonged oppression and further uprisings with devastating human tolls. Constitutional practices must uphold popular sovereignty through political processes, such as referendum, to address the 15th Amendment's flaws, ensuring that the people's will, not judicial intervention, shapes the Constitution to prevent such cycles of tyranny and sacrifice.

Lastly, he submits that the July uprising was a manifestation of the people's desire for change and a move towards greater accountability. If the basic structure doctrine continues to dominate, it may obstruct the possibility of achieving political settlements that could address the root causes of discontent and foster a more inclusive and participatory political environment; thus, perpetuating cycles of unrest. The continued adherence to the basic structure doctrine may impede the opportunities created by the July uprising for genuine democratic reform; ultimately, increasing the risk of another autocratic government emerging in Bangladesh.

Ms. Sonia Zaman Khan, as being the conscious citizen of Bangladesh as well as an Advocate of the Supreme Court of Bangladesh has been impleaded as Intervener to assist the Court on the issue of repealing the Non-Party Caretaker Government system and the effect of the said repeal in the exercise of the right of franchise of the respective citizens of the country.

In this regard, she goes to argue that Constitution (Fifteenth Amendment) Act, 2011 did away with the Non-Party Caretaker Government system in Bangladesh which allowed a non-partisan government to hold general elections in Bangladesh within 90(ninety) days upon expiration of the term of a government. Consequent to obliteration of the said system of government from the Constitution, Bangladesh lost hope for free and fair elections and fell under an undemocratic and tyrannical rule.

In order to substantiate her argument learned counsel submits that peaceful transition of power, ruling by consent, free and fair elections, universal suffrage are usual elements of democracy. In this connection she

goes to contend that every nation is different from the other and the more we research about democracies, the more we realise that it is not only difficult to define democracy, but is also naive to think that precise modes of governance can be prescriptive or superimposed worldwide. Broadly speaking, the idea of democracy involves a sharing of power and processes of participation by many stakeholders. According to John Morison (2008: 303-304), *"everyone affected by a decision has a right to participate in the decision-making process"*. Democracy, as she submits, fundamentally is a struggle over power and an agreement to share power by a defined group of people, provides an entirely different experience for those who are elected into positions of power which they then hold, and those who do not. This may be perceived at two levels, namely, in the power struggles between government and opposition and in the relations between governments and citizens.

The Non-Party Caretaker Government of Bangladesh, as she argues, despite all the political conundrums, clearly provided a response to the first element of such basic failures of participation, by creating a free and fair environment, a level playing field, where the electorate could participate in exercising their basic right to vote during elections. The voter turn-out rate, during such democratic transition, was encouraged by the sheer knowledge of the masses that an election conducted by a caretaker regime is not a sham but a genuine opportunity for participation. It generated considerable trust.

She further goes to submit that with established democracies, institutional procedures of democracy such as, an autonomous Election Commission, a more or less accurate and up-to-date electoral register,

reliable ballot boxes, the integrity of Returning Officers in counting votes, or that there has been no effort to purchase votes or vote rigging, that there is no election-related violence or deaths, or that Returning Officers, due to their political allegiance, are not strategically transferred in polling stations - are factors which are so basic that such questions about them usually do not arise.

In this regard, referring to the concept of democracy by Habermas, a famous German philosopher and social theorist, she submits that democracy cannot be equated with any particular set of institutional mechanisms such as, voting, separation of powers or representation. Rather, it is an institutional order whose legitimacy depends on "*collective will-formation through discourse"*. Accordingly, she quotes the following words of Habermas (1979: 186).

> *"Democracy is a question of finding arrangements which can ground the basic presupposition that the basic institutions of the society and the basic political decisions would meet with the unforced agreement of all those involved, if they could participate, as free and equal, in discursive will-formation. Democracy is the kind of politics that favours discursively mediated consensus over other ways of making collective decisions, namely by means of coercive authority, the authority of traditional or other non-discursively created identities or the authority of the markets."*

She also goes to submit that Constitution as unfinished projects are constantly amended and revised. They are part of a self-correcting constant learning process in which a society further develops the commitments made by the earlier generations. These commitments are implicit within a discursive conception of democratic law making. They are guarantees of autonomy for all citizens, both in the public, political realm and private,

personal one. This unfolding of basic commitments takes the form of an increasingly sophisticated system of constitutional rights. She offers to view democracy as theoretically 'unrestricted' and unlimited liberty of 'will formation' enjoyed as vested right by the 'united citizens'.

The caretaker system of governance under the Constitution of Bangladesh, she argues, for example, made its entry into the constitutional text following an upsurge of popular support. Nevertheless, its introduction could not be fully described as a democratic act. It arose initially as a kind of informal agreement between the various political protagonists to address a particular predicament, namely how to get rid of military rule. However, the paradoxical relation between democracy and the rule of law or will formation and constitutionalism resolves itself in the dimension of historical time, provided one conceives the Constitution as a project that makes the founding act into an ongoing process of constitution-making that continues over time and possibly even across generations. The Caretaker Government in Bangladesh is clearly an unelected body that governs the State for an interim period, which is a new dimension to politico-legal philosophy of transition to democracy, and yet it is thought to be the outcome of the will of the people due to the social and political reality of time, despite appearing to be opposed to the politics of electoral democratic principles.

She further contends, the electorates of Bangladesh does not want to have the accolades of a failing State, though the right kind of thinking, the right kind of leadership which would take the nation forward, at a pace the nation wants, having the quality the nation wants, is regrettably amiss. The Caretaker government system has now been demolished. As the whole

country is manifestly held to ransom by many types of petulant abuses of power, the top figures of leadership, as potential role models of good governance have failed their own country and the electorate and ruin the peaceful sailing of the people of Bangladesh and its democracy in the last 16 years. The only way forward is to create a government that acquires legitimation on the basis of the "*will of the people*".

As she argues, it is apparent on the face of records as well as experienced by the nation that upon enactment of the Fifteenth Amendment of the Constitution, all institutional structures of the country including the judiciary, the Election Commission, the police and rule of law and constitutional governance have been destroyed. As such, this amendment in addition to the procedural impropriety under Article 142 of the Constitution, in public interest, ought to be declared to be *ultra vires* the Constitution.

***Democracy and free and fair election are inseparable twins.***

As has been observed earlier, the Constitution is the rule of recognition with reference to which the validity of all laws including the constitutional amendments will have to be examined. An amendment of the Constitution is not a grundnorm because it has to be according to the method provided in the Constitution. Total abrogation of the Constitution, which is meant by destruction of its basic structure cannot be comprehended by the Constitution. The Constitution remains at the apex because it is the supreme law-it remains *sui generis* only so long it is accepted by the people: ***41 DLR (AD) 165 para-218, p-221.***

Further, it has been observed;

> *"We are relieved of the anxiety as to whether the Preamble is a part of the Constitution or not as it has been the case in some other country. Article 142(1A) stipulates that a Bill for amendment of the Preamble and provisions of Articles 8, 48, 56, 80, 92A and Article 142 when passed in the Parliament and presented to the President for assent" the President shall within the period of seven days after the Bill is presented to him, cause to be referred to a referendum the question whether the Bill should or should not be assented to". Hence the Preamble can only be amended by referendum and therefore is a part of the Constitution. .....*
>
> *Few Constitutions do have such a Preamble. Its amenability is rigidly protected which can only be done by the people at a referendum. .....*
>
> *..... in our Constitution the Preamble can only be altered by the people because our Constitution has proceeded from the people and it is not rhetorical flourish" **[ 41 DLR (AD) 165, para-53, 54, 55, p-197]**.*

The Preamble of our Constitution reflects the objectives of the Constitution declaring the people to be the source of power as well as the Constitution itself. It pledged that the high ideals of nationalism, socialism, democracy and secularism to be the fundamental principles of the Constitution. It declared that the fundamental aim of the State is to realize a socialist society, free from exploitation through democratic process- a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic, and social, will be secured for all citizens. Said concept is further fortified with the declaration of the fundamental principles of State Policy, as set out in Part II of the Constitution, which shall be applied by the State while promulgating law keeping in view of the social, economic and political concepts of

Bangladesh and shall be fundamental to the governance of Bangladesh, a guide to interpretation of the Constitution and other laws: [*Article 8(2) of the Constitution]*.

However, while discussing the features of basic structures the Appellate Division in the *8th Amendment case* had taken into consideration the case of ***Smt. Indira Gandhi Vs. Raj Narain, AIR 1975 SC 2299*** where the validity of the Constitution 39th Amendment Act, 1971 was challenged. The Supreme Court of India while declaring the said Amendment Act invalid, found that the amendment had violated *"the principle of free and fair election"* which is an essential postulate of democracy-which is in its turn a part of the basic structure of the Constitution: ***41 DLR (AD) 165 para-358 p- 248.*** Ultimately, our Appellate Division has categorically found democracy as the basic structure of the Constitution, which cannot be wiped out by the amendatory process under Article 142: ***[1989 BLD (Special) 1 para-377, p-156]***.

Democracy, in our Constitution, refers to denote *"People's power"*. It stands for the actual, active and effective exercise of power by the people. Democracy means the ability of the people to choose and dismiss a government. In the present context, it refers to the political participation of the people in running the administration of the government. It conveys the state of affairs in which each citizen is assured of the right of equal participation in the polity. ***R.C. Poudyal Vs. Union of India and others. (1994) Supp 15CC 324***.

It is already established through the process of time that democracy is established through the process of free and fair election, i.e. the right to vote in public election without any hindrance, without any interference,

without any undue influence, be it political or administrative, towards formation of a democratic government, being represented by the people selected by the respective voters. Further, Article 11, one of the fundamental principles of State policy also ensures that "*the Republic shall be a democracy. ... in which effective participation by the people through their elected representatives in administration at all levels shall be ensured*".

*"Thus, free, fair and periodic elections are part of the Constitution. ..... Democracy and free and fair elections are inseparable twins. There is almost inseverable umbilical cord joining them. The little man's ballot and not the bullet is the heart beat of democracy. ....."*. ***Special Reference No.1 of 2002, Ref by President, AIR 2003 SC 87.***

In other words, democracy and free and fair election are part of our Constitution and are fundamentally one of the important basic structures of the Constitution.

***Non-party Caretaker Government system, a part of the basic structure of the Constitution since 1996 in view of the "will of the people". -***

Admittedly, Non-Party Caretaker Government system was not in the original Constitution, it was introduced in the Constitution vide the Constitution (Thirteen Amendment) Act, 1996 materialising the voice of the people of Bangladesh who shed blood on the street with aspiration and demand to be governed under the rule of law, with freedom to exercise their right to choose their choice of representatives under a free and fair election and thereby to strengthen their will guaranteed under Article 7, "*the pole star of the Constitution"*.

If the historical background, the Preamble, the entire scheme of the Constitution, the relevant provisions thereof including Article 142 are kept in mind there can be no difficulty to discern that Non-party Caretaker Government system being intertwined with democracy became part of the basic structure of the Constitution since 1996 on the consensus of the major political parties and the public including the civil society, reflecting the *"will of the people"* to have *"free and fair election"* with *"political consensus and settlement"*. The system which was introduced and made part of the Constitution to strengthen our democracy, rule of law, independence of judiciary and other allied basic structures of the Constitution.

***Consequence of obliteration of the Non-Party Caretaker Government system.-***

It is well settled that the doctrine of basic structure cannot be rejected if consequence of its rejection is taken into consideration: ***41 DLR (AD) 165, p-251, para 368.*** It is the categorical findings of the apex court that our Constitution is not only a controlled one but the limitation on the legislative capacity of the Parliament is enshrined in such a way that a removal of any plank will bring down the structure itself: ***41DLR (AD) 165, p-216, para-184***. The amending power of the Parliament is but a power given by the Constitution to the Parliament; it is a higher power than any other given by the Constitution to Parliament, but nevertheless it is a power within and not outside the Constitution: ***41 DLR (AD) 165, p-222, para 220.***

Considering the above, if we give a glance at the consequence of abolishing the Non-Party Caretaker Government system by the Fifteenth Amendment Act, 2011 the result is: the three consecutive elections which were held in 2014, 2018 and 2024 in the absence of the said system have failed to demonstrate public confidence that those were held freely and fairly ensuring the right of franchise of the respective voters. Whole world witnessed disenfranchisement of the citizens in particular. Ultimately, it led to July-August, 2024 a nationwide student-mass revolution involving sacrifice of the lives of thousands of people including thousands of people becoming physically disabled permanently, just for a change of government. Eventually, the erstwhile government had to step down from power leading to formation of an interim government under extraordinary circumstances which does not base its root in the Non-party Caretaker Government system but backed by the reference of the Appellate Division under Article 106 of the Constitution and the people at large.

Now, the entire focus or demand of the nation is for establishing a system which will effectively ensure free, fair and impartial election for protecting democracy, rule of law, and independence of judiciary, which can be held only under a Non-Party Caretaker Government system, which will pave the way for a new democracy, a new hope, new freedom and a new Bangladesh.

At this juncture, we must remember, if the Constitution is to endure it needs to respond to the will of the people by incorporating the changes demanded by the people. The needs of the nation may call for severe abnegation, though the needs of the evolutionary changes in the fundamental law of the country do not necessarily destroy the basic

structure of its government. At the end of the day, what does the law live for, if it is dead to the living needs: ***Kuldip Nayar vs. Union of India and others: AIR 2006 SC 3127.***

In view of the above, it is unequivocally found by this court that since the Parliament, being a legislative body, is devoid of power to amend the Constitution which touches the basic structure of the Constitution and as such, repealing Article 58A along with Chapter IIA relating to Non-Party Caretaker Government by Sections 20 and 21 of the Act No.14 of 2011, i.e. Constitution (Fifteenth Amendment) Act, 2011 is hereby declared *ultra vires* the Constitution and hence, is void with prospective effect. Resultantly, Sections 20 and 21 of the Act, 2011 are hereby declared void.

***Repealing referendum under Article 142 without referendem.-***

Article 142, as it stood in the original Constitution of 1972, is quoted below:

> *"সংবিধানের বিধান সংশোধন বা রহিতকরণের ক্ষমতা*
>
> *১৪২। এই সংবিধানে যাহা বলা হইয়াছে, তাহা সত্ত্বেও*
>
> *(ক) সংসদের আইন-দ্বারা এই সংবিধানের কোন বিধান সংশোধিত বা রহিত হইতে পারিবে;*
>
> *তবে শর্ত থাকে যে,*
>
> *(অ) অনুরূপ সংশোধনী বা রহিতকরণের জন্য আনীত কোন বিলের সম্পূর্ণ শিরনামায় এই সংবিধানের কোন বিধান সংশোধন বা রহিত করা হইবে বলিয়া স্পষ্টরূপে উল্লেখ না থাকিলে বিলটি বিবেচনার জন্য গ্রহণ করা যাইবে না;*
>
> *(আ) সংসদের মোট সদস্য-সংখ্যার অন্যূন দুই-তৃতীয়াংশ ভোটে গৃহীত না হইলে অনুরূপ কোন বিলে সম্মতিদানের জন্য তাহা রাষ্ট্রপতির নিকট উপস্থাপিত হইবে না;*
>
> *(খ) উপরি-উক্ত উপায়ে কোন বিল গৃহীত হইবার পর সম্মতির জন্য রাষ্ট্রপতির নিকট তাহা উপস্থাপিত হইলে উপস্থাপনের সাত দিনের মধ্যে তিনি বিলটিতে সম্মতিদান করিবেন, এবং তিনি তাহা করিতে অসমর্থ হইলে উক্ত মেয়াদের অবসানে তিনি বিলটিতে সম্মতিদান করিয়াছেন বলিয়া গণ্য হইবে।"*

Subsequently, in 1973 it has been amended in the following terms:

*সংবিধানের বিধান সংশোধনের ক্ষমতা*

*১৪২। (১) এই সংবিধানে যাহা বলা হইয়াছে, তাহা সত্ত্বেও*

*(ক) সংসদের আইন-দ্বারা এই সংবিধানের কোন বিধান সংযোজন, পরিবর্তন, প্রতিস্থাপন বা রহিতকরণের দ্বারা সংশোধিত হইতে পারিবে;*

*তবে শর্ত থাকে যে, (অ) অনুরূপ সংশোধনীর জন্য আনীত কোন বিলের সম্পূর্ন শিরনামায় এই সংবিধানের কোন বিধান সংশোধন করা হইবে বলিয়া স্পষ্টরূপে উল্লেখ না থাকিলে বিলটি বিবেচনার জন্য গ্রহণ করা যাইবে না;*

*(আ) (As it was in 1972)*

*(খ) (As it was in 1972)*"

In 1979, Article 142 has further been amended, which runs as under:

"*সংবিধানের বিধান সংশোধনের ক্ষমতা*

***১৪২।(১) (As it was in 2nd Amendment in 1973).***

*(১ক) (১) দফায় যাহাঃ বলা হইয়াছে, তাহা সত্ত্বেও এই সংবিধানের প্রস্তাবনার অথবা ৮, ৪৮, ৫৬, ৫৮, ৮০ বা ৯২ক অনুচ্ছেদ অথবা এই অনুচ্ছেদের কোন বিধানাবলীর সংশোধনের ব্যবস্থা রহিয়াছে এইরুপ কোন বিল উপরি-উক্ত উপায়ে গৃহীত হইবার পর সম্মতির জন্য রাষ্ট্রপতির নিকট উপস্থাপিত হইলে উপস্থাপনের সাত দিনের মধ্যে তিনি বিলটিতে সম্মতি দান করিবেন কি করিবেননা এই প্রশ্নটি গণভোটে প্রেরণের ব্যবস্থা করিবেন।*

*(১খ) এই অনুচ্ছেদের অধীন গণভোট রাষ্ট্রপতি পদে নির্বাচনের জন্য প্রস্তুতকৃত ভোটার তালিকা ভুক্ত ব্যক্তিগণের মধ্যে নির্বাচন কমিশন কর্তৃক আইনের দ্বারা নির্ধারিত মেয়াদের মধ্যে ও পদ্ধতিতে পরিচালিত হইবে।*

*(১গ) এই অনুচ্ছেদের অধীন কোন বিল সম্পর্কে পরিচালিত গণভোটের ফলাফল যেদিন ঘোষিত হয় সেইদিন*

*(অ) প্রদত্ত সমুদয় ভোটের সংখ্যাগরিষ্ঠ ভোট উক্ত বিলে সম্মতি দানের পক্ষে প্রদান করা হইয়া থাকিলে, রাষ্ট্রপতি বিলটিতে সম্মতিদান করিয়াছেন বলিয়া গণ্য হইবে, অথবা*

*(আ) প্রদত্ত সমুদয় ভোটের সংখ্যাগরিষ্ঠ ভোট উক্ত বিলে সম্মতি দানের পক্ষে প্রদান করা না হইয়া থাকিলে, রাষ্ট্রপতি বিলটিতে সম্মতিদানে বিরত রহিয়াছেন বলিয়া গণ্য হইবে।*"

Subsequently, in 1991 it has been amended in the following terms:

"*সংবিধানের বিধান সংশোধনের ক্ষমতা*

***১৪২। (১) (As it was in 5th Amendment in 1979 ).***

*(১ক) (১) দফায় যাহা বলা হইয়াছে, তাহা সত্ত্বেও এই সংবিধানের প্রস্তাবনার অথবা ৮, ৪৮ বা ৫৬ অনুচ্ছেদ অথবা এই অনুচ্ছেদের কোন বিধানাবলীর সংশোধনের ব্যবস্থা রহিয়াছে এইরূপ কোন বিল উপরি-উক্ত উপায়ে গৃহীত হইবার পর সম্মতির জন্য রাষ্ট্রপতির নিকট উপস্থাপিত হইলে উপস্থাপনের সাত দিনের মধ্যে তিনি বিলটিতে সম্মতি দান করিবেন কি করিবেন না এই প্রশ্নটি গণভোটে প্রেরণের ব্যবস্থা করিবেন।*

*(১খ) এই অনুচ্ছেদের অধীন গণভোট সংসদ নির্বাচনের জন্য প্রস্তুতকৃত ভোটার তালিকা ভুক্ত ব্যক্তিগণের মধ্যে নির্বাচন কমিশন কর্তৃক আইনের দ্বারা নির্ধারিত মেয়াদের মধ্যে ও পদ্ধতিতে পরিচালিত হইবে।*

*(১গ) (As it was in 5th Amendment in 1979)*

*(১ঘ) (১গ) দফার কোন কিছুই মন্ত্রিসভা বা সংসদের উপর আস্থা বা অনাস্থা বলিয়া গণ্য হইবে না।*

*(২) এই অনুচ্ছেদের অধীন প্রণীত কোন সংশোধনের ক্ষেত্রে ২৬ অনুচ্ছেদের কোন কিছুই প্রযোজ্য হইবে না।"*

After impugned amendment vide Act No.14 of 2011, Article 142 stands as under:

**"সংবিধানের বিধান সংশোধনের ক্ষমতা**

*[১৪২। এই সংবিধানে যাহা বলা হইয়াছে, তাহা সত্ত্বেও-*

*(ক) সংসদের আইন-দ্বারা এই সংবিধানের কোন বিধান সংযোজন, পরিবর্তন, প্রতিস্থাপন বা রহিতকরণের দ্বারা সংশোধিত হইতে পারিবেঃ*

*তবে শর্ত থাকে যে,*

*(অ) অনুরূপ সংশোধনীর জন্য আনীত কোন বিলের সম্পূর্ন শিরনামায় এই সংবিধানের কোন বিধান সংশোধন করা হইবে বলিয়া স্পষ্টরূপে উল্লেখ না থাকিলে বিলটি বিবেচনার জন্য গ্রহণ করা যাইবে না;*

*(আ) সংসদের মোট সদস্য-সংখ্যার অন্যূন দুই-তৃতীয়াংশ ভোটে গৃহীত না হইলে অনুরূপ কোন বিলে সম্মতিদানের জন্য তাহা রাষ্ট্রপতির নিকট উপস্থাপিত হইবে না;*

*(খ) উপরি-উক্ত উপায়ে কোন বিল গৃহীত হইবার পর সম্মতির জন্য রাষ্ট্রপতির নিকট তাহা উপস্থাপিত হইলে উপস্থাপনের সাত দিনের মধ্যে তিনি বিলটিতে সম্মতিদান করিবেন, এবং তিনি তাহা করিতে অসমর্থ হইলে উক্ত মেয়াদের অবসানে তিনি বিলটিতে সম্মতিদান করিয়াছেন বলিয়া গণ্য হইবে।]"*

*"Power to amend any provision of the Constitution*

*"[142. Notwithstanding anything contained in this Constitution-*

*(a) any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of Parliament :*

*Provided that-*

*(i) no Bill for such amendment shall be allowed to proceed unless the long*

*title thereof expressly states that it will amend a provision of the Constitution;*

*(ii) no such Bill shall be presented to the President for assent unless it is passed by the votes of not less than two thirds of the total number of members of Parliament ;*

*(b) when a Bill passed as aforesaid is presented to the President for his assent he shall, within the period of seven days after the Bill is presented to him assent to the Bill, and if he fails so to do he shall be deemed to have assented to it on the expiration of that period.]"*

It is, thus, apparent that the Constitution (Fifteenth Amendment) Act, 2011 has purported to amend the Preamble, Articles 8, 48, 56 and Article 142 itself of the Constitution including referendum. However, vide Article 142(1A), as it then was vide Twelfth Amendment Act, 1991 a referendum was mandatory to be conducted by the Election Commission with the assent of the Hon'ble President of the Republic for bringing any amendment of the Preamble or any provisions of Articles 8, 48 or 56 or this Article, i.e. Article 142. The Legislature vide the Fifteenth Amendment has amended Article 142 repealing all provisions relating to referendum, i.e. sub-articles (1A)-(1D) and (2) of Article 142, without conducting referendum.

Now, the question remains, whether referendum was required under Article 142 prior to making amendment of Article 142 vide the Fifteenth Amendment Act, 2011.

Sub-articles (1A), (1B) and (1C) of Article 142 as to referendum was incorporated in the Constitution by the 2nd Proclamation (15th Amendment) Order, 1978 (2nd Proclamation Order No. IV of 1978), which was subsequently ratified, confirmed and validated by the Fifth Amendment Act, 1979. Later, Fifth Amendment Act, 1979 was declared unconstitutional by the Appellate Division in ***Khondaker Delwar Hossain, Secretary, BNP and another Vs. Bangladesh Italian Marble Works and another: 62 DLR (AD) 298*** (*popularly known as 5th Amendment judgment*) vide judgment and order dated 01.02.2010. However, the referendum of Article

142 was subsequently approved by the Fifth Parliament vide Section 19 of the Constitution (Twelfth Amendment) Act on 18.09.1991. Fact remains, Twelfth Amendment Act, 1991 omitted Articles 58, 80 and 92A, as were included in sub-article (1A) of Article 142 vide the Fifth Amendment Act, 1979.

In this regard, Mr. Sharif Bhuiyan, Mr. A.S.M. Shahriar Kabir, including the learned Attorney General in one voice submit that in the *Sixteenth Amendment Case [71 DLR (AD) para 208–215, pp-153-155]* our apex court highlighted the importance of referendum and ratification. In the said paragraph their Lordships categorically upheld that if any Act or amendment or any international treaty is ratified by or passed by a referendum, that is obligatory for the Parliament to obey. In this regard it has been contended that before the promulgation of Fifth Amendment, the then government placed a referendum and on basis of the referendum, the Fifth Amendment Act was passed; but this Hon'ble Court in the *5th Amendment Case* declared the said amendment void. However, in the Thirteenth Amendment Case, *[64 DLR (AD) para-70, pp-187 and 197]* the Appellate Division observed, *inter-alia,* that "সংবিধান সংশোধনের জন্য গনভোটের প্রশ্নে তিনি বলেন যে সংবিধান পঞ্চম সংশোধন মোকাদ্দমা প্রদত্ত রায়ের পরে উক্ত সংশোধনী কর্তৃক আনীত সংবিধানের ১৪২ অনুচ্ছেদের সংশোধনটি বিলুপ্ত হইয়াছে বিধায় গণভোটের কোন প্রশ্ন আর ওঠেনা। In paragraph 191, it was further observed that " হাইকোর্ট বিভাগে আরেকটি যুক্তি তুলিয়া ধরা হইয়াছে যে, সংবিধানের ১৪২ অনুচ্ছেদ অনুসারে এই সংশোধনীটির জনমত যাচাইয়ের নিমিত্ত গণভোট আহ্বান করা হয় নাই বিধায় উহা অশুদ্ধ।এই প্রসংগে বিজ্ঞ এ্যাডভোকেট মহোদয়ের মত হইল পঞ্চম সংশোধনীর রায়ের পরে গণ ভোটের আর আবশ্যকতা নাই।কারণ ঐ রায় দ্বারা গণভোটের বিষয়টিও সংবিধানের সহিত অসামঞ্জস্যপূর্ণ মর্মে ঘোষিত হইয়াছে।" But, the said case did not discuss elaborately the reasons for making the referendum redundant.

Also, it has been argued that the Twelfth Amendment was passed vide Act No.28 on 18.09.1991 and by the said Amendment, the provision of referendum in Article 142 in the Fifth Amendment was replaced and recast. Till date, there is no judicial pronouncement declaring the Twelfth Amendment *ultra vires* or repugnant to the Constitution. As such, under the substituted Article 142 by the Twelfth Amendment Act, 1991 referendum is mandatory, and without referendum, the Preamble, or any provision of Articles 8, 48, 56 or even, Article 142 of the Constitution cannot be amended. Moreso, as they argued, under the settled principle of law, basic structure of the Constitution cannot be changed, altered or amended without referendum. The Parliament ought to have conducted a referendum for passing the Fifteenth Amendment Act, 2011 and without referendum, the Fifteenth Amendment is *ultra vires* the Constitution.

In support of the said contentions, Mr. Mohammad Jamiruddin Sircar, the learned Senior Counsel adds by submitting that the provision of referendum for amending Preamble, Articles 8, 48 and 56 is not only a ceremonial issue, it got effected by the referendum held on 15th September, 1991 for the ratification of the Twelfth Amendment of the Constitution and in line with that "গণভোট আইন, ১৯৯১" was promulgated and is still in force. As such, without referendum of the Constitution there was no scope for amendment of Preamble, Part I, Part II and other provisions of the Constitution that give rise to basic structure; hence, it should be struck down.

He also goes to argue that the Constitution (Fifteenth Amendment) Act, 2011 has been purportedly made under Article 142 of the Constitution where there were specific provisions for referendum in case of amending

certain articles of the Constitution including the Preamble. Article 7B has been inserted by making certain articles unamendable whereas Article 7B was inserted under Article 142 of the Constitution and the same Article 142 has been amended by the same Fifteenth Amendment Act, 2011. Is it not putting the cart before the horse? By this way, he submits, a serious parliamentary fraud has been committed.

There is no doubt, as he submits, that the Constitution should not be changed for light or transient causes, but when weighty reasons appear, at those times veneration for antiquity must not hold them back. However, the Constitution was never thought to be a perfect document. It is the solemn expression of the will of the people. No one ever intended that all generations to come should abide by the same fundamental principles or basic features of the Constitution of today for all time to come.

This amending provision, he goes to argue, is the very ground that allowed this country to revert from one party rule to a multi-party rule, from presidential government to the parliamentary form, from a no woman representation to ensured women seats. The amending power of the Constitution is the power to salvage this country from crisis as it did once when the Non-Party Caretaker Government was incorporated in the Constitution. The people should be taught to defend the Constitution and not to circumvent it, as is reflected in the wordings of Robert Browning, in *Rabbi Ben Ezra*, *"The best is yet to be, the last of life, for which the first was made"*.

Accordingly, he submits that the Constitution (Fifteenth Amendment) Act, 2011 without adherence to mandated referendum process under Article 142, which enshrines the principle of "*we, the*

*people*", constitutes a profound democratic deficit; as such, this amendment should be struck down in its entirety.

In support of the contentions of the petitioners Ms. Ishrat Hasan, the learned Advocate appearing with Mr. Md. Abdur Rouf, the learned Advocate on behalf of the Intervener, Insaniyat Biplob Bangladesh goes to submit that before Fifteenth amendment, referendum was mandatory for amending Preamble, Articles 8,48, 56 and 142. The Fifteenth Amendment brought changes to the Preamble, Articles 8 and 142 without resorting to any referendum; thus, violated the constitutional provision as well as the sovereign power of the people to decide whether they at all want such drastic and fundamental changes to the Constitution. By this amendment the Parliament has upgraded itself into a constituent assembly at the detriment of the will of the people. Moreso, it is the general principle of parliamentary law that a future parliament is never bound by its predecessor except in the following manner and form. Accordingly, she submits that the impugned amendment having been made in violation of the Constitution itself is liable to be declared *ultra-vires* the Constitution.

***Power of amendment under Article 142 is subject to Article 7 of the Constitution.***

Article 142 of the Constitution deals with the power of the Parliament to amend the Constitution by way of addition, alteration, substitution or repeal by Act of Parliament subject to compliance of the mandatory procedures as prescribed therein. The word “amendment” has to be construed considering Article 7 of the Constitution which provides that this Constitution is the solemn expression of the will of the people of Bangladesh. As such, an “amendment” of the Constitution must conform to

the democratic pattern as envisaged by the Constitution. Here, the power which the Parliament may exercise is not the power to override the constitutional scheme.

The reason for making provision for the amendment of the Constitution is the need for orderly change in accordance with the Constitution. If, however, the change in the constituted instrument fails to respond to the will of the people in changed conditions and is posed as the stumbling block in their progress to reform it will be looked upon with distrust by the people and shall hardly have a chance to survive against the will of the people.

Fact remains that challenging the Fifth Amendment Act, 1979 writ petition No.6016 of 2000 was filed after the enactment of Twelfth Amendment Act, 1991. In the respective judgments and orders, however, neither the High Court Division nor the Appellate Division made any observation on the amendment of Article 142 which took place by the Twelfth Amendment Act, 1991. Hence, in view of the Constitution (Twelfth Amendment) Act, 1991 the need for referendum arises independently for making amendment of Article 142 in order to carry out the will of the people.

As has been observed earlier, vide the Fifteenth Amendment Act, 2011 the Parliament in exercise of power as provided in Article 142 has amended, among others, Article 142 itself so far it relates to the provision of referendum, i.e. sub-articles 1A-1D of Article 142 without conducting referendum; thus, negates the expression of the will of the people.

Consequently, without holding referendum amending Article 142 in order to omit referendum is repugnant to the Constitution; hence, is void being *ultra vires* the Constitution.

Accordingly, Section 47 of the Act No. 14 of 2011 vide which Article 142 of the Constitution, so far it relates to excluding the provision of referendum, is hereby declared void. Resultantly, Article 142 of the Constitution as it has been incorporated vide the Twelfth Amendment Act, 1991 is hereby restored.

***Article 7A and 7B:***

Article 7 of the Constitution has been termed by our Appellate Division as the *"pole star"* of the Constitution in the *8th Amendment Case* where it has been emphatically declared that all powers in the Republic belong to the people. Thus, it establishes the concept of sovereignty of the people, which is reflected in the wordings of the Preamble "*We, the People of Bangladesh*", whose will is the supreme.

While analyzing Article 7 our apex court observed, *inter-alia,* at ***p-214, para- 167 of 41 DLR (AD) 165:***

> *"Law as defined in Article 152 means any Act, ordinance, order, rule and regulations by law, notification or other legal instruments and any custom or usage having the force of law in Bangladesh. Article 7 says that if any law is inconsistent with the Constitution that law shall to the extent of inconsistency be void. When Article 26 says about the inconsistency of any law with the fundamental rights to be void, Article 7 operates in the whole jurisdiction to say that any law and that law includes also any amendment of the Constitution itself because Article 142 says that amendment can be made by Act of Parliament. Therefore, if any amendment which is an Act of Parliament contravenes any*

*express provision of the Constitution that amendment act is liable to be declared void. So says Article 7."*

In the *8th Amendment case*, an argument had been advanced by the then learned Attorney General that amending power is a constituent power, not legislative power; as such, the Parliament has unlimited power to amend the Constitution invoking its constituent power. While negating the said proposition the Appellate Division observed as follows:

*"The Constituent power is here with the people of Bangladesh and Article142 (1A) expressly recognizes this fact. ..... the "law" in Article 7 is conclusively intended to include an amending law. An amending law becomes part of the Constitution but an amending law cannot be valid if it is inconsistent with the Constitution. ..... No Parliament can amend it because Parliament is the creation of this Constitution and all powers follow from this article namely, Article 7..... . " [**41 DLR (AD) 165, para 184, 207, pp-216, 220**].*

The apex court in its observation has also found *"sovereignty of the people, supremacy of the Constitution, democracy, republican government, unitary state, separation of powers, independence of the judiciary and fundamental rights",* as the basic structures of the Constitution.

***Does Article 7A infringe upon the right to freedom of speech and expression?***

Article 7A has been incorporated by the Parliament after Article 7, by the Constitution (Fifteenth Amendment) Act, 2011. Said Article is quoted below for ready reference:

" ৭ক। সংবিধান বাতিল, স্থগিতকরণ, ইত্যাদি অপরাধ।

(১) কোন ব্যক্তি শক্তি প্রদর্শন বা শক্তি প্রয়োগের মাধ্যমে বা অন্য কোন অসাংবিধানিক পন্থায় -

(ক) এই সংবিধান বা ইহার কোন অনুচ্ছেদ রদ, রহিত বা বাতিল বা স্থগিত করিলে কিংবা উহা করিবার জন্য উদ্যোগ গ্রহণ বা ষড়যন্ত্র করিলে; কিংবা
(খ) এই সংবিধান বা ইহার কোন বিধানের প্রতি নাগরিকের আস্থা, বিশ্বাস বা প্রত্যয় পরাহত করিলে কিংবা উহা করিবার জন্য উদ্যোগ গ্রহণ বা ষড়যন্ত্র করিলে-
তাহার এই কার্য রাষ্ট্রদ্রোহিতা হইবে এবং ঐ ব্যক্তি রাষ্ট্রদ্রোহিতার অপরাধে দোষী হইবে।

(২) কোন ব্যক্তি (১) দফায় বর্ণিত-
(ক) কোন কার্য করিতে সহযোগিতা বা উস্কানি প্রদান করিলে; কিংবা
(খ) কার্য অনুমোদন, মার্জনা, সমর্থন বা অনুসমর্থন করিলে-
তাহার এইরূপ কার্যও একই অপরাধ হইবে।

(৩) এই অনুচ্ছেদে বর্ণিত অপরাধে দোষী ব্যক্তি প্রচলিত আইনে অন্যান্য অপরাধের জন্য নির্ধারিত দণ্ডের মধ্যে সর্বোচ্চ দণ্ডে দণ্ডিত হইবে।"

"*7A.* ***Offence of abrogation, suspension, etc. of the Constitution***

*(1) If any person, by show of force or use of force or by any other un-constitutional means-*

*(a) abrogates, repeals or suspends or attempts or conspires to abrogate, repeal or suspend this Constitution or any of its article; or*

*(b) subverts or attempts or conspires to subvert the confidence, belief or reliance of the citizens to this Constitution or any of its article,*

*his such act shall be sedition and such person shall be guilty of sedition.*

*2) If any person-*
*(a) abets or instigates any act mentioned in clause (1) ; or*
*(b) approves, condones, supports or ratifies such act,*
*his such act shall also be the same offence.*
*(3) Any person alleged to have committed the offence mentioned in this article shall be sentenced with the highest punishment prescribed for other offences by the existing laws."*

On a plain reading of Article 7A it is apparent that the said provision, in particular Article 7A(1)(a) and (b) contain some vague terms like, "অন্য কোন অসাংবিধানিক পন্থায়", বা "নাগরিকের আস্থা, বিশ্বাস বা প্রত্যয় পরাহত করিলে" "কিংবা উহা করিবার জন্য উদ্যোগ গ্রহণ বা ষড়যন্ত্র করিলে", which shall be termed as "*sedition*" or

"রাষ্ট্রদ্রোহিতা" and the person accused of shall be guilty of sedition with imposition of highest punishment, as prescribed in the existing laws.

In this regard, Mr. Sharif goes to contend that the vagueness of Article 7A surpasses all acceptable standards and permissible limits which has been incorporated with sole purpose, i.e. to establish authoritarianism, as is reflected in Article 7A. While elaborating his argument he submits that Article 7A has been included in the Constitution so that everything done by the Parliament and the Executive is immune from any criticism or protest. If anyone protests, then the person can be prosecuted under Article 7A.

Article 7A(2) is even more vague, he submits, according to Article 7A(2), providing "সহযোগিতা বা উস্কানি" or "কার্য অনুমোদন, মার্জনা, সমর্থন বা অনুসমর্থন" in respect of the offence in Article 7A(1), is a separate offence. Thus, 7A(2) has multiple layers of vagueness, for, it adds a number of additional vague provisions over an already vague original provision.

Also, he goes to contend that Article 7A(3) prescribes highest punishment that is prescribed in Bangladesh for "other offences". In which case the punishment, perhaps will be the "death penalty". Thus, while the Penal Code prescribes one punishment for sedition, Article 7A creates an offence of sedition and prescribes a different penalty but does not clearly specify the same.

In other words, he submits, Article 7A has created a vague offence and sought to impose "*punishment*" for the vague offence, but has not defined the "*punishment*" and has not specified the forum or court who will try the offence. Thus, Article 7A is nothing but a constitutional device for flouting the rule of law and for the midnight knock on the door, the

enforced disappearance, the mass arrest and arbitrary detention, the subjection of prisoners to torture, the show trial, the crimes against humanity and so on.

To fortify his said argument he has referred the decision of the case of ***Shreya Singhal Vs. Union of India: AIR 2015 (SC) 1523*** where the petitioner challenged the validity of Section 66A of the Information Technology Act, 2000 of India on the ground, among others, that the expressions used in Section 66A are vague and not defined. The Indian Supreme Court considered various standards laid down by courts in various jurisdictions to assess the legality of a penal provision and held that Section 66A was void because "*the expressions used in Section 66A are completely open ended and undefined* ". Accordingly, he submits that Article 7A being repugnant to the basic structure of the Constitution is liable to be struck down.

In support of the contentions of Mr. Sharif Bhuiyan, Mr. Fida M. Kamal adds, Article 7 is the *"pole-star"* of our Constitution which contains the fundamental premises of a democratic government to which the people had pledged in the Preamble. The principles as expressed in and derived from this Article are so basic and fundamental that Article 7 is unalterable and beyond change. Moreso, the said provision provides that if any law is inconsistent with the Constitution that law shall to the extent of inconsistency be void. ***Anwar Hossain Chowdhury Case*** reaffirms the principle that, Article 7 is the touchstone and any amendments passed by the Parliament should be in conformity with the said Article. However, Article 7A, he submits, is a new version of political oppression which

opens the door for oligarchy. Hence, it is liable to be knocked down being repugnant to Article 7(2) of the Constitution.

In this connection, the argument being placed by the learned Attorney General is that insertion of Article 7A in the Constitution has brought a new dimension within our constitutional schemes which have been made for bringing fear psychosis in the mind of the citizens to control democracy, to destruct supremacy of the Constitution and denial of the fundamental rights of the people, with malicious intention to prolong fascism and dictatorship in the country in the name and under the so called "*controlled democracy"*. This insertion has been made to weaken the sovereign power of the citizens resulting to destruction of the democratic fabric of the country and denial of the rule of law and independence of the judiciary.

The core of our Constitution, he submits, is the people of the country and all power belongs solely to them but Article 7A has inflicted such harm on the people that their hearts bleed, they cannot express their opinion without fear, they cannot get the taste of democracy, cannot reclaim their rights and they cannot make revolution against the oppressor, arbitrator or authoritarian government. In fact, this very insertion of Article 7A should be considered as offences which have destructed the sovereignty and supremacy of the people as well as the basic structures of the Constitution and as such, Article 7A may kindly be declared *ultra vires* the Constitution.

In support of the submissions so made by the petitioners of both the writ petitions including the learned Attorney General, Mr. Shishir Munir, the learned Advocate submits that Article 7A has not only destroyed the

supremacy of the Constitution, but has also destroyed the basic structures of the Constitution as well as has ravaged the will of the people.

Referring to quotation of Thomas Jefferson, 3rd President of USA that *"The will of the people is the only legitimate foundation of any government, and to protect its free expression should be our first object."* he goes to argue that Article 7 of our Constitution declares that all powers in the Republic belong to the people and their exercise on behalf of the people shall be effected only under and by the authority of this Constitution. Further, the Constitution as the solemn expression of the will of the people, is the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of inconsistency, be void.

In this connection, he submits that the principle of basic structure was adopted by our apex Court in ***Anwar Hossain Chowdhury Case*** where more or less 8(eight) principles were regarded as basic structure, i.e. *"Sovereignty" belongs to the people, democracy, republican government, unitary State, separation of powers, independence of the judiciary, fundamental rights and supremacy of the Constitution."*, which are unamendable. Thus, it is clear that if any other law including amendment law comes in contradiction with these principles, that law shall be void to the extent of inconsistency.

The Constitution (Fifteenth Amendment) Act, 2011, he goes to argue, by inserting Article 7A after Article 7 has created inconsistency in the provisions of the Constitution, for, those contravene the basic structure of the Constitution. In this regard he contends that the wordings used in Article 7A is blatantly vague. Phrases like "*by any other un-constitutional*

*means"* needs serious explanation since there is no proper list of what are those *"other unconstitutional means";* what kind of action by the people will be treated as the unconstitutional means, has not been defined. If people of the nation do not resonate with any provision of the Constitution don't they have the right to question that provision? People do not get power through the Constitution. Constitution itself derives its power from the will of the people. Thus, if people want to abrogate, repeal or suspend any provision of the Constitution, they shall have all the right to do so because will of the people are the source of power and Constitution is the solemn expression of that will.

Article 7A, he submits, not only subverts the will of the people but also circumscribes such will. Moreover, it violates the freedom of thought, conscience and of speech which is guaranteed as fundamental right under Article 39 of the Constitution. As such, it liable to be declared void and *ultra vires* the Constitution.

Ms. Ishrat Hasan, in this regard submits that this new Article has created two substantive offences to be termed as constitutional sedition, i.e. abrogation, repeal or suspension of the Constitution by show or use of force or any other unconstitutional means [7A(1)(a)]; and subverting the confidence, belief or reliance of the citizens to the Constitution or any Article of it by show or use of force or by any other unconstitutional means [(7A(1)(b)]. Relying on this sub-article, she submits, the government of the day may file a case against a columnist or writer or news presenter or talk show presenter on the ground that the alleged writing, column, news or presentation or speech was written or presented in such a manner that it subverts the confidence, belief or reliance of the citizens to the

Constitution. Thus, it gives sweeping power to the executive to harass the citizens at the cost of their guaranteed freedom of speech and expression. She further goes to argue, the words *'show of force'*, *'use of force'* and *'unconstitutional means'* are not only wide terms but are highly contestable. These provide scope for arbitrary exercise of power of the government to persecute legitimate public discussion, debate or, even academic argument against the desirability of a constitutional change under the purview of the *'unconstitutional means'*, should that be interpreted in that way.

Also, she argues, from the way the offence has been designed in clause(2)(b) it is clear that even judicial condonation has been made an offence of sedition and the Supreme Court's power of judicial review and condonation for the sake of restoration of democracy has been blocked. The category and status of the crime created in Article 7A also seems to clash with the existing provisions of the Penal Code,1860, which is the substantive criminal law of the country.

She further submits that Article 7A creates a separate offence named sedition, better to be termed as *"constitutional sedition"* but again, sub-article 7A(3) states that persons alleged to have committed the offence shall be sentenced with the highest punishment prescribed for offences by the existing law. Plainly speaking, she submits, the offence and its *actus reus* have been created by the Constitution whereas the punishment is to be hired from the Penal Code. This inconsistent outlook of penal jurisprudence in a sacred document like the Constitution seems irrational and conflicting with the spirit of the constitutional jurisprudence. Hence, it is liable to be declared *ultra-vires* the Constitution.

It is the established principle of law that where no reasonable standards are laid down to define guilt in a section which creates an offence, and where no clear guidance is given to either law abiding citizens as to what exactly is the offence which has been committed or to authorities who are administering the section and courts who will try the offence, must be struck down as being vague, open ended, undefined, arbitrary and unreasonable.

In ***City of Chicago v. Morales et al MANU/USSC/0045/1999: 527 U.S. 41 (1999),*** a Chicago Gang Congregation Ordinance prohibited criminal street gang members from loitering with one another or with other persons in any public place for no apparent purpose. The Court gave reference to an earlier judgment in ***United States v. Reese MANU/USSC /0108/1875 : 92 U.S. 214 (1875) at 221*** where it was observed that the Constitution does not permit a legislature to set a net large enough to catch all possible offenders and leave it to the Court to step in and say who could be rightfully detained and who should be set at liberty. In the light of the said observations it was held that "*the broad sweep of the Ordinance violated the requirement that a legislature needs to meet: to establish minimum guidelines to govern law enforcement. As the impugned Ordinance did not have any such guidelines, a substantial amount of innocent conduct would also be brought within its net, leading to its unconstitutionality."*

It was further held that "*a penal law is void for vagueness if it fails to define the criminal offence with sufficient definiteness. Ordinary people should be able to understand what conduct is prohibited and what is permitted. Also, those who administer the law must know what offence has*

*been committed so that arbitrary and discriminatory enforcement of the law does not take place."*

Article 7 of the Constitution is the embodiment of the will of the people, the "*will*" which shapes the fundamental rights of every citizen of the county and guarantees these rights under the Constitution. As has been observed by the Appellate Division in the *8th Amendment Case,* fundamental rights are basic structure of the Constitution [***1989 BLD (Special Issue) 1, para-377, p-156,***], which cannot be curtailed by the Parliament with limitation on legislative capacity in the name of having amending power under Article 142 of the Constitution, based on vague, undefined use of expressions leading to creating an offence of sedition with scope of imposition of the highest punishment, i.e. death penalty. Thus, it goes to violate his right to life and personal liberty *[Article-32].*

As such, there is no doubt to find that the undefined and vague expressions used in Article 7A are in direct conflict of a citizen's fundamental right guaranteed under Article 39, i.e. to have a different view, to have freedom of thought and conscience and of speech and expression. Moreover, due to the said vague and undefined restrictions on the right to freedom of thought and conscience and of speech and expression a citizen of the country shall be subjected to criminal proceeding with charge of sedition and its highest punishment is death penalty (Section 124A of the Penal Code), as has been observed earlier.

In other words, Article 7A is a mechanism introduced with constitutional device to establish authoritarianism and as such, is in direct conflict with the core concept of the Constitution, i.e. *the will of the people*, as enshrined in Article 7.

Thus, we find that since Article 7A is repugnant to and is inconsistent to Articles 7, 32, 39 and 142 of the Constitution, which alters the basic structure of the Constitution; hence, it cannot be allowed to remain as part of the Constitution. Accordingly, Article 7A is hereby declared void being *ultra vires* the Constitution.

***Article 7B binds the successor Parliament from bringing any change in the Constitution by making respective provisions of the Constitution unamendable.***

In the above manner, Article 7B has also been inserted by the Parliament after Article 7A with the amendment of Article 7, which runs as under:

> *" ৭খ। সংবিধানের মৌলিক বিধানাবলী সংশোধন অযোগ্য:*
> *সংবিধানের ১৪২ অনুচ্ছেদে যাহা কিছুই থাকুক না কেন, সংবিধানের প্রস্তাবনা, প্রথম ভাগের সকল অনুচ্ছেদ, দ্বিতীয় ভাগের সকল অনুচ্ছেদ, নবম-ক ভাগে বর্ণিত অনুচ্ছেদসমূহের বিধানাবলী সাপেক্ষে তৃতীয় ভাগের সকল অনুচ্ছেদ এবং একাদশ ভাগের ১৫০ অনুচ্ছেদসহ সংবিধানের অন্যান্য মৌলিক কাঠামো সংক্রান্ত অনুচ্ছেদসমূহের বিধানাবলী সংযোজন, পরিবর্তন, প্রতিস্থাপন, রহিতকরণ কিংবা অন্য কোন পন্থায় সংশোধনের অযোগ্য হইবে। "*
>
> *"**7B. Basic provisions of the Constitution are not amendable:***
> *Notwithstanding anything contained in article 142 of the Constitution, the preamble, all articles of Part I, all articles of Part II, subject to the provisions of Part IXA all articles of Part III, and the provisions of articles relating to the basic structures of the Constitution including article 150 of Part XI shall not be amendable by way of insertion, modification, substitution, repeal or by any other means.]"*

Vide Article 7B, 55 specific articles, various other articles relating to basic structure including 5$^{th}$ to 7$^{th}$ Schedule of the Constitution are made unamendable. Besides, Article 7B overrides Article 142 stating, *inter alia, "notwithstanding anything contained in Article 142"*. Conversely, Article 142 provides, *"notwithstanding anything contained in this Constitution"*.

In other words, Article 142 overrides the entire Constitution including Article 7B; thus, makes the overriding clause of Article 7B ineffective over Article142.

In this regard, we find it apt to quote the observations made by the Appellate Division on overriding clause of Article 142, i.e. *"notwithstanding anything contained in the Constitution"- " True it is wide but when it is claimed 'unlimited' power what does it signify? - to abrogate ? or by amending it can the republican character be destroyed to bring monarchy instead? The Constitutional power is not limitless-it connotes a power which is a constituent power. The higher the obligation the greater the responsibility-that is why the special procedure (long title) and special majority is required. Article 7(2) says-"if any other law is inconsistent with this Constitution that other law shall to the extent of the inconsistency be void".*

However, while elaborating the meaning of *"amendment"* the Appellate Division goes to say, "*Thus an amendment corrects errors of commission or omission, modifies the system without fundamentally changing its nature-that is an amendment operatives within the theoretical parameters of the existing Constitution. But a proposal that would attempt to transform a central aspect of the nature of the compact and create some other kind of system-that to take an extreme example, tried to change a Constitutional democracy into a totalitarian state-would not be an amendment at all, but a re-creation, a reforming, not merely of the covenant but also of the people themselves. That deed would lie beyond the scope of the authority of any governmental body or set of bodies, for they*

*are all creatures of the Constitution and the people's agreement. Insofar as they destroy their own legitimacy.*" ***41 DLR (AD) 165, p-222, para-221.***

In this connection, Mr. Fida M. Kamal, the learned Senior Counsel submits that Article 7B marks a significant departure from the basic structure doctrine as expounded in *Anwar Hossain Chowdhury Case*, which has, in fact, severely affected the application of at least two provisions: Articles 142 and 7 of the Constitution. For example, Article 7B has taken away much of the Parliament's power to amend the Constitution. The relationship between Article 7 and Article 7B is more complex. Article 7 declares the Constitution to be the supreme law to the effect that any law (including a constitutional amendment), if inconsistent with the Constitution, shall be void. Thus, Article 7, in one hand, contemplates that the Constitution in its entirety is the supreme law and all of its provisions have a *prima facie* co-equal status. On the other hand, Article 7B, by making unamendable at least more than one-third of the provisions of the Constitution, gives rise to an impression that certain constitutional provisions are superior to others. While Article 7 envisages a horizontally configured Constitution, Article 7B introduces hierarchy among the constitutional provisions. The net result is that Article 7B has created severe barriers to constitutional progress. It has modified the application of Article 26(3) in a noticeable manner. In this connection, he also goes to argue that Article 26(3) accepts constitutional amendments from judicial review, even if they are inconsistent with Part III of the Constitution. As Part I, II and III can no longer be amended because of Article 7B, the application of Article 26(3), so far as it relates to these Parts, has been reduced to redundancy. Moreso, since Article 26(3) itself is included in

Part III, the same cannot be deleted or modified by way of amendment. Adding to the complexity, Article 7B itself cannot be amended as it falls under Part I of the Constitution. Ironically, being a constitutional amendment, Article 7B shuts the door to subsequent amendments despite the fact that it does not make any ostensible claim of superiority over other constitutional amendments in any respect. More importantly, Article 7B has brought in significant changes in the method of scrutiny to determine the validity of future amendments to the Constitution.

He again submits that the basic structure doctrine has laid down a substantive compatibility test for determining the validity of constitutional amendments. Now, in view of Article 7B, any amendments to Parts I, II and III, Article 150, as well as the respective provisions relating to the basic structures of the Constitution will simply be void for the reason that the Parliament will exceed its power if it passes such amendments. Considering the above principles of law, he contends, Article 7B is contradictory with the judgement passed in the *Eighth Amendment Case* and therefore, Section 7 of the Fifteenth Amendment Act, 2011 is liable to be declared *ultra vires* the Constitution.

In support of the above contentions of the learned counsels of the respective writ petitions and the learned Attorney General appearing for the respondents-government, Mr. Mohammad Jamiruddin Sircar, the learned Senior Counsel goes to argue that basic structure of the Constitution was never expressly mentioned in the Constitution; however, by insertion of Article 7B basic structures of the Constitution have been recognized which include the Preamble, articles of Part I, all articles of Part II with exception of Part IXA, all articles of Part III and other articles relating to the basic

structures of the Constitution, which demonstrate that despite the above articles there are certain provisions in the Constitution which may be determined as basic structures. However, he submits, Article 7B says that these provisions *"shall not be amendable by way of insertion, modification, substitution, repeal or by any other means".* This, in other words, means the future generation of Bangladesh cannot change any other things listed in Article 7B of the Constitution because those who put it today have decided for all generations and all time to come for Bangladesh. Does this not mean that "*we, the people*" or "*will of the people*" as enunciated in Article 7 are not sovereign anymore?

In this regard, learned Senior Counsel contends that the people of Bangladesh have obtained independence through a 'war of independence' by a revolution. The necessity of the occasion invented the remedy. Unlike what the Fifteenth Amendment has done to us, he submits, when our Constitution was framed, or even when provision for referendum for changing certain provisions of the Constitution was incorporated by the Fifth Amendment, it was intended that our Constitution would be a progressive document or be a work in progress. He also submits that the power to amend the Constitution is the "safety-valve" to a nation and is as necessary to the safety of the State as it is to a boiler. The check on it is the ultimate right to a revolution if it becomes intolerable, oppressive and the oppression cannot be thrown off otherwise. Accordingly, he concludes his submission quoting the statements of Vattel so made in his Law of Nations:

> *"There can be no difficulty in the case if the whole nation be unanimously inclined to make a change. But it is asked, what is to be done if the people are divided? In the ordinary management of the State, the opinion of the majority must pass without dispute for that*

*of the whole nation; otherwise, it would be almost impossible for the society to take any resolution.*

*The amending power of the Constitution, is a recognition for the posterity to have the same power and prudence to do the right thing without being bound by any "blind veneration for antiquity, for custom, or for names".*

Mr. Mohammad Shishir Manir in this regard contends that Article 7B of the Constitution does ultimate injustice to the core principles of the Constitution. In the name of making the basic structure unamendable it has bound the will of the people within a boundary. In a democratic country like ours, he submits, will of the people are formulated into law by the elected members of the Parliament and Parliament decides what manifests the will of the people. One thing that may be reasonable during the term of a Parliament, may not be the same for the future Parliament. Man cannot predict the future. Thus, with the passage of time things lose their relevancy and new concept /new principle takes their place. This argument is valid in the case of the will of the people as well.

Accordingly, he submits that it is the general rule that no Parliament can bind the successor Parliament and therefore, Article 7B is a clear violation of this rule as it makes most of the provisions of the Constitution unamendable for eternity. By binding the future Parliament the Constitution (Fifteenth Amendment) Act, 2011 has destroyed democracy and negated the will of the people, which are the basic structures of the Constitution. Above all, to establish an authoritarian regime in the country where will of the people will be subservient to the will of a political party; hence, it is liable to be knocked down being *ultra vires* the Constitution.

Ms. Ishrat in this connection goes to argue that Article 7B of the Constitution has blocked the amending power of the successor Parliament and at the same time, it has nullified the power of judicial review of the Supreme Court. There are more than 50 articles (in fact, 53 articles) in this group and amending power over any of these articles has been curtailed. The implication of this amendment will be far reaching both from the view of treating the Constitution as a living document and also, the power of judicial review.

She elaborates her argument by submitting that this Article has not only affected but also, undermined the power of judicial review of the Supreme Court of Bangladesh when it says that basic structure provisions cannot be amended by any means. What is *"basic structure"* is to be determined by the court and not by any one else; it is unthinkable that the Parliament by amendment can block this judicial power of the Supreme Court. She also submits that when Article 7B specifies that the provisions of article relating to the basic structures of the Constitution are not amendable, it seems to have stretched to an indefinite number of provisions of the Constitution leading to vagueness and uncertainties. As such, it is unconstitutional.

Article 142, no doubt, is the amending power of the Parliament, which gives effect to the sovereign power of the people, as enshrined in Article 7. The Parliament as being the representative of the people is empowered to amend the Constitution by way of insertion, modification, substitution or repeal in the manner as prescribed therein subject to Articles 7 and 26 of the Constitution. Said power is to be adapted to various crisis of human affairs, as observed by *Marshal, C.J. John Stuart Mill* that, *"no*

*Constitution can expect to be permanent unless it guarantees progress as well as order".*

Also, *"every Constitution is expected to endure for a long time. Therefore, it must necessarily be elastic. It is not possible to place the society in a straight jacket. The society grows, its requirements change. The Constitution and the laws may have to be changed to suit those needs. No single generation can bind the course of the generation to case. Hence, every Constitution wisely drawn up provides for its own amendment.":* ***Kesavananda Bharati Sripadalvara Vs. State of Kerala (supra).***

*In* ***Ellen Street Estates, Ltd. v. Minister of Health [1934] 1 K.B. 590*** *Maugham L.J.* observed, *"The legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the legislature.*

In the light of the above spirit of the time, unamendability clause of Article 7B cannot be imposed upon the successor Parliament. Moreover, Article 7B not being an original provision of the Constitution cannot be termed as a basic structure of the Constitution.

In addition to the above, it is difficult to harmoniously interprete Article 7B with Article 142, for, the use of the phrase *"notwithstanding anything contained in this Constitution"* in Article 142 has given power of amendment over all the provisions of the Constitution including Article 7B. Conversely, by using the phrase ""*Notwithstanding anything contained in*

*article 142 of the Constitution"* in Article 7B, a contradictory situation has cropped up giving rise to confusion over the authority of Article 142. It is well settled principle of interpretation that all parts of the Constitution should be read together and harmoniously ensuring that its provisions are understood in the context of its spirit, its principles, and its broader purpose. Use of two non-obstante clauses, one in Article 7B and the other in Article 142, is preventing harmonious reading thereof, but considering the paramountcy of Article 142 it is given predominance over Article 7B of the Constitution.

Considering the above, Article 7B is hereby declared void as being *ultra vires* the Constitution for having been incorporated in derogation of Articles 7 and 142 of the Constitution.

As a result, Section 7 of the Act No.14 of 2011 vide which Articles 7A and 7B have been incorporated by the Parliament after Article 7 is hereby declared void and *non-est.*

***Article 44(2): Diversifying the power of the High Court Division of the Supreme Court of Bangladesh***

In our Constitution, limited government with three organs performing designated functions has been envisaged and judiciary is one of those organs. In the scheme of Article 7 and therefore, of the Constitution the structural pillars of Parliament and judiciary are basic and fundamental:***41 DLR (AD) 165, p-231, para 293.***

Supreme Court of Bangladesh, however, is vested with the plenary judicial power for maintenance of the supremacy of the Constitution: ***41 DLR (AD) 165 para-58, p-198.*** In view of the scheme and objectives of the Constitution our Appellate Division in the *8th Amendment case* has

included, among others, supremacy of the Constitution, separation of powers, independence of judiciary and fundamental rights as the basic features of our Constitution, including rule of law. However, the validity of the impugned amendment may be examined with or without resorting to the doctrine of basic feature, on the touchstone of the Preamble itself. [***1989 BLD (Spl) 1, pp-156, 171, para 377 and 443].***

Fact remains, supremacy of the Constitution and rule of law cannot be achieved without the guardianship of the Supreme Court and *per force* judicial review must be taken to be a basic structure of the Constitution: *Constitutional Law of Bangladesh*, *Mahmudul Islam, 3rd Ed. para 4.67, P-539.*

High Court Division, no doubt, is an integral part of the Supreme Court of Bangladesh, for, Article 94 provides-

> *"There shall be a Supreme Court for Bangladesh (to be known as the Supreme Court of Bangladesh) comprising the Appellate Division and the High Court Division".*

However, Article 44, as it stood originally in 1972 runs as under:

> *"The right to move the Supreme Court in accordance with clause (1) of Article 102 for the enforcement of the rights conferred by this Part is guaranteed.*
>
> *(2) Without prejudice to the powers of the Supreme Court under Article 102, Parliament may by law empower any other court, within the local limits of its jurisdiction, to exercise all or any of these powers."*

By the Constitution (Fourth Amendment) Act, 1975 (Act II of 1975) it was substituted by a new article, which reads as follow:

> *"Parliament may by law establish a constitutional court, tribunal or commission for the enforcement of the rights conferred by this Part."*

Subsequently, by Proclamation Order No.IV of 1976 it was substituted with the following:-

> *"(1) The right to move the High Court in accordance with clause (2) of Article 102 for the enforcement of the rights conferred by this Part is guaranteed;*
> *(2) Without prejudice to the powers of the High Court under Article 102, Parliament may by law empower any other Court within the local limits of its jurisdiction, to exercise all or any of those powers."*

Later, by the Second Proclamation Order No. 1 of 1977 the words "*High Court Division*" was substituted with the words *"High Court",* which is quoted herein below:-

> *"44.(1) The right to move the [High Court Division] in accordance with [clause (1) of Article 102, for the enforcement of the rights conferred by this Part is guaranteed;*
> *(2) Without prejudice to the powers of the [High Court Division] under Article 102, Parliament may by law empower any other court, within the local limits of its jurisdiction, to exercise all or any of those powers]"*

Article 44 of the Constitution, as it stands now vide the Fifteenth Amendment Act, 2011 is quoted below:

> *"৪৪। মৌলিক অধিকার বলবৎকরণ*
> *(১) এই ভাগে প্রদত্ত অধিকারসমূহ বলবৎ করিবার জন্য এই সংবিধানের ১০২ অনুচ্ছেদের (১) দফা অনুযায়ী হাইকোর্ট বিভাগের নিকট মামলা রুজু করিবার অধিকারের নিশ্চয়তা দান করা হইল।*
> *(২) এই সংবিধানের ১০২ অনুচ্ছেদের অধীন হাইকোর্ট বিভাগের ক্ষমতার হানি না ঘটাইয়া সংসদ আইনের দ্বারা অন্য কোন আদালতকে তাহার এখতিয়ারের স্থানীয় সীমার মধ্যে ঐ সকল বা উহার যে কোন ক্ষমতা প্রয়োগের ক্ষমতা দান করিতে পারিবেন।"*
> *"44. Enforcement of fundamental rights*

*(1) The right to move the High Court Division in accordance with clause (1) of Article 102, for the enforcement of the rights conferred by this Part is guaranteed.*

*(2) Without prejudice to the powers of the High Court Division under article 102, Parliament may by law empower any other court, within the local limits of its jurisdiction to exercise all or any of those powers."*

However, in order to appreciate Article 44, Article 102(1) also needs to be looked into, which runs thus:

*"১০২। **কতিপয় আদেশ ও নির্দেশ প্রভৃতি দানের ক্ষেত্রে হাইকোর্ট বিভাগের ক্ষমতা**।*

*[১০২।(১) কোন সংক্ষুব্ধ ব্যক্তির আবেদনক্রমে এই সংবিধানের তৃতীয় ভাগের দ্বারা অর্পিত অধিকারসমূহের যে কোন একটি বলবৎ করিবার জন্য প্রজাতন্ত্রের বিষয়াবলীর সহিত সম্পর্কিত কোন দায়িত্ব পালনকারী ব্যক্তিসহ যে কোন ব্যক্তি বা কর্তৃপক্ষকে হাইকোর্ট বিভাগ উপযুক্ত নির্দেশাবলী বা আদেশাবলী দান করিতে পারিবেন।"*

*"102. **Powers of High Court Division to issue certain orders and directions, etc.***

*(1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution."*

Vide Article 102(1) the High Court Division has the plenary power to enforce fundamental rights as conferred by Part III of the Constitution. According to Article 44(2) the Parliament has been empowered to make law in order to confer said plenary power of the High Court Division including the power to enforce fundamental rights as conferred under Part III to any other court within the local limits of its jurisdiction.

In this regard, it is pertinent to observe that the right to move the High Court Division in accordance with Article 102(1) for the enforcement of rights conferred under Part III, is a fundamental right under Article 44(1). If pursuant to Article 44(2) any other court other than High Court Division is conferred with the power of the High Court Division, will go to contradict with Article 44(1) and thereby shall go to affect the fundamental right of the citizen since the Constitution has guaranteed the said right under Article 44(1). Moreover, vide the impugned Article 44(2), the power being exercised by the High Court Division can now be conferred to any other court of law.

In this regard, the learned Attorney General goes to contend that Article 44(2) is inconsistent with the basic structure of the Constitution inasmuch as it is opposed to the ratio settled in the judgment of the *8th Amendment Case* being that the High Court Division cannot be broken into pieces and its jurisdiction cannot be made subject to the wish of the executives or the legislature. As per this impugned provision, if the Parliament desires, it may delegate the jurisdiction of the High Court Division upon any subordinate court which is a complete destruction of the unitary form of the Bangladesh Supreme Court and thus, it hits the basic structure of the Constitution. Accordingly, he submits that the amended Article 44(2) is liable to be declared *ultra vires* the Constitution.

The judicial structure of Bangladesh is two tiered comprising the Supreme Court of Bangladesh and the subordinate courts. Supreme Court acts as the guardian of the Constitution and the subordinate judiciary administers justice at the grassroots basing on the statute, promulgated by the Parliament. In addition, vide Article 109 the High Court Division shall

have superintendence and control over all courts and tribunals subordinate to it.

In the given context, without mentioning the level of the court empowering any other court, which is the creature of the statute, to exercise plenary power of the High Court Division undermines the sanctity of the High Court Division, which is the creature of the Constitution, and is the guardian and protector of the Constitution of Bangladesh. Thus, Article 44(2) goes against the spirit of the *8th Amendment case*, which established the oneness of the High Court Division upon declaring Article 100 of the Constitution *ultra-vires* on the findings that said Article *"destroyed the essential limb of the judiciary namely, of the Supreme Court of Bangladesh by setting up rival courts to the High Court Division in the name of permanent Benches conferring full jurisdiction, powers and functions of the High Court Division"*.

Accordingly, we have no doubt to find that within the framework of the Constitution no other court can be placed at par with the High Court Division simultaneously conferring all or any of the powers of the High Court Division. Thus, Article 44(2) having hit the basic structure of the Constitution hence, is beyond the amending power of the Parliament under Article 142 of the Constitution.

Resultantly, Section 18 of the Act No. 14 of 2011 vide which Article 44 has been amended with the incorporation of Article 44 (2) is hereby declared void as being *ultra vires* the Constitution.

***Article 116:***

*"অধনস্ত আদালতসমূহের নিয়ন্ত্রণ ও শৃঙ্খলা*
*১১৬। বিচার- কর্মবিভাগে নিযুক্ত ব্যক্তিদের এবং বিচারভাগীয় দায়িত্বপালনে রত ম্যাজিস্ট্রেটেদের নিয়ন্ত্রণ (কর্মস্থল- নির্ধারণ, পদোন্নতিদান ও ছুটি মঞ্জুরীসহ) ও শৃংখলাবিধান*

*রাষ্ট্রপতির উপর ন্যস্ত থাকিবে এবং সুপ্রীম কোর্টের সহিত পরামর্শক্রমে রাষ্ট্রপতি কর্তৃক তাহা প্রযুক্ত হইবে।"*

So far Article 116 of the Constitution is concerned, as it now stands after Fifteenth Amendment Act, 2011, is a *sub judice* matter in connection with Writ Petition No.10356 of 2024; hence, we refrain from making any observation to that effect.

In addition to the above provisions, the impugned amendment so made in the Preamble as well as some other articles of the Constitution vide Act No.14 of 2011 have also been assailed by the petitioners of the respective writ petitions and that the respondent government stand in support of the said assertions, namely, Preamble, Articles 4A, 6, 8-25, 26-47A, 95-116, 117A, 123(3), 150(2), 5th, 6th and 7th Schedule etc.

In this regard the arguments so have been placed by the petitioner of writ petition No.12431 of 2024, the learned Attorney General for the respondent government and the respective Interveners are placed below:

***The petitioner of writ petition No.12431 of 2024.***

***<u>Sections 2, 3, 4 and 8 of the Act No.14 of 2011:</u>***

Vide Section 3 of the Fifteenth Amendment Act, 2011 the words, *"absolute trust and faith in the Almighty Allah*" as were incorporated in the Preamble, have been erased.

In this connection, Mr. A.S.M. Shahriar Kabir, the learned Advocate appearing for the petitioner of writ petition No.12431 of 2024 goes to argue that India and Pakistan were created on the basis of two-nation theory, and after the partition of Pakistan, the Objectives Resolution of 1949 was the first constitutional document that proved to be the foundation of the constitutional developments in Pakistan which stated that,

*"Sovereignty over the entire universe belongs to Almighty Allah alone, and that the authority which He has delegated to the State of Pakistan through its people for being exercised within the limits prescribed by Him is a sacred trust".* In ***Asma Jilani V. The Government of the Panjab and another: PLD 1972(SC) 139***, it was held that sovereignty is vested in the Almighty alone and the authority which He had delegated to the State through its people, for being exercised within the limits prescribed by Him, is a sacred trust, therefore, Islam should be regarded as a basic structure of our Constitution. Furthermore, in the *Sixteenth Amendment Case, para-31*, it was affirmed that Islam is one of the basic structures of the Constitution. As such, omitting the principle of absolute trust and faith in the Almighty Allah is a fundamental departure from the belief of 91% of the people of this country and therefore, Sections 2, 3, 4 and 8 of the Act No.14 of 2011 are liable to be declared *ultra vires* the Constitution.

***Section 5 of the Act, 2011:***

He further submits that the Proclamation of Independence, 10th April, 1971 identified Sheikh Mujibur Rahman as "Bangabandhu", who returned to Bangladesh on 10.01.1972. However, on 11.01.1972, as the President of Bangladesh he passed the Provisional Constitution of Bangladesh Order, 1972. In the late afternoon on 12.01.1972, Bangabandhu Sheikh Mujibur Rahman left the office of the President, administered the oath of the office of Justice Abu Sayeed Chowdhury and then Justice Abu Sayeed Chowdhury appointed Bangabandhu Sheikh Mujibur Rahman as the Prime Minister of Bangladesh and administered his oath on 12.01.1972.

The above fact shows that Bangabandhu Sheikh Mujibur Rahman had never been called as the Father of the Nation, nor the Founder of the Nation. Therefore, calling Sheikh Mujibur Rahman as the Father of the Nation substituting Article 4A of the Constitution vide Section 5 of the Act, 2011 is a fraud being practiced upon the people and hence, is *ultra vires* the Constitution.

***Sections 8-15 of the Act, 2011:***

He also submits that Articles 8-25 were treated as fundamental principles of state policy and that under the doctrine of basic structure of the Constitution the fundamental principles cannot be amended. However, vide Sections 8-15 of the Act, 2011 the Parliament without referendum not only changed the fundamental principles of state policy with the incorporation of "secularism" but also, changed the definition of "nationalism", including addition of so many new Articles which were not included in the original Constitution of 1972 and therefore, Sections 8-15 are liable to be declared *ultra vires* the Constitution.

***Sections 16-19 of the Act, 2011:***

He also submits that Articles 26-47A are protected under Part III of the Constitution and are also, treated as the basic structure of the Constitution. However, vide Article 7 read with Article 26, those provisions are unamendable without referendum. Sections 16-19 of the Act, 2011 have completely ignored the foundation of the Constitution by amending the fundamental rights guaranteed under Part III of the Constitution. As such, Sections 16-19 are liable to be declared *ultra vires*, repugnant and *void-ab-initio*.

Again, he submits that the Constitution (Fifteenth Amendment), Act, 2011 is indeed a disaster for the constitutional mechanism of Bangladesh, as well as the rule of law undermining the will of the people including the sacrifice of a million of lives for restoration of democracy. The glorious July 36th Revolution of 2024 reminds us that, *"these dead shall not have died in vain, that this nation, under God, shall have a new birth of freedom, that the Government of the people, by the people, for the people, shall not perish from the earth."* In the name of absolute majority, no political party can undermine the will of the people by amending the Constitution, even by referendum. After the impugned amendment, in fact, the present Constitution became a footnote-based Constitution, there is no such other example of its kind in the world.

By incorporating the Fifteenth Amendment, he goes to argue, the Legislature has made about one-third of the Constitution a "holy text" that can never be changed or amended. The Parliament promulgated Fifteenth Amendment Act, 2011 even before the nation could see what the judges had to say about Thirteenth Amendment in a divided verdict that contained diverse opinion about the system of Non-Party Caretaker Government and as such, the said amendment is *ultra vires* the Constitution.

***Sections 30-39 of the Act, 2011:***

His further contentions are that it is the settled principle of law, as established in the *Eighth and Sixteenth Amendment cases* that judiciary is also a part of the basic structure of the Constitution and the Parliament cannot amend Part VI of the Constitution, but Sections 30 to 39 of the Fifteenth Amendment Act, 2011 have drastically amended the provisions

of Part VI of the Constitution, which is protected under the basic structure doctrine and therefore, Sections 30-39 of the Act, 2011 is liable to declared *ultra vires*, repugnant and *void-ab-initio*.

Lastly, he submits that the members of the Parliament were nominated on the basis of the manifesto given before the election and they were elected by the people on the basis of that manifesto. The members of the Parliament did not have any legitimate authority to pass any Act which is conflicting with their political manifesto. The Fifteenth Amendment Act, 2011, no doubt, is unconstitutional and is against the basic structures of the Constitution; hence, Sections 2, 3, 4, 5, 7, 8, 16, 20, 21, 25, 39, 42, 44, 47, 50, 53 and 55 of the impugned Constitution (Fifteenth Amendment) Act, 2011 are liable to be declared *ultra vires* and repugnant to the Constitution of the People's Republic of Bangladesh.

***The respondent-government.-***

***<u>Above the Preamble:</u>***

So far the incorporation of " [বিস্‌মিল্লাহির-রহ্‌মানির রহিম] (দয়াময়, পরম দয়ালু, আল্লাহের নামে)/ পরম করুণাময় সৃষ্টিকর্তার নামে।] " above the Preamble of the Constitution vide Act No.14 of 2011 is concerned the learned Attorney General submits that vide Section 2 of the Fifteenth Amendment Act the meaning of 'Bismillahir Rahmanir Rahim' "পরম করুণাময় সৃষ্টিকর্তার নামে", has been amended by adding a new meaning which is based on completely a wrong understanding inasmuch as there is no alternative meaning of 'Allah' and 'Allah' is now a Bengali word inserted in Bangla Academy Dictionary, p-128, wherein the meaning of Allah, 'সৃষ্টিকর্তা' is not mentioned. As such, he contends a new meaning has been introduced arbitrarily and unjustly; the only meaning of 'Bismillahir Rahmanir Rahim'

should be "দয়াময়, পরম দয়ালু, আল্লাহের নামে". By this amendment, inserting a wrong meaning of 'Bismillahir Rahmanir Rahim', the Parliament has created an ambiguity, hit the belief of the citizens and undermined the dignity of the Constitution and therefore, this part of the impugned Fifteenth Amendment Act may kindly be declared *ultra vires* the Constitution.

***Preamble:***

By Section 3 of the Fifteenth Amendment Act, the words "জাতীয় মুক্তির জন্য ঐতিহাসিক সংগ্রামের" has been substituted replacing the words "জাতীয় স্বাধীনতার জন্য ঐতিহাসিক যুদ্ধের " in the 1st paragraph of the Preamble, and the following substitution has been made in the 2nd paragraph of the Preamble "আমরা অঙ্গীকার করিতেছি যে, যে সকল মহান আদর্শ আমাদের বীর জনগণকে জাতীয় মুক্তি সংগ্রামে আত্মনিয়োগ ও বীর শহীদদিগকে প্রাণোৎসর্গ করিতে উদ্‌বুদ্ধ করিয়াছিল -জাতীয়তাবাদ, সমাজতন্ত্র, গণতন্ত্র ও ধর্মনিরপেক্ষতার সেই সকল আদর্শ এই সংবিধানের মূলনীতি হইবে। "

In this context, the learned Attorney General goes to argue that democracy is a part of the basic structure of our Constitution, not socialism; in the Fifth Amendment Act, 1979 the word '*socialism'* was explained as "*Socialism means economic and social justice*", which has been widely acclaimed and accepted by all concerns and became a part of the democratic exercise of the State. For this reason, the former second paragraph of the Preamble which was substituted by the Fifteenth Amendment Act, 2011 under Section 3 is a colorable legislation affecting the people's will, which should not be retained and hence, this part of the Fifteenth Amendment Act may kindly be declared *ultra vires* the Constitution.

***Article 4A:***

By Section 5 of the Fifteenth Amendment Act, Article 4A has been substituted in place of previous Article 4A, which runs as follows-

> "৪ক। জাতির পিতার প্রতিকৃতি।- জাতির পিতা বঙ্গবন্ধু শেখ মুজিবুর রহমানের প্রতিকৃতি রাষ্ট্রপতি, প্রধানমন্ত্রী, স্পীকার ও প্রধান বিচারপতির কার্যালয় এবং সকল সরকারী ও আধা-সরকারী অফিস, স্বায়ত্ত শাসিত প্রতিষ্ঠান, সংবিধিবদ্ধ সরকারী কর্তৃপক্ষের প্রধান ও শাখা কার্যালয়, সরকারী ও বেসরকারী শিক্ষাপ্রতিষ্ঠান, বিদেশে অবস্থিত বাংলাদেশের দূতাবাস ও মিশন সমূহে সংরক্ষণ ও প্রদর্শন করিতে হইবে। "

In this regard, he goes to submit that by inserting Article 4A, a respectful politician of this country being Sheikh Mujibur Rahman, whose paramount political contribution prior to our first liberation war in 1971 has been made a subject matter of serious debate of the country. By this insertion, unnecessary debate, criticism and controversy about him has been raised for which he is considered to be the 'father of the nation' by his followers only, not by the nation as a whole or in that view of the matter, not by the majority of the people. Moreso, he contends, it is neither originated from the original Constitution nor it is a basic structure, nor it is an undisputed subject for the nation. In spite of his political role in the history, his administrative role were never free from debate. In the said pretext, identifying his designation as 'father of the nation' in the Constitution by the impugned Fifteenth Amendment Act thus, suffered from malice in law and facts as well as a glaring instance of colorable legislation, which is not the reflection of the will of the people, rather an endeavor to destruct the constitutional scheme; hence, is liable to be declared *ultra vires* the Constitution.

***Article 6:***

Article 6 of the Constitution has been substituted by Section 6 of the Fifteenth Amendment Act, which runs as under:

"নাগরিকত্ব (১) বাংলাদেশের নাগরিকত্ব আইনের দ্বারা নির্ধারিত ও নিয়ন্ত্রিত হইবে।
(২) বাংলাদেশের জনগণ জাতি হিসাবে বাঙালী এবং নাগরিকগণ বাংলাদেশী বলিয়া পরিচিত হইবেন। "

Referring to the above, he submits that if the citizens of Bangladesh are known as "Bengali", then what will happen to the Chakmas, Marmas and other casts, sects? Under this principle, can the people of Poshchim Bangla, Bihar, Urishya, where there are people who speaks Bangla, be called the citizens of Bangladesh? This notion of a unified identity focusing solely on 'Bengali' language is creating divisions among the diverse people of Bangladesh. Thus, the power of the sovereign unity is being axed and the spirit of '*We ness'* of our Constitution is being hit. Everyone cannot be forced to become Bengali regardless of caste, religion, or ethnicity; this is not the spirit of our liberation war and other democratic norms but by way of colorable exercise of power.

Further, he submits that under the defined constitutional territory, people from all walks of life are included, not solely Bengali speaking people. No nation or citizens can be defined only on the basis of language; for example, in India, Pakistan, Sri-Lanka, Nepal, Bhutan and Maldives where people of various cultures and languages co-exist but none of their national identity is defined by its languages but by territorial boundaries. In the United States, he submits, the citizens are being identified as 'Americans' and nowhere in the world, the nation are being identified by language. Unfortunately, with this impugned amendment the basic structure of the Constitution as well as the supremacy of the Constitution have hit the concept of equality before law where all the citizens of the country are equal. As such, he submits, upon restoring the Fifth

Amendment Act, 1979 the provision as amended in the impugned Fifteenth Amendment Act is liable to be declared *ultra vires* the Constitution.

***Article 117A:***

*"১১৭ক। জাতীয় দল।-(১) রাষ্ট্রপতির নিকট যদি সন্তোষজনক ভাবে প্রতীয়মান হয় যে এই সংবিধানের দ্বিতীয় ভাগে বর্ণিত রাষ্ট্র পরিচালনার মূলনীতিসমুহের কোন একটা পরিপূর্ণভাবে কার্যকর করিবার উদ্দেশ্যে অনুরূপ করা প্রয়োজন, তাহা হইলে তিনি, আদেশ দ্বারা, নির্দেশ দিতে পারিবেন যে রাষ্ট্রে শুধু একটা রাজনৈতিক দল (অতঃপর জাতীয় দল নামে অভিহিত) থাকিবে।*

*(২) যখন (১) দফার অধীন কোন আদেশ প্রণীত হয়, তখন রাষ্ট্রের সকল রাজনৈতিক দল ভাঙ্গিয়া যাইবে এবং রাষ্ট্রপতি জাতীয় দল গঠন করবার জন্য প্রয়োজনীয় সমস্ত পদক্ষেপ গ্রহণ করিবেন।*

*(৩) জাতীয় দলের নামকরণ, কার্যসূচী, সদস্যভুক্তি, সংগঠন, শৃঙ্খলা, অর্থসংস্থান এবং কর্তব্য ও দায়িত্ব সম্পর্কিত সকল বিষয় রাষ্ট্রপতির আদেশ দ্বারা নির্ধারিত হইবে।*

*(৪) (৩) দফার অধীন রাষ্ট্রপতি কর্তৃক প্রণীত আদেশ-সাপেক্ষে প্রজাতন্ত্রের কর্মে নিযুক্ত কোন ব্যক্তি জাতীয় দলের সদস্য হইবার যোগ্য হইবেন।*

*৫) এই সংবিধানে যাহা বলা হইয়াছে তাহা সত্ত্বেও যখন জাতীয় দল গঠিত হয়, তখন কোন ব্যক্তি-*

*(ক) যদি তিনি, যে তারিখে জাতীয় দল গঠিত হয়, সেই তারিখে, সংসদ-সদস্য থাকেন, তাহা হইলে তিনি রাষ্ট্রপতি কর্তৃক নির্ধারিত সময়ের মধ্যে জাতীয় দলের সদস্য না হইলে সংসদ-সদস্য থাকিবেন না এবং সংসদে তাহার আসন শূন্য হইবে;*

*(খ) যদি তিনি জাতীয় দলের দ্বারা রাষ্ট্রপতি বা সংসদ-সদস্য নির্বাচনে প্রার্থীরূপে মনোনীত না হন, তাহা হইলে অনুরূপ নির্বাচনে রাষ্ট্রপতি বা সংসদ-সদস্য নির্বাচিত হইবার যোগ্য হইবেন না;*

*(গ) জাতীয় দল ছাড়া অন্য কোন রাজনৈতিক দল গঠন করিবার বা অনুরূপ দলের সদস্য হইবার কিংবা অন্যভাবে অনুরূপ দলের কার্যকলাপে অংশগ্রহণ করিবার অধিকার প্রাপ্ত হইবেন না।*

*(৬) এই অনুচ্ছেদের অধীন প্রণীত কোন আদেশ পরবর্তী কোন আদেশ দ্বারা প্রত্যাহার না হওয়া পর্যন্ত বলবৎ থাকিবে।"*

Referring to the above provision of law, the learned Attorney General goes to argue that Section 34 of the Fifteenth Amendment Act, 2011 Part VIA (Article 117A), containing provision of National Party being one party system has been restored inasmuch of Part VIA (Article 117A) was introduced in the Constitution Fourth Amendment which was later repealed/omitted by the Fifth Amendment in 1979. Since the provision of the Fifth Amendment has been omitted by this Fifteenth Amendment Act, it is presumed that they have restored the Fourth

Amendment so far it relates to one party system. The purpose behind its declaration of omitting Article 117A by the impugned amendment may not be to preserve democracy but to restore a one-party rule system. This amendment, which reintroduced this one party provision, was unnecessary and maliciously brought. It affects democracy, which is a basic structure of the Constitution and as such, this amendment be declared *ultra vires* the Constitution.

***Article 123(3):***

By Section 37 of the Fifteenth Amendment Act, clause (3) of Article 123 has been substituted in place of previous clause (3) of Article 123 in the following terms:

"১২৩। নির্বাচন-অনুষ্ঠানের সময়।

(৩) সংসদ-সদস্যদের সাধারণ নির্বাচন অনুষ্ঠিত হইবে-

(ক) মেয়াদ-অবসানের কারণে সংসদ ভাংগিয়া যাইবার ক্ষেত্রে ভাংগিয়া যাইবার পূর্ববর্তী নব্বই দিনের মধ্যে; এবং

(খ) মেয়াদ-অবসান ব্যতীত অন্য কোন কারণে সংসদ ভাংগিয়া যাইবার ক্ষেত্রে ভাংগিয়া যাইবাব পরবর্তী নব্বই দিনের মধ্যেঃ

তবে শর্ত থাকে যে, এই দফার (ক) উপ-দফা অনুযায়ী অনুষ্ঠিত সাধারণ নির্বাচনে নির্বাচিত ব্যক্তিগণ, উক্ত উপ-দফায় উল্লিখিত মেয়াদ সমাপ্ত নাহওয়া পর্যন্ত, সংসদ সদস্য রূপে কার্যভার গ্রহণ করিবেন না।"

*"123. Time for holding elections*

*[(3) A general election of the members of Parliament shall be held-*

*(a) in the case of a dissolution by reason of the expiration of its term, within the period of ninety days preceding such dissolution ; and*

*(b) in the case of a dissolution otherwise than by reason of such expiration, within ninety days after such dissolution :*

*Provided that the persons elected at a general election under sub-clause (a) shall not assume office as members of Parliament except after the expiration of the term referred to therein.]"*

In this connection, he submits that after being elected, constitutionally Members of Parliament continue for 5 (five) years starting from the date of taking oath. Vide the said amendment a Member of

Parliament is contesting in the election while holding/retaining his existing position as a Member of Parliament and if he is re-elected, his tenure will commence after his existing tenure expires. This is a classic example of colorable legislation and a blatant attempt to destroy democratic harmony and its core norms being free, fair and impartial election. By this amendment, in one hand it can be an attempt to have taken control of or influence the election, on the other hand, there will be 350 existing members and 300 elected-gazetted members of parliament. Our Constitution does not endorse such numbers. Hence, on this count as well, Article 123(3) may kindly be declared *ultra vires* the Constitution.

***Articles 150(2):***

Vide Section 45 of the Constitution (Fifteenth Amendment) Act, 2011 Article 150 has been substituted in place of previous Article 150 in the followings terms:

> "ক্রান্তি কালীন ও অস্থায়ী বিধানাবলী- ১৫০। (১) এই সংবিধানের অন্য কোন বিধান সত্ত্বেও ১৯৭২ সালের ১৬ ই ডিসেম্বর তারিখে এই সংবিধান প্রবর্তন কালে সংবিধানের চতুর্থ তফসিলে বর্ণিত বিধানাবলী ক্রান্তিকালীন ও অস্থায়ী বিধানাবলী হিসাবে কার্যকর থাকিবে।
>
> (২) ১৯৭১ সালের ৭ ই মার্চ তারিখ হইতে ১৯৭২ সালের ১৬ই ডিসেম্বর তারিখে এই সংবিধান প্রবর্তন হইবার অব্যবহিত পূর্ব পর্যন্ত সময় কালের মধ্যে সংবিধানের পঞ্চম তফসিলে বর্ণিত ১৯৭১ সালের ৭ই মার্চ তারিখে ঢাকার রেসকোর্স ময়দানে দেওয়া জাতির পিতা বঙ্গবন্ধু শেখ মুজিবুর রহমানের ঐতিহাসিক ভাষণ, ষষ্ঠ তফসিলে বর্ণিত ১৯৭১ সালের ২৬শে মার্চ তারিখে জাতির পিতা বঙ্গবন্ধু শেখ মুজিবুর রহমান কর্তৃক বাংলাদেশের স্বাধীনতা ঘোষণার টেলিগ্রাম এবং সপ্তম তফসিলে বর্ণিত ১৯৭১ সালের ১০ই এপ্রিল তারিখে মুজিব নগর সরকারের জারিকৃত স্বাধীনতার ঘোষণা পত্র হইল বাংলাদেশের স্বাধীনতা ও মুক্তি সংগ্রামের ঐতিহাসিক ভাষণ ও দলিল, যাহা উক্ত সময়কালের জন্য ক্রান্তিকালীন ও অস্থায়ী বিধানাবলী বলিয়া গণ্য হইবে। "

***5th, 6th & 7th Schedules:***

By Section 50 of the Fifteenth Amendment Act, the 5th, 6thand 7th Schedules respectively have been inserted wherein the speech of Sheikh

Mujibur Rahman of 7th March, 1971, Declaration of Independence by him and the Proclamation of Independence and Mujibnagar Government have been included in the said schedules.

In this regard, the contention of the learned Attorney General is that this amendment cannot be a part of the Constitution, for, it contains nothing of law to be treated as part of the Constitution. Moreover, this insertion/amendment is opposed to the ratio settled in the case of *Asaduzzaman Siddique (Sixteenth Amendment Case)* read with the Preamble of our Constitution inasmuch as by this amendment, it has tried to establish and uphold the contribution of a particular person and particular community in the Liberation War of 1971.

It is the spirit of our Constitution that "*'we, the people of Bangladesh"*, as he submits, owns the Liberation War. These insertion in the Constitution by the impugned Amendment has offended the spirit of *'we ness'* and has also offended the citizens who have contributed in the Liberation War and for this reason, in the Preamble, no individual has been mentioned but mentioned that *"we, the people of Bangladesh' having proclaimed our independence…."*.

The abovementioned proposition has been spelt out more elaborately in the *Sixteenth Amendment Case*, reported in ***71 DLR (AD) (2019) 52***, which runs as follows-

> *"The first word of the first sentence of the preamble of our constitution of the People's Republic of Bangladesh is "WE". The strength of a nation lies in this word and spirit of "WE". This 'weness' is the key to nation building. A community remains a community unless all those who belong to the community can assimilate themselves in this mysterious chemistry of 'weness', the moment they are elevated to this stage they become a 'nation'. And*

*our Founding Fathers very rightfully understood, realized and recognized this quintessential element of nation building and this is why they wrote the first sentence of the constitution "We, the people of Bangladesh, having proclaimed our independence on the 26th day of March, 1971 and, through a historic struggle for national liberation, established the independent, sovereign People's Republic of Bangladesh."*

*"These words mean that people are the source of all supreme power; People are the true achiever of the sovereignty and hence the constitution. The members of the Constituent Assembly were all people's representatives. The preamble, therefore, indicates that the legal basis of our constitution is the people- the ultimate source of all power." [Para- 61 and 62]*

*"Thus, if we carefully look into the philosophy of our political existence we unfailingly see that the citizens of our country are woven by a common thread called 'we the people'. And the solemn expression of the will of the people is the supreme law of the Republic, i.e. the Constitution. The triumph in 1971 was obvious because the feeling of 'weness' was unbreakable. There were numerous conspiracies to break this unity but the enemy utterly failed to inject even the slightest shred of doubt among us. Now that we are living in a free, independent and sovereign country, however, we are indulging into arrogance and ignorance which threaten the very precious tie and thread of 'we'." [Para- 65];*

Accordingly, he goes to contend that by inserting Article 150(2) and the 5th, 6th and 7th Schedules in the Constitution, the Legislature has offended the spirit of '*we ness'* of the Constitution and tried to establish '*I ness'*.

***Bangladesh Nationalist Party (BNP), the Intervener:***

***Article 6 :***

In agreement with the contentions of the learned Attorney General and other Interveners Mr. Sircar also submits that the Constitutions is the

solemn expression of the will of the people of Bangladesh and it begins with the word *"We, the People of Bangladesh"* that connote that there would be one identity of all citizens of the country living within the territory of Bangladesh. The purported amendment of Article 6 to identify the citizens as "Bangladeshi' and 'Bengali' is in clear conflict of the spirit of the Constitution that was earned by the blood of millions in 1971.

***Article 150(2), 5th, 6th, and 7th Schedules:***

In this connection Mr. Mohammad Jamiruddin Sircar adds, the purpose of the amendment of the Constitution is to accommodate the situation prospectively, not to bringing the country back to zero square. By amending Article 150, the Constitution has been made to be a party political document of the then ruling party, not a Constitution of '*we, the people of Bangladesh'*. This amendment is purposive and itself a negation to the basic structure doctrine of constitutionalism, rule of law, independence of judiciary, fundamental rights, equality before laws, which have been developed over the years as the basic structures of the Constitution.

In other words, Article 150(2) and the said 3 (three) schedules, he submits, were nothing but to inject '*I ness*' and also, an indirect induction of political culture into the people's mind which suffers from gross infirmity inasmuch as it is a colorable legislation. This scheme of Fifteenth Amendment Act, has been made in order to prolong fascism and to destroy or demolish the rule of law, democracy, human rights, fundamental rights, supremacy of the Constitution, separation and independence of judiciary and all the things prejudicial to the unity of the nation and supremacy of our Constitution and as such, the impugned Article 150(2) along with the

5th, 6thand 7th Schedules are liable to be declared *ultra vires* the Constitution.

***Bangladesh Jammaat-e-Islami, the Intervener:***

***<u>Preamble, Articles 8, 9, 10 and 12:</u>***

Mr. Shishir Munir submits that by the Constitution (Fifteenth Amendment) Act, 2011, more than one-third of the constitutional provisions have been amended including the provisions relating to aspiration of the people incorporated in the Constitution as the fundamental principles. In this regard, he goes to argue that in the Preamble and Article 8 of the original Constitution of 1972 high ideals of nationalism, socialism, democracy and secularism were introduced as the aspiration for our heroic people who sacrificed their lives in the national liberation war and those ideals were declared as the fundamental principles of the state policy. The elaborations of these principles were incorporated in Articles 9, 10, 11 and 12 consecutively. Thereafter, in 1978, by the Second Proclamation (Fifteenth Amendment) Order, 1978 fundamental principle of secularism was changed to "Absolute faith and trust in the Almighty Allah, and socialism was meant to be economic and social justice. Said proclamation was later ratified and confirmed by the Constitution (Fifth Amendment) Act, 1979. In 2011, by the Constitution (Fifteenth Amendment) Act, 2011 fundamental principles have been amended and the ideals of secularism and socialism have been reincorporated in the Constitution.

While elaborating his arguments he goes to submit that it is evident from the history of emergence of Bangladesh that socialism and secularism were never the aspiration of the citizen of this nation. From the Lahore Proposal, 1940 till the emergence of two nations in 1947 including the

independence of Bangladesh, the historical documents transpire that the struggle and demand of the people was for a real living democracy where social and economic justice, protection of minorities, independence of judiciary would be ensured. Religious values of the majorities, i.e. the muslims were well reflected and respected in the above mentioned documents. Moreover, various documents relating to independence war found in "বাংলাদেশ স্বাধীনতা যুদ্ধ দলিলপত্র" showcases grave impact of islamic faith and culture as the motivating factor for the freedom fighters.

Accordingly, he submits that the amendment introduced by the Second Proclamation (Fifteenth Amendment) Order, 1978 regarding the aspiration of the people in the Preamble and Article 8 are the true aspirations of the people of this nation. As such, Sections 3, 4, 8, 10 and 11 corresponding to the Preamble along with Articles 8, 10 and 12 of the Constitution are liable to be declared *ultra vires* the Constitution and the provisions previous to Fifteenth Amendment may kindly be restored.

***Articles 2A, 6(2) and 9:***

Article 2A of the Constitution, he submits, declares that the state religion of the Republic is Islam, but the State shall ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religions. This article directly contradicts with the Preamble and Article 8 of the Constitution which declares secularism as the fundamental principle. The term "secularism" has further been elaborated in Article 12. It declares that the principle of secularism shall be realised by the elimination of -(a) communalism in all its forms; (b) the granting by the State of political status in favour of any religion; (c) the abuse of religion for political purposes; (d) any discrimination against, or persecution of, persons

practicing a particular religion. It's hard to understand how secularism, i.e. the belief that religion shall not play a role in the government can be harmoniously constructed with Islam as the state religion.

Moreover, Article 6(2) declares that the people of Bangladesh shall be known as Bangalees as a nation and the citizens of Bangladesh shall be known as Bangladeshies. This Article is contradictory in itself. It creates confusion about the identity of the people of the country. Moreover, Article 9 has described the unity and solidarity of the Bangalee nation, which, deriving its identity from its language and culture, attained sovereign and independent Bangladesh through a united and determined struggle in the war of independence. Now, if these Articles are read together, it is difficult to figure out our identity as a citizen. Moreover, what about the indigenous people of this nation who does not share the same language or culture with bengalees but are core part of the country. Many of them were active freedom fighter and some of them even attained martyrdom in the process of independence war. These articles have failed to acknowledge their contribution for the country and by declaring people of Bangladesh to be known as bengalees as a nation, Article 6(2) has tried to impose Bengalee nationalism on the non-bengali indigenous people.

Thus, he submits that the Constitution (Fifteenth Amendment) Act, 2011 has failed to create coherence among several Articles of the Constitution and thus, made the Constitution more cryptic.

***Article 38:***

Substitution of Article 38 by the Constitution (Fifteenth Amendment) Act, 2011 has violated democracy which is one of the basic structures of the Constitution, as he argued. If we look back at the

constitutional journey of freedom of association incorporated in Article 38, he submits, we can find that in the original Constitution of 1972 Article 38 was in the following terms:

> *"Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interests of morality or public order:*
> *Provided that no person shall have the right to form, or be a member or otherwise take part in the activities of, any communal or other association or union which in the name, on the basis of any religion has for its object or pursues, a political purpose."*

In 1978, by the Second Proclamation (Fifteenth Amendment) Order, 1978 proviso to Article 38 was abolished. Thus, after the Constitution (Fifth Amendment) Act, 1979 Article 38 took the following form:

> *"Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interests of morality or public order."*

The Constitution (Fifteenth Amendment) Act, 2011 has substituted Article 38 as under:

> *"Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interests of morality or public order:*
> *Provided that no person shall have the right to form, or be a member of the said association or union, if- (a) it is formed for the purposes of destroying the religious, social and communal harmony among the citizens; (b) it is formed for the purposes of creating discrimination among the citizens, on the ground of religion, race, caste, sex, place of birth or language ; (c) it is formed*

> *for the purposes of organizing terrorist acts or militant activities against the State or the citizens or any other country ; (d) its formation and objects are inconsistent with the Constitution."*

Thus, it can be clearly seen that the impugned amendment has imposed unreasonable restriction on the freedom of association by adding those conditions which totally negated the basic concept of freedom of association. This provision puts an unreasonable bar on the formation of a political party on the basis of religion or other beliefs.

In this regard he goes to argue that all over the world whether it is east or west formation of a political party on the basis of religion is approved. If a nation wants to form a political party on the ideology of certain religion, he submits, they shall have the power to do so. Even, the people with atheist ideology or secular ideology shall have the freedom of association subject to reasonable restrictions. This provision can easily be used as weapon to declare any kind of association to be formed for the purposes of destroying the religious, social and communal harmony among the citizens. In a democratic country like ours this cannot be done. Only people can determine who will ultimately govern them. If a political party formed on the basis of religion or secularism gain with the trust and support of the majority people, they shall be able to form the government. By incorporating conditions to Article 38 spirit of freedom of association has been demolished.

He further submits that democracy is a basic structure of the Constitution and anything corollary to democracy is also a part of the democracy. In support, he has referred an article published by the *European Court of Human Rights titled "Guide on Article 11 of the*

*European Convention on Human Rights- Freedom of assembly and association"* which has emphasized on the importance of the right to freedom of association in a democratic society. *Thomas I. Emerson* in his article titled ***"Freedom of Association and Freedom of Expression"*** published in ***Yale Law Journal Vol.74 (1964)*** states that *"No one can doubt that freedom of association, as a basic mechanism of the democratic process, must receive constitutional protection…"*. The Constitutional Court of South Africa in ***New Nation Movement NPC and others vs President of the Republic of South Africa and others (2020)*** emphasized on*"the necessity to a functioning democracy of such a freedom (freedom of association), for a proper and coherent expression and interplay of collective interests."*

Accordingly, he submits that an association shall enjoy such freedoms which are being enjoyed by an individual. Hence, there shall be no unreasonable bar on the freedom of association as there can be no unreasonable bar to personal freedom. Article 38 as it was after 5th Amendment was perfect in every sense. By adding unreasonable conditions in Article 38, Fifteenth Amendment has, in fact, curtailed the actual freedom of association, which is a fundamental right of the people of the nation. As such, Section 16 corresponding to Article 38 (as amended) is liable to be declared *ultra-vires* the Constitution.

***Article 4A, 150(2) including 5th, 6th and 7th Schedule:***

In this regard, he goes to argue that the Parliament substituted Article 4A in the Constitution and made preserving and displaying portrait of Sheikh Mujibur Rahman in all the government offices compulsory. In the same provision it established Sheikh Mujibur Rahman as the father of the

nation. This provision is really an unnecessary provision to be the part of the Constitution. Moreover, there is no consensus among people of the country about Sheikh Mujibur Rahman being the father of the nation. But this Article imposes people to remember him as the father of the nation. Such unnecessary provision in the Constitution doesn't add any value to it. Furthermore, in this single provision his speech of 7th March and declaration of independence of 26th March has been added in the 5th and 6th Schedule of the Constitution.

In this connection, he goes to argue that all the documents that are included in the 5th, 6th and 7th Schedule are part of our political history, and it serves a specific group of political party to be the stakeholder of the independence war. As we all know, the people of our country didn't fight for 'Bengalee' nationalism or any ideology that any particular political party might try to impose on them. Our nationalism is defined by our territory, whoever lives in this territory whether Bengalee or non-Bengalee, indigenous, Muslim, Hindu, Christian, Buddhist are all part of us. Whether people of this territory possess same ideology or not is insignificant in this case.

He also submits that on going through the Constitution of twenty-seven countries who have gained their independence through bloody war to find out whether they had made their political historical document part of their Constitution, it transpired that not a single country has done anything similar to us. Furthermore, *Mr. Mahmudul Islam in his Constitutional Law of Bangladesh book* commented on the inclusion of Schedule 5, 6 and 7 in the Constitution as follows:

> *"..... the fifteenth amendment made something extraordinary when by adding clause (2) to art. 150, it made the speech of Sheikh Mujibur Rahman delivered on 7th march, 1971 his declaration of independence on 26th march, 1971 and the proclamation of independence in Mujibnagar on 19th April, 1971 part of the constitution by including them as fifth, sixth and seventh schedule to the text of the constitution. The speech of Sheikh Mujibur Rahman on 7th march, 1971 is a glittering piece of our political history, but it contains nothing of law to be treated as part of the constitution. The other two documents may be treated as constitutional documents in the sense that they may provide external aid for interpretation of the constitution and the laws in appropriate cases, nevertheless, they are not part of the constitution."*

Ultimately, Fifteenth Amendment has made these Articles unamendable and declared these as the basic structures of the Constitution through insertion of Article 7B.

Lastly, he submits that the Constitution (Fifteenth Amendment) Act, 2011 was passed to establish authoritarianism in the country. This amendment was made to serve the purpose of fascism. Insertion of Article 4A, 150(2), Schedule 5, 6 and 7 are a glaring example of authoritarianism which have altogether damaged the fabric of the Constitution. It destroyed the basic structure, subverted the will of the people, suppressed fundamental rights like freedom of association, freedom of thought and conscience, destroyed the process of free and fair election system, making the election committee puppet of the ruling government, destroyed democracy in the country and turned the country into an authoritarian regime. Therefore, for the greater interest of the people of the nation the

amendment so made in Preamble, Articles 4A, 150(2) including Schedule 5, 6 and 7 respectively be declared void as being *ultra vires* the Constitution.

***Secularism is needed to protect application of Articles 19, 23, 25, 27, 31 and 39 of the Constitution.-***

Mr. A B M Hamidul Mishbah, a practicing Advocate of the Supreme Court of Bangladesh, and the Founder of Bangladesh Intellectual Property Forum, having aptitude in the areas of intellectual property and technology has been impleaded as intervener in the instant writ petition. He, however, supports inclusion of the word “secularism” in the respective provisions of the Constitution in the interest of justice, inclusivity, diversity, ensuring freedom for creative and innovative work, freedom of expression of thoughts and conscience, preserving human rights, social justice, and technological development and proliferation within Bangladesh, as well as for the interest of Bangladesh to uphold secularism and continue to be a secular State in all aspects.

"Secularism", he contends, is one of the four fundamental principles of state policy as enshrined under Articles 8 and 12 of the Constitution of the People’s Republic of Bangladesh. In this regard he goes to submit that the principle "secularism" separates religion from state governance. It ensures that laws, policies and initiatives taken for the welfare of public remain impartial, inclusive, and grounded on the principles of equality, human rights, common values, and justice. It prevents religious beliefs from influencing government actions and guarantees equal treatment for all citizens, irrespective of faith. Secularism ensures no religion is privileged or discriminated against by the State, protects minorities from

marginalization and allows individuals the freedom to practice, change, or reject religion without state interference. It reduces inter and intra-religious conflicts, ensures that public policies are based on universal principles rather than religious doctrines and promotes a fair, inclusive, harmonious and peaceful society. By separating religion from the country's governance system, he argues, secularism ensures neutrality which creates a strong sense of shared national belonging within citizens' minds regardless of their faith, and characterizes as a just and equitable society.

He fortifies his argument by submitting that inclusivity, diversity, pluralism, co-existence, freedom of expression of thoughts and conscience, preserving human rights, equality, social justice, fairness, harmony, right to life and liberty, and justice are core elements and values of "democracy". Besides, the desire of a population who belongs to and shares the same ethnic group, culture, language, etc. to form and exists in an independent country, is the core element of "nationalism". Eliminating one of the four principles of the fundamental state policies, i.e. "secularism" from the Constitution will make the rest of the three fall flat. Moreover, removing the principle "secularism" from the Constitution, which would render Bangladesh as a non-secular country, will undermine and limit the application of Articles 19, 23, 23 A, 25, 27, 31 and 39 of the Constitution.

In the age of frontier technologies, as he submits, like artificial intelligence (Al), robotics and big data, non-secular policies risk embedding religious biases in technological systems result in inequities and unfairness. For example, in China, biased Al surveillance disproportionately targets Uyghur Muslims, thus, perpetrates discrimination. Hence, secularism is essential to ensure technology is

governed by universal ethics, inclusivity and fairness, and fosters an environment conducive to innovation, privacy, and security.

Conversely, he goes to argue that non-secularism can hinder intellectual property, creative expressions, and technological progress by imposing religious or ideological restrictions. In this connection he submits that religious or ideological doctrines that often guide policies and cultural norms in a non-secular State can significantly impact intellectual property, innovation, and creative works, that ultimately results in stifling the economic growth of a country. Secular governance, by contrast, nurtures creativity and innovation, being free from bias or conformity. In order to foster innovation and creativity, it is crucial to ensure that governance, regulations and policies remain neutral, inclusive and adaptive to the evolving societal and technological needs.

In this regard, he also goes to argue that the 1971 liberation war was not only about political independence but also about rejecting the religious division enthused by Pakistan's two-nation theory. Bangladesh was established as a secular country to provide a platform for its religiously diverse population, i.e. Buddhists, Christians, Hindus, and Muslims, to live in harmony and pluralism. The framers of our Constitution sought to create a political environment where religion would not be used for political control, believing that secularism was crucial for a just and egalitarian society. By including secularism within the fundamental state policies, they aimed to ensure that laws and governance were free from religious influence and grounded in universal human rights and justice. Today, secularism remains a key aspect of Bangladesh's socio-political identity, and ensures the separation of religion from state affairs.

Lastly, he submits that whether it is the Liberation War of 1971, the movement of 1990, or of 2024, the martyrs who sacrificed their lives for independence, freedom, and human dignity remind us of the invaluable nature of unity, human rights, equality and justice in our society. The lives we lost stood in harmony for a shared purpose. Their legacies must live in our actions, guiding us to carry forward their cause, ensuring it leads us towards unity, not division.

Accordingly, he submits, considering the greater interest of the nation the prayer so made by the petitioner of writ petition No.12431 of 2024 challenging incorporation of the word "secularism" in the Preamble and other respective Articles of the Constitution may kindly be negated.

However, considering the facts and circumstances of the case including the observations and findings so made above on the respective Articles of the Constitution it is the categorical findings of this Court that except Article 58A and Chapter IIA, Article 142 so far it relates to repeal of referendum, Articles 7A and 7B and Article 44(2) of the Constitution, the legality and propriety of all other impugned Sections of the Act No.14 of 2011, i.e. the Constitution ( Fifteenth Amendment) Act, 2011 vide which respective Articles of the Constitution including its Preamble have been amended by the Parliament by way of insertion, modification, substitution, repeal etc., are left to be looked into/decided by the successor Parliament in accordance with law.

In the light of the above observations and findings following decisions have been taken by this Court:

*a) Act No. 14 of 2011, i.e. Constitution (Fifteenth Amendment) Act, 2011 is found not void as a whole;*

b) *The repeal of Article 58A and Chapter IIA of the Constitution with regard to Non-Party Caretaker Government vide Sections 20 and 21 of the Act No.14 of 2011 has destroyed the basic structure of the Constitution, i.e. democracy; hence, those two sections are declared void being ultra vires the Constitution, with prospective effect;*

c) *With the repeal of referendum, as it was part of Article 142 of the Constitution vide Twelfth Amendment Act, 1991 has negated the will of the people to express their opinion on the amendability of the Preamble and Articles 8, 48 and 56 of the Constitution; hence, repealing the provision of referendum under Article 142 vide Section 42 of the Act No.14 of 2011 is declared void, being repugnant to and inconsistent with the basic structure of the Constitution. Consequently, Article 142 as it then was vide Twelfth Amendment Act, 1991 is hereby restored;*

d) *Incorporating Articles 7A and 7B after Article 7 of the Constitution is squarely contradictory to Article 7, guaranteeing the will of the people and the supremacy of the Constitution including the right of freedom of thought and conscious and of speech and expression. It also, has taken away the power of amendability of the successor Parliament. Hence, it is declared void and a nullity in the eye of the supreme law of the land, i.e. the Constitution of the People's Republic of Bangladesh. Consequently, Section 7 of the Act, 2011 incorporating Articles 7A and 7B after Article 7 of the Constitution is hereby declared void being ultra-vires the Constitution;*

e) *High Court Division is the creature of the Constitution with plenary power of judicial review over the impugned actions of the executive,*

*even the legislature. It has the power to declare amendment of law void which touches the basic structure of the Constitution. Moreso, High Court Division is the guardian of the Constitution, the supreme law of the land. The Legislature vide Article 44(2) has allowed said power of the High Court Division to be swallowed up by any other court, which is the product of statute. Thus, it comes in direct conflict with Article 102(1) read with Article 44(1) of the Constitution.*

*Accordingly, Section 18 of the Act No.14 of 2011 so far it relates to incorporation of Article 44(2) is hereby declared as void, non-est and a nullity having altered the basic structure of the Constitution; and*

*f) Except Article 58A and Chapter IIA, Article 142 so far it relates to repeal of referendum, Articles 7A and 7B and Article 44(2) of the Constitution, the legality and propriety of all other impugned Sections of the Act No.14 of 2011, i.e. the Constitution ( Fifteenth Amendment) Act, 2011 vide which respective Articles of the Constitution including its Preamble have been amended by the Parliament by way of insertion, modification, substitution, repeal etc., are left to be looked into/decided by the successor Parliament in accordance with law.*

In the result, both the Rules in writ petition Nos. 9935 and 12431 both of 2024 are made absolute in part, without any order as to costs.

Before we part, we would like to observe that the constitutionality of the Constitution (Fifteenth Amendment) Act, 2011 (Act No. 14 of 2011) has been challenged before this Court after more than 13 (thirteen) years by the conscious citizens of the country in the nature of public interest

litigation representing the citizens of the nation, the citizens who are the ultimate source of power, knocking the door of the High Court Division of the Supreme Court of Bangladesh, the protector and custodian of the Constitution of the People's Republic of Bangladesh, to listen to their cry for establishing justice, rule of law and democracy, to eliminate the concept of authoritarianism from all spheres of lives, to allow them to express their will with exercise of their right to franchise through the process of free and fair election; to allow the new generation to exercise their right to determine the law under which they want to live with change and growth in constitutional law with new hope and with the spirit of time.

Accordingly, we would like to extend our deep appreciation to the members of the Bar representing the respective petitioners and interveners including the learned Attorney General and his team of the Attorney General office who represented the government and appeared in this matter in support of the issue in question, for assisting this Bench towards proper dispensation of justice.

Communicate this judgment and order to all concerned.

***Debasish Roy Chowdhury, J:***

I agree.

Montu, B.O