JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS IN LIGHT OF THE POLITICAL QUESTION DOCTRINE: A COMPARATIVE STUDY OF THE JURISPRUDENCE OF SUPREME COURTS OF BANGLADESH, INDIA AND THE UNITED STATES

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Abstract

Judicial review in the matter of constitutional amendments provokes, *inter alia*, the democratic debate pertaining to counter-majoritarian effect as well as the institutional debate about intrusion of judiciary into the realm of politics. While the debate as to where the realm of constitutional judicial power ends and that of politics begins is never-ending, constitutional amendments are apt candidates to be called political questions. Call it political question or not, this paper demonstrates that the Supreme Court of Bangladesh and India entertain judicial review in constitutional amendment matters, while the United States Supreme Court declines to entertain such judicial review calling it a political question. This paper argues that several factors contributed to these divergent approaches regarding constitutional amendments. Most notable of them are: faith in elected representatives, faith in democratic process, position of judiciary in the political process and flexibility/rigidity of constitutional amendment process.

I Introduction

JUDICIAL REVIEW is a much debated phenomenon in democracies of the world primarily on account of thanks to its counter-majoritarian effect.[1] Since its initiation in the United States (US) case of *Marbury* v. *Madison*,[2] the

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1 The opponents view judicial review as a counter-majoritarian force in a democracy, since it upsets the legislations made by the elected representatives of the people. See Alexander M. Bickel, *The Least Dangerous Branch: the Supreme Court at the Bar of Politics* (Vail Ballow Press, New York, 1986) and Jeremy Waldron, The Core of the Case against Judicial Review 115 *Yale Law Journal* (2006). Although judicial review is now a firmly established principle in the US and other jurisdictions, the debate surrounding the counter-majoritarian difficulty of the practice has never stopped.

2 5 U.S. 137 (1803).

doctrine has travelled various jurisdictions, and adapted to various constitutional cultures and norms. Judiciary in some jurisdictions now wields much wider judicial review power as compared to its US counterpart. For instance, the Supreme Courts in Bangladesh and India exert judicial review power in reviewing constitutional amendments, while the US Supreme Court denies doing so.

While judicial review itself is a debated phenomenon in democratic countries, its use in constitutional amendments adds further complixity to the debate.[3] The proponents of judicial review of constitutional amendments argue that like an ordinary legislation, a constitutional amendment can carry the vices of unconstitutionality; in that case, why should such unconstitutional constitutional amendments go without judicial review.[4] The opponents, on the other hand, maintain that amending the Constitution is the privilege of the political branches of the government, and the court should stay away from such a political question. [5]

It is notable that both the proponents and the opponents of judicial reviewability believe in amendability of the Constitution, separation of power doctrine and judicial review. In other words, they do not contest democratic constitutionalism *per se*. But the judiciaries in different jurisdictions differ on the scope of judicial review. In particular, whether judicial review should or should not extend to constitutional amendments is the crux of the issue that divides them.

Why do some countries not extend its review power to constitutional amendments? Does it have something to do with the conceptualisation and development of democratic practices? Do the approaches in reviewing constitutional amendments correspond to various levels of rigidity of the constitutional amendment process? All these questions come to mind when

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3 The author marked such a step of reviewing constitutional amendments as the high water mark of judicial activism. See S. P. Sathe, *Judicial Activism in India* 98 (Oxford University Press, New Delhi, 2002).

4 Though the concept of unconstitutional constitutional amendment has been accepted in many courts and constitutions, critics raise the questions about the absence of the court s accountability *vis- -vis* its high level of discretion. See Rosalind Dixon, Transnational Constitutionalism and Unconstitutional Constitutional Amendments *Public Law and Legal Theory Paper No. 349*, Law School of the University of Chicago 1(May 2011).

5 The US Supreme Court has treated the constitutional amendment as a political question in several cases including *Coleman* v. *Miller* (1938). See Jesse H. Choper, The Political Question Doctrine: Suggested Criteria 54 *Duke Law Journal* (2005).

one thinks about different practices regarding judicial review of the constitutional amendments. This paper will factor in all these questions and issues.

The paper is divided into three parts. The first part explores the approaches adopted by the Supreme Court of Bangladesh, India and the US in reviewing or not reviewing constitutional amendments. The second part seeks to explore the reasoning offered by the apex courts of these countries behind their approaches. This part also makes an evaluation and comparative assessment of the factors that were decisive in their reasoning. The third part seeks to analyze if constitutional amendments are political questions or not. The conclusion summarises the findings of the study.

II Reviewing the constitutionality of constitutional amendments: Different approache

Constitutional amendments are made by the Parliament by enacting amending laws, though the procedure of passing such laws varies from country to country.[6] If one accepts the plain argument supporting judicial review of laws in general (namely, that the judiciary should have a right and duty to examine if different branches of the government are within their constitutional limits or not in conducting their business) constitutional amendments are also judicially reviewable. But judiciaries in many countries do not subscribe to the view that ordinary laws and Constitution-amending laws are of similar status when it comes to judicial reviewability. Some judiciaries view constitutional amendments as a different genre of law, enacted by the Parliament in a different capacity; and therefore, the Constitution-amending acts are considered to be beyond judicial review.[7] Judiciaries in some jurisdictions take a completely opposite position in this debate.

Before going into concrete examples, it is worth mentioning that a constitutional amendment can be reviewed on procedural as well as

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6 The quality of a Constitution Amending Act is different because once enacted it becomes a part of the Constitution itself. The procedure is, famously, different in that a Constitution Amendment Act requires the support of the supermajority in the Parliament in favor of the bill; it also requires ratification by state legislatures in a federation. And on some occasions, a constitutional amendment may even require referendum.

7 It is argued by some judges, though debatably so, that a Parliament acts in the capacity of constituent power when it amends the Constitution. For a detailed debate on this, see *Kesavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461 and the Bangladesh case, *Anwar Hossain Chowdhury* v. *Bangladesh* BLD Spl. 1989 SC 1.

substantive grounds.[8] Even while accepting the reviewability of constitutional amendments in general, some countries may not want to allow judicial review on substantive unconstitutionality. They concede judicial review only on procedural grounds, whereas some countries employ judicial review for ensuring both substantive and procedural constitutionality of an amendment.

Based on acceptance and rejection of judicial review of constitutional amendments on procedural and substantive grounds, there can be four scenarios:

i. Countries reviewing constitutional amendments on both procedural and substantive grounds: This means full exercise of judicial review in case of constitutional amendments, like reviewing ordinary laws. One can call this scenario the most liberal in exercising judicial review. At present, Bangladesh and India belong to this category.

ii. Countries refusing to review constitutional amendments on both grounds: This means putting constitutional amendments beyond judicial review. This is the most rigid scenario in using judicial review. At present, US belongs to this category.

iii. Countries reviewing constitutional amendments only on procedural grounds: Such an approach conforms to the positivist approach which considers the courts as impartial umpires, their only duty being to see if players play by the rules of the game or not.[9]

iv. Countries reviewing constitutional amendments only on substantive reasons: Such an approach can only exist in theory because when a judiciary is ready to review an amendment on substantive reasons, *a fortiori* it will review the amendment on procedural reasons as well.

In making a comparative study of Bangladesh, India and the US, one will see how the state of judicial review shifts from more rigid to more flexible and *vice versa*.

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8 The procedural ground pertains to following or not following the established procedure of constitutional amendments. And the substantive ground of review deals with inconsistency of an amendment with rule of law and fundamental features of the Constitution.

9 Teresa Stanton Collett, Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments 41 *Loyola University Chicago Law Journal* 338- 339 (Winter 2010).

Judicial review of constitutional amendments in the US

Coleman v. *Miller*: *The landmark decision*

Since the *Coleman* v. *Miller*[10] decision of 1939, the US Supreme Court has been maintaining a hands-off approach [11] to judicial review of constitutional amendments on both procedural and substantive fronts. Though the *Coleman* case basically involved a procedural question,[12] the underlying reasoning of the judgment went far beyond its immediate holding.[13] The judgment effectively precluded judicial review of constitutional amendments on substantive questions as well. In *Coleman*, the court emphatically opined that article V of the US Constitution vested Congress with sole and complete control over the amending process. [14] The questions relating to constitutional amendments were declared political questions, and hence, they were declared beyond the reach of the Supreme Court s judicial review power.

It was in the *Coleman* case decision that the US Supreme Court for the first time declared constitutional amendments to be political questions.[15] Before *Coleman*, the Supreme Court decided at least seven cases, where the constitutionality of different amendments was at issue, at least two of them being on substantive grounds.[16] Although in all these pre-*Coleman* cases the

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10 307 U.S. 433; 59 S.Ct. 972.

11 See also *supra* note 9 at 336.

12 The fact of the *Coleman* case in brief is that the Kansas legislature rejected the Child Labor Amendment in 1925. In 1937, a proposal for ratifying the same amendment was again initiated in the Kansas legislature. In the voting, the senators were evenly split in 20-20 votes. The Lieutenant Governor of Kansas casted deciding vote in favor of the ratification of the amendment. This ratification was challenged, among others, by the senators who voted against ratification. The US Supreme Court granted *certiorari* in this case but held that the case presented a political question which is beyond the judicial review power of the Supreme Court. So, in this case, the procedure, not the contents, of an amendment was at issue. The precise question involved was about the fixation of time limit for ratification of a constitutional amendment, and whether a state legislature can ratify an amendment subsequent to a prior rejection.

13 Walter Dellinger, The Legitimacy of Constitutional Change: Rethinking the Amendment Process 97 *Harvard law Review* 392 (Dec. 1983).

14 *Supra* note 10 at 459.

15 Marty Haddad, Substantive Content of Constitutional Amendments: Political Question or Justiciable Concern? 42 *Wayne Law Review* 1692 (Spring 1996).

16 Walter Dellinger referred to the following seven cases in his article The Legitimacy of Constitutional Change: Rethinking the Amendment Process 97 *Harvard law Review* 403-404 (1983); *Hollingsworth* v. *Virginia*. 3 Dall. 378 (1798) (11th amendment);

Supreme Court upheld the constitutionality of amendments in question, judicial review itself was not denied in any amendment-related cases before.

What was the reasoning that led justices in *Coleman* to hold against judicial review of amendments? The court gave three interlinked reasons:[17]

> [T]he necessity of giving finality to the political branches of government regarding certain constitutional matters, amendment being one of such matters entrusted to Congress. The court referred to the historic precedent of the ratification of the 14th Amendment, where Congress unilaterally adopted the proclamation that the amendment was duly ratified by required number of states in spite of a series of ratifications and rescissions by some states that created doubts about the amendment s status.

Also the judiciary is not well equipped to deal with amendment-related questions because in many cases an amendment might involve:[18]

> [A]n appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice. . . On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. *The questions they involve are essentially political and not justiciable.*

Finally the court found no basis in either Constitution or statute for such judicial action , meaning judicial review of constitutional amendments.[19]

Curiously enough, neither the parties to the case nor the *amicus* brief of the US raised the question of justiciability in the courts below.[20] The parties

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Hawke v. *Smith* 253 U.S. 221 (1920) (18th amendment); *National Prohibition* cases 252 U.S. 350 (1920) (18th amendment); *Dillon* v. *Gloss* 256 US 368 (1921) (18th Amendment); *United States* v. *Sprague* 282 U.S. 716 (1931) (the 18th Amendment); *Hawke* v. *Smith* 253 U.S. 231, 232 (1920) (19th amendment); and *Leser* v. *Garnett* 258 U.S. 130 (1922) (19th amendment). According to Marty Haddad, in the *National Prohibition* cases and *Leser* v. *Garnett*, the substance of the amendment was challenged; nevertheless, the court entertained the cases.

17 *Supra* note 10 at 448-450.

18 *Id.* at 454-455 [emphasis added].

19 *Id.* at 450.

20 *Supra* note 13 at 391.

sought the determination of two main questions, *firstly* whether once rejected by a state legislature, a constitutional amendment can be subsequently approved by a legislature of that state or not; and *secondly* whether after a lapse of 13 years and rejections by 26 states, an amendment is still open for ratification or not. Without going to the merits of the case, the court abruptly decided in advance that matters related to constitutional amendments are exclusively determinable by Congress. Walter Dellinger forcefully argues that the *Coleman* decision was profoundly wrong and should no longer be followed. [21]

Dillinger-Tribe debate

In the Harvard law review of December 1983, Dellinger submitted that the absence of judicial review in the constitutional amendment cases since *Coleman* has built a wonderland of uncertainty surrounding the amendment process[22] because many issues regarding constitutional amendments remained unsettled in this case: Does a prior rejection by a state preclude a subsequent state legislature from ratifying the same amendment? Can a state rescind ratification? Is there a time limit for the ratification of an amendment? The uncertainty surrounding these and other related questions will continue as long as constitutional amendments are regarded as the exclusive domain of Congress alone.[23] Dellinger argues that since the above mentioned questions are constitutional in nature, and the judiciary is entrusted with the duty of interpreting the Constitution and reviewing the constitutionality of such matters, there is no reason not to allow the Supreme Court to review every part of the Constitution, including the amendment related provisions of the Constitution.[24]

Dellinger further argued that judicial review of the amendment process is critically important for the overall legitimacy of a constitutional regime. Since an amendment duly enacted and ratified becomes a part of the Constitution, an unduly adopted amendment leaves a continuous legacy of unconstitutionality in the constitutional scheme. Since the Constitution is the basic reference point in assessing the legitimacy of government and its actions an unconstitutional constitutional amendment can put a lasting impact of illegitimacy in the overall framework of the government.[25] If the post-

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21 *Id.* at 388.

22 *Id.* at 395.

23 *Id.* at 392-393.

24 *Id.* at 411-12.

25 *Id.* at 387.

Coleman state of affairs continues, the unconstitutionality of many future amendments will go unnoticed.

Dellinger thinks that there is no textual bar in article V of the Constitution against judicial review of constitutional amendment. The antecedent cases of the US Supreme Court before the *Coleman* case also prove that many issues relating to constitutional amendment are judicially determinable.[26] Dellinger, therefore, thinks that judicial review of constitutional amendments is not only permissible; it offers a better clarity of the amendment regime than the muddled doctrines of congressional promulgation and political question. [27]

Laurence H. Tribe, on the other hand, argues that the added certainty *per se*, as argued by Dellinger, is not enough virtue to warrant the enormous vices that exclusive judicial control. . . . would entail. [28] Moreover, judicial power over constitutional amendment will create a never-ending clash between the judiciary and the legislative organ of the state, because a continuous trumping and overtrumping of each other s judgment will ensue.[29] He is also of the opinion that the details of constitutional amendments should not be determined by the court not because the court is less competent than Congress in doing so, but because the court may sustain the very legal structure that Congress tries to demolish through an amendment. Therefore, Tribe thinks that the substance of a constitutional amendment is a true political question .[30]

Tribe concludes that though there are some dangers in giving exclusive power relating to amendment-related issues to Congress, a broad deference on procedural as well as substantive aspects of amendment ratification is preferable to judicial review of amendments.[31] On the other hand, even noting the inherent vices of non-deferential judicial review power of the court, Dellinger prefers judicial review over plenary congressional power of amendment. One shortcoming of Dellinger s analysis is that he does not take the political question doctrine seriously, nor does he refute *Coleman* s

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26 *Id.* at 420.

27 *Id.* at 432.

28 Lawrence H. Tribe, A Constitution We Are Amending: In Defense of a Restrained Judicial Role 97 *Harvard Law Review* 435 (1983).

29 Powell J also raised the similar concern as Tribe s in *Goldwater* v. *Carter* 444 US 996 (1979) regarding judicial review of constitutional amendments.

30 *Supra* note 28 at 443.

31 *Id.* at 445.

assertion that constitutional amendments are political questions.[32] One may agree or disagree; the current established principle of the US Supreme Court is that constitutional amendments are judicially unreviewable.

Judicial review of constitutional amendments in India

The landmark Golaknath decision

Diametrically opposed to the US practice, the Supreme Court of India has consistently maintained from the very beginning that constitutional amendments are reviewable in general. After the *Golaknath*[33] decision of 1967, it started nullifying constitutional amendments on substantive grounds. In this case, the Supreme Court of India ruled for the first time that fundamental rights cannot be abridged by constitutional amendments. Even before *Golaknath*, the Indian Supreme Court reviewed constitutional amendments in a number of occasions on both substantive and procedural grounds, though the court had refrained from nullifying an amendment for unconstitutionality.

As early as in 1951, the Constitution (First Amendment) Act, was challenged in *Sankari Prasad* case[34] on a substantive ground. The petitioner argued that even in absence of an express bar, fundamental rights guaranteed in the Constitution cannot be changed by constitutional amendments.[35] The court, deciding on merit, declared that no such bar exists in the Constitution. In the words of the court: Had it been intended to save the fundamental rights from the operation of that provision, it would have been perfectly easy to make that intention clear by adding a proviso to that effect. [36] In 1965, another case came up before the Supreme Court challenging the 17th amendment of the Indian Constitution, this time on a procedural ground.[37]

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32 Marty Haddad has taken seriously Coleman s claim that constitutional amendments are political questions. By matching Colemans claim with the six criteria of political questions set up by *Baker* v. *Carr* (369 US 186 1962), Haddad proves that constitutional amendments are not political questions, and hence not beyond judicial review. See Marty Haddad, *supra* note 15.

33 *Golaknath* v. *State of Punjab,* AIR 1967 SC 1643 was the starting of a series of cases that consolidated the power of the Supreme Court of India to review constitutional amendments.

34 *Sankari Prasad* v. *Union of India,* AIR 1951 SC 458.

35 Sunder Raman, *Amending Power under the Constitution of India: A Politico-legal Study* 81(Eastern Law House, New Delhi, 1990).

36 *Ibid.*

37 In *Sajjan Singh* v. *State of Rajasthan,* AIR 1965 SC 845 the court was asked to strike down the 17th amendment on the ground that the Parliament did not follow the proper procedure.

The court upheld the amendment along the same line of argument as *Sankari Prasad* s.

What is special about *Golaknath* is that the court made it clear for the first time that constitutional amendments are not only reviewable, but also nullifiable for unconstitutionality. Interestingly enough, the court s assertion was based on no express amendment provision of the Constitution, but by reading an implied limitation into article 368 s seemingly absolute grant of power to Parliament in amending the Constitution.[38] The implied limitation was invoked based on another article of the Constitution, namely, article 13 (2), which gave power to the Supreme Court to nullify law that is inconsistent with any of the fundamental rights guaranteed in the Constitution. According to the majority, a constitutional amendment law is also law within the purview of judicial review of the Supreme Court. Though the government argued that constitutional law is not like ordinary law because a constitutional amendment is made in exercise of the sovereign power and not legislative power of Parliament and therefore it partakes the quality and character of the Constitution itself, [39] the court held that amending power was not a constituent power, rather it was a delegated power. [40] The court suggested that the power to amend fundamental rights was not vested with the Parliament; the proper way to do that is to invoke a fresh constituent assembly. [41] Subba Rao CJI did not accept the contention of the petitioner that constitutional amendment involved political question and hence not reviewable. The CJI said, [i]t is not possible to define what is a political question and what is not. [42]

Though the court overruled *Sankari Prasad* case by holding that fundamental rights cannot be changed by amending the Constitution,[43] surprisingly the court did not literally strike down the first, the fourth and the 17th amendment of the Constitution for the sake of continuity of the Constitution and for avoiding chaos. The court resorted to prospective overruling when

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38 Maureen Callahan Vandermay, The Role of the Judiciary in India s Constitutional Democracy 20 *Hastings International and Comparative Law Review* 114(Fall 1996).

39 *Supra* note 33 at 1652.

40 *Supra* note 35 at 103.

41 Bhagwati J forcefully argued that only a constituent assembly can bring a change in the fundamental rights chapter of the Constitution. *Supra* note 33 at 1718.

42 *Id.* at 1664.

43 Manoj Mate, Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective 12 *San Diego International Law Journal* 181- 182 (Fall 2010).

it declared that the Parliament will have no power from the date of the decision to amend any of the provisions of Part III of the Constitution so as to take away or abridge the Fundamental Rights enshrined therein. [44]

The minority held that the court can review constitutional amendment on procedural grounds only, not on substantive grounds, like integrity of fundamental rights. The minority thought that Parliament could do away with the fundamental rights, abolish elected legislatures, and even change the present form of government. [45] The amending power is not to bring small changes here and there, but to bring big changes, like amending the fundamental rights, if people so will. They described the argument of the majority as argument of fear, fear that Parliament will take away people s rights or bring about dictatorship by amending the Constitution. In their judgment, the minority opined that if something is wrong with an amendment, there are political solutions for that; and a legal solution is inappropriate in such a case. But the majority judges decided not to keep constitutional amendments under the complete control of the ruling majority, and undertook the role of overseers in ensuring that constitutional amendments do not go against rule of law and fundamental rights of the citizens.[46]

Kesavananda Bharati v. *State of Kerala*: *A shift to the extreme*

The government sharply reacted to the *Golaknath* decision. It passed the 24th amendment of the Constitution to supersede the verdict of *Golaknath* and to extend the Parliament s amending power to each and every provision of the Constitution. This amendment along with the 25th and 29th amendments of the Constitution were challenged in *Kesavananda Bharati* v. *State of Kerala*.[47] This case lifted the Supreme Court s judicial review power to a completely different level. Though the court held that *Golaknath s* case decision was wrong (because it is within the Parliament s amending power to change the fundamental rights guaranteed in the Constitution), the court imposed a bigger implied limitation on constitutional amendment called the basic structure doctrine. While such an implied limitation was sought from time to time since 1950s, the court upheld the basic structure for the first time in *Kesavananda Bharati* with a seven-six majority.

The doctrine of basic structure is based on the notion that the basic features of the Constitution can never be changed by a constitutional amendment.

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44 *Supra* note 35 at 101.

45 *Id.* at 108.

46 *Supra* note 43 at 178.

47 AIR 1973 SC 1461.

The petitioners argued that Parliament, being a constituted body, cannot change the basic features of the Constitution. Such basic features, though implied, are easily discernable from the structure of the Constitution. On the other hand, the government argued that implied limitation is a very wide term, and the democratic tradition requires a plenary amending power of the Parliament beyond judicial review. However, the government conceded to one implied limitation, that is, that the whole Constitution cannot be abrogated by way of amendment,[48] apart from that, Parliament is bound only by express limitations. On behalf of the government, the Advocate General of Maharashtra also argued that judicial review over constitutional amendments would mean involving the court in political questions. [49]

The Attorney General of India argued that the amending power had no limits unless they were expressly stated in the Constitution itself; unexpressed or implied limitations would defeat the purpose of amending power which was to keep the Constitution responsive to the needs of the changing times. [50] But the majority judges disagreed with the argument. They decided that the amending power does not include the power to change the basic structure of the Constitution. Judges, however, could not precisely tell what those basic features were. One of the judges mentioned republican and democratic form of government as basic structures. Other judges mentioned different basic features of the Constitution *viz.* supremacy of the Constitution, secular character of the state, federal character of the Constitution, separation of powers, and so on.[51]

Speaking for the majority, S.M. Sikri CJI, held that in absence of implied limitations of basic structure, Parliament may mutilate the structure of the Constitution by bringing unexpected changes in the Constitution. The minority held that constitutional amendment is not an ordinary law, and hence it generates its own validity. The validity of constitutional amendment lies on the acceptance of the society, not on the acceptance of the court.

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48 Niren De, the Attorney General of India, argued against implied limitation of basic structure, though he conceded that the amending power does not include power to abrogate the Constitution itself.

49 *Supra* note 47 at 1601-1602.

50 *Supra* note 35 at 130.

51 *Supra* note 43 at 184.

The minority recognised unfettered right of the Parliament to amend the Constitution.[52] Palekar J, speaking for the minority, held that whoever is given the amending power is constituent, and Parliament acts as constituent body when it amends the Constitution. Beg J commented that Parliament exercises its amending power as a principal, not as a delegate, and hence, exercises an unlimited power. Mathew J viewed basic structure as absurd because you cannot bind future generations with[53] the basic tenets set up by an earlier generation. Moreover, Dwivedi J mentioned, that the Constituent Assembly that framed the Constitution in 1949 was not an elected body. It is an added reason why the basic structures set up by that assembly should not be considered as iron-clad features in the Constitution. Marking Parliament as a continual Constituent Assembly, [54] Dwivedi J questioned the right of the court to make value judgments over constitutional amendment and make ultimate value choices for the people. [55] He urged that solution of political, economic and social problems be left for the people to solve, and should not be done by the court.

Minerva Mills: *Sealing the deal*

Since the decision of *Kesavananda Bharati*, it is a settled principle that constitutional amendments are judicially reviewable on both substantive and procedural grounds. Though Parliament did not accept this position in the beginning and engaged in a series of overtrumping activities, like supercession of judges and further enactment of constitutional amendments to regain the plenary power, finally it relented to the doctrine of basic structure. As a last attempt, the Parliament passed the 42nd amendment to the Constitution in 1976 for precluding judicial review power of the Supreme Court over constitutional amendments. The amendment added two new clauses to article 368, with respect to the amending procedure of the Constitution: clause (4) added that [n]o amendment of this Constitution (including the provisions of part III) made or purporting to have been made under this article [whether before or after the commencement of section 55 of the Constitution (Forty-Second Amendment) Act, 1976] shall be called in question in any court on any ground ; clause (5) added that there shall be no limitation whatever on the constituent power of Parliament to amend... [56]

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52 *Supra* note 35 at 146.

53 *Supra* note 47 at 1981.

54 *Supra* note 35 at 158.

55 *Id.* at 159.

56 The Constitution (Forty-Second Amendment) Act, 1976, cl. 5.

In *Minerva Mills Ltd.* v. *Union of India*,[57] the Supreme Court struck down both the clauses of the 42nd amendment for being inconsistent with the basic structure of the Constitution. Interestingly, even Chandrachud J, who was in the minority in *Kesavananda Bharati* and took a strong position against it, joined the majority in upholding the basic structure of the Constitution. After *Minerva Mills*, the basic structure doctrine has settled down as a fundamental principle of the Indian Supreme Court's judicial functioning, with its clarion call that constitutional amendments' contents must be befitting with the overall constitutional structure of India.

Judicial review of the constitutional amendments in Bangladesh

Like India, Bangladesh Supreme Court reviews constitutional amendments on both procedural and substantive grounds. Procedural reviewability is unquestionable because of the express provisions of the Constitution empowering the Supreme Court to do such reviews.[58] The Constitution has also mandated for reviewing any law including constitutional amendments on the substantive ground of inconsistency with any of the fundamental rights of the citizens guaranteed in the Constitution.[59]

Anwar Hossain case: Invoking the doctrine of basic structure

Bangladesh Supreme Court in *Anwar Hossain Chowdhury* v. *Bangladesh*[60] ruled that the Parliament cannot change the basic structure of the Constitution. By holding that the decentralization of high court division of Bangladesh Supreme Court is a violation of the Constitution's basic structure, the court nullified a part of the eighth amendment, and restored the amended articles 100 and 107 to their original form.[61] But like the Indian case, the judge could not come to a consensus about what those basic structures precisely were.[62]

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57 AIR 1980 SC 1789.

58 Constitution of the People's Republic of Bangladesh, 1971, art. 142 holds that an amendment of the Preamble, art. 8, 48, 56 or 142 require referendum for peoples' assent before it is passed.

59 *Id.*, art. 26.

60 1989 DRL (AD) 165.

61 Shah Alam, State-religion in Bangladesh: A Critique of the Eight Amendment to the Constitution, 4 (3) *South Asia Journal* 323 (1991).

62 Badrul Haider Chowdhury J mentioned 21 basic features of the Bangladesh Constitution. Shahabuddin Ahmed J mentioned eight, while Habibur Rahman J left it for determination in the future. Even the only dissenting member of the court, ATM Afzal J mentioned one basic structure: the three organs of the government. This impreciseness is one of the main critiques of the doctrine of basic structure.

The Attorney General of Bangladesh argued that the Parliament has unlimited amending power so long as it operates within the prescribed procedural limits. He also argued that Parliament s amending power is a constituent power, and hence, unreviewable.[63] He further argued that when the Constitution itself does not impose any express limitation, the power cannot be limited by some vague doctrine of repugnancy. [64] On the other hand, the petitioners argued that the Parliament cannot undermine the basic structure of the Constitution. Kamal Hossain, a world-famous lawyer from Bangladesh, argued that by setting up seven regional permanent benches of the high court division, the amendment has destroyed a Single Supreme Court envisaged by the framers of the Constitution.[65] Syed Ishtiaq Ahmed, another lawyer for the petitioner, argued that the Parliament s amending power is not a constituent power because unlike the Indian Constitution, Bangladesh Constitution does not mention the amending power as constituent power in express terms.[66]

The court was convinced with the arguments of the petitioners, and with a 3:1 majority upheld the implied limitation of basic structure. Having mentioned that only the power to frame a Constitution is a primary power, Badrul Hyder Chowdhury J held that a power to amend a rigid constitution is a derivative power derived from the Constitution and subject at least to the limitations imposed by prescribed procedure. [67] He further held that by virtue of article 7, that declares any law inconsistent with the Constitution void, the amendment passed by the Parliament is to be tested as against Article 7. [68] Once article 7 is invoked in testing a constitutional amendment, the bar of basic structure comes into play automatically. Similarly, Shahabuddin Ahmed J accepted the basic structure doctrine by holding that the basic structure cannot be changed by the Parliament, because the constituent power is vested to the people alone; and it is doubtful whether it can be vested in the Parliament. [69]

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63 Mahmudul Islam (ed.), *Constitution 8th Amendment Case Judgment,* BLD Special Issue 2 (Bangladesh Bar Council, Dhaka, 1989).

64 *Supra* note 60, para 163.

65 *Supra* note 63 at 23.

66 *Id.* at 30.

67 *Supra* note 60, para 145.

68 *Id.*, para 195. See also, *supra* note 58, art. 7 (2) holds that the Constitution is supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.

69 *Id.*, para 342.

But in his lone dissenting opinion, ATM Afzal J rejected any implied limitation of basic structure by holding that there is no substantive limitation on the power of the Parliament to amend any provision of the Constitution as may be found under article V of the Constitution of the USA. [70] He categorically held that no part of the Constitution is beyond the purview of amendment. The majority in this judgment agreed not to apply the basic structure test on previous amendments made in violation of such structure. Rather by applying the principle of prospective invalidation, the court saved the country from a constitutional earthquake. Unlike *Kesavananda* judgment in India though, the judgment of *Anwar Hossain* did not generate much criticism and parliamentary reaction in Bangladesh. After the *Anwar Hossain* judgment, the Supreme Court of Bangladesh nullified two other amendments, namely, the fifth and the seventh amendment,[71] both enacted during two different extra-constitutional martial law regimes with a view to give validity to everything done during martial law. Again, the court, in nullifying these amendments, was alert to preserve constitutional continuity, and, therefore, condoned many activities that were done against the basic structure and has become *fait accompli* since then. The bottom line is that Bangladesh Supreme Court, like Indian Supreme Court, now exercises judicial review of constitutional amendments on procedural as well as substantive grounds. The doctrine of basic structure has immensely enlarged the scope of such power.

III Legal Reasoning on the question of judicial review of constitutional amendments

As discussed above, the US Supreme Court refrains from reviewing constitutional amendments on both procedural as well as substantive grounds, while the Bangladeshi and the Indian Supreme Courts review amendments not only on procedural grounds but also on substantive grounds. It has been observed that the questions of separation of powers, democratic legitimacy and counter-majoritarian effects of judicial review, political question, constituent/derivative power *etc.* were raised in all the three jurisdictions. Nevertheless, the US Supreme Court reached a totally different conclusion than the Supreme Courts of other two jurisdictions. What are the reasons behind such divergence? An attempt has been made to find out below.

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70 *Id.*, para 530.

71 For details about the 5th amendment nullification, see *Bangladesh Italian Marble Works Ltd.*, v. *Bangladesh* BLT (Special) HCD (2006) and for details about the 7th amendment nullification, see *Siddique Ahmed* v. *Bangladesh* WP No. 696 (2010).

Judicial review of constitutional amendments on procedural grounds: A comparative discussion

In *Coleman* case, the US Supreme Court declared that the process of ratification of a constitutional amendment is a political question, and therefore, judiciary has no role to play in the entire process of amendment. Holding that Congress enjoys sole and complete control over the amending process, *Coleman* case shut the door of judicial review in an amendment case. Those who support *Coleman s* embargo on procedural review of judicial review argue that judicial review will hamper Congress s independent exercise of article V powers.[72] Since the overtrumping power of Congress over the Supreme Court s rulings maintains checks and balances of co-equal branches, judicial review would imbalance the scale of powers shared by the organs of government.

The US scholars who support judicial review of constitutional amendments on procedural grounds maintain that article V has left many procedural questions unanswered.[73] Since the answer to these questions are not clear, and since there is no definitive provision in article V or settled precedents, the court s opportunity to answer the unsettled questions should not be shut down.[74] Even Tribe, who strongly believes that constitutional amendments should be in Congress s domain, does not think that Congress can solely decide amendment-related issues. Mentioning such a claim as a straw man, it was asked: [75]

> Could anyone really believe, for example, that a court would feel bound to treat the equal rights amendment (ERA) as part of the Constitution if Congress determined that the thirty-five states that had ratified the amendment as of July 1, 1982, constituted the three fourths of fifty required by article V?..... Could anyone believe that a court would or should respect such a decision?

Precluding judicial review of constitutional amendments seems absurd because such review only demands compliance of those procedures which

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72 *Supra* note 28 at 444.

73 If one was to ask a question: is there a reasonable time limit for ratification? One finds different answers. In *Dillon* v. *Gloss*, the Supreme Court held that Congress can fix a time limit for ratification. In *Coleman* case, the court held that fixation of such a time is at the sole discretion of the Congress. The Supreme Court has no right to pass a judgment on this question.

74 *Supra* note 13 at 419-426.

75 *Supra* note 28 at 433.

were set up by the people for Congress. In such a review, the court s role is no more than an umpire. Since the Supreme Court exercises only a minimal role to oversee if the players played by the rules, the review of constitutional amendments is supportable.[76]

In Bangladesh and India, judicial review of constitutional amendments on procedural grounds was never denied. Part of the reason was that judicial review in these two countries came directly from express constitutional provisions,[77] and the Supreme Court in exercising such review power historically conceived itself as a guarantor of the constitutionality of amendment and other governmental processes. Therefore, though the judicial review provisions of the Constitution only provided for judicial review of laws in general, judges interpreted laws to include constitution-amending Acts as well. Moreover, the Supreme Court s overall interpretive function allowed judges to see if the amendment process has been duly followed or not.

Judicial review of constitutional amendments on substantive grounds: A comparative discussion

Before *Coleman*, at least on two occasions, the US Supreme Court has determined the constitutionality of the content of amendments.[78] But after *Coleman*, contents of amendment have become judicial untouchables. It is now argued that the US Constitution has conferred the sole right to amend the Constitution on elected bodies. Judicial review of the constitutional amendments on substantive grounds would amount to an extreme level of judicial interference on the activities of Congress, so much so that it virtually brings an end of democracy. [79] The proponents of non-interference on Congress s power to amend further argue that to prevent the Supreme Court from becoming a super-legislature, constitutional amendments contents must be kept aloof from judicial interference. Mainly, for its extreme counter-

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76 *Supra* note 9 at 339.

77 Constitution of India, 1950, arts.13, 32, 246, 248, 251, 372 contain express provision for judicial review. Similarly, arts. 7, 26 and 102 of the Bangladesh Constitution provide for judicial review of laws on various grounds.

78 In *Leser* v. *Garnett*, 258 U.S. 130 (1922) the court has ruled that Congress had all the power to bring an amendment on women s right to vote; and in *National Prohibition cases*, 253 U.S. 350 (1920) at 386, the court held that The prohibition of the manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment, is within the power to amend reserved by Article V of the Constitution.

79 *Supra* note 28 at 328.

majoritarian effects, judicial review of constitutional amendments contents is denied in the US.

Those who support judicial review of contents of constitutional amendments argue that if Constitution is the fundamental law of the land, one must conceive of it as a unified, if not a 100 percent coherent, document. Any anomalies and contradictions in the body of the Constitution, in case of the conflict between original Constitution and its amendment, will have a chilling effect on the overall constitutional structure. Therefore, scholars opine that for ensuring coherence, an amendment must conform to the fundamental values/ indispensable parts of the Constitution.[80] Tribe writes that the value of the Constitution as an evolving repository of the nation s core political ideals and as a record of the nation s deepest ideological battles depends significantly on the limitation of its substantive content to what all (or nearly all) perceive to be fundamental. [81] Ironically, Tribe does not believe in judicial review of contents of the constitutional amendments. Who, then, can ensure that Congress does not change those core ideals? He thinks Congress can ensure it. A complementary question then arises: How can Congress limit its own attempt to change a fundamental norm of the Constitution? Where lie checks and balances in such a provision? Would it not be wiser to give the review power in this case to make sure that Congress does not change the fabric of the Constitution itself? If Congress adopts a constitutional amendment allowing ownership of slave in the US, who will check such amendment? [82] Can Congress change the federal character or curtail first amendment rights of the citizens? On these questions, US academics are sharply divided. In India and Bangladesh, on the other hand, the apex courts answered above questions decisively by holding that Constitution s basic substances must be kept in mind while bringing an amendment to the Constitution.

Why does the US Supreme Court s practice differ from that of Bangladesh and India? The contexts of these countries may have contributed to the difference. Although all of these countries practice democracy, judiciary s role *vis- -vis* Parliament is accepted differently by the people. In India and Bangladesh, due to corruption and failure of the parliamentarians to obtain trust and confidence of the people, Parliament could not become a trustworthy institution in bringing social changes. Failure of the politicians paved the

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80 *Id.* at 440.

81 *Id.* at 442.

82 *Supra* note 9 at 341.

way for wide judicial review power of the Supreme Courts in these countries.[83] Scholars opine that, given the south-Asian culture of uncompromising political conflicts and continual overtrumping of the opposition s previously adopted constitutional changes, judicial review of constitutional amendments is appropriate for south Asia.[84]

In simple words, the Supreme Court is seen as the better arbiter than politicians in India and Bangladesh.[85] On the other hand, people in the US no longer believe that the courts are applying the law in cases involving constitutional challenges; instead, they have come to believe that courts are imposing the political preferences of judges. [86] While the US people conceive judicial review of the constitutional amendments as an extreme counter-majoritarian problem, people in India and Bangladesh see it as an epitome of judicial activism and as a counter-majoritarian check against the excesses of the Parliament.[87] Sathe argues that human rights of the minority groups are also counter-majoritarian, but still, when majoritarian Parliament ignores them, courts protect them. In the same vein, whether majority likes it or not, the unelected courts can preserve the liberties of all by protecting the basic features of the Constitution through judicial review of constitutional amendments.[88]

The political climate of India and Bangladesh during *Kesavananda* and *Anwar Hossain* decisions have also played a big role in availing validity to the practice of judicial review of constitutional amendments in general, and the doctrine of basic structure in particular. In India, the practice got final approval of the political community after *Indira Gandhi* case.[89] In this case the validity of the 39th amendment and the election of the Prime Minister of India were at issue. When Allahabad High Court declared that the Prime Minister s election as a Member of Parliament was void for corrupt practices, Indira Gandhi brought 39th amendment to the Constitution for retroactive validation of her election. When challenged for violation of basic structure,

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83 Maureen Callahan Vandermay, The Role of the Judiciary in India s Constitutional Democracy 20 *Hastings Comparative and International Law Review* 104 (Fall 1996).

84 Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* 117 (Cambridge Scholars Publishing, New Castle upon Tyne 2011).

85 *Supra* note 3 S.P. Sathe at 251.

86 *Supra* note 9 at 348.

87 *Supra* note 3 at 281.

88 *Id.* at 80.

89 *Indira Nehru Gandhi* v. *Shri Raj Narain* (1975) 2 SCC 159.

the court took a strategic decision in this case regarding the 39th Amendment. The court validated the Prime Minister s election but struck down a part of the 39th amendment for violating basic structure of the Indian Constitution. The Congress government, which was so far opposing the judicial review of constitutional amendments, for the first time in its history accepted the validity of the basic structure doctrine. Sathe thinks that this historic event helped basic structure doctrine to have a foothold in India, to only get stronger and stronger later on.[90]

Similarly, *Anwar Hossain* case judgment in Bangladesh came at a time when the whole country was rallying against a decade-long dictatorial regime, at the auspices of which the disputed eighth amendment was adopted.[91] Therefore, when the court nullified the amendment, it was seen as another victory against the dictator. Therefore, the starting point of the judicial review of the contents of a constitutional amendment was smoother in case of Bangladesh.

But the US did not face any change in the Constitution dramatic enough to arouse the court for nullifying an amendment on a substantive ground, nor was a political condition supportive enough to overrule *Coleman* case. The court s pre-*Coleman* precedents show that if a proper case comes to the docket, the court may proceed to overrule *Coleman* case in future for bringing back its judicial review power over constitutional amendments. There are many substantive constitutional questions in the US, which may create political situations when the court may feel obligated to review constitutional amendments. An abortion-related amendment or abolition of the second amendment or a change in the eighth amendment s capital punishment-related clause may trigger the judicial review of constitutional amendments in the US once again.

Another reason why judicial review of constitutional amendment developed in Bangladesh and India but not in the US is the extreme rigidity of the US Constitution s amendment process.[92] The numbers of amendments in these countries are enough to make the point clear. When a constitutional

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90 *Supra* note 3 at 8-9.

91 Lt. General Hossain Mohammad Ershad, the top army personnel, took power in 1982 by the proclamation of martial law throughout the country. Democratic forces were protesting against his regime since then, which ultimately ended in 1991.

92 In the US, the Constitution has gone through only 27 amendments in its history of more than 200 years, whereas, Bangladesh Constitution has gone through 15 amendments in its constitutional journey of 40 years, and similarly, the Indian Constitution has gone through more than 80 amendments in 60 years.

amendment gets through the steep process in the US, the Supreme Court generally feels it wise not to interfere with that rare sacred cow. On the other hand, Indian and Bangladeshi Constitutions amendment process is not too rigid, if not too flexible. Parliaments can sometimes bring extraordinary changes in the Constitutions of these countries by exploiting its super-majoritarian capacity, occasionally available. Therefore, judicial review of constitutional amendments in these two countries makes much sense.

IV Is constitutional amendment a political question?

One common question that invariably arises in a constitutional amendment case is that of the political question.[93] In the cases of *Coleman* in the US, *Kesavananda* in India and *Anwar Hossain* in Bangladesh, political question doctrine was presented as an argument against reviewability of constitutional amendment by one party or the other. Such an argument was accepted by the US judges, but rejected in other two jurisdictions.

The doctrine, arguably, brings checks and balances among the co-equal organs of the state. The opponents of judicial review of constitutional amendment argue that though judicial review is generally conceded to, there should be some exceptions. Political question is such an exception that includes constitutional amendment cases. In the *Coleman* case, the court unequivocally declared that constitutional amendment is a political question, and therefore the court cannot review it.

What makes a question political? Although the doctrine started its real journey in 1920s,[94] there were no clear criteria to identify a political question until 1962, when the Supreme Court in *Baker* v. *Carr*[95] set up six criteria to identify the presence of a political question. One of the criteria was [l]ack of

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93 A political question has been defined by Jesse H. Choper as a substantive ruling by the Justices that a constitutional issue regarding the scope of a particular prov ision (or some aspects of it) should be authoritatively resolved not by the Supreme Court but rather by one (or both) of the national political branches. See Jesse H. Choper, The Political Question Doctrine: The Suggested Criteria 54*Duke Law Journal* 1461 (2005).

94 It is mentionable that the doctrine of political question is in fact as old as the judicial review is. While establishing judicial review in *Marbury* case Marshall CJ made it clear that Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court. 5 US 1 (Cranch) 137 (1803).

95 369 US 186 (1962).

judges discoverable and manageable standards for resolving an issue. [96] In the hindsight, the *Coleman* justices basically relied on this criterion in holding that constitutional amendments were political questions. In the court s words:[97]

> The questions they involve are essentially political and not justiciable. They can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment.

However, most of the scholars writing on this issue do not think that the Supreme Court is less-equipped then the Congress in knowledge and appreciation of the political, social and economic conditions .[98] Even those scholars who do not believe in judicial review of constitutional amendments disagree with the basic assertion of *Coleman* case that a constitutional amendment issue is a political question. They acknowledge that amendment-related questions are constitutional questions, though for other reasons they oppose the judicial review of constitutional amendments. They argue that the court should not adjudicate such issues for the sake of keeping the function of a co-ordinate branch uninterrupted.[99] On the other hand, the supporters of judicial review of constitutional amendments argue that even if political questions do exist in reality, constitutional amendment is definitely not such a question.[100]

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96 *Id.* at 217.

97 *Supra* note 10 at 454.

98 Those who support judicial review of amendments, such as, Dellinger and Marty Haddad, and those who do not believe in judicial review of amendments, such as, Tribe and Jesse H. Choper think that the Supreme Court is not less-equipped knowledge-wise in deciding the constitutionality of an amendment.

99 Tribe who is a true disbeliever of judicial review of constitutional amendment held that the Supreme Court should not review an amendment not because courts are less adept than Congress at detecting the consensus that some observers believe an amendment should reflect, but because allowing the judiciary to pass on the merits of constitutional amendments would unequivocally subordinate the amendment process to the legal system it is intended to override and would thus gravely threaten the integrity of the entire structure. See also *supra* note 28 at 442.

100 Many constitutional scholars think that there is no necessity of a political question doctrine, and no such thing really exists. See Louis Henkin, In There a Political Question Doctrine 85 (5) *The Yale Law Journal* 597 (1976); Linda Sandstorm Simard, Standing Alone: Do We Still Need the Political Question Doctrine? 100 *Dickinson Law Review* 303 (Winter 1996).

V Conclusion

The Supreme Courts of Bangladesh and India exert very high judicial review power over constitutional amendments, while the Supreme Court of the US declines to exert any. This paper, highlighted that the same arguments were presented across the jurisdictions, but only with different results. A number of factors were responsible for such diverse results: flexibility/rigidity of the amendment process, political context of a given country, and the people s perceptions about the role of judiciary *vis- -vis* elected branches of government. In Bangladesh and India, supportive political climate and peoples positive perceptions about the court helped the Supreme Court in wielding the widest possible judicial review power. On the other hand, democratic zeal of the American people and their trust on the elected branches of the government barred the Supreme Court from ambitious extension of judicial review power in amendment-related cases. Extreme rigidity of the US Constitution s amendment process has also made judicial review of constitutional amendments undesirable.

Since judicial review of constitutional amendments is indeed the high water mark of judicial activism, [101] judiciary of a given country can maintain that high mark only when the people of a country acknowledge the legitimacy of such an enterprise. A change in the people s perception about the worth of the Constitution and the democratic institutions can transform the current judicial review practices of the Supreme Courts of Bangladesh, India and the US in constitutional amendment cases.

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101 *Supra* note 3 at 98.