# Anwar Hossain Chowdhury Vs. Bangladesh, 1989, 18 CLC (AD)

Supreme Court

Appellate Division

(Civil)

Present:

Badrul Haider Chowdhury J

Shahabuddin Ah-med J

M.H. Rahman J

A.T.M. Afzal J

Anwar Hossain Chowdhury.....Appellant
(In Civil Appeal No. 42 of 1988)

Vs.

Government of the
People's Republic of Bangladesh, represented by the Secre-tary, Ministry of Law
and Justice, Bangladesh Secre-tariat,Ramna,Dhaka & Others ……… Respondents (In
Civil Appeal No. 42 of 1988)

Jalaluddin.....Appe-llant
(In Civil Appeal No. 43 of 1988)

Vs.

Government of the
People's Republic of Bangladesh, represented by the Secretary to the Ministry
of Law and Justice, Bangladesh Secre-tariat, P.S. Ramna, Dhaka & other
……………………………………….....
Respondents (In Civil Appeal No. 43 of 1988)

Ibrahim
Sheikh.....Petitioner (In Civil Peti-tion No. 3 of 1989)

Vs.

Bangladesh,
represented by the Secretary, Ministry of Law, Govt. of the People's Republic
of Bangladesh
& others.....Respondents (In Civil Petition No. 3 of 1989).

Judgment

September 2, 1989.

The
Constitution of Bangladesh, 1972, Article 100, 107 & 142

Majority
view

Per
B.H. Chowdhury, J: Basic structural pillars of the Constitution cannot be changed by
amendment. The structural pillars of
Parliament and Judiciary are basic and fundamental. It is inconceiva-ble that
by its amending power the Parliament can deprive itself wholly or partly of
the plenary legisla-tive power over the entire Republic. The impugned amendment in a subtle manner
in the name of creating "Permanent Benches" has indeed erected new
courts parallel to the High Court Division as contemplated in Articles
94,101,102. Thus the basic structural pillar, that is judiciary, has been
destroyed and plenary judicial power of the Republic vested in the High Court
Di-vision has been taken away. Hence amendment of Article 100 is ultra vires be-cause it has 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 jurisdictions, powers and functions of the

High Court Division………………(293, 295 & 297)

Per Shahabuddin Ahmed, J: Impugned Amendment of Article 100 has broken the "oneness" of the High Court Division and thereby damaged a bas-ic structure or" the Constitution; as such, it is void. The Impugned Amendment has resulted in unrecognizable repugnancies to all other ex-isting provisions of the Constitution related to it rendering the High Court Division vir-tually unworkable in its original form, and as such, it is void. The impugned Amendment will go off the Constitution and the old Article 100 will stand revived along with its provi-sion for holding of Sessions………….(419 & 420)

Per M. H. Rahman, J: This Preamble is not only a part of the Constitution; it now stands as an entrenched provision that cannot be amended by the Parliament alone. one of the fundamental aims of our society is to se-cure the rule of Saw for all citizens and in further-ance of that aim Part VI and other provisions were incorporated in the Constitution. By the im-pugned amendment that structure of the rule of law has been badly impaired, and as a result the High Court Division has fallen into sixes and sevens— six at the scats of the permanent Benches and the seven at the permanent seat of the Supreme Court. Amendment is being struck down not on the ground of uncertainties or ir-reconcilability of the existing provisions with the amended provisions as such, but on the ground of the amendment's irreconcilability with the rule of law, as envisaged in the preamble, and, in further-ance of which, Articles 27, 31,32,44,94 to 116A were particularly incorporated in the Constitution. Amendments of Article 100 & 107 are declared unconstitutional. ……………………..(496, 523 & 529)

Dissenting view:

Per A.T.M. Afzal, J: The power to amend any provision of the Constitution by way of addition, alteration, substitution or repeal is found to be plenary and unlimited except as provided in Article 142 itself. There is, however, a built-in limitation in the word "amend" which does not

authorise the abrogation or destruction of the Constitution or any of its three structural pillars, which will render the Constitution defunct or unworkable. The impugned amendment of Article 100 has neither destroyed the Supreme Court High Court Division as envisaged in the Consti-tution nor affected its jurisdiction and power in a manner so as to render the Constitution unworkable. The impugned amendment and the Notifications issued and the Rules framed thereunder are not ultra vires on any of the grounds urged……………………..(673)

Cases Referred To-

34 DLR 225; 37 DLR 7; 20 DLR (SC) 322; 7 DLR 552 Eklas vs. Crown; 17 DLR (SC) 74 National Bank of Pakistan vs. Ataul Hoque; 25 DLR 236, 344 A. T. Mridha's case; 38 DLR (AD) 38 Abdus Sattar vs. Stole; 7 DLR (FC) 291 Federation of Pak vs. Tamijuddin Khan; 7 DLR (FC); 9 DLR (SC) 177, 178; 18 DLR (SC) 69; 32 DLR (AD) 233 Bangladesh vs. Hazi Abdul Gani; 17 DLR (SC) 384 Shamsuddin vs. Capt.Gauhar 1 Ayub; 35 DLR 362 Md. Mustafa Mandal Vs. State; 41 DLR 395 Nurul Huda vs. Baharuddin; 26 DLR (SC) 17; 34 DLR (AD) 110 Al Sayar Nav vs. Delia Int. Traders; 32 DLR (AD) 1; PLD 1957 (SC) 215,219=9 DLR (SC); PLD 1965 (SC) 477 I.T. vs. Khatija Begum; PLD 1965 (SC) 496 Shamsuddin vs. Capt. Gauhar Ayub; PLD 1963 (SC) 460,486 Fazlul Quader Chowdhury vs. Abdul Huq; PLD 1972 (SC) 139 Asma Jilani vs. Govt. of Punjab; PLD 1952 (FC) 29 Sobho Cyan Chand vs. Crown; PLD 1963 Dhaka 669 Md. Abdul Haque vs. Fazlul Quader Chowdhury; AIR 1967 (SC) 1643 Golaknath's case; AIR 1973 (SC) 1461 Keshavananda's case; AIR 1960 (SC) 845; AIR 1967 (SC) 944 Mongal vs. Union of India; AIR 1953 (SC) 210 Election Commissioners vs. Venkata; AIR 1939 (PC) 53 Attorney-General of Alberta vs. Attorney-General of Canada; AIR 1924 (AC) 328 Attorney-General vs. Reciprocal insurers; AIR 1932 (AC) Page 41 Re Insurance Act Canada; AIR 1977 (SC) 2328, Union of India vs. Sankalchand; AIR 1977 (SC) 2359; AIR 1982 (SC) 152 S.P. Gupta vs. President of India; AIR 1979 (SC) 478; AIR 1919 (PC) 145; AIR 1953 (SC) 375 Gajapati Narayan Vs. State of Orissa; AIR 1965 (SC) 1024 Vajravelu vs. Collector; AIR 1976 (SC) 311, 331 Nasiruddin vs. S.T.A. Tribunal; AIR 1951 (SC) 458 Sankari Prasad vs. State of Bihar; AIR 1965 (SC) 845 Sabjan Singh vs. State of Rajasthan; AIR 1980 (SC) 1789 Minerva Mills Ltd. vs. Union of India; AIR 1975 (SC) 2299 Smt. Indira Gandhi vs. Raj Narain; AIR 1939'(FC) I. C.P and Berar Act; AIR 1955 (SC) 549 Ram Jawaya vs. State of Punjab; AIR 1970 (SC) 1102 Sanjuvi Naidu vs. State of Madras; AIR 1971 (SC) 1002 J.N. Rao. Vs. Smt. Indira Gandhi; AIR 1950 (SC) 27 A.K Gopalan Vs. State of Madras; AIR 1955 (SC) 123 Bahram Khurshid vs. State of Bombay; AIR 1943 (FC) 24 Venugopal Reddiar vs. Krishnaswami Reddiar; AIR 1967 (SC) 1953 Para 28 I.C. Golak Nath vs. Punjab; AIR 1983 (SC) 239 Sanjeeb Coke Manufacturing Co; AIR 1975 (SC) 2466; AIR 1972 All 200 (FB) 201 Nirmal Das Khaturia; AIR All 488 (FB) Bhuwal; AIR 1977 All 488 (FB); AIR 1981 (SC) 271 Waman Rao vs. Union of India; AIR (1958) All 652 Union of India vs. Chheda Lai Ramutar; AIR (1950) Hyd. 71; (1941) Nag 364 Cawashah Bomanji vs. Profullah Nath; C.M.P. Case No.1 of 1986; 1950 (S.C.R.) 88 (120, 198); 1899 A.C. 580; (1584) 76 ER 637; 37 Commonwealth Law Reports Clyde Sugining vs. Cowburn; 1910 (AC) 444; B.C.R. (1984) A.D. 29 Joynal vs. Rustom Ali; (1839) 9 AD & E.I. Page 86, Stockdale vs. Hansard; (1971) Blackburn vs. Attorney-General; Murbury vs. Maddison; (1967) 1 AC 259 Liyanage vs. R; 378 U.S. 500 (1964) E.G. Aptheker vs. Secretary of State; 1952 (2) S.A. 428, Harris vs. Minister of Interior; 193 U.S. 457-48 Ed. 747, Kadnon vs. U.S; (1959) AC 259 D.J. Francis Douglas Liyanage Vs. The Queen; (1965) A.C.P. 190; 1965 (AC) 172 Bribery Commissioners vs. Pedrick Ranasinghe; (1919) 64 Law Ed. 946 State of Rhodes Island vs. Metchar Palmer; US 2 Law Ed 5-8 page 135 Marbury vs. Maddison; US 4 Law Ed. 579

McCulloch vs. Marryland; (1952) Osborn Vs. Bank of the United States 9 wheat 738; (1964) (AC) 42 Ridge vs. Baldwin; 258 U.S. 433 (1922) United States vs. Moreland; (1948) 2 All E.R. 995 Bide Vs. General Accident Fire, Life Insurance Corporation; 1936 (AC) 578 James vs. Commonwealth of Australia; 1920 (AC) 691 Me Cawley Vs. The King; 1967(AC)(1-2594) Liyange Vs. The Queen; 1951 (SCR) Canada 51, Attorney General of Nova Scotia and Attorney General of Canada; AC 935 In Re, Initiative and Referendum Act (1919); 23 CLR, 457 Tayler vs. Attorney-General of Queensland; 45 Aust. L.J 251 West vs. Commissioner of Taxation, New South Wales; 56 CLR 657 West vs. Commissioner of Taxation, New South Wales; 74 CLR 31 Melbourne Corporation vs. Commonwealth 15 [1878J3AC 889=1A 178] Queen vs. Burah; (1920) 28 CLR 129 Amalgamated Society of Engineers vs. Adelaide Steamship Co.; 1912 (AC) 571 Attorney-General of Canada vs. Attorney-General of Ontario; 1935 I.R. 170 Rayan vs. Michal Lennon; 1907 (AC) 81 Webb Vs. Outrim; 1910 (AQ 514 Whiteman vs. Sadlar; 74
CLR 319 Melbourne Corporation vs. Commonwealth; 1957 (AC) 436 [1957] 1AU E.R.49 Attorney-General vs. Prince Augustus; (1967)2 All E.R. 578 Borne Vs. Norwich Crematorium; 1913 (AC) 107= [1911-1913] AU E.R. Rep 241 Vacher & Sons Vs. London Society of Compositors 62 Law Ed. 372 Towne vs. Eisner; 1981 BLD (AD) 8 Bangladesh vs. Haji Abdul Gani; 1919 (AC) 172 Initiative and Referendum case; (1968) (AC) 574 Vacher & Sons vs. London
Society of Compositors and Lord Reid in Gartside vs. IRC; (1955) 1 SCR 933 Sajjan Singh vs. Rajasthan; 1933 IR 170 The State (Ryan) Vs. Lennon; (1964) All E.R. 785 Bribery Commissioner vs. Ranasinghe; (1981) 2 Sec. 362 Wamana Rao; (1922) 258 U.S. 130 Lesser Vs. Garnett; (1967) 289 U.S. 228 (231) Whitchill vs. Elkins; (180)1 Cranch 137 Marbury vs. Madison;
(1899) (AC) 143 Powell vs. Kempton Park Racecourse Co. Ltd; (1957) 1 All E.R. 49 Attorney-General vs. H.R.H. Prince Ernest Augustus of Hanover; (1960) 3 SCR 250, 282 Berubari Union and Exchange of Enclaves; 92 Ohio State 115 H.M.Co. Vs. Miller; (1878) 3 AC 889 Queen vs. Burah; (1908) 6 Com LR 469 New South Wales vs. Brewery Employees Union (564) 15 US
93 26 Law Ed. 110 Ex-parte John L. Rapier; (1887) 12 (AC) 575 Barrk Toronto vs. Lambe; (1921) 28 CLR 129 Amalgamated Society of Engineers vs. Adelaide Steamship Co.; (1931) 75 Law Ed. 640 282 U.S. 716 Sprague's case; 7 All 345 (350) Har Prasad vs. Jafar Ali; (1982) BLD (AD) 69 Al Sayar Nav vs. Delia Int. Traders; (1963) 372 U.S. 726 Ferguson vs. Skrupa; (1919) (AC) 935 In-Re Initiative and Referendum; (1883) 9 (AC) 117 Hodge Vs. The Queen; 17 D.L.R. (SC) 384 and A.I.R. 1977 Allahabad 488 Full Bench.

Lawyers Involved:

Dr. Kamal Hossain, Senior Advocate (Mahmudul Islam, Zakir Ahmed Advocates with him), in-structed by Kazi Shahabuddin Ahmed, Advocate-on-Record—For the Appellant (In Civil Appeal No. 42 of 1988).

M. Nurullah, Attorney-General (Abdul Wadud Bhuiyan, Additional Attorney-General, A. F. Hasan Arif, Deputy Attorney-General with him), instructed by B. Hossain, Advocate-on-Record—For the Re-spondents (In Civil Appeal No. 42 of 1988).

Syed Ishtiaq Ahmed, Senior Advocate [Mahmudul Islam, Mainul Hosein & Joynul Abedin, Advocates with him], instructed by Kazi Shahabud-din Ahmed, Advocate-on-Record,—For the Appellant (In Civil Appeal No. 43 of 1988).

M. Nurullah, Attorney-General, [Abdul Wadud Bhuiyan, Additional Attorney-General & A. F. Ha-san Arif, Deputy Attorney-General with him], in-structed by B. Hossain Advocate-on-Record,—For the Respondents (In Civil Appeal No. 43 of 1988).

Amir-ul-Islam, Advocate, instructed by Kazi Shahabuddin
Ahmed, Advocate-on-Record—For the Petitioner (In Civil Petition No. 3 of 1989).

Not represented—For the Respondents (In Civil Petition
No. 3 of 1989).

Asrarul Hossain, Senior Advocate with Khondker
Mahbubuddin Ahmed, Senior Advocate — Amicus Curiae.

Civil Appeal No. 42 of 1988

Civil Appeal No. 43 of 1988

Civil Petition for Special leave to Ap-peal No. 3 of
1989.

Judgment

Badrul Haider
Chowdhury J. —
These two appeals by special leave arise out of an order dat-ed 15.8.88 passed by a Division Bench of the High Court Division at Dhaka in Writ Petition Nos. 1252 and 1176 of 1988.

2. The gist of the controversy is that the Com-missioner of Affidavit refused to allow the counter-affidavit to be affirmed by the appellant at Dhaka on the ground that the writ petition stood transferred to the permanent Bench at Sylhet pursuant to the provi-sions of Rule 6 of the Supreme Court (High Court Division) Establishment of the Permanent Benches Rules, 1988 framed under Article 100(6) as amended by the Constitution (Eighth Amendment) Act, 1988.

3. In the other case the Registrar of the Su-preme Court had taken steps for sending the record to Chittagong Bench and the appellant was denied to affirm affidavit and have the writ petition heard in the High Court Division at Dhaka.

4. In these circumstances the appellants chal-lenged the constitutionality of amended Article 100 of the Constitution as amended by the Eighth Amendment Constitutional Act. The High Court Di-vision dismissed the petitions summarily.

5. Leave was granted to both the petitions be-ing Civil Petition Nos. 207 and 208 of 1988. In the leave granting order it was mentioned:

"Dr. Kamal Hossain, learned Counsel ap-pearing for the petitioner (in Civil Petition No. 207 of 1988), addressed the Court on the effect of the Constitution (Eighth Amendment Act, 1988) which has substituted the original Article 100 by a new Article. The whole argument of Dr. Hossain is that the Constitution contem-plates a superior Court, namely, Supreme Court of Bangladesh comprising the Appellate Divi-sion and the High Court Division vide

Article 94. By amending Article 100 for the purpose of setting up permanent Benches the basic structure of the Constitution has been altered and it seeks to destroy the independence of judiciary and the character and rule of effectiveness of the High Court Division. It is submitted that Article 100 (5) purports to mean that the President has been empowered to re-determine by executive fiat the territorial jurisdiction of the Permanent Benches which in effect renders the Constitutional provi-sion e.g. Articles 94, 95 (3), 101,102 nugatory and irreconcilable.

6. Mr. Syed Ishtiaq
Ahmed, learned Counsel appearing for the petitioner (in Civil Petition No.208 of 1988) submitted that the concept of the residuary area as envisaged in Article 100(5) is against the basic concept of the Constitution and therefore, the amendment was not made in accordance with Article 142 of the Constitution.

7. Mr. M. Nurullah
learned Attorney-General appearing for the Caveator pointed out that the con-cept of "Permanent Bench" is nothing new and ex-tensively referred to the establishment of the perma-nent Benches of the High Court from the Indian Jurisdiction. The learned Attorney-General contended that the establishment of the Permanent Benches is not incompatible with Article 94 nor has it changed the basic structure of the Constitution. The learned Attorney-General vigorously argued that the petition-ers have not made out a case as to how the unitary character of the Republic has been affected:

8. It appears that
a number of important ques-tions of public importance have been raised which require authoritative interpretation by this Court. Hence leave is granted for consideration of these points in full scale."

9. Article 100 of the Constitution as amended
by 8th Constitutional Amendment has been assailed. Dr. Kamal Hossain, the learned counsel, submitted that the amendment power is given by the Constitu-tion itself and therefore subject to limitation. Article 142 provides for the amendment of the Constitution. It is hedged by certain conditions and if such proced-ural conditions are not fulfilled then the amendment will be bad. His submission can be catalogued:

(a) amendment has
been made in violation of Article 142(1) inasmuch as no long title is to be found in the amendment bill;

(b) Permanent
Benches have been created by the amendment in violation of Article 94 of the Constitution. Supreme Court is one Court with two Divisions namely, Appellate Di-vision and High Court Division.

(c) Amended Article
purports to confer territori-al jurisdiction to the permanent benches which is repugnant to Article 102 of the Constitution.

(d) Transfer of
Judges have been made by a deeming provision although nowhere in the Constitution such provision transfer of Judges of the High Court Division could be found;

(e) Nothing has
been said about the pending proceedings although constant legislative practice
is to make such constitutional pro-vision whenever such circumstances require.
Rules framed by the learned Chief Justice are ultra vires because Parliament cannot delegate this legislative
power to any au-thority;

(f) Effectiveness
of admiralty jurisdiction is destroyed by the concept "alaka hoete
udvoddo" be-cause territorial waters are well beyond the district;

(g) Amending power
cannot destroy structure of the Constitution;

(h) Lastly, basic
feature of the Constitution cannot be demolished by amending process.

10. It was
submitted that there cannot be con-cept of territorial jurisdiction for the
Supreme Court which has jurisdiction over the entire territory of Bangladesh
including water and air. The concept of assigned area is repugnant to the Constitution
and has practically created mini High Courts. Articles 44 and 102 of the
Constitution conferred jurisdiction of the High Court Division for the entire territory of Bangladesh. The impugned
amendment has
not amended Articles 44 and 102. He has further submit-ted that the original
Article 100 preserved the unitary character of the Republic and in Article 100
basic conception was of Session and it was for the Chief Justice to determine
according to requirement of areas where the Sessions of the High Court Division
could be held. It was not confined with the particular District or area but
under the amended article six districts had acquired special status over other
districts. It has thus created regionalism which is contrary to the spirit of
nationalism. The learned counsel sub-mitted that functionaries performing
function in con-nection with the affairs of the Republic outside the
territorial jurisdiction of .any particular court is amenable to the
jurisdiction of the Supreme Court under Article 102 but the amendment having
created six permanent benches have led to uncertainty and confusion as to the
jurisdiction and it has shaken the confidence of the people.

11. Dr. Kamal
Hossain placed Article 102 with Article 22 of the 1956 Pakistan Constitution
and 32 of the Indian Constitution. In 1956 Constitu-tion while conferring power
on the Supreme Court by Article 22 it was not confined to territorial juris-diction.
Same is the case in Article 32 of the Indian Constitution. India and Pakistan have
federal structures of Government and of necessity the High Courts were created
in the State or Province with ter-ritorial limits. Article 226 (Indian),
Article 170(1956 Constitution), Article 98 of the 1962 Constitution had
conferred such territorial jurisdictions. But in Ar-ticle 102 the High Court
Division exercises jurisdic-tion throughout the Republic not only within the
territorial limits but whoever performs functions in connection with the
Republic is also amenable to the jurisdiction. Seat of Supreme Court as contem-plated
in the original article was the capital and such is the case with Parliament
Article 65(4). These bas-ic features, it is submitted, are unalterable and
there-fore amended Article 100 is void because it confers power on the
executive to define the territorial limits of the permanent benches which is
alien to the basic structure of the Supreme Court of Bangladesh.

12. Mr. Syed Ishtiaq Ahmed, the learned coun-sel,
submitted that the Constitution has built a structure which has its own

balance, beauty and grace. He submitted that these double protective Constitutional provisions in Articles 7 and 26 is an unique feature of this Constitution. While Article 7 declared that any law inconsistent with the Constitu-tion will be void to the extent of the inconsistency, Article 26 not only declares that all existing law in-consistent with the provisions of this part (fundamental rights) is void to the extent of inconsistency, fur-ther sub-article 2 provides that the State shall not make any law inconsistent with any provisions of this part. Though Sub-article (3) says nothing in this article shall apply to the amendment of this Constitution made under Article 142, it is referable to the fundamental rights only but the basic feature or the Constitution cannot be amended.

13. The plenary jurisdiction with amplitude of power is located in Articles 101 and 102 which go beyond the territory of republic and they have not been amended. Referring to Articles 107 and 108 read with 106 which refer to advisory jurisdiction of this court, the learned counsel submitted that only one indivisible character of the Supreme Court is focussed in the Constitution.

14. The learned Counsel submitted that in 1982 the Martial Law was proclaimed and then the concept of 'permanent benches' was devised by Mar-tial Law Proclamation but when the Constitution was restored on 10th November, 1986 it became ob-vious, that such benches cannot operate. Hence the amendment has been made on 9th June, 1988. 10th June was a Friday and on 11th June the learned Chief Justice had issued Notification constituting benches for the areas mentioned in Article 100. These were the very areas where the Benches were functioning during the Martial Law period and the Chief Justice was authorised to frame rules and nominate the judg-es to these benches from time to time and on such nomination the Judges "shall be deemed to have been transferred." The Chief Justice was empowered to frame rule to provide for any incidental, supplemen-tal and consequential matter relating to the perma-nent Benches and in doing so the Chief Justice by framing rule has altered the entire balance of the Constitutional frame.

15. The Indian High Courts due to historical reasons had to be bifurcated, for instance, High Court of Bombay and High Court of Gujrat. Some High Courts were amalgamated, for instance, High Court of Allahabad and Chief Court of Oudh and established the Permanent Benches in Luck now; again setting up some High Courts for States for instance, High Court of Panjab and Haryana.

16. In all these legislations the common fea-ture is that the jurisdiction of the High Courts is fixed by reference to the territories in which they function and of their permanent Benches in respect of cases arising from the districts assigned to such per-manent Benches. In all these legislations there are express provision of transfer of pending cases.

17. In India the High Courts are established by ordinary legislation by the Union Parliament because of Articles 3 and 4 of the Constitution.

18. The learned Counsel pointed out that even under the Martial Law dispensation the Admiralty ju-risdiction and the original jurisdiction of the High Court Division in respect of Company Matters were kept with the permanent Bench at Dhaka. Later when in January, 1985 a very limited writ jurisdic-tion was conferred on the High Court Division by the Martial Law Proclamation that jurisdiction re-mained exclusively with the permanent Bench

at Dhaka.

19. This was the
state of affairs till June, 1986 when the permanent Benches by a deeming provision were converted into Circuit Benches by the Martial Law Proclamation Order of 1986. The learned Counsel submitted that for safeguarding and ensuring the independence and effectiveness of the Judges the Supreme Court could have framed appro-priate Rules to guide and regulate the matter of nom-ination of the Judges. The learned Counsel submitted that confusion resulted after the amendment and cited the example of two cases when in an admiralty mat-ter (Learned single Judge Mustafa Kamal, J)
found difficulty in resolving the area of a pending proceed-ing in admiralty jurisdiction with the concept of "Alaka hote udvoddo” and referred the matter for larger Bench to the learned Chief Justice. The learned Chief Justice passed the order that larger Bench is not re-quired since a Division Bench had dismissed the writ petitions summarily.

20. Mr. Syed
Ishtiaq Ahmed further submitted that this amendment had created 10 effects

(i) Seeks to alter the permanent seat of the Su-preme
Court;

(ii) creates six
permanent Benches;

(iii) establishes
permanent Benches at predeter-mined places selected at random coinciding with Martial Law dispensation;

(iv) provides for
jurisdictions, powers and func-tions of permanent Benches;

(v) provides for
territorial limits of permanent Benches;

(vi) confines the
High Court Division function-ing at the permanent seat to the area not as-signed to permanent Benches;

(vii) Provides for
transfer of Judges of the High Court Division by a deeming provision;

(viii) gives power
of transfer of the Judges to the Chief Justice without any guideline, qualification or safeguard;

(ix) delegates to
the President the constituent power of assignment of areas of jurisdiction of the permanent Benches; and

(x) gives
rule-making power to the Chief Jus-tice on "incidental" matters
relating to the permanent Benches.

21. It was
contended that the territorial limita-tion of the High Court Division or its
permanent benches are inappropriate and irrelevant in the Con-stitutional
frame. Power to amend the Constitution cannot be stretched to the extent of
authority to de-molish the very Constitution. P.L.D.1957 (SC) 219 was
cited for the contention that interpretation of the Constitution must be made
in the context and the scheme of the entire Constitution. The amending Ar-ticle
cannot be interpreted in isolation or in vacua.

22. The amending
power is a legislative pro-cess for enacting amendments for the betterment of
the Constitution itself not for the destruction. Com-parison with the other
High Courts of Sub-continent is inappropriate because the High Courts of India
and Pakistan
have no plenary power over the entire terri-tory. Therefore the analogy of
permanent Benches of Indian jurisdiction cannot be brought because the laws are
not in pari materia. High Court
Division is an integral part of the Supreme Court. It has got plenary power.
Since the Parliament being a legisla-tive body is devoid of the Constituent
powers to amend the provisions of the Constitution in deroga-tion of the basic conception
so as to destroy the Constitution (Sic).

23. Mr.
Amir-ul-Islam contended that the amended Article had destroyed the unitary
character of the republic. He contended that the people of Bangla-desh in
the proclamation of independence at Mujibnagar dated 10.4.71 incorporated
fundamental norms of Government of the country including equality, so-cial
justice, humanity and sovereignty of the repub-lic which were reaffirmed and
expounded in the pre-amble and Articles 1 and 2 read with Article 143 of the Constitution.
He contended that the High Court Act 1861 contemplated limited territorial
jurisdiction of the High Court. But the Constitution of the Re-public of Bangladesh
had done away with such con-cept which is reflected in Article 102 of the
Consti-tution and the action of anyone performing functions in connection with
republic is amenable to jurisdic-tion of the High Court Division. The amended
Arti-cle has destroyed this basic structural pillar of our Constitution,

24. Mr. M.
Nurullah, the learned Attorney-General, contended that the amendment has been
made for the good of the people. The concept of per-manent benches at six
places having jurisdiction of the area assigned to them and the High Court Divi-sion
sitting at the permanent seat of the Supreme Court in the capital is no doubt a
new concept. But this new concept has not disturbed the basic concept of one
Supreme Court.

25. The learned
Attorney-General submitted that the Parliament has unfettered right to amend
the Constitution under Article 142 subject to the excep-tion as provided in
sub-Article (1A) which was in-serted in 1978. He submitted that a Constitution
can be amended by the Parliament in exercise of the con-stituent power and
cited certain passage from the In-dian jurisdiction. As for the criticism on
the long title, the learned Attorney-General submitted that the pattern and
practice of amendment from 1st to 8th amendments of the Constitution excepting
3rd is consistent but no objection can be taken when the bill had been passed
by the Parliament.

26. It was
submitted that Parliament in its wisdom had created the permanent benches and in those very places 'Sessions' were functioning under old dispensation. This amendment was done under Article 142 and the power is so wide that the Parlia-ment can amend any provision of the Constitution even if it amounts to affect the basic structure of the Constitution. It was submitted that such territorial arrangement for the purpose of initiation of proceed-ing and disposal do not curtail or impair jurisdiction of the High Court Division and it has full jurisdic-tion over the entire territory.

27. He conceded
that the Chief Justice has not been empowered with any power to transfer the cases from Rangpur to Dhaka or from one permanent bench to another- permanent bench but submitted that such difficulties can be settled by legislation. For this reason it cannot be said that the High Court Di-vision has been spilt into seven permanent benches. The concept of “Alaka hote udvoddo Bishoe” as mentioned in the Rule framed by the Chief Justice is akin to the concept of cause of action in the Civil Procedure Code. He referred to two decisions in this connection 17 D.L.R. (SC) 384 and A.I.R. 1977 Allahabad 488 Full Bench.

28. The
Attorney-General submitted that the amendment had been made to provide justice to the people at lesser expense. He traced the history of the evolution of the High Court Division and submitted that the "Sessions" as contemplated in the original Article 100 had to be recasted initially as 'permanent benches' then 'Circuit Benches' but with the restora-tion of the Constitution it had to be 'Sessions' again. Hence the legislature thought it fit to amend the Constitution for setting up permanent Benches. He conceded that the case arising out of an area as-signed to Chittagong Permanent Bench could only be heard by that Bench and no other permanent Bench could hear that matter although each of these permanent benches are exercising the power and functions of the High Court Division. The Attorney-General extensively cited Indian examples such as Allahabad which has a Bench at Ranchi;
Bombay High Court which has a Bench at Nagpur.

29. The learned
Attorney-General submitted that by the amendment no illegality had been com-mitted far less of destroying the basic structure of the Constitution. He also extensively quoted from two Indian decisions e.g. Golaknath's case A.I.R. 1967 (SC) 1643 and minority view of Keshavananda's case
A.LR.1973 (SC) 1461 for the proposition that no limitation can be implied upon the power of amend-ment.

30. Mr. Asrarul
Hossain, appearing as Amicus Curiae submitted that the amendment is beyond the amending power of the Parliament. He referred to the provision of the Constitution relating to the Execu-tive, Legislature and judiciary in juxtaposition to the provisions of the Indian and Pakistan Constitutions. He submitted that 'democracy’ is now associated to the famous dictum 'by the people' and for the peo-ple' and 'of the people' and in such democracy the functionaries are mentioned according to its nature and character.

31. He pointed out
that Article 48 says that there shall be a President of Bangladesh. Under Arti-cle 65(1) it says that there shall be a Parliament for Bangladesh. But in Article 94 it has been said in somewhat different fashion namely, there shall be a Supreme Court for Bangladesh
to be known as the Supreme Court of Bangladesh. The learned Counsel submitted

that the use of the prepositions were not without any purpose and submitted that the Supreme Court of Bangladesh is a creation of the Constitution and has provided certain unique features and has indu-bitably placed the Supreme Court above the two other organs. He submitted that the Supreme Court of Bangladesh is of the people, by the people and for the people and the Parliament has no power to amend this Article because it is the structural pillar of the Constitution and Parliament is a creature of the Constitution itself as such the amendment is ultra vires the Constitution.

32. The learned Counsel catalogued that-(a) un-der the amended dispensation there is no power to transfer the case from one Bench to another Bench and cited C.M.P. Case No. 1 of 1986 of this court; (b) Binding effect of judgments as emphasised in Ar-ticle 111 is displaced inasmuch as two different Benches may take direct different views on the same matter resulting in confusion and uncertainty, and cited 34 DLR 225 and 37 DLR 7 Jessore;
(c) In the Writ jurisdiction the writ will not run beyond the territorial jurisdiction of the permanent Bench. [See 17 DLR (SC) 74]. It will be operative only in the area where the record is kept [See 20 DLR (SC) 322]; (d) In habeas corpus matter the writ can be defeated by removing the detenu from area to area. Similarly mandamus will be ineffective outside the territorial limit; (e) Contempt matters cannot be pro-ceeded if a person makes scandalous remark at Rangpur against the permanent Bench at Dhaka; (f) In re-spect of Labour Court the Barisal, Comilla and Sylhet Benches are ineffective because the Labour Courts are located Division wise being at Dhaka, Khulna, Chittagong and Rajshahi. Hence an aggrieved person of Barisal, Comilla and Sylhet cannot move their area wise permanent benches for obtaining the relief from the respective Benches where the La-bour Courts are located;
(g) Similarly aggrieved per-son cannot move any of the area wise permanent benches in Administrative Tribunal matters because Administrative Tribunal and Appellate Tribunal are both located at Dhaka and same is the position with all the cases of the Banks, House Building Finance Corporation and Financial institutions, because the " Alaka hote udvoddo" concept is not applicable for re-dressing the grievances. Article 112 has become nu-gatory and meaningless because the permanent Bench, being located area wise will sit only area wise and not throughout the republic and therefore all authorities are no longer bound by the mandate in Article 112; (h) in the matter of Admiralty and Prize Court juris-diction serious complication will result and specially when it comes within the territory of one or more High Court Divisions. Neither Khulna District nor Patuakhali will have territorial jurisdiction over hot pursuit and therefore hot pursuit will add complica-tion; (i) In the matters of Trade Mark the Office of the Registrar is located at Dhaka who has a Branch Office at Chittagong.
There is scope of conflicting judgment in respect of the same Registrar. The same position will happen in Income Tax matter referenc-es and Company laws. The learned Counsel submit-ted that by this amendment basic structure of Su-preme Court had been destroyed and it has added new misery, uncertainty, chaos, in the Administration of Justice.

33. The provision of old Article 100 had a purpose for having Sessions outside the capital. He placed before us the reminiscences of Sir Harold Der-byshire who was the Chief Justice of Calcutta from 1934-44. The Chief Justice recollected the incident when Japanese occupied part of court's jurisdiction at Cox's Bazar and bombed Calcutta and how he wrote a secret letter for passing legislation enabling the court to sit in different places outside Calcutta and an Ordinance was accordingly passed though it had nev-er been used.

34. Mr. Asrarul Hossain, the learned Counsel, next contended that even the British Parliament has limitations.

35. Mr. Hossain
submitted that the impugned amendment of Article 100 and the Rules framed by the Chief Justice were ultra vires of
the Constitu-tion. He pointed out that the impugned Act of amendment suffers for non-compliance of the proced-ural limitation namely, the long title.

36. The learned
Counsel submitted that Article 107 had given the Rule-making power to the Su-preme Court whereas by amendment rule-making power of the permanent Benches only had been given to the Chief Justice individually and further submit-ted that Sub-Article 6 did not confer any power on the Chief Justice to frame rules for the distribution of business in so far as the Bench at permanent seat is concerned.

37. Mr. Hossain
pointed out that neither the President nor the Chief Justice has applied their mind in assigning the areas to the permanent Bench-es. It was mere mechanical application of the scheme that was conceived during the Martial Law period.

38. Mr. Hossain referred
to Article 7 and con-tended that such provision cannot be found in Indian Constitution or any other Constitution of the neighborhood countries. As for the Admiralty jurisdic-tion, Mr. Hossain referred to a decision of this court which clearly shows that our economic zone is upto 200 miles and the territorial limits is only 12 miles and therefore any cause of action arising out of such area cannot be effectively adjudicated by any of the Permanent Benches. “Alaka hote udvoddo Bishoe Somohu” as mentioned in the rules are inapplicable in Admiralty jurisdiction. Consequently chaos, confusion and un-certainty is the resulting' factor of the impugned amendment and the rules framed thereunder

39. Mr. Khondaker
Mahbubuddin Ahmed, ap-pearing, as Amicus Curiae, raised some pertinent question as to the purpose of the amendment itself. He pointed out that these permanent Benches originally was conceived in May, 1982 but even then the Admiralty and Original side matters, such as, Com-pany matter and Banking laws were kept out of the jurisdiction of these Permanent Benches and the ju-risdiction was conferred only on the Dhaka Bench.

40. On 17th June, 1986 the
Proclamation 3rd Amendment Order 1986 was promulgated after the general election. It provided that the Permanent Benches which were functioning in" the outlying are-as shall be deemed to be Circuit Benches and each Circuit Bench shall exercise such jurisdiction and power for the time being vested in the High Court Division. It provided that when Article 100 was re-vived the Circuit Benches shall be deemed to be Ses-sions of the High Court Division. Mr. Ahmed criti-cised that a proposition had been built upon by two deeming provisions.

41. When the 7th
Amendment had been passed by 2/3rd majority no such amendment was brought. Mr. Ahmed posed the question: why nothing was done during these two years although the Martial Law regime by one of their earliest acts had set up seven Benches. The learned Counsel regretted that even the learned Chief Justice did not apply his mind whether the scheme of setting up Permanent Benches violates the constitutional position of the Supreme Court. He referred to the various resolutions of the Bar Association when numerous appeals and peti-tions and representations were made to the Martial Law Authority to show disastrous

consequences of the conceived scheme but to no purpose.

42. He submitted
that diverse subjects had been introduced in the bills which are alien to each other and there is no means of knowing who voted for what. He clarified that a Muslim Member in all probability would not like to oppose the religion as State although he may not have supported the crea-tion of Permanent Benches. He cited from American jurisprudence certain passage to show that long title is imperative so that the members of the Parliament do get a clear picture as to what they are voting for. Such bill was introduced without compliance with the mandatory provision namely, long title which is absent in this amendment bill.

43. In reply Mr.
Syed Ishtiaq Ahmed pointed out that the learned Attorney-General had not con-tested the proposition that judiciary is one of the basic structures of the Constitution. He contested the proposition of the Attorney-General that the amend-ment power is unlimited and submitted that even the British Parliament is subject to limitation. Mr. Ah-med submitted that the judicial organ of the Repub-lic namely, the High Court Division is missing and the constitutional balance had been dislodged. He pointed out that the Attorney-General could not jus-tify by citing any authority for transfer of pending cases to the so-called Permanent Benches, when the amendment itself is completely silent about it.

44. Dr. Kamal
Hossain, in reply, pointed out that the Attorney-General could not locate the exis-tence of the High Court Division and he attempted to show that the High Court division existed in each of the Permanent Benches. He submitted that the Attorney-General did not reply as to the superintending

power as conferred
under Article 109 on the High Co«t Division nor has replied to the contention as to the devolution of the binding effect of the judg-ment of the Permanent Benches which are only oper-ative within their assigned areas and therefore Article 111 is displaced by such amendment. Further if a question of general public importance as mentioned in Article 110 (Sic) such question of public impor-tance will have to be broken into seven parts so as to get seven opinions from seven Permanent Benches which is an absurd proposition. Such a determination by a particular bench will only have an effect on the region for which it has been assigned the jurisdic-tions, powers and functions. That decision cannot be a decision on national level and, lastly, he submitted that no effective "constitutional consultation" had been made by the President with the Chief Justice al-though the whole matter touches upon the Judiciary and cited two decisions from Indian Jurisdiction. These are the submissions that had been made by the learned Counsels appearing for the appellants and the respondent.

45. It will be
appropriate to consider the histor-ical background and the genesis of the Constitution of the People's Republic of Bangladesh.

Proclamation of Independence

The Proclamation of
Independence dated 10th April,
1971 issued from Mujibnagar read:

Whereas free
elections were held in Bangladesh from 7th December, 1970 to 17th January, 1971 to elect representative for the purpose of framing a Con-stitution,

And

Whereas General
Yahya Khan summoned the elected representatives of the people to meet on 3rd March, 1971 for the purpose of framing a Constitu-tion,

And

Whereas the
Assembly so summoned was arbi-trarily and illegally postponed for indefinite period,

And

Whereas the
Pakistan Government by levying an unjust war and committing genocide and by other repressive measures made it impossible for elected representatives of the people of Bangladesh to meet and frame a Constitution and give to themselves a Government,

And

Whereas the people
of Bangladesh
by their hero-ism, bravery and revolutionary fervor have esta-blished effective control over the territories of Ban-gladesh,

We, the elected representatives of the people
of Bangladesh,
as honor bound by the mandate given to us by the people of Bangladesh whose will is su-preme duly constituted ourselves into a constituent Assembly, and having held mutual consultations, and in order to ensure for the people of Bangladesh equality, human dignity and social justice:

Declare and
constitute Bangladesh to be sove-reign People's Republic and thereby confirm the dec-laration of independence already made by Bangabandhu Sheikh Mujibur Rahman, and do hereby affirm and resolve till such time as a Constitution is framed, Bangabandhu Sheikh Muji-bur Rahman shall be President of the Republic and Syed Nazrul Islam shall be the Vice-President of the Republic, and that the President shall be Supreme Commander of all the Armed Forces of the Repub-lic,

Shall exercise all
the Executive and Legislative powers of the Republic including the power to grant pardon,

Shall have me power

to appoint a Prime Mini-ster and such other ministers as he considers neces-sary, shall have the power to levy taxes and expend monies, shall have the power to summon and adjourn the Constituent Assembly, and do all other things that may be necessary to give to the people of Bangladesh an orderly and just gov-ernment:

We the elected representatives of the people of Bangladesh do further resolve that in the event of there being no President or the President being un-able to enter upon his office or being unable to exer-cise his powers due to any reason whatever the Vice-President shall have and exercise all the powers, du-ties and responsibilities herein conferred on the Pres-ident.

We further resolve that this Proclamation of In-dependence shall be deemed to have come into effect from 26th day of March, 1971.

We further resolve that in order to give effect to this instrument we appoint Prof. Yusuf Ali, our duly constituted Potentiary, to give to the President and Vice-President oaths of office.

46. This declaration envisages the following:-

(a) Because of the unjust war and genocide of the Pakistani authorities it became "impossible for the elected representatives of the people of Bangladesh to meet and frame a Constitution" although General Yahya Khan sum-moned the elected representatives earlier" to meet on the 3rd March, 1971 for the purpose of framing a Constitution";

(b) The elected representatives duly constitute itself into a constituent Assembly because of the "mandate given to us by the people of Bangladesh whose will is supreme"

(c) It declared Bangladesh to be sovereign Peo-ple's Republic in order to ensure equality, human dignity and social justice:

(d) Bangabandhu Sheikh Mujibur Rahman was declared to be President and Syed Nazrul Is-lam Vice-President "till such time as a Constitution is framed":

(e) President or in his absence the Vice-President

"Shall have the power to appoint a Prime Minister and such other Minister as he con-siders necessary". It was the presidential system that was envisaged; -”

(f) President or in

his absence the Vice-President

"Shall have
the power to summon and ad-journ the Constituent Assembly".

47. This
Proclamation was followed by Laws Continuance Enforcement Order dated 10th April, 1971 and the Vice-President ordered "all laws that were in force in Bangladesh on 25th March, 1971 shall subject to the Proclamation aforesaid continue to be so in force" but nothing was said about the High Court because as it will been seen later by P.O.5 of 1972 (The High Court of Bangladesh Order 1972) "the High Court at Dhaka shall be deemed to have ceased to exist on the 26th day of March, 1971.

48. It is common
knowledge that Bangladesh
emerged as an independent country on 16th Decem-ber, 1971 when the liberation struggle ended. Provi-sional Constitution of Bangladesh Order, 1972 was promulgated on 11 th January, 1972 whereupon Jus-tice Abu Syed Chowdhury became the President and Sheikh Mujibur Rahman assumed the office of the Prime Minister. It was clear that shift had been giv-en to the future constitutional framework-from Presi-dential system to Parliamentary system.

49. The Constituent
Assembly of Bangladesh Order 1972 (P.O. 22 of 1972) was promulgated on 23rd March, 1972 "for the functioning of the Con-stituent Assembly".

Paragraph 7 stated:
"The Assembly shall frame a Constitution for the Republic."

50. In the Fourth
Schedule in paragraph I it was mentioned "upon the commencement of this Constitution the Constituent Assembly, having dis-charged its responsibility of framing a Constitution for the Republic shall stand dissolved". By Article 151 the P.O. 22 of 1972 was expressly repealed.

Now, the
Constitution was promulgated.

In the Preamble it
is stated:

"In our
Constituent Assembly, this eighteenth day of Kartic 1379 B.S. corresponding to the fourth day of November, 1972 A.D. do hereby adopt, enact and give to ourselves this Constitution".

And Article 153
stated that the Constitution "shall come into force on the sixteenth day of De-cember, 1972."

This is the

background of the Constitution of the People's Republic of Bangladesh.

51. It will be noticed that the Proclamation took notice of the "Mandate" for framing a Constitu-tion for the Republic so as to ensure "equality, hu-man dignity and social justice" and a democratic form of Government.

52. And now the Constitution itself. It begins with the Preamble:

"PREAMBLE

We, the people of Bangladesh, having pro-claimed our Independence on the 26th day of March, 1971 and through 2[a historic war for national inde-pendence], established the independent, sovereign People's Republic of Bangladesh.

3 [Pledging that the high ideals of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the war for national independence, shall be the fundamental principles of the Constitution];

Further pledging that it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation-a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, ec-onomic and social, will be secured for all citizens;

Affirming that 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 so that we may prosper in free-dom and may make our full contribution towards in-ternational peace and co-operation in keeping with the progressive aspirations of mankind;

In our Constituent Assembly, this eighteenth day of Kartick, 1379 B.S. corresponding to the fourth day of November, 1972 A.D., does hereby adopts, enact and give to ourselves this Constitution."

53. 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 (1 A) stipulates that a Bill for amendment of the Pre-amble and provisions of Articles 8, 48, 56, 80,92A and Article 142 when passed in the Parliament and pre-sented to the President for assent" the President shall within the period of seven days after the Bill is pre-sented to him, cause to be referred to a referendum the question whether the Bill should or should not be as-sented to". Hence the Preamble can only be amended by referendum and therefore is a part of the Constitu-tion. Now the features of the Preamble:

It takes notice of (1) People of Bangladesh have proclaimed Independence on 26th March, 1971; (ii)

The fundamental principles of the Constitution shall be the high ideals of absolute trust and faith in the Almighty Allah, nationalism, democracy and social-' ism meaning economic and social justice which in-spired our heroic people to dedicate themselves to and our brave martyrs to sacrifice their lives in, the war for national independence; (iii) Fundamental aim of the State is to realize through democratic process a socialist society in which the rule of law , fundamen-tal human rights and freedom, equality and justice will be secured; (iv) Our sacred duty is to safeguard, protect, and defend this Constitution and to maintain "its supremacy as the embodiment of the will of the people of Bangladesh".

54. Few Constitutions do have such a Pream-ble. Its Amendability is rigidly protected which can only be done by the people at a referendum. In Indian jurisdiction the contention that preamble should be regarded as "guiding star" has been repelled (See Gopalan vs. Stale of Madres 1950 S.C.R.88 (120,198). Nor it has been regarded as a source of any substantive power (See Beru Bari Union A.I.R.1960 SC. 845).

55. It is needless to pursue the point further because as it has been noticed already that in our Constitution the Preamble can only be altered by the people because our Constitution has proceeded from the people and it is not a rhetorical flourish. Our Constitution is not the result of the process of the Indian Independence Act, 1947 though we have taken inspiration from the wisdom of the past.

Ours is an "autochthonous" constitution. "Autochthony" in its most common acceptance is the characteristic of a Constitution which has been freed from any trace of subordination to and any link with the original authority of; the Parliament of the foreign power that made it. The aim is to give to a constitutional instrument the force of law through its own native authority. A factual autochthony is generally achieved after a revolution.

(On autochthony: K.C. Wheare, the Constitu-tional Structure of the Commonwealth 1960)."

56. In this background the Constitution is to be interpreted. Chief Justice Marshall "Who is gener-ally recognised as the most competent and successful of all the Chief Justices to date, and is ranked among the two or three most powerful and»influential jurists ever to sit in the Supreme Court" often reminded his countrymen that "We must never forget that it is Constitution that we are expounding". Mr. Justice Frankfurter considered the Marshall statement to be "the single most important utterance in the literature of Constitutional law-most important because most comprehensive and comprehending". (69 Harvard Law Review 217), 1955 at page 219).

57. Keeping in mind the words of wisdom, we proceed to consider our Constitution. The Preamble has already been noticed. Now Article 7 which has been found by Mr. Syed Ishtiaq Ahmed as the Pole Star of our Constitution echoing the words of a great American judge which was quoted by CJ. Munir—

"7. (1) All powers in the Republic belong to the people and their exercise on behalf of the people shall be

effected only under, and by the authority of, this Constitution:

(2) This
Constitution is, as the solemn expres-sion of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the incon-sistency, be void."

58. On analysis the
Article reveals the follow-ing:—

(a) All powers in
the Republic belong to the people. This is the concept of Sovereignty of the people. This echoes the words of the proclamation "by the mandate given to us by the people of Bangladesh
whose will is supreme;

(b) Their exercise
on behalf of the people, shall be effected only under, and by the authority of this Constitution. Limited government with three organs performing designated functions is envisaged. In the Proclamation it was said the President "shall exercise all the Executive and Legislative powers of the Republic" "till such time as Constitution is framed" and who will do all other things that may be necessary to give to the people of Bangladesh an orderly and just Govern-ment. Hence separation of powers emerge as a necessary corollary of designated func-tions;

(c) Supreme Law of
the Republic. That points to supremacy of the Constitution because;

(d) any law is void
to the extent of inconsistency with the Supreme Law (i.e. the Consti-tution) which therefore contemplates judici-ary;

(e) Supreme Court
with plenary judicial power for maintenance of the supremacy of the Constitution".

59. Mr. Syed
Ishtiaq Ahmed argued forcefully to say that Article 7 is the pole star of the Constitu-tion. Dr. Kamal Hossain made his full argument by referring to the Articles of the Constitution which will be noticed shortly. Before that few other Articles may be considered—

"8. (1) The
principles of absolute trust and faith in the Almighty Allah, nationalism, de-mocracy and socialism meaning economic and social justice, together with the principles derived from them as set out in this part, shall constitute the fundamental principles of state policy.

(1A) Absolute trust

and faith in the Almighty Allah shall be the basis of all actions.

(2) The principles
set out in this Part shall be fundamental to the governance of Bangla-desh, shall be applied by the State in the making of laws, shall be a guide to the in-terpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the works of the State and of its citizens, but shall not be judicially en-forceable."

60. The principles
set out in this Part (Funda-mental Principles of State Policy) shall be—

(1) fundamental to the governance of Bangla-desh;

(2) shall be applied by the State in making of laws:

(3) shall be a guide to the interpretation of the Constitution and other laws;

(4) shall form the
basis of the work of the State and its citizens.

61. Though the
directive principles are not enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws, it is a pro-tected Article in our Constitution and the Legislature cannot amend this Article without referendum. This alone shows that the Directive Principles cannot be flouted by the executive. The endeavour of the gov-ernment must be to realise these aims and not to whittle them down.

62. That is the
stipulation, that is, what was meant when the proclamation stated "in order to en-sure for the people of Bangladesh equality, human dignity and social justice". These are reflected in Part III Fundamental Rights, Special reference may be made to Article 27 (equality before law), Article 28 (Discrimination on grounds of religion), Article 29 (equality of opportunity in public employment), Ar-ticle 31 (Right to protection of law), Article 32(Protection of right to life and personal liberty) and all the other Articles 32 and 43 enumerate the rights which are guaranteed.

63. Then comes
Article 44. Article 44 had a chequered career. Originally, it reads: "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."

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

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

65. Then by
Proclamation Order No. IV of 1976 it was substituted by the following:—

"(1) The right
to move the High Court in ac-cordance with clause (2) of Article 102 for the enforcement of 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".

66. Then by the
Second Proclamation Order No. 1 of 1977 the words "High Court Division" was substituted for the words "High Court". It now reads:—

"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 jurisdic-tion, to exercise all or any of those powers]"

67. Article 44 brings the judiciary in the Con-stitutional
focus. 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.

68. Now the
question: What is this High Court Division? Part VI deals with the judiciary. Article 94 says—"There shall be a Supreme Court for Bangladesh (to be known as the Supreme Court of Bangladesh) comprising the Appellate Division 17 and the High Court Division"

69. The learned
Counsels Dr. Kamal Hossain, Mr. Syed Ishtiaq Ahmed and Mr. Amir-ul-Islam can-vassed that the High Court Division is an integral part of the Supreme Court. On the other hand, Mr. M. Nurullah, the learned Attorney -General, contend-ed that it is a distinct body and it has separate exis-tence in the constitutional framework. Mr. Asrarul Hossain Amicus curiae contended that the High Court

Division is not only an integral part of the Constitution but the entire judicial fabric has been built upon this thesis.

70. The learned Attorney-General pointed out that the judges appointed to the Appellate Division "shall sit only in that division and other judges shall sit only in the High Court Division" (Article 94 (3)). He referred to Article 98 to show that a judge of the High Court Division may sit as an ad-hoc judge for temporary period in the Appellate Division. He contended that the superintendence and control over subordinate courts is empowered upon the High Court Division (Article 109) and the High Court Di-vision may transfer cases from subordinate courts to it if a substantial question of law as to the interpreta-tion of the Constitution or a point of general public importance is involved (Article 110). From these ar-ticles the Attorney-General contended that the High Court Division is a distinct body but it was merely fused into one. To put in his exact words "the Su-preme Court of Bangladesh though is one composite Court it comprises of two distinct entities as would appear from the relevant provisions of the Constitu-tion."

71. So the bone of contention is as to the na-ture of the Supreme Court. This contention has aris-en because the impugned legislation, namely the amended Article 100 has set up permanent Benches.

72. Now to Article 100 as it was before the amendment: It reads:-

"The Permanent seat of the Supreme Court shall be in the capital, but sessions of the High Court Division may be held at such other place or places as the Chief Justice may, with the ap-proval of the President, from time to time ap-point."

73. This article was never brought into opera-tional level. No such sessions were ever held from the day of inception of the present Supreme Court after achievement of independence of Bangladesh or rather from the date of establishment of the then

High Court of East Pakistan (High Court of Judica-ture at Dhaka in East Pakistan) with the creation of Pakistan on 14th August, 1947, till the promulga-tion of the Proclamation of Martial law on 24th March, 1982 when the, Constitution of the. People's Republic of Bangladesh stood suspended. Nor was there any recommendation of the Law Reform Com-mittee (1976) to hold any session outside the capital. Nor any Chief Justice felt the necessity for so doing. Nor the Bar Association ever asked for such session.

74. Permanent Benches of the High Court Division.

It was only when the Martial Law was pro-claimed in 1982 that a Martial Law Proclamation dated 11th May, 1982 had set up "permanent Bench-es of the High Court Division" for the areas speci-fied with seats at the specified places. The Chief Martial Law Administrator, by issuing notifications, in the official

gazette, established permanent benches of the High Court Division at Rangpur, Jessore, Barisal, Chittagong, Comilla and Sylhet with speci-fied exclusive territorial jurisdiction for each of the above benches to exercise all powers in respect of the cases arising within the specified area of each of the aforesaid benches except in Admiralty matters and company matters which remained with the per-manent seat of the High Court Division in the capi-tal.

75. The Proclamation of the 24th March, 1982, was again amended by the promulgation of the Proclamation (Third Amendment) Order, 1986 (Proc-lamation Order No. III of 1986) on 17th June, 1986 and by this amendment paragraph 4 A of the Schedule to the Proclamation of the 24th March, 1982 was substituted by a new paragraph 4A—

"4A. (1) Sessions of the High Court Division may be held at such places outside Dhaka as the Chief Justice may, with the approval of the President, appoint from time to time;

(2) Such sessions of the High Court Division shall be called Circuit Benches;

(3) The permanent Benches of the High Court Division established at Rangpur, Jessore, Barisal, Chittagong, Comilla and Sylhet before the commencement of the Proclama-tion (Third Amendment) Order, 1986 (Proc-lamation Order No. III of 1986), shall on such commencement, be deemed to be Circuit Benches constituted under this para-graph for the areas for which the permanent Benches were established and shall function as such and all the provisions of this para-graph shall accordingly apply to them;

(4) Subject to any rules made by the Supreme Court under sub-paragraph (9) the Chief Justice shall determine which Judges of the -High Court Division are to constitute any Circuit Bench and which Judges of such Bench are to sit for any purpose.

(5) At least one Judge, to be nominated by the Chief Justice, shall sit in each Circuit Bench on a regular basis;

(6) The Chief Justice may, as and when necessary, nominate a Judge sitting in any Bench at Dhaka to sit in any Circuit Bench or a Judge sitting in any Circuit Bench to sit in any Bench at Dhaka or in any other Circuit Bench.

(7) Subject to any rules made by the Supreme Court under sub-paragraph (9), each Circuit Bench shall exercise such jurisdiction and power for the time being vested in the High Court Division in respect of cases and ap-peals arising within the area for which the Bench is constituted as the Chief Justice may determine.

(8) The Chief Justice may, in his discretion, or-der that any case or appeal or class of cases or appeals meant for hearing or disposal by any Circuit Bench shall be heard and dis-posed of by any Bench of

the High Court Division at Dhaka or by any other Circuit Bench;

(9) The Supreme
Court may make rules for reg-ulating the practice and procedure of the Circuit Benches;

(10) When Article
100 of the Constitution is revived, the Circuit Benches shall be deemed to be sessions of the High Court Division outside Dhaka under that article and all the rules and order made by the Su-preme Court or the Chief Justice relating to the practice and procedure of the Circuit Benches or their constitution, jurisdiction and power shall be deemed to have been made for the purpose of that article."

76. With the
promulgation of the Proclamation (Third Amendment) Order, 1986, the permanent benches were converted to 'sessions' of the High Court Division and these sessions of the High Court Division were called Circuit Benches

77. By this new
paragraph 4A in Proclamation Order No. III of 1986 attempts were made to give continuity to the permanent benches which had al-ready been functioning outside the permanent seat in the capital and this is clear from sub-paras (3) and (10) of para 4A.

78. The permanent
Benches which had already been functioning outside the Capital continued to function as the Sessions of the High Court Division or rather Circuit Benches, despite repeal of the origi-nal para 4A incorporated in Proclamation Order No. II of 1982, Proclamation Order No. III of 1986 stood repealed and the Constitution including the original Article 100 thereof was revived by the Proclamation of withdrawal of Martial Law issued by the Chief Martial Law Administrator on 10th November, 1986.

79. Chief Justice,
in exercise of his powers under Article 100 of the Constitution, issued notifi-cations on 24th November, 1986, appointing the same places in which the permanent Benches had been set up and in which subsequent to the 17th June, 1986, Sessions of the High Court Division called 'Circuit Benches' were functioning as places for holding sessions of the High Court Division of the Supreme Court.

80. These Sessions
of the High Court Divi-sion of the Supreme Court in these places continued to function until the enactment of the Constitution (Eighth Amendment) Act, 1988 (Act 30 of 1988) by the Parliament. By this amendment Article 100 of the Constitution was substituted by the following article:—

"100. Seat of
Supreme Court.- (1) Subject to this article, the permanent seat of the Supreme court shall be in the capital.

(2) The High Court
Division and the Judges thereof shall sit at the permanent scat of the Supreme Court and at the seats of its per-manent Benches.

(3) The High Court
Division shall have a per-manent Bench each at Barisal, Chittagong, Comilla, Jessore, Rangpur and Sylhet and each permanent Bench shall have such Benches as the Chief Justice may determine from time to time.

(4) A permanent
Bench shall consist of such number of Judges of the High Court Divi-sion as the Chief Justice may deem it ne-cessary to nominate to that Bench from time to time and on such nomination the Judges shall be deemed to have been trans-ferred to that Bench.

(5) The President
shall, in consultation with the Chief Justice, assign the area in relation to which each permanent Bench shall have jurisdictions, powers and functions con-ferred or that may be conferred on the High Court Division by this Constitution Or any other law; and the area not so assigned shall be the area in relation to which the High Court Division sitting at the permanent seat of the Supreme Court shall have such jurisdictions, powers and functions;

(6) The Chief
Justice shall make rules to pro-vide for all incidentals, supplemental or con-sequential matters relating to the permanent Benches."

It thus appears by
this constitutional amend-ment again permanent Benches were established at those places at which 'sessions' of the High Court were functioning i.e. at Rangpur, Jessore, Barisal, Chittagong, Comilla and Sylhet and all powers, jurisdictions and functions 6f the High Court Division were again conferred on these permanent Benches within their respective specified areas with exclusive jurisdiction.

81. Evolution of the Supreme Court of Bangladesh.

President Order No.
5 of 1972 established the High Court of Bangladesh. It inherited the power, functions and jurisdiction of the extinct Dhaka High Court. Later by President Order No. 91 of 1972 an Appellate forum was created namely, the Appellate Division for hearing appeal against the decision of the High Court. The Dhaka High Court was established in 1948 following the Indian Independent Act, 1947. Paragraph 5 in the High Court Bengal Order, 1947 reads as:

"The High
Court of East Bengal shall be a court of record and shall have in respect of territories for the lime being included in the Prov-ince of East Bengal all such appellate and other jurisdictions as under the law in force immedi-ately before the appointed day is exercisable in respect of the said territories by the High Court of Calcutta."

Pending proceedings
were transferred to the High Court in East Bengal
and it was provided that the "High Court of Calcutta shall have no jurisdiction in respect of the territories included in the Province of East Bengal".

82. Thus the High
Court of East Bengal came into existence and inherited all the jurisdictions, powers and functions of the High Court of Calcutta. In the case of Eklas v. The Crown 7 DLR 552 Ibra-him, J. pointed out that the district of Chittagong Hill Tracts was never amenable to the jurisdiction of the Calcutta High Court and therefore the Dhaka High Court could not exercise any jurisdiction over such area.

83. Indian
Constitution was promulgated in 1950 and Pakistan Constitution was promulgated in 1956. Till then, however, Pakistan
was governed by the Government of India Act, 1935.

84. It was only in
1955 by section 223 (A) the writ jurisdiction was conferred on the High Court at Dhaka. Later when the Constitution was
promulgat-ed by Article 170 (1956 Constitution) the writ juris-diction was conferred on the High Court. It said-shall have power "throughout the territories in relation to which it exercised its jurisdiction".

85. Same is the
position in Article 226 of the Indian Constitution. It is the 'territorial' concept but in the case of Supreme Court no territorial concept was injected. See Article 32 of the Indian Constitu-tion and Article 22 of the 1956 Constitution. The position was same under the 1962 Constitution. So the pattern is so far as the High Court is concerned it has the territorial jurisdiction but in the case of Su-preme Court there is no such territorial jurisdiction.

86. The Calcutta High Court was
established by the Letters Patent (1862) in pursuance of the Au-thority of the High Court Act 1861. There years lat-er a fresh Letters Patent was granted in 1865 for reasons which will be mentioned later in this judgment.

The Bombay and Madras High
Courts were set up si-multaneously.

87. Later the
Allahabad High Court was esta-blished in 1866. The Patna High Court was set up in 1916. The Lahore High Court Was set up in 1919. Rangoon High Court was set up in 1922. Nagpur High Court was established in 1936.

88. Section 219 of
the Government of India Act explains the meaning of the High Court and says the following Courts shall in relation to the British India be deemed to be High Court i.e. to say the High Court in Calcutta, Madras, Bombay, Alla-habad, Lahore and Patna and also includes the courts which were created by the Governor-General from time to time namely, the Chief Court of Oudh, the Judicial Commissioners' Court in the Central
Prov-ince and thereafter,
North-West Frontier Province and in Sind, any other Court constituted or re-constituted.

89. The Letters
Patent of the High Courts mentioned in the first Part will explain why a provi-sion was needed for conferring power on the High Court for exercising jurisdiction in any place "other than the usual places of sitting of the High Court". But the stipulation was "the proceedings in cases be-fore said High Court at such place or places shall be regulated by any law relating

thereto which has been or may be made by competent legislative authority for India".

90. Now it will be
useful to consider the Let-ters Patent of these High Courts.

Letters Patents-Analysis.

Clause 31 Letters
Patent of Calcutta High Court (1865) reads as:—

"And We do
further ordain that whenever it shall appear to the Governor-General in Council convenient that the jurisdic-tion and power by these Our Letters Patent, or by the recited Act, vested in the said High Court of Judicature at Fort William in Bengal, should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, the pro-ceedings in cases before the said High Court at such place or places shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for In-dia."

LETTERS
PATENT OF ALLAHABAD HIGH COURT
(1866).

Clause 24 of the
Letters Patent of Allahabad High Court (1866) reads as follows:—

"And We do
further ordain that whenever it shall appear to the Lieutenant Governor of the North-Western Provinces, subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Let-ters Patent, or by the recited act, vested in the said High Court, should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of any Sudder Dewany Adawlut of the Sudder Nizamut Adawlut of the North-Western Provinces, other than the usual places of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court, at such place or places, shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for In-dia".

LETTERS PATENT OF PATNA HIGH COURT (1916).

Clause 35 of the
Letters Patent of Patna High Court (1916) reads as:—

"And we do
further ordain that, unless the Governor-General in Council otherwise directs, one or more Judges of the High Court of Judica-ture at Patna shall visit the Division of Orissa. by way of circuit, whenever the Chief Justice from time to time appoints, in order

to exercise in respect of cases arising in that Division the jurisdiction and power by these Our Letters Pat-ent, or by or under the Government of India Act, 1915. vested in the said High Court; Provided always that such visits shall be made not less than four times in every year, unless the Chief Justice, with the approval of the Lieutenant-Governor in Council otherwise directs; Provided also that the said High Court shall have power from time to time to make rules with the previ-ous sanction of the Lieutenant-Governor in Council, for declaring what cases or class of cas-es arising in the Division of Orissa shall be heard at Patna and not in that Division and that the Chief Justice may, in his discretion, order that any particular case arising in the Division of Orissa shall be heard at Patna or in that Divi-sion".

LETTERS PATENT OF LAHORE HIGH COURT (1919)

Clause 33 of the
Letters Patent of Lahore High Court (1919) reads as:—

"And We do
further ordain that whenever it appears to the Lieut-Governor of the Punjab, subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by or un-der the Government of India Act, 1915, vested in the High Court of Judicature at Lahore should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places, by way of circuit, one or more Judges of the Court shall visit such place or places accordingly."

LETTERS PATENT OF RANGOON HIGH COURT (1922).

Clause 41 of the
Letters Patent of Rangoon High Court (1922) reads as follows:—

"And We do
further ordain that unless the Governor of Burma in Council otherwise directs one or more Judges of the High Court of Judica-ture at Rangoon, as the Chief Justice may from time to lime direct shall sit at Mandalaya. in or-der to exercise in respect of cases arising in such areas in Upper Burma as the Governor of Burma in Council may direct the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, vested in the said High Court provided that the Chief Justice may, in his direction, order that any particular case arising in the said areas in Upper Burma shall be heard at Rangoon."

LETTERS PATENT OF NAGPUR HIGH COURT (1936)

Clause 33 of the
Letters Patent of Nagpur High Court (1936) reads as follows:—

"And We do
further ordain that whenever it appears to the Lieut. -Governor subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, 1915, vested in the High Court of Judicature at Nagpur should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places, by way of circuit, one or more Judges of the Court shall visit such place or places accord-ingly."

91. It will be
noticed that the common feature in these Letters Patent is that the court can exercise its jurisdiction and power in places other than the usual places of sitting but it must be regulated by law.

92. Two exceptions
were made, namely, in so far the Patna High Court and Rangoon High Court arc concerned. Before the creation of the Patna High Court the Calcutta High Court used to exercise juris-diction in these areas, namely, Bihar
and Orissa. When the Letters Patent of Patna High Court was granted the jurisdictions of the Calcutta High Court ceased. The Patna High Court was empowered to ex-ercise jurisdictions in Orissa as well which was de-scribed as "Division" and express provision was made for the sitting of the
Patna High Court in Oris-sa" not less than 4 times in every year" but it was obligated that the court must frame rule" for declar-ing what cases or what classes arising in the Divi-sion of Orissa shall be heard at Patna and not in that Division, "and it was further empowered that the Chief
Justice" may order that any particular case aris-ing in the Division of Orissa shall be heard at Patna or in that Division."

93. As for the
Rangoon High Court its Letters Patent specifically mentioned that the court may sit at Mandalaya in respect of cases arising in the Upper Burma but the Chief Justice in his discretion" order that any particular case arising in the said area in Up-per Burma shall be heard at Rangoon."

94. In the Indian
Constitution Article 130 pro-vides for the sitting of the Supreme Court elsewhere other than Delhi
and the chief architect of the Con-stitution, Dr. Ambedkar explained why such provi-sion was necessary.

"If you do not
have the words which fol-lows, 'or at such other place or places, as the Chief Justice of India may, with the approval of the President, from time to time, appoint,' then, what will happen is this: Supposing the capital of India was changed, we would have to amend the Constitution in order to allow the Supreme Court to sit in such other place which Parlia-ment may decide as the capital. Therefore I think the subsequent words are necessary". (See the Constitution of India, V. N. Shukla p 268)."

95. In 1962
Constitution there are two Arti-cles namely, Article 56 (2) providing that

Supreme Court from lime to time may sit in such other plac-es as the Chief Justice decide but Sub-Article (1) provided that the permanent seat shall be at Islama-bad but' "it shall sit at Dhaka at least twice every year for such period as the Chief Justice of the Court may consider necessary". This provision as is well known was required because of the political arrange-ment that was achieved for making Dhaka Second capital of Pakistan. (See Article 211 (3) of 1962 Constitution). For the permanent seat of the High Court of the Province of East Pakistan it was Dhaka but "the Court may from time to time sit in such other places as the Chief Justice of the Court with the approval of the Governor of the province may appoint." (See Article 97 (1). Similar provision was made Sub-Article (2) of West Pakistan and it said that the permanent seat will be at Lahore", and it shall be principal seat and there shall also be perma-nent seat of that Court at Karachi and Peshawar but Court may from time to time sit in such other plac-es as the Chief Justice of the Court with the approv-al of the Governor of the Province may appoint." So in the Pakistan Constitution (1962) while in the case of East Pakistan the permanent scat was at Dha-ka a distinction was made in the case of West Paki-stan by using the expression "permanent seat" and "principal seat" due to historical reasons after achiev-ing one unit under the West Pakistan Act. 1955. Karachi and Peshawar had already been vested with the jurisdictions of High Court but by- the West Pa-kistan Act all these High Courts had to be amalga-mated. Since the judicial power was exercised in the territories in Karachi and Peshawar device was neces-sary by using the expressions, permanent scat and principal scat and Lahore was the permanent scat and the principal seat both; Karachi and Peshawar were 'permanent seats' of the High Court.

96. The Calcutta High Court had never gone on Circuit since 1861 although it had exercised juris-diction over the territory of Bengal; Bihar and Orissa. It was only in 1944 Sir Harold Derbeyshire, Chief Justice of Calcutta High Court felt the necessity of moving out from Calcutta when the Japanese started bombing on the city of Calcutta itself.

97. Thanks to Mr. Asrarul Hossain who placed before the Court the reminiscences of Sir Harold Derbeyshire, it clarified the situation. It is worth quoting:

> "Sometime in or about April, 1942 it was suggested to us by the Government that we took our annual vacation as it might lead to some people getting out of city. The Judges refused— it would be, showing the white feather. There was, however, one thing I did. I realized if the worst came to worst and the Court had got to clear out of Calcutta because of a Japanese inva-sion, we might have to sit somewhere else ei-ther in the "Province of Bengal or in Bihar and I wrote a secret letter to the Government of India asking that an Ordinance should be prepared which would come into operation if we were driven out of Calcutta enabling the Court to sit either as a whole or in sessions in different places either Bengal or Bihar, according as Judges thought and fit.(Sic) I kept that secret until just before I left Bengal. This Ordinance was made but it was never used".

98. This reminiscences of the Chief Justice of Calcutta High Court show two things—

"(a) what are
the" compelling circumstances when the Court must move out to sit in
places other than usual place;

(b) A legislation
is necessary for such purpose notwithstanding the enabling power that was given
in Letters Patent" (Vide Clause 31)”

99. Letters Patent mentioned the conditions which
must be fulfilled before the power can be exer-cised the conditions precedent
being the necessary legislation. Only- in one case "discretion had been
given to the Chief Justice but prior to that specific provision was made for
sitting of the Rangoon High Court at Mandalaya because that place had already
ex-ercised judicial power by an enactment namely, the court of Judicial
Commissioner of Upper Burma
in pursuance of Regulation No. 5 of 1892, Regulation No. VIII of 1886 and
Regulation No. 1 of 1896.

100. Notwithstanding
the provision in Article 97 of 1962
Constitution, the Dhaka High Court had never sat in any place other than in its
permanent seat namely, Dhaka.

101. Sessions— Article 100.

The Bangladesh
Constitution provided in Article 100, this enabling provision namely,
"Sessions of the High Court Division may be held at such other place or
places with the approval of the President from time to time appoint". In Article
101 jurisdic-tions, powers and functions have been conferred by the
Constitution and law. Article 102 details the plenary jurisdictions of the High
Court Division which is not hedged by any territorial conception as it is the
case in the case of Indian and Pakistan High Courts. Article 226 of Indian
Constitution says that writ jurisdictions can be exercised throughout the ter-ritories
of its jurisdictions but in the case of Supreme Court Article 32 does not limit
its operations territo-rially. Same was the case in Pakistan (1956) the Su-preme Court
had no territorial jurisdictions (See Arti-cle 22). Article 170 while granting
power to the High Court to issue writ it mentioned "throughout the
territories in relation to which it exercised its ju-risdictions".

102. The argument
of Attorney-General that in India
and Pakistan
permanent Benches had been esta-blished in so far some High Courts are
concerned. This-argument overlooks the point that the High Courts in India are not
constituted by the Constitu-tion. See
Article 214 which merely says there shall be a High Court in each State.
Article 225 recog-nised the jurisdiction of existing High Courts. Arti-cle 231
authorises the Parliament to establish a Common High Court for two or more States;
Arti-cle 241 says-Parliament may establish a High Court for Union territory.

103. Mr. Syed
Ishtiaq Ahmed pointed out that Article 3 of the Indian Constitution empowers
the Parliament by law to organise States and adjustment of the territories of
the constituent States of India. Article 4 provides that a law referred to in
Article 3 shall contain such provision for the amendment of the First Schedule
and the Fourth Schedule as may be necessary to give effect to the provisions of

the law. By Article 4 (2) it is provided that no such law shall be deemed to be an amendment of the Constitu-tion under Article 368. Mr. Ahmed cited Mongal vs. Union of India A. I. R. 7967 (SC) 944.
Articled (1) has been interpreted to include provisions relating to "selling up of the legislative, executive and judicial^ organs of the States essential to the effective Stale administration under the Constitution." But such power cannot override the Constitutional scheme.

104. That the Indian High Courts have their territorial jurisdictions cannot be disputed. Therefore, the writ issued by the Court cannot run beyond the territories. The authority must be "within those terri-tories" which implies that it must be amenable to the jurisdiction either by the residence or location. [See Election Commissioner Vs. Venkata A. I. R. 1953 SC 210].
Indian Constitution had to be amend-ed for this purpose namely, the 15th amendment. The Constitutional jurisdiction of these High Courts to enforce fundamental rights and of judicial review is limited to the territory "in relation to which it ex-ercises power".

105. Mr. Asrarul Hossain pointed out that writ will not run beyond its territory which was held in the case of National Bank of Pakistan Vs. Ataul Hoque 17 D. L. R. SC. page 74.

106. This analysis shows that the contentions of the learned Counsel Mr. Asrarul Hossain, Dr. Kamal Hossain and Mr. Syed Ishtiaq Ahmed that the High Courts in India have limited territorial jurisdic-tions are correct and must be accepted.

107. The Attorney-General referred lo three in-stances where permanent benches had been set up namely—

(a) Bench of Bombay
High Court at Nagpur,
Bench of Allahabad High Court at Luck-now, permanent Bench of Patna High Court at Ranchi. The learned Attorney-General overlooked the historical background of these courts.

108. Nagpur had a High Court which was created by Letters Patent in 1936. When the Bom-bay Re-Organisation Act, 1960 was passed, the Stale of Gujrat was separated as separate State and separate High Court was established at Gujrat. A Bench of the Bombay High Court was set up at Nagpur.
By Section 41 it was provided "without prejudice to the provisions of section 51 of the States Re-organisation Act, 1956, such Judges of the High Court at Bombay, being not less than three in num-ber, as the Chief Justice may from time to time nominate, shall sit at Nagpur in order to exercise the jurisdiction and power for the time being vested in that High Court in respect of cases arising in the dis-tricts of Buldana, Akola, Amravati, Yeoimal, Wardha, Nagpur, Bhandara, Chanda and Rajura:

Provided that the Chief Justice may, in his discretion, order that any case arising in any such districts shall be heard at Bombay".

Thus the oneness of the court was kept intact. In the objects and reasons it has mentioned

"The Committee is of the opinion that in accordance with the resolution adopted by the Bombay State Legislature, there should be a permanent Bench of the Bombay High Court at Nagpur consisting of at-least three Judges. This section seeks to achieve the object."

109. Next, United Provinces High Courts (Amalgamation) Order, 1948 by section 3 a new High Court was created. It reads:—

"As from the appointed day, the High Court in Allahbad and the Chief Court in Oudh shall be amalgamated and shall constitute one High Court by the name of the High Court of Judica-ture at Allahabad (hereinafter referred to as" the new High Court)".

It will be recalled that the Oudh Chief Court was mentioned as High Court within the meaning of section 219 which used to sit at Luck now. Oudh Chief Court was constituted by the Governor-General and not by Letters Patent. But the Allahabad High Court was constituted by Letters Patent. Judicial power was already exercised by the Oudh Chief Court sitting at Luck now. Hence when the amalgamation Order, 1948 was passed in exercise of powers conferred by section 229 of the Government of India Act, 1935 the new High Court was created. Para-graph 14 reads as:—

"The new High Court, and the Judges and division Courts thereof shall sit at Al-lahabad or at such other places in the United Provinces as the Chief Justice may, with the approval of the Governor of the United Provinces, appoint;

Provided that unless the Governor of the United Provinces with the concurrence of the Chief Justice otherwise directs, such Judges of the new High Court, not less than two in number as the Chief Justice may, from time to time nominate, shall sit at Luck now in order to exercise in respect of cases arising in such area in Oudh as the Chief justice may direct, the jurisdiction and power for the time being vested in the new High Court;

Provided further that the Chief Justice may in his discretion order that any case or class of cases arising in the said areas shall be heard at Allahabad".

Here again the oneness of the Court was kept in tact.

110. The High Court at Patna (Establishment of Permanent Bench at Ranchi) Act, 1976 provided for the establishment of Permanent Bench of the High Court at Ranchi.

Section 2 reads as follows:—

"There shall be established a permanent bench of High Court of Patna at Ranchi, and such Judges of the High Court of Patna, being not less than three in number, as the Chief Jus-tice of that High Court may, from time to time, nominate, shall sit at Ranchi in order to exercise the jurisdiction and power for the time being vested in that High Court in respect of cases arising in the districts of Hazaribagh, Giridih, Dhanbad, Ranchi, Palamau and Singhbhum:

"Provided that the Chief Justice of that High Court may, in his discretion, order in that any case or class of cases arising in any such district shall be heard at Patna."

The oneness of the Court was kept in tact.

111. It has been noticed that the High Courts in India are not creatures of the Constitution. These are created by the Parliament by ordinary legislation. The permanent benches were not set up by any Constitutional amendment. Now in all three instances namely, Bombay (Paragraph 41), Allahabad (Para-graph 14) and Ranchi (Paragraph 2) the proviso runs like a refrain that the cases will be heard at the per-manent scat at Bombay, Allahabad and at Patna, Thus the oneness of the Court even in Indian juris-diction was never dismantled.

112. The legislative drafting is on the same pattern in all the aforesaid enactments, namely, "in order to exercise the jurisdiction and power for the time being vested in that High Court". It is the same High Court. Only in certain class of cases, its juris-diction is exercised in the outlying areas. The Attor-ney-General emphasised on the expression" perma-nent Bench" at Ranchi presumably to bring his argument in line by the user of the expression" per-manent Bench" in Article 100 as amended. The argu-ment is untenable; because the State of Objects and Reasons clearly shows the reason. It is quoted below:—

"A circuit bench of the Patna High Court was established at Ranchi with effect from 8th March, 1972. Under clause 36 of the Letters Pat-ent of that High Court. The bench was established to meet the needs of the adivasi popula-tion of the Chota Nagpur area in Bihar. The functioning of the circuit bench was causing considerable difficulties besides involving heavy expenditure. As the reasons for the establishment of a bench at Ranchi continue to exist, the Gov-ernment of Bihar is very keen that the bench should be made permanent. It is, therefore, pro-posed to set up a permanent bench of the Patna High Court at Ranchi with its territorial jurisdic-tion extending over the North Chota Nagpur Di-vision comprising of the districts of Hazaribagh; Giridih and Dhanbad and the South Chota Nag-pur Division comprising of the districts of Ranchi, Palamau and Singhbhum. The Bill seeks to achieve this object-Gaz. of India 6-2-1976, Pt. II S. 2, Ext. P. 603".

113. What was the
justification for the creation of 'permanent Benches' as has been done in our case. Dr. Kamal Hossain, Mr. Syed Ishtiaq Ahmed and Mr. Amir-Ul-Islam in a painstaking manner placed before the Court the relevant legislation from time to time -as to how the Permanent Benches were set up.

114. It was done by
Proclamation Order No. 2 of 1982 initially. It established permanent Benches at Dhaka, Comilla, Jessore and Rangpur by
Notifica-tion of 8th June,
1982. Permanent Benches were mentioned and areas for which it was established and where it was to sit.—

| Permanent Bench | Areas for which established | Seats |
|---|---|---|
| Dacca Bench | District of<br>Dacca, Tangail,<br>Jamalpur, Mymensingh<br>and Faridpur. | Dacca |
| Comilla Bench | | |

District of Chittagong, Chittagong
Hill Tracts, Bandarban, Comilla
Noakhali, & Sylhet.

Comilla

Rangpur Bench

Districts of
Rajshahi, Pabna, Bogra, Rangpur and Dinajpur.

Rangpur

Jessore Bench

Districts of Khulna, Jessore,
Kushtia, Patuakhali and Barisal

Jessore

115. Later it was readjusted and permanent benches were set up in Chittagong, Barisal and Sylhet. Thus the entire Bangladesh was parceled out into seven regional courts or mini courts. To quote the words of Mr. Syed Ishtiaq Ahmed -the High Court Division of the Supreme Court that was creat-ed by Article 94 could not be found anywhere. Dr. Kamal Hossain in reply, after the submission of the Attorney-General, submitted that only one could say the High Court Division was hovering over the blue sky. Mr. Islam in his opening speech submitted that if it could be shown as to where is the High Court Division then he would be out of court.

116. Mr. Asrarul Hossain submitted that the confusion has been made because of the expression "High Court Division" which has an association of idea with "High Court". He submitted that the High Court was created in 1861, since then the idea had embedded. The High Court Division was created as an integral part of the Supreme Court by the Consti-tution of Bangladesh in 1972. The High Court Divi-sion was taken as the High Court in popular par-lance and frankly admitted that in the legal circle at times the expressions are used inter-changeably. The point is here. In popular notion the High Court Di-vision is the High Court as understood since the 19th Century. It overlooks the legal significance of the expression 'Division'- there are two Divisions of the Supreme Court e. g. Appellate Division and the High Court Division. Article 94 says "comprising". The dictionary meaning of the word is: "to include, to comprehend; to consist of, to hold together". That the High Court Division as an integral part of the Supreme Court as a Division, if overlooked, will cause all confusion. In Article 152 the Supreme Court means the Supreme Court of Bangladesh con-stituted by Article 94. Again 'Judge' means a judge of a Division of the Supreme Court.

Thus the oneness of the Court is settled by con-stitutional provision.

117. Mr. Hossain submitted that not only the High Court Division was dismantled by the im-pugned constitutional amendment Act but it has de-stroyed one of the structural pillars of the Constitu-tion itself, namely, the judiciary. Mr. Hossain supported the arguments of Dr. Kamal Hossain and Mr. Syed Ishtiaq Ahmed and submitted that they arc not only grounded on law but it will show that the new dispensation that was brought in by Martial Law Proclamation had created a disastrous effect on the administration of justice. This part of submis-sion will be considered later at the appropriate stage.

118. To finish the story, on the 7th June, 1986 in anticipation of revival of the Constitution after the election that had taken place on 7th May, 1986 by the Proclamation No. 3 of 1986, these per-manent Benches at Rangpur, Jessore, Barisal, Chittagong, Comilla and Sylhet by deeming provisions were converted into "Circuit Benches "of their re-spective areas. The Circuit Benches were "Sessions" of the High Court Division. When Article 100 re-vived, it said, that the Circuit Benches shall be deemed to be "Sessions" of the High Court Divi-sion. Thus a proposition was erected by two deeming provisions contrary to all canons of reasoning. But even in this enactment the jurisdiction and pow-er was conferred in familiar language which says:

"Each Circuit Bench shall exercise such jurisdiction and power for the time being vested in the High Court Division in respect of cases and appeals within the area" (Paragraph 7) or it could be heard by the Bench of the High Court Division at Dhaka (paragraph 8)."

119. Then Mr. Ahmed placed before the Court the Notification made by the Chief Justice from time to time although no Rules were framed by the Su-preme Court as contemplated by paragraph 9 which reads:—

"The Supreme Court may make rule for regulating the practice and procedure of the Cir-cuit

Benches".

120. Both Dr. Kamal Hossain and Mr. Syed Ishtiaq Ahmed placed before the Court a Notification which shows that only a single Judge had been nom-inated in each Circuit on regular basis in compliance of paragraph 5 but most of the Circuit Benches con-sisted of only two judges to constitute a Division Bench on all working days or part of a day and sit singly for rest of the day. Most of the time in some Circuit Benches a single Judge had worked because of the absence of his two other colleagues. This has not only placed the administration of justice in a chaotic condition but public confidence which is req-uisite for the administration of justice was shaken completely. Disposal of cases had gone down and down notwithstanding the fact that the number of judges were raised from 17 to 27. This aspect has been fully covered by my brother Shahabuddin Ah-med, J: and I fully concur with his view.

121. I better proceed to the position after the revival of the Constitution.

122. When the Constitution was revived the Chief Justice issued the notification No. 9096 G dat-ed 24.11 86 which reads:

"In exercise of the powers conferred by Arti-cle 100 of the Constitution of the People's Re-public of Bangladesh and in super session of all previous orders in this respect, the Chief Justice of Bangladesh has been pleased to appoint with the approval of the President, Rangpur, Jessore, Barisal, Chittagong, Comilla and Sylhet to be the places in which Sessions of the. High Court Division of the Supreme Court may be held on such dates and for such period as may be speci-fied by the Chief Justice."

123. Strangely enough the Chief Justice had found reasons for holding Sessions in the much said places which was selected by the Martial Law regime in 1982. Then he issued another Notification on the same day. To lake an example, "the Sessions of the High Court Division of the Supreme Court shall be held at Comilla (Notification No.9102) while pro-viding concurring jurisdiction with the High Court Division at Dhaka." It specified "such matters aris-ing within the districts of Comilla, Chandpur, Brahmanbaria, Noakhali, Feni and Luxmipur" with the exception of some matters mentioned therein. Sub-missions had been made by the learned Counsel that after the lifting of the Martial Law which was done on the 11th November, 1986 issuance of Notifica-tion by the Chief Justice limiting the territorial ju-risdiction of Sessions was contrary to the Constitu-tion itself It was submitted that though Martial Law was lifted its effect did continue otherwise such terri-tory-wise jurisdiction could not be exercised by the High Court Division.

124. Why such Benches, initially, Permanent Benches, then Circuit Benches and then Sessions were necessary which required considerable legisla-tive acrobatics?

125. The learned Attorney-General could only submit that the Government considered it necessary for the benefit of the public for providing justice eas-ily and expeditiously. In his written submission at page 81 he mentioned "The constitution has

not giv-en any criteria for selecting the places for Permanent benches. It depends on the wisdom of Parliament, who, in exercise of its constituent power can make provision for setting up permanent Benches by amendment of Article 100 of the Constitution.

126. The Attorney-General is perfectly correct that the Constitution has not given any criteria for permanent benches because Constitution never con-templated benches far less the territorial jurisdiction of the High Court Division. As pointed out earlier the confusion was caused because of the notion of a High Court having territorial jurisdiction with the High Court Division. But the question remains what was the purpose of such legislation.

127. In Attorney-General of Alberta V. Attor-ney-General of Canada and others, A.I.R 1939 P.C. page 53 it was observed:—"The next step in a case of difficulty will be examined the effect of the legis-lation (1899 A. C. 580 relied on) for that purpose the Court must take into account any public general knowledge of which the court would take judicial no-tice and may in a proper case require to be informed by the evidence as to what the effect of the legisla-tion will be. It is often impossible to determine the effect of the Act under examination without taking into account any other Act operating or intended to operate or recently operating in the provinces. A closely similar matter may also be called for consid-eration, namely, the object or purpose of the act in question."

"It is not competent either for the dominion or for the provinces under the guise or the pre-tence or in the form of an exercise of its own power to carry out an object which is beyond its own powers and to trespass on the exclusive powers of the other" (At page 57). Attorney-General vs. Reciprocal A.I.R. 1924 AC 328; Re Insurance Act Canada A.I.R. 1932 AC page 41 relied on.

128. The learned Attorney-General failed to show us the object and purpose of the impugned legislation nor could he make any submission as to the necessity of such amendment which will remedy the defects as laid down in Heydon Rule. In that well-known decision (1584) 76 E R 637 it was held:

"To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope and object of the whole Act, to consider according to Lord Coke (i) what was the law be-fore the Act was passed (ii) what was the mis-chief or defect for which the law had not provid-ed; (iii) what remedy Parliament has appointed and (iv) the reasons of the remedy."

In Commissioner of I. T. V. Khatija Begum P. L. D. 1965 SC at page 477 the court adopted this course "to examine in this case the legislative histo-ry" of the enactment.

129. The Amendment.

Necessarily we have

to now examine the amend-ment itself. The amended Article 100 has already been noticed.

Mr. Syed Ishtiaq
Ahmed while submitting pointed out the following effects:—

(1) It seeks to
alter the permanent seat of the Supreme Court by adding "subject to this Article". He submitted that more permanent seats had been created in a clever manner without padding the word 'seat' with the word 'permanent' He submitted that in the name of setting up Permanent Benches actual-ly permanent seats have been created and the six places mentioned in sub-article (3) namely, Barisal, Comilla, Jessore, Rangpur and Sylhet and Chittagong had been given constitutional status.

130. Dr.Kamal
Hossain pointed out in course of his submission that the discrimination had been made by giving these places constitutional status out of the 64 districts of Bangladesh
and it was done ar-bitrarily. By creation of these permanent Benches, mutually exclusive High Court Divisions had been created.

131. Sub-article
(5) confers 'jurisdiction,' 'powers' and 'functions' of the High Court Division on each of the permanent Benches and by adding the, amendment of the private member for the residuary area again the jurisdiction, power and functions were given to Dhaka. Mr. Ahmed submitted that these
six Permanent Benches and the so-called High Court Di-vision at Dhaka are in fact 7 (seven) High Court Di-visions of mutually exclusive and limited territorial jurisdiction. Thus it has destroyed the structural pillar of Article 94. Mr. Ishtiaq Ahmed pointed out that even in the 1962 Constitution while establishing permanent seats in the outlying areas there was no assignment of area. In Pakistan Constitution 1973 the assignment of area of jurisdiction of Benches un-der Article 198 had not divested the jurisdiction of the principal court or its confinement to the residu-ary area far less its total extinction.

132. The expression 'jurisdiction', powers'
and 'functions' are not terms of art. They have got long legislative historical background. In 1861 Act Sec-tion 9 mentioned
'jurisdictions, 'powers' and
'authority' of the High Court and Section 16 provid-ed for any other High Court to confer on such court such 'jurisdictions', powers' and 'authority’;

133. The Government
of India
Act, 1924 section 106 speaks of such' jurisdictions', powers' and' 'authority' in relation to the administration of jus-tice. Section 113 mentioned when Additional High Courts are set up it provided to confer such jurisdic-tions, powers and authority.

134. It will be
recalled in the Letters Patent preamble the words 'jurisdiction, 'powers' and' au-thority' is mentioned. It was only in 1935 Act sec-tion 223 mentioned jurisdictions of the existing High Courts and mentioned 'powers, jurisdictions and administrative functions'. In section 224 for the first time the expression Administrative functions of the High Court is mentioned in the margin. Its pre-cursor section 107 of 1915 Act in the marginal note says "powers of the High Court with respect to sub-ordinate Courts". Hence

since 1935 the 'superintendence' of the subordinate court became a 'function' of the High Court.

135. How let us turn to 1956 Constitution.

In 1956 Constitution Article 227(4) says" with-out prejudice to the other provisions of the Constitu-tion, the Supreme Court shall have same 'jurisdiction' and 'powers' as were immediately before the Constitution day. Sub-Article (5) says-without prejudice the other provisions of the Constitution each High Court shall have same 'jurisdictions, and powers' as were exercisable by it immediately before the Constitution day.

136. In 1962 Constitution in 3rd schedule Item 46 speaks of jurisdictions and powers of the court.

President Order No. 5 of 1972 speaks of all original, appellate, special revisional procedural and other powers.

137. Bangladesh Constitution in Article 101 says that the High Court Division shall have such original appellate and other' jurisdictions', 'powers' and 'functions' as are or may be conferred on it by the Constitution or any other law. Article 103 speaks of jurisdictions of the Appellate Division and Articles 104 and 105 speak of the power of the Ap-pellate Division to issue orders etc. or review its judgments.

138. Thus 'powers' and 'functions' and jurisdic-tions' are conferred specifically whenever a court is created by law or constitution. In India courts are created by law. In Bangladesh Constitution the Su-preme Court is constituted by the Constitution itself detailing the jurisdiction, powers and functions of each Division.

139. By the Amendment Act original Article 100 had been displaced and a complete new dispensation created by creating permanent Benches at six designated places (Article 100 (3) then comes Sub-article (5) which reads as under:—

"The President snail in consultation with the Chief Justice assign the area in relation to which each permanent Bench shall have jurisdic-tions, powers and functions conferred or that may be conferred on the High Court Division by this Constitution or any other law: and the area not so assigned shall be the area in relation to which the High Court Division sitting at the permanent seat of the Supreme Court shall have such jurisdictions, powers and functions."

140. In Article 101 the jurisdictions of the High Court Division had already been granted the Permanent Benches and the Court sitting at permanent seat of the Supreme Court shall have such jurisdictions, powers and functions.

141. Thus 'jurisdictions, 'powers' and 'functions' have been specifically conferred on two sets of courts the permanent Benches at the designat-ed places and the court at the permanent seat. The newly created courts the permanent Benches, have achieved competitive status with the court in the per-manent seat because both the sets of courts have been conferred jurisdictions, powers and functions of the High Court Division. Article 101 had not been amended but it has been dismantled structurally because the permanent Benches will exercise same ju-risdictions, powers and functions of the High Court

Division and in the residuary area at the permanent seat that court namely, the Dhaka Bench will also ex-ercise the jurisdictions, powers and functions of the High Court Division.

142. Criticism by the learned Counsels are not unfounded if the legislative pattern is looked into in all the Letters Patent quoted earlier. The language of the Letters Patent is significantly different. To quote, it says "the Jurisdictions and powers by these, Our Letters Patent, or by the recited Act vested in the said High Court of Judicature at Fort William in Bengal should be exercised in any place within the jurisdic-tion of any court now subject to the superintendence of the said court, other than the usual place of sitting of the said High Court or at several such places". (Clause 31 Calcutta High Court).

143. Same is the language of clause 24 of Let-ters Patent of Allahabad High Court.

144. In the Letters Patent of Patna High Court it was specifically ordained (clause 35) that the Judg-es of Patna shall visit the Division of Orissa, by way of circuit "in order to exercise in respect of cases aris-ing in that Division the jurisdiction and power vested in the said High Court."

145. Letters Patent of Lahore High Court Clause 33 was in identical terms of Calcutta High Court namely, "that the jurisdictions and powers .....vested in the High Court of Judicature at Lahore should be exer-cised in any place within- the jurisdiction of any court subject to the superintendence of the said High Court other than the usual places of sitting of said High Court..... by way of circuit, one or more judges shall visit such place or places accordingly."

146. Letters Patent of Rangoon High Court specifically mentioned that one or more Judges shall sit at Mandalay "in order to exercise in respect of cases arising in such area in Upper Burma as the Governor-in-Council may direct the jurisdiction and pow-er ..... vested in the said High Court provided that the Chief Justice may in his discretion, order that any particular case arising in the said area in Upper Burma shall be heard at Ran-goon."

147. Thus it is clear that the oneness of the court was always maintained by the Letters Patent of various High Courts. Only enabling provision was made for sitting of court at places other than the usu-al place but for that purpose Rules must be framed by the Court. Because discretion though was given to the Chief Justice that discretion could be exercised in accordance with well settled principles.

148. Now let us consider the Permanent Bench of Bombay High Court at Nagpur which is created by Bombay Re-organisation Act, 1960. Paragraph 41 clearly stipulates that the Judges of the High Court at Bombay, being not less than three in number "shall sit at Nagpur in order to exercise the jurisdic-tion and power for the time being vested in that High Court in respect of cases arising in the districts of Buldana, Akola, Amravati, Yeotmal, Wardha, Nagpur, Bhandara, Chanda and Rajura" and then a most important provision is made "Provided that the Chief Justice may, in his discretion, order that any case arising in any such districts shall be heard at Bombay.

149. When the Common High Court for Pun-jab, Haryana and Chandigrah was created following the Punjab Re-organisation Act, 1966, provision was made in paragraph 36 (2) providing "The Presi-dent may, after consultation with the Chief Justice of the Common High Court and the Governors of the States of Punjab and Haryana, by notified order, provide, for the establishment of a permanent Bench or Benches of that High Court at one or more places within the territories to which the jurisdiction of the High Court extends other than the principal seat of the High Court, and for any matters connected there-with."

150. When the U. P. High Court (Amalgama-tion) Order, 1984 was promulgated by paragraph 3 it was stated that the High Court in Allahabad and the Chief Court in Oudh shall be amalgamated and shall constitute one High Court by the name of the High Court of Judicature at Allahabad. Paragraph 14 is quoted below:—

"The new High Court, and the Judges and division Courts thereof shall sit at Allahabad or at such other places in the United Provinces as the Chief Justice may, with the approval of the Governor of the United Provinces, appoint:

Provided that unless the Governor of the United Provinces with the concurrence of the Chief Justice otherwise directs, such Judges of the new High Court, not less than two in num-ber ..... shall sit at Luck now in order to exercise in respect of cases arising in such area in Oudh as the Chief Justice may direct, the jurisdiction and power for the time being vested in the new High Court:

Provided further that the Chief Justice may in his discretion order that any case or class of cases arising in the area shall be heard at Allah bad."

151. The permanent Bench at Ranchi was set up by Act No. 57 of 1976 and paragraph 2 says not less than three Judges "shall sit at Ranchi in order to exercise the jurisdiction and power for the time being vested in that High Court in respect of cases arising in the districts of Hazaribagh, Giridih, Dhanbad, Ranchi, Palamau and Singhbhum:

Provided that the

Chief Justice of that High Court may, in his discretion order that any case or class of cases arising in any such district shall be heard at Patna."

152. As has been already mentioned that the High Courts in Indian jurisdiction exercised territori-al jurisdiction and whenever it became necessary per-manent Benches had been created as detailed above. But these Benches are not conferred the entire juris-dictions, powers and functions of the High Court. They exercised the jurisdiction and power only in re-spect of the cases which had already been vested in the High Court itself.

153. In other words they decide any case or class of cases arising in the area but the important provision is that such cases can also be heard at the principal places namely, Bombay, Allahabad and Patna. Bui the essential 'function' of the High Court had not been conferred on these Benches. They were given jurisdiction and power which is already vested in the High Court for the purpose of deciding cases arising in the area. The superintending function of the High Court was not given on these Benches. That power is vested in the High Court alone. What is this function? Little history will help. The back-ground of superintending power had been traced in A. T. Mridha's case (25 DLR 236 at page 344-48) and it was observed:—

"This survey shows that this power of su-perintendence has been handed down to this court since 1861 and except the period during which the country under Martial Law in 1958-62 and 1969-71 the High Court retained the su-perintending power".

It was stated:

"Special Courts having exclusive jurisdic-tion will function beyond the control and super-intendence of the higher judiciary-a proposition which is dangerous to conceive in a Society which is governed by Rule of Law".

154. In our Constitution no such territorial conception has been injected. The High Court Divi-sion exercised plenary power for giving directions and orders to any person or authority including any person performing any function in connection with the affairs of the Republic irrespective of considera-tion of residence or location. It exercises plenary power because it is the integral part of the Supreme Court of Bangladesh (See Article 94, Article 98) when a Judge of High Court Division can sit as an ad-hoc Judge in the Appellate Division; Article 106 confers the advisory jurisdiction of the Supreme Court but the opinion is given by Appellate Divi-sion, Article 109 the superintending power is given to High Court Division, Article 111 binding effect of Supreme Court judgments and Article 112 action in aid of the Supreme Court.

155. The amended Sub-Article (5) has disrupt-ed structural balance that was carefully erected in Part VI of the Constitution dealing with Articles 94 to 107, 1 16 namely, the part of the allocation of the ju-diciary in the Constitutional scheme.

156. If Sub-Article
(5) had attempted to create two new sets of Courts by a device terming them as' permanent Benches' and the 'Bench at permanent seat' then the legislative drafting may be admired for such device but as to the constitutionality of such amend-ment the least that can be said is that it is hit by Ar-ticle 114 which enables the legislature for setting up subordinate courts by law but such court must not be of co-ordinate jurisdiction or compete with Article 44 which is located in Part III Fundamental rights which says in Sub-Article (2) "without prejudice to the power of the High Court Division under Article 102, Parliament by law empower any other court within the local limits of its jurisdiction, to exercise all or any of those powers". In Bangla version which says: —

“44. (2) ae songbidhaner 102 onncheder odhin High Court Bivager khamotahani na ghotaia songsod Ainerdhara onnokono adalatke taher eakhatiarer sthanio simar moddhe oe sokal ba uher je kono khomata proyuger khomata dan korite paribe.”

157. Sub-Article
(5) has clearly destroyed the structural pillar of the Constitution as given in Arti-cle 94 and thus has violated the mandate of the Con-stitution and further brought itself within the mis-chief of the provision in Article 7 (2) "if law is inconsistent with this Constitution that other law shall to the extent of inconsistency be void".

158. What is meant
by inconsistency? In Clyde
Sugining v. Cowburn 37 Commonwealth Law Report Higgin, J: observed:—

"When is a law inconsistent with another law? Etymologically, I presume that things are in-consistent when they cannot stand together at the same lime; and one law is inconsistent with another law when the command or power or oth-er provision in one law conflicts directly with the command or power or provision in the oth-er. Where two legislations operate over the same 'territory and come into collision, it is necessary that one should prevail; but the necessity is con-firmed to actual collision, as when one legisla-ture says 'do' and the other says 'don’t’. (P. 503)"

159. Sub-Article
(5) is inconsistent with Arti-cles 44 and 114. It has created permanent Benches with jurisdictions, powers and functions of High Court Division contrary to the express mandate in Articles 44 and 114.

160. The mandate is
clear and express if Arti-cles 44 and 114 are read together. It is well settled principle in interpreting the Constitution, the entire Constitution is to be looked into and if any amend-ment to the Constitution does not fit in with Con-stitution itself then the amendment is to be declared ultra vires because Constitution is a logical whole (1910 A. C. 444).

161. 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 touch stone of validity of the exercise of the powers conferred by it. But no provision of the con-stitution can be ultra vires because there is no touch-stone outside the constitution by which the validity of a provision of the Constitution can be judged (See M. H. Seervai, Constitutional Law of India at page 1522-23).

162. Professor Baxi
while talking about Indian Constitution said that the Supreme Court reiterated that what is supreme is the constitution; "neither Parliament nor the judiciary is by itself supreme. 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 never the less it is a power within and not outside of the Constitution..... Article 368 is one part of the Constitution. It is not and cannot be the whole of Constitution". (See Indian Constitution Trends and Issues at page 123).

163. Professor K.
C. Wheare in Modern Con-stitutions quoted Alexander Hamilton in the Federal-ist when he said:

"There is no position which depends on clearer principles than that every act of a delegat-ed authority, contrary to the tenor of the Com-mission under which it is exercised, is void. No legislative act, therefore, contrary to the Consti-tution can be valid. To deny this would be to af-firm that the deputy is greater than his principal; that the servant is above his master, that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid. And he con-cludes that" the Constitution ought to be preferred to the Statute, the intention of the people to the intention of their agents".

164. Professor
Wheare further mentioned that once a Constitution is enacted, even when it has been submitted to the people for approval, it binds thereafter not only the institutions which it estab-lishes, but also the people itself. They may amend the Constitution, if at all, only by methods which the Constitution itself provides, (page 89-90). He further says" A Constitution cannot be disobeyed with the same degree of lightheartedness as a Dog Act. It lies at the basis of political order, if it is brought into contempt; disorder and chaos may soon follow", (page 91).

165. This nation
has learnt its bitter lessons to the consequences of disobedience of the Constitu-tion.

166. Our Article 7
has reflected the wisdom of the past and the learning of the history. Therefore it has said categorically:

(1) All powers in
the republic belong to the people. This is a concept of Sovereignty of the people. Sovereignty lies with the people not with exec-utive, legislature or judiciary —all these three are creations of the Constitution itself.

(2) Their exercises
on behalf of the people shall be affected only, under and by the authority of, this Constitution. This is the concept of limited Govern-ment based on theory of separation of power and then Article 7 (2) says significantly that this consti-tution is as the solemn expression of the will of the people, the supreme law of the republic—This is the Supreme law not in theory because it says" Any oth-er law if it is inconsistent with this Constitution that other law shall to the extent of the inconsisten-cy, be void".

167. Law as defined
in Article 152 means any Act, ordinance, order, rule and regulations by law, notification or other legal instruments and any cus-tom 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 in-consistency 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 jurisdic-tion 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 provi-sion 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 legisla-ture that passes the law. Then who will consider the validity or otherwise of the law-obviously the judici-ary.

168. Now this
impugned amendment act has violated directly two Articles namely, Article 102 and 44 and without amending expressly the other Ar-ticles of Chapter I and II of Part VI (Articles 94 to 116). It has disrupted the provisions relating to the judiciary given in Article 94 because it has added some alien concept by way of introducing 'permanent Benches' conferring
specifically 'jurisdictions, powers and functions' of the High Court Division, thereby creating seven courts in the name of permanent Benches. This has been done in-directly because it could not be done directly. It con-travenes expressly Article 101 because it has set up rival courts to the High Court Division which has been given jurisdictions, powers and functions of the Constitution.

169. It has
disrupted the Constitutional fabric of Article 102 by introducing territorial concept thereby creating innumerable difficulties and incon-gruities which has been cited by all the three learned counsels namely, Dr. Kamal Hossain, Mr. Syed Ishtiaq Ahmed and Mr. Amir-ul-Islam, specially, in the Admiralty jurisdiction and original side matters in-cluding Company law.

170. Mr. Asrarul
Hossain has added to it that the aggrieved person by any decision of the Adminis-trative Tribunal which is located at Dhaka
has to file appeal before the Administrative Tribunal which is located also at Dhaka.

171. Then how the
concept of “Alaka hote udvoddo” as the Chief
Justice by rule had promulgated could be reconciled. In admiralty matter the situation is worse. "The geographical jurisdiction of the Ad-miralty Court

extends over the world wide maritime environment. Judges have customarily expressed the scope of the Admiralty jurisdiction by reference to the "high seas' or by such phrases as" places where great ships go" or "at a place where the tide flows and below all bridges". These phrases clearly indicate that the Admiralty jurisdiction is not confined to the open sea but extends into foreign ports and navigable river .....

Thus under the so-called 'Mozambique' rule the courts of common law referred to entertain an action of trespass in respect of land situated abroad. In the Tolten, the Court of Appeal unanimously held that the rule had no application to the Admiralty jurisdic-tion. The international spread of the Admiralty juris-diction is endorsed by the Administration of Justice Act, 1956, and where under the Admiralty Court is given a jurisdiction" in relation to all claims, wheresoever arising". There are, however two exceptions e. g. in the Rhine Navigation Conception which however, is moribund and the other in action in personam. (British Shipping Laws. Vol. 14. Maritime Lien by Dr. R. Thomas page 309-10).

172. Same difficulty will be faced in the case of Registrar of Trade Mark whose office is located at Dhaka and a branch at Chittagong and if the decision in Trade Mark matter is interpreted differently by the seven mini courts that will mean merely confusion relating to the dispensation of justice. Similar situa-tion can happen in Income Tax References and in Company Laws, if 7 (seven) mini courts interpret differently and give decisions. It will create uncer-tainty and confusion and in effect it will destroy the binding effect of the Supreme Court judgments that has been mentioned in Article 111.

173. The learned Attorney-General has relied on the .structure and jurisdiction of the High Courts in India and Pakistan for supporting his contention on the amended Article 100. The approach itself was wrong because all these High Courts in the sub-continent had territorial jurisdiction. It was so during the British period. After Independence, the Constitu-tion of India stipulated there should be a High Court in each State (Note there cannot be two High Courts in one State) and the Constitution envisages a Com-mon High Court for two or more States (for instance Gauhati High Court). These High Courts are created by ordinary legislation. Judges are transferable from one High Court to another (Article 222 of Indian Constitution.

174. But the High Court Division is not a High Court within the meaning of Indian Constitu-tion. It is the creature of Article 94. It has the plen-ary judicial power .of the Republic. Therefore the ex-amples cited by the learned Attorney-General are in-apt.

175. Even the case cited by the learned Attor-ney-General (PLD 1965 S. C. 496) goes against his contention. In 1955 amalgamated High Court for West Pakistan with permanent benches at different places for political reasons was created but the one-ness of the High Court of West Pakistan was main-tained.

176. Next, the drafting language, namely, ju-risdiction in 'relation to area' or 'causes arising from the area' indicate the limited territorial jurisdictions of these High Courts. Curiously enough, these very expressions could be found in the Rules framed by the Chief Justice. The Attorney-General attempted to argue that “Alaka hote udvoddo” is akin to cause of action within the meaning of Civil

Procedure Code. The short answer to this is where you do get territorial conception in Article 102. In Indian Article 226 speaks of territorial jurisdiction and to obviate the constant difficulties the Constitution had to be amended (Fifteenth Amendment 1963) to insert the expression "may also be exercised by any High Court exercising jurisdiction in relation to the terri-tories within which the cause of action, wholly or in part, arises for the exercise of such power".

177. Hence it appears (a) High Courts are courts of limited territorial jurisdiction; (b) the judg-es of these High Courts are transferable from one High Court to another; (c) Question of their possess-ing plenary judicial power of the Republic does not arise; (d) These High Courts may be created by sub-constitutional legislations. These characteristics dis-tinguish the High Courts of India and Pakistan from the High Court Division which figures as integral part of the Supreme Court in Article 94.

178. The contention of the learned Attorney-General that these difficulties or uncertainties can be sorted out by proper legislation could have some force had it been an ordinary law, but if it is considered from the point of view of administration of jus-tice then the highest court of the land cannot allow this indulgence in tinkering with Constitutional ju-risdiction and making experiment of ill conceived ideas for damaging the well-laid foundation built over the centuries for the sake of any innovation. It was pointed out in A. T. Mridha's case. (25 DLR) 335

"The Constitution is the supreme law and all laws are to be tested in 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. It is rather late in the day to suggest that pre-constitutional piece of legis-lation will displace one of the three structural pillars on which the mechanism of the Consti-tution rests. Having declared that parliamentary democracy is the manifest aspiration of the peo-ple of Bangladesh, the Constitutional instru-ment has been drafted keeping in full view that the power of three organs of Government name-ly, Executive, Legislative and Judiciary are well defined". (page 344).

179. End of law is human happiness. It is the endeavour of any State to see that its citizen may prosper in freedom so that the genius of the Nation can flower to make contribution towards internation-al peace and co-operation in keeping with the pro-gressive aspiration of mankind. That is why the law has encouraged compromise in civil litigation and compounding offences in criminal litigation. Thanks to the Government of Bangladesh keeping in view of this noble idea Section 345 of the Code of Criminal Procedure had enlarged the scope of compounding the offences. Our Civil law is based on the philosophy of compromise and courts are duty bound to give ef-fect to such compromise See Section 96 and Order 23, Rule 3 C. P. C. TV o decision of this Court Jynal Vs. Rustom All B C. R. 1984 AD 29 and Abdus Sauar Vs. State 38 DLR (AD) 38 may be no-ticed in this connection. Litigation brings misery. That is why compromise and compounding of of-fences are encouraged. Touts, hangerons, middlemen flourish in such environment the more litigation the better for this parasitic class of people. That is why the State can never encourage litigation by setting up mush-room courts. Experience even in England has been bitter and therefore the Crown Courts were reduced to considerable number after experience

of 10 years (It has been reduced from 234 to 113. See S. A. de Smith Page 348).

180. In view of the above discussion there is no hesitation in saying that the six permanent Benches and the so-called High Court Division at Dhaka are in fact 7 (seven) High Court Division of mutually exclusive and territorial jurisdiction.

Amending Power.

181. The learned Attorney-General has can-vassed that the amending power is wide and unlimit-ed and there is no limitation on such power. To put his words from the written submission: "When Con-stitution makers have imposed no limitation on the amending power of Parliament, the power cannot be limited by some vague doctrines of repugnancy to the natural and unalienable rights and the preamble and principle of Slate Policy. The argument that Par-liament cannot change the basic structure of the Constitution is untenable". (Page 94). He further submitted that long title stating that certain provi-sion of the Constitution will be amended meets the requirement of Article 142 of the Constitution. (Page 79).

182. The Attorney-General is clearly wrong. This is not the case of "vague doctrines of repugnan-cy". Article 142 (1A) itself says that the preamble amongst others can only be amended when in refe-rendum the majority votes for it otherwise the Bill though passed by the Parliament does not become law. Here is the limitation on legislative compe-tence. Again, Article 8 is similarly protected and it is one of .the principles of Slate Policy.

183. The Attorney-General argued the amend-ing power is a constituent power. It is not a legisla-tive power and therefore the Parliament has unlimited power lo amend the Constitution invoking its constituent power.

184. The argument is untenable. The Attorney-General argued this point keeping an eye on Ar-ticle 368 of the Constitution of India which says that "Parliament may in exercise of its constituent powers amend" etc. which was inserted by amendment following certain observations in the Golak Nath case. The amendment therefore recognised the distinction between an ordinary law and a constitutional amendment. It will not be proper to express 30 any opinion as to the merit of any constitutional amendment made in Constitution of another country.

It will be enough that our Constitution does not make such distinction. Secondly, our Constitution is not only a controlled one but the limitation on legis-lative 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 affected only under, and by the authority, of this Constitution". To dispel any doubt it says: "This Constitution is 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 duly to safe-guard, protect, and

defend this Constitution and lo maintain its supremacy as the embodiment of the will of the people of Bangladesh".
The Constitution power is here with the people of Bangladesh and Ar-ticle 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 val-id if it is inconsistent with the Constitution. 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. It may be noticed that unlike 1956 Constitution or Sree Lanka Conciliation there is no provision in our Constitution for re-placing the Constitution.

185. Mr. Syed Ishtiaq Ahmed submitted that amending power given in Article 142 has provided for special formalities, procedure and majority and submitted that Article 142 not only expressly re-quired a long title but prohibited the introduction of any amendment bill without it and it has stipulated for special majority. Mr. Ahmed submitted that the amending power docs not contain any express power to replace the Constitution. He mentioned Article 216 of the 1956 Constitution which contained a power of repeal of the Constitution itself. Sree Lanka went further in their Constitution in 1977 lo provide for repeal and replacement of the Constitution vide Article 75 read with Article 82.

186. Dr. Kamal Hossain submitted that each and every word of the Constitution must be given due weight while interpreting the Constitution and emphasised that the long title is the mandatory re-quirement of the Constitution. This is to give no-tice to both members of the Parliament and Public to the nature and scope of the amendment that is in-tended.

187. Mr. Amir-ul-Islam argued that long title is a must but such bill, for amendment should only contain 'a provision', meaning not more than one. He submitted that express limitations contained in Article 142, is in such a prohibitive language that no such parallel expression can be found elsewhere in the entire Constitution. Mr. Islam submitted a quotation from Materials on Legislation by Horace Reed at page 173. The two definite purposes of con-stitutional requirement of single provision bill and a title arc: "One is to prevent fraud upon the Republic and the legislature by permitting the passage of Acts and nature of which their title do not disclose. An-other is to prevent the passage of unrelated measures by combination of interests each particularly con-cerned with one, or more and careless of others (Page 52 of his written submission).

188. This has a little history. The title of Acts was added since 1495 in England. Often there was a long title and short title. The long title merely indi-cates the purpose of the Act while the short title is the level of the law. For example: The Opium Act, 1857 it says: An Act to consolidate and amend the law relating to the cultivation of the poppy and the manufacture of opium in Bangladesh.

189. The Canals Act, 1864 (Bengal Act V of 1864) it says: An Act to amend and consolidate the law relating to the collection of tolls on canals and' other lines of navigation, and for the construction and improvement of lines of navigation in Bangla-desh.

190. It is no use of multiplying such instanc-es. It is clear that the draftsmen knew the purpose and distinction between the long title and short title. When the Constitution by prohibitive language is-sued a mandate it is not understood as to why such mandate was disobeyed.

191. The Attorney-General attempted to argue that in the previous amendments namely, the 1st Constitutional amendment to the 7th Constitutional amendment the legislative practices were different and in none of them one can find long title except-ing the third amendment which says" an Act further to amend certain provision of the Constitution of the People's Republic of Bangladesh to give effect to the agreement entered into between the Government of the People's Republic of Bangladesh and the Repub-lic of India". Mr. Nurullah submitted that such lapse may be overlooked by the Court especially when a private member contributed to the amend-ment. The Attorney-General submitted that the Bill was discussed for few days and a private member contributed to the amendment which shows that the members exactly knew what business they were transacting.

192. Since in this proceeding only one of the provisions of the amendment act namely, amended Article 100, is in controversy, the Court, consistent with the practice of superior courts in other jurisdic-tions will not pronounce anything which is not re-quired for adjudication. Since the amended Article has been found bad on merit for having created seven courts of exclusive jurisdiction as detailed above, the absence of long title only justifies the contention of Mr. Khandaker Mahbubuddin Ahmed that, it was de-liberately done to confuse the members of the Parlia-ment as to what was actually being carried through.

193. Next the Attorney-General argued as to the amending power of the Parliament and attempted to argue the legislative supremacy of the Parliament which really do not call for any serious consideration in this proceeding but as it has been argued by the Attorney-General this judgment will consider in brief manner this aspect.

194. Legislative Supremacy of Parliament.

Sovereignty of Parliament is a concept of Con-stitutional Law and rule of Law in the history of England.
Professor Dicey observed:-

> "The law of the Constitution, again, is in all its branches the result of two guiding princi-ples, which have been gradually worked out by the more or less conscious efforts of generations of English statesmen and lawyers".

> "The first of those principles is the sove-reignty of Parliament, which means in effect the gradual transfer of power from the Crown to a body which has come more and more to repre-sent the nation..... it has put an end to the arbitrary powers of the monarch; it has pre-served intact and undiminished the supreme au-thority of the State."

"The second of these principles is what I have called the "rule of law or the supremacy throughout all our institutions of the ordinary law of the land. This rule of law which means at bottom the right of the courts to punish any il-legal act by whomsoever committed is of the very essence of English institutions. If the Sov-ereignty of Parliament gives the form, the su-premacy of the law of the land determines the substance of our Constitution."

(An Introduction to the Study of the Law of the Constitution; A.V. Dicey 1973 Ed pages 470-471).

Dicey further explained "For the supremacy of the law of the land means in the last resort the right of the judges to control the executive government".

195. But Dicey points out that this is not the case with the countries having written Constitution. He says "the sovereignty of Parliament is an idea fundamentally inconsistent with the nations which govern the inflexible or rigid constitutions existing in by far the most important of the countries which have adopted any scheme of representative govern-ment". (Page 472). (Emphasis added)

196. But even the British Parliament got its own limitation. S.A. de Smith in Constitutional and Administrative Law says:-

"In its early days Parliament was a judicial as well as the law-making body. It was the High Court of Parliament, supreme over other courts. But it did not follow that its law-making competence was unlimited or unrivalled,"(page 69).

197. The Bill of Rights 1689 laid it down that the raising of money for the use of the Crown by pretence of prerogative was unlawful. It further de-clared that the pretended power of suspending of laws by prerogative was unlawful. In James Fs time there were dicta to the effect that Acts of Parliament con-trary to common right and reason, or making a man a judge in his own cause, were void. The Author surveyed the procedure and law of the Parliamentary sovereignty in his Book. (See pages 69-70).The Au-thor says" in order to express its sovereign will Par-liament must be constituted as Parliament and must function as Parliament within the meaning of exist-ing common law and statute law. Unless these ante-cedent conditions for law-making have been ful-filled, the product should not be regarded as an authentic Act of Parliament", (page 82).

198, this proposition enjoys widespread sup-port among modern writers for example: R.T.E. Latham, The Law and the Commonwealth, pp. 523-4, Sir Ivor Jennings, The Law and the Constitution (5th edn.), ch. 4. JJX B. Mitchell, Constitutional Law (2nd edn) ch. 4.

199. Then S.A. de
Smith gives the concrete example if a Bill to prolong the duration of a Parlia-ment beyond five years which is contrary to the Par-liament Act procedure (Vide Section 2,1911 Act) and if such a bill were to be passed by the Com-mons alone, certified by the Speaker and assented to by the Queen with words of enactment stating that it, has been passed in accordance with the Parliament Acts, a court should surely treat that 'Act' as nullity because it was bad on its face; the body purporting to enact it would not be Parliament within the mean-ing of existing law. The purported Act would be no more efficacious than a resolution of the House of Commons which has no legal effect outside the walls of Parliament (Stockdale vs. Hansard (1839) 9 AD. & E.I (Page 86).

200. The Author
then mentioned practical lim-itations on the legislative power of Parliament, (pag-es 92-93). The Author says the practical limitations on the exercise of parliamentary supremacy can be visualized from various angles. He says that -

(1) In the first
place, a Government's freedom of action is inhibited by its international posi-tion, and in particular by international ob-ligations which is undertaken. To quote his, word" Government would need to have very strong reasons for introducing legisla-tion inconsistent with its obligations under the European Convention on Human Rights, GATT,
or other multilateral con-ventions to which this country had acceded. Again, when the Government is obliged to seek a very large loan from external sourc-es, it may be compelled to introduce restrictive fiscal and economic measures by legis-lation as a condition of receiving the money";

(2) It would not
initiate legislation intended to encroach on the autonomy of an indepen-dent Commonwealth country or for exam-ple, to impose changes in the laws of the Channel Islands on purely domestic matters;

(3) The Government
will not introduce legislation which it believes to be incapable of enforcement;

(4) Although
unpopular legislation may be passed, the Government would not introduce and its normally obedient supporters in Parliament might refuse to support legis-lation which would court inevitable elector-al disaster in the later stages of the life of a Parliament;

(5) A Government's
freedom of legislative ini-tiative is circumscribed to some extent in so far as it is customary or expedient or both to consult in advance and pay some regard to the views of powerful organized interest groups, which are also able to exert pressure through their spokesmen in Parlia-ment".

This point will be
considered vis-à-vis the repre-sentations of the Supreme Court Bar Association.

201. Leslie Stephen
in 'Science of Ethics' 1882 while speaking on the omnipotence of the British Parliament says as follows:-

"It is limited, so to speak, both from with-in and from without; from within, because the legislature is the product of a certain social con-dition, and determined by whatever determines the society; and from without, because the power of imposing laws is dependent upon the instinct of subordination which is itself limited. If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislature must go mad before they could pass such a law, and subjects be idiotic before they could submit to it".

Lord Denning observed:-

In Blackburn vs. Attorney-General (1971) the legal theory does not always march along-side political reality.....Take the Acts which have granted independence to the Dominions and territories overseas. Can anyone imagine that parliament could or would reverse these laws and take away their independence. Most clearly not. Freedom once given cannot be taken away. Legal theory must give way to practical politics". . .

202. The last sentence of Lord Denning that legal theory must give way to practical politics actu-ally gives the key to understanding of the British Constitutional pattern. It is common knowledge that Britain does not have any written Constitution. It is needless to pursue this topic further although Mr. Asrarul Hossain offered his services to negative the contentions of the Attorney-General that the Parlia-ment is omnipotent. A court will not go into unnecessary academic matters for deciding a hypothetical question.

Our Constitution is a written Constitution-and that again a rigid one.

203. K. C. Wheare says: "Constitutional Gov-ernment means something more than Government according to terms of a Constitution. It means Gov-ernment accord to rule as opposed to arbitrary Gov-ernment, it means Government limited by terms of a Constitution not Government limited only by the desire and capacity of those who exercise powers". He says there might be country with a Constitution and the Constitution does more than established in-stitutions of Government and let them act as they wish. He observed:-

"In such a case we would hardly call the Government Constitutional Government. The real justification of Constitutions, the original idea behind them is that of limiting Government and of requiring those who govern to conform to the law and usage. Most Constitutions as we have seen do purport to limit the Government" and if in turn a Constitution imposes restriction upon the powers of the institution it must be said" then the courts must decide whether their actions transgress those restrictions and in do-ing so, the Judge must say what the Constitution means." (Page 146).

204. To quote Chief Justice Marshall's obser-vation in Murbury Vs. Maddison "It is emphatically the province and duty of the judicial department to say what the law is.....If, then the courts are to regard the Constitution and the Constitution is superior to any ordinary act of the legislature, the Constitution and not such ordinary act must govern, the case to which they both apply".

Professor Wheare said-

"The substance of the matter is that while it is the duty of every institution established under the authority of a Constitution and exercising powers granted by Constitution, to keep within the limits of those words, it is the duty of the Court, from the nature of their function to say what these limits are?, and that is why courts come to interpret a Constitution."

(Page 174 Modern Constitution).

205. E.C.S. Wade and G. Godfrey Phillips in Constitutional and Administrative Law considered the question of the doctrine of legislative supremacy. The authors pointed out that the doctrine of legisla-tive supremacy distinguishes the United Kingdom from those countries in which a written Constitution imposes limits upon the legislature and entrusts the ordinary courts whether the acts of the Legislature are in accordance with the Constitution. It is ob-served:-

"In a constitutional system which accepts judicial review of legislation, legislation may be held invalid on a variety of grounds; for exam-ple, because it conflicts with the separation of powers where this is a feature of the Constitu-tion, (Liyanage Vs. R (1967) 1 A.C. 259) or in-fringed human rights guaranteed by the Consti-tution, (E.G. Aptheker Vs. Secretary of State 378 U.S. 500 (1964) (Act of U.S. Congress re-fusing passports to Communists held an uncon-stitutional restriction on right to travel) or has not been passed in accordance with the procedure laid down in the Constitution (Harris Vs. Mini-ster of Interior 1952 (2) S.A.428)."

206. This topic can now be rounded off by saying that the contention of the Attorney-General that our Parliament has got unlimited power is un-sound; on the contrary the contention of all the counsels appearing for the appellants is grounded on the preamble of our Constitution which even the Parliament cannot amend without referring to the people nor can the Parliament amend Article 8 with-out referendum. Article 7 stands between the Pream-ble and Article 8 as statute of liberty, supremacy of law and rule of law and to put in the words of the American Judge quoted by Mr. Syed Ishtiaq Ahmed, that it is the pole star of our Constitution.

207. No Parliament

can amend it because Par-liament is the creation of this Constitution and all powers follow from this article namely, Article 7. When supra-constitutional authority suspends the Constitution and while reviving they do it partially on careful selection. Article 7 stood revived on the first day of meeting of the Parliament.

208. Pending proceedings.

The Attorney-General argued that pending pro-ceeding can only be transferred when a new court is established and he pointed out to the legislative prac-tices since 1861. A provision is given in the Consti-tutional instrument for transferring the pending pro-ceeding whenever a new court is established. Hence, it was submitted that there was no necessity for such provision. He elaborated that by the Proclamation Order No. 2 of 1982 dated 8th May, 1982 pending proceedings were transferred to the permanent Bench-es and that was done by the Martial Law.

209. Hence, if a new court is constituted pend-ing proceeding can be transferred and the converse proposition is equally true that the pending proceed-ing cannot be transferred when there is no new court.

210. The Attorney-General did not deny as a matter of fact the pending proceedings had been transferred by the order of the Chief Justice to the permanent Benches. The rules framed by the Chief Justice therefore, show that the permanent Benches are in fact new courts and therefore pending proceed-ing had to be transferred. These permanent Benches are not new courts—that was the contention of the Attorney-General, and therefore in the Amendment no provision had been made for transfer of proceed-ings. But when questioned about the Rule framed by the Chief Justice and proceedings were actually transferred to these Benches, the Attorney-General was in dilemma. On the face of it the Rules are ul-tra vires.

211. The Constitution was revived partly by the Proclamation Order No. 3 of 1986 dated 17th June, 1986 which operated in the field and the Chief Justice constituted Benches in pursuance of such proclamation. The Constitution came into force on the first day of its silting namely, 10th November, 1986 the Proclamation Order No.3 could not still operate in the field. This difficulty was met by tak-ing resort to Article 100 which speaks of Sessions. The Chief Justice sought the approval of the Presi-dent. Curiously enough without framing any rule by the Court these very six places figured in his propo-sal for holding Sessions. As has been mentioned earlier in this judgment that power for holding Sessions has been given as an enabling power as was done in the Letters Patent. The Chief Justice is only to determine which Judges are to constitute any Bench of Division Vide Article 107 (3) subject to any rules made under Article 107. No such rule was framed still the Chief Justice deemed fit for consti-tuting Benches in the outlying area which was termed as "Sessions".

212. Then the 8th Amendment came on the. 9th June, 1988. 10th June was a Friday. On 11th June notification was made by the President assign-ing areas of the permanent Benches and similar noti-fication was made by the Chief Justice constituting Benches all on the same day namely, 11th June 1988;

a) Rangpur
Permanent Bench was given jurisdiction of 16 districts;

(b) Barisal Bench
was assigned 7 districts;

(c) Jessore Bench
was assigned 10 districts;

(d) Sylhet
Permanent Bench was assigned 4 districts;

(e) Comilla
Permanent Bench was assigned six districts;

(f) Chittagong
Permanent Bench was assigned district of Chittagong, Chittagong Hill Tracts and Bandarban;

(g) and the
residuary area was allocated by the suggestion of a private member to the High Court Division sitting at the permanent Bench.

213. Thus entire Bangladesh was
divided and assigned to the 7 Benches. As has been noticed earli-er jurisdictions, powers and functions were given to the Permanent Benches and again jurisdictions, pow-ers and functions were assigned to the Bench sitting at the permanent scat after assigning of area of Ban-gladesh. Then what was left for Article 101 which again speaks of jurisdictions, powers and functions of the High Court Division. The conclusion is obvi-ous—the High Court Division does not exist. It has withered away. To illustrate the point further: Pow-ers, functions and jurisdictions as to the High Court Division was given by Article 101. That is the soli-tary Article which confers jurisdictions, powers and functions. When by amendment Article 100 (5) con-fers powers, jurisdictions and functions on six desig-nated permanent benches then these benches share equally the power, jurisdictions and functions of the High Court Division. That means full jurisdiction. Again the residuary bench also has been con-ferred same powers. Then where is the High Court Division? And what is its usefulness? Not that the draftsman was not aware of the legislative drafting style. In Proclamation Order No. III of 1986 dated 17th June, 1986, while conferring jurisdiction and power it said "subject to any rules made by the Su-preme Court under sub-paragraph (9), each Circuit Bench shall exercise such jurisdiction and power for the lime being vested in the High Court Division in respect of cases and appeals arising within the area for which the Bench is constituted as the Chief Jus-tice may determine". (Paragraph 7).

214. The language
is familiar. That is the lan-guage mentioned in the Indian enactments and the Letters Patent.

Here comes the
judicial power to see how far this was valid. This was done by Amendment Act, Act 30 of 1988 under Article 142.

215. A Constitution
is a mechanism under which laws are to be made and not a mere Act which declares what laws is to be (See A.I.R. 1939 F.C. at page 4).
The power to amend the Constitution is there within the Constitution itself namely, Article 142. Constitution is the original and supreme will. The powers of legislatures are defined and limited and these limits may not be mistaken or forgotten when the Constitution is written.

216. The term 'amendment'
implies such an addition or change within the lines of the original in-strument as will effect an improvement or better car-ry out the purpose for which it was framed.

217. As has been
noticed in Kadnon  Vs U.S.193 US. 457-48 Ed.
747).

"The power to
amend must not be con-founded with the power to create. The difference between creating and amending a record is analo-gous to that between the construction and repair of a piece of personal property".

218. The
Constitution is the rule of recogni-tion, to borrow Prof. Hart's words, with reference to which the validity of all laws including the constitu-tional 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 Consti-tution, which is meant by destruction of its basic structure, cannot be comprehended by the Constitu-tion. If it comes, if has to come from outside the Constitution. (For instance Ayub Khan's Martial Law (1958) when the constitution itself was abrogat-ed. Same was the case with Yahya Khan's in 1969. But in Bangladesh Constitution it has been suspend-ed twice in 1975 and 1982).

219. The
Constitution remains at the apex be-cause it is the Supreme law-it remains sui generis only so long as it is accepted by the people. That was pointed out in Mridha's case.

220. It must
control all legislation including amending legislation. The laws amending the Con-stitution are lower than the Constitution and higher than the ordinary laws. That is why legislative pro-cess is different and the required majority for passing the legislation is also different (Compare Article 8p (4) and Article 142 (1) (ii). 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 equal-ity and justice' is assured- and declares that is 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 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 parlia-ment but nevertheless it is a power within and not outside the Constitution.

221. The argument
of the learned Attorney-General that the power of amendment as given in Ar-ticle 142 'Notwithstanding anything contained in the Constitution' is therefore wide and unlimited. 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 1 (2) says-"if any other law is inconsistent with this con-stitution that other law shall to the extent of the in-consistency be void". The appellants have contended that the integral part of the Supreme Court is the High Court Division. By amendment this Division has been dismantled into seven courts or regional courts. Before we proceed further, let us understand what is meant by 'amendment'. The word has latin origin 'emendere' to amend means to correct.

"Thus an
amendment corrects errors of com-mission or omission, modifies the system with-out fundamentally changing its nature-that is an amendment operatives within the theoretical par-ameters of the existing Constitution. But a pro-posal 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 ex-treme example, tried to change a Constitutional democracy into a totalitarian state-would not be an amendment at all, but a re-creation, a re-forming, not merely of the covenant but also of the people themselves. That deed would lie be-yond the scope of the authority of any govern-mental 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."

222. Dr. Kamal
Hossain relied on the above passage from Constitutions, Constitutionalist? and Democracy by Walter F. Murphy for his submission that the amending power has its own limitation which inheres in the Constitution itself. He analysed the various articles e.g. Articles 7, 8, 22, 26 and 31 and rights given by Articles 32 to 43 to substantiate his contention that the amending power has its own limitation.

223. Mr. Syed
Ishtiaq Ahmed reinforced the ar-gument by his inimitable way of expounding the Constitution pointing to its grace and beauty and termed it as a unique Constitution because Article 7 is not to be found in any other constitution standing like statue of liberty. 224. Mr. Asrarul Hossain and Mr. Khandaker Mahbubuddin Ahmed pointed out that Article 7 was never amended-no attempt was made because such exercise would be in futility constitutionally.

225. The learned
Attorney-General in his writ-ten submission mentioned that these benches are working in one name or other for the last six years and if the amended article is struck down then that will create disastrous effect on the administration of justice .The short answer to this can be given in the words of Munir, CJ: in Federation of Pakistan Vs. Tamijuddin Khan. 7 DLR (PC) 291

"If the result
is disaster, it will merely be another instance of how thoughtlessly the Constituent Assembly proceeded with its business and by assuming for itself the position of an ir-removable legislature to what stage it has brought the

country. Unless any rule of estoppel require it to pronounce merely purported legisla-tion as complete and valid legislation, the court has no option but to pronounce it to be void and to leave it lo the relevant authorities under the Constitution or to the country to set position in any way it may be open to them. The question raised involves the right of every citizen in Pa-kistan, and neither any rule of construction nor any rule of estoppel stands in the way of clear pronouncement". 7 D.L.R. (FC) 291.

As a sequel to that
decision validating legislations had to be passed.

226. Conscious as we are of the heavy respon-sibility
which in a final analysis falls upon this court while we have decided to strike down the amended Article 100 we considered it our lawful duty to restore Article 100 in its original position and we saved by our express order the judgments, decrees and orders Tendered or to be rendered, transactions passed and closed. But while restoring old Article 100 we mentioned "along with the Sessions of the High Court". Why it was necessary? The answer is that for two reasons namely, to emphasise that the per-manent seat of the Supreme Court shall be in the capital. Secondly, the latter part namely, "but Sessions of the High Court Division may be held at such other place or places as the Chief Justice may with the approval of the President from time to time appoint". That will be a matter for consideration for the Supreme Court or if delegated to the High Court Division for framing proper rules.

227. The power has
been given to the Chief Justice for seeking the approval. His constitutional responsibility is to determine which Judges arc to constitute a Bench or Division of the Supreme Court but the rule-making power has been given to the Su-preme Court "for regulating practices and procedure of each Division of the Supreme Court and any sub-ordinate court to it". Sub-article (2) says the Supreme Court may delegate any of its functions under clause (1) and Article 113 (Appointment of the Staff), to a Division of that Court or to one or more Judges.

228. So when the
Chief Justice initiates the proposal for holding Sessions of the High Court Di-vision it must be regulated by law as has been no-ticed in various Letters Patent or the rules to be framed by the court itself under Article 107. Then he can seek the approval of the President and the Presi-dent being the Chief Executive would consider the proposal and if he finds justification he will accord approval. It is to be noticed that Article 100 does not mention 'consultation' there is nothing to consult in the matter of judicial functions and surely to hold Sessions or not is the end-result of judicial decision to be taken in the Full Court.

229. It is only in the matter of seeking approv-al
that Chief Justice brings the matter to the notice of the President because logistics and administrative matters are involved.

230. In 1862 when
the Letters Patent of Cal-cutta High Court was forwarded by the Secretary of State Sir Charles Wood to the Governor-General of. India it was mentioned" It has been considered wheth-er the precedence of section 14 of the Act of Parlia-ment should not be followed and the authority to make the necessary arrangement for exercise of the court's jurisdiction out, of the usual place of sitting vested in the Chief Justice. On the whole it was thought that acts partaking so much of an administra-tive character might be more perfectly performed by the Governor-General in Council. But it is scarcely for me to add

that Her Majesty's Government entertains full confidence that the Chief Justice will be the authority habitually consulted in the matter". Despatch to the Governor-General of India dated 14th May, 1862 (F.D.F. Mulla 12th Ed).

231. It is not for any individual. In the case of Union of India Vs. Sankalchand A.I.R. 1977 S.C. 2328 while considering the legality of transfer of the Judges in consultation with the Chief Justice. It was observed:-

"It is essential for free and independent judiciary that power exercisable over it should not be left wholly in the hands of the executive and, it should not be enough merely to consult the Chief Justice of India to get a charter to exercise the power in such manner as the executive thinks fit. It would not be safe to entrust to the executive or to one single individual, howsoever high and lofty, the power to inflict injury on a High Court Judge. Power in order to obviate the possibility of its abuse or misuse should be broad-based and divided and it should be hedged in by proper safeguards". (At Page 2361).

And it was observed at page 2364:-

"It would be as much destructive of judicial independence to allow the executive to hold out blandishment or show favour to a High Court Judge as to put it within the power of the execu-tive to inflict injury on him and consultation with the Chief Justice of India was intended to act as a check upon it. I think it was Mr. Justice Jackson who said that "judges are more often bribed by their ambition and loyalty than by money".

232. Power corrupts and absolute power cor-rupts absolutely. Therefore, power is intended to be used fairly because "absolute discretion like corrup-tion must be the beginning of the end of liberty".

233. These principles are so well settled that they cannot be overlooked. As the Privy Council in Don John Francis Douglas Liyanage vs. The Queen (1959) AC 259 "What is done once, if it be allowed, may be done again and thus judicial power may be eroded. Such erosion is contrary to the clear func-tion of the Constitution".

234. These settled principles are to be kept in mind while interpreting the Constitution because in this proceeding the contentions have been advanced in terms of Sub-Article (5) the President assigned the area in relation to which each permanent Bench shall have jurisdiction in consultation with the Chief Jus-tice.

235. This clearly runs counter to the theory of separation of powers and cherished canon of indepen-dence of judiciary because it is the Chief Justice who is to initiate

the proposal for holding Sessions for declaring what cases or what class of cases shall be heard at the outlying areas. It is not for the Chief Executive to initiate such proposal far less for as-signing areas for permanent benches alternatively (as the exercise was done by proclamation dated 17th June, 1986) for holding Sessions.

236. For instance in the Letters Patent of Patna High Court it is specifically mentioned that what class of cases was to be heard in the Division of Orissa and such visits by the Judges shall be made "not less than four times of every year" and the High Court "shall have the power from time to time to make rules with the previous approval of the Lt. Governor-in-Council for declaring what cases or what class of cases shall be heard at Patna" and pre-served the discretion of the Chief Justice" that any particular case arising in the Division of Orissa shall be heard at Patna or in that Division."

237. So the rule must be framed for deciding what class of cases will be heard and such Rules must be framed by the High Court Division itself subject to Article 107 (1), the Chief Justice then ini-tiates the proposal for the "approval" of the Chief Executive namely, the President.

238. In the Letters Patent of Patna, Orissa has been specifically, mentioned. Similar is the case of Rangoon. The Constitutional instrument specifically mentioned that the courts shall sit at Mandalay if the Chief Justice directs from time to time in respect of cases arising in such areas in Upper Burma. But the discretion was given to the Chief Justice that any particular case arising in the said areas in Upper Bur-ma may be heard at Rangoon.

239. Even in the case of Permanent Bench at Nagpur the place is fixed by the law itself namely, Bombay Re-organisation Act, 1960 to exercise juris-dictions in respect of cases arising in those districts. So is the case of Luck now "to exercise in respect of cases arising in such area in Oudh" but the jurisdiction and power "for the time being vested in the new High Court". Same is the legislative drafting "to exercise the jurisdiction and power for the time being vested in that High Court in respect of cases arising in the districts".

240. These designated places namely, Orissa in the case of Patna High Court and Mandalay in the case of Rangoon High Court are mentioned in the Letters Patent themselves,

241. Thus it is clear that it is the Chief Jus-tice who will propose and the Chief Justice does so 47 after framing the rule which is done by the court it-self vide Article 107 of the Constitution. The approval of the President is necessary because he is the highest executive and in his wisdom he can advise the chief Justice as to the viability of the proposal itself. Whether holding of Session is necessary, it is the Chief Justice who is to take the decision in ac-cordance with rules framed by the Court, Because the Full Court or the Committee to be constituted by the Chief Justice will take into consideration the fac-tors, circumstances and the necessity for holding sessions in an outlying area and the manner of nomi-nating Judges to such Benches whereupon the Chief Justice will pass the necessary order to constitute any Bench (Article 107 (3)).

242. In Article 100
(5) it has been done other way about, namely, the President is to assign the area in consultation with Chief Justice. The learned Attorney-General has placed before us & copy of the minute which shows that it was initiated by the Law Ministry for setting up permanent Benches in those very six places which were selected earlier by the Martial Law period and the Chief Justice only gave consent by saying" TW "without taking the opin-ion of the High Court Division itself.

243. Mr. Syed Ishtiaq Ahmed has argued that no rules have been framed by the Court for holding Sessions or setting up permanent Benches and it was not controverted by the learned Attorney-General.

244. So when the courts were holding Ses-sions immediately after the withdrawal of the Martial Law, the Sessions were held without framing any rule although paragraph 9 says the Supreme Court may make rules for regulating the practice and proce-dure for the Circuit Benches or for that "matter which will deem to be Sessions when Article 100 is re-vived.

245. Next, arguments have been made on Sub-article (4) which says on nomination by the Chief Justice the Judges shall be deemed to have been transferred to the permanent Benches. Transfer-ability of the Judges could not be found in the Con-stitution because it never contemplated transfer of judges because there was no other court to which a judge of the High Court Division could be trans-ferred. When the Court goes to Session as contem-plated in Article 100, the judges are not transferred. They visit the place for discharging their duties. The word 'transfer' has a specific meaning in ser-vice vocabulary. Such power in the hand of the Chief Justice without any guideline as to which of judges should be 'transferred' and when and for how long may give rise to apprehension which may not always be well-founded. To obviate these apprehensions the Chief Justice could have been well advised to take the matter in the Full Court. So that transfer-ability of the judges is hedged in by proper safeguard.

246. It is not necessary to pursue this point further. The question is whether such deeming provi-sion in Sub-Article (4) is violative of Article 147 (2) which says the remuneration, privileges and other terms and conditions of services shall not be varied to the disadvantage of any such person during this term of office. A service condition cannot be altered by a deeming provision. On the face of it, this provision is ultra vires and violative of Article 147 (2).

247. In what peculiar circumstances the Judges of the High Court Division had to perform their functions and discharge their duties when permanent Benches were set up by Martial Law in May, 1982 vide Paragraph 4A (5) enabling the Chief Martial Law Administrator to transfer a Judge of the High Court Division to any of the permanent Bench and from one permanent Bench to another permanent Bench may be noted.

248. Judges arc human beings and obviously when they assume office they do so fairly at advanced age. Bhagwati, J: in A.I.R. 1977 S.C. at page 2359 considered the probability of consequences of transfer of the Judges and observed:-

"Sometimes a
transfer can be more harmful than punishment".

249. I would not
like to pursue this point fur-ther. Lately in the beginning of this year the
Chief Justice had formed a Committee for looking into the problems of judiciary
and backlogs of cases which was headed by Mr. Justice A.T.M. Afzal. This Com-mittee also noticed that our judges
of the High Court Division in the outlying areas were living a mess-like life.
One can only say it is reminiscence of the days of Carmichael Hostel, Baker
Hostel or S.M. Hall.

250. As has been
mentioned earlier in this judgment that what were the compelling reasons for
setting up such permanent Benches in the outlying areas could not be answered
by the Attorney-General save and except by way of submitting that is was to
bring justice to the door-step of the litigant. This as-pect has been fully
covered by S. Ahmed, J: to show that it has resulted in disastrous effect,
hardship for litigant and heavy expense.

251. Mr. Khondaker
Mahbubuddin Ahmed sub-mitted that the 7th Constitution Amendment Act was passed
on 11.11.86. The Chief Justice by his Constitution No. 52 of 1986 nominated one
Judge for Ses-sions of the High Court Division. Then by Constitutions No. 1 of
1987 dated 28.12.86 two judges were nominated in each of the six Sessions from
4.1.87 to 19.2.87.

252. On 15.2.87
Constitution No. 14 of 1987 was issued by the senior-most Judge performing the
functions of the Chief Justice in his absence for Ses-sions at Rangpur,
Jessore, Chittagong with two Judges each for the period from 8.3.87 to 31.
3.87. The Court functioned normally.

253. Constitution
No. 14 of 1987 was issued by the next senior-most Judge performing the func-tions
of the Chief Justice on deliberation in Full Court of the High Court Division.
It was found the volume of pending cases were in Rangpur, Jessore and Chittagong. The decision
was taken accordingly. It was taken from another angle, namely, out of four
civil Divisions of Bangladesh each one had a Ses-sion of High Court Division e.g. Rajshahi (at
Rangpur), Khulna
(at Jessore), Chittagong
and Dha-ka and as such question of
discrimination could not be raised. But the six places make the position vul-nerable
because Chittagong Division alone gets three Sessions (Chittagong, Comilla and
Sylhet) and Khul-na gets two (Barisal and Jessore). This is dispropor-tionate
and could be assailed as discriminatory.

254. Representations of Bar Council. Supreme
Court Bar Association.

Numerous petitions
were filed to the Chief Mar-tial Law Administrator, later to the President
request-ing for reconsideration of the necessity of selling up of permanent
Benches in the outlying areas. Mr. Ah-med placed before the Court the various
representa-tions, appeals. Extract from the meeting of Bangla-desh Bar Council
held on 22. 11.86 read as:-

"The Council,
therefore, unanimously re-solved that the Government be advised to revise their decision without loss of lime and undo the so-called decentralisation of judiciary in the greater interest of the people and the country.”

255. Bar Council is
a statutory elected body. Mr. Ahmed drew our attention to a resolution of the National Bar Association of Bangladesh which is af-filiated to the International forum-

“Bicher bebostha sadharon manosher dore pousaea dewer name sasontontrer bidhan birodhi pontha obolambone Supreme Courter High Court Bivager durbal, bichar bilombito, bichar prarthike hoyrany abong kharochanto korer je opobebostha bortoman sarker chalo

koriasen ochirae oher obushan koriea Supreme Courtke uher Sangbidhanic gourober sthane puno protistha korer jonno ae kauncil odhebation jor dabi janaeasen.”

Then he placed
before us numerous resolutions of the Supreme Court Bar Association which focus "the need of an honest effort to find out the real anomaly". Then in another resolution dated 5.6.82 the Bar Association took notice "The authorities con-cerned-remained unconcerned to our appeal and repre-sentation". On 23.9.82 the following resolution was passed unanimously:-

"It is further
resolved that the authority be urged once again to review the entire matter in the greater interest of the country".

Then on 10.10.82
the Bangladesh Bar Associa-tion recommended for setting up a National Law Commission.

256. On 13.10.82
the Supreme Court Bar As-sociation authorised President of the Association "to hold dialogue with the Chief Martial Law Adminis-trator in order to apprise him of the situation arising out of the establishment of the High Court Divi-sions in the Divisions and is authorised to take such steps as may be necessary in this regard". On 18th October, 1982 the Bar Association noticed that-

"That the
unprecedented situation created by the Government in arresting the 12 eminent Ad-vocates of the Supreme Court Bar of Bangla-desh, sealing of the Office of the Supreme Court Bar Association, seizure of its papers and docu-ments after forcefully breaking open the Office-room and posting of armed police personnel in the Association Building have impeded the nor-mal activities and functioning of the Supreme Court and also of the Supreme Court Bat Asso-ciation compelling

abstention from works by the learned Advocates."

257. Thereafter
series of resolutions were passed on different dates namely, 3,9,84, 1,0.1.85, 26.6.86, 23.7.87, 3,9,86,20.11.86,23.11.86,1.1.87,26.1.87,19.2.87,4.3.87,11.6.87, 21.4.88 and 14.6.88 ,to show how the Bar consistently petitioned fervently, appealed to the Government to reconsider the decision and even suggested for setting up a broad based National Law Commission with retired Judges and Members of the Bar who will hold regu-lar enquiry and elicit public opinion. Mr. Ahmed submitted "all our endeavours failed and instead we got amended Article 100".

258. The judiciary
has a duty to see that the administration of justice functions properly.

259. It is not
clear when the Supreme Court Bar Association and the National Bar Association and the Bar Council made so many appeals and repre-sentations even suggesting for setting up a National Law Commission the authorities concerned did not pay any heed to such representations, instead it passed an amendment act.

260. Even in the United Kingdom
these things are taken into consideration and these are practical limitations of the supremacy of Parliament. Professor H.W. Clarke in Constitutional and Admin-istrative Law observed:-

"It must be
emphasised, however, that the supremacy of Parliament is a legal concept and what may be possible in legal theory may be practical impossibility."

261. He then
considered the practical limita-tions on Parliament in the matter of passing law and taking note of the public opinion; it is observed:-

"The
Government in turn must be sensitive to public opinion having regard to the fact that it must eventually submit itself to the electorate at a general election. This imposes further prac-tical limitation on the legislative supremacy of Parliament since it would be inadvisable for the Government to use it in an arbitrary manner. Thus, legislation is often preceded by a White Paper setting out the Government's proposals and this enables public opinion to crystallise and the Government to make amendments to its policy. More recently the Government has on; several occasions issued a Green Paper at an even earlier stage so that representations from interested bodies can be taken into account even before policy has been decided. On a narrower basis, the Government also consults without-side interests when drafting legislation, e.g. the T.U.C, and the C.B.I, on industrial and econom-ic matters, or the B.M.A. on matters affecting the National Health Service, This is not only advisable but necessary in view of the complex and technical nature of much of present-day legislation." (P 25-26).

262. Professor S.A.
de Smith in Constitutional and Administrative Law voiced the same opinion:-

"A Government's freedom of legislative ini-tiative is circumscribed to some extent in so far as it is customary or expedient or both to con-sult in advance and pay some regard to the views of the powerful organized interest groups, which are also able to exert pressure through their spokesmen in Parliament.” (Page 92).

263. However, this is a matter for the execu-tive to give fresh look into the matter. The Govern-ment may consider whether a Law Commission should be set up to go fully into the matter because not only it touches the administration of justice, it also raises question of the independence of judiciary.

264. The Judges Committee (Mr. Justice A.T.M. Afzal, Chairman, Members: A.K.M. Sadeque and Naimuddin Ahmed, JJ:) found that since 1982 the rate of disposal of cases has progressively gone down and with more filing, the pending cases went on piling. It is distressing to note that with 19 Judges, the number of disposal in 1980 was 5963; in 1981 with 17 Judges it was 6189; with 19 judges in 1982 it was 7961; in 1983 with 23 judges, it was 6572 and in 1988 with 27 judges it was 3868.

265. The Committee found that "as far as dis-posal of cases is concerned the decentralisation of the Benches have been proved to be counter-productive. Moreover, because of easy accessibility, frivolous cases are being filed adding to the number of pending cases".

It recommended:-

"The Government may consider whether there is any need to review/readjust the scheme of decentralisation upon evaluation of the work-ing and output of the permanent Benches."

266. The effect of decentralisation of superior judiciary was considered in the background of Eng-land and America:

"The decentralisation of judicial organisa-tion and the administration of justice arc thought by some to be fatal to the maintenance of a true judicial power, and fear is reinforced for those who see a menace in the new importance attaching to the place of legislation as a source of law."

(Major Legal Systems in the World Today by Rene David and John E.G. Brierley, Third Edition at page 375).

267. The aforesaid
authors compared the ef-fect of decentralisation of judicial power with Eng-lish
and American System and stated:

"By way of
comparison to the English sys-tem, it is worth noting that in the United States
there is considerably less centralisation of judi-cial power. English justice
is centred in London; the superior courts, with very few exceptions, were until
recently found only in London. For quite obvious reasons, both historical and
geo-graphical, there has been no analogous development in America. This
is so, therefore, not only because there are separate state courts but also
because the multiplicity of federal courts runs throughout the union; they are
not located just in the federal capital. The concentration of judi-cial power
in London was a
decisive factor in the development of the Common Law, and thus the
diversion—the inevitable dispersion—of American justice has created a series of
prob-lems that never arose in England.
These same problems have tended to encourage, the adoption of a more flexible
view respecting the authority of decided causes, notably because of the intro-duction,
also the normal and essential preoccu-pation for the security of legal
relations, of the further concern for legal uniformity, a matter that does not
arise in England."
(Pages 429-30).

268. Mr.
Amir-ul-Islam pointed out that the concept of a unitary Sovereign Republic
is based on indivisible characteristic of sovereignty which can not be
territorially limited or divided. He submitted that unlike in a Federation the
exercise of this pow-er of sovereignty is not dependent on any federating unit
consenting or concurring to it nor sharing the sovereign power by distribution
or division of sub-jects under various reserved and concurrent lists. He
further submitted that the Unitary, independent, sovereign, characteristic of
the Republic is a consis-tent concept under our Constitution. This is doubly
reinforced, first in the proclamation of independence, and later in our
Constitution. Sovereign power is distributed among various organs of the State
and this separation of power is an essential feature of the Republic. He
submitted that the unitary characteris-tics reconfirmed, in the Constitution is
our 'birth jacket' which we are born with and not a jacket giv-en to us by any
body. He pointed out that Bangla-desh
is a solitary example which enjoys the homo-geneity and compactness of a
unitary Republic. The impugned amendment had created a dent on it by setting up
courts with territorial jurisdiction. It pur-ports to create territorial
limitations on the Supreme Court of Bangladesh in the colonial pattern and re-ferred
to the Letters Patent of Supreme Court 1773 which though was known as Supreme
Court of Fort William, it had territorial limitations in Calcutta and Fort William
only.

269. The
apprehension of Mr. Amir-ul-Islam's, that the amendment destroyed the unitary
character of the Republic cannot be ignored. It has created re-gionalism which
might one day give rise to the sa-trapies as happened in ancient India following
Alexander’s invasion. Such fissiporous tendencies nourish parochial, regional
aspiration which ultimately gives rise to narrow local interests.

270. The amendment
purports to create territo-rial units which eventually may claim the status of
federating Units thereby destroying the very fabric of Unitary Republic.
In other words, by sowing the seeds of regionalism the next step can be disman-tling

the fabric of the republic.

271. Finally, Mr. Islam submitted that the amendment has created disastrous effect on the ad-ministration of justice by impairing the indepen-dence of judiciary.

272. This point may now be considered. Inde-pendence of judiciary is not an abstract conception. Bhagwati, J said “if there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Con-stitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective". He said that the Judges must uphold the core principle of the rule of law, which says-"Be you ever so high, the law is above you". This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social jus-tice to the vulnerable sections of the Community. It is this principle of independence of the judiciary which must be kept in mind while interpreting the relevant provisions of the Constitution (S.P. Gupta and others Vs. President of India and others A.I.R. 1982 SC at page 152).

273. He further says-"what is necessary is to' have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence who are judicial suites-men with a social vision and a creative faculty and who have, above all, a deep sense of commitment to the Constitution with a, activist approach and obliga-tion for accountability, not to any party in power nor to the opposition .....We need Judg-es who are alive to the socio-economic realities of Indian life, who are anxious to wipe every tear from every eye, who have faith in the Constitutional val-ues and who are ready to use law as an instrument for achieving the constitutional objectives. (At page 179). He quoted the eloquent words of Justice Krish-na Iyer:

"Independence of the judiciary is not genuflexcion; nor is it opposition to every proposi-tion of Government. It is neither judiciary made to opposition measure nor Government's pleasure.

274. There is no hesitation in saying that these are the words of wisdom handed down to us by the generations of Judges who very politely and meekly from the beginning of the civilization re-minded the monarch that the King is not above the law but under the law. Some of them were beheaded, 1 imprisoned or destroyed but the cherished theme ran like a refrain throughout the pages of the history.

275. While forwarding the Letters Patent of 1862 it was pointed out by the Secretary of State:-

“Another reason for the form which the present Letters Patent assume is to be found in the provisions of Section 17 of the Act of last Sessions. By that section power is given to the Crown to recall the Letters Patent establishing the Court at any lime within three- years after its establishment, and to grant other Letters

Patent in their stead. This provision was inserted in the Act, mainly with the view of enabling Her Ma-jesty's Government to avail themselves of the advice and assistance of the Judges of the Court in framing the more perfect Charier be which the jurisdiction and authority of the Court is to be permanently fixed. On this point, I request you will put yourselves in communication with the Judges of the Court and at any time previous to the expiration of two years from the date of establishment of the Court, furnish me with any suggestions they make, or any amendments they may propose in the Letters Patent now transmitted, and I shall be glad if, in proposing altera-tions, the Judges will put their recommendations as nearly as possible in the form in which they wish them to appear in the future Letters Patent". (emphasis added)

276. The opinion of the Judges was sought as far back as in 1862. It is lamentable why the Government could not do so while contemplating for setting up of permanent Benches in 1982 or 1988.

277. In countries where there is a written Constitution which cannot be overridden by ordinary legislation (for example, the United Stoles of Ameri-ca), the judges are guardians of the Constitution and may declare a statute to be unconstitutional and in-valid.

278. In the United Kingdom, the chief consti-tutional function of the judiciary is to ensure that government is conducted according to law and thus in an important sense to secure the observance of the rule of law. If this function is to be adequately performed, independence of the judiciary must be maintained". -Constitutional and Administrative law -Wade and Phillips at page 315.

279. In the Preamble it is affirmed "that it is our sacred duty to safeguard, protect, and defend this Constitution and to maintain its supremacy". In Arti-cle 7 the supremacy of the Constitution is declared -it is the Supreme law of the Republic and any in-consistent law is void. It has already been discussed that consequently it is for the judiciary to perform this task.
:

280. While it is the duty of the people at large' to safeguard, protect and defend' the Constitution, the oath of the President, Judges' is to preserve, pro-tect and defend the Constitution, To preserve is an onerons duty-while for the people the duty is to 'safeguard'. Nature of the two duties are different and runs in parallel. To deny the power to judiciary to 'preserve' the Constitution is to destroy the indepen-dence of the judiciary thereby dismantling the Con-stitution-itself.

281. The amendment has purported to create seven independent High Court Divisions in the name of permanent Benches. When the question of inter-pretation of the Constitution or on a point of general public importance arises, there are possibilities of 49 divergent views which will nullify the binding effect as contemplated in Article 111 because the decision by one permanent Bench will not bind another per-manent Bench. Thus one of the essential constitu-tional duties of the Supreme Court will be rendered nugatory thereby destroying the one of the basic fea-tures of the Constitution.

282. Same will be

the case in matter of super-intendence of the subordinate courts because of the absence of any central organ to discharge this duty.

283.
Decentralisation of judiciary is conceiva-ble in so far as the trial courts are concerned but such attempt in the sphere of superior judiciary has been deprecated by the jurists far less in the case of the highest court of the country.

284. Sub-Article
(5) presupposes consultation of the President with the Chief Justice. The file that was produced by the Attorney-General shows there was no effective consultation concerning such a vital matter of the administration of justice.
In Sankal
Chand's case Chandrachud J:
observed:-

"Article 222
(1) which requires the President to consult the Chief Justice of India is founded on the principle that in a matter which concerns the judiciary vitally, no decision ought to be taken by the Executive without obtaining the views of the Chief Justice of India who, by training and experience, is in the best position to consider the situation fairly competently and objectively. But there can be no purposeful con-sideration of a matter in the absence of facts and circumstances on the basis of which alone the nature of the problem involved can be appre-ciated and the right decision taken. It must, therefore, follow while consulting the Chief Justice the President must make the relevant data available to him on the basis of which he can offer to the President the benefit of his con-sidered opinion. If the facts necessary to arrive at a proper conclusion are not made available to the Chief Justice he must ask for them because, in casting on the President the obligation to consult the Chief Justice, the Constitution at the same time must be taken to have imposed a duty on the Chief Justice to express his opinion on nothing less than a full consideration of the matter on which he is entitled to be consulted. The fulfillment by the President, of his constitu-tional obligation to place full facts before the Chief Justice and the performance by the latter, of the duty to elicit facts which are necessary to arrive at a proper conclusion, are parts of the same process and are complementary to each other, will earn a handsome dividend useful to the administration of justice. Constitution with-in the meaning of Article 222 (1), therefore, means full and effective, not formal or unpro-ductive, consultation."

285. No one has
evaluated the performance of these outlying benches, their rate of disposal, rea-sons for decline in disposing cases, backlog of cases and the remedial measures that may be taken. It was only in the beginning of this year the Chief Justice had framed a Committed to look into these matters. But while proposing for setting up of Permanent Benches in the designated six places no endeavours were made to assess the position. Hence the criti-cism of Mr. Asrarul Hossain that neither the Presi-dent nor the Chief Justice did apply his mind cannot be brushed aside. Since the pre-requisite in Article 100 (5) is consultation the absence of such consulta-tion has demonstrated the arbitrariness in setting up of permanent benches which, on such, ground alone is unconstitutional.

286. It may be mentioned that while propos-ing to
set up a Special Court,
the President of India thought it fit to refer the matter to the Supreme Court for its opinion as to the Constitutionality of such legislation. The Supreme

Court in its advisory jurisdiction (Article 143) gave its opinion that the absence of a provision for transfer of cases from one court to another is fatal. Singhal, J: went further and observed: -

“It is not permissible for parliament or a State legislative to ignore or bypass that scheme of the Constitution by providing for the establishment of a civil or criminal court paral-lel to a High Court in a State or by" way of an additional or extra or second High Court or a Court other than a Court Subordinate to the High Court. Any such attempt would be uncon-stitutional and will strike at the independence of the judiciary which has so nobly been enshrined in the Constitution and so carefully nursed over the years.....It is beyond any doubt or contro-versy that the Constitution does not permit the establishment of a court similar to the High Court or parallel to the High Court." (A.I.R.1979 S.C.478).

287. Even this was not done when the consti-tutional amendment Bill was introduced although about two years' time was available to have the opinion of the Supreme Court under Article 106.

288. When there is the written Constitution the unavoidable duty falls upon the judiciary and as Professor K.C. Wheare says-"the success of judicial review depends as much upon a well drafted Consti-tution as upon the caliber of the Judges." (Modern Constitution at page 177)

289. This judgment will be incomplete if a .historical episode is not mentioned. Sir Coke was summoned by King James the First to answer why the king could not himself decide cases which have to go before his own court of justice. Sir Coke asserted:-

"No King after the Conquest assumed him-self to give any judgment in any cause what-soever which concerned the administration of justice within the realm but these are solely de-termined in the court of justice."

290. When the King said that he thought the law was founded on reasons and that he and others had reasons as well as Judges, Coke answered-

"True it was that God has endowed his Ma-jesty with excellent science and great endow-ments of nature, but his Majesty was not learned in the law of his realm in England, and causes which concerned the life or inheritance or good or fortune of his subject, arc not to be de-cided by natural reasons, but by the artificial reasons and judgment of the law, which law is an act which requires long study and experience, before that a man can attain the cognizance of it, and the law was the golden metawand one and measure to try the causes of the subject and which protect his Majesty in safety and peace."

291. The moral is
here in the following words:

"The greatest
of all the means .....
for ensuring the stability of the Constitution, but which is now-a-days generally neglected is the education of citizens in the spirit of the Constitution .....To live by the rule of the Constitution ought not to be regarded as slav-ery, but rather as Salvation."[Aristotle's Politics (335-322 B.C.) pp
233-34.]

292. Back to the
Constitution. The following are the unique features of our Constitution:

(1) It is an
autochthonous Constitution because it refers to the sacrifice of the people in the war of national independence after having proclaimed Independence;

(2) The Preamble:
It postulates that it is our sacred duty to safeguard, protect, and defend this Constitution and to maintain its su-premacy as the embodiment of the will of the people of Bangladesh;

(3) Fundamental aim
of the State is to realise through democratic process a society in which 'the rule of law, fundamental human rights and freedom, equality and justice will be secured.

(4) Bangladesh is a
unitary, independent, sove-reign republic.

(5) All powers in
the Republic belong to the people. The Constitution is the Supreme Law of the Republic and if any other law is inconsistent with the Constitution that other law shall be void to the extent of in-consistency. Such article e.g. Article 7 can-not be found in any other Constitution.

(6) Article 8 lays
down the fundamental princi-ples to the Government of Bangladesh. This article is protected like the preamble and can only be amended by referendum.

(7) Article 44
figures as a fundamental right and sub-article (2) says without prejudice to the powers of the High Court Division under Article 102 Parliament may by law em-power any other court, within the local lim-its of its jurisdiction, to exercise all or any of those powers. In Bangla-

(8) Article 48. The
President shall be elected by direct election. This is also a protected arti-cle

which can only be amended by referendum.

(9) The President
shall appoint as Prime Minister who commands the support of the ma-jority of the members of Parliament. This article 58 is also protected and can be amended by referendum. This pre-supposes the existence of Parliament within the meaning of Article 65.

(10) There shall be
a Supreme Court for Ban-gladesh
to be known as the Supreme Court of Bangladesh comprising the Appellate Division and High Court Division (Article 94). This is given by the Constitution which the people of Bangladesh 'do hereby adopt, enact and give to ourselves this Constitution'.

(11) This
Constitution has erected three structu-ral pillars e.g. Executive, Legislative, and Judiciary all these three organs are creatures of the Constitution. None can compete with the other.

(12) Judges shall
be independent in the exercise of their judicial functions (Article 94(4) and 116A).

(13) In case of necessity a judge of the High
Court Division can sit as ad-hoc
judge in the Appellate Division — that shows to the oneness of the Court itself. (Article 98).

(14) If any
question of law of public importance arises the President can refer the question to the Appellate Division although it is the opinion of the Supreme Court. (Article 106).

(15) In the absence of the Chief Justice the next
most Senior Judge of the Appellate Division may perform those functions if approved by the President. Such clause can-not be found in any other Constitution. It thus safeguards the independence of judici-ary. (Article 97) (See Arts. 126 and 223 of Indian Constitution).

(16) The plenary judicial power of the Republic is
vested in and exercised by the High Court Division of the Supreme Court (Articles 101,102,109 and 110) subject to few limitation e.g. in Articles 47,47A,78,81(3) and 125.

(17) The power of
Superintendence of subordi-nate Courts is exercised by the High Court Division and these courts are subordinate to the Supreme Court (Article 114).

(18) If a point of
general public importance is involved in a case pending before a Subordinate Court the High Court Division has the power to transfer the case to itself. This is unique feature of the Constitution because this power is not available to any High Court either in India
or Pakistan.

Nor such power was available under the Government of India Act, 1935.

(19) The plenary judicial power of the Republic is not conferred within the territories of the Republic but extends to the functionaries and instrumentalities of the Republic be-yond the Republic. See Article 102.

(20) The declaration and pledges in the Pream-ble have been enacted substantively in Arti-cles 7 and 8. While Preamble and Article 8 have been made unamendable, necessarily Article 7 remains as unalterable.

(21) Judges cannot be removed except in accor-dance with provisions' of Article 96-that is the Supreme Judicial Council. Sub-article (5) says if after making the inquiry, the Council reports to the President that in its opinion the Judge has ceased to be capable of properly performing the functions of his office or has been guilty of gross miscon-duct, the President, shall by order remove the Judge from office. This is unique feature because the Judge is tried by his own peers-'thus there is secured a freedom from politi-cal control' (1965 A.C.P 190).

293. Now, some of the aforesaid features are the basic features of the Constitution and they are not amendable by the amending power of the Parlia-ment. In the scheme of Article 7 and therefore of the Constitution the structural pillars of Parliament and Judiciary are basic and fundamental. It is inconceiva-ble that by its amending power the Parliament can deprive itself wholly or partly of the plenary legisla-tive power over the entire Republic.

294. To illustrate further, the President must be elected by direct election (Article 48). He must have a council of ministers (Article 58). He must ap-point as Prime Minister the member of Parliament who appears to him to command the support of the majority of the members of Parliament (Article 58 (3)), Both these articles 48 and 58 are protected and so is Article 80 which says every proposal in Parlia-ment for making a law shall be made in the form of a Bill. Now if any law is inconsistent with the Con-stitution (Article 7) it is obviously only the judici-ary which can make such declaration. Hence the Constitutional Scheme if followed carefully reveals that these basic features are unamendable and unalter-able. Unlike some other Constitution, this Constitu-tion does not contain any provision "to repeal and re-place" the Constitution and therefore cannot make such exercise under the guise of amending power.

295. The impugned amendment in a subtle manner in the name of creating "Permanent Benches" has indeed erected new courts parallel to the High Court Division as contemplated in Articles 94,101,102. Thus the basic structural pillar, that is judiciary, has been destroyed and plenary judicial power of the Republic vested in the High Court Di-vision has been taken away.

296. Since the amendment has been found in-valid the Rules framed thereunder fall automatically. This much can be said in passing what the amend-ment wanted to cover up the Rules have exposed them. For instance, the amendment itself did not say anything about pending proceeding. The consistent legislative practice is that transfer of pending proceedings when considered necessary has been express-ly

provided for. It is well settled that a litigant has vested right to continue the proceedings pending at the time of change of forum and is therefore entitled to continue the proceedings in the pre-existing fo-rum. But the Rules framed by the Chief Justice have exceeded all recognised norms of law and therefore ultra vires. Moreover Article 100(6) has conferred the Rule-making power in relation to permanent Bench-es only. Hence the Rules as are made applicable to the High Court Division at Dhaka are unauthorised. Lastly, the concept of cause of action can arise when the jurisdiction is defined with territorial limits. The Rules are the fore invalid.

297. To sum up:

(1) The amended Article 100 is ultra vires be-cause it has 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 jurisdictions, powers and functions of the High Court Division;

(2) Amended Article 100 is ultra vires and invalid because it is inconsistent with Arti-cles 44, 94,101 and 102 of the Constitution, The amendment has rendered Articles 108,109,110, 111 and 112 nugatory. It has directly violated Article 114.

(3) Amendment is illegal because there is no provision of transfer of cases from one Per-manent Bench to another Bench which is an essential requisite for dispensation of justice (See A.I.R. 1979 SC. 478);

(4) The absence of such provision of Transfer shows that territorial, exclusive courts, in-dependent of each other, have been created dismantling the High Court Division which in the Constitution is contemplated as in-tegral part of the Supreme Court;

(5) Transfer of judges by a deeming provision is violative of Article 147;

(6) It has not merely set up a permanent Bench as in Indian jurisdiction because the Indian High Courts have territorial jurisdiction and in setting up Benches for deciding cases in outlying area the legislative language is “to exercise the jurisdictions and powers for the time being vested in the High Court in respect of cases arising in the districts". That is the language of the Letters Patent as well. See Patna High Court Letters Patent Clause 35 while conferring jurisdiction for Orissa" in order to exercise in respect of ,cases arising in that Division the jurisdiction and power by these Our Letters Patent, or under the Government of India Act, 1915 vested in the said High Court".

Same is the language in Letters Patent of Ran-goon and other High Courts and that lan-guage had been used in the Bombay Re-organisation Act and Allahabad Act and Pat-na Act for setting up permanent Bench at Ranchi.
The oneness of the court had never been destroyed. It was kept intact;

All the provisions
which have been discussed above show that it is the discretion of the Chief Justice to decide which class of cases can be heard in the outlying area and cases in the principal scat:

(7) But in this
amendment unfortunately the legislative will have been carefully drafted to

camouflage the real
purpose namely of setting of two rival classes of High Court Division-in the name of permanent Bench and Bench in the residuary area while using the expression’ jurisdiction', 'powers' and 'functions' separately in each group and the Article 101 stands alone with the language of law namely, the High Court Division shall exercise powers, functions and juris-dictions when that High Court Division it-self ceases to exist except in name;

(8) Sessions connotes temporariness. The
Dictionary meaning: "a period of being assem-bled." In the Constitution Article 100 says as the Chief Justice may, with the approv-al of the President, from time to time appo-int. Any other device contrary to the spirit of the Constitution will tantamout to fraud on the Constitution on the principle what cannot be done directly shall not be done in-directly.

Sessions of the
High Court Division may be held at such places or places from time to time in accordance with the Rules of the , Court regulating the practice and procedure and the Chief Justice may seek the approval of the President whenever it becomes neces-sary for holding such Sessions;

(9) No argument was
advanced directly though but an attempt was made whether by run-ning a blue pencil the court would severe the bad part from the good part of the enact-ment. The answer is in the negative: be-cause what is the purpose of this amend-ment, namely, to set up permanent Benches with full jurisdictions, powers and func-tions of the High Court Division. The oth-er provisions in the amended Article are so interwoven with the scheme that they can not be separated. Therefore, the full article is liable to be declared ultra
vires.

The Initiative and
Referendum Act A.I.R. 1919 P.C. 145.

298. In the result,
therefore, both the appeals are allowed without any order as to costs and the or-ders of the High Court Division are set aside. Civil Petition No. 3 of 1989 is disposed of in these terms. Lastly, we are grateful to the members of the Bar who actively assisted their Seniors Dr. Kamal Hossain, Mr. Syed Ishtiaq Ahmed and Mr. Amir-Ul-Islam and Amicus Curia & Mr. Asrarul Hossaion and Mr. Khondaker Mahbubuddin Ahmed without whose assistance the learned counsels could not have made such full and effective arguments over the days of hearing. The Attorney-General Mr. M. Nurullah must be thanked for all his research and the background of the Constitutional issues for presenting the case to the best of his ability before tins Court.

Shahabuddin Ahmed, J.—These two ap-peals by special leave call in

question an order of the High Court Division dated 15 August 1988 summarily dismissing Writ Petition Nos. 1252 of 1988 and 1176 of 1988. In those Writ petitions the constitu-tional validity of the Bangladesh Constitution Amendment Act No. XXX, known as the Eighth. Amendment, so far as it relates to the amendment of Article 100 of the Constitution, was challenged, among others, on the ground that the 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 and that in place of one High Court Divi-sion seven Mini-High Courts with mutually exclu-sive territorial jurisdictions were created rendering thereby the High Court Division totally ineffective and unworkable.

300. Civil Petition
No.3 of 1989 is directed against another order of the High Court Division, dated 31 October 1988,
by which the Petitioner's Writ Petition No. 1283 of 1988 was summarily dis-missed. In that Writ Petition the same question as to the constitutional validity of the Eighth Amendment was raised. This Amendment in respect of Article 100 will be hereinafter referred to as the "Impugned Amendment".

301. Appellant in
Civil Appeal No. 42 of 1988 was a contesting candidate for election to the office of Bathgaon Union Parishad in the district of Sunamganj. He claimed to have been duly elected in the election held on 10 February 1988. But another contesting candidate challenged his election by filing Writ Petition No. 963 of 1988 in which the appel-lant was impleaded as respondent No. 5. A rule was issued in that Writ-Petition and an interim order was granted by which the publication of the appellant's election as Chairman of the said Union Parishad was stayed. The appellant, in order to challenge the order of stay, wanted to swear an affidavit-in-opposition but it was refused by the Commissioner of Affidav-its of the High Court Division (Dhaka) who in-formed him that by virtue of the Impugned Amend-ment which was published in the official gazette on 11 June 1988, read with President's Notification under clause (5) of Article 100 and the Chief Justice's Rules, made under clause (6) of the Article 100, the Writ petition stood transferred to the newly created Permanent Bench at Sylhet and that the swearing of the counter-affidavit would be made only in the Per-manent Bench at Sylhet since the Writ petition in question arose in the area assigned to the Permanent Bench at Sylhet which got exclusive jurisdiction over this matter. The appellant contended that since his Writ petition was pending at the time of the passing of the Amendment Act, it was to be dis-posed of in the High Court Division at Dhaka, par-ticularly when no
provision was made in the Amend-ment Act for transfer of such pending cases. His contention was rejected by the Commissioner of Af-fidavits whereupon he filed the Writ petition (No. 1252 of 1988) as referred to above, challenging the validity of the Amendment itself.

302. Similarly, the
appellant in Civil Appeal No. 43 of 1988 challenged the Impugned Amend-ment in his Writ Petition No. 1176 of 1988 when his prayer for swearing an affidavit in connection with his earlier Writ Petition No. 495 of 1988 relat-ing to an election dispute was refused. His Writ Peti-tion, as he was informed by the Commissioner of Affidavits, stood transferred the newly created Per-manent Bench of the High Court Division at Chitta-gong. Petitioner in Civil Petition No. 3 of 1989 challenged the validity of the Impugned Amendment when his Writ Petition No. 1283 of 1988 relating to a labour dispute, which was ripe for hearing at the Dhaka Bench, was about to be transferred to the Per-manent Bench of the High Court Division at Jessore on the similar ground, that is, the cause of action in his case arose in the area over which the Jessore Bench got exclusive jurisdiction.

303. As stated

above, leave was granted by us to the appellants to consider the question relating to interpretation of the Constitution as it stood amend-ed. Civil Petition No, 3 of 1989 was filed some-time after this leave was granted; as such it would be heard along with the two appeals,

304. In the Constitution of Bangladesh, as it stands today after undergoing several amendments starting from the First Amendment by Amendment Act No. XV of 1973, Part VI relates to "THE JUDI-CIARY". This Part consists of 24 Articles from 94 to 117. Article 94 provides, "there shall be a Su-preme Court for Bangladesh (to be known as the Su-preme Court of Bangladesh) comprising the Appel-late Division and the High Court Division. Clause (3) of this Article provides that the Chief Justice, -and the Judges appointed to the Appellate Division, shall sit only in that Division, and the other Judges shall sit only in the High Court Division. Article 100, just before it was amended by the Impugned Amendment Act, provides that the permanent seat of the Supreme Court shall be in the capital, but ses-sions of the High Court Division may be held at such other place or places as the Chief Justice may, with the approval of the President, from time to time appoint. After the impugned amendment Article 100 reads thus:

"100. (1) Subject to this article, the permanent seat of the Supreme Court shall be in the capital.

(2) The High Court Division and the Judges thereof shall sit at the permanent seat of the Supreme Court and at the seats of its per-manent Benches.

(3) The High Court Division shall have a per-manent Bench each at Barisal, Chittagong, Comilla, Jessore, Rangpur and Sylhet, and each permanent Bench shall have such Benches as the Chief Justice may determine from time to time.

(4) A permanent Bench shall consist of such number of Judges of the High Court Divi-sion as the Chief Justice may deem it ne-cessary to nominate to that Bench from time to time and on such nomination the Judges shall be deemed to have been transferred to that Bench.

(5) The President shall, in consultation with the Chief Justice, assign the area in relation to which each permanent Bench shall have jurisdictions, powers and functions .con-ferred or that may be conferred on the High Court Division by this Constitution or any other law; and the area not so assigned shall be the area in relation to which the High Court Division sitting at the permanent seat of the Supreme Court shall have such; jurisdictions, powers and functions.

(6) The Chief Justice shall make rules to pro-vide for all incidentals, supplemental or consequential matters relating to the permanent Benches".

305. In exercise of his power under clause (5) of Article ,100, as quoted above, the President, in consultation with the Chief Justice, assigned the area in relation to which

each "permanent Bench" shall have jurisdictions, powers and functions vested in the High Court Division. The area assigned to each Bench was described by mentioning the names of the districts comprising the area. As for example, the area assigned to the Rangpur Bench consists of 15 districts including Rangpur, Lalmonirhat, Rajshahi, Pabna, Dinajpur and Bogra. After assigning the areas to the six permanent Benches the residuary area fell to the jurisdiction of the "High Court Division sit-ting at its permanent seat" of the Supreme Court. In respect of these "areas" thus assigned, separate Noti-fications were issued bearing the same date, 11 June 1988.

306. Again, in exercise of his power under clause (6) of Article 100, the Chief Justice made Rules on the Same day, 11 June 1988, called "The Supreme Court (High Court Division's Permanent Benches) Rule, 1988". Rule 4 of these Rules pro-vides that all cases arising from the area assigned to a permanent Bench under Article 100 (5) shall be filed and shall also be disposed of, in that Bench only; cases which arise in the residuary area, that is, the area not assigned to any of these six permanent Benches, shall be filed and shall also be disposed of, in the "High Court Division sitting at its permanent seat". Rule 6 of the "Rules" provides that all cases which arose in the areas, assigned to the permanent Benches, but are pending at the permanent seat of the High Court Division, shall stand transferred to their respective permanent Benches. This provision in Rule 6 providing for automatic transfer of "pending cases" gave the immediate cause for filing the Writ petitions challenging the validity not only of the Rules but also of the Notifications of the President and the amended Article 100 itself.

307. This matter was heard for 28 working days. Main arguments on behalf of the appellants and the petitioner were advanced by Dr. Kamal Hossain, Syed Ishtiaq Ahmed and Mr. Amir-ul-Islam, learned Advocates. Respondent No. 1, Government of Bangladesh, was represented by Mr. Md. Nurullah, learned Attorney General who submitted the re-spondent's case. Mr. Asrarul Hossain and Kh. Mahbubuddin Ahmed, two senior members of the Bar, at our request, appeared as amicus curiae and made their submissions. During the arguments learned Counsels of both sides referred to the Constitutions of some other countries including India, Pakistan, Ceylon, United States of America, United Kingdom, Canada and Australia and cited about one hundred de-cisions of superior courts of those countries. Genesis of our present legal system as left by the British was traced to the North's Regulating Act of India, 1773 under which a Supreme Court with limited territorial jurisdiction was established at Fort William, Calcutta which was followed by the establishment of High Court at Calcutta under the Indian High Courts Act, 1861. Then came the Federal Court and the High Courts established under the Government of India Act, 1935 and the legal system under this Act con-tinued with minor changes—through the Partition of the country in 1947—till Constitutions were enacted for the two Independent countries, India and Paki-stan. Even under these Constitutions basic structures of the legal system have remained practically unal-tered. Powers, jurisdictions and functions of these courts as well as their practice and procedures have been referred to during the arguments in order to get aid to- interpretation of the Constitution in the in-stant case.

308. Sum and substance of the arguments oh behalf of the appellants are: the Impugned Amend-ment is beyond the amending power given to the Parliament in Article 142, that by this amendment the integrity and "oneness" of the High Court Divi-sion as an integral part of the 'Supreme Court' of Bangladesh, as contemplated in, and established un-der Article 94 has been broken; that in place of one High Court Division with full and plenary jurisdic-tion throughout the Republic

seven mini-high courts have been created in the guise of 'permanent Benches' to exercise mutually exclusive jurisdictions within their respective water-tight territorial limits, one having no connection with the other, even with the so-called "High Court Division sitting at its perma-nent seat", which got no jurisdiction over any case arising in the areas assigned to the permanent Bench-es; even the Chief Justice was denuded of his power of transferring a case from a subordinate court to, the High Court Division for determining a question of law or for resolving any conflicting decisions; under the Constitution Judiciary is one of the three State Organs, (the other two being the Executive and the Legislature) but this Organ, which is a structural pil-lar of the Constitution, has been destroyed; there are inherent and implied limitations on the power of Parliament to amend any constitutional provision which relates to its basic, structure or basic frame-work, as appears from the Preamble, the Directive Principles of State Policy and the whole scheme of the Constitution, but this power has been exceeded by the Impugned Amendment; there is irreconcilable repugnancy between the impugned amendment and the existing provisions of the Constitution and that if the amendment stands, the existing provisions be-come useless; that-the mandatory provision of Arti-cle 142 that "no Bill for amendment shall proceed unless the long title thereof expressly shows which Article of the Constitution is proposed to be amend-ed" was not complied with and consequently the Amendment was void ab initio.

309. On the other hand, the learned Attorney-General has argued that Parliament's amending power is unlimited, unrestricted and absolute and it is capa-ble of reaching any article of the Constitution ex-cepting the Articles specified in clause (1 A) of Arti-cle 142, which provides for a referendum for amendment. The Amendment having been made in exercise of the Parliament's "constituent power" it stands beyond any challenge like any other provi-sions of the Constitution, it has been argued. Ac-cording to the learned Attorney- General the basic structure of the Constitution is within the reach of the amendatory process" but in this case no basic structure or essential feature of the Constitution has been destroyed, damaged or affected in any way. Es-tablishment of permanent Benches outside the capi-tal, he has argued, is not a new feature in our Con-stitution or in the Constitutions of India and Pakistan, but the system of such Benches has been in operation for a long time. The 'oneness' of the High Court Division has not been affected by crea-tion of the permanent Benches which are not mini-High Courts, but are mere Benches of the High Court Division. Lastly, the learned Attorney-General, has pointed, out that the basic structures of the Constitution, as spoken of, were destroyed on several occasions by the previous Amendments, par-ticularly the Fourth and the Fifth Amendments, which brought about fundamental changes in the Constitution so much so that after those amend-ments the Constitution lost its original identity "and character.

310. Learned Counsels on both sides sought reliance from decisions of foreign jurisdictions in support of their respective arguments. Dr. Kamal Hossain and Syed Ishtiaq Ahmed have, among many other decisions, referred to recent decisions of the Indian Supreme Court which struck down a number of constitutional amendments, namely 25th Amend-ment, 39th Amendment and 42nd Amendment on the ground that these amendments destroyed some basic structures or basic frame-works of the Constitution. They have given particular emphasis on an observa-tion of the Judicial Committee of the Privy Council in a case from Ceylon—'Bribery Commissioner V, Pedrick Ranasinghe, 1965 AC 172'. In that case while interpreting sec. 29 of the Ceylon Constitu-tion which gives power of amendment of the Consti-tution, the Privy Council held that the provisions of the Constitution as to the right of religion are unalterable and beyond the power of amendment though there is no express limitation upon the power of amendment. The learned Attorney-General has cited, among many others, the decisions of the U.S. Su-preme Court in which the said Court dismissed chal-lenges to the validity of the 18th and 19th Amend-ments of the U.S. Constitution and rejected

the doctrine of implied limitation. I shall discuss these cases along with other relevant matters in due course; but I can say without any hesitation that though the decisions cited by the opposing parties in this case are apparently conflicting, but in fact they are not so, if they arc considered with reference to the context and the facts and circumstances of those cases.

311. In this case we are to interpret a Consti-tution which is referred to, as the will of the people and supreme law of the land and as such it is a most' important instrument. But its pre-eminence is not derived only from the fact that it is the supreme law of the land; it is pre-eminent because it contains lofty principles and is based on much higher values of human life. On the one hand, it gives out-lines of the State-apparatus, on the other hand, it enshrines long cherished hopes and aspirations of the people; it gives guarantees of fundamental rights of a citizen and also makes him aware of his solemn duty to himself, to his fellow citizen and to his country. It is the balancing of right and duty on which depends its success or failure. Constitution of democratically advanced countries functions without interruption, whereas that of a nascent democracy cracks off and on. That is why the principles as to construction of the Constitution of the former may not be applicable for this purpose in the case of the latter. Great Brit-ain which ha: no written Constitution has got a de-mocracy of the highest standard that can be ever con-ceived of by man. Their Constitution has been working without interruption since the glorious rev-olution of 1688. The Constitution of the United States, adopted in 1787, that is, within 12 years after the Declaration of Independence, has been working uninterruptedly and it was not touched even during the gravest calamities of its national life, such as the Civil War of 1861-65, the great economic depres-sion, in the thirties, and the two World Wars. Even the Constitution of India which achieved indepen-dence from Great Britain, along with us in 1947, functioned in spite of so many wars, civil commo-tions, communal riots and ethnic violence’s. As against this, 10 out of 23 years of Pakistan's exis-tence were covered by Martial Law. Bangladesh which got independence from Pakistan through a costly War of Independence which was fought with the avowed declaration to establish a democratic poli-ty, under a highly democratic Constitution, met the same fate as Pakistan. Two Martial Laws covered a period of 9 years out of her 18 years of existence. During these Martial Law periods the Constitution was not abrogated but was either suspended or re-tained as a statute subordinate to the Martial Law Proclamations, Orders and Regulations. However, ours is not the only country to have such problems and misfortunes. These are common features of all the under-developed countries which, though they are called developing countries by mere courtesy, are held in contempt by the Western Democracies as countries of the Third World, wrecked by coups and counter-coups, revolution and rebellion, over-populated, steeped in abject poverty, illiteracy and superstition, exploited by their leaders under catchy slogans. Constitutions of most of those countries are as transitory as sand dunes. S. A. de Smith is perfectly correct when he said in his Constitutional and Administrative Law:

"Constitutions in developing countries are apt to prove frail structures, mainly because so much value is attached to the acquisition and re-tention of political power, followed by the sus-pension or super session of the Constitution".

312. The learned Attorney-General has submit-ted that the permanent Benches of the High Court Division are not new things but these permanent Benches have been functioning in some form or oth-er since the middle of 1982. Kh. Mahbubuddin Ah-med, learned Counsel, has contended that the Chief Martial Law Administrator who held the supreme power in his hand under the Proclamation of 24 March 1982 set up four permanent Benches in place of the High Court Division without obtaining any views of the persons and institutions most concerned with the subject and

it is those Benches which have been retained even after the revival of the Constitu-tion and then legitimised by the Impugned Amend-ment of Article 100.

313. Martial Law was declared in the country from 24 March 1982 under a Proclamation which gave unlimited, supreme, absolute power to the Chief Martial Law Administrator for governance of the country and in exercise of this power the perma-nent Benches were first set up. Some of the provi-sions of the Proclamation are quoted below:

"(a) I have assumed and entered upon the office of the Chief Martial Law Administrator with effect from Wednesday, 24th March 1982.

(b) I may nominate any person as President of the country who shall enter upon office af-ter taking oath. I may rescind or cancel such nomination from time to time and nomi-nate any person as the President. The Presi-dent so nominated by me shall be the head of the State and act in accordance with my advice as Chief Martial Law Administrator and perform such functions as assigned by me.

(h) No Court including the Supreme Court shall have any power to call in question..... ………………….. this Proclamation or any Martial Law Regulation or Order ....."

314. By Proclamation Order No. I dated 11 April 1982; a Schedule was added to the Proclama-tion of 24 March 1982. Section 1 (1) of this Procla-mation Order provided that "the executive power of the Republic shall vest in the Chief Martial Law Ad-ministrator". Section 1 (4) vested the legislative powers of the Republic in the Chief Martial Law Administrator. Section 3 provided that" the Chief Justice and other Judges of the Supreme Court shall be appointed by the Chief Martial Law Administra-tor from Advocates of the Supreme Court or Judicial Officers".

315. By Proclamation Order No. 11 of 1982, published in the Gazette Extraordinary dated 8 May 1982 a new paragraph, 4 (A), was inserted in the Schedule after paragraph 4. Under this paragraph "the Chief Martial Law Administrator may establish per-manent Benches of the High Court Division at some places outside the capital. Clause (3) of this para-graph (4A) reads thus:

"(3) A permanent Bench of the High Court Di-vision shall,, in relation to the area for which it is established, have all the powers and jurisdiction of that Division, except that the Admiralty jurisdiction of the High Court Division and the original jurisdiction of that Division in respect of company mat-ters shall be with the permanent Bench hav-ing its seat at Dhaka."

316. Under clause (4) of paragraph 4A provi-sion was made for transfer of cases pending in the High. Court Division to the respective permanent Benches; and clause (5) empowered the Chief Martial, Law Administrator to transfer Judges of the High Court

Division to permanent Benches and from one permanent Bench to another permanent Bench.

317. In pursuance of this Proclamation Order the Chief Martial Law Administrator issued a Notifi-cation on 8 June 1982 establishing four permanent Benches of the High Court Division at four places, Dhaka, Comilla, Jessore and Rangpur and assigned their respective areas of jurisdiction and functions. Dhaka Bench was given the jurisdiction over the erstwhile districts of Dhaka, Tangail, Jamalpur, Mymensingh and Faridpur. Comilla Bench was given jurisdiction over the erstwhile districts of Chittagong, Chittagong Hill Tracts, Noakhali, Comilla and Sylhet. The area assigned to Rangpur Bench con-sisted of the districts of Rajshahi, Rangpur, and Pabna, Bogra, Dinajpur while that of Jessore Bench consist-ed of the erstwhile districts of Khulna, Jessore, Kushtia, Barisal and Patuakhali. By three subsequent Notifications permanent Benches were created at Syl-het, Barisal and Chittagong and their respective areas of jurisdiction were also assigned. Thus seven per-manent Benches including a permanent Bench at Dhaka were established in place of the High Court Division and these Benches started functioning from the middle of 1982 with the respective territorial ju-risdictions excepting that certain matters, such as Admiralty matters and original matters were retained in the permanent Bench at Dhaka.

318. This position continued for four years till 17 June 1986. On that day the Proclamation Order No. III of 1986 was issued by which paragraph 4 A of the Schedule to the Proclamation of 24 March 1982 was replaced by new paragraph, 4A, which is quoted below:

"4A. (1) Sessions of the High Court Division may be held at such places outside Dhaka as the Chief Justice may, with the approval of the President, appoint from time to time.

(2) Such sessions of the High Court Division shall be called Circuit Benches.

(3) The permanent Benches of the High Court Division established at Rangpur, Jessore, Barisal, Chittagong, Comilla and Sylhet before the commencement of the Proclama-tion (Third Amendment) Order, 1986 (Proc-lamation Order No. III of 1986), shall, on such commencement, be deemed to be Circuit Benches constituted under this paragraph for the areas for which the permanent Benches were established and shall function as such and all the provisions of this paragraph shall accordingly apply to them.

(4) Subject to any rules made by the Supreme Court under sub-paragraph (9), the Chief Justice shall determine which Judges of the High Court Division are to constitute any Circuit Bench and which Judges of such Bench are to sit for any purpose.

(5) At least one Judge, to be nominated by the Chief Justice, shall sit in each Circuit Bench on a regular basis.

(6) The Chief
Justice may, as and when neces-sary, nominate a Judge sitting in any Bench at Dhaka to sit in any Circuit Bench or a Judge sitting in
any Circuit Bench to sit in any Bench at Dhaka
or any other Circuit Bench.

(7) Subject to any
rules made by the Supreme Court under sub-paragraph (9), each Circuit Bench shall exercise such jurisdiction and power for the time being vested in the High Court Division in respect of cases and ap-peals arising within the area for which the Bench is constituted as the Chief Justice may determine.

(8) The Chief
Justice may, in his discretion or-der that any case or appeal or class of cases or appeals meant for hearing or disposal by any Circuit Bench shall be heard and dis-posed of by any Bench of the High Court Division at Dhaka
or by any other Circuit Bench.

(9) The Supreme
Court may make rules for reg-ulating the practice and procedure of the Circuit Benches.'

(10) When Article
100 of the Constitution is revived, the Circuit Benches shall be deemed to be sessions of the High Court Division outside Dhaka under that article and all the rules and orders made by the Su-preme Court or the Chief Justice relating to the practice and procedure of the Circuit Benches or their constitution, jurisdiction and power shall be deemed to have been made for the purpose of that article."

319. Under the
Proclamation Order No. Ill
of 1986, in place of permanent Benches, Sessions of the High Court Division were to be held, but what is a Session and what is a Bench or a permanent Bench was not defined. It was further provided that 'Sessions' would be called Circuit Benches. What is Circuit Bench was also not defined, but it was pro-vided that the existing permanent Benches at Rangpur, Jessore, Barisal, Chittagong, Comilla and Sylhet "shall be deemed to be Circuit Benches". But when it was further provided that at least "one Judge shall sit in each Circuit Bench on a regular basis", it was found that the permanent Benches as established in 1982 have been retained and functioning in the name of "Circuit Benches" with the difference that the "permanent Bench at Dhaka was not included among these Circuit Benches. This means that it re-verted to its former position of the High Court Divi-sion, though with limited jurisdiction. However, the Chief Justice retained power to transfer any case from one Circuit Bench to the High Court Division or from one Circuit Bench to another thereby maintain-ing a link with all the Benches and the High Court Division.

320. Kh.
Mahbubuddin Ahmed has submitted that one month before this Proclamation Order No. III was promulgated, election to the National Assem-bly was held under the provision of the Constitution as partially revived for the purpose. He has posed a question, when the Constitution was being restored in full and Martial Law was going to be lifted, why this Martial Law Proclamation was made relating to the High Court Division except for the apprehension that the people's representatives in Parliament might not retain the system of permanent Benches if and when the matter was placed before them. The learned Counsel contends

that the authorities were bent upon keeping the permanent Benches functioning even af-ter the Martial Law was lifted bypassing the Parlia-ment and that is why an express provision was made in clause (10) of this Proclamation Order. This clause as already quoted provided that when Article 100 of the "Constitution is revived, the Circuit Benches shall be deemed to be Sessions of the High Court Di-vision".

321. The learned Counsel has submitted that not to speak of a legal expert, even a man with ordi-nary prudence understands that whatever might have been the position under the Martial Law, but when it-is lifted and the Constitution comes into force it is the Constitution which will regulate all functions and activities of the Government and its instrumen-talities, and that the Martial Law Proclamations, Or-ders and Regulations shall cease to operate. If this is the legal position, why clause (10) was inserted in the Proclamation Order except for continuation of the permanent Benches, created under the Martial Law, after the Constitution came into full force. As to 'Session' of the High Court Division, as referred to in Article 100, this is a matter which lies absolutely within the discretion of the Chief Justice. How this discretion can be encroached upon by a Martial Law provision, such as clause (10), when the Constitu-tion comes into force and Martial Law goes. The learned Counsel concludes that under paragraph 4A of the Proclamation Order dated 17 June 1986 the permanent Benches outside Dhaka were retained, first in the name of "Circuit Benches" and then in the name of Sessions, even after the Martial Law was lifted without making corresponding amendment of Article 100 of the Constitution.

322. Martial Law was lifted and the Constitu-tion was revived in full on and from 10 November 1986. On 24 November 1986 the Chief Justice is-sued a Notification, with approval of the President, under Article 100, stating that he appointed six plac-es outside the capital where Sessions of the High Court Division would be held. By separate Notifica-tions of the same date the "Chief Justice assigned the areas over which the Sessions would exercise juris-diction, power and functions. These places and the areas of the Sessions were exactly the same as were in the case of the former permanent Benches, then Circuit Benches. In other words, the permanent Benches/Circuit Benches created under the Martial Law Proclamation Orders continued to function in the name of Sessions. This action of the Chief Jus-tice was objected to by the Supreme Court Bar Asso-ciation who met the Chief Justice on several occa-sions and contended that a Session of the High Court Division is neither a Circuit Bench nor a permanent Bench but is a mere sitting of the High Court Divi-sion either in full court, if feasible, or in one or two Benches, Division Bench/ Single Bench/Special Bench, which are constituted by the Chief Justice in normal course from time to time under the Appellate Side Rules of the High Court Division. The Chief Justice did not accept the lawyers' contention and continued with the Sessions. Lawyers contended that this was being done in flagrant violation of Article 100 of the Constitution which was not amended for the purpose of accommodating this arrangement made by the Chief Justice, purportedly under this ar-ticle. The dispute thus arose took unhappy turns, but ho step was taken for resolving it either by the law-yers through court nor by the President by making a reference to the Appellate Division under Article 106 of the Constitution. This article reads thus:—

"106. If at any time it appears to, the President that a question of law has arisen, or is like-ly to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the division may, after such hearing as it thinks fit, report its opinion thereon to the Presi-dent."

323. It may be mentioned that during the Pa-kistan time when disputes arose on questions relat-ing to interpretation of the Constitution two References were made seeking the Court's advisory opinion. The first Reference was made by the Gov-ernor General of Pakistan to the Federal Court seek-ing opinion as to whether he got power to convene a Constitutional Convention (after he had dissolved the Constituent Assembly in October 1954) to frame a Constitution for Pakistan under the provisions of the Indian Independence Act, 1947, read with the Government of India Act, 1935 as adapted in Paki-stan. Answer of the Court was in negative, and ac-cording to the advice given by the Federal Court the Governor General formed a fresh Constituent Assem-bly with members elected by the two Provincial As-semblies. This matter has been reported in 7 DLR FC 395. The other Reference was made by the Presi-dent of Pakistan under Art. 162 of the Constitution of 1956. Question in the Reference was whether a Provincial Governor got power, to dissolve the in-terim 'Provincial Assembly. The answer was in the negative. This matter has been reported in 9 DLR (SC) 177= PLD (1957) 219.

324. While the strained relationship between the Chief Justice and the Bar Association on this is-sue continued, an Emergency was declared by the President under Article 141 A of the Constitution in November 1987 to deal with the internal disturbances. Parliament was dissolved and a new Parliament was elected on 7 April, 1988, and before this Parlia-ment a Bill for amendment of Article 100 was intro-duced which Was made into an Act as the Impugned Eighth Amendment.

325. The Impugned Amendment has been as-sailed on a number of grounds, one being that it has destroyed one of the basic structures of the Constitu-tion which relates to the 'Judiciary' and indirectly af-fected the Unitary character of the Stale itself. To ap-preciate this contention it will be necessary first to see the actual position that has emerged from the Im-pugned Amendment.

326. Dr. Kamal Hossain has contended that the impugned amendment as being interpreted and applied' has affected other relevant articles of the Constitution and rendered the High Court Division of the Supreme Court practically unworkable. The jurisdiction of the High Court Division over the entire Republic, it is argued, has been divided into sev-en territorial parts and these parts have been assigned to the six permanent Benches and the High Court Division at the permanent seat in such a way that these Benches and the Court at permanent scat are exercising mutually exclusive jurisdictions, one hav-ing no relation with the other, even through the Chief Justice, in matters of judicial function.

327. Reference has been made to Article 44 which provides that "the right to move the High Court Division under Article 102 (1) of the Consti-tution for the enforcement of fundamental rights is guaranteed". Power of the High Court Division un-der Article 102, it is argued, extends over the whole of the Republic; but now there is no court left with the power and jurisdiction over the whole of the Re-public. The learned Counsel contends that a perma-nent Bench's jurisdiction is limited to the territory or area assigned to it; similarly, the jurisdiction of the High Court Division sitting at the permanent seat is also limited to the residuary area, that is, what has been left after assignment of 'areas' to the permanent Benches. It has been contended that by colourable legislation and practicing fraud on statute the High Court Division has been denuded of its plenary pow-er all over the republic. Learned Counsel contends that Art. 102 have been covertly amended by having resort to colourable legislation. He has cited the deci-sions in the cases of Attorney-General of Alberta V. Attorney-General of Canada, AIR 1939 PC 53, Gujapat Narayon State of Orissa AIR

1953 SC 375 and Vajraveiu v. Dy. Collector, AIR 1965, SC 1024 in support of this contention. Doctrine of colourable legislation and fraud on statutes has been discussed in these cases.

328. Next, learned Counsel contends that be-cause of the area-wise mutually exclusive jurisdic-tions of the High Court Division and Permanent Benches the Supreme Court is no longer the Court of Record within the meaning of Article 108; now in place of only one 'court of record'—which expression indicates its pre-eminent position—there are now seven courts of records—or no court of record at all. Learned Attorney-General has explained, that power of the High Court Division under Article 102 is now being exercised from seven seats of the Court and as such litigant public have not been deprived of their rights to seek remedy thereunder. Dr. Kamal Hossain contends that in view of area-wise division of juris-diction, writ issued by one Bench will not run in the area of another Bench when a particular cause of ac-tion arises from two or more areas.

329. Dr. Hossain next refers to Article 109, which provides that "the High Court Division shall have superintendence and control over all courts sub-ordinate to it". He contends that this Article has be-come ineffective since there is no such court now to exercise this power over all subordinate courts which have been parceled out to seven mini-high courts; subordinate courts within the areas of the Benches arc not subordinate courts of the High Court Division sitting at the permanent seat, he has pointed out. He has expressed doubts whether the permanent Benches have got the power of control and supervision of their respective subordinate courts in absence of any specific provision in the Constitution.

330. Article 110 provides that the High Court Division may transfer a case pending in any subordi-nate court to decide any "substantial question of law as to interpretation of the Constitution or any ques-tion of general public importance"; Dr. Hussain has pointed out that the High Court Division at the per-manent seat cannot transfer a case for this purpose if the case is pending in a subordinate court within the jurisdiction of a permanent Bench. Article

111 pro-vides that the law declared by the High Court Divi-sion "is binding upon all courts subordinate to it". Dr. Hussain contends that under the new dispensation the law declared by the High Court Division sitting at the permanent seat is not binding upon subordinate courts falling under the jurisdiction of permanent Benches. Similarly, a law declared by a permanent Bench is not binding upon subordinate courts of oth-er permanent Benches and the High Court Division sitting at the permanent seat and consequently con-flicting decisions on question of law are bound to oc-cur. It has been pointed out that no provision has been made in the impugned Amendment for resolving such conflicting decisions.

331. Dr. Hussain has submitted that very often disputes arise as to place where a cause of action has arisen or where an offence has been committed and parties to the dispute institute proceedings on the same cause of action in two different courts falling under the jurisdiction of different High Court Bench-es. Now there is no provision for withdrawal of such cases for the purpose of trying them together or anal-ogously in one court, because neither the High Court Division nor the Chief Justice has been given such power of transfer. In criminal matters, S. 526, Crim-inal. P. C. as amended in 1983, conferred power to transfer such cases to the Appellate Division of the Supreme Court; but the

High Court Division has not been given that power. In civil matters, no such pro-vision has been made and consequently, even the Ap-pellate Division has got no power to make transfer of a case from one permanent Bench to another perma-nent Bench for analogous trial. This has also been half by the Appellate Division in Civil Miscellane-ous Petition No. 1 of 1986. In the absence of ma-chinery for dealing with cases arising under doubtful or uncertain jurisdiction conflicting decisions are bound to occur to the detriment of the litigant pub-lic.

332. Conflicting
decisions were in fact given by two permanent Benches on a question of law. Learned Attorney-General has informed us that very recently a similar question arose in a case in the per-manent Bench at Comilla and a Full Court of five Judges was constituted by the Chief Justice to give an authoritative decision on the question. Since the Comilla Bench had only three Judges, two more Judges from "the High Court Division at permanent Scat" were transferred to Comilla Bench and these five Judges sitting in a Full Bench gave a decision. The learned Attorney-General contends that this deci-sion of the Full Bench will be binding upon all the subordinate Courts throughout the Republic, no matter they fall under the jurisdiction of different per-manent Benches and the High Court Division sitting at the permanent seat.

333. Mr. Asrarul
Hossain, who appeared as amicus curiae, rejected this argument and said that not to speak of a Full Bench of five Judges, even if 27 Judges from different Benches were sent to Co-milla Bench and they as a Full Bench gave the deci-sion still it will be a decision of the permanent Bench at Comilla and not a decision of the High Court Division at permanent seat or of any other, permanent Benches in the country. Firstly, because, he has explained, the case in which the decision was given arose from the area which was assigned to the permanent Bench at Comilla and as such it shall be disposed of only by the Comilla Bench, as per clause (5) of Article 100 and the Chief Justice's Rule under clause (6) of Article 100 and secondly, because, a Judge, whenever nominated to a permanent Bench, he stands transferred to that Bench and ceases to be a Judge of the Court or Bench from where he has been transferred severing all connections therewith so far his judicial function is concerned. Learned Counsel has submitted that to make such a decision binding upon all courts of the county two conditions must be fulfilled; one is that a particular court at the top, such as the High Court Division within the meaning of Article 94 has jurisdiction all over the country, and the other is that the Chief Justice has got jurisdiction to withdraw a case from any court and trans-fer it to any other court. The attempt of solving the question in the manner as described by the learned Attorney-General, it is contended, is a crude method unsupported by any provision of the Constitution.

334. As. to Admiralty
jurisdiction of the High Court Division, Dr. Hussain has submitted, it has been vested only in the High Court Division under the Court of Admiralty Act, 1891, read with Article 101 of the Constitution, and the concept of a case arising in an area assigned to a permanent Bench is not applicable to Admiralty Jurisdiction, Quoting from Maritime Lines by Thomas, learned Counsel has submitted that "the Geographical jurisdiction of the Admiralty Court extends over the worldwide mar-itime environment". Jurisdiction of the permanent Benches and the High Court Division at the perma-nent seat, based on 'areas' does not extend beyond the high watermark in the coastal line, as the district boundary is limited upto this mark. This jurisdiction does not extend over the territorial water which be-longs to the Republic and not to any district. If a cause of action arises in the territorial waters, which permanent Bench will have jurisdiction over it, the learned Counsel questions? Learned Attorney-General has referred to the British Shipping Laws, Admiralty Practice, by Kenneth C. Mc Guffie Sec. 61 of which, provides that "usually it is for the plaintiffs solicitor to decide which forum he will choose".
By this the learned Attorney-General seems to convey the idea that in case of

doubtful jurisdiction plaintiff or his lawyer may choose any of the three permanent Benches lying at the coastal belt. But if the plaintiff chooses one such Bench, say Chittagong, and the de-fendant files a counter case in another Bench, say Barisal, then conflicting decisions by two Admiralty Courts ,may follow. In substance, Dr. Kamal Hossain's contention is that Admiralty jurisdiction is in-divisible and cannot be distributed to several courts or Benches.

335. As to "High Court Division" as contem-plated in Article 94, Dr. Kamal Hossain contends that it has ceased to exist and in its place seven mini-high courts have emerged. Even what has been retained in the capital is not called "High Court Di-vision", but it is called "the High Court Division sitting at the permanent scat" indicating thereby that there are other High Courts also, though in the name of permanent Benches. Mr. Ishtiaq Ahmed has posed a question, after parceling out the territorial jurisdic-tion of the High Court Division to six Benches, where is the "High Court Division now"? He has said that if the High Court Division as contemplated in Article 94 can be located he will concede to the Attorney-General's argument and leave the court.

336. Answer of the learned Attorney-General in this respect is not clear. Sometimes he has said that all the six permanent Benches and the "High Court Division at its permanent seat", together and collectively, constitute the High Court Division. But when it was pointed out that these seven bodies arc independent of each other having no agency over them to make inter-Bench transfer of cases, he has said that the High Court Division at the permanent seat is the" High Court Division" .of the Supreme Court. In that case, when asked why this High Court Division at the permanent seat has no jurisdiction beyond the area that fell to its share he has replied that the jurisdiction of the High Court Division is being exercised from different seals, and it need not be exercised from one particular seat. Learned Attor-ney-General has referred to the system of Benches and permanent Benches of some of the High Courts of India and Pakistan and tried to show that our per-manent Benches of the High Court Division are functioning in the same way as those of the High Courts of India and Pakistan as integral parts of their respective High Courts.

337. Under the Bombay Re-Organisation Act, 1960, a permanent Bench of the Bombay High Court has been established at Nagpur and that Bench has been given the jurisdiction and power for the time being vested in the High Court in respect of cases arising in the districts of Buldana, Akola, Amravati, Yeatmal, Wardha, Nagpur, Bhandara, Chanda and Rajura. But it has been provided that the Chief Justice may in his discretion order that any case arising in any such districts shall be heard at Bombay.
Distinc-tive features in the creation of the Nagpur Bench are that only the area of jurisdiction of the Nagpur Bench has been assigned, that no area for the High Court of Bombay has been assigned, clearly indicat-ing that it has retained jurisdiction over the whole of the Province and that any case arising in the area of Nagpur Bench may be heard at Bombay and that the Chief Justice may transfer any case from Nagpur to Bombay for disposal. Above all, the name of the High Court has remained unaltered, the High Court of Bombay, and the integrity of a single High Court has not been disrupted.

338. The position of a permanent Bench of the Patna High Court established under the High Court at Patna (Establishment of a permanent Bench at Ranch!) Act, 1976 is exactly the same as the case of the Nagpur Bench of Bombay High Court. Sec-tion 2 of the Act provides that the permanent Bench of Patna High Court at Ranchi will exercise the ju-risdiction

and power for the time being vested in the High Court in respect of cases arising in the districts of Hazaribagh, Giridih, Dhanbad, Ranchi, Palamau and Singhbhum; provided that the Chief Justice of the High Court may, in his discretion, order that any case or class of cases arising in any such district shall be heard at Patna. It is further provided that the Judges not less than three in number of the High Court may be nominated from time to time by the, Chief Justice to sit at Ranchi.
Provisions of the Acts creating these permanent Benches at Nagpur and Ranchi clearly show that the" High Courts remained intact retaining not only their 'names' but also their full jurisdiction over the whole of the respective Provinces.

339. In 1055 four Provinces of West Pakistan such as the Punjab, Sindh, North West Frontier and Beluchistan, which had been in existence for over a century, were suddenly amalgamated and formed into a single Province under the name of the Province of West Pakistan—obviously as a political move to rally those Provinces as bulwark against the then Province of East Bengal in order to counteract its po-litical influence by dint of its majority population. In line with this single Province, the Governor Gen-eral made an Order—the High Court of West Paki-stan (Establishment) Order, 1955, under which the existing High Courts, such as the High Court of La-hore, the Chief Court of Sindh and the Judicial Commissioner's Court in the North-West Frontier Province and Beluchistan were merged into one sin-gle High Court with its principal seat at Lahore. Clause (3) of sec. 1 of the Order provided for retaining these existing High Courts at Karachi and Pe-shawar as Benches of the West Pakistan High Court. It provides as follows: "The High Court and the Judges and divisional Courts thereof shall sit at La-hore,
but the High Court shall have Benches at Kara-chi
and Peshawar
and Circuit Courts at other places within the Province of West Pakistan,
consisting of such of the Judges as may from time to time be nominated by the Chief Justice".

340. The Chief Justice under the Order has been given power for assigning areas of the Benches at Karachi and Peshawar in relation to which each Bench was to exercise jurisdiction vested in the High Court. There was no provision for assigning any area to the High Court at Lahore for exercising its jurisdiction, obviously because it got jurisdiction all over the Province. On the coming into force of the Constitution of 1956 this arrangement as to two Benches at Karachi, and Peshawar continued to func-tion as before. Article 165 (2) is the relevant provi-sion which is that the High Court for the Province of East Bengal and West Pakistan functioning imme-diately before the Constitution Day shall be deemed to be the High Court, under the Constitution, for the Province of East Pakistan and West Pakistan, respec-tively. Constitution of 1956 was abrogated and Mar-tial Law was promulgated in 1958 which continued till June 1962. From 8 June, 1962 another Constitu-tion known as the Constitution of 1962, enacted by the President, Field Marshal Mohammad Ayub Khan, came into force. Under this Constitution the existing two High Courts of East Pakistan arid West Pakistan continued to function. Sub-article (2) of Article 97 provided that "there shall be a permanent seat of the High Court of West Pakistan al Lahore which shall be its principal seat and there shall be also permanent scats of that High Court at Karachi and Peshawar". Sub-clause (3) provides for transfer of Judges from a permanent seal to another perma-nent scat with the President's approval. As to juris-diction, power and function of the Benches, vis-à-vis the High Court, the provision of the High Court of West Pakistan (Establishment) Order, 1955 contin-ued in force.

341. In 1965 just immediately after re-election of Field Marshal Mohammad Ayub Khan as Presi-dent a criminal case was filed against his son, Capt. Gauhor Ayub, by a private individual, Shamsuddin, in a Magistrate's court of Karachi in connection with some offences committed in a victory procession led by Gauhor Ayub. On an

application filed by accused Gauhor Ayub, the case was transferred by the Chief Justice of West Pakistan High Court from the Mag-istrate's court under the Karachi Bench of the High Court to the principal seat of the High Court at La-hore for disposal. This order was challenged by the complainant, Shamsuddin before the Supreme Court taking the ground that the case having arisen in the area assigned to the Karachi Bench it could be dis-posed of only by the Court within the jurisdiction of Karachi Bench and that the Chief Justice's order transferring the case to Lahore was violative of the High Court of West Pakistan (Establishment) Order as referred to. This case has been reported as Sham-suddin v. Capt. Gauhor Ayub, in PLD
1965 SC 496. The Supreme Court rejecting the appellant's contention that the High Court at its principal seat in Lahore got no jurisdiction over the case arising from the jurisdiction of Karachi Bench, held that in-spite of the creation of two Benches the High Court is one and the same and further held that under the Letters Patent (Lahore) powers vested in the High Court are also vested in its Judges in respect of the whole area of its jurisdiction. This decision was based on the provision in paragraph 4 of the High Court of West Pakistan Order, 1965 which gave power to the Chief Justice to assign areas to the "Benches at Karachi and Peshawar" but not to the principal seat at Lahore it is obvious that while creating the two Benches in Karachi and Peshawar the law makers were conscious that the two Benches were just branches of the High Court and that is why areas of the Benches only were assigned meaning clearly that the jurisdiction of the principal Seat con-tinued to be over the whole of West Pakistan.

342. The Province of West Pakistan, artificial-ly created as it was, did not last long and before Pres-ident Ayub Khan stepped aside from the seat of power and handed over the country to General Yahya Khan, the then Army Chief, admitted that the merger of those four historical Provinces into a single Prov-ince and the introduction of the system of Basic De-mocracy as the Constituency for election of mem-bers of the National and two Provincial Assemblies were wrong and retrograde steps. After the break-up of Pakistan resulting in the Independence of Bangla-desh, another Constitution for Pakistan, Constitution of 1973, was enacted for what was previously West Pakistan and under this Constitution each Province got its own High Court except Beluchistan which was brought under the jurisdiction of the High Court at Karachi, renamed as the High Court for Sindh and Beluchistan. The Constitution of 1973 was abrogated by General Ziaul Huq who over-threw the elected Government of Z. A. Bhutto in July 1977 and ruled the country by Martial law till it was lifted in 1986. One year before the revival of the Constitution of 1973, he as President of Pakistan as well, as Chief Martial Law Administrator promulgat-ed the Revival of the Constitution of 1973 Order, 1985. Among other things, this Revival Order amended Article 186 of the Constitution relating to High Courts. It provided that the Lahore High Court 'shall have a Bench each at Bahawalpur, Multan and Rawalpindi; the High Court of Sindh shall have a Bench at Sukkur; the Peshawar High Court shall have a Bench at Abbottabad and Dera Ismail Khan and the High Court of Beluchistan shall have a Bench at Sibi. It further provided that the Governor of a Province in consultation with the Chief Justice of the High Court shall make rules providing for as-signing the area in relation to which each Bench shall exercise jurisdiction for the time being vested in the High Court.

343. The learned Attorney-General has on these provisions as to jurisdictions, functions and powers of the Benches of the High Courts of West Pakistan and the decision in the case of Shamsuddin v. Capt. Gauhar Ayub, tried to show that integrity of the High Court Division of our Supreme Court has remained in tact in spite of the working of the permanent Benches. Learned Attorney-General has lost sight of the basic differences between the two systems, particularly the impugned Amendment, the President's Notification and the Chief Justice's Rules regarding the permanent Benches. Firstly', name of the High Court there in Pakistan and India has re-mained in tact, such as, the High Court of Bombay, High Court of Patna, High Court of Lahore, etc. but ' in our case there is no Court named

as "High Court Division", and what is generally referred to as the "High Court Division" is officially called "the High -Court Division sitting at its permanent seat". This is obviously because it is not the only High Court Division, but there are six other such courts in the name of permanent Benches, equal in rank, power and jurisdiction and independent of the High Court Division sitting in the permanent seat. Secondly, in none of the cases in India and Pakistan, area of juris-diction of the High Court has been assigned, such as the residuary area, but only the area for the Bench has been assigned showing that the jurisdiction of the High Court has remained all over the Province. Thirdly, the Chief Justice's power to transfer any case or class of cases from any Bench to the High Court has been retained there, whereas this power has been denied in respect of our High Court Divi-sion. Another distinctive feature is that the High Court Division of the Supreme Court of Bangladesh cannot be equated with any High Court of India or Pakistan since the High Court Division as an inte-gral part of the Supreme Court has been given juris-diction over the whole country, vis-à-vis, a High Court in those countries whose jurisdiction is limit-ed to its Province only. This aspect of the question will be examined in detail in a subsequent paragraph.

344. The learned Attorney-General has lastly referred to a decision of the Indian Supreme Court in "Nasiruddin v. S. T. A. Tribunal", AIR 1976 SC 331. This relates to respective powers, functions and jurisdictions of the High Court at Allahabad and its permanent Bench at Luck now. At the time of parti-tion of India in 1947 there were the High Court at Allahabad and the Chief Court of Oudh in the United Provinces, now Uttar Pradesh. By the United Provinces High Courts (Amalgamation) Order, 1948, both the Courts were amalgamated and named as the High Court at Allahabad for the Province of Uttar Pradesh. The pre-existing Chief Court at Oudh was reorganised as a Bench of the Allahabad High Court to be known as the Bench at Luck now; it was to exercise jurisdiction over the same area which was previously the area of jurisdiction of the Oudh Chief Court. This area is ordinarily referred to as Oudh area. Provision was made for institution of cases in Luck-now if they arose in the Oudh area and at Allahabad if they arose from the area outside the Oudh area. The question arose whether a case instituted in Luck now Bench could be transferred to and heard at Allahabad and, it was answered in the affirmative, provided the Chief Justice transferred it and it was pointed out that the Amalgamation Order provided for only "institution" of cases in the respective areas retaining Chief Justice's power to withdraw a case from the Bench to the High Court at Allahabad. It was further held that a case which arose in Lucknow circa, but filed at Allahabad could not be rejected but should be transmitted to Lucknow.

345. In that case it was further held that the powers vested in the High Court are necessarily vest-ed in a Judge of the High Court which may be exer-cised by him whether he sits at Lucknow or at Alla-habad. From this the learned Attorney-General tries to argue that our Judges of the High Court Division, whether they sit in a permanent Bench or in the per-manent Seat, exercise all the powers vested in the High Court Division and that their decision is bind-ing on all courts subordinate to the High Court Divi-sion at permanent seat as well as to the permanent Benches, that is, all over the country.

346. So far as the first part of his argument is concerned, that is, a Judge of the High Court

Divi-sion has got all the jurisdictions, power and func-tions vested in the High Court, it is correct. But the second part of his argument, that is, their decision given at any Bench will be a decision binding on all subordinate courts throughout the country, is not correct. This is because of the water tight compartmentalisation of the territorial jurisdiction among the six permanent Benches and the High Court Division sit-ting at the permanent Seat exercising mutually exclu-sive jurisdiction having no common judicial authori-ty over them all.

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

348. Learned Counsel has next submitted that besides the inalterability of the basic structure, the term 'amendment'/'amend' occurring in Article 142 itself contains an inherent limitation for, amendment of a constitutional law means some change, altera-tion, addition or deletion in respect of some of its provisions, for the purpose of improvement, to re-move any wrong or snag, but it does not mean de-struction or abrogation of the law itself. Some Indian decisions have been relied upon, by which a number of Amendments of the Indian Constitution have been declared invalid on the ground of damage or destruction of its basic structures in respect of fundamental rights, guaranteed by articles 14,19 and 31 of that Constitution. Dr. Kamal Hossain has emphasised that the doctrine of basic structure as ap-plied by the Indian Supreme Court had originated from a decision of the then Dhaka High Court which was upheld in appeal by the Pakistan Supreme Court in the case of Fazlul Qader Chowdhury v. Abdul Huq, PLD 1963 SC 460 = 18 DLR SC 69.

349. The question raised in the case of Fazlul Qader Chowdhury related to interpretation of Article 224 (3) of the Constitution of 1962 and President's Order No. 34 of 1962 made thereunder. Under that Constitution a Presidential Form of Government was provided with a Cabinet consisting of Ministers who should not be members of Parliament. Mr. Faz-lul Qader Chowdhury was elected a member of the Parliament but he was appointed a member of the President's Cabinet as well. Under Article 224 (3) of the Constitution the President was empowered, for the purpose of removing any difficulties that may arise in bringing this Constitution into operation, to direct by an Order that the provisions of the Consti-tution shall have effect subject to "such adaptations, whether by way of modification, addition or omission, as he may deem necessary or expedient". The President made Order No. 34 for removing the diffi-culties, providing that a Minister of his Government might retain his seat in the Parliament. This Order was challenged by a writ petition before the High Court

on the ground that the President's power to re-move 'difficulties' in launching the Constitution docs not extend to amend the Constitution altering one of its basic structures—namely no person shall be a Minister and a Member of Parliament at the same time. This contention was upheld and the Pres-ident's Order was struck down as ultra vires of the Constitution.

350. In the Indian Constitution, Article 368 provides for amendment of the Constitution by Par-liament by a special majority and in accordance with a prescribed procedure. This Article was first amend-ed by the 24th Amendment Act, 1971. Under the original Article an amendment of the Constitution may be initiated by the introduction of a Bill in the Parliament and when the Bill is passed in each House by the prescribed majority and the President gives his assent thereto the Constitution "shall stand amended". In respect of certain Articles ratification by at least half of the State Legislatures is necessary. After the Amendment, Article 368 stands thus:

> "Notwithstanding anything in this Constitution. Parliament may in exercise of its con-stituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in the article".

I have underlined the words which were inserted by the Amendment. Since both the parties to our case have referred to Indian Supreme Court's deci-sions as to interpretation of Article 368 along with some Articles on Fundamental Rights, I would look into those Articles closely.

351. Part III consisting of Articles 12 to 36 relates to Fundamental Rights. Of them Article 13 provides that laws inconsistent with fundamental rights are void. Article 14 guarantees "right to equal-ity of all person; Article 19 gives protection of right as to freedom of speech, association, assembly, ex-pression, profession etc., and Article 31 gives right to property. Article 31 was amended several times and it is these amendments which gave rise to the cases in which some of the Amendments were struck down as invalid.

352. "Kesavananda v. State of Kerala", AIR 1973 SC 1461 is the case on which the parties be-fore me have concentrated all their efforts. It centres round Article 31-C which was brought in by the 25th Amendment Act and it reads thus:

> "31-C.—Notwithstanding anything contained in Article 13, no law giving effect to the poli-cy of the State towards securing the princi-ples specified in clause (b) or clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31 and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy".

Article 39 is
within Part IV of the Constitution which contains the Directive Principles of
Stale Pol-icy. Article 31-C was challenged in the case of Ke-savananda v. State of Kerala
on the grounds that it empowered the Legislatures to take away fundamen-tal
rights under the pretext of making laws to give effect to any Directive
Principles of State Policy, and that it took away the Court's power of judicial
review of unjust legislation and thereby altered the basic structure of the
Constitution. The matter was heard by a Bench of 13 Judges including the Chief Justice Sikri, and by majority of
7-6 the Court ac-cepted the contention of the petitioner in part and held the
second part of Article 31-C to be ultra
vires of the Constitution and declared it invalid. The part struck down is
"and no law containing a declaration that it is for giving effect to such
policy shall be called in question in any court on the ground that it does not
give effect to such policy". Summary of the majority decision is: The
expression "amendment of the Constitution" does not enable Parliament
to abrogate the fundamental rights or to completely al-ter the fundamental
features of the Constitution so as to destroy its identity; though the power to
amend cannot be narrowly construed and it extends to all the articles of the
Constitution, it is not unlimited so as to include the power to abrogate the
Constitution or destroy its basic structure or framework; subject to retention
of the basic structure the power of amend-ment is plenary and includes the
power to amend any provisions of the Constitution; majority decision in Golak Nath's case (an earlier case)
that the law in Ar-ticle 13 (2) includes a Constitutional amendment was held to
be incorrect".

353. Earlier the
First Amendment of the Con-stitution of India by Amendment Act of 1951 which
inserted Articles 31-A and 31-B was challenged in "Sankari Prasad v. State of
Bihar", AIR 1951 SC 458 on the contention that it took away or
abridged the rights conferred by Part III and therefore it fell within the
mischief of Article 13 (2). The Seven-teenth Amendment of the Constitution
(1964) by which Article 31-A was further amended and 44 Acts were included in
the 9th Schedule which contained a List of Acts which were given immunity
against any challenge on the ground of being inconsistent with the
Constitution, was challenged in "Sajjan Singh v. State of
Rajasthan", AIR 1965 SC 845, taking the same ground. The challenge
was rejected and constitutional validity of both the Amendments (1st and 17th)
was upheld.

354. The same
question as to Parliament's power to amend the Constitution abridging or taking
away any fundamental rights was again raised in "Golaknath v. State of
Punjab", AIR 1967 SC 1643. This time, the Court by majority of 6—5
up-held the contention that law within the meaning of Article 13 (2) includes
an amendment of the Consti-tution and as such it is void if it conflicts with
any provision guaranteeing fundamental rights. All the three previous
Amendments were found invalid; but these previous amendments, which already
became part of the Constitution by acquiescence of the peo-ple for a long time
were not disturbed and the "doctrine of prospective overruling" was
applied from the date of this decision, that is Parliament would have no power
in future to amend any provi-sion of Part HI so as to take away or abridge the
fundamental rights.

355. It appears
that irritated by frequent chal-lenges in court to its power of amendment,
Parlia-ment amended Article 368 itself by the 24th Amend-ment Act, 1971,
inserting therein the phrases as underlined by me above thinking that in view
of the reinforcement of the amending power with its provi-sions
"Notwithstanding anything in the Constitu-tion", "constituent
power" bar against judicial re-view, no further interference by Court with
its amending power will be made. But challenge came in Keshavananda’s case with
the result as already stat-ed.

The Parliament
brought in two more controver-sial Amendments in the Constitution; one is the 39th Amendment, 1971 and the other is the 42nd Amendment, 1976. Since the 42nd Amendment re-lates to the same Article 31-C, it will be discussed first.

356. Section 55 of
the 42nd Amendment amended Article 368 again by adding to it two Clauses, (4) and (5) which are quoted below:

"(4) No
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.

(5) For the removal
of doubts, it is hereby de-clared that there shall be no limitation whatever on the constituent power of Par-liament to amend by way of addition, varia-tion or repeal the provisions of this Consti-tution under this article".

These two
provisions of Article 368 were chal-lenged in "Minerva Mills Ltd. v. Union of India", AIR 1980, SC 1789 on the contentions that these provisions look away Court's power of judicial re-view and destroyed a basic structure of the Constitution. The Supreme Court upheld the contentions and held the amendment invalid observing that Sec. 55 of the 42nd Amendment Act is beyond the amending power of the Parliament and is void since it removed all limitation on the power of the Parliament to amend the Constitution and conferred upon it power to amend the Constitution so as to damage or de-stroy its basic or essential features or its structures. Section 4 of the 42nd Amendment Act amended Arti-cle 31-C again by substituting the words "all or any of the principles laid down in Part IV" for the words "the principles' Specified in clause (b) or clause (c) of Article 39. The amended Article 31-C reads thus:

"31C. Notwithstanding
anything contained in Article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Arti-cle 14, Article 19 or Article 31, and no law containing a declaration that it is for giving effect to such policy shall be called in ques-tion in any court on the ground that it does not give effect lo such policy."

This amendment by
Sec. 4 was successfully challenged (along with, Sec. 55) in the same case, Minerva Mills, with the following result: Section 4 of Constitution 42nd Amendment Act is beyond the amending power of the Parliament and is void since it damages the basic or essential features of the Constitution and destroys its basic structure by a total exclusion of challenge to any law on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 of the Constitution, if the law is for giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV of the Constitu-tion.

357. In between Kesavananda
and Minerva Mills, the sensational case of Smt. Indira Gandhi v. Raj Narain, AIR 1975 SC 2299, came up before the Supreme Court. This case arose from a dispute over Indira Gandhi's election to the Lokshabha in 1971 and in this case the validity of the Constitution 39th Amendment Act, 1971 was challenged.

358. Indira Gandhi
was elected to the Lokshabha, but her election was challenged by Raj Narain, a contesting candidate, by an election petition. The pe-tition was allowed and the election was declared void by the Election Tribunal oh the ground that she had adopted corrupt practices in the election. She pre-ferred an appeal before the Supreme Court. During the pendency of the appeal Parliament passed the 39th Amendment Act inserting into the Constitution Article 329-A (4) and (5), The Amendment provided that henceforward any dispute over election of the Prime Minister and the Speaker would be resolved by the Parliament itself, declared that the existing law for determining election disputes would not ap-ply to election of the Prime Minister and the Speak-er, that the disputed election of the Prime Minister, Indira Gandhi, was valid and further declared that the election petition against her abated. The Supreme Court declared the Amendment Act invalid and held that the Amendment 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, that the Parliament by declaring the disputed election 'valid' exercised the ju-dicial power not vested in it, and that the Amend-ment is the outright negation of the right of equality under Article 14 of the Constitution.

359. Learned
Attorney-General has cited the minority decisions of Kesavananda and Golak Nath's cases to refute the contentions that there is implied limitation on Parliament's power to amend any provision of the Constitution including provisions as to basic structure, even if such provi-sions can be correctly ascertained. He has placed considerable reliance on two decisions of the Supreme Court of USA which "brushed aside the doctrine of implied limitation" on the amending power under Art. V of the US Constitution. These decisions were given in cases where the validity of the 18th and 19th Amendments was challenged on the basis of this doctrine.

The 18th Amendment
of the US Constitution reads thus:

"After one
year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United Stated and all territory subject to the ju-risdiction thereof for beverage is hereby prohib-ited.

The Congress and
the several States shall have concurrent power to enforce this article by appropriate legislation.

This article shall
be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission thereof to the States by Congress."

Validity of this
Amendment was challenged in a group of cases, known as National Prohibition Cas-es,
in "State
of Rhode Island v. Mitcher Palmer" (1919) 64 Law Ed. 946. To prohibit
liquor and de-stroy the liquor trade, a law, known as Volshed Act, was passed.
The Amendment empowered the Con-gress and the several Slates Legislatures to
jointly enforce this Article by appropriate legislation. It was contended that
this Amendment was beyond the Congress's amending power. The contention was re-jected
outright without assigning any reason. Later, Chief Justice White regretted this decision. I do not think that
this decision will be helpful to the learned Attorney-General, for the question
before us is as to alteration of basic structures of the Constitu-tion by
amendment—a question not raised there. The objective of the Amendment was to
destroy the liquor trade by joint efforts of both Federal and State agencies.
The 19th Amendment was challenged on a simple ground that a State which had not
ratified the Amendment would be deprived of its equal franchise in the Senate.
No particulars of the case in which this challenge was made and rejected have
been supplied to us by the learned Attorney-General.

360. Dr. Kamal Hossain
has contended that the fundamental principles of the US Constitution were not
intended to be ever altered by its makers and, has cited the following
observation of Marshal, C.J. in his
historic decision in "Marbury V. Madi-son” (US 2 Law Ed. 5-8
p. 135):

"That the
people had an original right to es-tablish for their future government such
princi-ples, as in their opinion, shall most conduce to their own happiness is
the basis on which the whole American fabric has been erected. The ex-ercise of
this original right is a very great exer-tion, nor can it, nor ought it, to be
frequently repeated. The principles, therefore, so esta-blished, are deemed
fundamental. And as the au-thority from which they proceed is supreme, and can
seldom act, they are designed to be perma-nent.” (Emphasis supplied)

361. Marshal, C.J. in a subsequent case, McCulloch
v. Marryland" US 4 Law Ed. 579 ob-served that the
"Constitution was intended to endure for ages to come and, consequently to
be adapted to the various crises of human affairs". In another case 'Osborn
V. Bank of the United States", referred to by Corwin in
"Constitution of the United States" (1952) 1 Marshal CJ found implied limitation on the power of a State
Legislature to make any law taxing any "instrumentality" of the
Federal Govern-ment although there was no such express limita-tion or
prohibition.

362. Dr. Kamal
Hossain has referred to the Preamble of the Constitution of Bangladesh and cer-tain
Articles including Articles 1,7,8,44 and 102 in order to show that the
provisions therein clearly in-dicate the intention of the makers of the
Constitu-tion that its basic pillars were intended to last for all time to
come. A Preamble gives the intention of the makers of the Constitution, the
objects which are sought to be achieved, the purposes for which the State itself
was established and the fundamental principles as to exercise of the sovereign
power for governance of the country. A Preamble reflects the long cherished
hopes and aspirations of the people and contains the ideologies of the State
and guaran-tees fundamental rights of the people. In the Consti-tution of Bangladesh,
Part IV, defines the power of the Executive, Part V and Part VI, respectively

that of the Legislature and the Judiciary.

363. Mr.
Amir-ul-Islam has referred to the Proclamation of Independence dated 10 April 1971 made when the war of Independence
began. This Document and the Constitution including its Pre-amble show the Principles and Ideals for which our national martyrs sacrificed their lives and our brave people dedicated themselves to the said war. Essen-tial features of these documents are People's Sove-reignty, Constitution's supremacy, Independent Judi-ciary, Democratic Polity based on free election and justice. He has emphasised the fact that these funda-mental principles were not followed, and the basic rights were denied to us, during the Pakistan regime and that is why the War of Independence was fought and won and consequently these rights and principles have been enshrined in the Constitution as the sol-emn expression of the people's will and hat these objectives are intended to last for all time to come and not to be scrapped by any means including amendment of the Constitution.

364. Yakub Ali, J., in Asma Jilani Vs. Gov-ernment of
Punjab (1972) PLD SC 139 while trac-ing the genesis of Pakistan's constitutional problems said that mishaps started in 1953 when the Governor-General arbitrarily dismissed the Government of Prime Minister Khawaja Nazimuddin. No, the con-stitutional mishaps started much earlier, even before the birth of Pakistan. Election battle of Pakistan was
fought on the basis of the Lahore Resolution of the All India Muslim League adopted by its Council on 23
March 1940 which envisaged two states in the contiguous Muslim majority Provinces of India, one in the North-Western Wing and the other in the North-Eastern Wing. But just after election battle was won on this issue, the word 'States' in the La-hore Resolution was found replaced by the word 'State' in a mysterious way. Consequently, the two geographical areas separated from each other by over a thousand miles were constituted into one single state. The Eastern wing, East Bengal, contained the
majority population of the country, but this major-ity, instead of becoming a boon, brought trouble and sorrow for her. The Constituent Assembly consisted of 77 members, 44 from East Bengal and 33 from West Pakistan. But East Bengal gave up five seats in favour of the Muslim League Leaders, including Liakat Ali Khan, Prime Minister, who had migrated to Pakistan from Indian Dominion. These five mem-bers, officially representing East Bengal,
never iden-tified with East Bengal, her
interest, hopes and senti-ments, but all of them settled in the Western Wing and consequently East Bengal's majority in the
Con-stituent Assembly was neutralised.

365. The Objectives
Resolutions passed by the Constituent Assembly on 7th March 1949 con-tained the Fundamental Principles of the State, the first among them being "the principles of democracy, freedom, equality, tolerance and social justice as en-unciated by 'Islam' shall be fully observed". Of this principle only the word 'Islam' was left in the lips of the Leadership to be uttered on and off giving a go-by to the rest of the principles. In April 1953 the West Pakistani
Governor-General dismissed the Bengali Prime Minister although he had almost cent percent majority in the. Parliament, and when the Bengali members of the Parliament-cum Constitu-ent Assembly were going to assert their majority in the House to frame a constitution on democratic principles, the Governor-General dissolved the Con-stituent Assembly itself though he, as a mere repre-sentative of the British Crown, had no power what-ever to do so. Speaker of the Constituent Assembly, Mvi. Tamijuddin Khan, challenged this autocratic action of the Governor-General in the Sindh
Chief Court by a Writ Petition and got a favorable
verdict which declared the Governor-General's action illegal, unconstitutional and arbitrary. Governor-General pre-ferred an appeal to the Federal Court which

was pre-sided over by a Punjabi Chief Justice. There a lame excuse was found to undo the decision of the Chief Court. It was that the Writ petition itself was not maintainable as Sec. 223 (2) of the Government of India Act, as adopted in Pakistan, under which the Writ petition was invoked by Mvi. Tamizuddin Khan was invalid as it did not receive the Governor-General's assent. Cornelius, J, who dissented from the majority judgment of the court, held that Gov-ernor-General not being a part of the Constituent Assembly, his assent to any constitutional law was not at all necessary; he pointed out that 38 such con-stitutional laws enacted by the Constituent Assem-bly since 1947 did not receive assent of the Govern-or-General but were acted upon without any question. By majority judgment the Federal Court set aside the Chief Court's decision and dismissed the Writ Petition upholding the arbitrary action of the Governor-General who continued to rule the country in autocratic fashion, fully backed by West Pakistani military, civil bureaucracy, landed aristoc-racy and industrial and business magnates.

366. A Constitution was ultimately enacted in 1956 only when East Pakistan surrendered her claim to majority and accepted 'parity' between the two Wings in all respects. But before this Constitution was given a fair trial, it was abrogated in 1958 by a military coup led by the then C-in-C (General Ayub Khan) and the country was ruled by Martial law for about four years. In 1962 Gen. Ayub Khan, who, in the meantime, declared himself President of the country and Field Marshal of the army, enacted a Constitution which denied the people their demo-cratic right of adult franchise and made the 'basic democrats—grass root local bodies—the electorate for election to Parliament and Provincial Assemblies and consequently the country continued to be ruled by civil and military bureaucrats of West Pakistan. Even this Constitution did not last long. In March 1969, Genenal Yahya Khan, Army Chief, abrogated it, imposed Martial Law and declared himself Presi-dent of the country. During this Martial Law he arranged a General Election to Parliament—the first and the last General Election in Pakistan—the mem-bers of which were to frame a new Constitution. Re-sult of the election went in favour of the Awami League which proceeded to frame a Constitution on the basis of its Six-point programme which envis-aged full autonomy to the Provinces and a Federal Government with only three subjects. Leaders of West Pakistan, both civil and military, did not like any such Constitution to be framed; political tur-moil followed and while negotiation' was going on between Government and East Pakistani leaders for a political settlement, Yahya Khan and his military treacherously declared war on the unarmed people of East Pakistan and started the worst genocide in histo-ry. Thus the war began which ended in independent Bangladesh which was established solely for esta-blishing a democratic polity.

367. Learned Attorney-General does not dis-pute that people's Sovereignty, Democracy, Indepen-dence of the Judiciary and the Principle as to separa-tion of power are basic structures of the Consti-tution and says that no question arises as to their de-struction or abolition. But he contends that in all other respects, the basic structure concept is vague and uncertain. He argues that in the absence of a full catalogue of these basic structures neither the citi-zens nor the Parliament will know what is the limit of the-power of amendment of the Constitution. In this connection he has referred to the minority views in Keshavananda’s case where it has, been said that the Parliament will never be able to know what amend-ment it can make in the Constitution and what it cannot and that to "find out essential or non-essential features of the Constitution is an exercise in imponderables....". Learned Attorney-General has submitted further that in the case of Indira Gandhi vs. Raj Narain, it has been observed that "the theory of basic structure has to be considered in each individual case and not in the abstract".

368. There are many concepts which are not capable of precise definition, nevertheless they ex-ist

and play important part in law. Negligence, reasonableness, natural justice is some of these con-cepts which are very much understood but cannot be precisely defined. In Ridge vs. Baldwin, (1964) AC 42, Lord Reid explained the concept of natural justice thus:

"In modern times opinions "have sometimes been expressed ... that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured, therefore it does not exist. The idea of negligence is equally insusceptible of exact definition, but what a reasonable man would regard as fair procedure in particular circumstances and what he would regard as negligence in particular cir-cumstances are equally capable of serving as tests in law, and natural justice as it has been interpreted in the courts is much more definite than that."

Again, the doctrine of basic structure cannot be rejected if consequence of its rejection is taken into consideration. Seervai in his Constitutional Law of India, Vol. 11, page 1568 rightly observed that the consequences of rejecting the doctrine of basic struc-ture would be so grave and so opposed to the objec-tives of the Constitution that the consequence of uncertainty would be insignificant by comparison.

69. The trump card of the learned Attoney-General is that some of the past Amendments of the Constitution destroyed its basic structures and dis-rupted it on several occasions. It is true that such mishaps did take place in the past. The Constitution Fourth Amendment Act, dated 25 January 1975, changed the Constitution beyond recognition in many respects and in place of a democratic Parlia-mentary form of Government on the basis of multi-ple party system a Presidential form of Govern-ment, authoritarian in character on the basis of a single party, was brought about overnight thereby. Fundamental right to form free association was de-nied, all political parties except the Government party were banned and members of Parliament who did not join this Party lost their seats though they were elected by the people. Freedom of the press was drastically curtailed; Independence of the Judiciary was curbed by making the Judges liable to removal at the wish of the Chief Executive; appointment, control and discipline of the subordinate Judiciary along with Supreme Court's power of superinten-dence and control of subordinate courts were taken away from the Supreme Court and vested in the Government. The change was so drastic and sudden Friends were bewildered, Enemies of the Liberation had their revenge and the critics said with glee that it is all the same whether damage to democracy is caused by democratically elected persons or by un-democratic means like military coup.

370. Within a short time came the first Mar-tial Law which lasted for four years. By Martial Law Proclamation Orders the Constitution was badly mauled 10 times. Secularism, one of the Fundamen-tal State Principles, was replaced by "Bismillah-er-Rahman-Ar-Rahim" in the Constitution and social-ism was given a different meaning. Supreme Court, one of the symbols of national unity, was bifurcated for about two years and then was restored. All these structural changes were incorporated in and ratified, as the Constitution Fifth Amendment Act, 1979.

371. In spite of these vital changes from 1975 by destroying some of the basic structures of the

Constitution, nobody challenged them in court after revival of the Constitution; consequently, they were accepted by the people, and by their acquiescence have become part of the Constitution. In the case of Golak Nath, the Indian Supreme Court found three past Amendments of their Constitution invalid on the ground of alteration of the basic structures, but refrained from declaring them void in order to pre-vent chaos in the national life and applied the Doc-trine of Prospective Invalidation for the future. In our case also, the past Amendments which were not challenged have become part of the Constitution by general acquiescence. But the fact that basic struc-tures of the Constitution were changed in the past cannot be and is not, accepted as a valid ground to answer the challenge to future amendment of this nature, that is, the Impugned Amendment may be challenged on the ground that it has altered the basic structure of the Constitution.

372. Now it is to be seen what is the neces-sity of an amendment of a Constitution when it is "intended to last for all ages to come", as observed by Marshal, C J. The answer has been given by himself when he- added "and consequently to be adapted to various crises of human affairs". Holmes, J. observed that Constitution should be "interpreted according to the felt necessities of the time". Brandeis 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, eco-nomic and social. Growth which is significant manifests itself rather in intellectual and moral con-ceptions than in material things". Woodrow Wilson said " "Living political constitutions must be Dar-winian in practice", if they 'are to-be a "vehicle of life". Jefferson observed: "Each generation has a right to determine, the law under which it lives. the earth belongs in usufruct to the living; the dead have neither powers nor right over it". John Stuart Mill says, no Constitution can expect to be perma-nent unless it guarantees progress as well as order; Wills says that change and" growth in constitutional law should not be stopped with the present. Ivor Jen-nings 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 Constitu-tion 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.

373. Now I shall see what the expression "amendment" means 'Amendment' of a statute may have various meanings depending upon its context. Dictionary meaning of the word 'amendment' is change for the purpose of effecting improvement or removing any defect. According to Crawford, in his Statutory Construction page 171, "Amendment is a change in some of the existing provisions of a stat-ute... a law is amended when it is in whole or in part permitted to remain and something is added to, or taken from it, or it is in some way changed or al-tered in order to make it more complete or perfect or effective... an amendment is not the same as a repeal although it may operate as a repeal, to a certain de-gree.... a repeal is the abrogation or destruction of a law."

374. In "Murphy's Constitution, Constitu-tionalism and Democracy" 'amendment' has been de-fined as a word which comes from the Latin "amender," to correct. Thus an 'amendment' corrects errors of commission or omission, modifies the sys-tem without fundamentally changing its nature, that is, an amendment operates within the theoretical par-ameters of the existing Constitution." In Baxi's "Some Reflections on the Nature of

Constitutional Power" it has been stated that the amending power is but a power given by the Constitution to Parlia-ment; it is a higher power than any other given to Parliament but nevertheless it is a power within, and not outside of, the Constitution." Lord Greene said in Bidi Vs. General Accident, Fire, Life Insurance Corporation", 1948, 2 All EX. 995 that in constru-ing words in a section of an Act of Parliament these words could not be taken in vacuum and observed:

"The first thing one has to do, I venture to think, in construing words in a section of an Act of Parliament is not to take those words in vacua, so to speak, and attribute to them what is sometimes called their natural or ordinary meaning.... The method of construing statutes that I prefer is not to take particular words and attribute to them a sort of prima facie meaning which you may have to displace or modify. It is to read the statute as a whole and ask oneself the question: “In this state, in this context, re-lating to this subject-matter, what is the true meaning of that word”.

375. In "Central Provinces and Berar Act Ref-erence", AIR 1939 FC I, Gwyer, C.J. observed that the "grant of power in general terms would no doubt be construed in the wider sense, but it may be qual-ified by any express provision, by implication of the context, and even by consideration arising out of what appears to be the general scheme of the Act.” House of Lords, in James Vs. Commonwealth of Australia, 1936 AC 578, expressed a similar view that the question must be determined upon the actu-al words used, read not in vacuum but as occurring in single compact instrument in which one part may throw light on another. As in other cases, the word 'amendment' or 'amend' has been used in differ-ent places to mean different things; so it is the con-text by referring to which the actual meaning of the word "amendment can be ascertained My conclu-sion therefore is that the word "amendment" is a change or alteration, for the purpose of bringing in improvement in the statute to make it more effec-tive and meaningful, but it does not mean its abro-gation 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.

376. Learned Attorney-General is of the opin-ion that the term 'amendment' may not be construed in a narrow sense but be construed in the widest possible sense and that in Art. 142, excepting the limitations specifically mentioned in clause 1 (a) and clause (1A) thereof 'amendment' does not contem-plate any other limitation or hindrance. But when asked whether 'amendment' means destruction of any provision he has not expressed himself very clear-ly, but has submitted that in case of total repeal, a substitute for the provision repealed may be brought in. He has contended that by amending Article 142 itself, scope of amendment has been widened by bringing in the phrase "by way of addition, altera-tion, substitution or repeal".

377. Article 142, before it was amended by the First Amendment Act, 1973 provided that any provision of the Constitution "may be amended or repealed by an Act of Parliament". With the amend-ment, Art. 142 provides that any provision of the Constitution may be "amended by way of addition, alteration, substitution or repeal" by Act of Parlia-ment. It appears that by this amendment of Article 142 only the words "by way of addition, alteration, substitution or repeal" have been brought in for the words "amended or

repealed". This does not ap-pear to be any substantial change and by this sub-stitution only different kinds of amendments have been indicated. As to the two limitations in the Ar-ticle, one relates to a special procedure according to which a Bill for amendment should be introduced, and the other relates to a referendum to the people in certain cases. To these limitations I shall refer pres-ently.

378. Learned Attorney-General has argued that in amending a constitutional provision, Parliament exercises its 'Constituent power' under Article 142 and not its legislative power under Article 80, and as such, there is no limitation to the exercise of the constituent power. Amendment effected by exercis-ing the "constituent power" is not a law and it is unchallengeable as it becomes a part of the Constitu-tion, he has contended further. Mr. Ishtiaq Ahmed disputes this proposition and contends that amend-ment of any provision of the Constitution is noth-ing more than a law within the meaning of Article 7 and it is liable to be declared void if it is inconsis-tent with the provision of Article 7. Secondly, he contends that there is no such concept like 'Constituent power' in Article 142 and has submit-ted that when Article 142 was amended no such term was inserted therein. Again, law as mentioned in Article 26, before its amendment, had included a constitutional amendment and that is why both Ar-ticles 26 and 142 have been amended in order to make it clear that an amendment of the Constitution is not included in "law" as referred to in Article 26. Mr. Ahmed has pointed out that no corresponding amendment has been made in Article 7 so as to pro-tect an amendment from the mischief of Article 7. This Article, he argues, is one of the most impor-tant provisions of the Constitution as it proclaims the supremacy of the Constitution as the solemn expression of the will of the people.

379. It may be mentioned here that 'law' in Article 13 (2) of the Indian Constitution does not include any constitutional amendment and as such an amendment of the Constitution is immune from challenge on the ground of it being inconsistent with any fundamental rights which are otherwise protect-ed. Article 13 (2) of the Indian Constitution corre-sponds to Article 26 (2) of the Bangladesh Constitu-tion which provides that any law inconsistent with a fundamental right is void. Article 7 provides that any law inconsistent with the Constitution is void; besides, it declares that Constitution is the supreme law of the Republic. There is no corresponding Article in the Indian Constitution, but even without any such provision like Article 7 in their Constitu-tion, the Indian Supreme Court declared the supre-macy of the Constitution. Mr. Ahmed contends that if a constitutional amendment is excluded from law within the meaning of Article 7, the Article will become redundant and ineffective. But law, that is, an ordinary statute, is enacted through the ordinary legislative process, whereas an amendment of the Constitution is effected through a special procedure. An amendment, if it is made strictly following the prescribed procedure and does not alter any basic structure or essential feature of the Constitution, becomes a part of the Constitution whereupon it derives the same sanctity as the Constitution itself. If an amendment of a constitutional provision is the same thing as a law it is the Constitution whose position will fall down to the level of ordinary leg-islation. Validity of a law is tested by the touch-stone of the Constitution; but there is no such touch-stone to test the validity of the Constitution. Its validity is inherent and as such it is unchallenge-able.

380. There is, however, a substantial differ-ence between Constitution and its amendment. Be-fore the amendment becomes a part of the Constitu-tion it shall have to pass through some test, because it is not enacted by the people through a Constitu-ent Assembly. Test is that the amendment has been made after strictly complying with the manda-tory procedural requirements, that it has not been brought about by practising any deception or fraud upon statutes and that it is not so

repugnant to the existing provision of the Constitution that its co-existence therewith will render the Constitution un-workable, and that, if the doctrine of bar to change of basic structure is accepted, the amendment has not destroyed any basic structure of the Constitu-tion.

381. 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 spe-cial 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 deriva-tive constituent power will not automatically make the amendment immune from challenge. In that sense there is hardly any difference whether the amend-ment is a law, for it has to pass through the ordeal of validity test. My considered opinion therefore is that an amendment of the Constitution is not included in 'law' within the meaning of Article 7 in the same way as it is not law in Article 26.

382. Learned Counsels for the appellants re-ferred to a number of cases where the doctrine of im-plied limitation has been applied in interpreting stat-utory and constitutional provisions. They have placed a good deal of reliance in the case of Bribery Com-missioner vs. P. Ranasinghe, 1965 AC 172. In that case, Section 29 (4) of the Ceylon Constitution Or-der came up for interpretation before the Judicial Committee of the Privy Council. Section 29 relates to Parliament's power to make law. Under Section 29 (4) Parliament may amend any provision of the Constitution by following a special procedure, that is, two-third majority of the total strength of the Par-liament and obtaining Speaker's Certificate to' this effect. Appellant in that case was convicted by a Bribery Tribunal but he challenged the conviction contending that the Tribunal was not constituted ac-cording to law. It was constituted under section 41 of the Bribery Amendment Act. The Privy Council found that section 41 of this Act contravened section 29 (4) of the Constitution in that the Bribery Act had been treated as an amendment of the Constitu-tion under section 29 (4). The Privy Council found that in enacting the Bribery Amendment Act the prescribed procedure of clause (4) of section 29 was no followed' and as such the Act was invalid and con-sequently the Tribunal was; not legally constituted.

383. Their Lordships of the Privy Council considered in this connection clauses (2) and (3) of section 29 also and found that in sub-clauses (b), (c) and (d) of clause 2 of section 29 certain rights as to religion and race—that is, minorities’ rights were 'entrenched' and as such were "unalterable" and be-yond the amending power under section 29 (4) of the Constitution, even though (here was no express limi-tation on the Parliament's amending power. It was observed: "They represent the solemn balance of rights, between the citizens of Ceylon, the funda-mental conditions on which inter se they accepted the Constitution; and these are, therefore, unalterable under the Constitution." Learned Attorney-General has contended that the Privy Council simply made an observation on a question which was not directly in issue in that case. I do not think so, for the obser-vation of the highest judicial body carried the same weight as that of its decision on a point in issue.

384. The learned Counsels have, in this con-nection referred to the case of Me. Cawley Vs. The King, 1920 AC

691. In that case a law enacted by the Legislature of Queensland (Australia) pro tanto amended a provision of the Constitution of Queens-land by following the ordinary legislative procedure. It was found that the Legislature of the Province of Queensland was empowered to amend the Constitu-tion of the Province by a simple majority of mem-bers of the Legislature following the ordinary proce-dure for making laws. In other words, there was no difference between the procedure for amendment of the Constitution and that for making any other laws. In that case an ordinary law enacted by the legislature was challenged on the ground that it was inconsistent with the Constitution. The challenge was rejected and it was held that this was valid leg-islation since "it must be treated as pro tanto altera-tion of the Constitution which was neither funda-mental in the sense of being beyond change nor to be so construed as to require any special legislative process to pass upon the topic dealt with." The Privy Council referred to the case of Me. Cawley in construing section 29 of the Ceylon Constitution in the Bribery Commissioner's case and found that the Constitution of Queensland was an "Uncontrolled Constitution" and that of Ceylon a controlled one. A Constitution is 'controlled' if the provision for its amendment requires special procedure and special majority 'as in the case of the United States' Consti-tution and it is "uncontrolled" if it can be amended following ordinary legislative procedure, as if it were an ordinary statute.

385. The Constitution of Bangladesh is a con-trolled 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 Ar-ticle 142 which requires a referendum in certain mat-ters. Learned Attorney-General quoting from a dissenting view in Keshavananda’s case argued that the rigidity in the amendment process as it is today if made more rigid by implied limitation, will leave no scope for peaceful change and this may lead to change by violent and unconstitutional means, such as, revolution. I would not very much appreciate this argument for, nowadays, there is hardly any revolution in the sense of French or-Russian revolu-tion for radical change of the socio-economic struc-ture. What is spoken of as revolution in the third world countries is the mere seizure of state power by any means, fair or foul. If a real revolution comes, it cannot be prevented by a Constitution however flexible it might be.

386. Next case cited by Dr. Kamal Hussain is "Liyange Vs. The Queen, 1967, AC (1-2594). The appellant in that case was tried and convicted for an abortive coup, under the Ceylon Criminal Law (Special Provisions) Act, enacted with retrospective operation. The Act legalised the imprisonment of the appellant while he was awaiting trial and modi-fied a provision of the Penal Code so as to enact ex post facto a new offence to meet the circumstances of the abortive coup. The Minister of Justice was empowered to appoint Judges to try the appellant without Jury. He challenged his conviction on two grounds— the Act is void as it violated the principle of justice— and the Legislature usurped the judicial power. The Privy Council upheld the second conten-tion and held that the Act involved "usurpation and infringement by the Legislature of judicial powers", that it was inconsistent with the Constitution which, by necessary implication, vested judicial function in the Judiciary of the country intending to secure in the Judiciary a freedom from political, executive and legislative control Learned counsel also cited an observation of the Privy Council in re the Reg. and Control of Aeronautics in Canada, 1932 AC 54, that there is implied limitation in the Brit-ish North America Act, 1869 against "dimming or whittling down the rights of the minorities".

387. Next case relied upon by Dr. Hussain is "Attorney-General of Nova Scotia and Attorney-General of Canada"—1951 SCR—Canada-51. The Legislature of the Province of Nova Scotia passed an

Act respecting the delegation of legislative powers of the Dominion Parliament to the Provincial Legisla-ture and vice versa. It was held that the legislative powers exclusively vested in the respective Legisla-tures and that there was limitation to delegation of each other's power though no such limitation was expressly imposed in the Constitution. Similarly, In Re the Initiative and Referendum Act (1919) AC 935, the Privy Council found implied limitation on the power of the Provincial Legislature of Manitoba (Canada) to so amend its Constitution as to elimi-nate the Governor from the process of law making. Under the British North America Act, the Dominion Legislature got legislative power in section 91 and the Provincial Legislatures in section 92. Governor of a Province was an integral part of the Provincial Legislature as his assent was necessary for a Bill to be enacted into law. The Legislature of Manitoba made an Act vesting its legislative power to a separ-ate "body" not elected by the people and not in the contemplation of section 92 and from that body the Governor was excluded. Consequently, any law in-cluding a law amending the Constitution of the Province could be enacted without Governor's assent. This was declared invalid by the Privy Council on the ground of implied limitation as well as of bar of excessive delegation of legislative power, which vested exclusively in the Legislature.

388. Learned Counsel for the appellants cited a few cases from Australian and Indian jurisdictions in which the principle of implied or inherent limi-tation on the power of amendment has been applied... Among the Australian cases, particular emphasis has been laid on the Tayler vs. Attorney-General of Queensland, 23 CLR 457, Victoria vs. Common-wealth, 45 Aust. LJ 251, West Vs. Commissioner of Taxation, New South Wales, 56 CLR 657 and Melbourne Corporation Vs. Commonwealth, 74 CLR 31. Among the Indian cases, are Mangal Singh Vs. Union of India, AIR 1967 SC 944, Ram Jawaya Vs. State of Punjab, AIR 1955 SC 549, Sanjeevi Naidu Vs. State of Madras, AIR 1970 SC 1102, and J. N. Rao Vs. Smt. Indira Gandhi, AIR 1971 SC 1002. In Mangal Singh's case the Supreme Court held that the Parliament while creating a new State and for that purpose making necessary amendments in the First and Fourth Schedules of the Constitution must "conform to the democratic pat-tern envisaged by the Constitution ... No state can, therefore, be formed, admitted or set up by law un-der Art. 4 by the Parliament which has no effective executive, legislative and judicial organs". In the other three Indian cases, it has been held that though the President and the Governor of a State are respec-tively 'head of their governments, their powers are limited by implication in that they are mere figure heads, the real powers being exercised by their re-spective Cabinets.

389. Learned Attorney-General has placed reli-ance upon the following cases in which the doctrine of implied limitation on amending power did not find any approval whatever: Queen Vs. Burah, 5I A,178; Amalgamated Society of Engineers Vs. Adelaide Steamship Co., (1920) 28 CLR; Attorney-General of Canada Vs. Attorney-General of On-tario, 1912 AC 571; James Vs. Commonwealth of Australia, 1936 AC 578 ; A.K. Gopalan Vs. State of Madras, AIR 1950 SC 27; Rhyan Vs. Michal Lennon, 1935 Ir Report 170; Webb Vs.Outrim, 1907 AC 81; Whiteman Vs. Sadler, 1910 AC 514.

390. The Privy Council in the case of Queen vs. Burah while considering the question whether the Indian Legislature got power to delegate its leg-islative power made the following observation:

"The established courts of justice, when a question arises whether the prescribed

limits have been exceeded, must of necessity, deter-mine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmative-ly, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited, it is not for any court of justice to inquire further, or to enlarge constructively those conditions or restrictions."

391. In the Amalgamated Society of Engineers' case, the doctrine of implied limitation on law-making power was rejected. But in a number of later cases, such as West vs. Commissioner of Taxa-tion, New South Wales 56 CLR, 657 and Melbourne Corp. vs. Commonwealth, 74 CLR 319, this deci-sion was not followed. In James vs. Commonwealth of Australia, Lord Wright observed:"The question there is one of construction and in the ulti-mate resort must be determined upon the actual words used, read not in vacua but as occurring in a single complex instrument in which one part may throw light on another". In Attorney-General of Canada vs. Attorney-Genenal of Ontario, the Privy Council observed: "If the text is explicit the text is conclusive alike in what it directs and what it pro-hibits. In Rhyan vs. Michel Lennon, the Supreme Court of Irish Free State by majority refused to apply the principle of implied limitation on Parliament's power to amend the Constitution. In Webb vs. Outrim, the Privy Council observed: "It is impossible to suppose that the question now in debate was left to be decided upon an implied prohibition when the power to enact laws upon any subject whatsoever was before the Legislature". In Whiteman vs. Sadler, Lord Dunedon observed that "express enactment shuts the door to further implication". It thus appears that the doctrine of implied limitation on the power of amendment has been applied in some cases and rejected in other, depending upon the facts and cir-cumstances of each case.

392. In interpreting 'amendment' in Article 142, guidance has been sought from the Preamble of the Constitution. But unlike in other cases, there is no dispute here in this case that the Preamble is a part of the Constitution. As to the use of the Pream-ble of a statute, it cannot be used to modify the lan-guage of the statute if it is clear, plain and unam-biguous giving one and only one meaning. But if the language is not clear and the words used therein indicate or are capable of bearing more than one meaning, then the meaning which is nearest to the purpose of the statute is to be preferred. The office of the preamble in interpretation has been authorit-atively staled by the House of Lords in Attorney-General vs. Prince Augustus, 1957 AC, 436. It is stated: "if they (words) admit of only one construc-tion, that construction will receive effect even if it is inconsistent with the preamble, but if enacting words are capable of either of the constructions of-fered by the parties, the construction which fits the preamble may be preferred."

393. But Preamble of a Constitution is something different from that of an ordinary stat-ute. A Constitution is not merely the outline of the governmental structure; it is the embodiment of the hopes and aspirations of the people cherished all the years and includes the nation's high and lofty princi-ples and people's life philosophy. According to Sto-ry "Constitution is a key to open the minds of its makers"—meaning, it shows the general purposes for which the Constitution was enacted; but Willoughby observes that Preamble of the American Constitution has never been regarded as the source of any substantive power of the Government. Learned Attorney-General has referred to In re Berubari Union and Exchange of Enclaves (AIR 1960 SC 845) where the Supreme Court of India refused to use the Preamble to limit the meaning of the clear words of the operative part of the Constitution. But in a number of cases

including Bahram Khurshid vs. State of Bombay,
AIR 1955 SC 123, the Court used the Preamble as aid to construction. It is the inten-tion of the makers of the original Constitution as expressed in the Preamble that is the guide to its in-terpretation.

394. Mr. Ishtiaque Ahmed
has cited certain principles as to interpretation of statutes and referred to a number of decisions which, he thinks, indicate guidelines for our purpose. These are the Pakistan President's Reference to the Supreme Court, PLD 1957 SC 219= 9 DLR SC 178, Fazlul Qader Chowdhury Vs. Abdul Huq, PLD 1963
SC 486= 18 DLR SC 69 (already discussed by me above), Cen-tral Province and Berar Ref. Case AIR 1939 FC I (also referred to by me above), Bidie General Acci-dent, Fire and Life Insurance Corp. (1948) All E.R. (2) 995; Borne Vs. Norwich Crematorium (1967) All E. R. (2) 578; Vacher & Sons Vs. London Soci-ety of Compositors, 1913 AC 107; Towne Vs. Eis-ner, 62 Law Ed. 372 and Bangladesh Vs. Hazi Abdul Gani, 1981, ELD (AD) -8 = 32 DLR (AD) 233. As to the first one, I shall consider it in connection with the paragraph related to the question of 'repugnancy' of the impugned Amendment. In the other cases the ratio is that intention of the makers of a statute is of fundamental importance in constru-ing it and that this intention is to be gathered from a consideration of the whole enactment and that in respect of a constitutional provision every word must be given effect, no word as a general rule should be rendered meaningless or inoperative. In the case of Vacher & Sons, Lord Atkinson observed that "it is legitimate to consider the consequence which would result from a particular construction, for, as there are many things which the legislature is presumed not to have intended to bring about, a construction which would not lead to any one of these things should be preferred to one which would lead to one or more of them."

395. A major
assault was launched by the learned Counsels for the appellants on the impugned Amendment Bill that the mandatory procedure for in-troduction of the Bill for amendment of the Consti-tution was not followed and as such the amendment is void ab initio. Provision in Art. 142 is that "no Bill for amendment shall be allowed to proceed un-less the 'long title' thereof expressly states what pro-vision of the Constitution it seeks to amend". The Bengali text of the Constitution says that the long title (Purno Sironam) shall contain “Songbidhan kono aungso songsodhon".
But in the impugned Amendment Bill the long title did not mention what provision of the Constitution was proposed to be amended but simply said that Songbidhan Kotipoye oangsho odhiker songsodhon somichin o proyojon. The learned Counsels argued vehemently that this omission misled the mem-bers of Parliament as to the exact provision which was sought to be amended.

396. Learned
Attorney-General does not seri-ously dispute that the procedural requirement is man-datory and its non-compliance will render the amendment void. But he has submitted that the pro-cedure was followed as the long title of the Bill con-tained clear indication as to what provision of the Constitution was proposed to be amended. He has further submitted that this Bill was introduced and passed in the same way in which the past Amend-ment Bills were introduced and, has placed before us copies of those Bills along with the impugned Bill. None of those Amendment Bills, except probably the Third Amendment Bill, fulfilled correctly the re-quirement as to long title. Constitution Third Amendment related to an Agreement between the Government of Bangladesh and the Government of India for the exchange of Berubari Enclave and this matter was specifically mentioned in the long title. Even in that 'long title' the particular Article of the Constitution sought to be amended was not men-tioned; nevertheless, the long title gave sufficient notice to the members of Parliament as to the na-ture of the proposed amendment. But the fact that the previous Amendments suffered from such omissions is not a defence against future challenge in this respect since the procedure to be followed is mandato-ry.

397. Kandokor
Mahbubuddin Ahmed learned Counsel has invoked the bar of 'plurality of subject-matters" in one amendment bill. He has argued that in the same impugned Amendment Bill, as many as five subjects having no relation with each other, were included creating a confusion in the minds of the members of Parliament. Besides the proposal for amendment of Art. 100 relating to permanent Benches, some politically controversial subjects, such as, Islam shall be the State Religion, were in-cluded therein. He has argued that as a Muslim hard-ly any M.P. would have objection to Islam becom-ing the State religion, but he may have objection to the creation of several Benches of the High Court Division which, he might think, would amount to splitting up of the Court; he has argued that since these two subjects were mingled together and the Bill as a whole was put to vote the members had no option but to support it. He has contended that the passing of the Bill under the name of Islam amounted to practising fraud and deception on stat-ute which is by itself sufficient for declaration of nullity of the entire Amendment. The learned Counsel in support of his contention has referred to certain Articles of 50 American Jur.

398. Learned
Attorney-General has referred to the "Limited Government and Judicial Review" by Barua in order to press his view that omission of de-tails in the long title of the impugned Bill did not create any confusion in the minds of the legislators, particularly when the subject was not a new one and that they got sufficient notice about the matter. He has refuted the argument that inclusion of other subjects in the Bill had misled the legislators. It ap-pears that the long title of the Bill was closely fol-lowed by a detailed statement as to the subject-matter of the Bill specifically naming the Articles of the Constitution which were proposed to be amended and in which manner. There is hardly anything to indicate that members of the Parliament were in confusion or misled as to the nature and scope of the Bill: In the circumstances I am of the opinion that the mandatory requirement as to procedure was substantially fulfilled.

399. I shall now
examine the amended Article 100 clause by clause. By the Amendment in clause (1) of this Article vital alteration has been made as to the permanent Seat of the Supreme Court: This clause provides that “subject to this Article" perma-nent Seat of the Supreme Court is in the capital. This means the capital is not the only permanent seat of the Court but there are other permanent seats as well. Had the permanent Benches been "mere branches of the Supreme Court as the learned Attorney-General contends, there would have been no necessity for the words "subject to this Ar-ticle ".

400. The concept of
the Supreme Court of Bangladesh consisting of both the Appellate Division and the High Court Division is a unique one and it has been so devised as to keep the Supreme Court, the highest judicial organ of the State, in line with Art. 1 which provides that "Bangladesh is a unitary, independent, sovereign Republic". Like the permanent seats of the other two organs, namely the Executive and the Legislature, seat of the Su-preme Court is in the capital of the Republic. This integrated Supreme Court is a part of the basic structure of the Constitution; it cannot be damaged directly or indirectly. Separation of the High Court Division from the Supreme Court is not permissi-ble because it is an integral part of the Supreme
Court, nor is it permissible to create a separate High Court under the Supreme Court as it will run counter to the unitary character of the State opening a door for ultimate disintegration of the State. Stat-us of the High Court Division of the Supreme Court is higher than that of a Provincial High Court in a Federal State, such as India or Pakistan. High
Court is headed by a Chief Justice who is in-ferior in rank and status not only to the Chief Jus-tice of the country but also to other Judges of the Supreme

Court. But the High Court Division as an integral part of the Supreme Court is headed by the Chief Justice of the country and its territorial juris-diction is co-extensive with that of the Appellate Division that is all over the Republic. Mr. Asrarul Hussain has said, and I think rightly, that the status of the High Court Division is higher than that of a High Court. The impugned provision in clause (1) of this article comes in conflict with the concept of the Supreme Court of Bangladesh having its perma-nent seat at the capital.

401. As to the unitary character of the State, it is clear that in view of the homogeneity of her peo-ple having same language, culture, tradition and way of life, within a small territory the State has been so organised as a Unitary State by its founding fa-thers leaving no scope for devolution of executive, legislative and judicial powers on different regions to turn into Provinces ultimately. The unitary char-acter of the State has been reflected in the field of Judiciary, one of the three State Organs, by creating an integrated Supreme Court. Once this integrity is damaged, affected or broken, more High Courts than one are likely to be created either directly or indirectly under the garb of permanent Benches making them independent of each other. Creation of more permanent seats than one is not permissible if the Supreme Court is to continue as an integrated Judi-cial Organ of the State at the apex.

402. Clause (3) of Art, 100, which has creat-ed six permanent Benches, has been assailed also on the ground that selection of the seats for these Benches was made by arbitrary exercise of power as the selection got no rational basis. By a Martial Law Proclamation Order of 1982 three permanent Bench-es outside the capital were, first established. There might have been some justification for those Bench-es as they were intended for three Administrative Di-visions of the country other than the Central Divi-sion, Dhaka. Had the principle of convenience of communication been considered then, the districts of Barisal—Patuakhali and Sylhet could have been re-tained under the jurisdiction of the Dhaka Bench in-stead of tagging them, respectively, with the juris-dictions of the Jessore Bench and the Chittagong Bench. Great inconvenience due to communication difficulties led the people of those areas to demand permanent Benches in their respective districts and the authority yielded to their demands by creating three more permanent Benches without considering whether the number of cases arising from those dis-tricts at all justified the creation of those Benches. Other districts with greater number of cases, such as Mymensingh, Rajshahi, Faridpur, Khulna were left out of consideration. By the impugned amendment in clause (3) those six places have been retained without making even any evaluation of the working of those Benches. The learned Attorney-General has argued that members of the Parliament in their infi-nite wisdom thought it proper to establish Bench-es in those places. Nobody challenges their wisdom or their power, but power shall be exercised on ra-tional basis and according to certain recognized principles. However, a constitutional provision, if otherwise validly made, cannot be assailed and struck down on the ground of unreasonableness.

403. Clause (4) of the impugned Article 100 provides for transfer of Judges from one permanent Bench to another or from the permanent seat of the Supreme Court to any permanent Benches. It has been assailed taking the ground that this provision for transfer of Judges is inconsistent with Article 47 (3) which prohibits any change of the terms and conditions of Judges' service to their disadvan-tage and because of this disadvantage their indepen-dence has been affected. Article 94 (4) says that the Judges shall be independent in the exercise of their judicial functions. Provision for transfer of a Judge from one High Court to another in India has been made subject to the President's consultation with the Chief Justice and adequate compensatory allowance has also been provided. In Pakistan,

Judges may be transferred from a High Court to its permanent Benches. Transfer in the interest of the State does not affect a judge's independence, provided, by the transfer, he is not put into financial and other diffi-culties. That is why adequate compensation has been provided in India under the Constitution itself and, in Pakistan
under Acts of Parliament. It has been re-ported that recently some allowance has been allowed to our Judges on transfer, but only in lieu of Gov-ernment accommodation.

404. Independence of the
Judiciary, a basic structure of the Constitution, is also likely to be jeopardized or affected by some of the other provisions in the Constitutution. Mode of their appointment and removal, security of tenure particularly, fixed age for retirement and prohibition against employ-ment in the service of the Republic after retirement or removal are matters of great importance in con-nection with the independence of Judges. Selection of a person for appointment as a Judge in disregard to the question of his competence and his earlier per-formance as an Advocate or a Judicial Officer may bring in a "Spineless Judge", in the words of Presi-dent Roosevelt; such a person can hardly be an inde-pendent Judge. Under the original Constitution, ap-pointment of Judges was made by the President in consultation with the Chief Justice, but under the existing provision no such consultation is necessary. Nor an appointment made by the President is sub-ject to ratification by the Parliament as in the case of some other countries. Again, under the original Arti-cle 99 there was total prohibition against the ap-pointment of a Judge, after retirement or removal, to any office of profit in the service of the Republic. This Article was amended by a Martial Law Procla-mation Order dated 12 December 1975 making a re-tired Judge eligible for appointment to a judicial or quasi-judicial office. In pursuance of that amendment retired Judges are being appointed as Chairman of Tribunals, such as Labour Appellate Tribunal, Ad-ministrative Tribunal, obviously because such ap-pointments are judicial in nature. But under the co-lour of quasi-judicial office a retired Judge may be appointed to an executive office also. The purpose of the prohibition was to keep a Judge independent all through his service as a judge. Opening up of oppor-tunities for appointment after retirement may serve as a temptation and "tamper" with his independence during the concluding period of his service. If this provision for appointment after retirement is re-tained, its bad effect may be countered if a reasonable period, say two years, elapses from the date of a Judge's retirement to the date of his fresh appoint-ment to any purely judicial office.

405. Clause (5) of
the impugned Article 100 has been challenged on a number of grounds. One is that an essential legislative power, in this case, the power of amendment of a constitutional provision, was delegated by the Parliament to the President to assign the area in relation to which each permanent Bench shall have jurisdiction. This power, it is contended, shall be exercised .by the amending body namely the Parliament by following a special proce-dure and that clause (5) under which Parliament relin-quished its power to the President is void. Learned Counsels for the appellants have cited a number of decisions in support of this contention. Of them, de-cisions of the Privy Council in the two Canadian cases, 'Attorney-General
of Nova Scotia (1951) SCR Canada 31, and the Initiative & Referendum case, AIR 1919 PC 145 = 1919 AC 172 have been discussed in connection with the question as to implied limitation. In the former, the Canadian Legislature and the Nova Scotian (Provincial) Legislature pro-ceeded to transfer their legislative powers to each other, but the Privy Council ruled that such delega-tion, of legislative powers was not permissible under the B.N.A. Act 1867. In the latter, a proposed Bill of the Legislature of Manitoba by which its legisla-tive power was sought to be vested in a separate body was held invalid on the same ground. In Paki-stan,
the first case of such a nature is Sobho Cyan Chand vs. Crown, PLD 1952 FC 29. In that case the Federal Legislature, after promulgating the Pub-lic Safety Ordinance, 1949, delegated to the Govern-ment the power of extending its life

year by year. This delegation of legislative power was held to be ultra vires and it was held that after the expiry of one year the Ordinance died its natural death. Similar views were taken by the Supreme Court in the case of F.Q. Chowdhury vs. Abdul Huq, 18 DLR SC 69 which has been discussed by me in an earlier paragraph. It appears that the essential legislative work under clause (5) is not the assignment of areas of ju-risdiction for the Benches but what jurisdiction would be transferred to the Benches. This has been done by this clause and it has been provided that whatever ju-risdiction, power and function the High Court Divi-sion got would be the power, function and jurisdic-tion of the Benches. This jurisdiction, power and function were given by the amending body itself and, the President was given authority to assign the area for each Bench the seat of which was also fixed by this body. Assignment of the area does not fall with-in the essential legislative power of the amending body.

406. Next ground for assailing clause (5) is that there was no consultation between the President and the Chief Justice in the matter of assigning the areas of jurisdiction for the permanent Benches. This clause provides that "the President" shall, in consul-tation with the Chief Justice, assign the area. This is a mandatory requirement and if it were not complied with, then only the Notification of the President is-sued under this clause would be void and fresh notifi-cation might be issued in strict compliance with the requirement. It has nothing to do with the validity of the impugned clause (5) of the Article.

407. Learned Attorney-General has given two answers to the question as to President's consultation with the Chief Justice. First he has said that the con-sultation is a mere formality in view of the fact that these very Benches had been functioning already from 1982 satisfactorily and effectively by speedy dispo-sal of cases at the door-steps of the people. The learned Counsels for the appellants seriously disputed this claim that these Benches had been functioning satisfactorily and effectively bringing substantial good and benefit to the people and, contended that the disposal of cases, instead of improving, drastical-ly fell down since then because of unworkability of the system itself. In this connection, statements of year-wise disposal of cases from January 1981 to De-cember 1988 were obtained from the Registrar's of-fice along with a statement of expenditure incurred for the propose of running these Benches and the Court. This matter will be examined in a subsequent paragraph. The second answer of the learned Attorney-General will be examined now. Learned Attorney-General after obtaining from the Law Ministry the relevant file submitted that in fact the President had consulted the Chief Justice and the a assigned the area 'to each Bench to exercise its jurisdiction.

408. A photo copy of the file was produced be-fore us. It shows that the Secretary of the Ministry initiated a proposal on 11 June 1988 to the effect that the areas over which the permanent Benches esta-blished in 1982 under Martial Law Proclamation had exercised jurisdiction should be accepted for the pur-pose of clause (5). The proposal was placed before the Chief Justice who signified his assent at once and the Notifications for that purpose were published in the Bangladesh Gazette on that very day, 11 June 1983. Learned Counsels for the appellants assailed the Notification firstly, on the ground that it was al-most impossible for publication of the Notification in the Gazette on, 11 June had the proposal been in-itiated that very day and secondly, that even if it were so initiated and finalised in such "an unusual and ex-tra ordinary rapidity", the consultation was not effec-tive and meaningful within the meaning of clause (5). They placed reliance on a number of decisions of the Indian Supreme Court including the decisions in the cases of Sankal Chand vs. Union of India, AIR 1977, SC 2328 and S.P. Gupta vs. President of India, AIR 1982, SC 152. Those cases related to a Constitutional provision for the President of India to consult the Chief Justice in the matter of transfers of Judges from one High Court to another High Court. The Supreme Court held that

"consultation" is not a mere formality but it must be meaningful and for that purpose all relevant facts must be placed before the Chief Justice so as to enable him to come to a conclusion on consideration thereof. In the absence of the necessary data, the consultation was held by the Indian Supreme Court to be 'ineffective and meaningless' and not within the contemplation of the Constitutional provision. Learned Counsels, therefore, contend that in this case there was no con-sultation with the Chief Justice within the meaning of clause (5). If this contention is upheld, only the Notification made by the President will be hit and not the clause (5).

409. As to the statement of disposal of cases by the High Court Division, before and since the es-tablishment of the six Benches, it shows that in the year 1981,17 Judges had disposed of 6189 cases—per Judge disposal being 365; whereas in the year 1988,27 Judges disposed of 3868 cases—per Judge disposal falling down to 143. Number of cases re-maining pending on the year end of 1981 was 21,694; as against 30,647, at the year end of 1988. Disposal figures during the years in between are practically the same — per Judge disposal remaining almost the same, 160 case on the average. Further-more, the cases disposed of during the period from June 1982 to December 1988—included the cases which stood 'abated' under the Martial Law provi-sions, such as Writ Petitions. As to expenditure in-curred for the High Court Division as a whole, it was Tk. 67.66 lakhs in 1981-82 and Tk. 382 crores in 1988-89. It appears that though the expenditure increased by six times and the number of Judges in-creased from 17 to 27 the disposal position remained unchanged; nay, it has fallen considerably. The claim of the learned Attorney-General that the Benches were functioning effectively, bringing benefit to the people by speedy disposal of their cases, does not stand scrutiny; and if speedy disposal of cases were the purpose for creating these Benches, the purpose has been defeated taking into consideration the heavy expenditure incurred. Learned Counsel for the appel-lants contend that had this fact been placed before Parliament while introducing the impugned Bill the Parliament would have certainly considered the mat-ter and rejected the Bill.

410. Learned Counsels for the appellants have submitted that the poor disposal of cases is due to the inherent unworkability of the system itself. They contend that the idea that establishment of Courts or Benches at the door-steps of the people will provide speedy remedy at little cost is not correct, for it may be correct in the case of original trials, such as, in the courts of Munsifs and Magistrates, but not in the case of appeals and revisions at the highest court, such as the High Court Division. In the High Court " Division, they pointed out, no witnesses are exam-ined and the parties are also not required to attend the Court; even they need not come to the High Court Division except at the time of filing their cases to swear an affidavit and hand over all papers to their lawyers and the latter on receipt of relevant papers take up the entire responsibility for the cases which may spend for years together. It has been further sub-mitted that in the permanent Benches with two or three Judges, constitution of specialised Benches, such as, Civil Benches, Criminal Benches, Writ Benches, is not possible and the same Judge hears all such matters. Sometimes a Judge hears civil matters daring the first half of the week and other matters during the remaining two days of the week; even the same judge hears civil matters during the first half of the day and other matters in the last part of the day. As a result, it is submitted, hardly any case could be heard in full and many cases are left part-heard. Be-cause of these and other difficulties which are hardly appreciated by persons having no idea about the working of the Supreme Court, the disposal has fal-len down in spite of increase in the number of Judg-es for the High Court Division. I find substance in these submissions. In the High Court Division Judges do not simply decide cases of the parties; they also decide questions of law involved in those cases and their decision becomes law of the land binding upon all, whether they are parties to the decision or not. Difficulty to constitute specialized Benches is 62 one of the reasons for fall of disposal figures. If this state of things

continues, even further increase in the number of Judges will hardly make any difference.

411. Notification
of the Chief Justice under clause (6) of Art. 100 has been assailed, among oth-ers, on the ground that pending cases have been transferred to the Permanent Benches without any provision to this effect in the amendment of the Ar-ticle. Reliance has been placed by learned Counsels for the appellants on a number of decisions including 'Venugopal Reddiar Vs. Krishnaswami Reddiar', AIR 1943 FC 24 to the effect that a party's right to continue a duly instituted suit is in the nature of a vested right and it cannot be taken away except by a clear indication in law in this respect. Learned Attor-ney-General has replied that this principle will not apply if the transfer is within the same court. The entire things centre round the question whether the impugned Amendment has resulted in the creation of separate courts in the name of permanent Benches.

412. Now
considering, the impugned Article as a whole along with the other Articles related thereto, I am to see what is the position that emerges. Inde-pendent of the contentions that basic structure of the Constitution has been altered and amendment has transgressed the limit of amending power, I find that the amended Article is in serious conflict with the other Articles and that the conflict is so uncompromisable that if it is allowed to stand, other Articles stand amended by implication. Repeal or amendment “by necessary implication, though permissible in or-dinary statutes, is not so permissible in a Constitu-tion like ours because of the mandatory procedural bar. Again, if both the provisions are allowed to stay on, the High Court Division cannot function as an indivisible organ as created under Article, 94. Ordi-narily, any question of conflict between a constitu-tional amendment and an existing provision of the Constitution does not arise, because the amending Article opens with the non-obstante clause — Notwithstanding anything contained in this Constitution — and in case there arises any, it will be the duty of the Court to reconcile them for their co-existence.

If it is not
possible then the question is which one will yield.

413. Munir, CJ. in the Reference by the
President (9 DLR SC 178=1957 PLD
215) referring to an observation of an Ohio Judge stated that the "pole star" in the construction of a constitution is the intention of its makers and adopters. He laid down four rules of construction; one of them is that whenever there is a particular enactment and a gener-al enactment in the same statue the particular one should be preferred. In the instant case this rule is not attracted. Another rule is that the amendment be-ing the last will of the Legislature should prevail over the earlier provisions. This is not also attracted here, for if it is accepted and the amendment stands, all other existing provisions on this subject shall be taken as repealed or drastically amended with the result that the High Court Division as one and sin-gle entity will cease to exist. In such a situation the principle as to consequence of a particular construc-tion, as stated in Maxwell's Interpretation of Statutes and also expounded by Lord Atkinson in Vacher & Sons vs. London Society of Compositors and Lord Reid in Gartside vs. IRC (1963) AC, 574 deserves consideration and, the construction which avoids any evil consequences should be preferred.

414. Looking at the
impugned Article and other relevant Articles, it is found that by the impugned Article the High Court Division has been denuded of its power and jurisdiction under Article 102 of the Constitution over a large part of the country. The

impugned Amendment does not con-tain any statement of its objects and reasons. But the learned Attorney-General has stated that decentralisa-tion of the Judicial system is the objective of the Amendment. It is argued by him that all the power and jurisdiction of the High Court Division is now exercised by the six Benches and the High Court Di-vision sitting at the permanent seat. This is true, but over which areas? Because of the territorial divi-sions for the jurisdiction of the Benches and the High Court Division in the permanent seat, which have no common authority over them all, writs is-sued by them will be limited in operation to their re-spective areas only. As to Admiralty jurisdiction of the High Court Division, it cannot be assigned to any of the areas, for the territorial waters does not belong to any district but belongs to the Republic and in case the cause of action of a case under Admi-ralty jurisdiction arises in the territorial waters, none of the Benches and the High Court Division in the permanent seat shall have jurisdiction thereon. High Court Division's power to transfer any case from one subordinate court to another or to withdraw it to it-self under Article 110 has been negatived; at best this power now may be exercised by the Six Benches and the High Court Division sitting in the perma-nent Seat over their respective subordinate courts. Similar is the case with superintendence and control over subordinate courts under Article 109. As to the binding effect of judgment under Article 111, the judgment of one Bench or Court is not binding upon another Bench/Court and the courts subordinate to it; as such conflicting decisions are quite likely. As to the Supreme Court as the only Court of Record un-der Article 108, it is not clear how many such Courts of Records have now resulted from the Amendment. The repugnancy thus resulted is irreconcilable and as such it is the amended provision, rather than the existing provisions which together form a particular scheme for the Judicial function of the State, that should leave the field.

415. Main arguments
against the impugned Amendment are that a basic structure of the Consti-tution has been destroyed and its essential features have been disrupted. There is no dispute that the Constitution stands on certain fundamental princi-ples which are its structural pillars and if these pil-lars are demolished or damaged the whole Constitu-tional edifice will fall down. It is by construing the Constitutional provisions that these pillars are to be identified. Implied limitation on the amending power is also to be gathered from the Constitution itself in-cluding its Preamble. Felix Frankfurter, in his book "Mr. Justice Holmes" said:

“Whether the
Constitution is treated primar-ily as a text for interpretation or as an instru-ment of government may make all the difference in the world. The fate of cases, and thereby of legislation, will turn on whether the meaning of the document is derived from itself or from one's conception of the Country, its development, its needs, its place in a civilized society."

I shall also keep
in mind the following obser-vation of Conrad in "Limitation of Amendment Procedure and the Constitutional Power"— "Any amending body organized -within the statutory scheme, however verbally unlimited, its power, can-not by its very structure change the fundamental pil-lars supporting its constitutional authority". He has further stated that the amending body may effect changes in detail, adopt the system to the changing condition but "should not touch its foundation". Similar views have been expressed by Carl J. Fried-man in "Man and his Govt.", Crawford in his Consti-tution of Statutes and Cooly in his Constitutional Limitation.

416. Main objection
to the doctrine of basic structure is that it is uncertain in nature and is

based on unfounded fear. But in reality basic structures of a Constitution are clearly identifiable. "Sovereignty" belongs to the people and it is a basic structure of the Constitution. There in no dispute about it, as there is no dispute that this basic structure cannot be wiped out by amendatory process. However, in reali-ty, people's sovereignty is assailed or even denied: under many devices and 'cover-ups' by holders of power, such as, by introducing 'controlled democra-cy', basic democracy or by super-imposing thereupon some extraneous agency, such as a council of elders or of Wiseman. If by exercising the amending power people's Sovereignty is sought to be curtailed it is the constitutional duty of the Court to restrain it and in that case it will be improper to accuse the Court of acting as "super-legislators". Supremacy of the Constitution as the solemn expression of the people, Democracy, Republican Government, Uni-tary 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 Oli-garchy or the Judiciary cannot be abolished, although there is no express bar to the amending power given in the Constitution. Principle of separation of pow-ers means that the sovereign authority is equally dis-tributed among the three Organs and as such one Or-gan 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 ab-solutely", I think the doctrine of bar to change of basic structure is an effective guarantee against fre-quent amendments of the Constitution in sectarian or party interest in countries where democracy is not given any chance to develop.

417.
Learned Attorney-General argues that by this amendment no basic structure of the Constitu-tion has been destroyed or damaged and as such the argument on this doctrine is mere academic. But on examining the impugned Amendment along with other relevant provisions of the Constitution, I find that the High Court Division as an integral part of the Supreme Court has lost its original character as well as most of its territorial jurisdiction. Seven ju-dicial bodies, by whatever name they are called, Benches or Courts, are, to all intents and purposes, independent courts having no relation with each oth-er except a thin link through the Chief Justice whose sole function, power and jurisdiction is limited to only transfer Judges from one seat to another and constitution of Benches in usual course. The "High Court Division sitting in the permanent seat" is not the original High Court Division with jurisdiction over the whole of the Republic; it is a Court with limited territorial jurisdiction—that is, the jurisdic-tion over what is called the "residuary area" in clause (5) of the impugned Article. That is why it is not called the High Court Division, but is referred to as the "High Court Division, sitting in the permanent seat" meaning that-it is a Court with jurisdiction over a small part of the country .as against the High Court Division which' had jurisdiction all over the country. High Court Division, as contemplated in the unamended Article, is no longer in existence and as such the Supreme Court, one of the basic struc-tures of the Constitution, has been badly damaged, if not destroyed altogether. As to implied limitation on the amending power, it is inherent in the word "amendment" in Article 142 and is also deducibic from the entire scheme of the Constitution Amend-ment of Constitution means change or alteration for improvement or to make it effective or meaningful and not its elimination or abrogation. Amendment is subject to the retention of the basic structures. The Court therefore has power to undo an amendment if it transgresses its limit and alters a basic structure, of the Constitution.

418. 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 dic-tates of conscience and the principle of self-restraint. It is these principles which restrain them from ex-ceeding the limits of their power. In this connection the following observation of Wythe sitting in the Court of Appeal, State of Virginia is quite appro-priate:

"I have heard of an English Chancellor, who said, and it was nobly said; that it was his duty to protect the rights of the subject against the encroachments of the Crown; and that he would do it at every hazard. But if it was his duty to protect a solitary individual against the rapacity of the sovereign, surely it is equally mine to protect one branch of the legislature and conse-quently the whole community against the usur-pations of the other and whenever the proper oc-casion occurs, I shall feel the duty; and fearlessly perform it.....if the whole legisla-ture, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the Court, will meet the united powers at my seat in this tribunal, and pointing to the Consti-tution, will say to them, there is the limit of your authority; and hither shall you go, but no further,"

419. My conclusions are:

(1) The Impugned Amendment of Article 100 has broken the "oneness" of the High Court Division and thereby damaged a bas-ic structure or" the Constitution; as such, it is void;

(2) The Impugned Amendment has resulted in unrecognizable repugnancies to all other existing provisions of the Constitution related to it rendering the High Court Division virtually unworkable in its original form, and as such, it is void.

420. In view of, this decision, the impugned Amendment will go off the Constitution and the old Article 100 will stand revived along with its provi-sion for holding of Sessions. For the purpose of clarification I may say that Session is not a regular Bench of the High Court Division outside the capital, but it means the holding of court in full, if feasible, or in one or two Benche -Single Bench or Divi-sion Bench in one or more places from time to time. During Pakistan time, the Supreme Court whose permanent seat was in West Pakistan, held two or three Sessions in Dhaka each year. Purposes for holding a sessions are to familiarise the lawyers and litigant public of an area with, the working of the High Court Division and for shifting the Court in full or in part to a safer place during any national emergency from war or natural calamities. A session may also be held in a place because of its special importance or of its great distance from the perma-nent seat coupled with heavy filing of cases from that area. Holding of a Session outside the capital is a matter which lies in the discretion of the Chief Justice; but the discretion is to be exercised on some principles and not arbitrarily.

421. In the result, I allow the appeals and dis-pose of the leave Petition. I hold the Impugned Amendment void and declare it ultra vires of the Constitution; this invalidation will not however af-fect the previous operation of the Article. The old Article 100 consequently stands revived along with the provision of holding Sessions outside the capi-tal.

M. H. Rahman J. — In last seventeen years the Constitution has experienced avulsion and kinds of reformation in situ.
Far-reaching and radical changes had been introduced in the Constitution both during the time when it was functioning and during the time when it was not allowed to function. For the first lime an amendment of the Constitution has been challenged in this Court and it is now declared to be unconstitutional.

423. I have read the draft judgments of broth-ers B. H. Chowdhury, J. and S. Ahmed, J. I concur with their decision that the impugned amendment is unconstitutional. As I hold slightly different views on one or two points, I think, I should give my rea-sons for the decision. My brothers have considered the contentions of the parties in great details and ex-amined in depth the numerous decisions cited from the Bar. I shall be brief.

424. All three matters have arisen out of writ petitions that were filed in the High Court Division at Dhaka before the Eighth Amendments came into effect from June 9,1988. Appellant in Civil Appeal No.42 of 1988 was respondent No. 5- in Writ peti-tion No. 963 of 1988. He wanted to affirm an affi-davit for challenging an ad interim order granted by the High Court staying the publication of the result of his election as the chairman of Bathagaon Union Parishad, District Sunamganj. The Commissioner of Affidavit of the High Court Division, Dhaka did not allow him to do so on the ground that by vir-tue of a Notification dated June 11, 1988 under clause (4) of amended Art. 100 of the Constitution and the Chief Justice's Rules, made under clause (6) of that article the writ petition stood transferred to the Per-manent Bench at Sylhet because the matter arose from Sunamganj, an area assigned to the Permanent Bench at Sylhet. By filing Writ Petition No. 1252 of 1988 the appellant challenged validity of the Eighth Amendment and further, contended that since the writ petition was pending at the time of the pass-ing of the amendment at Dhaka and as no provision was made in the amendment for transfer of his case the matter should be disposed by the High Court at Dhaka.

425. Appellant in Civil Appeal No.43 of 1988 also challenged the amendment in his Writ petition No. 1176 of 1988 when he was not allowed to swear an affidavit in connection with his earlier Writ petition No. 495 of 1988 relating to an election dis-pute.

426. Petitioner in Civil Petition No. 3 of 1989 also challenged the validity of the impugned amendment by filing Writ Petition No. 1283 of 1988 when his Writ Petition No. 12 of 1987 relating to a labour dispute was about to be transferred to the Permanent Bench of the High Court Division at Jessore, as the matter arose in that case from an area over which the Jessore Bench had got exclusive jurisdiction. After repelling the main contention that the impugned amendment destroyed the unitary character of the state and the oneness of the High Court Division. The learned Judges of the High Court Division held that the amendment was not incompatible with any article of the Constitution; that it was possible to give harmonious interpretation of the amended article with the other articles, that the High Court Divi-sion and its Benches have got the same jurisdiction as provided under Articles 100 and 102, and that no attempt had been made to amend other articles and "What has not been done directly cannot be consid-ered to have been done indirectly". The High Court Division summarily dismissed all the three writ peti-tions.

427. Leave was
granted to the two appeals for considering the appellants' contention that the Eighth Amendment with regard to Articles 100 and 107 and the Chief Justice's Rules framed under clause (6) of Article 100 were unconstitutional, Civil Petition No.3 of 1989 filed after that leave, was or-dered to be heard together.

428. On the
eighteenth day of Kartick, 1379 B.S. corresponding to the fourth day of November, 1972 AD. the People of Bangladesh adopted, enacted and gave to themselves the Constitution pledging in clear terms in the preamble "that it shall be a funda-mental aim of the State to realise through the demo-cratic process a socialist society, free from exploitation— a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be se-cured for all citizens". By Proclamation Order No.1 of 1977 some substitutions and insertions were made in the preamble. By inserting clause (1A), (1B) & (1C) in Article 142 the Proclamation Order No. IV of 1978 made the preamble along with Articles 8, 48, 56, 58, 80, 92A an entrenched provision in the Constitution. The preamble could no longer be amended by two thirds of the total number of mem-bers of the Parliament alone unless the amending Bill gets the majority of the total votes cast in a ref-erendum in its favour. The preamble has become the touchstone for assaying the worth or the validity of an amendment that may be passed in accordance with clause (1) of article 42. When the Parliament can not by itself amend the preamble it can not indirectly by amending a provision of the Constitution impair or destroy the fundamental aim of our society.

429. In furtherance
of the goal of rule of law some specific provisions were incorporated in the Constitution. Article 27 provides: "All citizens are equal before law and entitled to equal protection of law". Art. 22 provides: "The State shall ensure the separation of the judiciary from the executive organs of the State". Art. 31 provides: "To enjoy the pro-tection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law". Art. 32 provides: "No person shall be deprived of life or personal liberty save in accordance with law". Ar-ticle 44 (1) guarantees the right to move the High Court Division in accordance with clause (1) of Arti-cle 102 for enforcement of the fundamental rights conferred in Part III.

430. In Part VI of
the Constitution the scheme of the judiciary has been delineated. Art. 94 provides for the establishment of a Supreme Court comprising the Appellate Division and the High Court Division. The functions of the two Divisions are different, but the two together form, the Su-preme Court, a single Court, having plenary power over the whole country. The Supreme Court is a single Court of record. Art. 109 provides that the High Court Division shall have power of superinten-dence and control over all Courts subordinate to it, and under Art. III its decisions shall be binding on all such Courts. Art. 101 provides that the High Court Division shall have such original, appellate and other jurisdictions as are or may be conferred on it by the Constitution or any other law. Art. 102 provides that the
High Court Division shall have power to enforce any of the fundamental rights con-ferred by Part III of the Constitution, and shall issue orders or and directions in the nature of writs of mandamus, certiorari and habeas corpus.

431. The provisions
contained in Part VI for the Supreme Court are not entrenched provisions and

they can be amended by the legislature under Ar-ticle 142. But if any amendment causes any serious impairment of the powers and the functions of the 59 Supreme Court, the makers of the Constitution de-vised as the kingpin for securing the rule of law to all citizens, then the validity of such an amendment will be examined on the touchstone of the preamble.

432. After drawing
our attention to some of the articles of the Constitution Mr. Asrarul Hossain has contended that the Supreme Court has been given the most eminent place in the Constitution. He has pointed out that while Article 48 provides that there shall be a President of Bangladesh, and Article 65(1) provides that there shall be a Parlia-ment for Bangladesh, Article 94 provides that there shall be a Supreme Court for Bangladesh (to be known as the Supreme Court of Bangladesh). He has asserted that the two prepositions, 'of and ‘for', have been used to invest die Supreme Court with a supervening power in the Republic. This ingenious argument will fall through if we examine the Bangla text where the President, the Parliament, the Su-preme Court—all of them have been described as Bangladesher
an expression that can be translated into English as either 'of Bangladesh' or' for Bangladesh'. For its power of judicial review and authority to de-clare and decide what a provision of the Constitution means the Supreme Court cannot claim supremacy in the Republic. It is the Constitution which is the Supreme, and all the three organs, the executive, the legislature, and the judiciary, are to work under a co-ordinate structure devised in the Constitution.

433. Alexander
Hamilton, one of the founding fathers of the U.S. Constitution, in his "Federalist Paper No. 78" described the Supreme Court as the least dangerous branch. He said: "The executive not only dispenses the honours but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated; the judiciary, on the contrary, has no influence over ei-ther the sword or the purse; no direction either of the strength or of the wealth of the society, and can take any active resolution whatsoever".

434. The
"least dangerous" organ of the State in our country, however, has much attention from the legislature as well as from the Martial Law Authorities. So far changes have brought in the structure, powers and functions of the Supreme Court for the eighteenth time. What the U.S. Chief Justice William H. Rehnquist said of his Supreme Court in preface to his book "The Supreme Court, How It Was, How It Is". (New York 1987) seems to be apt in our case as well: "that the Supreme Court is the least understood of the three branches".

435. The genesis of
this case of to be traced back to 13th May, 1982 when by Proclamation Or-der No. 11 of 1982 Paragraph 4 A was added to the Schedule to the Proclamation of Martial Law dated 24th March,. 1982 and the Chief Martial Law Administrator assumed power to establish permanent Benches of the High Court Division with seats at such places and for such areas as may be specified by him. On 8th June, 1982 four permanent Benches of the High Court Division were established at Dhaka, Comilla, Rangpur and Jessore.

436. In a signed
article: "The nation must ponder", published in the New Nation on March 30, 1983, Lt. General H.M. Ershad, the Chief Martial Law Administrator, expressed his views on the role of the Supreme Court. At that time, it appears, he was thinking in terms of a new Constitution.

437. After emphasizing on a consensus on na-tional issues like foreign policy, national defence and finance he observed:

"However, even before a Constitution is written there must be one other agreement that is more important than bipartisanship on Na-tional Issues. And that is the role of the judici-ary."

"No matter what Constitution is agreed on, were will always be disputes as to whether govern-ment policies are "constitutional". Individuals, par-tics, businesses, parts of the bureaucracy, and the Military may feel that some policy is unconstitu-tional. To settle constitutional questions only one institution is capable of doing so. That is the Su-preme Court. A free independent Court is the only way to settle constitutional issues peacefully. And before a constitution is written all parties, the peo-ple, the bureaucracies, the Parliament and the mili-tary must agree to accept judicial supremacy on de-ciding what is and what is not constitutional.

This point is crucial. Yet in all the writing about democracy, the Court is often overlooked ... The reason for this is that in a democracy the Court is assumed by everyone to be supreme. No one de-bates the supremacy of the Courts.

Nixon lost power because of a court decision. Jeremy Thorpe, the leader of Liberal Party, was brought to Court. Civil Rights of minorities or in-dividuals arc protected by the Courts.

It is often forgotten why a court is important and why a court must be independent. The reason is that all rights are rights against the state. A court must be able to overturn unconstitutional law passed by the Parliament; it must overrule the police, the bureaucrats, and the army, the President or the Prime Minister. Only when the Court has this power can it protect the citizen from the State.

Moreover, the Court must protect bureaucrats against the Parliament. The Court must be able to protect the Military so that it can preserve national security. The Court must protect the rights even of policemen.

A strong and powerful court is essential to de-mocracy. For only it can guarantee that disputes, which inevitably arise, can be settled. According to the constitution and according to just la vs. with-out a commitment to the courts and the rule of law la settle disputes peacefully, no constitution can ex-ist".

438. In that article it was further noted that "Court development has never been a part of the de-velopment process",

"there are about as many Judg-es to day as in 1947", that "Court facilities have

not expanded", that "almost all the justices are British trained and few have had exposure to other democrat-ic countries' legal systems like Japan or India or Ma-laysia, Australia or the USA", arid that "the Court still has not geared itself to commercial law", and that "the British habits of thought must be modi-fied to account for a democratic country, not a colo-ny".

439. It was pointed out that "Before there can be political or constitutional dialogue there must be Court reform. At worst Court reform should paral-lel political arid constitutional dialogue".

440. In the above article there was no reference to the experiment, of decentralisation of the Su-preme Court's High Court Division though by this time three separate High Court Benches had already been established. Subsequently three other Benches were established at Barisal, Chittagong and Sylhet respectively on 7th July, 1983, 3rd August, 1983 and 27th December, 1983.

441. The learned Attorney-General informs us that the new Benches were set up for quicker disposal of cases at less expense and for making justice "available at the door-steps of the people. It is not clear how the doctrine of door-step justice could be applied to the High Court Division, virtually the last appellate Court where, except in a few cases of original jurisdiction, most of the Court's business is done on the basis of records, written papers and sub-mission of the learned Counsels, and the parties or their witnesses are not required to cross their thres-holds for coming to Dhaka, except for giving a power and for affirming an affidavit. For many it is a classic case of harassment from pillar to post, par-ticularly for the litigants from Sylhet who had to move from Dhaka to Camilla, from there to Chittagong and then, from there to Sylhet.
Orders of transfer were made without considering the convenience of the litigants and without considering the norms and safeguards consistently followed till now in this sub-continent in several cases of bifurcation or amalgamation of High Courts.

442. By the Proclamation (Third Amendment) Order of 1986 a new paragraph 4A was substituted in place of earlier paragraph 4A to the Schedule to the Martial Law Proclamation. It was provided that on the commencement of that Proclamation Order-on 17.6.1986 the permanent Benches be deemed to be Circuit Benches, and that after the restoration of the Constitution the Circuit Benches be deemed to be Sessions of the High Court Division outside Dhaka. Despite the dexterous device of double deeming pro-visions, after restoration of the Constitution the learned Chief Justice resorted to Article 100 and, with the approval of the President, issued Notifica-tion No. 9096- G dated 24th November, 1986 "appointing Rangpur, Jessore, Barisal, Chittagong, Comilla and Sylhet to be places in which Sessions of the High Court Division of the Supreme Court may be held on such dates and for such period as may be specified by the Chief Justice.'" From a number of resolutions of Bangladesh Supreme Court Bar Association, it appears that notification, dated 24.11.1986 was .viewed as an instrument for contin-uing the Martial Law dispensation prevailing imme-diately before the restoration of the Constitution. Certain unfortunate things happened at the perma-nent seat of the Supreme Court. The above notifi-cation was, however, not challenged in Court and the High Court Division continued to hold its Sessions at six places. The members of the Supreme Court Bar Association

abstained from attending the Court presided over by the learned Chief Justice who stoi-cally carried on his administrative functions. The whole matter uneasily drifted for some time.

443. The impugned amendment was intended to resolve the conflict by giving a constitutional cover. I am fully aware that when the Court exam-ines the constitutionality of an amendment of the Constitution the initial presumption of validity is heavily in favour of the amendment and that the leg-islature deserves full deference in view of the doc-trine of separation of power. The Court will exer-cise utmost self-restraint and weigh the consequences for and against before striking down an amendment and hold back from striking down an amendment if it can be reconciled with the provisions of the Consti-tution.

444. In exercise of his power under clause (5) of Article 100 the President in consultation with the Chief Justice, issued six separate notifications on June 11, 1988 for assigning the areas, administrative Zilla areas, to each of the six permanent Benches at Barisal, Jessore, Rangpur, Chittagong, Comilla and Sylhet. The areas not so assigned to the six permanent Benches were left to the jurisdiction of the High Court Division sitting at the permanent seat of the Supreme Court. On the same day the Chief Justice, in exercise of his power under clause (6) of Article 100, made the Rules "The Supreme Court (High Court Division's Permanent Benches) Rules, 1988. Rule 4 provides that all cases arising from the area assigned to a permanent Bench under clause (5) of Article 100 shall be filed, and also should be dis-posed of, in that Bench only, and cases which arise in the area not assigned shall be filed and disposed of in the High Court Division sitting at its permanent seat. Rule 6 provides that all cases which arose in the area's, assigned to the permanent Benches, but, were pending at the permanent seat of the High Court Division, shall stand transferred to their re-spective permanent Benches. The amendment of Article 100 and the notifications and the rules made thereunder were challenged in the three writ peti-tions before the High Court Division.

445. From the context and circumstances in which the amendment was made one may assume that its object was merely to provide a basis for set-ting up some permanent Benches. In this regard the laconic statement, in the objects and reasons, of the Minister-in-Charge does not throw much light. It is not clear why second half of clause (5) was not included in the Bill and it had to be inserted on the pro-posal of Mr. A.K.M. Shamsul Huda, a private mem-ber. I do not like to speculate on the matter. The private member's contribution was the last straw on the camel's back. The High Court Division lost its resonance. Its plenary jurisdiction was totally under-mined.

446. In a number of conferences amongst us we gave our anxious consideration whether the amendment of Article 100 could be saved by severing the most offending part, the second half of clause (5). After a Jot of deliberations three of us have at last decided that this is not a case of simple surgery and it also needs a little grafting, a few words here and there, which the Court is not entitled to supply.

447. The rules framed by the Chief Justice un-der clause (6) of new Article 100 appear to be in consonance with that article. If I had upheld the amended article I would have upheld the rules as well. The rules have in fact brought in focus the evils of the impugned amendment which I shall 72 soon consider.

448. The notification issued under clause (5) of Article 100 has been assailed on the ground that there was no consultation between the President and the Chief Justice in the matter of assigning areas of jurisdiction for the permanent Benches. From the consultation papers placed before us it appears the Law Secretary in a straight forward manner drew attention of the Chief Justice to the areas of six per-manent Benches that were set up during the Martial Law lime. The areas mentioned in the notification under clause (5) does not call for any reflection on the ground that the whole process of consultation and the publication of the notification was completed in great expedition within a few hours.

449. Let me now take up the least controver-sial ground on which an amendment of the Constitu-tion can be challenged. It is now well settled that the power of judicial review extends to enable a court to decide whether a purported amendment to a con-stitution has been validly made in accordance with the procedure prescribed by the constitution itself.

450. The following objections have been raised on the procedural ground : that in the long title of the Bill for amendment there was no express statement as to the provisions of the Constitution that were proposed to be amended though the Bill contained as many as five subjects, having no rela-tion to each other; that the Bill had a misleading general title "Ganoprojatontry Bangladesher Songbidhaner kotipoye odhiktoro Songsodhankolpe anito"; and that as per proviso to clause (1) of Article l42 the Bill should have con-tained 'a provision', meaning not more than one. The Court's attention has been drawn to the following Bangla text of the proviso to clause (1) of Article 142:

“Tobe sorto thake je, (a) anorup Songsodhanir jonno anito kono biler sompurno sironamae ae songbidhaner kono bidhan Songsodhan kora hoebe bolia spostorupe ullekh na thakile bilty bibechoner jonno grohon kora jaebe na.”

451. Mr. Khandaker Mahbubuddin has contend-ed that the Bangla word kono in the second line is to be read as kono for giving a correct meaning to the provision. The term kono has been used seven times in Article 142 meaning either 'a' or 'any’. We cannot ascribe the meaning of 'which' to that word by ad-ding a hasanta to its last letter without violating elementary principles of construction.

452. Dr. Kamal Hossain has contended that the Private Member's Amendment is ultra vires and Void because it did not comply with the mandatory requirement regarding long title and because it is be-yond the scope of that Bill. Rule 84 (1) of the Rules of Procedure of the Bangladesh Parliament ex-pressly provides that "an amendment shall not be ... beyond the scope of the Bill". Dr. Hossain has quoted from More's Treatise on Practice and Proce-dure of Indian Parliament (1960) pp. 384-385:

"All amendments to a bill must be within its scope which is to be sought not in the state-ment of objects and reasons but either in the title or in the preamble".

453. Mr. Khandaker
Mahbubuddin Ahmed has contended that as one of the objects of the Bill was to make Islam a State religion Muslim members of the Parliament who wanted Islam as the state- relig-ion had no option but to vote for it, and that they were precluded from exercising their franchise on the merit of that part of the Bill that amended Article 100.

454. I do not find
any merit in these submis-sions. In Article 142 there is no embargo as to in-clusion of more than one object in a Bill for amendment. The private member's amendment was clearly within the scope of Bill, and it complied with rule, 84 (1) of the Rules of Procedure of the Parliament.

455. The learned
Attorney-General without seriously disputing the procedural requirement for an amendment has submitted that the long title of the Bill contained clear indication as to the amendment of some provisions of the Constitution, and the omission of details in the long title of the Bill did not create any confusion in the minds of the legisla-ture because the long title was immediately fol-lowed by clear statements as to the subject matters of the Bill and as to the articles of the Constitution that were proposed to be amended. Before us mere is no affirmed statement, giving sufficient particulars, as to whether any Member of the Parliament made any objection on the ground that he was confused because of the lack of details in the long title. Had the aggrieved person been a Member of the Parlia-ment then the matter would have called for closer scrutiny. The purpose for the long title is to give a notice to the Members of the Parliament and there is nothing on record to show that any Member of the Parliament felt aggrieved or misled for the long title not being really a long one. Therefore, I reject the appellants' objection as to the non-compliance of procedural requirement in passing the impugned amendment.

456. Mr. Ishtiaque
Ahmed wants us to apply the general doctrine of ultra vires to both law and to an amendment of the Constitution on the touch-stone of Article 7.

457. It appears
that Article 7 was inserted in the Constitution to emphasize the supremacy of the Constitution because even without that article the Constitution, the fundamental law of the country, would have been supreme.

458. In Sankari
Prasad Singh Deo V. Union AIR 1951 (SC) 458, the Indian Supreme Court after noticing a distinction between a "law" made in the exercise of legislative power and a "law" made in the exercise of constituent power unanimously held that an amendment of the Constitution was not "law" within the meaning of Article 13 (3). That view was affirmed by a majority of 3 to 2 in Sajjan Singh V. Rajasthan (1955) I SCR 933.

459. In I.C.
Golak Nath V. Punjab AIR 1967 (SC) 1953 para 28 Subba Rao, CJ. observed:

"An amendment
cannot be made otherwise than by following the legislative process. The fact that there are other conditions, such as a large majority and in the case of

articles men-tioned in the Proviso ratification by Legislatures is provided; docs not make the amendment any the less a law".

460. In Kesavanand V. Kerala AIR 1973 (SC) 1461 the view that "law" did not include an amendment of the Constitution was, however, reaffirmed.

461. Sir Ivor Jennings in his "Law and the Constitution" (fifth edition) at pages 62-65 clearly makes out the distinction between constitutional law, and the rest of the law. He observed that the 'constitutional law' is never used in the sense of in-cluding the law of the constitution and the law made under it.

462. In our Constitution in several Articles the term 'constitution' and the term 'law' are used in juxtaposition, sometimes conjunctively, and some-times alternatively. Art. 101 provide that jurisdic-tion, power and functions may be conferred on the High Court Division by the Constitution or by any other law. Article 119 provides that the Election Commission shall have functions as may be provid-ed in the Constitution or by any other law. The President takes oath to preserve, protect and defend the Constitution and Article 53 provides that he can be impeached on a charge of violating the Constitution. On the other hand, the Chief Justice and oth-er judges of the Supreme Court take oath to pre-serve, protect and defend the Constitution and the laws of Bangladesh.
The term "law" has been used singly in several places in the Constitution. see Arti-cles. 107,108,142(IB). In Article 152 the term 'law has been given an extended meaning: "law" means any Act, ordinance, order, rule, regulation, bye-law, notification or other legal instrument, and any cus-tom or usage, having the force of law in Bangladesh. The term 'Constitution' has not been intended in that meaning of law.

463. Mr. Ishtiaque Ahmed asserts that inclusion of clause (3) in Article 26 clearly indicates that an amendment of the Constitution should be regarded as a 'law.' It appears that as an abundant caution the legislature added clause (3) to Article 26 because clause (2) of Article 142 was enough to exclude ap-plication of Article 26 to an amendment of the Constitution. This is an instance of overzealousness that might have been borrowed from the Indian example, the 24th amendment of the Indian Constitution.

464. After an amendment is passed by the leg-islature it becomes a part of the Constitution. It is needless to emphasize that an amendment passed un-der Article 142 is quite dissimilar to any other law passed by the legislature by its ordinary procedure. Apart from the ordinary legislative procedure or the special requirement of two third majority of the total number of members of Parliament in certain cases, as under Art. 142 (1A), an amendment cannot be passed without getting the majority votes cast in a referendum held under clause 1(B). I, therefore hold that the validity of an amendment of the Constitu-tion cannot be examined on the touchstone of Article 7.

465. The learned Counsels for the two appel-lants and the one petitioner, Dr. Kamal Hossain, Syed Ishtiaque Ahmed, Mr. Amirul Islam, and the two learned Counsels, Mr. Asrarul Hossain and Khandakar Mahbubuddin Ahmed, who appeared as amicus curiae have covered some common grounds. Their main contention is that the amending power of the Parliament is subject to implied limitation on its power to amend

any constitutional provision which relates to its basic structure of the Constitution, as envisaged in the preamble, the Directive Principles of the State Policy and in the whole scheme of the Constitution.

466. It is contended that the impugned amend-ment has destroyed a basic feature of the Constitu-tion by damaging the integrity and oneness of the High Court Division, an integral part of the Su-preme Court of Bangladesh.

467. Dr. Kamal Hossain has claimed that the basic structure doctrine had its origin in a decision of the High Court of East Pakistan in 1963, Md. Abdul Haque vs. Fazlul Quader Chowdhury PLD 1963 Dhaka 669, later affirmed by the Pakistan Su-preme-Court PLD 7963 (S.C) p. 460. This decision was cited by the Indian Supreme Court in Sajjan Singh's case AIR (SC) 1965 p. 845 at p. 864 in support of the proposition that amending power could not be exercised to destroy the basic structure of the Constitution:

"If upon a literal interpretation of this pro-vision an amendment even of the basic feature of the Constitution would be possible it will be a question of consideration as to how to harmonise the duly of allegiance to the Consti-tution 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 Fazlul Quader Chowdhury V. Mohd. Abdul Itaque, 1963 PLD 486 (SC) held that franchise and form of Government are fun-damental features of a Constitution and the pow-er conferred upon the President by the Constitu-tion of Pakistan to remove difficulties does not extend to making an alteration in a fundamental feature of the Constitution".

In Fazlul Quader's case the question of a tempo-rary provision of adaptation not an amendment of a provision of the constitution came up for considera-tion. In Reference by the President PLD 1957, (SC) 219, relied by the appellants, the question of amendment did not directly come up for any scru-tiny. In that case it was held that the Governor had no power to dissolve the Provincial Assembly under Article 225 of the Constitution of Pakistan, 1956. Scholars have traced back the origin of the basic structure doctrine to Chief Justice Coke's famous fourth argument in Bonham's case 8. CO. Rep. 114 (1610), arguments of Counsels made on the 18th amendment cases in U.S.A. and , particularly to Chief Justice Kennedy's dissent in The State (Ryan) Vs. Lennon 1933, IR. 170. (See Rajeev Dhavan’s The Basic Structure Doctrine—A Footnote Comment—Indian Constitutional Trends and Issues. (1978) Bombay).

468. In this regard further reliance is placed on Bribery Commissioner V. Ranasinghe (1964) All. E.R. 785, Kesavanand AIR 1973 (SC) 1461; Smt. Indira Gandhi AIR 1975 (SC) 2299, Minerva Mills AIR 1980 (SC) 1789 and Wamana Rao (1981) 2

69. On the other hand, the respondent's case is that the Parliament's amending power docs not suffer from any implied limitation excepting the ex-press provision specified in clause (1A) of Article 142.

470. The learned
Attorney-General has submit-ted that the independence of judiciary, and separation of powers between the legislature, executive and the judiciary are the basic features of our Constitution but the impugned amendment has not affected any of these features.

471. Mr.
Attorney-General has relied on Less-er V.
Garnett (1922) 258 U.S. 130 where the, U.S. Supreme Court upheld the validity of the 19th Amendment
rejecting the contention that "... the power of amendment conferred by the federal Consti-tution ... does not extend to this amendment be-cause of its character...so great an addition to the electorate, if made without the State's consent, de-stroys its autonomy as
a political body".

472. He also cited Whitehill
V. Elkins (1967) 289 U.S.
228 (231) where the U.S. Supreme Court reaffirmed that "... the Constitution pre-scribes the method of 'alteration' by the amending process in Art. V: and while the procedure for amending it is restricted, there is no restraint on the kind of amendment that may be offered".

473. Mr.
Attorney-General read out extensive-ly from the minority decision of the six Judges in Kesavanand who took the view that there were no limitations of any kind of the power of amendment. At times, I had the feeling that the Court is re-hearing Kesavanand, the appellants relying on the majority decision, the respondent relying on the mi-nority one.

474. Mr.
Attorney-General has further submit-ted that the instant case docs not attract the doctrine of basic structure. He has drawn our attention to the following observation of Chandrachud J. in Smi.
In-dira Gandhi's case AIR 1975 (SC) 2299 at paragraph 668:

"The theory of
Basic Structure has to be considered in each individual case, not in the abstract, but in the context of concrete prob-lem".

Times change and we
change with them.
After referring to that old Latin tag and the development of English customary law by judicial decisions in re-cent times Lord
Hailsham of St. Marylebone, Lord Chancellor of Great Britain, said on 22 April, 1987 at a Public Lecture organised by the Supreme Court of Malaysia and the Bar Council of Malaysia during the Fourth International Appellate Judges Conference at Kuala Lumpur:
"though we may not discern it, there are growing points and withering points. In time the withered boughs must be sawn off and dis-carded, but the growing points need to be carefully tended, at times ruthlessly pruned, but only so that they may branch and flourish "Law, Justice and the Judiciary: Transnational Trends (editors Abas and Sinnadurai at p.297)

475. 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 legis-lature, gets snap amendments of the Constitution passed without a Green Paper or White Paper, with-out eliciting any public opinion without sending the Bill to any select committee and without giv-ing sufficient time to the members of the Parlia-ment for deliberation on the Bill for amendment. Ex-amples may be found both at home and abroad. In India the thirty-ninth amendment with regard to Article 329 A (4) of the Indian Constitution was rati-fied in three days during a period of emergency when freedom of speech was suspended and there was hard-ly any time for the debate on the Constitutional im-plications of that amendment. See H.M. Seervai, Constitutional Law of India (Third Edition) Vol. II at pp. 2659- 2660.

476. The doctrine of basic structure has been vehemently criticised as dubious, uncertain and dan-gerous. In 1975 the Attorney-General of India moved an application in the Supreme Court of India for a reconsideration of the theory of basic structure as laid down in Kesavanand. On a query from the Su-preme Court whether the doctrine of the basic structure had prevented the Government from making laws for implementing its socio-economic measures the Attorney-General replied that it had not done so. As no case was made out for the reconsideration of Kesavanand's case the Bench was dissolved. Whatev-er unreality there was around the doctrine of basic feature if was found to be a useful principle in Smt. Indira Gandhi's case AIR 1975 (SC) 2299.

477. In 1971 Smt. Indira Gandhi's election was declared invalid by the Election Tribunal on the ground that she had adopted corrupt practices in the election. During the pendency of her appeal the Par-liament by 39th Amendment inserted Article 329A (4) and (5) in the Constitution. It was provided by that amendment that henceforth the Parliament would decide any dispute as to the election of the Prime Minister and the Speaker; that the existing law in this regard would not apply to the election of the Prime Minister and the Speaker; and that the dis-puted election of Smt. Indira Gandhi was valid and the election petition against her abated. The Supreme Court declared the amendment as invalid as it violat-ed the principle of free and fair election, a basic structure of the Constitution, offended the Rule of law and the right of equality under art. 14 of the Constitution.

478. The doctrine of basic structure is a new one and appears to be an extension of the principle of judicial review. Although the U.S. Constitution did not expressly confer any judicial review, Mar-shall CJ held in Marbury V. Madison (1803) I Cranch 137 that the court, in the exercise of its judi-cial functions, had the power to say what the law was, and if it found an Act of Congress conflicted with the Constitution it had the duty to say that the Act was not law. Though the decision of Marshall, CJ is still being debated the principle of judicial re-view has got a wide acceptance not only in the coun-tries that are under the influence of common law but in civil law countries as well.

479. It may take some lime before the doctrine of basic structure gets acceptance from the superior Courts of the countries where constitutionalism is prevailing.

480. After referring to Minerva Mills AIR 1980 (SC) 1789 and Sanjeeb Coke Manufacturing Co. AIR 1983(SC) 239. Sir Harry Gibbs, the for-mer Chief Justice of Australia, observed in his paper on "The Court as the Guardian: The Basic Princi-ple", before the Fourth Appellate Judges Conference in Kuala Lumpur, 1988: "The extent to which the power of judicial review enables

the court to strike down a constitutional amendment, duly made in ac-cordance with the prescribed procedure, on the ground it conflicts with an existing provision of the Con-stitution, still appears to give rise to controversy in India".

481. It was noted in that paper that in the case of Loh Kooi Choon V. Government of Malaysia the Malaysian Supreme Court rejecting an argument based on Indian authorities held that once an amend-ment has been made in compliance with the process prescribed by the constitution, it becomes part of the constitution notwithstanding that it contradicts some existing constitutional provision. Sir Harry Gibbs observed: "The question depends on the proper con-struction of the constitution in question, but it would involve very serious issues in the case of an amendment which appeared to destroy the very basis of the constitution". (Law, Justice and the Judiciary Transnational Trends at p. 63).

482. After referring to the various past amend-ments, particularly the Fourth Amendment, the learned Attorney-General has submitted that the Con-stitution has undergone so many radical changes with regard to the Preamble, the powers of the Pres-ident and several other important matters that the doctrine of basic structure merely evokes an amaze-ment why if it is such an important principle of law (and it had already been propounded by the In-dian Supreme Court in 1973) it was not invoked earlier in this Court. I find no force in this conten-tion. Because the principle was not invoked in the past, the Court cannot be precluded now from con-sidering it.

483. In this case we are concerned with only one basic feature, the rule of law, marked out as one of the fundamental aims of our society in the pre-amble. 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.

484. The learned Counsels for the Appellants put great reliance on the Preamble of the Constitu-tion. The learned Attorney-General has, however submitted that the Preamble can not prohibit or control the Parliament's power of amendment. Let me refer to some of the leading decisions on this point.

485. Lord Davey in Powell V. Kempton Park Racecourse Co. Ltd. (1899) A.C. 143, after quot-ing with approval the words of Chitty, L.J., in the same case "it is a settled rules that the preamble can-not be made use of to control the enactments them-selves where they are expressed in clear and unam-biguous terms," observed:

> "The preamble is a key to the statute and af-fords a clue to the scope of the statute where the words construed in themselves without the aid of the preamble are capable of more than one meaning. There is, however, another rule or warning which cannot be too often repeated, that you must not create or imagine an ambiguity in order to bring in the aid of the preamble".

486. In Attorney-General V.H.R.H. Prince Ernest Augustus of Hanover

(1957) 1. All E.R. 49 (ILL)
Viscount Simonds said: "No one should profess to understand any part of a statute or of any other document before he has read the whole of it. Until he has done so, he is not entitled to say that it, or any part of it, is clear and unambiguous. To say then that you may not call in aid the preamble in order to create an ambiguity in effect means very little, and, with great respect to those who have from time to time invoked this rule, I would suggest that it is better stated by saying that the context of the preamble is not to influence the meaning otherwise ascribable to the enacting part unless there is a com-pelling reason for it. And I do not propose to define that expression except negatively by saying (as I have said before) that it is not to be found merely in the fact that the enacting words go further than the preamble has indicated. Still less can the pream-ble affect the meaning of the enacting words when its own meaning is in doubt."

487. Lord Normand said: "The preamble is part of the statute, and that no part of a statute can be regarded as independent of the rest... It is, there-fore, clearly permissible to have recourse to it as an aid to construing the enacting provisions. The pre-amble is not, however, of the same weight as an aid to construction of a section of the Act as are other relevant enacting words to be found elsewhere in the Act, or even related Acts. There may be no exact cor-respondence between preamble and enactment, and the enactment may go beyond, or it may fall short of, the indications that may be gathered from the preamble. Again, the preamble cannot be of much, or any, assistance in construing provisions which embody qualifications or exceptions from the operation of the general purpose of the Act. It is only when it conveys a clear and definite meaning in comparison with relatively obscure or indefinite en-acting words that the preamble may legitimately prevail. The courts are concerned with the practical business of deciding a lis, and when the plaintiff puts forward one construction of an enactment and the defendant another, it is the court's business in any case of some difficulty, after informing itself of what I have called the legal and factual context in-cluding the preamble, to consider in the light of this knowledge whether the enacting words admit of both the rival constructions put forward. If they ad-mit of only one construction, that construction will receive effect, even if it is inconsistent with the preamble, but, if the enacting words are capable of either of the constructions offered by the parties, the construction which fits the preamble may be pre-ferred".

488. Lord Somervell observed: "If, however, having read the Act as a whole, including the pream-ble, the enacting words clearly negative the construc-tion which it is sought to support by the preamble, that is an end of it.....I find it difficult to believe that LORD DAVEY was intending to create an ex-ception to the rule that an Act, like other docu-ments, must be considered as a whole. Preambles differ in their scope and, consequently, in the weight, if any, which they may have on one side or the other of a dispute. There can be no rule. ... Com-ing to the Act, I therefore accept the Attorney- Gen-eral's submission that the preamble and enacting words should be read before deciding whether the lat-ter are reasonably capable of the meaning which the Attorney-General seeks to place on them."

489. In Smt. Indira Gandhi V. Rajnarain, AIR 1975 (SC) 2299 (Para 347) P. 2386, Mathew J. ob-served:

"The preamble, though a part of the Consti-tution is neither a source of power nor a limita-tion upon that of the ideological aspirations of the peoples ... 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."

490. In Minerva Mills Ltd., AIR 1980, SC 1789 at page 1811 Bhagwati J, supported the above view of Mathew, J.

491. Chandrachud, J. observed in AIR 1975 (SC) (Para 666) P.2466: "I find it impossible to subscribe to the view that the Preamble of the Con-stitution holds the key to its basic structure...the Preamble cannot affect or throw light on the meaning of the enacting words of the Constitution. Therefore, though our Preamble was voted upon and is a part of the Constitution, it is really "a prelim-inary statement of the reasons" which made the passing of the Constitution necessary and desirable. As observed by Gajendragadkar, J., In re: Berubari Union and Exchange of Enclaves (1960) 3 SCR 250, 282= (AIR 1960 SC 845 at p. 856) what Willoughby has said about the Preamble to the Ameri-can Constitution, namely, that it has never been re-garded as the source of any substantive power, is equally true about the prohibitions and limitations. The Preamble of our Constitution cannot therefore be regarded as a source of any prohibitions or limi-tations".

492. A few years later Chandrachud C.J., how-ever, in delivering the majority decision in Minerva Mills 'Case said at para 21: The Preamble assures to the People of India a polity where basic structure is described therein as a Sovereign Democratic Re-public."

493. Let me turn to the other side of the coin. Shelat and Grover, JJ. observed in Kesavanand AIR) 973 SC 1461. "The Constitution makers gave to the preamble the pride of place. It embodied in a solemn form all the ideals and aspirations for which the country had struggled.... It is not with-out significance that the Preamble was passed only after draft articles of the Constitution had been adopt-ed with such modifications as were approved by the Constituent Assembly. The Preamble was, there-fore, meant to embody in a very few and well de-fined words the key to the understanding of the con-stitution.

494. At para 537 of the report the learned Judges said: "The Preamble serves several important purposes. Firstly it indicates the source from which the Constitution comes viz. the people of India. Next it contains the enacting clause which brings into force the Constitution. In the third place, it de-clares the great rights and freedoms which the peo-ple of India intended to secure to all citizens and the basic type of government and polity which was to be established. From all these, if any provision in the Constitution had to be interpreted and if the ex-pressions used therein were ambiguous, the Pream-ble would certainly furnish valuable guidance in the matter, particularly when the question is of the cor-rect ambit, scope and width of a power intended to be conferred by Article 368."

495. At para 539 of the report the learned Judges referred to Story: "While dealing with the Preamble to the United States Constitution it was observed by Story (Commentaries on the Constitu-tion of the United States, 1833 edition, Volume I), that the Preamble was not adopted as a mere formu-lary; but as a solemn promulgation of a fundamental fact, vital to the character and operations of the Gov-ernment. Its true office is to expound the nature and extent and

application of the powers actually con-ferred by the Constitution and not substantially to create them."

496. After referring to the Proclamation of In-dependence on 26th day of March, 1971, the war of national independence and the principles of national-ism, democracy and socialism for which our brave martyrs sacrificed their lives the makers of the Con-stitution in the name of 'We, the people declared the fundamental principles of the Constitution and the fundamental aims of the State." This Preamble is not only a part of the Constitution; it now stands as an entrenched provision that cannot be amended by the Parliament alone. It has not been spun out of gossamer matters nor is it a little star twinkling in the sky above. If any provision can be called the pole star of the Constitution then it is the Preamble. The impugned amendment is to be examined in the light of the preamble. I have indicated earlier that one of the fundamental aims of our society is to se-cure the rule of Law for all citizens and in further-ance of that aim Part VI and other provisions were incorporated in the Constitution. Now by the im-pugned amendment that structure of the rule of law has been badly impaired, and as a result the High Court Division has fallen into sixes and sevens—six at the scats of the permanent Benches and the seven at the permanent seat of the Supreme Court. More on this point later.

497. The learned Counsels for the appellants has contended that the Eighth Amendment has in ef-fect reduced the High Court Division at the perma-nent seat in Dhaka to a Permanent Bench, that is, one of the seven regional Courts and divested the High Court Division of a plenary jurisdiction, since an aggrieved citizen can only move a perma-nent Bench in whose area a case might be said to arise. It is submitted that the amendment has created uncertainty. There may to cases where one may have no forum whatsoever as in the case of a citizen who is aggrieved by an action of a public official beyond an area which is assigned to any of the Permanent Benches or trie residual area, such as, in the exclusive economic zone beyond Bangladesh's territorial waters or in a Bangladesh Embassy abroad.

498. It is submitted that by setting up seven Courts the amendment has brought about a situa-tion where the protection available to subordinate Courts would be that of the territorially limited per-manent Benches and not of the Supreme Court with powers to punish throughout the Republic. If con-tempt of a subordinate Court of a particular area was committed outside the territorial limits of the per-manent Bench of that area, difficulties would arise with regard to prosecution of the contemner. Diffi-culties would also arise where violation of the order of a subordinate Court took place within the territo-rial limits of different permanent Benches.

499. It is contended that under Article 109 the superintendence by the High Court Division with plenary jurisdiction throughout the Republic would mean that the functioning of all the Courts within the Republic would be subject to a uniform nation-al yardstick, whereas having seven regional Courts with powers of superintendence limited to subordi-nate Courts within their local limits would involve introduction of diverse and conflicting standards and norms.

500. It is submitted that even the Chief Jus-tice had not been given any power to transfer a case from one permanent Bench to another Bench or to the High Court Division at Dhaka in the interests of justice, or for determining under Article 110 a sub-stantial question of law as to the interpretation of the Constitution or on a point of general public im-portance.

501. Dr. Kamal Hossain has 'laid great empha-sis on the anomaly that has been created in the exer-cise of the Admiralty jurisdiction vested in the High Court Division.

502. He has asserted that the concept of “Alaka hoyete udbhoddo bishoye” introduced by rule 6 of the Rules framed under clause (6) of the new Article 100, is not capable of application to maritime causes be-cause the geographical jurisdiction of the Admiralty Court extends over the worldwide maritime environ-ment as it was observed by D.R. Thomas in the British Shipping Laws Maritime Liens at page 309.

503. Dr. Hossain has pointed out that the power of arrest is often exercised within territorial waters beyond the limits of the permanent Benches, since the territorial waters arc not that of any district but that of Bangladesh as a whole and hence if the power of arrest is to be exercised on the basis of the concept of presence of the ship within the territorial jurisdiction of a Permanent Bench, extremely difficult questions would arise as to which Perma-nent Bench would exercise that power. The ensuing uncertainty and delays could in effect render nugato-ry the prompt and effective exercise of the power of arrest by the Admiralty jurisdiction. There would al-ways be the risk of an arrest of a ship being found to be without jurisdiction, with serious consequences.

504. After referring to the British Shipping Laws, Admiralty Practice Vol.1, 1964 Edition p.28 the learned Attorney-General has submitted that ad-miralty actions may be either in rem or in personam and it is for the plaintiffs Solicitor which to choose. He has drawn our attention to the follow-ing;

"A consideration which may lead a plaintiff to sue in personam is that service of a writ in rem can only be affected within the jurisdiction. This means that although a writ in rem and a warrant of arrest may be issued even if the res is not within the jurisdiction, in order for either to be effective the res to be, proceeded against must be, or come, within the jurisdiction unless service is accepted by a solicitor, whereas ser-vice of a writ in personam can often be effected abroad provided that the rules laid down in the rules of the Supreme Court are satisfied".

505. After referring to the above passage the learned Attorney-General has submitted that wherever the cause of action may arise, the res must be within the jurisdiction of the High Court Divi-sion in order that an order for arrest may be effec-tive in an admiralty action in rem. In an admiralty action in personam, either the cause of action should arise or the defendant should be within the ju-risdiction of the Court, therefore, the question which Bench of the High Court Division will exercise admiralty jurisdiction will be dependent on the facts of each case taking into consideration the situation of the res and the residence of the defendant or the place where the cause of action arises. Mr. Attorney-General contends that the difficulties pointed out on behalf of the appellants are imaginary. The question of admiralty jurisdiction can be decided in a given case upon consideration of the facts of that case.

506. It appears

that the emphatic assertions made on behalf of the appellant have been denied with matching emphasis. The learned Attorney-General has submitted that the impugned amend-ment has not altered Articles 101, 102, 107, 109, 110 and 111 of the Constitution; that, subject to Article 100, the High Court Division exercises the same jurisdiction and the same power of superinten-dence, that the judgments of the Supreme Court have the same binding effect and that the power and position of the Supreme Court under Articles 107 and 108 have not been affected.

507. It is submitted that clauses (1) to (3) of Article 100 have not affected the integrity of the High Court Division as the Judges of the High Court Di-vision wherever they may sit they will exercise all the powers and jurisdictions of the High Court Di-vision. The establishment of permanent benches is only functional re-arrangement of the judges of the High Court Division who will sit at the permanent seat and at the seats of the permanent benches. Clause (4) provides that a permanent bench shall consist of such number of judges of the High Court Division as the Chief Justice may nominate from time to time and on such nomination the judges shall be deemed to have been transferred to that Bench. From that clause it is submitted, that it is clear that all the Judges belong to one High Court Division. The territorial arrangement introduced by the Eighth Amendment for the purpose of initia-tion and disposal of the proceedings or for invoking the jurisdiction of the High Court did not impair the jurisdiction of the High Court.

508. In support of his contention learned At-torney-General cited Shamsuddin V. Capt Gauhar Ayub and State 17 DLR (SC) 384 (388). In that case while considering the jurisdiction of West Pa-kistan High Court after assignment of areas to the two Benches of that Court, the Supreme Court ob-served, inter alia, as follows:

> "The assignment of areas to the two Bench-es under paragraph 4 of the Order, cannot be Construed to restrict the jurisdiction of any judge of the High Court, in derogation of full jurisdic-tion conferred by clause-26. To hold otherwise would be to confer power on the Chief Justice to confine the jurisdiction of any judge of his court, in a manner contrary to the main instru-ment conferring jurisdiction, not only on such judge but upon the whole Court. It would amount to creation of three High Courts with mutually exclusive jurisdictions which is entire-ly outside the contemplations of the order of 1955. Orders of assignment under paragraph 4 must therefore be construed to be without effect upon the fullness of the jurisdiction vested in each Judge of the High Court in respect of the entire jurisdiction of the High Court, subject of course, to such orders as the Chief Justice might make as to the distribution and disposal of work among and by the judges and the Divi-sion Court, of the High Court".

509. Mr. Attorney-General has submitted that the seat of a High Court is not treated as an essential attribute of the powers and jurisdiction of the High Court and the provision for setting up Benches of a High Court outside its principal seat were made in India as well as in Pakistan and this is not a new-feature. In this regard he has referred to a numbers of acts of India and Pakistan.

510. In support of

his contentions the learned Attorney-General has placed reliance on Nirmal Das Khaturia AIR 1972 All 200 (F.B) 201 and Bhuwal AIR All 488 (F.B) Paragraph 14" of the U.P.".
High Court (Amalgamation) Order, 1948 came up for considerations in these two cases.

511. In Nirmal Das's case Pathak, J. (as he then was) in delivering the majority judgment held:

"Now, with profound respect to Moothan, C.J. and A. P. Srivastava, J. we are unable to subscribe to the view that if cases arising in the Oudh areas are to be heard at Lucknow alone it would in effect result in splitting up the High Court into two Courts. From the provisions of the Amalgamation Order already set out, it is clear that there is only one High Court, with one seal, one Chief Justice and a single body of judges, and a single code of rules and orders re-lating to practice and procedure which except for a few transitional provision operates in re-spect of the entire Court. The jurisdiction de-fined by Art. 7 vests in the entire body of judg-es. It is jurisdiction enjoyed by every judge of the High Court and extends to all cases through-out the territories of the State.... Whether the judge sits at Allahbad or at Lucknow, he re-mains a Judge of the same High Court. A judge sitting at Lucknow may sit at Allahabad and vice versa. It is only the work entrusted to him at the two places which will differ. A judge of the High Court at Lucknow will hear cases arising in the specified areas of Oudh except cas-es transferred to Allahabad, while a Judge at Al-lahabad will exercise jurisdiction in respect of all remaining cases. The writ of the High Court runs throughout the territories of the State, and the law laid down whether by the Judges at Lucknow or the Judges at Allahabad is binding on all throughout the State, the Judges and lay public alike".

512. After relying on the above findings an-other Full Bench in AIR 1977 All 488 (F.B) repelled the contention that the test of singularity of a High Court, as contemplated by the Constitution, in a State should be its capacity to judicially func-tion throughout its territory from the place where it is erected and that the singularity of the Chief Justice or common set of Judges or a common "seal should not be the correct test to find out the constitutional contemplated singularity.

513. After referring to Nirmal Das's case the Full Bench reaffirmed: "the nature and extent of the jurisdiction enjoyed by a Court and the manner in which that jurisdiction will be exercised are two dis-tinct matters. How and where the jurisdiction will be exercised by the Judges are matters governed by the practice and procedure prescribed by law and the place of sitting appointed for them.... It was not dis-puted before us that it is open to the Chief Justice under the Rules of the Court to allocate different classes of cases to individual Judges or Division Benches of this Court. Thus the Chief Justice has the power to order that individual Judges or Division Benches of this Court will entertain cases arising out of separate districts of the State in the event of such an order being passed, it cannot be contended that in substance the High Court had been split up merely because by reason of an order of the Chief Justice other Judges of the Court do not have juris-diction to entertain and decide cases arising out of a district allocated to a particular judge or Division Bench." It was also held that the view taken in Nirmal Das's case was not dissented by the Indian Su-preme Court in Nasiruddin

AIR
1976 SC 311.

514. The reasonings
of the decisions reported in 17 DLR (SC) 384 and the two
Allahabad cases, AIR 1972 200 (F.B) 1 and AIR 1977 Allahabad '(F.B) 488 might
have been a complete answer to the appellant's contentions as to mutilations of
the High Court Division's power and jurisdiction had there been no concept of
confining the High Court Divi-sion with the residual area as in Article 100 (5)
Be-cause of the last part of clause (5) the High Court Division has been left
high and dry. It has lost its valency as an integral limb of the Supreme Court.
Because of clause (5) the legislature did not or could not make any provision
for transfer of Civil Cases from a court situated within territorial
jurisdiction of one permanent Bench to another court within territo-rial
jurisdiction of another permanent Bench. This was noticed by this Division in Sk.
A.K.M. Abdul Mannan V. M/s. Raj Textile Mills Ltd., in Civil Miscellaneous Case
No. 1 of 1986. Because of clause (5) the Chief Justice has got also no
power to trans-fer any case from one permanent Bench to another or to the High
Court Division sitting in the permanent seat. The statutory provision of power to
transfer in furtherance of coherent administration of justice has been clearly
retained in similar other cases of setting up of Benches in this subcontinent.
It has faint-heartedly been argued that the High Court Division sitting in the
permanent seat shall have all kinds of areas of jurisdiction that are not
assigned to the per-manent Benches. This submission has got no force. The term
'area' has been mentioned in Article 100 three times, always, meaning a
territorial area and the six notifications show that the areas are Zilla ar-eas.
The term 'area' cannot be extended to mean ju-risdiction. It has been submitted
that the learned Chief Justice has sufficient power to make any order under
rule 9 of his Rules for proper functioning of the Benches. Rule 9 reads as
follows:

Purbe ullekheto bidhi somoher sadharon boisisto behoto na
koriea abong Songbidhaner 100 anusseder bidhen sapekhe Bench somoher kerjo
susthovabe porichlona rnimette prodhan Bicherpoty jerup pro-ojon bibechona
koriber somoe shie Adesh prodhen korite pareben.

515. It is clear
from the rule that the learned Chief Justice is not empowered to act in
derogation of Article 100, particularly to its clause (5).

516. Because of
lack of concrete cases and suf-ficient particulars I do not like to decide all
the ques-tions that have been raised in these three matters.

But the arguments
advanced on the ground that the amendment has caused great uncertainty in the
ad-ministration of justice and thereby directly impaired the rule of law in the
country cannot be brushed aside as arguments in terrorem.

517. In Md.
Mustafa Mandal Vs. State 35 DLR 362 S.M. Hossain, J. after deciding the scope of section 29C of the
Code of Criminal Procedure, 1898 ordered that a copy of the judgment be forward-ed
to the District and Sessions Judges of Rajshahi, Pabna, Bogra, Dinajpur and
Rangpur, the Courts that were under the Rangpur Bench, but not to the Courts
which were under other Benches. Obviously the learned Judge thought his
decision was not bind-ing on all the subordinate Courts.

518. If there are

different decisions on a simi-lar matter by different Benches and the difference is not resolved for a considerable time then there is no doubt whatsoever that the Subordinate Courts will be in a quandary. A subordinate Court is most likely to follow the decision of the particular Bench within whose functional jurisdiction it is situated.

519. In Admiralty
Suit No. 10 of 1985 a ques-tion was raised whether clause (5) of the amended Article 100 had taken away the admiralty jurisdiction of the High Court Division at the permanent seat over the entire territory of the Republic. After con-sidering the submission of the learned Deputy At-torney-General that as the matter involved substan-tial question of law as to the interpretation of the Constitution it be, as per rule 3 of Chapter V of the Original Side Rules, reported to the learned Chief Justice for considering whether a Bench of two or more Judges be constitution to hear the matter, the learned admiralty Judge, Mustafa Kamal, J. referred the matter to the learned Chief Justice for dong the needful. The matter was kept pending for some time. After the High Court Division's summary rejection of Writ Petitions No. 1176 of 1988 and 1252 of 1988 the learned Chief Justice ordered that there was no necessity to constitute a larger Bench.

520. Mr. learned
Attorney-General has enthu-siastically cited Nurul Huda V. Bahar Uddih & ors 41 DLR 395 a Full Bench decision of the Comilla Bench in support of his contention that effective machinery for resolving a conflict of decisions is al-ready there.

521. Six different
decisions, three from Chittagong Bench, and one each from Rangpur, Comilla and Jessore Benches were referred to the Full Bench for deciding the extent of powers of an Assistant Judge who is deemed to be an Additional Sessions Judge under the proviso to sub-section (3) of section 9 of the Code of Criminal Procedure. The earliest of the six decisions was made on August 8, 1983. The Full Bench was constituted on 20 February. 1989 and the decision was announced on March 22, 1989. The case indicates how an important question on the administration of criminal justice remained unre-solved for about six years.

522. In the fitness
of things the matter ought to have been resolved at the High Court Division in its permanent seat but the learned Chief Justice had to, as per existing law, constitute the Full Bench at Comilla and nominate two more judges for be-ing transferred there as the matter arose from the area assigned to the Comilla Bench.

523. From the above
it appears that uncertain-ties loomed large even in the minds of the Judges not to speak of the minds of lay public. The learned Attorney-General's remark that no difficulty will arise for any litigant, if he gets proper legal advice is rather farfetching. I am, however, striking down the amendment not on the ground of uncertainties or irreconcilability of the existing provisions with the amended provisions as such, but on the ground of the amendment's irreconcilability with the rule of law, as envisaged in the preamble, and, in further-ance of which, Articles 27, 31,32,44,94 to 116A were particularly incorporated in the Constitution.

524. It has been
repeatedly pointed out before us that because of the unitary character of our Re-public the constitution makers devised only one court for the whole of Bangladesh in Supreme Court of Bangladesh comprising the Appellate Division and the High Court Division. In an unitary State there can be more than one Appellate Court

like the High Court, but both in an unitary and in a federal State .There must be one court having full plenary power over the whole State. The most important dis-tinction between an unitary and a federal Stale is that in the former the legislative authority is located in one legislature, but in the latter the legislative power may be shared by the Federal legislature and the legislatures of the units that together constitute the Federation. Our founding fathers devised a com-posite Supreme Court to emphasise the oneness of the country. The Supreme Court was bifurcated into two Supreme Court and High Court in 1976, but in the next year the Supreme Court was restored to its original position. The Attorney-General has re-peatedly stated that the Parliament has no intention to interfere with the oneness of the Supreme Court.

525. While in India the Bombay High Court, the Patna High Court, and the Allahabad High Court—each has only one Bench at Nagpur, Ranchi and Lucknow respectively, in our country where there are only four administrative Divisions the Parliament has gone for six Benches.

526. In view of the separation of powers the Supreme Court does not claim to supervise, oversee or to interfere with the legislative policy of the Par-liament or the administrative policy of the Execu-tive. It is only when a provision of the Constitu-tion or a law is violated the court, in pursuance of its constitutional duty, exercises its power of re-view, then again, not suo motu, but at the instance of an aggrieved person, and with great restraint, and, further, weighing all the consequences that may follow from its order. This court will have no occasion to interfere if for attaining a particular object the Parliament exercises its amendatory legislative pow-er within its competence.

527. Since old Article 100 stands revived after this judgment I think I should say a few words with regard to Sessions. Occasion for holding a session at place or places other than the permanent seat of a Court may arise for various reasons. Sessions con-cept is nothing new. During Pakistan time the Su-preme Court which had its permanent seat in West Pakistan used to, hold two or three sessions in Dhaka each year. In 1970 the High Court of East Pakistan in a Full Court meeting disfavored the idea of holding sessions outside Dhaka. So did the High Court Division on 16th August, 1977. After revi-val of the old Article-100 Sessions of the High Court Division may be held from time to time at appointed places. The learned Chief Justice shall decide in his discretion, considering the convenience of the High Court Division, the judges and the staff, what causes will be heard at which appointed place, who will constitute the Bench or Benches and what will be the duration of each session. The work schedule of the sessions may not be coexten-sive with that of the High Court Division sitting at Dhaka. All judges will be at the permanent seat v for sufficiently long time for attending businesses like Full Bench, Special Bench, Full Court meeting, Full Court Reference, meeting of various Commit-tees that are constituted under the rules, and the traditional annual get-together between the Bench and the members of the Bar, some of which have fallen into desuetude since 1982.

528. The Court's attention has repeatedly been drawn to the oath the Chief Justice or a Judge of the Supreme Court takes under Article 148 of the Constitution on his appointment. Mr. Asrarul Hossain has pointed out the difference between the languages of the oath the Judges of the Indian Supreme Court take "to uphold the Constitution," and that of the oath the Judges of our Supreme Court take "to preserve,

protect and defend the Constitution." The import of the single word 'uphold' is no less signifi-cant or onerous than that of the three words 'preserve, protect and defend.' In either case the bur-den is the same. And the Court carries the burden without holding the swords of the community held by the executive or the purse of the nation com-manded by the legislature. The Court could do so because all the authorities of the Republic act, as enjoined by the Constitution, under Article 112, in aid of the Court for securing obedience to its judg-ments and orders. When the Constitution is sus-pended or made subject to a non-law the Court is de-prived of the aid of the relevant authorities of the Republic. When such art abnormal situation occurs a judge has got two alternatives: either he would re-sign or he would hold on to his post. One who has not lost faith in the rallying power of law may pre-fer a temporary deprivation of freedom to desertion. It is hardly necessary to point out that the. Court will have no worthwhile power without the Constitu-tion. The future of the Constitution lies in the com-mitment of the citizens who are obliged under Arti-cle 21 of the Constitution to observe the Constitution.

529. I allow the
two appeals but without any order as to costs. Amendments of Articles 100 and 107 of the Constitution are declared unconstitu-tional. In view of that, no leave is necessary in Pe-tition No. 3 of 1989 which stands as disposed of.

A.T.M. Afzal J. — At the heart of the ques-tions raised in these appeals, there lies a fundamental question and that is with regard to the extent of pow-er of the Parliament to amend the Constitution under Article 142 of the said Constitution. The apparent questions, however, which call for determination re-late to the constitutionality of Article 100 as amend-ed by section 7 of the Constitution (Eighth Amend-ment) Act, 1988 (Act XXX of 1988) and the Rules, called the Supreme Court (High Court Division) Es-tablishment of Permanent Benches Rules, 1988, made by the learned Chief Justice under sub-article (6) of said Article 100.

531. The subject,
setting up of permanent Benches of the High Court Division outside the per-manent seat of the Supreme Court, which has given rise to the present cases, is an innovation of the Martial Law regime. Through metamorphosis, polit-ical and otherwise, what in the beginning started as a Martial Law measure has come to rest in the pages of the Constitution at the instance of the Parliament. It is a matter of current history that the measure has all along been opposed by the Supreme Court Bar Association at various stages and on different grounds. Over the years, the matter has taken on po-litical colour and dimension of no small magnitude. The learned counsel for the appellants Syed Ishtiaque Ahmed and Dr. Kamal Hossain, former being the present President of the Supreme Court Bar Associa-tion, and both of them members of the Bar Council, have been among the leaders of the movement op-posing the measure. The Court being at the centre of the controversy has itself experienced the heat and dust of the said movement. It may thus be imagined under what complex and charged-up circumstances the court is called upon to decide a purely Constitu-tional question of grave import. In answering the ul-timate question involved in these cases i. e. scope of the Parliament's power of amendment of the Consti-tution, the Court's only function is to examine dis-passionately the terms of the Constitution and the Law without involving itself in any way with all that I have indicated above. Neither politics, nor pol-icy of the government nor personalities have any rel-evance for examining the power of the Parliament under the Constitution which has to be done purely upon an interpretation of the provisions of the Con-stitution with the help of legal tools.

532. I would like
to pay a tribute to the learned counsels for the appellants for the high stan-dard of professionalism and moderation set by them in that in their long

submissions, they have not in-troduced any matter other than law avoiding scrupu-lously any reference to political and extraneous mat-ters. This tribute is also due to Mr. Amir-ul-Islam, learned counsel for the petitioner in C.P.L.A. No. 3/89 and Mr. Asrarul Hossain who addressed us as amicus curiae. The other learned counsel, Khondker Mahbubuddin Ahmed who also appeared as amicus curiae, however, inter alia, raised the question of competence of the present Parliament, malafide acts of the government and so on which are not quite rel-evant to the issue in hand. Being conscious of the limitations, Mr. Ahmed also fairly submitted that those matters may not be decided in this proceeding. On the whole, the deliberations took place in the cold perimeter of law with the able and studied assis-tance of all the learned counsels and their learned jun-iors. The learned Attorney-General made thorough and competent submission on behalf of the respon-dents. The learned counsel on both sides once again proved the validity of the appellation-'learned', to themselves and their profession.

533. It may be useful to start by giving brief-ly the background of the amendment of Article 100 of the Constitution, Article 100 originally read as follows:

> 100. The permanent seat of the Supreme Court shall be in the capital, but sessions of the High Court Division may be held at such other place or places as the Chief justice may, with the approval of the President, from time to time appoint.

534. It may be mentioned here that the provi-sions as above can be traced back right from the time when High Courts were established in British India under the Act for establishing High Courts of Judica-ture in India, 1861(24 and 25 Viet, Cap 104). It was provided in the Letters Patent for the High Court of Judicature at Fort William in Bengal (28th Decem-ber, 1865):

31. And we do further ordain that whenever it shall appear to the Governor-General in Council convenient that the jurisdiction and power by these Our Letters Patent, or by the recited Act, vested in the said High Court of Judicature at Fort William in Ben-gal, should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, the proceeding in cases before the said High Court at such place or places shall be regulated by any law relating thereto which has been or may be made by, competent legislative authority for India.

535. Under the Government of India Act, 1935 (26 Geo 5, Chapter 2) similar provision as in Article 100 was made in respect of the Federal Court:

203. The Federal Court shall be a Court of record and shall sit in Delhi and at such other place or places, if any, as the Chief Justice of India may, with the approval of the Gov-ernor-General, from time to time appoint.

536. The 1962 Constitution of Pakistan, which was in force before the Independence of Bangladesh, in Article 97(1) provided that the permanent seat of the High Court of the Province of East Paki-stan shall be at Dacca, but the Court may from

time to time sit in such other places as the Chief Justice of the Court, with the approval of the Governor of the Province, may appoint.

537. The Constitutional documents always provided aforesaid enabling provisions for sitting of the highest Court outside its permanent usual seat but in practice neither the Calcutta High Court (be-fore partition) nor the then Dhaka High Court nor the High Court Division of the Supreme Court of Bangladesh ever sat outside the capital. The only time the High Court thought of moving out of the capital, albeit temporarily, it is interesting to note, was during a threat of foreign aggression. It is found from the reminiscences of Sir Harold Derbyshire, ex-Chief Justice of Calcutta High Court(Reminiscences of Chief Justice", article) that in the wake of Japa-nese bombing of Calcutta during Second World War, the learned Chief Justice realised that if the worst came to worst and the Court had got to clear out of Calcutta because of a Japanese invasion,” we might have to sit somewhere else" and so an Ordinance was asked to be prepared "enabling the Court to sit either as a whole or in sections in different places, either in Bengal or Bihar, according as the Judges thought fit". "This Ordinance was made but it was never used. They were anxious times" said the learned Chief Jus-tice. There have been occasional proposals from the government since Pakistan days for setting up of one or two Benches outside the capital but the Court al-ways viewed it with disfavor.

538. Upon Proclamation of Martial Law on March 24, 1982, the Constitution was suspended. By the Proclamation (Second Amendment) Order 1982 (Proclamation Order No. II of 1982) dated 8 May 1982 it was provided that the Chief Martial Law Ad-ministrator may, by notification in the Official Ga-zette, establish permanent Benches of the High Court Division with seats at such places and for such areas as may be specified therein. On 8th June, 1982, the following notification was issued:

NOTIFICATION

Dacca, the 8th June, 1982.

No. S.R. O. 175-L/82-In exercise of the pow-ers conferred by sub-paragraph(1) of paragraph 4 A of the Schedule to the Proclamation of the 24th March, 1982, The Chief Martial Law Administrator is pleased to establish the permanent Benches of High Court Division mentioned in column 1 of the Sched-ule below for the areas specified in column II thereof with seats at the places shown in column III of the Schedule.

| Permanent Benches | Areas for which established |
|---|---|

Seats

I

II

III

Dacca Bench

District of Dacca, Tangail Jamalpur,
Mymensingh, and Faridpur.

Dacca.

Comilla Bench

District of
Chittagong, Chittagong Hill-Tracts,
Bandarban, Noakhali, Comilla & Sylhet.

Comilla

Rangpur Bench

Districts of
Rajshahi, Pabna, Bogra, Rangpur and Dinajpur.

Rangpur

Jessore
Bench

District of Khulna, Jessore,-Kushtia,
Patuakhali and Barisal.

Jessore

Dacca:

The 31st May, 1982.

H.M. Ershad, ndc,
psc

Lieutenant General

Chief Martial Law
Administrator

and

Commander-in-Chief.

539. The Benches
outside Dhaka started func-tioning from 15 June, 1982, three Judges
for each Bench having been transferred from Dhaka
by the Chief Martial Law Administrator by separate notifi-cations of the same
date (8 June, 82).
Subsequently, by notification dated 7 July,1983, the Barisal Bench was
established for the then Districts of Barisal and Patuakhali, by notification
dated 3 August, 1983, the Chittagong Bench was established for the then
Districts of Chittagong, Hill Tracks and Bandarban and lastly by notification
dated 27 December, 1983, the Sylhet Bench was established for the then Sylhet
District only.

540. Then came the
Proclamation (Third Amendment) Order, 1986 (Proclamation Order No. III of 1986)
dated 17 June 1986
by which the concept of sessions of the High Court Division was brought back,
to be called Circuit Benches. It was provided in clauses (3) and (10) of the
substituted paragraph 4A of the Schedule as follows:

"(3) The
permanent Benches of the High Court Division established at Rangpur, Jessore, 'Barisal, Chittagong, Comilla and Sylhet before the
commencement of the Proclama-tion (third Amendment) Order, 1986 (Proclamation
Order No. III of 1986), shall, on such commencement, be deemed to be Cir-cuit
Benches constituted under this para-graph for the areas for which the permanent
Benches were established and shall function as such and all the provisions of
this para-graph shall accordingly apply to them.

(10) When Article
100 of the Constitution is revived, the Circuit Benches shall be deemed, to be
sessions of the High Court Division outside Dhaka under that article and all
the rules and orders made by the Supreme Court or the Chief Justice relaying to
the practice and procedure of the Circuit Benches or their constitution,
jurisdiction and power "shall be deemed to have been made for the purposes
of that article".

541. The
Constitution was finally revived on 10 November, 1986 by the Constitution (Final Re-vival)
Order, 1986 (Chief Martial Law Administra-tor's Order No. VIII of 1986) and
Martial Law was withdrawn on the same day by another Proclamation.

542. On 24 November, 1986, the
following notification was caused to be issued by the learned Chief Justice;

BANGLADESH SUPREME COURT

High Court Division

Dhaka, the 24th November 1986

No. 9096-G-In exercise of the powers conferred by Article 100 of the Constitution of the People's Republic of Bangladesh and in suppression of all previous orders in this respect, the Chief Justice of Bangladesh has been pleased to appoint with the ap-proval of the President, Rangpur, Jessore, Barisal, Chittagong, Comilla and Sylhet to be the places in which Sessions of the High Court Division of the Supreme Court may be held on such dates and for such period as may be specified by the Chief Justice.

By order of the Chief Justice

Quamrul Islam Siddiquee

Registrar-in-Charge.

543. In pursuance of the said notification, six other notifications were issued on the same day de-fining the areas and powers of the Sessions at the aforesaid six places. A sample of such notification is reproduced below:

BANGLADESH SUPREME COURT

High Court Division

NOTIFICATION

Dhaka, the 24 November 1986.

No. 9107-G In pursuance of the order issued un-der Notification No. 9096-G dated 24th November 1986, the Chief Justice is pleased to direst that the Sessions of the High Court Division of the Supreme Court shall be held at Chittagong with immediate ef-fect and until further orders and shall exercise the powers and jurisdiction as follows:

1.The Sessions of the High Court Division at Chittagong shall exercise concurrent jurisdiction and powers including filing with the High Court Division at Dhaka in respect of all Division Bench matters and Single Bench matters including all applications in connection with such matters arising within the Districts of Chittagong, Cox's Bazar, Rangamati Hill Tracts, Bandarban and Khagrachari, except in respect of Original Side Matters, Criminal Appeals against sentences of death

and transportation for life and against acquittals, application under section 561A of the Code of Criminal Procedure, matters relating to Contempt of Court, First Appeals valued exceeding Taka 50,000 and First Miscellaneous Appeals valued exceeding Taka 50,000 against decrees and orders in civil suits and cases.

2. The High Court Division at Dhaka shall exercise exclusive jurisdiction and power in-cluding filing in respect of all Original Side Matters, Criminal Appeals against sentenc-es of death and transportation for life and against acquittals, applications under sec-tion 561A of the Code of Criminal Proce-dure, matters relating to Contempt of Courts and First Appeals valued exceeding Taka 50,000 and First Miscellaneous ap-peals valued exceeding Taka 50,000 against decrees and orders in civil suits and cases, arising within the jurisdiction of the districts of Chittagong, Cox's Bazar, Ranga-mati Hill Tracts, Bandarban and Khagracha-ri.

3. The appeals/Petitions/applications in Division Bench matters filed before the Sessions of the High Court Division at Chittagong when the Division Bench is not in session-these should be filed before the Single Bench there to save limitation. The Single Bench will also pass urgent ad interim Orders in such Division Bench matters which are to remain in force until the Division Bench sits when it will be placed before the Division Bench.

4. Notwithstanding anything contained in any of the-foregoing paragraphs the Chief Justice may at any stage of any proceeding, on the application of any party to the proceeding or of his own motion, transfer any case, ap-peal or application from the High Court Di-vision at Dhaka to the Session of the High Court Division at Chittagong, or from the Session of the High Court Division at Chittagong to the High Court Division at Dhaka or to any other Session of the High Court Division for hearing and disposal.

5. Benches will be constituted for the Sessions of the High Court Division at Chittagong from time to time as and when the Chief Justice may deem necessary.

6. Savings:
Notwithstanding anything contained in paragraphs 1 and 2 all cases and appeals including all applications filed therein ex-cept Original Side Matters, pending immediately before the commencement of this Order, before the Circuit Bench of the High Court Division at Chittagong shall contin-ue to be tried, heard and disposed of by the Session of the High Court Division at" Chittagong as if this order had not come into force subject, however, to any Order that may be passed by the Chief Justice un-der foregoing paragraph.

By Order of the
Chief Justice

Quamrul Islam
Siddiquee

Registrar-in-Charge.

544. In pursuance

of the aforesaid orders of the learned Chief Justice, the Sessions of the High Court Division started functioning at the six places outside Dhaka from the end of November, 1986. The opposition to the establishment of the permanent Benches outside Dhaka which was mounted by the Supreme Court Bar Association on principle during Martial Law continued with more vigor and on dif-ferent grounds against the holding of Sessions at six places after the restoration of the Constitution. It should also be mentioned that it provoked a counter movement by lawyers at those six places for setting up of permanent Benches instead of Sessions. In this context, Parliament passed the Constitution (Eighth Amendment) Act, 1988 (published in the Gazette on 9 June, 1988) inter alia, substituting Article 100 as follows:

7.100. Seat of Supreme Court.-(1) Subject to this article, the permanent seat of the Supreme Court shall be in the capital.

(2) The High Court Division and the Judges thereof shall sit at the permanent seat of the Supreme Court and at the seats of its permanent Benches.

(3) The High Court Division shall have a permanent Bench each at Barisal, Chittagong, Comilla, Jessore, Rangpur and Sylhet, and each permanent Bench shall have such Benches as the Chief Justice may determine from time to time.

(4) A permanent Bench shall consist of such number of Judges of the High Court Division as the Chief Justice may deem it ne-cessary to nominate to that Bench from time to time and on such nomination the Judges shall be deemed to have been transferred to that Bench.

(5) The President shall, in consultation with the Chief Justice, assign the area in relation to which each permanent Bench shall have jurisdictions, powers and functions conferred or that may be conferred on the High Court Division by this Constitution or any other Law; and the area not so assigned shall be the area in relation to which the High Court Division sitting at the permanent seat of the Supreme Court shall have such jurisdictions, powers and functions.

(6) The Chief Justice shall make rules to pro-vide for ail incidental, supplemental or con sequential matters relating to the permanent Benches".

545. The President by notifications dated II.6.88 assigned the areas of for permanent Benches under Article 100(5). A sample of such notification is reproduced below:

GONUPROJATONTRY
BANGLADESH SARKER

AIN O BICHER MONTRONALOYE

BICHER SHAKHA - 4

S.R.O No. 136-Ain
Date: 28-2-95
Bang
No.198- Bicher – 4/5 se- 2/88. 11-6-88 Ing.

PROGGAPON

Gonoprojatontry
Bangladesher Songbidhaner 100 onnosedder (5) dofer bidhen motabek Rastropoty, Bangladesher Prodhen Bicherpotir sohid poramorshocrome Rangpur, Lalmonirhat, Gaibandha, Nilphamari, Korigram, Rajshahi, Nator, Nowga, Nababgonj, Pabna, Sirajgonj, Bogura, Joypurhat, Dinajpur, Thakurgao o Ponchogher Zilla somoher antorvokto Alaka sompurky High Court Bivager upor arpito ba oapito hoite pare aerup akhtier, khamota ba daetto thakbe bolia nirdisto koriasen.

Rastropoter Adesh Crome

Sha-

(Bicherpoty Mohammed
Abdul Kuddus Chowdhury)

Shochib.

On the same date
i.e. II. 6.88 the learned Chief Justice framed the following Rules under Sub-art. (6):

BANGLADESH SUPREME COURT

HIGH COURT BIVAG

PROGGAPON

Dhaka, 28 she Joisto, 1395/11-e June, 1988

No.4822-G- Gonoprojatontry Bangladesher Songbidhaner 100 onnosedder (6) dofer bidhen motabek Bangladesher Prodhen Bicherpoty nimnolikhito bidhimala pronaon korilen:-

1. Ae bidhimala Supreme Court (High Court Bivag) sthaye Bench sthapon 1988 name ovihito hoybe.

2. Ieha obilombe karjokory hoybe.

3. Bisho-e othoba prosogger poriponthy kono kiso na thakile, ae bidhimalaye---

(ka)“Bench” bolite Songbidhaner 100 ‘onnosed’ motabek protistheto High Court Bivager sthaye Bench bojabe.

(kha)“Prodhen Bicherpoty” bolite Bangladesher Prodhen Bicherpotike bojabe abong Samoekvabe Prodhen Bicherpoter daetto palonrato Bicherpotike bojabe.

(ga)“Bicharok” bolite Supreme Courter High Court Bivager Bicharok abong otiricto Bicharoke bojabe.

4. Kono Bencher jonno nirdestro Alakae udvoto sokol songlisto Benche daer korite hoibe abong ukto Bench-e shea sob bishoe nispotty hoebe. Anno kono Bencher jonno nirdestro nohe amon alaka hoete udvoto bishoesomoho Supreme Courter High Court Bivager sthaye ashone daer kority hoybe abong tothae shesob bishoye nispotty hoybe.

5. Atro bidhesomoho probortoner obbebohito purbe High Court Bivager sthaye ashone betito.onnano sthane ashen High Court Bivager bivenno sessioner officesomoho akhan hoete Bencher registry hisabe karjo porichalona koribeabong uha akjon Deputy Register o shaerup sonkhak officer o kormocharybrindo dhara gotheto hoybe jahara ae bidhimala probortoner obbebohito purbe kormorato chilen abong shaesob officer o kormochary dhara jahader 1987 soner Supreme Courter High Court Bivager (kormochary) niogbidhe onoshare prodhen becherpoty o register kortic niog prodhen kora hoybe.

6. Atro bidhi karjoker hoyer obbebohito purbe kono Bencher jonno nirdestro Alaka nirdestro alaka hoete udvoto bishoesomoho jaha bortoman High Court Bivager sthaye ashone othoba onno Benche bicharadhen rohiase she-e bishoesomoho she-e Benche sthantorito hoyease bolia gonno hoybe abong High Court Bivager sthaye ashoner Alaka hoyte udvoto bishoyesomoho jaha bortomane onno kono Benche bicharadhin rohiase she-e bishoyesomoho High Court Bivager sthaye ashone sthantorito hoyease bolia gonno hoybe.

7. Songbidhaner 100 onnosedder (4) dofer motabek Prodhen Bicherpoty konno Bicharoke konno Bencher jonno mononito korile ukto Bicharok, Bicharok hisabe bodler karone procholito Ain onushare jerup Vata o subedhadi power joggo hoyben, taha paite odhekari hoyben.

8. Prodhen Bicherpoty; somoye, Adesh bole Benche karjoroto sorbojesto bicharokke, taher je kono khamota abong daetto orjon korite pariben abong orpito oerup khamota o daetto othoba uher ongsho bishes akevabe protteher korete pareben.

9. purbeullekheto bidhansomoher sadharon boysesto behoto na
korea
abong Songbidhaner 100 onnosedder
sapekhe Benchsomoher karjo susthovave porichalonar nimitte Prodhen
Bicherpoty jerup proyojon bibechona koriben somoye somoye sheaerup adesh
prodhan korete pareben.

Adeshcrome

Md.

Hamidul Huq,

Register.

546. The amended
article 100 and the Rules made by the learned Chief Justice as above have been impugned in Writ Petition Nos. 1252 of 1988 and 1176 of 1988 out of which these appeals no.42/88 and 43/88 respectively have arisen. Now it will be necessary to refer to the facts, of the cases briefly to sec the occasion and cause for questioning the consti-tutionality of the amended article 100 and the Rules made thereunder.

547. The appellant
in Civil Appeal No. 42/88 was respondent No.5 in Writ Petition No.963 of 1988 in which the learned Vacation Judge of the High Court Division at its permanent seat granted on 26.5.1988 an ad-interim order of stay of the pub-lication of the result in the election for the post of Chairman of No. 13 Bathgaon Union Parishad within Chhatak Upazila of Sunamganj District. The appel-lant was anxious id have the said matter taken up for hearing in order to submit his prayer for vacating the stay order and summary disposal of the writ petition and. for this purpose a counter-affidavit was prepared and the appellant was to affirm the counter-affidavit on 27.5.1988(7) but the Commissioner of Affidavits refused to allow the counter-affidavit to be affirmed at Dhaka on the ground that the writ petition stood transferred to the permanent Bench at Sylhet pursu-ant to the provisions of rule 6 of the Supreme Court of Permanent framed under Article 100(6) as amended by the Constitution (Eighth Amendment) Act, 1988. (the impugned arti-cle).

548. The appellant
then filed aforesaid Writ petition No.1252 of 19.88 on 18.7.88 challenging the transfer of Writ Petition No.963/88 from Dhaka to Sylhet of Bench and for a declaration that the impugned Article 100 and the Rules made thereunder are uncon-stitutional and void on the ground, inter alia, that Article 142 of the Constitution does not authorise the making of any amendment which alters or mate-rially affects the basic structure of the Constitution, particularly such as the jurisdiction, independence and effectiveness of the High Court Division; that the impugned amendment and the Rules rendered the High Court Division extinct as an integral compo-nent of the Supreme Court and discharging constitu-tional Jurisdiction and powers throughout the territo-ry of the Republic, that the impugned amendment is inconsistent with the Preamble, Arts. 7, 8, 22, 44 etc. and the scheme, role, powers and jurisdiction of the High Court Division, and therefore, subversive of the basic structure and that the Rules made are be-yond the authority under amended Article 100 and the Constitution.

549. The appellant
in Civil Appeal No. 43 of 1988 filed Writ Petition No. 1176 of 1988 making similar prayers and raising similar grounds as in Writ Petition No. 1252 of

1988 alleging, inter alia, that he had contested for chairmanship of No.2 Hinguli Un-ion Parishad, Upazila Mirersarai. District Chittagong in the election held on 10.2.88, that he filed Writ Petition No. 495/88 challenging the order of the Elec-tion Commission for opening additional polling station in Ward No. 3, that a Rule was issued by the, High Court Division, Dhaka and an interim order was passed restraining the Election Commission from publishing the election result, that the Registrar of the Supreme Court, High Court Division (respon-dent No.2) had been taking steps for sending the record of the aforesaid Writ Petition to the permanent Bench at Chittagong in purported compliance with rules 4 and 6 of the impugned Rules and that thus the appellant was being denied to affirm affidavit and have his writ petition heard in the High Court Division at Dhaka.

550. Both the writ petitions were heard togeth-er and by the impugned judgment and order dated 15 August, 1988, rejected summarily.

551. Leave to appeal from the said judgment was sought for by the appellants alleging that the case was one of first impression relating lo amend-ment of the Constitution, but the High Court Divi-sion, by rejecting the writ petitions summarily, wrongly declined to decide upon a full consideration of the matter the important questions raised as lo the validity of the impugned Article 100 and the Rules made thereunder which involves interpretation of the Constitution.

552. Having heard the learned counsel briefly on merit it was felt that the summary manner in which the High Court Division dealt with the grave issues of Constitutional interpretation involved in the matter was anything but fair and satisfactory and leave was, accordingly, granted for an authoritative pronouncement on the important questions of public importance which have been raised.

553. We have heard lengthy submissions from the learned counsel of both sides spreading for nearly a month supported by decisions, text books, journals, extracts from various legal publications, etc. and at the end followed by equally voluminous written arguments. The submissions made by the learned coun-sels for the appellants are generally the same, the dif-ference lies only on emphasis put on some parts thereof by one or the other. Mr. Amirul Islam and both the learned counsels who appeared as amicus curiae have adopted their submission, explained them in their own way adding one or two new dimensions but made no new ground. For the sake of clarity of understanding of the broad points that have emerged from the long and often complex deliberations and the views I have taken on them, I propose to set out, before entering into details, the main submissions of the appellants in a nutshell in the form of issues and record my views thereon.

Issues

I. Parliament in exercise of its power of amendment under Article 142 of the Constitution cannot alter the essential features or the basic struc-ture and framework of the Constitution. Although there is no express limitation on the said power, the reading of the Constitution as a whole (particularly Article 7) would show that there are some fundamen-tal, permanent and unalterable factures in the Constitution which cannot be amended and to that extent there is implied limitation to the amending power.

II. The word "amendment" in any case is of limited import and, therefore, cannot authorise the abrogation or destruction of the Constitution or any of its structural pillars, such as the Judiciary is, which will make the Constitution defunct.

III. The impugned amendment (of Article 100) has destroyed the High Court Division as originally conceived as an integral part of the Supreme Court of Bangladesh, the highest judicial organ of the Uni-tary Republic of Bangladesh, vested with plenary powers without any territorial limits, and further has created seven mini—High Courts, with territorially limited jurisdiction. The impugned amendment has covertly amended, inter alia, all the articles of chap-ter I of Part VI (The Judiciary) of the Constitution destroying the Supreme Court or at least making it ineffective.

IV. The impugned amendment is ultra vires be-cause the mandatory requirement of Article 142(1) (a) (i) regarding long title of the Bill was not complied with.

V. Article 100(5) under which the President has been empowered, in consultation with the Chief Justice, to assign the area in relation which each per-manent Bench shall have jurisdictions powers and functions of the High Court Division is void on the ground of impermissible delegation of the amending power by the Parliament to the President.

VI. No effective and substantial consultation having taken place as required under Art, 100(5), the notifications made by the President assigning the ar-eas to the permanent Benches were, in any case, bad.

VII. Even if the impugned amendment was val-id, the impugned Rules made by the learned Chief Justice, particularly Rules 4 and 6 are void as not be-ing authorised by the rule-making power.

My answer to all the issues are in the negative except Issue No. II with which I agree. Now I may proceed to consider the matter in details.

Issue No. 1

The learned counsel for the appellants referred to the Preamble, Articles 1, 7, 8, 11, 22, 31, 44, 94 and other articles of Part VI (Chapter 1) of the Con-stitution and submitted that there are some essential and fundamental features in the Constitution, for ex-ample, supremacy of the Constitution, sovereignty of the people and Republic, Unitary and republican character of the State and Government, limited Gov-ernment with three Organs performing function on behalf of the people by and under the authority of the Constitution, separation of powers between the three co-ordinate Organs of the State, Rule of Law, and one integrated Supreme Court with plenary power throughout the republic in conformity with the uni-tary Stele, etc. These essential features are so funda-mental that they are not amenable to the amending process under Article 142 of the Constitution. It has been argued that the power of the Parliament to amend the Constitution in its

essential parts is sub-ject to an inherent or implied limitation because the ultimate sovereignty resides in the people, that the Parliament is only a creature of the Constitution and that the power to amend the essential features of the Constitution is an application of the ultimate sove-reignty which the parliament does not possess.

554. Syed Ishtiaque
Ahmed submitted that Ar-ticle 7 which is a unique feature of our Constitu-tion contains the entire basis of the submission as to the essential features of the Constitution being unamendable. Mr. Ahmed has described Article 7 as the 'pole-star' with reference to which the validity of all laws including an amendment of the Constitution is to be judged. He has pointed out that Article 7 has declared the Constitution to be the supreme law of the republic being the solemn expression of the will of the people and if 'any other law' including an amending law is inconsistent with the Constitution, 'that other law' shall, to the extent of the inconsis-tency, be void.

555. The learned
Attorney-General, however, submitted that the power of amendment under Article 142 is not subject to any limitation whatsoever ex-cept those provided in" the article itself. The amend-ing power being a 'constituent power', which is vest-ed in the Parliament, is very wide and any provision of the Constitution can be amended in compliance with the provision of Article 142.

556. The learned
counsels for the appellants in support of their submission on the issue relied on the celebrated case of Kesa vananda Bharali vs. The Stale of Kerala AIR 1973(SC) 1461 and other subse-quent cases i.e. Smt. Indira Gandhi vs. Rajraranin AIR 1975 S.C. 2299, Minerva Mills Ltd. Vs. Un-ion of India AIR
1980 S.C. 1789 and Waman Rao vs. Union of India AIR 1981 S.C. 271 from the In-dian Jurisdiction. Kesavananda's case is a locus classics on the subject and a monument of legal indus-try and I shall, let me admit here; draw profusely from the said decision in appropriate places.

557. Both Dr. Kamal Hossain and Syed Ish-tiaque
Ahmed, however, have submitted that 'the basic feature' theory was not discovered for the first time in Kesavananda's case but; it has been recog-nized in other jurisdictions from long before includ-ing in the case of Fazlul Quader Chowdhury Vs. Mohammad Abdul Haque of the then Supreme Court of Pakistan, 1963 PLD 486(SC) =18 DLR (SC) 69.

Dr. Hossain even
went back and quoted a passage from Marbury vs. Madison, 1 Cranch 137, 2 Lawyers Edition 60(1803):

"That the
people had an original right to es-tablish for their future government such principles, as in their opinion, shall most conduce to their own happiness, is the basis on which the whole American Fabric has been erected. The exercise of this original right is a very great ex-ertion, nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the au-thority from which they proceed is supreme, and can seldom act, they are designed to be permanent.”(emphasis added)

559. Long before
Chief Justice Marshall said-as above, Dr. Hossain pointed out, George Wythe, a

teacher of Marshall,
sitting in the Court of Appeals of the State of Virginia (1782) said thus:

“I shall not
hesitate, sitting in this place, to say to the general court, Fiat justitia, ruat coelum; and to the usurping branch of the legisla-ture, you attempt worse than a vain thing; for although you can not succeed, you set an exam-ple which may convulse society to its centre. Nay, more, if the whole legislature, an event to be deprecated, should attempt to overleap, the bounds prescribed to them by the people. I. in administering the public justice of the court will meet the united powers at my seat in this tribunal; and pointing to the constitution will say to them, there is the limit of your authority; and hither shall you go but no further."Cited in Cahn, Supreme Court and Supreme Law (1954) P.18) (emphasis added)

560. Syed Ishtiaque
Ahmed on his part referred to two dicta in the judgment of the Privy Council in Bribery Commissioner v. Ranasinghe (1965) A.C. 172 at 193,198;

After setting out
ss. 18, 29(1) and 29(2) (a) [of the Ceylon (independence) Order in Council 1947], the Judicial Committee observed:

"There follow
(b), (c) and (d), which set out further entrenched religious and racial matters, which are not to be the subject of legislation. They represent the solemn balance of rights, be-tween the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution and these are therefore unalterable under the Constitution".

The second of the
dicta is the remark of the Judicial Committee that the essential difference between Mc Cawley v. The King (1920) A.C.691 and the Ceylon case was that in Mc Cawley the Queensland legislation was up-held "since it must be treated as pro tanto an al-teration
of the Constitution, which was neither fundamental in the sense of being beyond change nor so constructed as to require any special legislative process to pass upon the topic dealt with.”

Dr. Kamal Hossain
relied upon the Bribery Commissioner's Case for a different purpose which will be relevant in connection with issue No. IV.

561. Lord Pearce in
that case held that "a legis-lature has no power to ignore the conditions of law-making that are imposed by the instrument which it-self regulates its power to make law. This restriction exists independently of the question whether the leg-islature is sovereign, as is the legislature of Ceylon, or whether the Constitution is uncontrolled as the Board held the Constitution of Queensland to be. Such a Constitution can be indeed be altered or amended by the legislature, if the regulating instru-ment so provides and if the terms of those provisions are complied with:.....Therefore in the case of amendment and repeal of the Constitution the speaker's certificate is a necessary part of the legisla-tive process and any bill which docs not comply with the condition precedent of the proviso (to S. 29 (4)) is and remains, even

though it receives the royal assent, invalid and ultra vires". This is the main part of the decision in the Bribery Commr's case and the dicta relied upon by Mr. Ahmed have been held to be obiter. More of this case later on.

562. Before taking up article 142 which falls for interpretation it becomes necessary to stale here certain principles which are to be kept in view for the purpose of interpretation of a Constitutional pro-vision. Munir CJ. in the Reference (made by the President of Pakistan) case, PLD 1957 S.C.219=9 D.L.R (SC) 178 referred to several principles and ob-served that the fundamental principle of the Constitutional construction has always been to give effect to the intent of the Framers of the organic law and of the people adopting it and further endorsed the Ohio Judge in H.M. Co v Miller (92 Ohio St. 15) who said that the pole-star in the Construction of a Con-stitution is the intention of its maker and adopters.

The following principles are emphasised:

(i) The intention of the maker of the instrument is to be gathered from the language used. If the language is not only plain but admits of only one meaning the language declares the intention. It matters not what the conse-quences are.

(ii) The intention is to be gathered from a con-sideration of the whole enactment. No, word or expression should be considered in vac-ua.

(iii) Every word of a constitutional instrument must be given effect to; no word, as a general rule, should be rendered meaningless or inoperative. .

(iv) If the words are susceptible of more than one meaning, then in the words of Lord At-kinson in Vacher's case (1911-1913) All ER Reprint 241 (at p.248) "it is, legitimate to consider the consequences which would result from any particular construction, for, as there are many things which the legisla-ture is presumed not to have intended to bring about, a construction which would not lead to any one of those things should be preferred to one which would lead to one or more of them."

(v)"The length and detail of modern legislation" wrote Lord Evershed M.R., "has undoubtedly reinforced the claim of literal construction as the only safe rule" (Maxwell 11th Eel. P. vi)

563. In the case of the Queen v. Burah, (1878) 3 AC 889 at pp. 904-5(PC) Lord Selborne observed:

"The established courts of justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by

which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates on express condition or restriction by which that power is limited..... it is not for any court of justice to inquire further, or to enlarge constructively those conditions or re-strictions." (Emphasis added)

Although the above observations were made in the context of the legislative power, they have equal, if not greater, relevance in the context of the power of amendment of the Constitution.

564. For our present purpose we may with great advantage quote from Kania, C.J. in the case of A.K. Gopal Vs. The State of Madras AIR 1950 S.C. 27 = 1950 S.C.R. 88 (at pp. 119-121)

"In respect of the construction of a Consti-tution Lord Wright in James v. The Common-wealth of Australia, 1936 AC-578 at p.614 ob-served that 'a Constitution must not be construed in any narrow of pedantic sense'. Mr. Justice Higgins in Attorney-General of New South Wales v. Brewery Employees Union, (1908)6 Com LR 469 at pp. 611-12 observed: "Although we are to interpret words of the Con-stitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting—to remember that it is a Constitution, a mechanism under which laws are to be made and not a mere Act which de-clares what the law is to be". In the Re the Central Provinces and Berar Act XIV of 1938 FCR 18 at p.37 = (AIR 1939 FC 1), Sir Mau-rice-Gwyer, C.J. after adopting these observa-tions said: "Especially is this true of a Federal Constitution with its nice balance of jurisdic-tions. I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it; bet I do not imply by this that they arc free to stretch or pervert the language of the enact-ment in the interest of any legal or constitution-al theory or even for the purpose of supplying omissions or of correcting supposed errors." There is considerable authority for the statement that the Courts are not at liberty to declare in Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the funda-mental law has not limited, cither in terms or by necessary implication, the general powers conferred upon the Legislature we cannot declare a limitation under the notion of having discov-ered something in the spirit of the Constitution which is not even mentioned in the instrument. It is difficult upon any general principles to lim-it the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority. It is also stated, if the words be positive and without ambiguity, there is no authority for a Court to vacate or repeal a Statute on that ground alone. But it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of Courts of justice to declare void any legislative enactment. Any assumption of au-thority beyond this would be to place in the hands of the judiciary powers too great and too indefinite either for its own security or the protection of private rights." (emphasis added)

565. Keeping the aforesaid principles in view, Article 142 providing for amendment of the Consti-tution

may now be seen and examined which reads as follows:

"Amendment of the Constitution.

142. [(1)]
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 Par-liament;

(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.

[(1A)
Notwithstanding anything contained in clause (l), when a Bill, passed as
aforesaid, which provides for the amendment of the Preamble or any provisions
of articles 8, 48, 56, 58, 80,92A or this arti-cle, is presented to the
President for assent, the Pres-ident, shall, within the period of seven days
after the Bill is presented to him, cause to be referred to a ref-erendum the
question whether the Bill should or should not be assented to.

(1B) A referendum
under this article shall be conducted by the Election Commission, within such
period and in such manner as may be provided by law, amongst the persons
enrolled on the electoral roll prepared for the purpose of election lo the
office of President.

(1C) On the day on
which the result of the refe-rendum conducted in relation to a Bill under this
arti-cle is declared, the President shall be deemed to have—

(a) assented to the
Bill, if the majority of the total votes cast are in favour of the Bill being
assented to; or

(b) withheld assent
there from, if the majority of the total votes cast are not in favour of the

Bill being assented to.

[(2) Nothing in
article 26 shall apply to any amendment made under this article]."

566. The article
itself has undergone considera-ble amendment since its inception. By the
Constitu-tion (Second Amendment) Act 1973 (Act XXIV of 1973) art. 142 was
renumbered as clause (1) of that article from 15 July 1973. The words "amendment by way of
addition, alteration, substitution or repeal" were substituted for the
words" amended or repealed." Sub-art (2) was added. Sub-Arts. (1A),
(1B), (1C) were inserted by the Second Proclamation Order No. IV of 1978.

567. According to
dictionary meaning, to "amend", inter
alia, means, to "free from faults", cor-rect, rectify, reform,
make alteration, to repair, to better and surpass". For the purpose of
this issue the "amendment" will be understood in the sense of
'alteration' as was understood by the majority judg-ment in Kesavanda's
case in regard to parliament's power to amend the basic structure and
framework of the Constitution.

568. It will be
seen, in the first place, that there is no substantive limitation on the power
of the parliament to amend any provision of the Con-stitution as may be found
under Art. V of the Consti-tution of the USA which, inter alia, says "provided that no amendment which may be made
prior to the year one thousand eight hundred and eight shall in any manner
affect the first and fourth clauses in the ninth section of the first article;
and that no state, without its consent, shall be deprived of its equal suffrage
in the Senate". Such substantive limitation is also there in the West
German Constitution of 1949. The French Constitution by an amendment in 1884
declared that the National Assembly shall never entertain a proposal for
abolition of the republican from of government. In our Constitution there is no
such article or clause and thus no article is unamendable. The limitation which
is provided in art. 142 re-lates only to procedure for amendment and not sub-stantive
in the sense that no article is beyond the purview of amendment.

569. In sub-article
(1) the limitation lo the plenary power of amendment is that 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 and (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.

570. Ours is a
controlled Constitution because the Constitution cannot be amended by the
ordinary legislative process but it requires a special procedure as above. In
case some provisions, namely, the Pre-amble, Articles 8, 48, 56, 58, 80, 92A
and Articles 142 itself, further special and rigorous procedure has been
provided in Sub-art (1A). If a Bill is passed for amendment of any of these
provisions the President will have no option but to refer the same to a refe-rendum
on the question whether the Bill should or should not be assented to. The
Preamble and the arti-cles referred to in sub-article (1A) are as much amen-able
to amendment by the Parliament as any other provision but the procedure in
respect of these provi-sions includes in addition a referendum after the passing
of the bill. Similar strict procedure is provided in Article V of the U.S.
Constitution where an amend-ment to be valid requires ratification by the
legisla-tures of three fourths of the several states, or by con-ventions in
three fourths thereof. In India
if the amendment relates to any provision mentioned in the proviso to sub-art.

(2) of Article 368, the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States. Therefore, these provisions are only, what are called, more entrenched provisions but not altogether unamendable.

571. It appears clearly that there is no sub-stantive limitation on the power of the Parliament to amend any provision of the Constitution. It may be said, in other words, that there is no express limita-tion on the power. A close examination of Article 142 shows that it restricts only the procedure or the manner and form required for amendment but not the kind or the character of the amendment that may be made.

572. Sub-article (1) shows that any provision the Constitution may be amended by way of addition alteration, substitution or repeal by Act of Parlia-ment. Any provision evidently includes all provi-sions. The language is clear and suffers from no am-biguity. Any provision could not be said to mean some provision. This clear language amply indicates the wide sweep and plenitude of power of the Parlia-ment to amend any provision of the Constitution. It is difficult, therefore, to conceive, as contended by the appellants, that there are some provisions called 'basic' which are not amenable to the amendatory process.

573. It is significant that the article opens with a Non Obstante Clause. A Non-Obstante Clause is usually used in a provision to indicate that, that provision should prevail despite anything to the contrary in the provision mentioned in such Non Obstante Clause. (The Interpretation of Statutes-BINDRA P.949). In the presence of such a clause in Article 142, it is difficult to sustain the contention of the appellants that some provisions containing basic features' are unamendable or that the amendment of any provision has to stand the test of validity under Article 7.

574. The 'basic feature' theory does not appeal to reason on two fundamental grounds. The first is that it is inconceivable that the makers of the Con-stitution had decided on all matters for all people of all ages without leaving any option to the future generation.

Secondly, if it is right that they wanted the so-called 'basic features' to be permanent features of the Constitution there was nothing to prevent them from making such a provision in the Constitution itself. On the other hand, it has been noticed that the makers placed no limitation whatsoever in the matter of amendment of the Constitution except providing for some special procedure in Article 142. Further af-ter the incorporation of sub-article (1 A) providing for a more difficult procedure of referendum in case of amendment of the provisions mentioned therein, the contention as to further 'essential features' becomes all the more difficult to accept. The Constitution, as now stands, by the said sub-art (l A) amply manifests that except the provisions mentioned therein, no oth-er provision is so basic that it will need a referendum for its amendment to be incorporated in the Consti-tution.

575. All the provision of the Constitution are essential and no distinction can be made between es-sential and non-essential feature from the point of view of amendment unless the makers of the Consti-tution make it expressly clear in the Constitution it-self. If the positive power of amendment of the Con-stitution in Article 142 is restricted by raising the wall of essential features, the

clear intention of the Constitution-makers will be nullified and that would lead to destruction of the Constitution by paving the way for extra-constitutional or revolutionary chang-es. So long the Constitution exists; there is no other method of amendment open to the people. K.C. Wheare in 'Modern Constitutions' P.89-90 states, 'Moreover, once a Constitution is enacted, even when it has been submitted to the people for approv-al, it binds thereafter not only the institutions which it establishes, but also the people itself. The theory of implied and inherent limitation could not be al-lowed to act as a boa constrictor to the clear and un-ambiguous power of amendment.

576. In the Indian Jurisdiction the first chal-lenge to the amending power of the Parliament was made in relation to the Constitution (First Amend-ment) Act 1951 in the case of Shankari Prasad vs. Union of India AIR 1951 S.C.458. In that case Patanjali Sastri J. held that the terms of art. 368 (corre-sponding to our art. 142) are perfectly general and empowered Parliament to amend the Constitution without any exception whatever. Until the case of Golak Nath Vs. State of Punjab AIR 1967 S.C. 1643 the Supreme Court of India for more than a decade and a half had been holding that no part of the Constitution is unamendable and that Parliament may by passing a Constitution amendment Act in compliance with the requirements of article 368 amend any provision of the Constitution including the fundamental rights and article 368 itself. But in Golak Nath's case a majority of six judges of a spe-cial Bench of eleven overruled the previous decisions and took the view that though there is no express ex-ception from the ambit of Article 368 the fundamen-tal rights included in Part III of the Constitution could not by their very nature be subject to the pro-cess of amendment provided for in Article 368. The majority decision in Golak Nath's case, however, was superseded by the Constitution (24th amendment) Act 1971 by-inserting Clause (4) in Article 13 and Clause(1) and sub-article (3) in Article 368 as a result of which an amendment of the Constitution passed in accordance with Article 368, will not be 'law' within the meaning of Article 13 and the validity of a Con-stitution Amendment Act shall not be open to ques-tion on the ground that it takes away or affects a fun-damental right. Then came the famous case of Kesavanda (Supra) where the aforesaid 24th and other amendments of the Constitution were challenged be-fore a Bench consisting of 13 Judges. By majority judgment the decision in Golaknath was overruled, that is to say, the power of Parliament to amend Part III relating to fundamental rights was conceded.

577. On the question which is at issue before us, whether Parliament could alter the basic structure or framework of the Constitution, there was a sharp division of opinion among the Judges. Six Judges led by Sikri C.J. held in favour of the proposition but six other Judges led by Ray J, held the exact con-verse. The thirteenth Judge, Khanna J, was equivocal on the question. The summary of the views issued by the Court which, inter alia, says 'that Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution', was, however, signed by nine judges. In the subsequent cases, i.e. Indira v. Rajnarain, Minerva Mills Ltd., Woman Rao etc. the aforesaid view has been followed.

578. The majority judgment led by Sikri J came in for a good deal of criticism in the Annual Survey of Commonwealth Law 1973 P.33. Sikri C.J. in his decision, inter alia, relied on the two dicta of the Privy Council in the Bribery Commissioner's Case (Supra) as Mr. Ahmed has relied on them in the present case. It has been pointed out in the survey re-port that none of the dicta and decision relied upon goes squarely to the question of the Constituent or amending power of the legislature of a sovereign pol-ity and the basis for the majority judgment was not sound. I propose to reproduce the relevant portion from the said report which will be partly in answer to Mr. Ahmed

and in support of the point of view that I take in the evenly-matched decision in Kesavanda.

"Now these dicta are indeed of general interest, as showing the judicial Committee willing to contemplate restrictions of substance, not mere-ly "manner and form", and they certainly are of greater weight, for Sikri, CJ's purposes, than the other dicta and decisions he relied on as il-lustrative of constitutional implications and of implied restrictions on the power of legislatures (for none of these dicta or decisions goes squarely to the question of the constituent or amend-ing power of the legislatures of a sovereign pol-ity). But even the dicta in Bribery Commissioner v. Ranasinghe are made to bear too much weight by Sikri. C.J. since s.29 of the Ceylon (Constitution') Order in Council em-bodied an express limitation on the Constituent or amending power of the Ceylon Parliament. In the last analysis, the judgments of Sikri. C.J. and his four supporters must rest, so far as they go beyond the connotations of the word "amendment", on an argument in terrorem: an unlimited power of amendment could be abused and made the instrument of tyranny.

To this argument in terrorem. Khanna. J. like the six judges led by Ray. J...i opposes, firstly, the classical teaching that the virtue of the people, not devices and documents, nor laws and courts, is the only reliable fundament of liberty and justice, and that abuses non tollit usum: secondly, the fear that excessive rigidity may provoke, rather than prevent, an abandonment of constitutionality: and thirdly, the polemical irony of Lord Birkenhead in McCawtey:

Some communities, and notably Great Brit-ain, have not in the framing of constitutions felt it necessary, or thought it useful to shackle the complete independence of their successors. They have shrunk from the assumption that a degree of wisdom and foresight has been conceded to their generation which will be, or may be, want-ing to their successors, in spite of the fact that those successors will possess more experience of the circumstances and necessities amid which their lives are lived."

579. What is the nature of the amending pow-er in a written Constitution? What is the object, ne-cessity and scope of such power? The answer to these questions will clearly show the untenability of the argument of alleged permanence of some provi-sion and implied limitation on the otherwise unlim-ited power of amendment given to the Parliament ex-cept as provided in the article for amendment itself. Instead of paraphrasing the reasons, consider it will be fair and honest and more effective if I reproduce the relevant passages from Kesavananda containing the reasons and view which are identical with mine.

Palekar. J.

Para 1240. Strong in the Book (Modern Politi-cal Constitutions, Seventh revised edition, 1966 reprinted in 1970 at page 152 ob-serves "The constituent assembly, knowing that it will disperse and leave the actual business of legislation to another body, at-tempts to bring into the constitution that it promulgates as many guides to future ac-tion as possible. If it wishes, as it generally does, to

take out of the hands of the ordi-nary legislature the power to alter the con-stitution by its own act, and since it cannot possibly foresee all eventualities, it must arrange for some method of amendment. In short it attempts to arrange for the recrea-tion of a constituent assembly whenever such matters in future to be considered, even though that assembly be nothing more than the ordinary legislature acting under certain restrictions."

1241. Authorities
do not want who declare that such amending power is sovereign con-stituent power. Orfield in his book, the Amending of Federal Constitution (1942) page 155(1971) Edn.) Says that in America the amending body is sovereign in law and in fact. Herman Finer in his book, the the-ory and Practice of Modern Government, fourth edition 1961 reprinted in 1965, pages 156/157 says "Supremacy is shown and maintained chiefly in the amending process.....Too difficult a process, in short, ruins the ultimate purpose of the amending clause.....The amending clause is so fun-damental to a constitution that I am tempt-ed to call it the constitution itself." Geoffrey Marshall in his Constitutional Theory (1971)P.26 says "there will in most consti-tutional systems, be an amending process and some "collection" of persons possibly complex, in whom sovereign authority to alter any legal rule inheres.....Constitu-tions unamendable in all or some respects are non-standard cases and a sovereign entity whether (as in Britain) a simple legislative majority, or a complex specially convened majority can be discovered and labeled "Sovereign" in almost all systems. Wade in his Introduction to Dicey's Law of the Con-stitution, 10th Edition says as follows at page XXXVII "Federal government is a sys-tem of government which embodies a divi-sion of powers between a central and a number of regional authorities. Each of these "in its own sphere is co-ordinate with the others and independent of them." This involves a division of sovereignty. Yet somewhere lies the power to change this di-vision. Wherever that power rests, there is to be found legal sovereignty" Having re-gard to this view of the jurists, it was not surprising that in Sankari Prasad's case Patanjali Shastri, J. speaking for the court de-scribed the power to amend under Article 368 as "sovereign constituent power". (P. 106). By describing the power as "sovereign" constituent power it is not the intention here to declare, if somebody is al-lergic to the idea that legal sovereignty lies in this body or that. It is not necessary to do so for our immediate purpose. The word 'sovereign' is used as a convenient qualita-tive description of the power to highlight its superiority over other powers conferred under the constitution. For example, legis-lative power is subject to the constitution but the power to amend is not. Legislative activity can operate only the constitution but the power of amendment operates over the constitution. The word 'sovereign', therefore, may, for our purpose, simply stand as a description of a power which is superior to every one of the other powers granted to its instrumentalities by the con-stitution.

1261. It is
unnecessary to multiply cases to ap-preciate the width of the amending power in a 'rigid' Constitution. Even the dictionaries bring out the same sense. The word 'amend' may, have different nuances of meaning in "different contexts, like 'amend one's con-duct'; "amend a letter or a document," "amend a pleading" "amend a law" or "amend a Constitution". We are concerned" with the last one, namely, what an amend-ment means in the context of a Constitu-tion which contains an amending clause. In the Oxford English Dictionary, Vol.1 the word 'amend' is stated to mean "to make professed improvements in (a measure be-‘fore Parliament); formally, to alter in detail, though practically it may be to alter its principle so as to thwart it".

1262. Sutherland in
his Statutes and Statutory Construction, third edition, Vol 1. P.325 has explained an "amendatory act", as any change of the scope or effect

of an existing statute, whether by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form.

1273. We thus come to the conclusion that so far as the wording of Art. 368 itself is con-cerned, there is nothing in it which limits the power of amendment expressly or by necessary implication. Admittedly it is a large power. Whether one likes it or not, it is not the function of the court invent limi-tations where there are none. Consequences of wreck less use of the power are political in character with which we are not con-cerned. Consequences may well be consid-ered in fixing the scope and ambit of a power. Where the text of the statute creating the power is unclear or ambiguous. Where it is clear unambiguous courts have to imple-ment the same without regard to conse-quences good or bad, just or unjust. In Vacher's case 1913 AC 107 Lord Shaw ob-served at "page 129" Were they (words) am-biguous, other sections or sub-sections might have to be invoked to clear up their meaning but being unambiguous, such a reference might distort that meaning and so produce error. And of course this is a fortio-ri the case, if a reference is suggested, not to something within, but to considerations extraneous to, the Act itself. If, instance, it be argued that the mind of parliament "looking before and after" having in view the past history of a question and the future consequences of its language, must have meant something different from what is said, then it must be answered that all this essay in psychological dexterity may be interesting, may help to whittle language down or even to vaporise it, but is a most dangerous exercise for any interpreter like a Court of law, whose duty is loyally to ac-cept and plainly to expound the simple words employed."

Khanna. J.

1404. Each generation, according to Jefferson, should be considered as a distinct nation, with a right by the will of the majority to bind themselves but none to bind the suc-ceeding generations, more than the inhabi-tant of another country. The earth belongs in usufruct to the living; the dead have nei-ther the power nor the right over it. Jeffer-son even pleaded for revision or opportunity for revision of constitution every nineteen years. Said the great American statesman:

> "The idea that institutions established for the use of the nation cannot be touched or mod-ified, even to make them answer their end, because of rights gratuitously supposed in those employed to manage them in the trust for the public, may perhaps be a salutary provision against the abuses of a monarch, but is most absurd against the nation itself. Yet our lawyers and priests generally indi-cate this doctrine and suppose that preceding generations held the earth more freely than we do had a right to impose laws on us. unalterable by ourselves, and that we in the like manner, can make laws and impose burdens on future generations, which they will have no right to alter: in fine that the earth belongs to the dead and not the living."

The above words were quoted during the course of the debate in the Constituent Assembly (see.Vol X Constituent assembly Debates, P.975)."

1405. Thomas Paine
gave expression to the same view in the following words:

"There never
did, there never will and there never can exist a Parliament, or any
description of men, or any generation of men, in any country, possessed of the
right or the power of binding and controlling posterity to the 'end of time' or
of com-manding for ever how the world shall be governed, or who shall govern
it; and there-fore all such clauses, acts or declarations by which the makers
of them attempt to do what they have neither the right nor the power to do, nor
take power to execute, are in themselves null and void. Every age and generation
must be as free to act for itself in all cases as the ages and generations
which preceded it. The vanity and presump-tion of governing beyond the grave
is the most ridiculous and insolent of all tyran-nies. Man has no property in
man. Neither has any generation a property in the genera-tions which are to
follow. We may also re-produce the of Pt. Nehru in his speech to the
Constituent Assembly on November 11.1948.

"And remember
this, that while we want this Constitution to be as solid and as permanent a
structure as we can make it nevertheless there is no permanence in
Constitutions.
There should be certain flexibility. If you make anything rigid and permanent,
you stop a nation's growth of living vital organic people. Therefore it has to
be flexible." (emphasis added)

580. It has been
argued that if there be no lim-it to the power of Parliament to amend the
Constitu-tion in any manner it likes, then what will prevent it, for example,
from turning Bangladesh,
by amend-ing Article 1, into a non-sovereign dependency or a simple monarchy.
The answer is here and I confess "that I cannot improve upon it.

Khanna J

1428. That power
may be abused furnishes no grounds for denial of its existence of gov-ernment
is to be maintained at all, is a proposition, now too well established (see
the unanimous opinion of U.S. Supreme Court in Ex-pane John L. Rapier, (1879-81)
15 US 93=26 Law Ed 110. Some view was expressed by the Judicial
Committee in the case of Bank of Toronto v. Lambe (1887)12 AC 575,
while dealing with the provisions of Section 92 of the British North America
Act relating to the power of Quebec Legis-lature.

1430. L.B. Orfield
has dealt with the question of the abuse of power in his book. "The
amending of Federal Constitution", in the following words on page 123.

"Abuse' of the
amending power is an anoma-lous term. The proponents of implied limitations
resort to the method of reduction ad
absurdum in pointing out the abuses which might occur if there were no
limitations on the power to amend.....The amending power is a power of
an altogether different kind from the ordinary governmental pow-ers. If abuse

occurs, it occurs at the hands of a special organization of the nation and of the States representing an extra-ordinary majority of the people, so that for all prac-tical purposes it may be said to be the peo-ple, or at least the highest agent of the peo-ple, and one exercising sovereign powers. Thus the people merely take the conse-quences of their own acts." It has already been mentioned above that the best safe-guard against the abuse of power is public opinion. Assuming that under the sway of some overwhelming impulse, a climate is created wherein cherished values like liberty and freedom lose their significance in the eyes of the people and their representatives and they choose to do away with all fundamental rights by amendment of the Consti-tution, a restricted interpretation of Article 368 would not be of much avail. The peo-ple in such an event would forfeit the claim to have fundamental rights and in any case fundamental rights would not in such an event save the people from political en-slavement, social stagnation or mental ser-vitude. I may in this context refer to the words of Learned Hand in his eloquent ad-dress on the Spirit of Liberty:

"I often
wonder whether we do not rest our hopes too much upon constitutions upon laws and upon Courts. These are false hopes: believe me these are false hopes. Liberty lies in the hearts of men and wom-en: when it dies there no constitution, no law .no Court can save it no constitution, no law, no court can even do much to help it. While it lies there it needs no constitu-tion, no law, no court to save it. And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where free-dom is the possession of only a savage few; as we have learned to our sorrow", (see pag-es 189-190 Spirit of Liberty edited by Irving Billiard). Similar idea was expressed in another celebrated passage by Learned Hand in the Contribution of an Independent Judi-ciary to Civilization:

"You may ask
what then will become of the fundamental principles of equity and fair play which our constitutions enshrine: and whether I seriously believe that unsupported they will serve merely as counsels of mod-eration. I do not think that anyone can say what will be left of those principles: I do not know whether they will serve only as counsels: but this much I think I do know— that a society so driven that the spirit of moderation is gone, no court can save: that a society where that spirit flour-ishes, no court need save: that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.(emphasis added)

581. The theory of
implied limitation or pro-hibition on the amending power under a written con-stitution does not seem to have been approved in any Jurisdiction either of the U.K., U.S.A or Australia, (vide Palekar J, para 1317). The observations of Lord Selborne in Reg
v. Bwrah (Supra) has already been noticed. Earl Loreburn in Attorney-General for the Province of Ontario vs. Attorney-General for the Dominion of Canada 1912 AC 57 observed at page 583
"In the interpretation of a completely self gov-erning Constitution founded upon a written organic instrument such as the British North America Act, if the test is explicit the text is conclusive alike in what it directs and what it forbids. When the text is ambiguous, as, for example, "when the words esta-blishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act". The only course which is open to courts is to determine the extent of power expressly granted after excluding .what is expressly or by necessary im-plication excluded. That is the view of the

Privy Council in Webb v. Outrim, (1907) AC 81 the effect of which is summarized by Isaacs, J. in Amalgamat-ed Society of Engineers v. Adelaide Steamship Co. Ltd. (1921)28 CLR 129, at P.150 as follows:

".....We should state explicitly that the doctrine of prohibition" against the exercise of a power once ascertained in accor-dance with ordinary rules of construction was definitely rejected by the Privy Council in Webb v. Outrim."

1318. On the other hand, in America where im-plied limitations were sought to be pressed in cases dealing with constitutional amend-ments, the same were rejected. In Sprague's case (1931)75 Law Ed.640= 282 US 716 the Supreme Court rejected contention of implied limitation supposed to arise from some express provisions in the Constitu-tion itself. Referring to this case Dodd in Cases in Constitutional Law, 5th edition pages 1375-1387 says "This case it is hoped puts an end to the efforts to have the court examine into the subject-matter of constitutional amendment". In (1920)65 Law Ed 994 National Prohibition case Decided earlier, the Prohibition Amendment (18th) was challenged, as the briefs show, on a host of alleged implied limitations based on the constitution, its scheme and its history. The opinion of the Court did not accept any of them, in fact, did not even notice them. American jurists are clearly of the opinion that the Supreme Court had re-jected the argument of implied limitations. See for example Cooley Constitutional Law. 4th edition. 46-47. Burdick Law of American Constitution pp.45 to 48.

1461. Rottschaefer in Handbook of American Constitutional Law has observed on pages 8 to 10:

“The only assumption on which the exercise of the amending power would be inadequate to accomplish those results would be the existence of express or im-plied limits on the subject-matter of amend-ments. It has been several times contended that the power of amending the federal Con-stitution was thus limited, but the Supreme Court has thus far rejected every such claim, although at least one state Court has subjected the power of amending the state constitution to an implied limit in this re-spect. The former position is clearly the more reasonable, since the latter implies that the ultimately sovereign people have inferentially deprived themselves of that portion of their sovereign power, once pos-sessed by them, of determining the content of their own fundamental law."

582. The theory of implied limitation stems from the concept of essential features or fundamental and permanent provisions in the Constitution. Be-sides the cases already referred to on the point, Dr. Kamal Hossain also referred to A.T. Mridha's Case 25 D.L.R(1973) P.335 at P.344 where it was observed that it is rather late in the day to suggest that a pre-constitutional piece of legislation will dis-place one of the three structural pillars on which the mechanism of the Constitution rests. Evidently this observation in a case where the main question was the quashing of a criminal proceeding and bail has not much significance because the issue here is the power of the parliament to amend the Constitution itself. Moreover, that decision has been set aside by the Appellate Division; see 26 D.L.R (SC) 17. Simi-larly in Fazlul Kader's case (Supra) an observation is there that franchise and form of government are fun-damental features of a Constitution but the main question

for consideration there was whether Art. 224(3) of the then constitution empowered the Presi-dent to make the impugned Order No. 34 of 1962. Referring to Clause (3) S.A. Rahman, J. observed that "the word 'adaptation' provides the key to the interpretation of this clause. It savours of a machinery provision, inserted to facilitate the enforcement of the Constitution. It cannot be equated with the pow-er of amendment of the Constitution at large.” The last sentence amply indicates why that decision is not relevant for the present purpose. For the same reason, Marbury vs. Madison and George Wythe as referred to by Dr. Hossain are not of much help.

583. In the Bribery Commissioner's Case re-lied upon by Mr. Ahmed, the respondent Ranasinghe was convicted for a bribery offence by the bribery tri-bunal created under the Bribery Amendment Act 1958. S. 55 of the Ceylon (Constitution) Order in Council, 1946 provided for appointment, etc. of Ju-dicial Officers by the Judicial Services Commission.

584. The question before the Judicial Com-mittee was whether the statutory provisions for the appointment of members of the panel of the bribery tribunal otherwise than by the Judicial Service Com-mission conflict with s. 55 of the Constitution, and if so, whether those provisions are valid.

585. The Judicial Committee found that there was a conflict between S. 55 of the Ceylon Consti-tution Order and Section 41 of the Bribery Amend-ment Act. It further found that section 29(4) of the Order was attracted but the requirements of section 29(4) had not been complied with and, therefore the appointment of the bribery tribunal was invalid. The certificate of the Speaker under the proviso to sec. 29 (4) of the Ceylon Constitution Order was an essen-tial part of the legislative process. There was no such certificate in the case of the legislation under which the appointment of the impugned tribunal was made. The Judicial Committee said that a legislature has no power to ignore the conditions of law-making that are imposed by the regulating instrument. This restriction exists independently of the question whether the legislature is sovereign as the legislature of Ceylon or whether the Constitution is uncon-trolled as happened in McCawley's case with regard to the Constitution of Queensland.

586. It is difficult to accede to the contention that the Judicial Committee laid down in the above case that Sections 29(2) and 29 (3) placed a restric-tion on the power of amendment of the Constitution under Section 29 (4) of the Constitution. The ques-tion with which the Judicial Committee was con-cerned was regarding the validity of the appointment of the members of the bribery tribunal. Such ap-pointment though made in compliance with the pro-visions of the Bribery Amendment Act, was in con-travention of the requirements of Section 55 of the Ceylon Constitution. No question arose in that case relating to the validity of a constitutional amend-ment brought about in compliance with Section 29 (4) of the Constitution. Reference to the argument of the Counsel for the respondent on top of page 187 of that case shows that it was conceded on his behalf that "there is no limitation at the moment on the right of amendment or repeal except the requirement of the requisite majority". The Judicial Committee nowhere stated that they did not agree with the above stand of the counsel for the respondent. Perusal of the judgment shows that the Judicial Committee dealt with Sections 18 and 19 together and pointed out the difference between a legislative law, which was required to be passed by a bare majority of votes under Section 18 of the Constitution, and a law re-lating to a constitutional amendment which was re-quired to be passed by a two third majority under sec-tion 29 (4).

587. Ray, J. in Kesavananda observed that
the Privy Council accepted the distinction made in McCawley's case between controlled and uncon-trolled Constitutions by emphasizing the observa-tion in McCawlay's case with reference to section 9 of the Queensland Constitution. The description of Section 29 (2) of the Ceylon Constitution as an en-trenched provision means that it can be/amended but only by special procedure in Section 29 (4). That is the meaning of the word "entrenched". This meaning alone is consistent with the clear language of the amending power and also with the decision. Section 29 (4) does not limit the sovereignty of the Ceylon legislature because the legislature can always pass the amendment after getting two-thirds majority and the certificate.

588. Who is to
decide and how to decide when the Constitution-makers themselves in their wisdom chose not to distinguish, what are to be considered as transcendental, in limitation to the power of amend-ment given to the Parliament? Ray, J. says, with which I agree, that 922."To find out essential or non-essential fea-tures is an exercise in imponderables. When the Constitution does not make any distinc-tion between essential and non-essential fea-tures it is incomprehensible as to how such a distinction can be made. Again the ques-tion arises as to who will make such a dis-tinction. Both aspects expose the egregious character of inherent and implied limitations as to essential features or core of essential features of the Constitution being unamendable. Who is to judge what the essential features are? On what touchstone are the es-sential features to be measured? Is there any yardstick by which it can be gauged? How much is essential and how much is not essential? How can the essential fea-tures or the core of the essential features be determined? If there are no indications in the Constitution as to what the essential features are the task of amendment of the Constitution becomes an unpredictable and indeterminate task. There must be an objec-tive data and standard by which it can be predicted as to what is essential and what is not essential. If Parliament cannot judge these features Parliament cannot amend the Constitution. If, on the other hand, amendments are carried out by Parliament the petitioner contends, that eventually court will find out as to whether the amendment violates or abridges essential features or the core of essential features. In the ultimate analysis it is the Court which will pro-nounce on the amendment as to whether it is permissible or not. This construction will have the effect of robbing Parliament of the power of amendment and reposing the final power of expressing validity of amendment in the courts."

589. In our context
the doctrine of basic fea-tures has indigenous and special difficulties for ac-ceptance. The question naturally will arise "basic fea-tures" in relation to which period? What were or could be considered to be 'basic' to our Constitution on its promulgation on 16th December 1972, a refer-ence to the various amendments made up to the (Eighth) Amendment Act will show that they have ceased to be basic any more. The 'basic features' have been varied in such abandon and with such quick suc-cession that the credibility in the viability of the the-ory of fundamentally is bound to erode. Few examples will be sufficient. There has been repeated reference to Art. 44 by all the learned Counsels say-ing that this article providing for guarantee to move the High Court Division for enforcement of funda-mental rights is one of the cornerstones of our Con-stitution. It is well known that this article was com-pletely substituted by the Fourth Amendment Act (Act 11 of 1975) excluding the Supreme Court en-tirely. It is somewhat ironical that the article has come back to the Constitution by a Proclamation Order. (Second Proclamation Order No. IV of 1976). It has been claimed that Art 94 is another corner-stone providing for an integrated Supreme Court with two Divisions. We have the experience of aban-doning this Supreme Court and establishing alto-gether two different Courts, The Supreme Court and the High Court in a Unitary state (see Second Proclamation Order No. IV of 1976). And this was again done away with and the Supreme Court as before was restored by the Second Proclamation Order No. 1 of 1977.

590. The Preamble
(second clause) originally read as under:

"Pledging that
the high ideals of national-ism, socialism, democracy and secularism, which inspired our heroic people to dedicate themselves to , and our brave martyrs to sacri-fice their lives in, the national liberation strug-gle, shall be the fundamental principles of the Constitution:"

Now it stands thus
after amendment by Procla-mations Order No. 1 of 1977.

"Pledging that
the high ideals of absolute trust and faith in the Almighty Allah, national-ism, democracy and socialism meaning econom-ic and social justice, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in , the war for national independence, shall be the fundamental principles of the Constitution".

591. The original
Constitution started with "Secularism' as one of the fundamental principles of the Constitution but now we have provided for a state religion of the Republic. Thus the changes made in the basic features within a span of 17 years have been too many and too fundamental and it is not necessary to refer to all of them nor is it my pur-pose to find fault with any amendment or anybody or any regime for the amendments made in the Consti-tution. Mr. Ishtiaque Ahmed very pithily described, we have had a very close shave. I have only endeavored to show how the organic document, such as a Constitution of the Government is, has developed and grown in our context in fulfillment of the hopes and aspirations of our people during this brief period of 17 years. In view of the experience as noticed above, any doctrinaire approach as to "basic features', in my opinion, will amount to 'Aiming a blind eye to our Constitutional evolution and further will not be in the interest of the country'. I shall give one ex-ample. Today a basic feature in our Constitution is the Presidential form of government. We can take ju-dicial notice that there is a demand by some political parties to restore Parliamentary form of Government as it originally obtained. Why a roadblock should be created by the Court, if people choose to send the members of those political parties to the Parliament, against amending the Constitution providing for Parliamentary system?

592. Lastly, let me
consider the validity of Mr. Ishtiaque Ahmed's submission on Art. 7 upon which he developed his entire argument. He put great emphasis on the declaration that the Constitution as the solemn expression of the will of the people, is the supreme law of the Republic and if 'any other law' including a law amending the Constitution is inconsistent with the Constitution, that other law shall to the extent of the inconsistency, be void.

593. That the
Constitution is the supreme law under a written Constitution and other laws made un-der it depend for their validity on consistency with the Supreme law is a proposition, which is true even without Art. 7. In Indian Constitution there is no provision like Art. 7. But then the proposition is as old as Marbury

v. Madison. "By what argument can it be said that the law in a Constitution is superior to the law enacted by legislative authorities esta-blished in a country by the Constitution? Posed K.C. Wheare in the book "Modern Constitutions". He then quotes Chief Justice Marshall at P. 81"certainly all those who have framed written constitutions con-template them as forming the fundamental and para-mount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution is void".

594. The question, however, is whether "any other law" in sub-art (2) of Art. 7 would take in a law amending the Constitution itself enacted under the Constituent power, in as much the same way as an ordinary law enacted under the ordinary legislative power. Mr. Ahmed contends that whether constituent or legislative, Parliament derives the power from the Constitution and in exercise Of that power enacts an Act of Parliament in both cases and by definition, 'Law' means any Act, etc. (Art 152); therefore there is no reason why a law amending the Constitution should have any higher status and be not subjected to Art. 7 for examining its legitimacy as any other law. Mr. Ahmed has not referred to any authority in sup-port of his proposition. It become difficult to agree with him having regard to the views expressed by judges and Jurists as to the position and quality of a law which is enacted under the constituent power of a Parliament even though it is a derivative power and further the position of Constitutional law, in relation to ordinary law made under ordinary legislative pro-cess.

595. K. C. Wheare in his book aforesaid says at P. 91 "It is fundamental law, it provides the basis upon which law is made and enforced.....A consti-tution cannot be disobeyed with the same degree of lightheartedness as a Dog Act",

Sir Ivor Jennings in "The Law and the Consti-tution" says at P. 63 "whatever the nature of the written Constitution it is clear that there is a funda-mental distinction between constitutional law and the rest of the law."

596. Now what is Constituent power? And what is the end product of the exercise of such power? Is it only 'law' generally that is produced or a kind of law that is higher than ordinary law which be-comes a part of the Constitution?

597. The dictionary meaning of the word 'constituent' includes the power not only 'to frame' but also 'to alter a political Constitution'. (The con-cise Oxford Dictionary). In the case of Shankari Prasad (supra) Patanjali Sastri, J. observed that "Although 'law' must ordinarily include constitution-al law, there is a clear demarcation between ordinary law, which is made in exercise of legislative power, and Constitutional law, which is made in exercise of constituent power". Therefore, a power to amend the Constitution is different from the power to amend ordinary' law.

"When Parliament is engaged in the amending process it is not legislating. It is exercising a partic-ular power which is sui generis bestowed upon it by the amending clause in the Constitution." says Ray. J. in Kesavananda. He goes on to say:

"835. This is
the position of the amending ' clause in a written Constitution. When the power under Article 368 is exercised Parlia-ment acts as a recreation of Constituent assembly. Therefore, such power cannot be restricted by or widened by any other provi-sion. As soon as an amendment is made it becomes a part of the Constitution. An amendment prevails over the Article or Ar-ticle amended. The fact that Article 368 'confers constituent powers is apparent from the special conditions prescribed in the Article. Those conditions are different from or-dinary law making process. Article 368 puts restraints on the ordinary law making process and thus confers constituent power. The Constituent Assembly was fully aware that if any limitation was to be put on the amending power the limitation would have to be expressly provided for".

797. The difference
between legislative and con-stituent power in a flexible or uncontrolled constitution is conceptual depending upon the subject-matter. A Dog Act in England is prima facie made in exercise of legisla-tive
power. The Bill of Rights was made in the exercise of constituent power as modify-ing the existing constitutional arrangement. But conceptual difference does not produce different legal consequences since the provi-sion of a Dog Act inconsistent with the ear-lier provisions of the Bill of Rights would repeal those provisions pro tanto. In a rigid or controlled Constitution the distinction between legislative power and constituent power is not only conceptual but material and vital in introducing legal consequences. In a controlled Constitution it is not correct to say that legislative power is the genus of which constituent power is the species. The question immediately arises as to what the differentia is which distinguishes that species from other species of the same ge-nus. It would be correct to say that the law making power is the genus of which legis-lative power and constituent power are the species. The differentia is found in the dif-ferent procedure prescribed for the exercise of constituent power as distinguished from that prescribed for making ordinary laws. The distinction between legislative power and constituent power is vital in a rigid or controlled Constitution, because it is that distinction which brings in the doctrine that a law ultra vires the Constitution is void, since the Constitution is the touchstone of validity and that no provision of the Con-stitution can be ultra vires.

787. The
distinction lies in the criterion of validity. The validity of an ordinary law can be questioned. When it is questioned it must be justified by reference to a higher law. In the case of the Constitution the va-lidity is inherent and lies within itself. The validity of constitutional law cannot be jus-tified by reference to another higher law. Every legal rule or norm owes its validity to some higher legal rule or norm. The Constitution is the basic norm. The Con-stitution generates its own validity. It is valid because it exists. The Constitution is binding because it is the Constitution. Any other law is binding only if and in so far as it is in conformity with Constitution. The validity of the Constitution lies in the so-cial fact of its acceptance by the communi-ty. The constitutional rules are themselves the basic rules of the legal system. The Constitution prevails over any other form of law not because of any provision to the effect either in the Constitution or else-where but because of the underlying as-sumption to that effect by the community."(emphasis added)

598. It therefore
follows from above that when an amendment is made in compliance with the terms of Art 142 it becomes a part of the Constitution and the question of its validity under the Constitution will no longer arise. But for an amendment to attain this status it must, first of all, satisfy the terms of the amending article itself as H. M. Seervai says in "Constitutional Law of India" (Third Edition) Vol II P. 2647..... "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."

599. A question may arise what happens if there is found any inconsistency between an existing provision in the Constitution and that in an amend-ing law. The answer is to be found in the principle to be followed in such a case. Munir, CJ. in the reference Case (supra) pointed out that "if there be any apparent repugnancy between different provisions, the Court should harmonize them, if possible. The rules of construction of Constitutional Law require that two sections be so construed, if possible, as not to create a repugnancy, but that both be allowed to stand and that effect be given to each. Cases may, however, arise where it is impossible to harmonize or reconcile portions of a constitution. In such a case, if there is conflict between a general and a spe-cial provision, the special provision must prevail in respect of its subject- matter, as it will be regarded as a limitation on the general grant. (Am. Jur., Con-stitutional Law. Art. 53)."

600. Issue No. 2

The power to amend any provision of the Con-stitution by way of addition, alteration, substitution or repeal is found to be unlimited except as provided in Art. 142 itself. But there is a limitation inherent in the word "amend" or "amendment" which may be said to be a built-in limitation. The various mean-ings of the said words have already been noticed and Issue No. 1 has been considered on the basis of the meaning to" alter' or 'alteration'. Whatever meaning those words may bear, this, in my opinion, cannot be disputed that they can never mean, to' destroy', "abrogate" and “destruction" or "abrogation". It is significant that under Art 142 any provision of the Constitution may be repealed but there is no conferment of power to repeal the Constitution itself as are to be found in the then Constitution of Pakistan of 1956 and the Constitution of Ceylon (vide articles 216 and 82(5) respectively). Therefore, in exercise of the power under Art. 142 the Constitution cannot be destroyed or abrogated. The destruction of the consti-tution will be the result if any of its "structural pil-lars", that is, the three organs of the Government', Executive, Legislature and Judicial, is destroyed. The result will also be the same if any of these organs is emasculated and castrated in such a manner as would make the Constitution unworkable. For example, if the Supreme Court or a Superior Court by any name is retained but the power of judicial review as under Art. 102 is taken away, the result will be that the form will be there but the 'soul' of the Judiciary will be gone and the Constitution will be rendered un-workable in as much as the balance which is struck in the scheme of the Constitution cannot be main-tained. There can be no objection to the exercise of amending power to fulfill the needs of time and of the generation. But the power cannot be so construed as to turn the Constitution which is the scripture of hope of a living society and for its unfolding future, I §9 into a scripture of doom. The learned Attorney-General does not seem to have disputed this proposi-tion. Therefore, it is found that short of producing such destructive result, the power of amendment is sui juris and plenary provided the terms of the amending article are complied with.

601. Issue No. 3.

Dr. Hossain submitted that the impugned amendment (of Art. 100) had fragmented the High Court Division resulting in 'a mini High Court' at its permanent scat in Dhaka along with six other mini High Courts described as permanent Benches outside Dhaka; the seven 'mini High Courts' taken together cannot make up an

indivisible integrated High Court Division with plenary powers and juris-diction necessary for maintenance of the supremacy of the Constitution and its uniform enforcement. He further submitted that the impugned amendment creating seven permanent Benches at different places, independent of each other, each having mutually ex-clusive limited territorial jurisdiction in effect extin-guished the indivisible and integrated High Court Di-vision as envisaged in the Constitution. Elaborating further the learned counsel pointed out that the im-pugned amendment in effect amended Articles 101, 102, 107,108, 109, 110, 111 and 112 of the Consti-tution rendering the High Court Division crippled and ineffective. He explained article by article. To lake an example, the jurisdiction of the High Court Division under Art. 102 is throughout the Republic, may beyond, in the sense that any act done by a func-tionary of the Republic anywhere in the world is amenable to be declared to be without lawful authori-ty and of no legal effect. But the amendment having limited the territorial jurisdiction of the different Benches including that of the High Court Division sitting at the permanent seat, the High Court Divi-sion's plenary power as above has been extinguished and the people will have no remedy against order and in respect of causes of action in admiralty matters taking place outside the assigned area of the Benches.

602. Dr. Hossain
submitted extensively on the nature of admiralty jurisdiction to show that "the geographical jurisdiction of the Admiralty Court ex-tends over the world maritime environment" (Thom-as, Maritime Liens (1980) at pp. 309-310) and thus, he argued, the territorially limited mini High Courts in place of the original High Court Division with plenary jurisdiction will be found physically wanting in such matters.
He submitted that even the 'territorial waters' are outside the assigned areas for the Benches and as such none of the Benches can ex-ercise admiralty Jurisdiction if the res or subject matter is found even within the territorial waters of Bangladesh.

603. Syed Ishtiaq
Ahmed further developed the concept of one unified Supreme Court with a perma-nent scat in the Capital as envisaged in the Constitu-tion and how the impugned amendment was in con-flict with Art. 94 and all other articles referred to above. He submitted that the power of amendment was not unlimited but it must be subject to Art. 7 which provides the balance, beauty and grace of the Constitution. Mr. Ahmed argued that the High Court Division is not at its permanent seat, its Con-stitutional habitat; there is only a Bench for the re-siduary area and the other Benches are confined in their assigned areas; "where then is the High Court Division with its plenary power"? he wondered. Mr. Ahmed submitted that by the impugned amendment the plenary judicial power throughout the Republic vested in the High Court Division has been taken away and it is now under a sentence of death pro-nounced by the Parliament.

604. Mr. Ahmed
submitted that there is a fun-damental difference between a High Court of a feder-ating State with territorial limitation and the High Court Division conceived in our Constitution with plenary power throughout the Republic and any leg-islative device to compartmentalize such power (as under the amendment) will be an attempt to fix a square peg into a round hole.

605. Mr. Amirul
Islam besides adopting the submissions of the learned counsel for the appellants submitted that the purported amendment violated 26 articles of the fundamental documents i.e. the Declar-ation of Independence, Proclamation of Independence and the Constitution. In particular, he submitted that the impugned amendment failed to maintain the composite and compact nature of the Supreme Court; rather it annihilated the same by making eighteen different assaults on the structure of the ju-diciary which he explained.

606. Mr. Asrarul
Hossain referring to the vari-ous provisions of the Constitution, particularly the language of Art. 94 (1) submitted that the Supreme Court stands on a higher footing in relation to any other organ or office under the Constitution. Mr. Hossain submitted that the Judges are bound by their oath to keep the Constitution fully alive and Opera-tive, to preserve it in all respects and to stand firm in defence of its provision against any encroachment.

According to him,
there is a mutilated High Court Division functioning at the permanent seat of the Supreme Court in the capital though it stands high in the Constitutional framework. He submitted that because of territorial limitation put on the jurisdic-tion of Benches, any order passed by a Bench would be invalid outside its territorial limit. He supported the learned counsel for the appellants that the Admi-ralty and Prize Jurisdiction has been put under jeo-pardy by setting up Benches with territorial limits.

607 Khandkar
Mahbubuddin Ahmed after trac-ing the background of the impugned amendment from the time of Martial Law submitted that when it was not possible to keep the outside Benches perma-nently in the name of 'Sessions' under the unamended Art. 100 a device was made to amend the Consti-tution and this was done by a Parliament not elected, by the people (when no major political parties par-ticipated). The way in which the amendment was made was malicious and fraud was practiced both on the Constitution and the Parliament, he contended.

608. The learned
Attorney-General in reply submitted that the impugned amendment has not in any way destroyed the Supreme Court/High Court Division or its power as envisaged in the Constitu-tion but only brought about a change in the silting of the Benches of the High Court Division with a new arrangement for disposal of cases of the areas as-signed to them for the benefit of the people of those areas. Citing from earlier Constitutional documents, The Government of India Act 1935 and those that followed he submitted that the scat of a superior court (Supreme Court/High Court Division) is not an essential attribute of its powers and jurisdictions. He referred to the Constitution of the Islamic Repub-lic of Pakistan 1973, The High Court of West Paki-stan (Establishment) Order, 1955, Bombay Re-organization Act, 1960 and the High Court at Patna (Establishment of a permanent Bench of Ranchi) Act. 1976 and other statutes and submitted that es-tablishment of permanent Benches with assigned are-as outside the permanent or principal seat was nei-ther unconstitutional nor a new thing as has been sought to be achieved by the impugned amendment.

609. The learned
Attorney-General submitted that the Supreme Court of Bangladesh is composed of two Divisions and the provisions of Chapter I Part VI will show that the two Divisions have been treated as separate entities. He submitted that the per-manent seat of the Supreme Court has not been changed. The permanent Benches are the Benches of the same High Court Division and they exercise the same plenary jurisdiction of the High Court Division as before. The territorial arrangements as have been introduced in the amended Art. 100 of the Con-stitution read with the rules is for the purpose of ini-tiation and disposal of the cases proceedings and for invoking the Jurisdiction of the High Court Division. Such arrangements do not curtail or impair the jurisdiction of the High Court Division, it is submit-ted. The learned Attorney-General also submitted that since the plenary Jurisdiction of the High Court Di-vision is not limited by territorial assignment, there is no difficulty in exercising Admiralty Jurisdiction even if the cause of action took place beyond the borders of Bangladesh, but either the res or the defendant must be within the Jurisdiction of a permanent

Bench.

610. It will be
seen that in the ultimate analy-sis the entire argument on behalf of the appellants rests on an assumption under, or call it interpretation of, sub-art (5) of amended An 100, that by assigning the areas to the permanent Benches and leaving the residue to the High Court Division sitting at the per-manent seat, the Jurisdiction of the Judges, silting on those Benches have been limited to the areas thus as-signed (territorially limited ) and as such they have ceased to be judges of the High Court Division exer-cising plenary power throughout the Republic as en-visaged under the Constitution. If this assumption or interpretation is correct, I shall have no hesitation to accept the argument elaborated for days together that the High Court Division, a structural pillar of the Constitution, has ceased to exist and the impugned amendment has passed a sentence of death upon the Supreme Court. Indeed the argument is so simple that it will need no persuasion for acceptance. Take just one example, Art. 94 provide that there shall be a Supreme Court for Bangladesh comprising the Ap-pellate Division and the High Court Division. Now the Supreme Court or for the matter of that the High Court Division is for the entire country. If the pow-ers of the judges are limited territory wise, they be-come judges of territorial Courts or regional courts or anything else but they cease to be judges of the High Court Division which is for the entire Republic. So, the crux of the matter is, whether the assumption or interpretation ( of sub-art (5) made by the appellants that the jurisdiction of the judges silting in the per-manent Benches and al the permanent scat have been limited to the areas assigned to them is correct or not. I have given full consideration to all the learned arguments made by the learned counsel for true appel-lants and other learned counsel supporting them but I remain convinced that the assumption or interpreta-tion made by them is wrong and not tenable in law.

611. In my opinion,
upon a true interpretation of the amended Art 100 particularly sub-art (5) read in the context of all other provisions of Chapter I, Part VI, the position that emerges is that the plenary jurisdiction which is vested in the Judges of the High Court Division under Arts. 101 and 102 has re-mained unaffected and the provisions of the amended Art. 100, particularly that of sub-art (5) read with rule (4) of the impugned Rules merely provide for the places from where and the manner in which such jurisdiction is to be exercised. The limitation of ter-ritory under sub-art (5) is meant to operate not on the Jurisdiction of the Court or of its judges but on the manner of its exercise.

612. There is a fundamental difference between
Jurisdiction of a court and the manner of its exercise. "Jurisdiction in Wharton's Law Lexicon, means, le-gal authority, extent of power, jurisdiction, said West, J., in Amritra
v. Balakrishan, 11 Bom. 488 (499), consists in taking cognizance of a case in-volving some determination of some jural relation in ascertaining an essential point in it, and pronouncing upon them. In other words, it means the legal au-thority to administer justice according to the means which the law has provided and subject to its limita-tion. Bar Prasad v. Jafar Ali 7 All. 345 (350). There is however a difference between the existence of ju-risdiction and the exercise of jurisdiction. Cawashah Bomanji v. Prafulla Nath, 1941
Nag. 364 (367)". Vide
Prem's Judicial Dictionary Vol 11, 1964, at P.926.

613. How and where
the Jurisdiction will be exercised by the Judges are matters governed by the practice and procedure prescribed by law and place of sitting appointed for them. Decisions in support of this proposition will be referred to presently.

614. The Jurisdiction
of the High Court Divi-sion and its judges has been vested under Articles 101 and 102 of the Constitution. Originally the High Court Division exercised that Jurisdiction through its judges, all sitting in different Benches at the permanent seat of the Supreme Court in the capi-tal. A radical change was made after promulgation of Martial Law on 24 May 1982 and the subsequent changes made thereafter have already been noticed. Immediately before the amendment came into force, the High Court Division was functioning from the permanent seat as also from the six places of 'Sessions' as already referred to above.

615. The amended
Article 100 shows in sub-art. (2) that the High Court Division and the judges thereof shall henceforth sit al the permanent seat of the Supreme Court and at the seats of its permanent Benches. By sub-art (3) the seats of the permanent Benches have been located at Barisal, Chittagong, Comilla, Jessore, Rangpur and Sylhet and it has been left to the Chief Justice to constitute such Benches at the permanent seats as he may determine from time to lime. By sub-art (4) it is provided that a permanent Bench shall consist of such number of Judges of the High Court Division as the Chief Jus-tice may deem it necessary to nominate to that Bench from time to lime and on such nomination the judges shall be deemed to have been transferred to that Bench. These provisions relate to the places of sitting of the permanent Benches of the High Court Division and the constitution of Benches by Judges at those scats to be decided by the Chief Justice. Evidently these provisions relate lo the manner of exer-cise of jurisdiction by the Judges of the High Court, Division. Then comes sub-art (5) over which the controversy begins. It provides that the President shall, in consultation with Chief Justice, assign the area in relation to which each permanent Bench shall have jurisdictions, powers and functions conferred or that may be conferred on the High Court Division by this Constitution or any other law; and the area not so assigned shall be the area in relation to which the High Court Division sitting at the per-manent seat of the Supreme Court shall have such jurisdictions, powers and functions. It has been no-ticed that the President by notifications dated 11.6. 88 has assigned the areas for each of the permanent Benches and the area not so assigned, therefore, re-mains for the High Court Division sitting at the per-manent seat. According lo the appellants by sub-art (5) jurisdiction of the Judges of the permanent Benches and that of the High Court Division sitting at the permanent-seat has been limited to the territo-ries assigned to them. Bangladesh has been parceled out into seven mutually exclusive divisions by such assignment and the judges silting in these divisions are judges of regional courts with territorially limited Jurisdiction, it is contended. This view will inevita-bly be in conflict with all the relevant articles, of Chapter I Part VI. I have already said that in my opinion this view is not tenable in law and the lim-itation of territory under sub-art (5) is meant lo operate not on the jurisdiction of the court or of its judg-es but on the manner of its exercise. It will be seen that sub-art (5) read with rule (4) amounts to-no more than a statutory allocation of the category of cases arising from the respective areas to each of the permanent Benches and it does not in any manner limit or affect the plenary power of the judges of these Benches as are vested in them as judges of the High Court Division under the Constitution.

616. I shall
elaborate on this but it may be useful at this stage to notice the position of the Su-preme Court in our Constitution as considerable ar-gument has been made on its indivisible and integral character which has been allegedly impaired by the impugned amendment.

617. In the
independent Bangladesh, we started with a High Court of Bangladesh, vide Art. 9 of the Provisional Constitution of Bangladesh Order 1972 dated 11 January, 1972. Then came the High Court of Bangladesh Order 1972, President's Order No. 5 of 1972, which by Article 4 declared it to be a Court of Record and defined its jurisdiction. By P.O. 91 of

1972 the above Order was amended and a new Arti-cle, No. 6A, was inserted by which it was provided that there shall be an Appellate Division of the High Court of Bangladesh which shall consist of the Chief Justice and two other judges to be appointed by the President after consultation with the Chief Justice.

618. In the Constitution which was promul-gated on 16 December, 1972 in place of the High Court of Bangladesh, the Supreme Court of Bangla-desh was provided for and established. Art 94 pro-vides that there shall be a Supreme Court for Bangla-desh (lo be known as the Supreme Court of Bangladesh) comprising the Appellate Division and the High Court Division. Evidently the nomencla-ture of "Supreme Court" has been used in the Con-stitution in place of "High Court" in order to glorify the highest Court of the country. If the articles of Chapter I, Part VI relating to the Supreme Court are analyzed it will be seen that the Supreme Court as such has no Judicial function. Comparing with any proceeding Constitutional document prior lo Indepen-dence it will be seen that in our Constitution when-ever the Constitution-makers wanted to refer to the general attributes of a superior Court, they men-tioned "Supreme Court" but where Jurisdiction and Judicial function are concerned, they mentioned Appellate Division' and "High Court Division" sep-arately although the two together constitute the Su-preme Court. Thus while providing for a permanent seal in Article 100; the generic term 'Supreme Court' has been mentioned, rule-making, power has been vested in the Supreme Court (Art. 107). Art 108 provides that the Supreme Court shall be a Court of Record and shall have all the powers of such a Court. But while conferring Jurisdiction and provid-ing for exercise of judicial power, a clear division has been maintained. Articles 101 and 102 relate to the powers and Jurisdiction of the High Court Divi-sion while Articles 103,104 and 105 define the powers and Jurisdiction of the Appellate Division. Art. 106 provides that the President may seek the opinion of the Supreme Court on a question of law under certain circumstances but the reference will have to be made to the Appellate Division which is to give opinion in the matter. Art. 109 provide that the High Court Division shall have superintendence and control over all courts subordinate to it. Art. 110 empowers the High Court Division to withdraw' any pending case from a subordinate Court when it is satisfied that the case involves a substantial question of law as to the interpretation of the Constitution, etc. Thus it is clear that in matters of exercise of judicial power, the High Court Division has been treated sep-arately in the Constitution and the impugned amendment is but only an extension of such treatment. What is very important to remember is that no other article of Chapter I having been amended (except 107 (3) which is consequential) it must be presumed that the integrity of the Supreme Court/ High Court Di-vision with its unlimited territorial jurisdiction has not been impaired and the High Court Division has remained one as before and therefore the impugned amendment has to be construed in harmony with all the other provisions of Chapter I.

619. Now coming back to sub-art. (5) of the amended Article 100 it is to be observed that from the language used it means that each permanent Bench shall have jurisdictions, etc. in relation to the area assigned to it. The Bengali version reads:

Je alaka sompurke protity sthaye Bencher …………. Akhtier ittady thakibe.

The language does not permit the meaning that the jurisdiction is limited within the territory assigned: The jurisdiction is in relation to the area and not confined within the area. It will be, seen that by itself the provision is incomplete and in-definite. In some case it is supplemented by making provision in the statute itself as to how Jurisdiction will be exercised in relation to the area assigned and in some

cases it is left to the rule-making authority. We shall see, for example, that under the U.P. High Courts (Amalgamation) Order 1948, in the first pro-viso to paragraph 14 certain areas of Oudh were as-signed to Lucknow Bench of the newly created Alla-habad High Court in that the cases arising out of the specified area were to be filed in the Lucknow Bench and impliedly the Bench at Allahabad could not enter-tain those cases arising out of Oudh area. In the Paki-stan Constitution, 1973 under Art. 198 provision was made as under our impugned amendment for creation of Benches of the High Courts outside their principal seats and the subject as aforesaid including the "assigning of area" was left to the governor for mak-ing Rules in that behalf under sub-art (6). In our case rule-making power has been given to the Chief Jus-tice under sub-art (6) and rule 4 of the Rules framed by him has supplemented sub-art (5) providing for as to how a permanent Bench will exercise Jurisdiction in relation to the area assigned to it. Rule 4 provides that all matter arising out of an assigned area to a Bench will have to be filed in the connected Bench and will be disposed of there. This rule is similar to paragraph 14 of the U. P. High Courts (Amalgama-tion) Order 1948 or section 2 of the High Court at Patna (Establishment of Permanent Bench at Ranchi)
Act 1976, which provided for a permanent Bench at Ranchi in respect of cases arising in the districts of Hazaribagh, Giridih, etc.

620. By using the phrase ' in relation to’, it could not have been meant 'within' the area, for, if that was the purpose, the language would have been different and a typical example conveying such meaning will be found in Art. 226 of the Indian Constitution putting territorial limitation on the ex-ercise of power by the High Court. Art. 226 read thus:

226. Power of High Courts to issue certain writs.— (1) Notwithstanding anything in Art. 32 **** every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in ap-propriate cases, any Government within those territories directions, orders or writs, including, (writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose)

621. Secondly, if it is accepted that sub-art (5)'1 has territorially limited the Jurisdiction of a Perma-nent Bench then it will lead to a plainly absurd situa-tion. Take one instance, for example, an order is passed by the Government at Dhaka affecting a prop-erty in Rangpur. The aggrieved person goes to Rangpur Bench under Art. 102 but his petition cannot be entertained there because the impugned order has been passed outside its territorial limits. The person comes to the High Court Division at its permanent seat. His petition cannot be entertained here also as the subject matter falls outside the territorial limits of the permanent scat. Could the legislature have in-tended such an absurd situation? Can absurdity be at-tributed to the Parliament? The answer is obviously no.

622. The meaning of sub-art (5) will be clear if we apply the universally accepted principles that a Constitution of Government is a living and organic thing, which of all instruments has the greatest claim to be construed utres magis valeat quam pareat (AIR 1939 FCI), that in accordance with the general rule that harmony in Constitutional construction should prevail, whenever possible, an amended Constitution must be read as a whole, as if every part of it had been adopted at the same time and as one law. A constitutional amendment is not to be considered as an isolated bit of design and colour, but must be seen as an integral part of the entire harmonious pic-ture of the Constitution. (16 Am Jur 20, 102,

P. 441-442).

623. It certainly bears repetition to say that no Other Article in Chapter I Part VI has been amended except Art. 100 and 107 (3) Amended Art. 100, therefore, of necessity has to be construed and inter-preted in harmony with all other provisions of the chapter. It has to be borne in mind that the Constitu-tion envisages even after amendment one High Court Division with plenary power throughout the repub-lic. By amending Art. 100 Parliament has provided for six permanent Benches outside the permanent seat of the Supreme Court of the same High Court Division. The territorial limit set under sub-art (5) must be construed so as not to limit the jurisdiction of the High Court Division in any manner that may be exercised by any of its judges sitting in any Bench anywhere in Bangladesh. I have already shown that the assignment of area under sub-art (5) read with rule 4 amounts to statutory allocation of cate-gory of cases to a Bench arising out of the area as-signed to it. Given this interpretation and meaning, there will be no difficulty in solving the example given above and I venture to say that the learned counsel for the appellants also will agree that the conflicts and difficulties pointed out by them will cease to exist. In the case taken as an example above, the person from Rangpur can maintain his application under Art. 102 both in Rangpur Bench and also at the permanent seat as the "subject matter" fall within both the areas. Here I may briefly indi-cate that "subject matter" under rule 4 is not the same as "cause of action" under the Code of Civil Procedure. The words "subject matter" must be given the widest meaning, to include not only "cause of ac-tion" but also party, property, right, obligation, vio-lation, etc. in connection with the lis so that a citi-zen is not refused before any Bench on a technicality regard being always had to the fact that it is the same court.

624. The contention that setting up of Benches with assigned areas outside the permanent or prin-cipal seat amounts to splitting up the High Court and limiting the powers of the judges of the said Benches within the territories so assigned was raised in three Full Bench Cases in the Allahabad High Court and all the Benches rejected the said conten-tion. The last of those cases was Bhuwal vs. Deputy Director, consolidation AIR 1977 Allahabad 488. The learned Attorney-General strongly relied on these decisions.

625. The statute under consideration was the United Provinces High Courts (Amalgamation) Or-der 1948. By paragraph 3 of the said order, as from the 26th July 1948, the then High Court at Allaha-bad and the erstwhile Chief Court in Oudh stood amalgamated and a new High Court was constituted by the name of High Court of Judicature at Allaha-bad. By paragraph 4 the Judges of the said two Courts became Judges of the new High Court. Para-graph 7 (1) provided that the new High Court shall have all powers in respect of the whole of the United Provinces which was partly under Allahabad High Court and partly under Oudh Chief Court earlier. The first proviso to para 14 provided that cases arising out of certain district in Oudh will be heard by the Judges of the new High Court sitting at Lucknow.

626. It was contended that this provision (first proviso to para 14) amounted to creation of two separate Judiciaries in violation of the constitutional mandate of a single High Court in each State. The contention was rejected upon reference to another Full Bench Case of the same High Court, Nirmal Dass Khaturia v. State Transport (Appellate) Tribu-nal, U.P. Lucknow AIR 1972 All 200(F.B) where by majority it was held that the nature and extent of the Jurisdiction enjoyed by a Court and the manner in which that jurisdiction will be exercised are two different matters. How and where the Jurisdiction will be exercised by

the Judges are matters governed by the practice and procedure prescribed by law and the place of sitting appointed for them. It was held that paragraph 7 of the Order defines the Jurisdiction of the new High Court and paragraph 14 is concerned with the manner in which that jurisdiction is to be exercised. The view taken in Nirmal Dass Khaturia that the first proviso to paragraph 14 amounts to a statutory allocation of the category of cases ( arising out of certain district) mentioned therein to the Judg-es at Lucknow was upheld and followed.

627. It was pointed out in Nirmal Dass's case that although Lucknow Bench had exclusive Jurisdic-tion in matters arising out of the specified areas in Oudh, a case from that area, if filed inadvertently at Allahabad, could not be dismissed but was liable to in the High Court." be transmitted to Lucknow. This view was not dis-sented from by the Supreme Court in Nasiruddin v. State Transport Appellate Tribunal AIR 1976 SC 331.

628. The Full Bench in Bhuwal's case noted that if the contention was correct that two separate High Courts had been created by the first proviso to paragraph 14 of the Order, the view taken in Nirmal Dass's case (on question No. 2) could not have been upheld by the Supreme Court in the case of Nasirud-din (supra).

629. Reference was made to yet another Full Bench case, Union of India v. Chheda Lai Ramautar, AIR 1958 All 652 which is very important for the present purpose. There the learned CJ. Mootham and A. P. Srivastava, J. took the view that in respect of cases arising in the specified Oudh areas not only the Judges at Lucknow but also the Judges at Allaha-bad could exercise Jurisdiction on the assumption that otherwise it would mean splitting the High Court into two courts. Palhak, J. (as he then was) delivering the Judgment for the majority held that this assumption was legally unjustified. It was ob-served that the Jurisdiction defined by Art. 7 vests in the entire body of Judges. It is a Jurisdiction en-joyed by every Judge of the High Court and extends to all cases throughout the territories of the State. Where that Jurisdiction will be exercised is a matter determined under Art. 14. It may be exercised at Alla-habad or it may be exercised at Lucknow or at any other place appointed by the Chief Justice under Art. 14. But wherever exercised it is exercised by a judge, who equally with all other judges represents the High Court.

630. Exactly the same view was taken by the then Supreme Court of Pakistan in the case of Shamsuddin vs. Capt. Gauhar Ayub 17 D. L. R (S. C) 384= PLD 1965 (SC) 496. The Statute under consideration was the High Court of West Pakistan (Establishment) Order, 1955 under paragraph 4 of which Karachi was assigned to the Karachi Bench of West Pakistan High Court (as Lucknow Bench in the Allahabad Case) (supra). Under paragraph 3 (3) of the said Order it was provided "the High Court and the Judges and Divisional Courts thereof shall sit at Lahore, but the High Court shall have Benches at Karachi and Peshawar and circuit courts at other plac-es within the province of West Pakistan....."

By paragraph 4 the Chief Justice was empowered to make provision, inter alia, for" a) assigning areas to the Benches at Karachi and Peshawar in relation to which each Bench shall exercise Jurisdiction vested.

631. A Criminal
case by one Shamsuddin against Capt. Gauhar Ayub was pending before the City and Additional District Magistrate, Karachi.
Shamsuddin wanted the case to be tried in the origi-nal side of the High Court at Karachi for
which he filed a petition before the Karachi Bench. Gauhar Ayub, on the other hand, wanted the case to be trans-ferred to a competent court in Lahore and for that purpose he filed a petition in Lahore
under section 526 Cr.P.C. Both the petitions were heard by the Chief Justice at Karachi and it
was ordered that the Criminal Case against Gauhar Ayub "be heard on the Original side of the High Court at Lahore".

632. In the Supreme
Court, on behalf of Shamsuddin, Mr. Z. H. Lari, took objection to the aforesaid order on the ground that since the matter was from Karachi which was assigned to Karachi Bench, the Chief Justice was not authorised to trans-fer the case to Lahore. In rejecting the contention, the Supreme Court observed that:

"All the
powers vested in the High Court of West Pakistan were also vested in each Judge of that High Court in respect of the whole area of the High Court's jurisdiction, and this was so wherever in that area, such powers shall fall to be exercised by such judge. The assignment of areas to the two Benches, under paragraph 4 of the Order, cannot be construed to restrict the ju-risdiction of any Judge of the High Court, in derogation of the full jurisdiction conferred by clause 26. To hold otherwise would be to con-fine the jurisdiction of any Judge of this Court, in a manner contrary to the main instrument conferring jurisdiction, not only on such Judge, but upon the Chief Justice himself, and equally upon the whole Court. It would amount to crea-tion of three High Courts with mutually exclu-sive jurisdictions, which is entirely outside the contemplation of the Order of 1955. Orders of assignment under paragraph 4 must therefore be construed to be without effect upon the fullness of the Jurisdiction vested in each Judge of the High Court in respect of the entire jurisdiction of the High Court subject, of course, to such or-ders as the Chief Justice might make as to the distribution and disposal of work, among and by the Judges and the Division Courts, of the High Court. (emphasis added)

633. These
decisions (rationale thereof) are on all fours with the view that I have taken about the impugned amendment and the Rules. The said view will dispel all conflicts and relieve all difficulties that were argued by the appellants. If a functionary of the republic passes an order in London affecting the rights of a citizen residing in any of the assigned areas, he will go to the concerned Bench for the re-dress of his grievance. If a mariner has not been paid his dues in a Greek ship on the high seas, he will have his redress before the Bench in whose assigned area he finds the ship or its agent. The Jurisdiction of the High Court Division under the Courts of Ad-miralty Act, 1891 was considered by this Division in the case of Al-Sayer Nav Vs. Delta Int. Traders 34 DLR (AD) P. 110 =1982 BID (AD) P. 69 and it has been held that the jurisdiction conferred by this Act on the High Court of Admiralty may be exercised by proceedings in rem or by proceedings in personam. In keeping with the Admiralty practices as described in the British Shipping Laws Vol. I 1964 Ed. P. 28, wherever the cause of action may arise, the res must be within the jurisdiction of the High Court Division (within the assigned area of any Bench) in order that an order for arrest may be effective in an admiralty action in rem. If an order passed by the Rangpur Bench is violated at Dhaka
the Bench pass-ing the order will have no difficulty in taking action as its

authority runs throughout the republic. Thus the law declared by the Rangpur Bench or any Bench shall be binding on all the subordinate Courts of the republic and in case of conflict of decision between two Benches it will be resolved in the same manner as was used to be done when all the Benches per-formed from the permanent seat only.

634. Neither in the amended article nor in the Rules, there is any provision for transferring a case from a permanent Bench to the principal seat or vice versa for hearing, by the Chief Justice, and this was pointed out time and again to show that the Benches are separate courts with mutually exclusive territorial jurisdiction. Reference was made to Sec. 41 of the Bombay Reorganisation Act. 1960 which provides for a permanent Bench of the Bombay High Court at Nagpur. The Nagpur Bench is to exercise Jurisdic-tion "in respect of cases arising in the districts of
Baldana, Akola,
Amravati,
Yeotmal, Wardha, Nagpur,
Bhandara, Chanda and Rajura." It was, however, provided that the Chief Justice may, in his discre-tion, order that any case arising in any such districts shall be heard at Bombay.
Similar provision is there in Sec.2 of the High Court at Patna (Establishment of a Permanent Bench at Ranchi) Act 1976 by which
the Chief Justice was authorised, in his discretion, to order that any case or class of cases arising in the districts assigned to the Ranchi Bench shall be heard at Patna.
True, there is no specific provision as above in our case. There was no such specific provi-sion authorising the Chief Justice of the West Paki-stan High Court in the High Court of West Pakistan (Establishment) Order 1955. But even then the Su-preme Court of Pakistan in the case of Shamsuddin Vs. Gauhar Ayub (supra) found nothing in paragraph 4 of the Order "which would justify the view that after an order of assignment of an area to a particular Bench has been made, the Chief Justice is thereafter devoiced of authority to transfer a case from that area pending in such Bench, either to the main seat of the High Court at Lahore or to another Bench or to a circuit court". I entirely agree with this view, for, if it were not so then, as pointed out in that case, it would amount to creation of seven High Court Divi-sions with mutually exclusive Jurisdictions which is entirely outside the contemplation of the Constitu-tion. Further when the Chief Justice is authorised under sub-art (6) to provide by-rules for all incidental supplemental or consequential matters relating to the permanent Benches, he can always make a rule pro-viding for transfer of cases in his discretion. I am in-clined to think that the Chief Justice is fully compe-tent to pass such order even now under rule 9 of the impugned Rules. It is inconceivable that the Chief Justice of Bangladesh is lacking in authority to make an order of transfer of a case when the functioning of the Benches has been left entirely to him subject to the amended Article 100.

635. Finally, it is to be observed that the ef-fect of the impugned amendment has been that whereas the High Court Division under the unamended Article 100 used to function (before the in-troduction of 'Sessions' in Nov. 1986) from the per-manent seat of the Supreme Court in the Capital, the place of sitting of the High Court Division has been scattered to six different district headquarters be-sides the permanent seat under the new dispensation. It has already been noticed that the decentralization of the High Court Division which started under the Martial Law regime has now been given constitu-tional recognition by the Eighth Amendment Act. Whether the decentralization of the High Court Divi-sion is justified on principle or not whether it is in the interest of the administration of justice or not, whether the results shown so far are productive or not—are all matters relating to policy and consequence of the measure. I have pointed out above that the court has always shown disfavor to hold sit-tings even outside the permanent seat. But in this proceeding we are called upon to examine the extent of power of the Parliament under Art 142 in making amendment to the Constitution. In ascertaining this power the policy behind or consequence of

any partic-ular amendment, it is settled on high authorities, are not to be looked into by the Court. The setting up of six permanent Benches may have been unwise and unproductive but whatever may be the personal view a Judge regarding the wisdom behind or the improv-ing quality of an amendment, he would be only con-cerned with the legality of the amendment and this, in its turn, would depend upon the question as to whether the formalities prescribed in Art. 142 have been complied with.

636. In this connection the limits for the court which has been drawn by the Privy Council consis-tently may be referred to. It has already been noticed, the dicta laid down in the Queen v. Burah (supra) that it is not for any court of justice to inquire further, if what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited. In Attorney-General for Ontario vs. Attorney-General for Canada 1912 A. C. 571 the Privy Council said that so far as it was a matter of wisdom and policy it was for the determina-tion of Parliament. In Vacher & Sons 1913 A. C. 107 Lord Atkin observed at pages 121-122 "if the language of sub-section be not controlled by some other provisions of the Statute, it must, since its lan-guage is plain and unambiguous, be enforced as your Lordships here sitting judicially is not concerned with the question whether the policy it embodied is wise or unwise, whether it leads to consequence, just or unjust, beneficial or mischievous."

637. Khanna J, in Kesavananda observed that an amendment of the Constitution in compliance with the procedure prescribed for it cannot be struck down by the court on the ground that it is a change for the worse. If the court were to strike down the amendment on that ground, it would be tantamount to the court substituting its own opinion for that of the Parliament regarding the wisdom of making the impugned Constitutional amendment which is not permissible Khanna, J. then quotes from the U. S. Supreme Court in Ferguson v. Skrupa (1963) 372 U. S. 726 wherein it has been observed: " We refuse to sit as a super legislature to weigh the wisdom of legislation, and we emphatically refuse to go back to the time when Courts used the Due Process Clause to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

638. In view of the aforesaid time-honored principles it will be clearly outside the province of the court to sit on judgment as to the merit of the amended Article 100 whatever be and howsoever strong be the personal view of a Judge. A Court can-not afford not to enforce the law because in its opin-ion the policy behind it was not good or that some-thing else would have produced better result. The learned counsel for the appellants understandably did not put much emphasis on the aspect of policy and consequence of the measure in attacking the vires of the impugned amendment even though much has been said about the background in which it came about (which is again unrelated to the Power of Par-liament). A question may be raised what then is the remedy if the policy is found to be wrong and unpro-ductive. The public leaders must give the answer be-cause they are supposed to represent the true spirit of the society. To quote learned Hand again (already quoted before) "that a society where that spirit flour-ishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nature of that spirit, that spirit in the end will perish". My own approach on the subject is based on the belief that in matters of state there is no higher faith than faith in the democratic process. In a democracy the determination of the right policies to be pursued can only be achieved by a majority vote cast at the national election and then

by a majority of the elected representatives in the Parliament.

639. Issue no.
IV

The long title of
the Bill which was introduced in the Parliament for the passage of the
Constitution (Eighth Amendment Act 1988 reads as follows :

Bill

Jeheto nimnobornito uddeshosomuho puran kolpe Constitution
of the People's Republic of Bangladesh
er kotepoe bidhaner odhekotoro songsodhon somichin o pro-ojon; Seheto atodhara
nimnorup Ain kora hoelo:-

640. Dr. Kamal Hossain
submitted that since in the long title it was not specifically set out as to
which of the Articles of the Constitution were to be amended there was
violation of Art. 142 (1)(a)(i) and as such the impugned amendment is
unconstitution-al. He argued that the long title in this case men-tioned only
that certain provisions of the Constitu-tion were to be amended but did not
specify that Art. 100 was to be amended. The learned counsel contend-ed that it
is a mandatory requirement to mention spe-cifically which particular article
will be amended and if it is not done, there will be a violation of the special
procedure laid down for amendment and the Act will be rendered ultra vires. The
object of such a mandatory requirement, it is pointed out, is to give due notice
both to the members of the Parliament and the public of the nature and scope of
the amend-ment proposed to be made in the Constitution. In the absence of such
particulars in the long title the members of Parliament would not have the
benefit of notice of the implication and effect of the pro-posed amendment.

641. Dr. Hossain
further submitted that the mandatory requirement as to the content of the long
title is meant to avoid amendment by stealth or con-cealment.

642. In support of
his first contention, he has placed reliance on the Bribery Commissioner's Case
(supra) as already noticed in which the Privy Council held that a legislature
has no power to ignore the conditions of law-making that are imposed by the in-strument
which itself regulates its power to make law. For the second proposition he has
referred to para 169 of American Jurisprudence Volume. 50 (5 Am Jur) P.149
which reads as follows:

"169. Rules
Requiring Adherence to Constitu-tional Provision. A challenge of the suffi-ciency
of the law under constitutional pro-visions relating to its title is not a
technical objection to be treated lightly by the courts. Indeed, it is the
sworn duty of the courts to enforce these provisions, the same as any other
constitutional provision, and the courts cannot uphold an act, or part of an
act, the subject of which is not mentioned in the title and is not within the
scope thereof; if the title imports one subject, while the statute itself shows
a different subject to be its purpose, the act is unconstitutional on the
ground that its subject is not expressed in its title. In cases falling within

the reasons upon which the constitu-tional provision rests, it will be strictly en-forced by the courts. A tendency toward such strict application is especially discerni-ble where it is necessary to prevent un-wholesome and mischievous laws."

643. Khandkar
Mahbubuddin Ahmed made sig-nificant submission on the long tide supporting Dr. Hossain and making extensive reference to the afore-said American Jurisprudence. Mr. Ahmed argued that since the subject was not mentioned in the long title it should be construed that there was an attempt to conceal from the legislature and the public as to what was going to be passed under the vague heading of kotepoe bidhaner odhektoro songsodhan somichin o pro-ojonio.

644. Mr. Amirul
Islam added a new dimension to the argument by submitting that since proviso (i) speaks of a bill for amendment of "a provision of the Constitution" a multipurpose bill for amendment will be in violation of the said provisions. He argued that an "one-provision" bill is an unique safe-guard of our Constitution because it provides the legisla-ture a chance to devote its full attention and focus to the provision which is sought to be amended and it is not likely to be misled or confused as in the case of a bill containing more then one provision. Mr. Ahmed went further by highlighting the mischief that .may be caused in putting up a bill for amend-ment of several provisions of the Constitution. He argued that in the present case there was a provision in the bill along with others to make Islam the State Religion of the Republic and most of the members because of their religious belief and conviction were expected l§ support the said provision, but in respect of setting up of permanent Benches of the High Court Division they might have had different views. As the bill was a composite one many members might have felt compelled to vote for the impugned amendment which perhaps they would not have done if the bill came with a provision for amending Art. 100 only.

645. The learned
Attorney-General submitted that the words 'a provision’ in proviso (i) also means 'provisions' in view of section 13 (2) of the General Clauses Act and the long title stating that certain provisions of the Constitution will be amended meets the requirement of clause (i) to the proviso. The learned Attorney-General pointed out that in all the amending Acts prior to the Eighth Amendment, the long title was very much the same as in the present case and the same practice has been followed in framing the long title as was done uni-formly on all earlier occasions, but there was some deviation in case of the third amendment Act only which was to give effect to the agreement entered into between the Government of the People's Repub-lic of Bangladesh and the Republic of India.

Article 142 (1) (a)
(i) reads thus;

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

The Bengali Version
of the provision reads thus;

(a)
Anorup (Songsodhonir) jonno anito kono biller sompurno sironam ae Songbidhaner kono bidhan songsodhon kora hoibe bolia spostorupe ullekh na korile bilty bibechoner jonno grohon kora jaebe na.

646. Since the provisions of Art. 142 provide for a special procedure for amendment of the Consti-tution itself there can be no doubt that "the condi-tions of law-making "as described by the Privy Council in the Bribery Commissioner's case must be strictly complied with. The provision as to the long title of the bill shows that it has to be expressly stated that it will amend a provision of the Constitu-tion. Under Art. 152 (2) the General Clauses Act 1897 has been made applicable to the Constitution. It is, therefore, clear that words in the singular shall include the plural and vice-versa (s.13 (2). ‘A provision’ will mean 'provisions', and the long title will not be had if it provides for amendment of more than one provision. The argument that the bill for amendment should be 'a mono-provision' bill has, therefore, no basis in the language of the rele-vant clause. Nor there is any basis for the submis-sion that the long title must mention expressly the articles sought to be amended. Neither the Bengali version nor the English version of Clause (1) to the proviso can be construed to mean that specific arti-cles are required to be mentioned in the long title. The learned Attorney-General has pointed out rightly that unlike the provision under Art. 82 (1) of the Ceylonese Constitution which requires the specific mention of the 'provision' to be amended in the long title of the bill there is no such requirement in our provision. The requirement in our case only is that it must be mentioned in the long title that a provision or provisions of the Constitution will be amended. In my opinion it will be sufficient compliance with law if it is expressly mentioned in the long title that a provision or certain provisions of the Constitution will be amended. This reference to the Constitution in the long title of the bill will put the legislators on guard and they are expected to go through the bill to find out with at are the provisions that are going to be amended under the bill. There can thus be no question of Stealth or concealment in passing the Amending act.

647. It will be seen that the requirements un-der the American law to which reference has been made both by Dr. Hossain and Mr. Ahmed have no relevance in considering the requirements provided" for a long title under our Constitution. It is well-settled that while strict compliance with the condi-tions of law-making will be insisted 'upon by the Court, but at the same time the broad principle that a Constitutional provision should not be construed narrowly or with pedanticity should not be lost sight of.

648. Under the American law it has been pro-vided in the Constitution that the subject or object of a statute has to be expressed in the title thereof.

649. It has been mentioned in para 166 of the aforesaid American Jurisprudence that the abuse that developed in legislation before the adoption of the Constitutional Provision requiring the subject or ob-ject of a statute to be expressed in the title thereof, was the practice of enacting laws under false and misleading title thereby concealing from the members of the legislature and from the people the true nature of the laws so enacted or of the particular pro-visions included therein. In our law there is no such provision for mentioning the subject or object of the law in the long title of the bill for making amend-ment in the Constitution. Therefore, any reference to the American principles for considering our own pro-vision will be misleading and will amount to reading

something which has not been provided for in the terms of our Constitution.

650. On a reference
to the bill, however, it is found that the purposes for the fulfillment of which the bill was brought have been stated at the bottom of the bill and reference has been made in the long title itself to the-said purposes. This has been done 94 apparently in accordance with the ordinary practice and procedure of law-making, but Clause (i) to the proviso in Article 142 does not mandatorily require that the subject or object of the law is to be ex-pressed in the long title of the bill.

651. It will be
seen that in all the amending acts prior to the Eighth Amendment the same prac-tice as in the present case relating to long title was followed. The Constitution (Fourth Amendment) Act, 1975 (Act No II 1975) by which not only a large number of articles were amended but chapter af-ter chapter were substituted and added bore the same title as in the present case.

652. The contention
raised by Mr. Mahbubuddin Ahmed that some members might have felt com-pelled to vote for the impugned amendment because it was brought in the same bill providing for Islam as the State Religion does not deserve serious con-sideration for the reason that it postulates assertion of fact that, as a matter of fact, some members had raised objection to the impugned amendment being added to the bill for making Islam the State Relig-ion. The argument in the absence of any such fact is based merely on guesswork. It has already been ob-served mat there is no bar under the law for bringing a multi-purpose bill which, it appears, has been' the consistent practice of the Parliament in making all the amendments to the Constitution prior to the present one. Thus I am of the opinion that there has been no violation of any provision regarding the long title of the bill which may have the effect of in-validating the impugned amendment.

653. Issue No. V

The learned counsel
for the appellants submit-ted that the Parliament cannot divest itself of its es-sential legislative function and delegate the same to another authority and this is more so in case of its amending power under Art. 142 which require spe-cial form and procedure to be followed for exercise of such power. The power under sub-art (5) given to the President to assign areas in respect of which each permanent Bench would exercise its jurisdiction amounts to definitive determination of the territorial jurisdictions, powers and functions of the .newly created permanent Benches on the one hand and impliedly amounts to doing the same to the High Court Division at the permanent seat in the capital on the other. This power includes the power to ex-tend or exclude the areas of territorial jurisdiction from time to time. It is submitted that such power being essentially a part of the constituent power in-hering in the Parliament alone, it could not be dele-gated to the President and as such sub-art (5) is void and any action taken thereunder is a nullity.

654. In support of
the submission Syed Ishtiaq Ahmed referred to and relied upon two cases, 1) in Re-Initiative and Referendum Act 1919 A.C. 935 and 2) Attorney-General of Nova Scotia v. Attorney General of Canada 1951 S. C. R (Canada)
31. In the first case the Judicial Committee of the Privy Coun-cil was concerned with the interpretation of Section 92, head 1, of the British North America Act, 1867 which empowers a Provincial Legislature to amend the Constitution of the Province, "excepting as re-gards the office of the Lieutenant-Governor". The Legislative Assembly of Manitoba enacted the

Initia-tive and Referendum Act, which in effect would compel the Lieutenant Governor to submit a proposed law to a body of voters totally distinct from the legislature of which he is the constitutional head, and would render him powerless to prevent it from becoming an actual law if approved by these voters.

655. As to whether the legislature could confer that power on a body other than itself the Judicial Committee observed at page 945;

"Having said so much, their Lordships, following their usual practice of not deciding more than is strictly necessary, will not deal finally with another difficulty which those who contend for the validity of this Act have to meet. But they think it right, as the point has been raised in the Court below, to advert to it, Section 92 of the Act of 1867 entrusts the legislative power in a Province to its legislature, and to that Leg-islature only. No doubt a body, with power of legislation on the subjects entrusted to it so am-ple as that enjoyed by a Provincial Legislature in Canada, could while preserving its own ca-pacity intact, seek the assistance of subordinate agencies, as had been done in Hodge v. The Queen, (1883) 9 AC 117 the Legislature of On-tario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lord-ships do no more than draw attention to the gravity of the constitutional questions which thus arise".
(emphasis supplied).

656. In the second case the legislature of the Province of Nova Scotia contemplated passing an Act respecting the delegation of jurisdiction of the Parliament of Canada to the Legislature of Nova Scotia and vice versa. The question arose whether, if enacted, the bill would be constitutionally valid since it contemplated delegation by Parliament of power, exclusively vested in it by S. 91 of the Brit-ish North America Act to the Legislature of Nova Scotia, and delegation by that Legislature of powers, exclusively vested in Provincial legislatures under S. 92 of the Act, to Parliament.

657. It was held that "the Parliament of Cana-da and each Provincial Legislature is a sovereign body within the sphere, possessed of exclusive juris-diction to legislate with regard to the subject-matters assigned to it under S. 91 or S. 92, as the case may be. Neither is capable therefore of delegating to the other the powers with which it has been vested nor of receiving from the other the powers with which the other has been vested".

658. It is difficult to see how the principles enunciated in the aforesaid cases is applicable to the facts of the present case. It is well settled that a leg-islature cannot part with its essential legislative function and invest another agency with the same but within the framework of the legislation it can entrust subordinate functions to other agencies. This will be clear from the quotation reproduced above from the judgment in the Initiative Referendum case. I have already found in connection with issue No. III that sub-art. (5) neither limits the plenary jurisdic-tion of the High Court Division nor puts territorial limitation to the jurisdiction of the judges sitting in the permanent Benches. I have also found that the as-signing of area by the President read with Rule

(4) of the Rules is meant only for regulating the manner of exercise of jurisdiction by the permanent Benches by allocation of cases arising from the respective as-signed areas to the concerned Benches. The assigning of areas left to the Chief Executive is no part of the legislative function and it is only a ministerial act. It will be seen that similar power has been given to the Governor under Art. 198 of the 1973 Constitution of Pakistan for assigning the area in relation to which each Bench shall exercise jurisdiction vested in the High Court. Sub-art. (5), therefore, cannot be said to-be ultra vires.

659. Issue No.
VI

Dr. Hossain
submitted the "consultation" with the Chief Justice contemplated in sub-art (5) has to be full, purposeful and substantial on the basis of relevant data and facts to be made available by the President. In order to high-light the scope and impor-tance of "Consultation" between the President and the Chief Justice, he referred to Sankalchand's Case in AIR 1977 (SC) P. 2328 and S. P. Gupta's Case in AIR 1982 (SC) P. 149 at PP. 275, 280 (per Bhagwati, J.). The hurried manner, in which the con-sultation was done in
the present case and notifica-tion issued on the same day, it is submitted, is indi-cative of observance of the formality only without any application of mind either by the President or by the Chief Justice.

660. The
Consultation was to be in connec-tion with assigning of areas to the permanent Bench-es set up under the impugned amendment. It is to be remembered that the areas were already assigned and Benches of the High Court Division were function-ing in the said areas under different names since 1982. If they had been created for the first time under the amendment it would have been necessary to hold more objective consultation for assigning areas, but having regard to the background of the amendment, it cannot be said that the consultation which took place was not sufficient and full to render the Notifi-cations invalid. The decisions cited by Dr. Hossain relate to consultation under Art (222) (1) of the Indi-an Constitution which provides for transfer of a judge from one High Court to another High Court.

The subject being
different the consideration also is bound to be different. It has been noticed that the context of the present case is also different as the Benches were not being established for the first time.

661. The learned
Attorney-General produced a copy of the file relating to the correspondence on the subject which shows that everything was done upto the issue of Notification on the same day i. e. 11.6. 1988.

662. This
extraordinary movement was appar-ently made to avoid dislocation in the sitting Bench-es but the fact remains that the assignment of areas (already existing) was done in consultation with the Chief Justice. The objection raised, in the circum-stances of the case, does not, therefore, appear to be valid.

663. Issue
No". VII.

Dr. Hossain

submitted that rule 6 in so far as it seeks to provide for transfer of pending cases from the High Court Division at its permanent seat to a permanent Bench is ultra vires and unconstitutional since the amended Article 100 does not provide for or authorise the transfer of pending proceedings; in the absence of such a provision, such power to affect a vested right cannot be assumed under the rule-making power under sub-art (6) of Art. 100.

664. Secondly, he
submitted that rule 4 which has introduced the concept of kono bencher jonno nirdisto alakae uddretto sokol bisoe is a new concept not contem-plated in the amended Article 100 and likely to create serious anomalies and difficulties in the exercise of Jurisdiction of the High Court Division by the terri-torially limited permanent Benches. The learned counsel elaborated the difficulties which have been already noticed in connection with Issue No. III.

665. Syed Ishtiaq
Ahmed in addition to the first submission of Dr. Hossain urged that as regards transfer of pending proceeding, there has been a long and consistent legislative practice as is reflected in sub-constitutional as well as Constitutional legisla-tions that while establishing or changing forum of proceedings, transfer of pending proceedings, when considered necessary, had been expressly provided for. This is because a litigant has a vested right to continue the proceeding in the pre-existing forum unless the new law or the new provision of the con-stitution provides otherwise. In support of his sub-mission he referred to several constitutional docu-ments and other statutes including paragraph 6 (3) of the Fourth Schedule to the Constitution which provided for transfer of all legal proceeding (other than those referred to in sub-para (4)) pending in the High Court immediately before the commencement of the Constitution to the High Court Division for deter-mination. The learned counsel in support of his proposition as to the right to continue in the old fo-rum relied upon AIR 1943 F. C. 24, 32 DLR (AD) 1, AIR 1950 Hyd. 71.

666. Mr. Ahmed next
submitted that rule 4 amounts to conferring of Jurisdiction on the perma-nent Benches and the High Court Division at the permanent seat on the basis of "cause of action" which could have been done, if at all, by the Parlia-ment itself.

667. Both Mr. Ahmed
and Dr. Hossain con-tended that so much of the rules as are made applica-ble to the High Court Division at Dhaka are com-pletely unauthorised as sub-art (6) has authorised the Chief Justice to make rules relating to permanent Benches only.

668. It has been
found in connection with Is-sue No. III that the result of the impugned amend-ment has been that whereas under the unamended Art. 100, the High Court Division and its judges used to function from the permanent seat only, now the High Court Division and its Judges are to func-tion from the permanent seat and six other perma-nent Benches created under the amended Article 100 (vide sub-art (2). Since the permanent seat of the Su-preme Court in the capital was already there which has been continued subject to the amendment, there could be no necessity to term the permanent scat as a permanent Bench, but the scheme of the amendment shows that in reality the seat in the capital is noth-ing but another permanent Bench. Further, the work-ing arrangements of the Benches are so interrelated that it will be unrealistic to hold that the rules made by the Chief Justice for permanent Benches could not be made applicable to the High Court Division sitting at the permanent seat or that he had no au-thority to make rules for the latter.

669. As to the contention that for transfer of pending cases a provision in the enactment itself was necessary, it will be seen that such provision is made when there is a change of forum. For example, in the illustration cited above, provision was made for transfer of cases in the Fourth Schedule of the Constitution, as a new forum; namely, the High Court Division in place of the old High Court was established under the Constitution. In the present case, by the impugned amendment no new forum has been created but permanent Benches of the same court' have been set up. Further, it will be seen that the writ petitions out of which the present appeals and C.P.S. L. A. No. 3 of 1989 arise were filed in the Dhaka Bench pursuant to the Rules made by the Chief Justice on 24 November 1986. It is difficult, therefore, to accept in the facts and circumstances of the case that the Chief Justice was not competent to make rules (Rule 6) for transferring the pending cas-es from one Bench to another.

670. As to rule 4, the argument on the basis of likely anomalies and difficulties due to the con-cept of Nirdisto Alakeye uddovoto sokol bishoe as advanced by Dr. Hossain has been answered in connection with Issue No. III and, therefore, need not be repeated here. It may be mentioned that it is not a new concept at all and has been applied both in India and Pakistan while creating Benches of the High Court outside the principal or permanent seat.

671. In reply to Mr. Ahmed's contention it may be observed that rule 4 does not confer any ju-risdiction to the permanent Benches but merely regu-lates the manner of exercise of the Jurisdiction which is already vested in the High Court Division by the constitution and the law. This aspect has also been considered in connection with Issue No. III. It is true that provision such as in rule (4) has been made in the Statute itself in India, vide Sec. 41 of the Bom-bay Reorganisation Act, 1960, First proviso to para 14 of the United Provinces High Court (Amalgama-tion) Order, 1948 etc. But in Pakistan it has been left to the Chief Justice. For example, paragraph 4 of the High Court of West Pakistan (Establishment) Order, 1955 empowered the Chief Justice to assign areas to the Bench at Karachi and Peshawar in rela-tion to which each Bench shall exercise Jurisdiction vested in the High Court. The Lahore High Court ( Establishment of Benches) Rules, 1981, however, shows that the governor of Punjab in consultation with the Chief Justice of the Lahore High Court framed Rules providing, inter alia, that "3. All mat-ters arising within the area assigned to a Bench shall be filed before and disposed of by that Bench."

672. Thus it appears that there was no uni-form rule to be followed in such matter. Sub-art (6) having conferred on the Chief Justice authority to make rules to provide for all incidental, supplemen-tal or consequential matters relating to the permanent Benches, I am of the view that the rules made includ-ing rules 4 and 6 are covered by the authority as given and as such the rules cannot be held to be void.

673. Finally, the conclusions I have reached in view of the discussion above may be stated as follows:

1. The power to amend any provision of the Constitution by way of addition, alteration, substitution or repeal is found to be plenary and unlimited except as provided

in Article 142 itself.

2. There is,
however, a built-in limitation in the word "amend" which does not authorise the abrogation or destruction of the Constitution or any of its three structural pillars, which will render the Constitution defunct or unworkable.

3. The impugned
amendment of Article 100 has neither destroyed the Supreme Court High Court Division as envisaged in the Consti-tution nor affected its jurisdiction and power in a manner so as to render the Constitution unworkable.

4. The impugned
amendment and the Notifications issued and the Rules framed thereunder are not ultra vires on any of the grounds urged.

674. Before parting
with the judgment, I want to make it clear once again that in determining the power of the Parliament; I have all the time visual-ized it in abstraction, having no reference to any par-ticular period or the manner of its election. Indeed the learned counsels for the appellants themselves main-tained the bounds. Secondly, the finding as to the im-pugned amendment being intra vires does not necessarily reflect my agreement with the merit thereof. Lastly, I regret that for the reasons stated above I have found myself unable to agree with the decision of my learned brothers.

675. In the result,
therefore, I would dismiss the appeals and the petition. There will, however, be no order as to costs.

Order of the Court

1. By majority
judgment the appeals are al-lowed; the impugned orders of the High Court Divi-sion are set aside.

2. The impugned
amendment of Article 100 along with consequential amendment of Article 107 of the Constitution is held to be ultra vires and hereby declared invalid.

3. This
invalidation however will not affect the previous operation of the amended Articles and judg-ments, decrees, orders, etc. rendered or to be rendered and transactions past and closed.

4. In view of this
invalidation, old Article 100 of the Constitution stands restored along with the Sessions of the High Court Division.

5. Civil Petition
No. 3 of 1989 is disposed of in terms of this Order.

6. There will be no

order as to costs.

Ed.

This Case is also Reported in:  (1989) BLD (Special Issue) 1, 41 DLR (AD) (1989) 165.