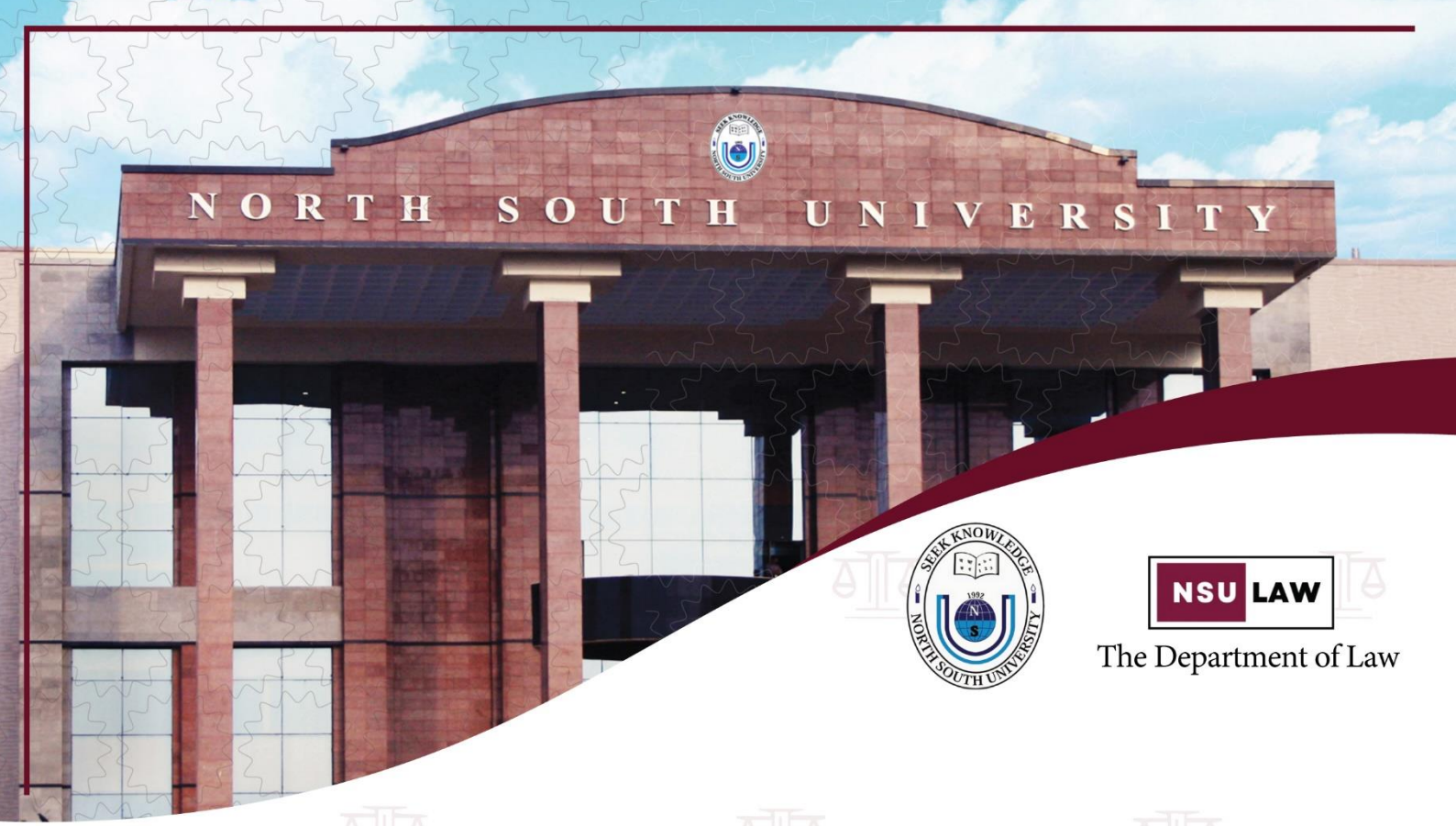

The Department of Law

THE DEPARTMENT OF LAW

Working Paper Series

Working Paper No. 1

Rhetorical Invocation of Constitutional Guardianship as a Justificatory Tool: The Case of Bangladesh

by,

Nafiz Ahmed
Lecturer
Department of Law
North South University

December 2022

Rhetorical Invocation of Constitutional Guardianship as a Justificatory Tool: The Case of Bangladesh

Nafiz Ahmed*

ABSTRACT

The claim of constitutional guardianship by apex courts is not uncommon in jurisdictions with constitutional supremacy, including Bangladesh. The article introduces its readers to the notion of constitutional guardianship by examining the terminology and existing literature. It illustrates how the Supreme Court of Bangladesh (SCOB) used constitutional guardianship rhetoric while enforcing constructional rights in cases that may give rise to political tension. It shows how the SCOB has used the claim of constitutional guardianship to enforce its own preferred version of constitutional balance or political order. The article argues that SCOB uses claims of constitutional guardianship as a tool to add justificatory value to the use of extraordinary powers. It argues that when the SCOB decisions lack textual or precedential support, the Court uses its role as the guardian of the Constitution to add justificatory weight to its decisions.

Key Words: Guardian of the Constitution; Bangladesh; Judicial Review; Constitution; Separation of Powers.

INTRODUCTION

The law claims to be a precise endeavor. However, those who are deeply engaged with legality would probably agree that the law is often unclear about some of its most important elements.[1]

* LL.M (University of Cambridge); LL.B (North South University); is a Lecturer at the Department of Law, North South University. The author would like to thank Sajidur Rahman Nirjhor, Ragib Shahriar, Shahriyar, and Durjoy Saha for their valuable research assistance. The author is grateful to Professor Md. Rizwanul Islam for his

This is especially challenging when one tries to understand the demands of constitutional law. Despite being the supreme law in most countries, constitutions are not self-enforcing. In countries where constitutional designs favour legal constitutionalism, it is the courts that often enforce constitutional laws. In the process of enforcing constitutions, the courts also expand constitutional law.[2] Due to its position as the law above all laws in jurisdictions with constitutional supremacy, the propositions of constitutional law carry an extraordinary force within them. The inevitable vagueness in constitutional law thus poses a grave danger. The lifetime of a constitution in stable democracies ought to far exceed the lifetime of other laws.[3] As a constitution grows older, constitutional law becomes denser and more complex. In legal systems with moderate and strong judicial reviews,[4] the judiciary assumes the role of the interpreter and expounder of the Constitution. Certain judicial positions relating to the Constitution may obtain dogmatic status in this process. For instance, as this article shows in its later parts, the Supreme Court of Bangladesh (SCOB) has time and again held itself to be the guardian of the Constitution without much resistance from the other public players. Similar claims have been made in other jurisdictions as well.[5] However, the exploration of multiple

comments on an earlier draft of the paper. Lastly, the author is grateful to Nasir Uddin Ahmed and Wahida Parvin for being constant sources of inspiration and support. The usual disclaimers apply. The author can be reached at <na538@cantab.ac.uk>

[1] Timothy Endicott, 'Law is Necessarily Vague' (2001) 7 Legal Theory 379.

[2] David A. Strauss, 'Common Law Constitutional Interpretation' (1996) 63 University of Chicago Law Review 877.

[3] Hanna Fenichel Pitkin, 'The Idea of a Constitution' (1987) 37(2) Journal of Legal Education 167.

[4] For differences between strong and weak judiciaries, see, Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115(6) Yale Law Journal 1346, 1354-1356

[5] For instance, the Indian Supreme Court has made similar claims in, *A.R. Antulay v R.S. Nayak* [1988] AIR (SCI) 1531; *Ram Pal v The Hon'ble Speaker, Lok Sabha and Ors.* (2007) 3 SCC (SCI) 184. For more, see, Ga´bor

jurisdictions demands longer discussions. This article solely focuses on the jurisprudence of constitutional guardianship that developed in Bangladesh through various judgments of the SCOB.

One may argue that being deficient in democratic legitimacy,[6] the judiciary's legitimacy and acceptability derive from it being a principled institution speaking with a unified voice in a principled and intellectual manner.[7] The academia should closely examine judgments delivered by the judiciary to make sure that the judiciary is deciding cases in a principled manner. It should also examine the possible outcomes of judgments.[8] Unfortunately, not much has been written about the judiciary holding itself to be the guardian of the Constitution. As an effort to fill in the gap in the literature regarding constitutional guardianship in Bangladesh, this article peruses the judgments of both divisions of the SCOB, [9] in which, the Court held itself to be the guardian of the Constitution.

By analysing the judgments of the SCOB, the article shows the different powers the SCOB has exerted and is exerting by claiming to be the guardian of the Constitution. The article first introduces its readers to the notion of constitutional guardianship by existing literature. The

---

Halmai, 'Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?' (2012) 19(2) Constellations 182.

[6] Waldron (n 4 above).

[7] Kim Lane Scheppele, 'Guardians of The Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe' (2006) 154 University of Pennsylvania Law Review 1757, 1760.

[8] For more on the unpredictability of the consequences of some judgments, see, J.W.F Allison, 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication' (1994) 53(2) Cambridge Law Journal 367-383.

[9] The SCOB is divided into two divisions, namely, the Appellate Division (AD) and the High Court Division (HCD). The HCD has, *inter alia*, original jurisdictions of judicial review. The AD has the jurisdiction to hear appeals arising out of judgments of the HCD. See, The Constitution of People's Republic of Bangladesh, art. 102 and 103.

article then illustrates how the SCOB used constitutional guardianship rhetoric while enforcing constructional rights in cases that may give rise to political tension. It then moves on to show how the SCOB has used the claim of constitutional guardianship to enforce its own preferred version of constitutional balance or political order. The article argues that SCOB uses claims of constitutional guardianship as a tool to add justificatory value to the use of extraordinary powers. It argues that when the SCOB decisions lack textual or precedential support, the Court uses its role as the guardian of the Constitution to add justificatory weight to its decisions.

NOTION OF CONSTITUTIONAL GUARDIANSHIP

The concept of guardianship of a polity can be traced back to Plato's Republic, where he considered the rulers of a polity to be its guardians.[10] The claims of guardianship by judges can also be found in the Shi'ite Islamic legal systems.[11] The debate regarding the guardianship of the constitution garnered a lot of attention in the days of the Weimar Republic when two of the leading constitutional theorists of that time, Hans Kelsen and Carl Schmitt, were engaged in it.[12] Schmitt argued for constitutional guardianship to be bestowed upon a democratically elected executive leader, who may take extra-legal actions at times of emergency to ensure peace and security.[13] Constitutional guardianship by the judiciary, prima facie, seems better than constitutional guardianship in the hands of a single person. Thus, Kelsen's argument of

[10] Brian Christopher Jones, 'Constitutional Paternalism: The Rise and Problematic Use of Constitutional Guardian Rhetoric' (2019) 51(3) New York University Journal of International Law and Politics 773

[11] Abbas Amanat, 'From Ijtihad to Wilayat-i Faqih: The Evolving of the Shi'ite Legal Authority to Political Power' (2003) 2(3) Logos: A Journal of Modern Society & Culture 1.

[12] Lars Vinx (ed. and trans), *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press, 2015) 6-16.

[13] ibid 11-12.

viewing the judiciary as the guardian of the constitution gathered more support than Schmitt's when Schmitt argued in favour of constitutional dictatorship from the other side.

Lars Vinx argues that constitutional guardianship may mean one of two things.[14] The first meaning of constitutional guardianship is the guardianship of a concrete social and political order.[15] The second meaning is the guardianship of constitutionally guaranteed rights.[16] Needless to say, the two meanings imply two very different powers. Protection of constitutionally guaranteed rights can be a completely legal matter fit for the judiciary to decide in litigation. However, guardianship over a social and political order is more of a political act than legal. Guardianship of constitutionally guaranteed rights may raise fewer eyebrows than guardianship of social and political order. The growth of jurisprudence regarding guardianship of constitutionally protected rights has remained largely uncontested, although those who have challenged the legitimacy of judicial review have criticized it.[17] However, the natural growth of guardianship of political and social order by the judiciary has led to the development of the 'unconstitutional constitutional amendment' movement in the form of the doctrine of basic structure, which has provoked many debates.[18]

[14] Lars Vinx, 'Carl Schmitt and the Problem of Constitutional Guardianship' in Matilda Arvidsson, Leila Brännström and Panu Minkkinen (eds), *The Contemporary Relevance of Carl Schmitt: Law, Politics, Theology.* (Routledge, 2016) 34, 35.

[15] ibid.

[16] ibid.

[17] See, Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115(6) Yale Law Journal 1346.

[18] For more on this, see, Gary Jeffery Jacobsohn, 'An Unconstitutional Constitution?: A Comparative Perspective' (2006) 4(3) International Journal of Constitutional Law 460; Nafiz Ahmed, 'The Intrinsically Uncertain Doctrine of Basic Structure' (2022) 14(2) Washington University Jurisprudence Review 307.

There can also be a third meaning of constitutional guardianship. Courts, at times, used the term guardian in a metaphorical sense that ought not to be taken literally. For instance, the Supreme Court of India has remarked in a case that the lawyers are the guardians of the legal system, bestowed with authority to preserve and strengthen the constitutional government.[19] The consequence of metaphorical constitutional guardianship remains unresearched. It has to be understood by interpreting the context of the use of the term. The following discussions focus on how the SCOB has assumed the role of the guardian of constitutionally guaranteed rights and its preferred version of the political order in Bangladesh.

GUARDIAN OF CONSTITUTIONAL RIGHTS

In this Part, the article discusses two cases decided by the SCOB where it asserted its position as the guardian of the Constitution. The Part III of the Constitution of Bangladesh grants justiciable and entrenched fundamental rights to its citizens. The right to seek remedy from the High Court Division of the SCOB (HCD) is also guaranteed as one of the fundamental rights in the Constitution of Bangladesh.[20] Article 102(1) of the Bangladeshi Constitution bestows upon the HCD the power to perform the judicial review of actions violating the fundamental right(s) of the citizens. Article 102(1) of the Constitution states,

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

[19] *Ramon Services Pvt. Ltd v Subhash Kapoor And Others* (2001) 1 SCC 118.

[20] The Constitution of the People's Republic of Bangladesh, Art 44(1).

A careful reading of Article 102(1) shows that the HCD has the power to issue any appropriate direction or order against any person or authority for enforcing a fundamental right. The HCD's power to enforce fundamental rights is extraordinary with little limitation (the requirement of 'appropriateness'). The HCD's power under Article 102(1) is not limited to issuing orders and directions against those performing any functions of the republic. This has been confirmed by the HCD in *Liberty Fashion Wears Limited vs. Bangladesh Accord Foundation and Ors*. in which the Court held, 'When fundamental rights of a person is infringed the remedy under Article 102(1) is available to the aggrieved person irrespective of whether he is in the service of the Republic, local authority, statutory body or even a private capacity.'[21] Since fundamental rights in Bangladesh can also be enforced against private individuals, the HCD can even apply rights horizontally.[22] The Court, in several cases, applied Article 102(1) to enforce the fundamental rights of an aggrieved citizen.[23]

For this part, the relevant cases are those in which the Court has made claims of constitutional guardianship while enforcing a fundamental right. In *Government of Bangladesh*

[21] (2019) 12 SCOB (HCD) 1 at [30].

[22] For more on the horizontality of fundamental rights in Bangladesh, see, Ridwanul Hoque, 'Horizontality of Fundamental Rights in Bangladesh' (2021) 32(1) Dhaka University Law Journal 55; For more on the concept of horizontality, see, Stephen Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102(3) Michigan Law Rev 387.

[23] See for example, Children's Charity Bangladesh Foundation (CCB Foundation) v Bangladesh and Ors. (2018) 70 DLR (HCD) 491; Dr. Mohiuddin Farooque v. Bangladesh (1997) 49 DLR (AD) 1; Bangladesh Legal Aid and Services Trust (BLAST) v. Government of Bangladesh (2010) 30 BLD (AD) 194;
See also, Jobair Alam and Ali Mashraf, 'Fifty Years of Human Rights Enforcement in Legal and Political Systems in Bangladesh: Past Controversies and Future Challenges' (2023) 24 Human Rights Review 121; Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* (Cambridge Scholars Publishing, 2011) 139-183.

v Delawar Hossain Sayedee and others,[24] the Appellate Division of the SCOB (AD) dealt with the appeal of a judgment delivered by the HCD declaring the government's refusal to let the writ petitioner leave the country. The writ petitioner was a well-known opposition to the 1971 liberation war of Bangladesh and was alleged to have committed war crimes in 1971. The petitioner was later convicted by a court after allegations of war crimes against him was proved. However, no charges were brought against the writ petitioner when the petition was pending. The government's argument for refusing the writ petitioner to leave the country was that the trial of war criminals was to begin, and the writ petitioner could be charged for committing war crimes in 1971. The HCD decided that the government's action violated the petitioner's fundamental right of leaving and re-entering Bangladesh, guaranteed under Article 36 of the Constitution. The AD confirmed the HCD judgment, especially emphasizing the following quote from the HCD's judgment:

> If the Government wants to stop the Petitioner from leaving the country[,] then it must start a specific criminal case against him and get a custodial order by a court of law under the laws of the land. If the Government is allowed to restrict a person from going abroad at its discretion simply because he is going to make propaganda against Government policy or because he may be required to stand trial at a future date, then Article 36 will become nugatory. *This Court[,] being the Guardian of the Constitution[,] cannot condone such practice.*[25] (Emphasis added)

In *Banu v Bangladesh and Ors*,[26] the HCD dealt with a petition challenging the imprisonment of the petitioner's innocent son. The petitioner's son was imprisoned instead of a fugitive due

[24] (2010) 7 ADC (AD) 310.

[25] ibid at [13].

[26] (2021) 73 DLR (HCD) 123.

to the negligence of the concerned police officers. While ordering the police to pay 20 lakh taka as monetary compensation and withdraw the concerned police officers from their designated duties, the HCD held:

> Article 102 of the Constitution has mandated this court to direct the concerned authority to dig-out the truth basing on the materials on record, so that none howsoever he/she mighty be[,] cannot play ducks and drakes with the life and liberty of any citizen of this country to serve their petty interest. Our Constitution guarantees enjoying the fundamental right to every citizen of this country and *this court[,] as a guardian of the Constitution[,] is oath bound to protect that inalienable right*.[27] (Emphasis added)

In the above-discussed cases, the power exercised by the Court was well within the ambit of the power granted to it by Article 102(1) of the Constitution. The Court in these two cases found direct violations of fundamental rights and gave orders to enforce the infringed fundamental rights. The Court's role as the bulwark of fundamental rights is common and well-accepted in the common law jurisdictions possessing a written constitution (like Bangladesh).[28] Even those who argue strongly in favour of restricting judicial power (especially that of judicial review) must concede that the courts have the power to enforce fundamental rights in cases of clear violations. Even Jeremy Waldron, one of the most influential advocates against judicial

[27] ibid at [32].

[28] John Laws, 'Is the High Court the Guardian of fundamental Constitutional Rights?' (1992) 18(4) Commonwealth Law Bulletin 1385; Margit Cohn and Mordechai Kremnitzer, 'Judicial Activism: A Multidimensional Model' (2005) 18(2) Canadian Journal of Law & Jurisprudence 333, 335.

review, would concede that the court is the appropriate body to enforce individual rights when a society fails to meet its 'four assumptions.' [29]

The exercises of power in the two cases discussed in this section fit the nature of adjudication. The determinations made in the cases discussed above were objective and based on clear facts that were beyond controversy. In both cases, the facts were undisputed, and the rights enforced were pre-established. No judge would disagree that a citizen has the right to leave and re-enter the country if no prosecution was pending against her. Similarly, no judge would claim that a person can be held in custody for negligence on the part of the police. Judges are trained to decide cases and controversies before them. It is largely believed that even for a court that shows the utmost respect for judicial restraint, deciding on the constitutionally protected rights of individuals would be uncontroversial and common.[30] When litigants seek remedy from the courts for violation of their fundamental rights, for the most part, these litigations are similar to private rights litigations. In both types of cases, the judiciary's task is

[29] Jeremy Waldron, 'The Core of the Case Against Judicial Review (2006) 115 Yale Law Journal 1346, 1360. Waldron's four assumptions are:

(1) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage;

(2) a set of judicial institutions, again in reasonably good order, set up on a nonrepresentative basis to hear individual lawsuits, settle disputes, and uphold the rule of law;

(3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and

(4) persisting, substantial, and good faith disagreement about rights (i.e., about what the commitment to rights actually amounts to and what its implications are) among the members of the society who are committed to the idea of rights.

[30] Henry P. Monaghan, 'Constitutional Adjudication: The Who and When' (1973) 82(7) Yale Law Journal 1363, 1365-66.

to judge whether the impugned actions of the respondents violated the rights of the applicants and provide appropriate remedies.

Traditional lawsuits that courts ordinarily deal with have sharply defined issues that are capable of judicial remedies.[31] The cases discussed in this part of the article were presented in adversarial forms and the courts had the jurisdiction to give remedies to enforce the rights that were claimed to have been encroached. Thus, the remedies granted to the petitioners of the two cases discussed above fall within the ambit of the power of the HCD granted in Article 102(1). The absence of claims of constitutional guardianship by the Court would not have affected the remedies granted to the litigants. The Court's power in the above-mentioned cases did not derive from claims of constitutional guardianship. Instead, the powers exercised by the Court came from the text of the Constitution.

We then must seek to understand the rationale behind the Court's use of assertation of constitutional guardianship in the cases of *Delawar Hossain Sayedee* and *Banu*. One possible answer can be that the court made the claims of constitutional guardianship as an effort to justify and add extra weight to its positions. In the *Delawar Hossain Sayedee* case, the petitioner, whose right the court enforced, was a known war criminal, and allowing him to leave the country when the government was publicly planning to prosecute him had a severe political impact. Similarly, since awarding compensation to victims of police negligence is still a rare action in Bangladesh, awarding monetary compensation in *Banu* also was a strong move

[31] ibid 1371. Monaghan refers to the Supreme Court of the United States of America's decision in *Flast v Cohen* (1968) 392 US (SC) 83, where the Court held that the standing of a case is related to the question of whether the issue before the court is presented in an adversary context and in a form that is historically viewed as capable of judicial resolution.

from the judiciary.[32] Since the Court in both cases took strong positions against the government, it might have felt the necessity to add extra weight to its justification of using its power.[33]

GUARDIAN OF CONSTITUTIONAL BALANCE

In addition to cases where the Court enforced constitutionally guaranteed rights, the Court also made claims of constitutional guardianship in cases concerning the distribution of powers among the organs of the state. This Part discusses three cases in which the SCOB has made claims of constitutional guardianship, not to enforce rights but to justify its positions regarding the distribution of legal power. In these cases, the SCOB held itself to be the guardian of the constitution to justify using its power to conserve or implement its preferred versions of political order.

Government of Bangladesh and ors. v Advocate Asaduzzaman Siddiqui and ors[34]

The SCOB's use of the claim of guardianship is not limited to cases where it enforces fundamental rights. An example of it would be the AD's judgment in the *Government of Bangladesh and Ors. v Advocate Asaduzzaman Siddiqui and Ors*.,[35] in which the AD declared the sixteenth amendment of the Constitution unconstitutional. *Assaduzzaman* challenged the

[32] For more on public law compensation in Bangladesh, see, Nafiz Ahmed, 'The Scope of Claiming Monetary Compensation under Public Law by Victims of Police Brutality' [2020] Public Law 210; Taqbir Huda, 'Fundamental Rights in Search of Constitutional Remedies: The Emergence of Public Law Compensation in Bangladesh' (2021) 21(2) Australian Journal of Asian Law 27.

[33] There is similarity between the function of such justification and what Ronald Dworkin argued the functions of legal principles are. Ronald M. Dworkin, 'The Model of Rules' (1967) 35(1) University of Chicago Law Review 14, 23- 29.

[34] (2019) 71 DLR (AD) 52.

[35] ibid

sixteenth constitutional amendment, which gave the Bangladeshi Parliament the power to impeach judges. The power to impeach judges was previously vested in the Supreme Judicial Council.[36] The Constitution originally vested the power to remove Judges of the Supreme Court on the Parliament, which was changed through constitutional amendments.[37] Thus, the sixteenth constitutional amendment restored the judge removal procedure that was provided in the original Constitution. However, the Court struck down the sixteenth amendment based on the notion that it violated the basic structure of the Constitution.[38] The AD held:

> … [I]t leaves no room for doubt that the task of administration of justice is entrusted to the Judges who are unelected people and thus the Judges exercise sovereign judicial power of the people and by the authority of the constitution; *that being the guardian of the constitution, the Supreme Court is empowered to interpret and expound the constitution*.[39]

The judiciary's power to interpret the Constitution and other laws is not heavily contested.[40] Due to the open texture of language, which is the primary mode of communication of laws, laws may suffer from indeterminacy.[41] This is especially true for constitutional law, which is a mixture of text-based rules, practice, history, precedence, scholarly work, and many more.[42]

---

[36] *See*, Kawser Ahmed, 'Revisiting Judicial Review of Constitutional Amendments in Bangladesh: Article 7B, the Asaduzzaman Case, and the Fall of the Basic Structure Doctrine' (2023) 56 Israel Law Review 263, 264.

[37] ibid.

[38] See, Ahmed (n 18 above) 329.

[39] Asaduzzaman (n 34 above) at [99]. [Emphasis added)

[40] Henry P. Monaghan, 'Constitutional Common Law' (1975) 89(1) Harvard Law Review 1, 2.

[41] HLA Hart, *The Concept of Law* (Joseph Raz and Penelope A. Bulloch eds, 3rd edn, Oxford: Clarendon Press, 2012) 124-136.

[42] Pitkin (n 3 above).

Since the Court applies constitutional law, it must have the power to interpret it. The Constitution of Bangladesh expressly notes the Supreme Court's power to interpret the Constitution.[43] Thus, even if the Court did not claim to be the guardian of the Constitution, it would have been able to exercise its power to interpret the Constitution.

Controversy may arise when the interpretation provided by the Court causes severe political tension or crosses into the boundaries of judicial invention.[44] As discussed before, the sixteenth amendment introduced the process of impeaching judges by the legislature by restoring a provision that was present in the original Constitution. It was held unconstituional by using the doctrine of basic structure. However, the basic structure doctrine connotes that the Parliament cannot change the Constitution in a way that destroys its basic structure.[45] Thus, scholars have rightly been critical of using the doctrine of basic structure to strike down a provision present in the original Constitution.[46] It is not hard to follow why the use of a principle created to preserve the original basic structure of a constitution to strike down a provision present in the original constitution would raise eyebrows. The controversy called for additional justification from the Court for the use of its extraordinary power. To add justificatory value to its decision, the Court made claims of constitutional guardianship.

Another obvious point of controversy was the natural justice concern surrounding the case. As noted, the Court in *Asaduzzaman* dealt with the constitutionality of the procedure of impeaching judges. This begged the question of whether the Court could decide a case that was

[43] Constitution of People's Republic of Bangladesh, art 103 and art 110.

[44] Scholars have criticised the doctrine of basic structure for being a judicial invention. For instance, see, Monika Polzin, The Basic-structure Doctrine and its German and French Origins: A Tale of Migration, Integration, Invention and Forgetting' (2021) 5(1) Indian Law Review 45, 56-60.

[45] Ahmed (n 18 above), 309-11.

[46] Kawser Ahmed (n 36 above), 283-84.

clearly related to its institutional interest. Readers of common law would be familiar with the rule against bias, one of the principles of natural justice. The rule against bias connotes, '*nemo debet esse judex in propria causa*,' which roughly translates to 'no person can be a judge of her own case.' The AD has in several cases remarked that the two principles of natural justice are part of the legal system of Bangladesh.[47] According to the rule against bias, a person cannot judge a case where she may have any interest, since it may lead to a biased decision. The alleged bias does not have to be actual; it can simply be apprehended bias.[48] Since in *Asaduzzaman*, the Judges were deciding the constitutionality of the procedure through which they may be removed from office, they were clearly judging a matter concerning their own interest. It was even pointed out by Ajmalul Hossain, in his amicus curie opinion.[49] To address the amicus curie's concern, Justice Miah held,

> I feel constrained to deal with a point raised by Mr. Ajmalul Hossain under the bold head "A CAUTION" " ... can the Judiciary be a Judge in his own case" applying

[47] For instance, in *Abdul Latif Mirza v Govt. of Bangladesh and other* (1979) 31 DLR (AD) 1, the AD held,

> It is now well settled that whenever any person or an authority is empowered by law to take an action or make a decision which may operate to the prejudice of another person, such person or authority is under an obligation to act judicially in taking such action or making such decision. That is to say, such person or authority is to take such an action or make such a decision on the basis of certain materials and observe the principle of natural justice unless otherwise provided by the enactment creating such a power. at [13]

[48] Matthew Groves, 'The Rule Against Bias' in Matthew Groves and H.P. Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 316. Groves writes,

> A court that upholds a claim of apprehended bias is not required to make an adverse finding against the decision maker. It can make the more palatable finding that a reasonable observer, but not necessarily the court, might conclude that the decision maker was not impartial and go no further.

[49] Asaduzzaman (n 34 above) at [399].

> the rule against bias or "nemo iudex in causa sua. Since the Judiciary has an interest in this case, it should be extremely careful in deciding this case." … In submitting so, Mr. Ajmalul Hossain has, in fact, tried to dissociate us from hearing the appeal. In making the submission quoted, Mr. Ajmalul Hossain totally failed to comprehend the constitutional scheme that the Supreme Court is the guardian of the Constitution … I failed to understand the purport to put forward such an opinion in the form of 'CAUTION' by Mr. Ajmalul Hossain. The Judges of the Supreme Court (including this Division) do never have and can never have any personal interest in a particular matter[,] including the instant one; they hear and dispose of a matter in accordance with law and in case, constitutionality of an act or an amendment to the Constitution is challenged in a writ petition, it is decided in accordance with the constitutional scheme of separation of power and that such amendment to the Constitution does not impair or destroy the fundamental or the basic structures of the Constitution.[50]

In Justice Miah's holding, we again witness the use of the claim of constitutional guardianship to address a controversial situation. There can be little doubt that the rule against bias applies to decision-makers of all judicial bodies.[51] However, the Court here used the claim of constitutional guardianship as an effort to bypass the hurdle of the rule against bias. A reader of Justice Miah's opinion may reasonably conclude that his position is that as the guardian of the constitution, the SCOB is immune from the rule against bias.

In Asaduzzaman, the AD also held,

[50] ibid.

[51] As previously held by the AD in *Abdul Latif Mirza* (n 47 above).

> …*The Supreme Court being the guardian of the constitution any interpretation of the relevant provision of the constitution by this court prevails as a law*, there is no doubt about it. The interpretation placed on the constitution by this court thus becomes part of the constitution. This interpretation gets inbuilt in the provisions interpreted…[52]

As discussed before, the Court's power to interpret the Constitution is rather uncontroversial in Bangladesh. However, in the above-quoted paragraph, the AD held that the Court has the final say regarding constitutional issues and hailed itself to be a legitimate creator of constitutional law. The judiciary's role as one of the creators of constitutional law is generally accepted by constitutional law scholars. For instance, David A. Strauss wrote, '…when people interpret the Constitution, they rely not just on the text but also on the elaborate body of law that has developed, *mostly through judicial decisions*, over the years.' [53] However, although the judiciary occupying the authority to have the final say regarding constitutional issues is not an uncommon claim in jurisdictions with a supreme constitution, it poses a separation of powers concern. Previously, the AD held that in Bangladesh separation of powers means that 'the sovereign authority is equally distributed among the three [o]rgans and as such one [o]rgan cannot destroy the others [sic].'[54] The Constitution is not only the most important legal document of the land but also the most important political document. Thus, it can be argued that having the final say over constitutional issues may amount to the same as having the final say over political issues. The judiciary alone having the final say over political questions may

[52] Asaduzzaman (n 38 above) at [346].

[53] Strauss (n 2 above). (Emphasis added)

[54] *Anwar Hossain Chowdhury v Govt. of the People's Republic of Bangladesh* (1989) 41 DLR (AD) 165 [416].

create separation of powers concerns.[55] Here too, the court referred to its role as the guardian of the Constitution to add justificatory value to its decision.

Lastly, in Asaduzzaman, the Court used constitutional guardianship claims to hold that its role as the guardian of the Constitution also creates obligations on the other organs of the state. It held, 'It is the duty of all organs of the State to allow the Supreme Court functioning [sic] as *guardian of the Constitution and running the Judiciary smoothly, otherwise, the doomsday will not be far of…*'[56]

Tayeeb and ors. v Government of the People's Republic of Bangladesh and ors[57]

Another interesting case where the SCOB made claims of constitutional guardianship was the *Tayeeb and Ors. v Government of the People's Republic of Bangladesh and Ors.*[58] The case decided by the AD. The appeal before the AD arose after the HCD issued a *suo moto* rule declaring fatwas[59] as unlawful. Apart from the legality of fatwas, the question before the AD was whether the HCD had the power to issue *suo moto* rules using its writ jurisdiction under Article 102. Since the writs, apart from the habeas corpus and quo warranto, require applications by 'an aggrieved person',[60] the question before the Court was whether the HCD had the power to issue a writ without an application from the aggrieved person. While writing

[55] For more, see, Ahmed (n 18 above) 337-39.

[56] Asaduzzaman (n 34 above) at [777].

[57] (2015) 67 DLR (AD) 57.

[58] ibid.

[59] Fatwa can be defined as 'an answer by a mufti [Islamic jurist] to the question regarding sharia laws.' Wan Mohd Khairul Firdaus Wan Khairuldin, et al 'Ethics of Mufti in the Declaration of Fatwa According to Islam' (2019) 22(5) Journal of Legal, Ethical and Regulatory Issues 1, 2.

[60] Constitution of People's Republic of Bangladesh, art 102.

for the majority judgment, Justice Syed Mahmud Hossain justified the HCD's power to issue *suo moto* rule by holding, inter alia, that:

> The Supreme Court of Bangladesh[,] as the guardian of the Constitution[,] is the protector of rights, freedoms and liberties of the people. Using tools of innovative and creative interpretation of the constitutional provisions, the Supreme Court of Bangladesh has consistently endeavored to further extend the horizon of rights and liberties and administered quality justice to the justice-seekers…. There is no gainsaying the fact that the majority of the people of Bangladesh cannot afford to come to the High Court Division to seek redressed of their grievances. If the fundamental rights of an indigent citizen is violated and if he does not have the means, should he be allowed to suffer only because of his inability to come before the High Court Division with an application…. As a result, various Non-Governmental Organizations are coming forward to help the indigent people for redressal of their grievances; but it is not always expected that such Organizations will come forward to assist such people in each and every case. In such a situation, the Court cannot sit idle.[61]

Before the *Tayeeb* judgment, the settled position in Bangladesh was that the HCD can entertain a writ petition once an aggrieved party (including citizens and indigenous organisations in public interest litigations)[62] has filed an application seeking redress.[63] One of the main

[61] Tayeeb (n 57 above) at [319]-[320]

[62] *Dr. Mohiuddin Farooque v Bangladesh and others* (1997) 49 DLR (AD) 1 [48]; For more, see, Md. Rizwanul Islam and Md. Tayeb-Ul-Islam Showrov, 'Sifting through the Maze of 'Person Aggrieved' in Constitutional Public Interest Litigation: Has Abu Saeed Case Ushered a New Dawn?' 28 Dhaka University Law Journal 155-168.

[63] Tayeeb (n 57 above) at [2] and [314]

arguments against the Court's use of suo-moto power was that it lacked any textual or precedential justification. Since neither the text of the Constitution nor any past cases expressly provide such a power, the Court used the claim of constitutional guardianship to justify its use of this *new* power. In his dissenting opinion, Justice Wahab Miah also held that the Court is the guardian of the Constitution but argued that it is not enough to justify issuing suo-moto writs.[64] Justice Miah held,

> It is true that the Supreme Court[,] as the Guardian of the Constitution[,] is the protector of the rights, freedom and liberty of the People as enshrined in Part III of the Constitution, but when the framers of the Constitution, namely, the Constituent Assembly, in plain and unambiguous language/wordings stated that the High Court Division "on the application of any person" may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of the Constitution, so also in respect of the other remedies as mentioned in clauses (a) and (b) of sub-Article (2) thereto how then it can be read that such power would include a power of issuance of a suo motu Rule in the absence of any application.[65]

Omer Ali v Government of Bangladesh[66]

In the recent case of *Omer Ali v Government of Bangladesh*,[67] the HCD had to deal with a judicial review submitted by a private contractor that challenged the government's order to

[64] ibid at [172].

[65] ibid.

[66] (2022) 30 BLT (HCD) 377; LEX/BDHC/0156/2020.

[67] ibid.

encash a security deposit of the petitioner. The government entered into a contract of sale with the petitioner for importing high-power fog lights to be installed on ferries. Unfortunately, the lights that were bought were not effective despite the government officials testing the lights before the sale was made. While dealing with the case, the HCD noticed that the fog lights were tested in New York during the summer. Needless to say, New York in summer is not an appropriate situation to test fog lights. The Court in *Omer Ali* held,

> *As Guardian of the Constitution, this Court has a duty and obligation to ensure that the tax-payers' money is not wasted*. The case in hand is a classic example where Government officials have not only abused their official position and authority to undertake the trip to USA, but they also failed to perform their duty…[68]

If the proposition made in the above-quoted paragraph is taken to be true, then the HCD has the power to judge how the government spends its money. The SCOB previously held that the HCD only has the power to judge the legality of government actions and cannot perform proportionality tests in judicial reviews.[69] When the Court reviews how the government is spending its money, it must compare the government's action with other possible actions, which would be a test similar to the proportionality test.[70] The Court previously denied performing merit reviews of government actions while observing that

> It [proportionality test] involves the exercise of balancing relevant considerations like, the balancing test, the necessity test and the suitability test. This concept

[68] Ibid at [18]. (Emphasis added)

[69] See, Nafiz Ahmed, *Bangladesh One Step Closer to Adopting the Doctrine of Proportionality?*, International Journal of Constitutional Law Blog, Mar. 8, 2023, at: iconnectblog.com/2023/03/bangladesh-one-step-closer-to-adopting-the-doctrine-of-proportionality/ (last accessed 17 August 2023).

[70] ibid.

> involves the Court to evaluate whether proportionate weight has been attached to one or other consideration relevant to the decision. As a ground for judicial review it is absolutely a new concept to our jurisprudence. And in accepting it this Court shall have to accord different weights to different ends or purposes and different means[,] which cannot be allowed in a review.[71]

Thus, the power that the HCD is held to have in *Omer Ali* is unprecedented in Bangladesh. Even though *Omer Ali* dealt with a clear misuse of public money, the principle set by the judiciary in this case can create a new dimension of judicial review in Bangladesh. Needless to say, the judiciary's decision to suddenly conduct a merit review of administrative decisions may cause tension between the judiciary and the executive. Here too we see the use of constitutional guardianship claims to justify the use of an unconventional power by the Court. The Court went on to hold in *Omer Ali*,

> As Guardian of the Constitution, this Court is concerned about the manner in which official matters are being conducted. Such conduct on the part of irresponsible, not to mention incompetent, Government officials cannot be allowed to continue unabated. This guardianship… is exercised through the principle of reasonableness…[72]

Here, the Court is connecting constitutional guardianship with the principle of reasonableness. The SCOB adopted the principle of reasonableness (also known as Wednesbury reasonableness) from Lord Green's opinion in *Associated Provincial Picture*

[71] *Ekushey Television Ltd. and another v Dr. Chowdhury Mahmood Hasan and ors*. (2003) 55 DLR (AD) 26 [33].

[72] *Omer Ali* (n 66 above) at [24].

Houses Ltd v Wednesbury Corporation,[73] and applied it in several cases.[74] Generally seen as a principle of administrative law rather than constitutional law, the reasonableness principle notes that if a decision is so unreasonable that no reasonable person applying her mind could have taken it, it lacks legality. It is unclear how the HCD is connecting constitutional guardianship with the principle of reasonableness. However, it is another example of the Court using claims of constitutional guardianship vaguely to add justificatory value to a possibly controversial decision.

In the three cases discussed in this Part of the article, we can see an observed pattern of the SCOB using constitutional guardianship rhetoric to justify using extraordinary powers. In *Asaduzzaman*, the SCOB used it to justify holding itself to be the final decision maker regarding the distribution of powers among the organs of the state and the accountability mechanism of these organs. It also used the same claim to justify not applying the rule against bias against itself. In *Tayeeb*, the SCOB used its position as the guardian of the Constitution to justify using its power to entertain judicial review on its own motion, a power that it previously did not use. In *Omer Ali*, the SCOB used the same rhetoric to justify deciding that it had the duty and power to judge the merit of official decisions. The SCOB's power affirmed in *Omer Ali* was also a power that the SCOB previously did not use. In all three of these cases, the SCOB lacked textual and precedential support and used the claim of being the guardian of the Constitution to fill up the justificatory void.

CONCLUSION

[73] [1948] 1 KB 223.

[74] *Bobby Hajjaj v Bangladesh Election Commission and Ors*. (2019) 71 DLR (HCD) 89; *Hafizur Rahman Nafor v Bangladesh and Ors.* (2015) 35 BLD (HCD) 307; *Abul Asad (Md.) and Ors. v Secretary, Ministry of Education and Ors*. (2020) 18 ALR HCD) 65.

The most attractive feature of a written constitution is the limitation of powers it imposes on all organs of the state. One of the foundations of judicial review in jurisdictions with written supreme constitutions is that since the Constitution is written, the power it grants to its organs is limited. Although the judiciary is often considered the least dangerous branch,[75] it too can go beyond its allocated power. The SCOB occupies the position in Bangladesh's polity to decide its own competence. If the SCOB can use any new power it wishes just by using constitutional guardianship rhetoric, a future Court may misuse this power or get embroiled in avoidable controversies. As discussed above, the SCOB has previously held that the separation of powers in Bangladesh demands that no organ of the state would become more powerful than the others. If the SCOB can justify introducing new powers by simply claiming to be the guardian of the Constitution, it could disturb the existing equilibrium of the distribution of powers among the organs.

Although the use of constitutional guardianship rhetoric in cases involving the enforcement of constitutional rights is comparatively uncontroversial, the same cannot be said for cases in which the rhetoric is used to preserve or enforce a political order. Not all disputes are fit for adjudication as some judges may not always be well-equipped in adjudication to foresee all the possible consequences of the decision.[76] As Lon L Fuller rightly remarked, 'decision may act as a precedent, often an awkward one, in some situation not foreseen by the arbiter.'[77] In an adversarial system like the one Bangladesh has, the outcome of a judgment heavily depends on the arguments that the litigants present. It may not be possible to predict the possible outcomes of upholding a political setting over another

[75] Alexander M. Bickel, *The Least Dangerous Branch* (Yale University Press, 1986) 1.

[76] Allison (n 8 above) 369-71.

[77] Lon L. Fuller and Kenneth I. Wintson, 'The Forms and Limits of Adjudication' (1978) 92(2) Harvard Law Review 353, 397.

just by hearing the litigants. Enforcing a version of a particular political order in adjudication thus may be problematic.

As this article tries to illustrate, using its role as the guardian of the Constitution, the SCOB asserted its power to enforce rights, give authoritative constitutional interpretation (at times inventions), make constitutional law, unmake constitutional amendments, create constitutional duties for other organs, avoid trappings of natural justice, issue suo-moto rules, and perform merit review of administrative actions. However, this list is far from an exhaustive one. If all that stands between the judiciary and the assumption of a new power is a constitutional guardianship rhetoric, the list of powers of the guardian of Bangladesh's constitution is almost bound to grow. It is theoretically and empirically impossible to assume the constant benevolence of one of the organs of the state. If one of the organs of the state gets a license to expand its own powers, the constitutional balance and ethos may be under threat. We must then ask if a constitution can really have a guardian.