11 MLR (AD) 2006 FARIDA AKHTER AND OTHERS VS BANGLADESH AND OTHERS (MOHD. FAZLUL KARIM-J.)

APPELLATE DIVISION
(CIVIL)

Syed J.R. Mudassir Husain-C.J.
Md. Ruhul Amin-J.
Mohammad Fazlul Karim-J.
M.M. Ruhul Amin-J.
Md. Tafazzul Islam-J.
Amirul Kabir Chowdhury-J.

CIVIL PETITION FOR LEAVE TO APPEAL NOS.707, 708 & 789 OF 2005.
(From the judgment and order dated 20th May 2005 passed by the High Court Division in Writ Petition Nos.3262, 6942 and 3975 of 2004).

Farida Akhter and others .....Petitioners
in CP No.707 of 2005.
Sigma Huda, Advocate, Supreme Court of Bangladesh and others.....Petitioners.
in CP No.708 of 2005
Ayesha Khanam General Secretary of Bangladesh Mahila Parishad, Dhaka and others.....Petitioners in CP No.789 of 2005

vs.

Bangladesh represented by the Secretary, Cabinet Division, Bangladesh Secretariat, Dhaka and others.....Respondents.
in all the petitions

For the Petitioners (in CP Nos.707 & 708/2005) : Dr. M. Zahir,
Senior Advocate,
(Mrs. Sigma Huda,
Advocate with him),
instructed by
Mr. Syed Mahbubur Rahman,
Advocate-on-Record.

For the Petitioners
(in CP Nos.789/2005 : Mr. M. Amirul Islam, Senior Advocate, instructed by Mrs. Sufia Khatun, Advocate-on-Record.

For the Respondents
(in all the petitions) : Mr. A.J. Mohammad Ali Attorney General, instructed by Mr. Ahsanullah Patwary, Advocate-on-Record.

Judgment: 19th July, 2005
Constitution of Bangladesh-
Article 65(3)- Reserved seats of Parliament for women-
Bangla.....(Act No.30 of 2004)-

JUDGMENT
MOHAMMAD FAZLUL KARIM, J:-

These Civil Petitions for Leave to Appeal being No.707 of 2005 arising out of Writ Petition No.3262 of 2004, No.708 of 2005 arising out of Writ Petition No.6942 of 2004 and No.789 of 2005 arising out of Writ Petition No.3975 of 2004 were heard analogously as the same arose out of the single judgment and order dated 30.05.2005 passed upon hearing of the aforesaid writ petitions together and disposed of accordingly discharging the rules without any order as to costs and directing exclusion of time from 4th January, 2005 when the respondent No.4 was restrained from holding the election till the receipt of the copy of the impugned judgment in computing the period of 90 days for the holding of the election to the reserved seats.

2. The Civil Petition for Leave to appeal Nos.707 and 789 of 2005 arose out of Writ Petition Nos.3262 and 3975 of 2004 respectively challenging the constitutionality of sections 3 and 8 of the Constitution (Fourth Amendment Act), 2004 published in the Bangladesh Gazette dated 17th May 2004 amending, inter alia, Article 65(3) of the Constitution and further adding paragraph 23 in the Fourth Schedule of the Constitution of the People's Republic of Bangladesh purporting to reserve 45 seats in the Parliament

exclusively for women to be elected on the principles set forth by the Parliament whereas Civil Petition for Leave to appeal No.708 of 2005 arising out of Writ Petition No.6942 of 2004 purporte3d to challenge the constitutionality of Act No.30 of 2004 being Jatiya Sangsad (Sanrakhita Mahila Ashana) Nirbachan Ain 2004 being ultravires to the Constitution and violation of the fundamental rights of the petitioners.

3. All the above writ petitions were filed in the form of public interest litigations by women leaders, social workers and leaders of the political parties and certain other members of the civil society with important public image who have been advocating and fighting for the rights of the women of the Country and fighting against the reserved seats for promoting the cause of election of the women by direct election and althorough representing to the Authorities concerned to ensure the women's true representations in the Parliament by direct election.

4. The Civil Petition Nos.707 and 789 of 2005 arose out of Writ Petition Nos.3262 and 6975 of 2004 respectively which were filed stating, inter alia, that Article 10 of the Constitution provides for the participation of women in all spheres of national life and Article 11 provides that the Republic shall be a democracy in which fundamental human rights and freedom shall be guaranteed, in which effective participation by the people through their elected representatives in administration at all levels shall be ensured. Article 19 of the Constitution also provides that the State shall endeavour to ensure equality of opportunity to all citizens who will choose their own representatives and the impugned amendment of the Constitution, contrary to the Article 27 of the Constitution, the petitioners are not being treated in accordance with law inasmuch as it has not given them the opportunity of participating in the reserved seats as they are not members of any political party and has curtailed the power of the people and has authorized the political parties, especially the party in power, to nominate Members of Parliament by themselves. In this process, the party in power will nominate only those women who are the members and leaders of their own political party contrary to Articles 36, 37, 38, 39 and 40 of the Constitution guaranteeing freedom of movement, freedom of assembly, freedom of association, freedom of thought and conscience and speech and freedom of profession and occupation. Thus the right to join or not to join a political party is the fundamental right of the women but the amendment is designed forcing the women to join as such contrary

to their will in order to be a member of the Parliament. The impugned Amendment has disregarded and disrespected the said fundamental rights enshrined in Article 31 of the petitioners so far as it has provided that the reserved seats will be filled in by the existing Members of the Parliament by a single transferable vote. Hence the Act is ultra vires and it has been passed without any lawful authority and of no legal effect. All the petitioners have the requisite positive constitutional and legal qualifications to be a Member of Parliament holding the said qualifications provided in Article 66 of the Constitution read with section 8 of the Act but could not be a member of Parliament in the reserved seats only because they are not members of any particular political party seriously prejudicing their fundamental rights. The impugned Amendment is absolutely in contravention of the basic feature of the Constitution inasmuch as it does not reflect or contain the direct participation of the people and hence it is liable to be declared to have been passed without any lawful authority and of no legal effect.

5. The impugned section 3 provides for 45 reserved seats exclusively for women for a period of 10 years. After the dissolution of the current Parliament to be elected on the basis of procedure of proportional representation in the Parliament through single transferable vote, which is not just workable but arbitrary, capricious and contrary to the basic structure of the Constitution due to the following reasons: First, the number 45 is absolutely absurd, unworkable and unimplementable because it is not a number which is divisible by 300 (existing general seats or constituencies). Therefore these 45 reserved seats will be without any corresponding constituencies whatsoever and as such there shall be inconsistency between Article 119(c), 121 and 122 of the Constitution, which contemplates that each and every parliamentary seat shall have corresponding constituency(s). Secondly, under the new system every political party or a group of MPs who commands 6.67 (300 % 45) seats shall proportionately be entitled to one woman MP from the reserved seats. This shall cause discrimination amongst smaller political parties having less than 6.67 seats or independent MPs inasmuch as they will not have a representation through a woman MP. Thus, there will be discrimination in the House of Nation amongst MPs from the general seat when they will indirectly elect 45 women MPs for reserved seats, which is incongruent with Article 27 of the Constitution. Thirdly, a woman who is otherwise eligible to become MP, but who does not belong to any political party is debarred from becoming an MP for the reserved seat under the

impugned amendment. Because in order to be nominated she must belong to a political party or a group in parliament which commands at least 6.67 parliamentary seats. The above amendment is ultra vires to the Constitution and void ab initio and a nullity for the following reasons: (i) that the Fourth Schedule has to be read along, understood and interpreted in light of Article 150 of the Constitution. The transitory period as contemplated under Article 150 is a limited period frozen in history between 26th March 1971 and the meeting of the first Parliament. All laws made during that period under the authority of the Proclamation of Independence dated 10th April 1971, were ratified by the Constitution under the Fourth Schedule. Thus the 4th schedule is limited within the transitory period between 26th march 1971 and until the operation and commencement of the Constitution in 1972, in order to give cover to such interim and temporary laws, which came into operation prior to the commencement of the Constitution. Thus the scope and ambit of the 4th Schedule has already been exhausted through the passage and expiry of the transitory period as contemplated by the framers of the Constitution. (ii) that the amendment to Article 65(3) was done in order to create 45 reserved seats for women which is itself a temporary provision of the Constitution itself and as such there cannot be yet another temporary special provision for the remainder of the current Parliament inserted in the 4th Schedule arising out of the same temporary Article 65(3). It is therefore absurd to have a temporary special provision (4th Schedule) arising out of a temporary special provision i.e. Article 65(3), which is itself temporary. (iii) The Fourth Schedule in any event has always been used to insert temporary laws not Articles of the Constitution itself. The Fourth Schedule is not capable of Absorbing temporary Articles of the Constitution itself, (iv) Insertion of the residual period of this Parliament in the Fourth Schedule is therefore inappropriate, since its proper place is within the main body of Constitution itself; (v) that the impugned paragraph 23(2) in the 4th Schedule has by operation law created a Parliament, consisting of 345 members, effective from the operative date of the 14th Amendment of the Constitution (i.e. 17th May 2004), which is another absurdity. Because without first passing of any law by the present Parliament to indirectly elect 45 women MPs, it cannot change its own constitution from 300 MPs to 345 MPs. Therefore such an inoperative and absurd provision is void abinitio. Therefore in a systemic way this method ensures that these women always remain subservient to the majority male MPs purely on the ground of gender. That it encourages nepotism and surrogate male nomination of candidates to

these reserved seats in the sense that if the husband or other male party members is refused nomination from a general seat, then as a consolation, his wife or some other close female relation or a relative of a party loyalist is offered the reserved seat, etc. Very rarely women who are capable on their own merit are offered these seats, which inevitably go to those who enjoy a close relationship with a party loyalist or a party boss. Therefore, this system discourages true political empowerment or leadership amongst women which tantamount to degrading treatment towards them. That in the above circumstances, it does not encourage the growth of women's leadership or political empowerment of women, which can only happen by way of direct election. Instead false, incorrect and sometimes demeaning loyalties and alliances are encouraged with a culture of subservience which tantamount to 'degrading treatment' towards women and as such it is crippling the political growth and empowerment of women, as a class, at the expense of a few individuals who are encouraged in a systemic way to serve the patriarchy in a submissive manner at the whims and caprices of the male leaders. That since the seat of these women depend upon the choice of the male majority, these women can hardly ever rise as leaders over and above their male counterparts, and therefore in a systemic manner it cripples the growth of political empowerment of women, emerging as a class or a critical mass to be reckoned on their own merit, not at the mercy or account of other politicians, but directly accountable to the people.

6. Civil Petition for Leave to Appeal No.708 of 2005 arose out of the impugned judgment and order in Writ Petition No.6942 of 2004 discharging the rule which arose out of the almost similar facts alleged in other two writ petitions being Nos. 3262 and 6975 of 2005 in addition to impugning Act 30 of 2004 on the grounds that it discriminates between a lady citizen who does not belong to a political party or a jote and would not get any chance to contest the 45 reserved seats; the law should be struck down as being vague, complicated, illogical, inconclusive and incomprehensive and impossible to be understood and followed by an ordinary citizen especially the quota system in sections 16, 28 and third schedule.

7. The respondents appeared and contested the rules denying the material allegations made in the writ petitions stating, inter alia, that the statements relating to the observations of some of political parties of the country which do not formulate any legal basis to challenge any constitutional amendment on the ground of alleged

change of basic structure of the Constitution and violation of fundamental rights as guaranteed under the Constitution hence denied. It has been further asserted that by amending Article 65(3) of the Constitution and adding paragraph 23 in the 4th Schedule of the Constitution of Bangladesh reserving 45 (forty five) seats in parliament exclusively for women who will be elected by the members of Parliament is not incompatible with the preamble of the Constitution nor has it changed the basic structure of the Constitution. Moreover, a system of indirect election cannot be called undemocratic as the same is provided in the Constitution itself from the very date of its commencement. In the original Constitution, passed by the Constituent Assembly, there was a similar provision for reservation of 15 seats for women for ten years in addition to 300 seats for member of parliament. By Second Proclamation Order No.IV of 1978 the number of seats was increased to 30 seats and the period was extended to fifteen (15) years from the date of the commencement of the Constitution. That period expired on 16.12.1987. It is further asserted in this connection that clause (3) of Article 65 of the Constitution was the substitution of the earlier clause (3) by the new one and as such cannot be challenged as ultra vires and is also not violative of clause 4 of Article 28 of the Constitution which provides that nothing in that Article shall prevent, the State, which expression includes Parliament, from making special provision in favour of women. It has been further asserted that to contest the election to be a member of parliament a candidate contestant may be a nominee of political party or combination of political parties. To be a candidate for participating in the election to be a member of Parliament whether it is general election or bye election, provisions relating to qualification or disqualification are provided in the law which is a subordinate legislation and the law is titled, “Representation of the People’s Order, 1972”. A woman as a citizen fulfilling the conditions as provided by the said law is entitled to contest Parliament election along with others from any general sat and there are presently seven women elected members and the Leader of the House, the prime Minister, and the Leader of the Opposition who are also elected from such general seats. Forty five (45) seats as provided by the 14th Amendment are reserved for women only who are to be elected not directly as applicable in case of general election from general seat, but by the members of parliament in accordance with the provision of law which has since been made and passed by the Parliament namely Act No.30 of 2004. It is declared by the Ministry of Law, Justice and Parliamentary Affairs that after the

draft of the said proposed law relating to election of women member was placed before the Cabinet for deliberation and approval, thereafter, this law was placed in the parliament for passing and making it a law as an Act of Parliament, which has since been done in accordance with the provisions of the Constitution. It has been further asserted that the amending power is a legislative process for enacting amendments for the betterment of the Constitution and Parliament has unfettered right to amend the Constitution under Article 142 subject to the exception as provided in sub-article (1A) which was inserted in 1978 and the amendment of the said Article had taken place on several occasions in exercise of power as enumerated in Article 142 of the Constitution and the said power is sufficiently wide and the Parliament can amend any provision of the Constitution provided it does not affect the basic structure of the Constitution and by the impugned amendment no illegality had been committed far less of destroying the basic structure of the Constitution. It has been further asserted that keeping in mind the provision of Article 28(4) of the Constitution Article 65 clause 3 has been incorporated in the Constitution along with other provisions and the said provision has always existed in the Constitution from the very date of commencement of the Constitution which has undergone several changes with regard to the number of seats and its period of existence. But never the said provision was deleted, it remained in the Constitution. the substitution of the earlier clause (3) by the new one cannot be challenged as ultra vires after about 32 years on the ground of alleged violation of fundamental rights and contravention of the basic feature of the Constitution. It has been asserted that in amending a constitutional provision. Parliament exercises its Constituent power under Article 142 and not its ordinary legislative power under Article 80 of the Constitution and as such there is no limitation to the exercise of the constituent power and amendment affected by exercising the constituent power is not a law and it is unchallengeable. It has been asserted that the word amendment corrects errors or commission or omission or modified the system without fundamentally changing its nature. This power of amendment may not be construed in a narrow sense but be construed in the widest possible sense and in Article 142 of the Constitution excepting the limitations specifically mentioned in clause (a) and clause (1A) thereof. Amendment does not contemplate any other limitation or hindrance. Moreover, by amending Article 142 itself, scope of amendment has been widened by bringing in the phrase. “By way of addition, alteration substitution or repeal”. Besides this the Constitution of Bangladesh is a controlled one because a special

procedure and a majority of two-third of the Parliament are required for its amendment. Moreso, further limitation has been imposed by amending Article 142 which requires a Bill to be introduced with long title for amendment and the other relates to a referendum to the people in certain cases. The procedure was followed in the impugned amendment as the long title of the Bill contained clear indication as to what provision of the Constitution was proposed to be amended and having mandate of the 2/3 majority of the members of parliament the said Bill was forwarded to the President for his assent and accordingly the President gave assent and consequently the said Bill took the shape of an Act after publishing into gazette notification. The impugned Amendment being mandated by two-third majority of the members of parliament who are the representative of the people of the country, hence, the will of the people is reflected in it. It has been asserted that amending power is wide and unlimited and there is no limitation to such power. When Constitution has imposed no limitation on the amending power of Parliament, the power cannot be limited by some vague doctrines of repugnancy to the natural, unalienable rights allegedly envisaged in the preamble and principles of State policy. It has been asserted that law, which 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 of essential feature of the Constitution, becomes a part of the Constitution whereupon it derives the same sanctity as the Constitution itself. Validity of a law is tested by the touchstone of the Constitution but there is no touchstone to test the validity of the Constitution. it’s validity is inherent and as such it is unchallengeable.

8. Dr. M. Zahir, the learned Counsel appearing for the petitioners in Civil Petition Nos.707 and 708 of 2005 submitted that the impugned amendment introducing proportionate basis as to reserved women seats in the parliament based on political party has done away with Constitutional basis of the election as envisaged under Article 121 of the Constitution thereby disturbing the basic structure of the Constitution inasmuch as Article 121 of the Constitution speaks of constitutionality of the election manifesting a pillar of parliamentary form of democracy is being contradicted.

9. The learned Counsel further reiterated that the women belonging to the reserve seats having no constituency the alleged

election demolished the root of the democracy as women citizenship not belonging to any political party would not serve the purpose of protection of the women's right and would be deprived of the right of the women in general to contest in those seats thereby offending Article 38 of the Constitution as to freedom of association inasmuch as 45 elected women in the reserved seats may not advance the cause of democracy. The learned Counsel further submitted that insertion of paragraph 23 in the Fourth Schedule of the Constitution making provision for election in 45 reserved women seats in the present Assembly is unwarranted for remaining one and a half year of Parliament, which is definitely an abuse of the power and besides, admittedly there was no such election for the last 8 years after the previous provision of Article 65(3) elapsed in 1997.

10. While adopting the submission of Dr. M. Zahir for the petitioners Mrs. Sigma Huda, the learned Counsel for the petitioner joined issue and submitted that the 45 seats that would be distributed among the political parties would by no means mean empowerment or advancement of the women as enshrined in Article 10 and 28(4) of the Constitution. Mrs. Huda referring to a speech of the Law Minister that there would be direct election for all the reserved seats at the parliament alleged the legitimate expectation of women in general that the election process would provide for direct election entitling all women of the Country irrespective of party affiliation to be able to contest the election for the reserved seats which has not only violated the preamble of the Constitution but breached Articles 24-28 of the Constitution making degrading treatment towards women.

11. Mr. M. Amirul Islam, the learned Counsel has submitted that each vote should be given due weight instead violative of equal and political justice enshrined in our preamble to the Constitution. The learned Counsel has further submitted that constitution has provided under Article 121 for single electoral roll for such constituency and lack of the same would destroy the ambit/concept of equality for equal vote of equal value which is demonstrative of the concept of equal right.

12. Mr. A.J. Mohammad Ali, the learned Attorney General appearing for the respondents-Government has submitted with reference to Article 65(2) and Article 121 of the Constitution that the Parliament shall consists of 300 members to be elected in accordance with law from the single constituency by direct election

and that Article 11 provides that there shall be one electoral roll for each constituency for the purpose of election to Parliament and that so far Article 65(3) is concerned the members provided for in that clause shall be designated members and no special electoral roll shall be provided so as to hold the ele3ction according to their sex for the purpose of reserved women seat in the Parliament inasmuch clause (2) makes them the member of the Parliament as deemed to be so. The learned Attorney General has further submitted that the amendment in question which is a substitution of the old clause providing 30reserved seats by 45 reserved seats do not offend the basic structure of the Constitution or democratic process inasmuch as it is not an amendment of any substantial nature but only the number has been increased by way of substitution. The learned Attorney General has further submitted that our Constitution from the 1st day of its journey has proceeded along with the election to the reserve seats for women but the present impugned Act 30 of 2004 has provided the power and sought to change the procedure introducing more efficiencies and proper proportionate representation of the women by allocation of seats to the political parties upon introducing change ensuring equality of allocation of the seats amongst the political parties which scheme is inconsonance with the provision of Article 10 and 32(4) of the Constitution maintaining the basic structure of the Constitution and of the democracy and further submitted that the said law cannot be questioned on the ground of repugnancy to the preamble or Article 7, 8, 11, 121 and 121(1) of the Constitution.

13. In the backdrop of the aforesaid submissions on behalf of the respective parties let us examine the provision of Article 65 of the Constitution which reads as under:

65. (1) There shall be a Parliament for Bangladesh (to be known as the House of the Nation) in which, subject to the provisions of this Constitution, shall be vested the legislative powers of the Republic.

Provided that nothing in this clause shall prevent Parliament from delegating to any person or authority, by Act of parliament power to make orders, rules, regulations, bye-lays or other instruments having legislative effect.

(2) Parliament shall consist of three hundred members to be elected in accordance with law from single territorial constituencies

by direct election and for so long as clause (3) is effective, the members provided for in that clause; the members shall be designated as Members of Parliament.

(3) Until the dissolution of Parliament occurring next after the expiration of the period of ten years beginning from the date of the first meeting of the parliament next after the parliament in existence at the time of the commencement of the with law on the basis of procedure of proportional representation in the parliament through single transferable vote;

Provided that nothing in this Clause shall be deemed to prevent a woman from being elected to any of the seats provided for in clause (2) of this article.

14. Clause (1) of Article 65 mentioned about a Parliament of Bangladesh which shall be known as the “House of the nation” subject to the provision of Constitution which is vested with the legislative power of the Republic. The provision in the proviso thereto authorises the parliament from delegating its power to any person or authority by act of Parliament, power to make orders, rules, regulations, bye-laws and other instruments having legislative effect.

15. Clause (3) thereof provides that until the dissolution of Parliament occurring next after the expiration of the period of ten years beginning from the date of the first meeting of the Parliament next after the parliament in existence at the item of the commencement of the Constitution(Fourteenth Amendment Act, 2004, there shall be reserved forty five seats exclusively for women members and they will be elected by the aforesaid members in accordance with law on the basis of procedure of proportional representation in the Parliament through single transferable vote. The clause contains a proviso that such clause shall not be deemed to prevent a women from being elected to any of the seats provided under Article 65(2) of the Constitution i.e. the women are at liberty to contest any seats provides in Article 65(2).

16. Article 65(2) provides that 300 members should be elected from single territorial constituencies by direct election and provisions have been done under the provision of Representation of the People’s Order 1972 (P.O. No.155 of 1972) and the said 300 members are elected according to the procedure laid down therein

whereas the members of the Parliament mentioned in clause (3) of Article 65 are the members to the seats reserved for the women who were previously elected under the provision of Representation of people's Order (seat for women members) 1973 framed pursuant to 4th Schedule to the Constitution of the People's Republic of Bangladesh for election of the reserved seats of women to be elected by the members of the Parliament elected from the single territorial constituency as amended up-to-date and presently under the provision of bangla….(Act 30 of 2004). Thus only those members of the amended up-to-date and presently under the provision of bangla….(Act 30 of 2004). Thus only those members of the parliament elected to it under clause (2) of Article 65 become the electors in respect of the seats reserved for the women under Article 65(3) of the Constitution.

17. If we trace the history of the reserved seats for women Article 65(2) read with clause (3) thereof have made provision since the inception of the Constitution itself i.e., 16th December, 1972 by the founding fathers of the Constitution initially for a period of 15 years from the date of commencement of the Constitution. After expiry of the said period a fresh similar sub-clause (3) was substituted by the Constitution 10th Amendment Act of 1990 published in the official gazette on June 23, 1990 providing for 30 seats exclusively for the women for a period of 10 years who shall be elected according to law by the members elected to the parliament under clause (2) of Article 65 of the Constitution. The provision of the said P.O. No.17 of 1973 read with section 24 of the General Clauses Act, 1897 the election to the 30 reserved seats for women members shall continue in force and shall be deemed to have been made under the provisions of re-enacted clause (3) unless and until it is superseded by any order, rule etc. issued under the provisions so re-enacted. By the present amendment, the Constitution (14the Amendment of 2004), has substituted the said provision in clause (3) of Article 65 of the Constitution as under:

"Until the dissolution of Parliament occurring next after the expiration of the period of ten years beginning from the date of the first meeting of the Parliament next after the Parliament in existence at the time of the commencement of the Constitution (Fourth Amendment) Act, 2004, there shall be reserved forty five seats exclusively for women members and they will be elected by the aforesaid members in accordance with law on the basis of

proportional representation in the parliament through single transferable vote.

Provided that nothing in this Clause shall be deemed to prevent a woman from being elected to any of the seats provided for in clause (2) of this article."

18. From the above, it appears that the founding fathers of the Constitution contemplated two types of members of Parliament, one 300 members of Parliament to be elected in accordance with the law from single territorial constituencies by direct election and certain number of members in the reserved seats exclusively for women members who shall be elected according to law by the members aforesaid.

19. The present amendment after the expiry of previous Act 10th Amendment Act of 1990 has substituted the present one whereby 45 seats exclusively for women members shall be elected in accordance with law on the basis of proportionate representation in the Parliament through single transferable vote for a period of 10 years beginning from the date of the meeting of the next Parliament. Thus the said provision was although in the Constitution in some form or other since commencement of the Constitution and it does not lie in the month of the writ petitioners that the substitution of 45 seats of the previous provision has destroyed the basic character/structure of the Constitution.

20. In the case of Dr. Ahmed Hossain vs. Bangladesh and others reported in 44 DLR (AD) 109 this Court held that substitution of earlier clause (3) of Article 65 or the Constitution by the new one cannot be challenged ultra vires the Constitution for the simple reason that the said provision was there in the Constitution since its commencement.

21. Dr. M. Sahir, the learned Counsel has further submitted under the scheme of our Constitution providing for Parliamentary democracy making a member of parliament responsible to the electorate/people electing him buy the alleged election to the reserve seats without any constituency makes the election meaningless cutting at the root of the parliamentary democracy inasmuch as the scheme of instant election differentiate between one woman and another as woman other than nominee of political party has no chance to be elected as a member of Parliament in the changed

process to the election, thereby making some women more equal than the others.

22. Mr. M. Amirul Islam, the learned Counsel appearing for the petitioners in Civil Petition No.789 of 2005 submitted that the amendment has violate the inbuilt doctrine provided in the preamble to our Constitution that there should be equal justice, political, social and economic, secured to all citizens connoting the concept to be the fundamental structure of the Constitution inasmuch as the women of the Country are not entitled to vote, to have the same value in terms of their respective representation and the same could not be diluted by introducing the unequal concept as the amendment has done away with the concept that the election should be open to all.

23. The learned Counsel has referred to certain passages from a book titled "Limitations on Government Power by Nowak; Rotunda and Young for supporting his submission that each vote should be given due weight instead of weightage of vote diluting creating inequality resulting in violation of political justice alleging that the Act of 2004 has destroyed the concept that constituency is the part of distributive justice and the build in concept of equality has been mutilated, which promote that equal votes of equal value and the concept of equal right.

24. The referred passage is as under:-

"In Reynolds v. Sins the Court was faced with a challenge to the malapportionment of the Alabama state legislature. This time, relying on the equal protection clause, Chief Justice Warren formulated the broad one person, one vote rule:

"Legislators represent people, not trees or acres. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted .....the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."

25. In one of the companion cases the Court struck down an election apportionment scheme in which one house was mal-apportioned by use of an area representation system analogous to the U.S. Senate. While it was contended that the state voters in every

country of the State had approved of their mal-apportioned State Senate, the mal-apportionment was still flawed: “An individual’s constitutionally protected right to cast an equally weighed vote cannot be denied even by a vote of a majority of a State’s electorate.....” The majority cannot waive the rights of the minority, nor should the majority be able to waive the rights of the minority, nor should the majority be able to waive the rights of future generations of voters.”

26. *In our case, the framers of the Constitution visualized and contemplated certain seats reserved exclusively for women members who shall be elected according to law by the members of Parliament. They shall be elected according to law by the members of Parliament. The challenge to the law on the ground of offending principle of equality before law or protection of an equal law for holding the amendment to be ultra vires the provisions of Article 27 and 38(3) of the Constitution falls to the ground for the simple reason that the said phrases are not to be interpretated in the absolute sense to be held all person are equal in all respect disregarding different condition and circumstances in which they are placed or special qualities and characteristics which some of them may possess but which are lacking in others.*

27. The term ‘protection in equal law is used to mean all persons or things are not equal in all cases and that persons similarly situated would be treated alike. Equal protection of law is the guarantee that similar people is dealt with in a similar way and that people of different circumstances will not be situated, as if they were the same.

28. Sir Ivor Jennings in his treatise “The law and the Constitution illustrated the phrase “equal protection of law” as “Equality before the law” means that among equals the law should be equal and should be equally administered that like should be treated alike”.

29. In the case of Smt. Indira Gandhi v. Raj Narayan reported in AIR 1975 SC 2275 Chandrachur J. observes:

“All who are equal are equal in the eye of law” meaning that it will not accord favoured treatment to persons either the same class.”

Thus equal protection appear to be the guarantee that similar people will be dealt with in a similar way and the people of different situation is not expected to be treated as if they were the same.

30. In the case of Jibendra Koshora of East Pakistan, reported in 9 DLR SC 21 Munir CJ observed:

"Whatever the expression equal protection of law means it certainly does not mean equality of operation of legislation upon all citizens of the State. .... Equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons and other classes, in the like circumstances."

31. The legislature while proceeding, to make law with certain object in view of which is either to remove some evil or to confer same benefit has power to make classification on reasonable basis.

32. Similarly, classification of persons for the purpose of legislation is different from class legislation which is forbidden. For any legislation to stand the test of equality a classification must have reasonable nexus with the object which the legislature intends to achieve.

33. Although Article 27 of the Constitution guaranteed that all citizens are equal before law and are entitled to equal protection of law and Article 28(1) provides that the State shall not discriminate against any citizen on ground of any sex etc. but Article 28(4) provides that the State may make special provision in favour of women or for the advancement of any backward section of citizens.

34. Without any aspersion, needless to say that in view of the socio-economic background of our society as the women are lagging behind in all spheres of national life including administration at all levels for good reasons our Constitution postulates in Article 10 that steps shall be taken to ensure participation of women in all sphere of national life and in Article 11 thereof that the democratic Republic shall guarantee the fundamental human rights and freedoms and shall have respect for the dignity and worth of the human person in which effective participation by the people through their elected representatives in administration at all levels shall be ensured. It is also the determined aim of the State to promote local Government

institutions by encouragement and participation of women through special representations as far as practicable (Article 9), for there was no classification between people's representation in the local Govt. bodies and those in the Parliament and they are treated as one and similar class.

35. In the case of Jalan Trading Company vs. Mill Mazdoar Sabha reported in AIR SC 69 it was held that:

"Equal protection of the law is denied if in achieving a certain object, person, things or transactions of similar circumstances are differently treated and that the principle underlying that different treatment has rational relation to the object sought to be achieved by the law."

36. Reviewing the decisions on the subject in the case of Sheikh Abdus Sattar vs. Returning Officer and others reported in 41 DLR (AD) 30 S. Ahmed, J. as his Lordship then was, held:

"The main object of the 'disqualification' provision is to be the furtherance of economic and financial interest of the State and though it has not been expressly stated in the statute it is clear from the nature of duties and responsibilities of the persons constituting these local bodies. It is a common knowledge that for non-payment of loans taken from State owned banks, the national economy has been badly affected. One of the functions of Union Parishads is to help collection of government dues, rent and taxes. Besides, members of the Union Parishad are directly involved in financial transaction in the course of their official duties and running the affairs of the Union Parishad. The fact that these persons are financially handicapped by being 'defaulters' will embarrass them in the discharge of their duties. It is quite natural that a person seeking election to local body, such as a Municipality, will be debarred from doing so unless he clears his dues in rent and taxes to that body. What is the harm if the Legislature extends this bar to his dues to the government controlled banks? The legislature has not imposed similar bar against persons seeking election to Parliament because it has treated members of Parliament as a separate class and in making classification of persons and things it is not bound by any inflexible standard disregarding vital points of differences. Dead uniformity in making a classification is not necessary and rules of classification may allow flexibility. As Plato said in his 'Politicus' laws would operate like an obstinate and ignorant tyrant if they impose inflexible

rules without allowing for exceptional cases. If a law is applicable to all persons of a well defined class, then it cannot be criticised on the ground that similar law has not been made for application to members of other classes. Exclusion of members of the other class, namely the Parliament from this law, which is undisputedly a beneficial one, is certainly unethically and morally undefendable; but it is not unconstitutional. It is not invalid because it is uniformly applicable to all persons of the same class, namely members of local bodies. When the Legislature thought it expedient in the national interest to provide for the impugned disqualification for members of local bodies, they should have provided for similar disqualification for themselves by amending the Representation of the People Order, 1972. Exclusion of members of Parliament is found to be an omission of grave impropriety, which however, may be corrected even now by the law makers themselves, if not required by any law, at least by dictates of good conscience and high sense of patriotism. But exclusion of members of one elective body from a particular disqualification cannot be a ground for attacking the validity of the law in respect of other local bodies; those who are disqualified to seek election to local bodies face no discrimination if they seek election to Parliament, and secondly, there is no inter se discrimination among members of the elective bodies.

37. The right to seek election to the local bodies or even to the Parliament is not fundamental right guaranteed by the Constitution; it is a statutory right and in the instant case, created by the Union Parishad Ordinance, 1983."

38. In the case of Bangladesh v. Md. Azizur Rahman reported in 46 DLR (AD) 19 wherein S. Ahmed, CJ. has held:

"Classification of persons for making law is permissible. This classification is not class legislation. The term "equality before law" should not be interpreted in its absolute sense to hold that all persons are equal in all respects disregarding different conditions and circumstances in which they are placed or special quality and characteristics which some of them may possess but which are lacking in others. In fact, this term means that all persons are not equal in all respects and that persons similarly situated should be treated alike. Equal protection of law is a guarantee that similar people should be dealt with in a similar way and that people of different circumstances will not be treated as if they were the same. A single law therefore cannot be applied uniformly to all persons

disregarding the basic differences among them, and if these differences are identified, then the persons may be classified into different groups or categories according to those distinctions. Therefore a classification is reasonable if it is made to give special treatment to a backward section of the people. It is also permissible to dole out distributive justice by taxing the privileged class and subsidizing the poor section of the people. A classification based on distinct characteristics cannot be assailed as arbitrary. Secondly, a classification to be reasonable it must have direct nexus to the object which the classification seeks to achieve."

39. Parliament often makes a law to attain certain objectives and for effective representation of certain class of persons through their elected representatives or otherwise selects person/persons to whom the law applies. In order to determine reasonableness of a classification it is necessary to discuss the purpose or object of the enactment in question. The validity of a classification depends on the existence of a rational nexus of the differentia of classification with the object sought to be achieved by the enactment.

40. It will be profitable here to quote a passage from the book "Limitations on Government Power" (Supra) on the heading "The application of one person one vote" as under:

"In Fortson v. Morris the Supreme Court upheld the election of Georgaia's Governor by the state legislature. When no candidate had received a majority of the votes cast in the state's general election, the State Constitution allowed the General Assembly to elect the Governor from the two front runners. The voters of each legislative district elected the state representatives who in turn elected the Governor. One major procedural defect struck down in Gray v. Sanders – not adding a minority candidate's votes in one part of the state to the votes he receives in other parts- was approved in Fortson as it applied to the 'delegates' who elect another person. The case indicates that the equal protection principle underlying Gray and other reapportionment cases may be inapplicable to voting by representative bodies which, like party conventions, performs a deliberative, but non-legislative function.

41. Gray and Fortson are perhaps difficult to reconcile with one another. On one level they appear directly, contradictory. Gray, on the one hand, seems to hold that where the voters are asked or required to participate, equal protection mandates that each vote be

counted equally. Fortson, on the other hand, upholds the selection of a state.....by what had earlier been rules to be a malapportioned legislature. On another level, however, Fortson sanctions a representative process in the performance of a non-legislative task, after the voters have exercise untrammeled their right to choose first-tier spokesmen. Fortson and Gray together thus appear to permit selection of an officer through indirect election by a representative body, but not be a mechanical unit system.

42. The Fortson-Gray theory developed above would permit multi-stage representative selection of delegates to the national conventions. A majority of the registered voters in a particular area – a country, for example – could constitutionally elect a delegate to a state convention, which in turn chooses the national delegates. The minority voters in the country are not disenfranchised, as they would be under a untidily system, because they will be represented at higher levels by a delegate who, though committed to a different point of view, can think, compromise and change in the deliberative process, the purpose of which is to select the “best man” for the Presidency. Pragmatic reasons may also explain Fortson: Georgia already had two primaries, one general election and still failed to choose a governor. Justice Black argued that “Statewide elections cost time and money and it is not strange that Georgia’s people decided to avoid repeated elections”.

43. In any event, Fortson, at the least, shows that the Constitution does not require that the Governor of a State be popularly elected. The State can choose to appoint members to an official position rather than elect them. If there is no popular election, the one person one vote rule does not apply.”

44. A single law may not be applied uniformly to all persons disregarding the basic differences among them and these differences are identified and recognized then the persons may be classified in the group of categories according to their distinction, that is what is called “permissible criteria” or “intelligible differential”. Therefore, the classification may be reasonable if it is made to provide special terms to a backward section of the people. But in the case of Sharfat AH V. Union of India reported in AIR 1974 SC 1631, Bhagawati J. has cautioned that:

"The doctrine of classification should not be carried to a permit where instead of being a useful servant it becomes a dangerous master."

45. In the instant case, admittedly as has been noticed in Article 10 of the Constitution "steps shall be taken to ensure participation in all spheres of national life of the women" recognizing the broad fact that so far the representation at the "House of nation" is concerned women though stand at par with the male citizen in the matter of seeking election to the general seats as envisaged in Article 65(2) of the Constitution but are not at the same advantageous position as the male for certain obvious reason, for which the Constitution consciously provided provision in Article 65(3) thereof and keeping in mind the paradoxical situations, our Constitution has provided for provisions like Articles 10, 11, 15 etc. as our fundamental principles of State policy.

46. *Our fundamental principle of State policy enshrines that the State shall encourage local Government institutions composed of representatives of the areas concerned and in such institutions special representation shall be given, as far as possible, to peasants, workers and women and in Article 11, the Republic shall be democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured. In interpreting those Articles 9 and 11 which according to the Constitution itself work as guide to the interpretation of the Constitution and the laws of Bangladesh and inconformity with the principles and legal provisions made to further the cause of State policy must prima facie be constitutional and apparently clear and must not appear to be ambiguous and found to be inconsistent with any provision of Part-II because these principles of State policy having been treated as fundamental to the governance of Bangladesh.*

47. In interpreting the said provision of Article 65(3) read with Act 30 of 2004 as to whether the same are repugnant to Article 7(2) of the Constitution which stand for democratic character of the Republic, the basic structure of the Constitution, the Constitution is the solemn expression of the will of the people, the Supreme law of the Republic and if any other law is inconsistent with the Constitution that other law shall to the extent of the inconsistency be

void. A law is inconsistent with other if they cannot stand together while governing the self same subject-matter. The said Article is fundamental to the governance of Bangladesh, shall be applied in the making of laws and designed as a guide to the interpretation of the Constitution, of other laws and shall form the basis of the work of the State and of its citizen. In the case of Kashabananda Bharati v. State of Kerala reported in AIR 1973 SC 1461 it has been held that:

"The principles of State Policies are mere guidelines for the State in the nature of moral precepts but are no laws to be binding upon the State."

48. In the case of C.B. Boarding and Lodging Vs. Mysore reported in AIR 1970 SC 2042 it has been held that it did not see any conflict on the whole between fundamental rights and the principles of State policy.

49. *In interpreting the various provisions of the Constitution the construction of one part shall throw light on the other part and the construction must hold balance among all the parts and that one part is complementary and supplementary to the other. Ours being a written Constitution no implication could be made and Parliament has unfettered right of amendment of the Constitution subject only to limitations put-forth in Article 142 itself and that as to the rule of interpretation of the constitutional provision in order to ascertain the intention of the legislature, the general rule of law is to construe them applying literal and grammatical meaning of the word. The reservation of the seat exclusively for the women members are already there in the Constitution from the very day of its Commencement and as such the substituted clause (3) of Article 65 i.e. the existing provision in the Constitution cannot be said to be violative of the basic structure of the Constitution.*

50. It has to be assumed that the other provisions of the Constitution have been made to facilitate and not hinder but to realize the ends and objects of the fundamental principles of State policy. A question arose in Indian jurisdiction in the case of madras vs. Chamapakan Dorairagan reported in AIR 1951 SC 226 as to whether the provisions related fundamental right would prevail in case of conflict with the principle of State policy, the Supreme Court of India held that the provision relating to fundamental right shall have prime over the principle of State policy.

51. In a subsequent case in the case of Union Krisan vs. Andra Prodesh reported in AIR 1993 SC 2178 it has been held that one is not to ignore the principle of State policy but should adopt the principle of harmonious construction and attempt to give effect to both as much as possible.

52. Our Appellate Division in the case of Kudrat-E-Elahi Panir Vs. Bangladesh reported in 44 DLR (AD) 319 held, inter alia, that:

"The Repeal Ordinance has been challenged mainly on the ground of its being inconsistent with Articles 9, 11 and 59 of the Constitution. Article 7(2) of the Constitution says that any law inconsistent with the Constitution shall be void. Learned Counsels for the appellants are seeking a declaration of nullity of the Repeal Ordinance on this ground. A law is inconsistent with another law if they cannot stand together at the same time while operating on the same field. Article 9 requires the State to encourage the local Government institutions but the Ordinance had abolished a local Government, namely the Upazila Parishad. Similarly, Article 11, they have pointed out, provides that the Republic shall be a democracy in which, among other things, "effective participation by the people in administration" at all levels shall be ensured; but the Ordinance has done away with such participation in the administration at the Upazila level. These two Articles as already quoted are Fundamental Principles of State Policy, but are not judicially enforceable. That is to say, if the State does not or cannot implement these principles the Court cannot compel the State to do so. The other such Fundamental Principles also stand on the same footing. Article 14 says that it shall be a fundamental responsibility of the State to emancipate the toiling masses-the peasants and workers –and backward sections of the people from all forms of exploitation. Article 15(a) says that it shall be a fundamental responsibility of the State to make provision of basic necessities of life including food, clothing, shelter, education and medical care for the people. Article 17 says that the State shall adopt effective measures for the purpose of establishing a uniform mass-oriented and universal system of education extending free and compulsory education to all children, for removing illiteracy and so on. All these principles of State Policy are, as Article 8(2) says, fundamental to the governance of the country, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the

Constitution and of other laws and shall form the basis of the work of the State and of its citizen, but “shall not be judicially enforceable”. The reason for not making these principles judicially enforceable is obvious. They are in the nature of people’s programme for socio-economic development of the country in peaceful manner, not overnight, but gradually. Implementation of these Programmes require resources, technical know-how and many other things including mass-education. Whether all these pre-requisites for a peaceful socio-economic revolution exist is for the State to decide.

53. Similar Principles of State Policy are there in the Indian Constitution also, wherein they are called Directive Principles of State Policy. Under Article 37 of the Indian Constitution the Directive Principles are also “fundamental in the governance of the country and it shall be the duty of the State to apply these Principles in making laws” but these principles shall not be enforceable by any Court. The Indian Supreme Court in a number of cases including the case of Keshavanda Bharati (AIR 1973 SC 1461) and Deepchand Vs. State of Uttar Pradesh (AIR 1959 SC 664) have held that these principles are mere guidelines for the State in the nature of moral precepts but are not laws to be binding upon the State. Some eminent Jurists like BN Raw and Alladi Krishnaswami and distinguished authors of books on Constitutional law, such as Seervai and Basu, have expressed almost the same view about the Directive Principles of State Policy.”

54. An argument has been advanced that the impugned amendment is inconsistent or repugnant to Article 119(1)(c) of the Constitution. as we have already pointed out that Article 65(2) provides for two types of member of Parliament in the House of Nation, i.e., one 300 members to be elected in accordance with law from single territorial constituencies by direct election and Article 119(1)(c) speaks of delimitation of these constituencies for the purpose of election to the Parliament i.e. for 300 general seats as mentioned in Article 65(2) but so far the election to the reserved seats, a separate provision has been made therein by connoting such members as designated members of Parliament for so long which is a special procedure provided by law and has nothing to do with constituency or its delimitation. Previously P.O. No.17 of 1973 and presently Act 30 of 2004 provides for modalities of conducting the election for 45 reserved seats exclusively for women members in the Parliament who shall be designated as Members in Parliament under

Article 65(2) and Article 119(1)(c) is for the election of 300 members elected on the basis of single territorial constituencies who shall form a electoral roll or electoral college for the purpose of electing women members to the reserved seats.

55. Article 121 of the Constitution provides for single electoral roll for each constituency so far the election to 300 members of Parliament to be elected in accordance with law from single electoral constituency by direct election and Article 122(1) thereof provides for election to Parliament shall be for the 300 members to be elected in accordance with law from single territorial constituency by direct election on the basis of adult franchaise wherein a person with requisite qualification provided therein shall be entitled to be enrolled on the electoral roll for a constituency delimited for the purpose of election to the Parliament.

56. Since commencement of the Constitution, Article 65(3) was there who shall only be designated as member of Parliament as provided in Article 65(2) and so long as clause (3) is effective the members provided for in that clause shall be the members of Parliament and provision has been made for reserved seats exclusively for women to be elected in accordance with law made by the Parliament and such members shall be designated as members of parliament and subsequently the previous Article 65(3) has been substituted by a similar provision enhancing the number of reserved seats to 45 by the 14th Constitutional Amendment Act 2004, the same cannot be said to be violative as inconsistent or repugnant to the Constitution.

57. The High Court Division as well in interpreting the said provision of the Constitution was of the view that the amendment has not offended the doctrine of basic structure of the Constitution.

58. The basic structure has been spelled out in the popularly known 8th Amendment case judgment by this Court in Anwar Hossain Chowdhury vs. Government of Bangladesh and ors reported in 41 DLR (AD) 1675 as under:

“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 structure of a Constitution are clearly identifiable. Sovereignty belongs to the people and it is a basic structure of the Constitution. There is no dispute about it, as there is no dispute that this basic

structure cannot be wiped out by amendatory process. However, in reality, people's sovereignty is assailed or even denied under many devices and "cover-ups" by holders of power, such as, by introducing controlled democracy, basic democracy or by superimposing thereupon some extraneous agency such as council of elders or of wise men. If y exercising the amending power people's sovereignty is sought to be curtained 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 is the solemn expression of the will of the people. Democracy, Republican Government. Unitary State, Separation of powers. Independency of the Judiciary. Fundamental Rights are basic structures of the Constitution. There is no dispute about their identity. By amending the Constitution the Republic cannot be replaced by Monarchy. Democracy by oligarchy or the judiciary cannot be abolished, although there is no express bar to the amending power given in the Constitution. Principle of separation of powers means that the sovereign authority is equally distributed among the three organs and as such one organ cannot destroy the others. These are structural pillars of the Constitution and they stand beyond any change by amendatory process. Sometimes it is argued that this doctrine of bar to change of basic structures is based on the fear that unlimited power of amendment may be used in a tyrannical manner so as to damage the basic structures. In view of the fact that "power corrupts and absolute power corrupts absolutely". I think the doctrine of bar to change basic structure is an effective guarantee against frequent amendments of the Constitution in sectarian or party interest in countries where democracy is not given any chance to develop."

59. The High Court Division have further found that:

"We are in respectful agreement with the submission of Mr. Mahmudul Islam, the Amicus Curiae. He submits that the present law also cannot be questioned on the ground of repugnancy to the preamble or Articles 7(1), 8, 11 or 121 and 122(1) of the Constitution in view of the fact that the judgment in Dr. Ahmed Hussain' case is binding upon this Court."

60. Our Appellate Division in the case of Dr. Ahmed Hossain vs. Bangladesh reported in 44 DLR (AD) 109 while considering the Article 7, 8, 11, 28(4) has held:

"The petitioner next contends that the impugned amendments by providing for indirect election for the seats reserved exclusively for women has destroyed the principle of democracy as expressed in the Preamble, in clause (1) of Article 7 and Article 8 and 11 of the Constitution. A system of indirect election cannot be called undemocratic. It is provided in the Constitution itself. The amendment is not also violative of Article 28. Clause (4) in Article 28 provides that nothing in that Article shall prevent the State, which expression includes Parliament, from making special provision in favour of women."

61. It appears that the people's sovereignty presupposes the democracy, independence of the judiciary and the separation of power which are basic features of our Constitution and the theory of basic structure of the Constitution has to be considered in the light of the provision of the Constitution and as the provision of Article 65(3) was there since its commencement, no question of destruction of basic structure arises. Article 142 of the Constitution excepting the limitations specifically mentioned in proviso to Article 1(a) thereof, amendment to the Constitution does not contemplate any other limitation or hindrance and the scope of amendment has been widened not only by the amendment of Article 142 itself but also with the incorporation of the word "by way of addition, alteration, substitution or repeal."

62. The learned Counsel for the petitioner has taken exception to the introduction by way of addition of new paragraphs 23, a temporary special provision for the residual period of the parliament in existence at the time of the commencement of the Constitution (Fourteenth Amendment) Act 2004 providing for election to 45 seats exclusively for women members and who will be elected by the aforesaid members in accordance with law on the basis of procedure of proportional representation in the parliament through single transferable vote as the period of transition is over with the adoption of the Constitution necessitating any such temporary provision.

63. As already stated above that the original Constitution of 1972 adopted by the Constituent Assembly a similar provision like 65(3) seats exclusively for women for 10 years to be elected from Zones. The Representation of the People's (Seats for Women Members) Order, 1973 provided for the procedure for holding such election. Thereafter by Second Proclamation Order No.IV of 1976

*the number of seats were increased to 30 seats and the period was extended to 15 years from the date of commencement of the Constitution which period expired on 16.12.1987 i.e., till 7th Parliament. But Article 65(3) of the (Constitution was never deleted and it remained a part of the Constitution and the impugned amendment has substituted the present Article 65*3) and added paragraph 23 in 4th Schedule to the Constitution providing for 45 seats exclusively reserved for women to be elected by the members of the Parliament as an interim measure in between the present Parliament and next Parliament which is not incompatible with the preamble of the Constitution, or its basic structure or to the Article 150 of the Constitution and as such under no stretch of imagination it could be said that the amendment/substitution of Article 65(3) is ultravires the Constitution nor the same is violative of Article 28(4) of the Constitution which provides that nothing in this Article shall prevent the State from making any special provision in favour of women through legislative processes.*

64. Article 150 of the Constitution empowers the Parliament to provide for any transitional and temporary period or purpose as the heading connotes. Since we have held that amended provision of Article 65(3) of the Constitution substituting the earlier provision thereof to have been made lawfully which is to take effect from the first meeting of the Parliament next after the Parliament of existence at the time of the commencement of the Constitution (Fourteenth Ame3ndment) Act 2004 i.e., the present Parliament, the Parliament in its wisdom did make transitory temporary special provision regarding reserved 45 seats exclusively for women members in the present parliament under the provision of Article 150 of the Constitution as an interim measure providing representation of the women in between the present parliament and the next parliament as a measure of stopgap arrangement to provide for continuity of women reserved seat in the present parliament. The said introduction of transitional temporary provision by adding paragraph 23 to the Fourth Schedule to the Constitution is not incompatible with the preamble of the Constitution and the same haws not changed the basic structure of the Constitution and such provision has as well been contemplated under Article 150 of the Constitution inasmuch as the transitional period is not over or a new one, as like situations have occurred good many times in the past as well as necessitating such temporary provision as a measure of linkage or arrangement by way of introducing temporary provision as contemplated in Article 150 or the Constitution.

65. This is to be noted that the amending power is a legislative process by enacting amendments for smooth and better functioning of the Constitution and the parliament has unfetted right/power to amend the Constitution under Article 142 of the Constitution subject to exceptions including one that provided in proviso to Clause (1)(a) thereof and that it does not affect the basic structure thereof. It is worthwhile to mention that under Article 142 of the Constitution subject to limitation mentioned therein, amendment does not contemplate any limitation or hindrance and by amendment of Article 142 itself, the scope of amendment has been widened by incorporating the words "by way of additional, alteration, substitution or repeal "by an Act of Parliament.

66. Besides, such power of amendment to the preamble/provisions of the Constitution is controlled one providing a special procedure and a majority of 2/3rd members agreeing to such amendment is mandatory for the amendment of the Constitution. Once amended the amendment becomes a part of the Constitution and attaches with it the sanctity as the Constitution itself whose validity is inherent and as such should not be challenged whereas the validity of any be challenged whereas the validity of any law could be challenged and tested by the touchstone of the Constitution as ultra vires the Constitution.

67. It has been submitted by the learned Counsel for the petitioners that Act No.XXX of 2004 being ……2004 i.e., the impugned Act is discriminatory bnetween any woman citizen of the Country who does not belong to a political party or a jote/alliance will not be privileged to contest the reserved 45 seats being integral part of the parliament, the law is thus discriminatory offending fundamental right to equality before law and right to be treated in accordance with law and elucidating the same the learned Counsel for the petitioner has submitted that it as well offends Article 142 of the Constitution affecting basic structure of the Constitution with regard to structure of the Republic's jurisdiction and democratic characteristics of the Constitution inasmuch as the preamble to the Constitution, Article 7 and Article 27 of the fundamental rights which have clearly indicated for form of Government, the fate of law including the amendment of the Constitution and the people's right. The learned Counsel further urges that the Act 30 of 2004 has introduced a new qualification i.e. to be a candidate forgone of the 45 reserved seats one must belong to a political party or a group of

members in the Parliament having strength at least of 6.17 whereas no such qualification is attached to Article 66 of the Constitution.

68. The learned Attorney General has referred to the provisions of sections 3(3) and 3(6) providing for formation of a Nirdolio Jote and section 3(8) providing for preparation of non-partisan voter's list and section 4 of Act 30 of 2004 providing for procedure for distribution of seats and further submitted that the new Act has opened u-p the possibility/scope of holding election which was not held under the previous law, that is, P.O. No.17 of 1973, as previously anybody nominated to their respective reserved seats by the ruling majority party used to be elected without any election.

69. Act No.XXX of 2004 repealing P.O. No.17 of 1973 has provided for holding, conducting and supervising the election and providing procedures, methodologies and modalities of conducting election to the 45 seats exclusively reserved for women members in the Parliament. Previous to the amendment, the provisions were there for electing the women members to the reserved seats as were done by the majority party in the Parliament by virtue of their majority vote and thus in previous system the minority party/parties in the parliament had no say in electing members to the reserved seats but in the present case, for the first time provision has been made for all the political parties or jote/alliance or independent members representing the Parliament have been given opportunity to elect members in the reserved seats on the basis of a procedure of proportional representation which manifest a democratic attitude and spirit promoting the cause of democracy and towards institutionalizing democracy adopting a democrating process, in other words, the constituencies for its 45 reserved women seats have been delegated to the law by Article 65(3) of the Constitution and as such the same cannot be treated as affecting the basic structure of the |Constitution which stands for democracy and promotion thereof and in line with the spirit of the Constitution in its fundamental principles of State policy. The said Act, not for a moment does curtail franchise right of the citizen because previously as well barring the members of the parliament, the citizens had no part to play in the election of the reserved seats for women as the founding fathers of the Constitution mandated. The modalities and procedure have been provided in the Act for proportional representation, a universally accepted common mathematical mechanism to determine the proportion among the political parties. Jote or independent members representing the parliament, adopted by other Countries

where the election is held on the basis of procedure of proportional representation.

70. Similar provision was envisaged in the Constitution of the People's Republic of Pakistan 1973 in its "Article 51 provides that there shall be three hundred and forty-two seats of the members in the National Assembly, including seats reserved for women and non-Muslims and Article 51(4)(b) & (d) and Article 51 (4)(b) provides each Province shall be a single constituency for all seats reserved for women which are allocated to the respective Provinces under clause (1A) and Article 51(4)(d) provides members to the seats reserved for women which, are allocated to a Province under clause (1A) shall be elected in accordance with law through proportional representation system of political parties lists of candidates on the basis of total number of general sets secured by each political party from the Province concerned in the national Assembly. He also referred to Article 59(1)(d) of the said Pakistan Constitution which provides "four women shall be elected by the members of each Provincial Assembly" and Article 59(2) which provides "Election to fill seats in the Senate allocated to each Province shall be held in accordance with the system to proportional representation by means of the single transferable vote."

71. *The impugned Act has not curtailed or infringed the right of the petitioners in any way as alleged. In the past as well all the reserved seats for women in the parliament were elected by the majority party in the Parliament by virtue of their strength electing all the 10 or 30 seats exclusively reserved for women to the exclusion of minority party/parties in the Parliament and P.O. No.17 of 1973 provided for the modalities/methodology of conducting election to those seats and Article 3 thereof empowered the Election Commission to divide the Country in to thirty Zones and Article 4 thereof provided for the preparation of the list of electors i.e., the members of the parliament who have been elected and have made and subscribed oath or affirmation shall be the voters for the purpose of election to the seats reserved exclusively for women members in Parliament. But the impugned Act has for the first time provided that all the political parties, jote and independent members represented in the Parliament have been given opportunity to elect women members of the reserved seats proportionally which is not only in keeping with the provision of the preamble of the Constitution and is also in consonance to Article 7(2) of the Constitution.*

72. Preamble of Act 30 of 2004 has clearly referred Article 65(3) of the Constitution together with paragraph 23 of the 4th Schedule provided the procedure for holding the election of the women members to the exclusively reserved seats for women in accordance with law on the basis of proportional representation in the Parliament and ancillary thereof.

73. Act 30 of 2004 is very much contemplated in Article 65(3) of the Constitution when it provides for election to reserved seats in accordance with law. The Act provides procedure, inter alia, in section 3(3) and (6) for formation of non party jote. Section 3(5) provides for bangle……and section 4 thereof providing for seat distribution amongst the political parties and jote on the basis of procedure of proportional representation, section 5 thereof preparation of voter's list, section 6 declaration of schedule for election, section 7 appointment of returning officer and other sections for submission of nomination papers, scrutiny, withdrawal, declaration of final list of candidates, voting procedure, counting, determination of quota, declaration of result and other incidental procedures of proportional representation.

74. The Act providing procedure for holding the election to women reserved seats, is an ordinary statute enacted following the legislative procedure in order to materialize the provision of Article 65(2) of the Constitution as contemplated therein, whereas amendment of the Constitution has been done in the case of Article 65(3) following the prescribed Constitution procedure substituting utmost or similar provision as aforesaid which has been in existence since its commencement and does not alter the basic structure and essential feature of the Constitution and became part of the Constitution.

75. The validity of the impugned Act providing modality, methodologies and procedure for the election to the women reserved seats in keeping with the mandate, purpose and object of the amendment to the Constitution in Article 65(3), if judged by the touch stone of the Constitution, we do not find the same to be inconsistent or repugnant or ultra vires the Constitution or offending any law. On the contrary, the same is designed to reflect the purpose and procedure and for materializing the object of the amended provision of the Constitution providing for election to the 45 reserved seats for the women in the Parliament on the basis of

procedure of proportional representation in the parliament through single transferable vote enhancing the cause of democracy through a process which could not be termed as undemocratic.

76. In the result, the result, the petitions are dismissed.