CHAMPIONING CONSTITUTIONALISM THROUGH THE BASIC STRUCTURE DOCTRINE - ANALYZING LIMITATIONS ON CONSTITUTIONAL AMENDMENT

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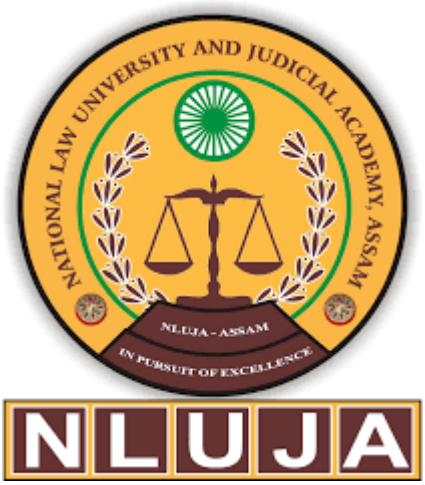

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CERTIFICATE

This is to certify that **RAAJDWIP VARDHAN** has completed his dissertation titled **"CHAMPIONING CONSTITUTIONALISM THROUGH THE BASIC STRUCTURE DOCTRINE - ANALYZING LIMITATIONS ON CONSTITUTIONAL AMENDMENT"** under my supervision for the partial fulfillment of **LL.M.(HONS) DEGREE PROGRAMME** at National Law University and Judicial Academy, Assam.

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DECLARATION

I, RAAJDWIP VARDHAN, do hereby declare that the dissertation titled " CHAMPIONING CONSTITUTIONALISM THROUGH THE BASIC STRUCTURE DOCTRINE - ANALYZING LIMITATIONS ON CONSTITUTIONAL AMENDMENT" submitted by me for the award of the degree of LLM (HONS) DEGREE PROGRAMME of National Law University and Judicial Academy, Assam is a bonafide work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise.

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1789 - Constitution of the United States of America

1814 - Constitution of Netherlands

1814 - Constitution of Norway

1888 - Local Government Act [British Jurisdiction]

1901 - Constitution of Australia

1919- Constitution of Germany

1920 - Constitution of Austria

1935 - Government of India Act

1937 - Constitution of Ireland

1947 - Constitution of Italy

1947 - Constitution of Japan

1948 - Constitution of South Korea

1948 - Constitution of Turkey

1949 - Constitution of Costa Rica

1949 - Constitution of Germany

1949 - Constitution of India (amended in 1951, 1964, 1971, 1972, 1975, 1976, 2002, 2005, 2015, 2019)

1950 - Bihar Land Reform Act

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1969 - Vienna Convention on Law of Treaties

1972 - Constitution of Bangladesh (amended in 1979, 1996, 2011)

1973 - Declaration of the Rights of Man and Citizen

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1975 – Constitution of Greece

1977 - Constitution of Tanzania

1979 - West Bengal Land Holding Revenue Act

1981 – Constitution of Belize (amended in 2011).

1982 - Constitution of Honduras, 1982

1985 - Administrative Tribunals Act

1986 - The Muslim Women (Protection of Rights On Divorce) Act

1991 - Constitution of Colombia,

1993 - Constitution of Russia

1995 - Constitution of Bosnia & Herzegovina

1999 - Constitution of Switzerland

2003 - Constitution of Romania

TABLE OF ABBREVIATIONS

&	And
§	Section
AIR	All India Reporter
ALJ	Allahabad Law Journal
Anr.	Another
Art.	Article
BCLR	Butterworths Constitutional Law Reports
BLD	Bangladesh Legal Decisions
BOM LR	Bombay Law Reporter
CAD	Constituent Assembly Debates
Del.	Delhi
DLR	Dhaka Law Reports
Gau	Guwahati
HC	High Court
Id.	*Ibid*
ILRM	Irish Law Reports Monthly
PLD	All Pakistan Legal Decisions
SC	Supreme Court
SCC	Supreme Court Cases
SCR	Supreme Court Reporter
v.	Versus

1. INTRODUCTION

The constitution is the supreme law of the land. It represents the fundamental framework responsible for governing the polity of the nation, while also being the fountain of all rights and duties. It is also a repository of legitimacy for all legal norms within the nation, thus embodying the Kelsenian *grundnorm* or 'basic norm'.[1] This makes the constitution the most important legal document for the nation.

The importance of the constitution mandates that it should be able to successfully express the aspirations, ideals, passions and dreams of the people it seeks to represent, and be based on the consent of all persons it shall govern.[2] It also signifies that the constitution should, as far as practicable, be permanent in nature. Nonetheless, true permanence is impossible for written constitutions. A change of times also brings forth a change in the aspirations, ideals, passions and dreams of the people, and the constitution must be flexible enough to accommodate them. Pandit Jawaharlal Nehru has, as a response to the draft constitution introduced by Dr. Ambedkar, famously stated that a rigid and permanent constitution would inevitably bring down the growth of the nation as well as the growth of the people for whose governance it was drafted in the first place.[3]

The scholar A.V Dicey has similarly argued that a rigid constitution, which checks gradual innovation, may, due to it being an impediment to change, lead to revolution in unfavorable circumstances.[4] This implies that for a written constitution to continue as the representative of people's desires and aspirations and prevent stagnation of the nation's growth, it should be amenable to amendment. A document as important as the constitution could only survive the test of time if it is made flexible to change.[5] A democratic constitution such as the Constitution of India must be especially responsive

[1] J.W Harris, *When and Why Does the Grundnorm Change?*, 29(1) CAMBRIDGE LAW JOURNAL 103, 109 (1971).
[2] I CONSTITUENT ASSEMBLY DEBATES 37 (Lok Sabha Secretariat, 2014)
[3] VII CAD, *Ibid*, at 31.
[4] A.V DICEY, THE LAW OF THE CONSTITUTION 70 (Oxford University Press, 2013).
[5] IX CAD, *Supra Note* 02, at 1650.

to the changing aspirations of people since the notion of constitutional democracy is itself founded on the principle of popular sovereignty.[6]

Contrastingly, the constitution, although open for amendment, should also have some degree of stability. A constitution which bows to whimsical changes shall never retain its value since the fundamental principles which it embodies can be curtailed at will. This necessitates limitations on the power of amendment. These limitations may either be explicit or implicit in nature. Interestingly, the Indian Constitution does not place explicit limitations on the power of the parliament to amend it. Instead, it only goes so far as to demarcate three separate procedures for amending the constitution, with each constitutional provision being amendable by adhering to one of these three procedures.[7]

The lack of limitations on constitutional amendment within the Indian Constitution was evident from the Constitution (First Amendment) Act, 1951, when individual rights were limited in favor of socialistic aspirations. The initial position adopted by the Indian judiciary was extremely positivist in nature, with the legislature bestowed virtually unlimited rights to amend.[8] Subsequently though, a debate arose between the judiciary and legislature on the nature and extent of amending power vested in the parliament by the Constitution of India. Finally, in the landmark case of *Keshavananda Bharati v. State of Kerala,* the Supreme Court of India promulgated the *'basic structure doctrine'* which unequivocally stated that the parliament was empowered to amend any and every provision of the constitution in the manner provided within the constitutional provisions, however, any provision which curtails or abrogates the basic structure of the constitution shall be deemed to be unconstitutional.

This doctrine was influenced by Professor Dietrich Conrad's discussions on constitutional eternity clauses.[9] In a remarkable instance of judicial activism, the Indian judiciary, through the basic structure doctrine, imposed an implicit limitation on the parliament's unlimited power of amendment, and brought every amendment within the purview of the doctrine of judicial review. This position is consistent with the judiciary's role as the watchdog of the constitution. Nonetheless, placing the judiciary

[6] P.D.T ACHARYA (ED.), CONSTITUTION AMENDMENT IN INDIA 01 (Lok Sabha Secretariat, New Delhi, 2008).
[7] CONSTITUTION OF INDIA, 1950, Art. 368.
[8] S.P Sathe, *Judicial Review in India: Limits and Policy*, 35 OHIO STATE LAW JOURNAL 870, 872 (1974).
[9] Satarupa Dutta, *Comprehending and Inquisitioning the Doctrine of Basic Structure in India: Urgency to Define the Doctrine,* 7(3) INTERNATIONAL JOURNAL OF RESEARCH AND REVIEW 80, 80 (2020).

as the final arbiter in deciding what falls within the basic structure has also been criticized as being judicial overreach and democratic usurpation. Essentially, in the absence of a strong jurisprudential foundation, the Supreme Court of India can extend this doctrine to legislative and executive action thus taking away powers of a democratically elected parliament.[10]

It is in this backdrop that the present research attempts to understand the significance of both constitutional amendments and also the necessity of placing limitations on the power to amend, with special emphasis on the basic structure doctrine as a form of implicit limitation.

1.1 STATEMENT OF PROBLEM

In the present study, the researcher seeks to explore the problem of declaring constitutional amendments as unconstitutional by emphasizing on the basic structure doctrine as an implicit limitation to constitutional amendment.

The constitution of any nation represents the supreme law of the land. This makes it the most important legal document for the nation. It also entails that the constitution should be dynamic in nature, since a static constitution will be unable to stand the test of time. A written constitution must therefore be flexible and dynamic enough to accommodate the needs of future generations within the constitutional framework. This can only be achieved through constitutional amendment.

Nonetheless, an unchecked power of amendment is also not healthy for the constitution. This is because an unlimited power of amendment, bestowed on the legislature, would risk negating the constitutional structure itself. The fundamental principles of the constitution would be diluted and the principle of constitutional supremacy and constitutionalism may be nullified through amendment. Therefore, it is essential to place limitations on the power of amendment.

The Indian Constitution contains a peculiar procedure for constitutional amendment. The articles within the constitution have been divided into three categories – firstly, those amendable by simple majority in the parliament; secondly, those amendable by

[10] Raadhika Gupta, *State of West Bengal v. Committee for Protection of Democratic Rights: Is Judicial Review the Indian Judiciary's Trump Card?*, 4 INDIAN JOURNAL OF CONSTITUTIONAL LAW 124, 130 (2010).

special majority in the parliament; and finally, those which may be amended by special majority in the parliament and subsequent ratification by state legislatures of not less than half the states. The latter two are contained under Article 368 of the Indian Constitution and amendments made in this nature fall within the ambit of the term 'constitutional amendments.' Interestingly, no explicit limitation has been placed on the constituent power of the Indian Parliament to amend the constitution. This, however, poses the risk of constitutional abrogation by excessive amendment. To confront this situation, the Indian judiciary formulated the implicit limitation of the 'basic structure doctrine.' The doctrine recognized the parliament's unlimited power to amend the constitution, but held that any amendment which violates the basic structure of the constitution will be unconstitutional. Thus, the notion of unconstitutional constitutional amendments was added to Indian constitutional jurisprudence. The doctrine has, over the years, elicited opposing reactions. Advocates of the doctrine perceive it as a necessary safeguard for protecting constitutional supremacy. Critics however regard it as overreach of judicial activism and usurpation of the democratic fabric of the country. The present research seeks to analyze both of these narratives and assess the notion of unconstitutional constitutional amendments by examining the basic structure doctrine as an implicit limitation on constitutional amendment and an instrument for championing constitutionalism and constitutional supremacy.

1.2 REVIEW OF LITERATURE

- **Sudhir Krishnaswami,** in his book, **Democracy and Constitutionalism in India,**[11] provides an overview of the Basic structure doctrine and its implementation in the Indian legal system. It has been divided into five chapters. The book has been divided into five chapters. The author provides a dual faceted approach to the discourse on the basic structure doctrine, firstly, by arguing that the doctrine itself is a novel form of judicial review which is applicable to all forms of State action, as a protector of the constitutional sanctity; and secondly, by arguing that that the doctrine is rooted within the constitutional framework and thus receives affirmation from the constitution itself. Subsequently, there is an examination of the necessity of subjecting constitutional amendments to

[11] SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA - A STUDY OF THE BASIC STRUCTURE DOCTRINE (Oxford University Press, 2010).

review, and the judicial power of adjudicating the extent of State action, which thereafter delves into a study on the grounds which can validate such a review within the content of the Basic structure doctrine. Finally, the author, from looking at the legal justifications also provides brief arguments on the moral and sociological reasons, with the former relying upon a rejection of majoritarianism in the interests of pluralism, and the latter being an amalgamation of the legal and moral justifications, and in this manner, provides arguments for justifying the legitimacy of the Basic structure doctrine.

- **Sanjay K. Singh & Sathya Narayan,** in their book, **Basic Structure Constitutionalism - Revisiting Kesavananda Bharati,**[12] provide a comprehensive and thorough description of the judicial development of the basic structure doctrine in the case of *Kesavananda Bharati*. The book has been divided into three parts, consisting of a total of twenty-five chapters, and each part deals with one distinct facet of the case wherein this doctrine was formulated. The first section is dedicated to the opinions of the Bench, and it contains a meticulous scrutiny of the eleven separate judgments which were awarded in the *Kesavananda Bharati* judgment from the perspective of comparative and critical analysis. The second section is dedicated to the contributions of the bar vis-à-vis the development of the doctrine, and it shines light on the two eminent jurists representing the petitioners and respondents in this case– *Nani Palkhivala* and *H.M Seervai*, whose arguments and juristic expertise also contributed towards shaping the Basic structure doctrine. Finally, the third part contains a scrutiny of the doctrine since its inception, and a look at the various developments that have occurred within its aegis through ten distinct articles written by leading jurists of today, and these articles delve into the philosophical foundations and the socio-political connotations of the doctrine since its application.

[12] SANJAY S. JAIN & SATHYA NARAYAN, BASIC STRUCTURE CONSTITUTIONALISM - REVISITING KESAVANANDA BHARATI (Eastern Book Company, 2011).

- **Yaniv Roznai,** in his book, **Unconstitutional Constitutional Amendments: The Limits of Amendment Powers,**[13] analyses the paradoxical scenario of applying the doctrine of judicial review to constitutional amendments which are a part of the constitution, and declaring them unconstitutional on the basis of them being invalid vis-à-vis the constitution, despite being part of the constitution itself. The author begins his analysis by examining the concept of constitutional amendment, and rationalizing the necessity for allowing constitutions to be amended, and in this vein, also scrutinizes the notion of placing limitations on the power of amendment. Thereafter, he delves into the nature of limitations imposed by separately examining the explicit limitations and implicit ones on constitutions across the world through a comparative analysis of the same. Subsequently, the author enumerates the distinction between legislative power and constituent power, and delineates the theoretical implications demarcating these two. Next, the author scrutinizes critically the imposition of judicial review on the powers of constitutional amendment, and prescribes the rationale behind granting the judiciary the ability to review the amendments made to the constitution. Finally, the author discusses the objections against the notion of rendering constitutions unamendable by relying upon either explicit or implicit limitations, and elucidates that although judicial review or allied instruments may, in essence, render certain aspects of the constitution unamendable, they are nonetheless sacrosanct safeguards for constitutionalism.

- **Richard Albert,** in his book, **Constitutional Amendments: Making, Breaking, and Changing Constitutions,**[14] provides a detailed theoretical analysis of comparative constitutional amendment across the legal systems of the world. The book begins with an introduction to the concept of constitutional amendment. In this section, the author traces the historical roots of constitutional amendment and highlights the inherent relationship between written constitutions and amendment. Subsequently, the book is divided into three parts.

[13] YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (Oxford University Press, 2019).
[14] RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING AND CHANGING CONSTITUTIONS (Oxford University Press, 2019).

The first part, divided into two sections. The first section delineates why constitutional amendments are necessary and the second part elucidates the theoretical position on why there must be some boundary or limitation on the power of amendment. The author, in this section, also distinguishes between constitutional amendment and constitutional dismemberment. The second part is dedicated to comparing the rigidity and flexibility of The author relies on the constitutional designs of the United States of America and Canada to highlight the notion of constitutional rigidity. He also provides an analysis of the concept of constitutional unamendability effected by eternity clauses. Finally, the third part of the book deals with the architecture of constitutional architecture and herein the author traces the procedural models for effecting constitutional change.

- **T.R Andhyarujina**, in his book, **The Kesavananda Bharati Case,**[15] provides an eloquent analysis of the case which birthed the Basic structure doctrine in the Indian legal system. The book has been divided into twelve chapters, and each chapter is dedicated to examining one novel aspect of the case and its judgment. The book provides a multi-faceted analysis to the entire issue by tracing the political aspects and developments which led to the formation of the issue, as well as the political developments which occurred subsequent to the court's judgment as an attempt by the legislature to overcome the limitations imposed by the judgment. Interestingly, the author also makes an attempt highlight the personal experiences of the judges on the bench, thus providing a unique outlook to the already existing literature on the topic. The author also points out certain procedural paradoxical issues pertaining to the nature of the powers exercised by the then Hon'ble Chief Justice S.M Sikri vis-à-vis the proclamation of the majority judgment. The book also addresses the controversial 13 judge-bench formulated by Chief Justice A.N Ray in the year 1975, two years after the *Kesavananda Bharati case* had been decided, and its demure conclusion on the third day of hearing. The author, finally, delves into the acceptability of the doctrine in the Indian legal system, as a paragon of constitutionalism, and also, from a comparative perspective, views the acceptance of the basic structure

[15] T.R ANDHYARUJINA, THE KESAVANANDA BHARATI CASE (Universal Law Publishing Co., 2016).

doctrine as a limitation on constitutional amendment in other jurisdictions across the world.

- **M.P Jain,** in his book, **Indian Constitutional Law,**[16] provides a detailed and thorough analysis of the Indian Constitution and its nuances. The treatise has been divided into seven distinct parts and each part is further divided into a number of chapters, with the total number of chapters being forty-two. The relevant portion for the present research is dealt with under chapter LXI. The author first highlights the methods of amending a constitution by differentiating between formal and informal means of amendment, Subsequently, the author highlights the perceptions regarding the amendment of a constitution since India's independence, and traces how the judicial opinion has changed and shifted over time. Then, the procedure for amendment provided within the Indian Constitution is elaborately analyzed. Finally, the author provides a piquant analysis of the basic structure doctrine and its imposition within the Indian Constitution by the judiciary, and how the same has shaped the powers of constitutional amendment in the Indian legal system.

- **Dr. Ashok Dhamija,** in his book**, Need to Amend a Constitution and Doctrine of Basic Structure,**[17] examines the questions on why constitutions need to be dynamic and organic entities by analyzing the nature, scope and power of constitutional amendment, with special reference to the basic structure doctrine. The book has been divided into fourteen chapters. The author first provides a basic introductory overview on the nature of a constitution in the legal system of any nation. Subsequently, the author investigates on the need to amend a constitution, and delineates the factors which necessitate constitutional amendment, and, in this regard, the author provides a comparative overview of the modes of amendment adopted within the constitutions of various countries across the globe, and in this vein, the author also delves into the variances in the amending procedures of the state constitutions in the United States of America. Thereafter, the discussion moves to the Indian Constitution, and the author

[16] M.P JAIN, INDIAN CONSTITUTIONAL LAW (Lexis Nexis, 2018)
[17] DR. ASHOK DHAMIJA, NEED TO AMEND A CONSTITUTION AND DOCTRINE OF BASIC STRUCTURE (Wadhwa and Co., 2007).

analyses the power and procedure of amendment delineated in the Indian Constitution, and inspects critically the judicial pronouncements regarding the same, ultimately culminating his analysis on the development of the basic structure doctrine. Finally, the author looks at the nuances of the doctrine, and critically peruses the doctrine from the perspective of implementation since its initial formulation.

- **Stuti Deka,** in her book, **Constitutionalism & Constitution of India,**[18] traces the development of the notion of constitutionalism within Constitutional framework of India. The book has been divided into eight chapters. In the first chapter, the author provides an introduction to the fundamental ideas enshrined in the Indian Constitution. The second and third chapters are dedicated towards understanding the historical antecedents which contributed to the formation of the Indian Constitution in its present iteration. The fourth chapter analyses the institution of constitutionalism from a theoretical standpoint, and then delves into the concept's existence within the Indian Constitution by highlighting how tenets of constitutionalism have been adopted and inserted into the constitutional mandate. The fifth and sixth chapters focus on the essentiality of dynamism within the constitutional framework, while the seventh chapter probes the intrinsic relationship and desired balance between the tenets of constitutionalism and the requisite necessity of ensuring constitutional dynamism through a living and organic constitution.

1.3 RESEARCH QUESTIONS

The following research questions have been formulated for the present study –

- Is the ability to amend a constitution integral for its continued legitimacy?
- Should the power to amend constitutions be unlimited or should it be subject to some limitations?
- What is the amendment procedure contained under Article 368 of the Indian Constitution?
- What is the basic structure doctrine and how does it operate as a limitation on constitutional amendment?

[18] STUTI DEKA, CONSTITUTIONALISM AND CONSTITUTION OF INDIA (EBH Publishers, 2014).

- Can the basic structure doctrine be regarded as a necessary instrument for championing constitutionalism and ensuring constitutional supremacy or is it an instrument of judicial overreach causing subversion of parliamentary democracy?

1.4 AIMS & OBJECTIVES OF THE STUDY

In light of the brief introduction made, and the statement of problem delineated, through the present study, the researcher aims to understand the nature of the basic structure doctrine as an implicit limitation on the amending power of a constitution, and a facilitator of constitutionalism and constitutional supremacy.

In light of the aforementioned aims, the following objectives may be highlighted –

- To assess whether the ability to amend is necessary for a constitution to maintain its existence.
- To analyze the necessity of placing limitations on the amending power of constitutions.
- To understand the nature and extent of the power of constitutional amendment under Article 368 of the Indian Constitution.
- To examine the genesis of the basic structure doctrine and study its evolution as a limitation on constitutional amendment in the Indian legal system.
- To analyze whether the basic structure doctrine operates as a champion of constitutionalism or whether it is an instrument of judicial overlay, causing subversion of the parliament in a parliamentary democracy.

1.5 SCOPE AND LIMITATIONS

The scope of the present research shall be limited to analyzing the nature and necessity of constitutional amendments. It shall focus on the theoretical framework pertaining to the same, and shall, through a detailed examination, shed light on the power of amendment enshrined under Article 368 of the Indian Constitution. It shall, then, examine the requisite nature of placing limitations on the power of amendment vis-à-vis the constitution perusing the notions of explicit and implicit limitations on the same, and shall subsequently, attempt to shed light on the origins of the Basic structure doctrine and trace its implementation within the Indian legal system, as well as other

systems across the globe, and analyze, in this vein, whether the doctrine is a means of upholding constitutionalism.

Based on the scope of the study, the following are the perceived limitations –

i). The study deals with the power of amendment, and although the theoretical framework pertaining to the necessity of constitutional amendments and limitations on amending power will be examined, the scope of the study shall be limited to only delving into a detailed analysis of the basic structure doctrine as a limitation on constitutional amendment, and other implicit limitations will not be dealt with exhaustively.

ii). Being a study centered on the legal aspects, the social and sociological implications arising from the imposition of the basic structure doctrine shall be briefly examined where relevant but there shall not be a detailed analysis of the same.

1.6 HYPOTHESIS OF THE STUDY

The following hypotheses have been formulated for the present study –

- There is an active need for limiting the powers of constitutional amendment for safeguarding constitutional supremacy and protecting it from abrogation.
- The basic structure doctrine, as an implicit limitation on constitutional amendment, is a necessary safeguard for protection for ensuring constitutional supremacy and championing constitutionalism.

1.7 RESEARCH DESIGN

The research design is an integral part of any study since it provides the skeletal framework which the researcher seeks to follow during the research endeavor. The present study shall be divided into six chapters, and the following is the tentative research design for the same –

The first chapter, titled **'INTRODUCTION',** shall contain a brief introduction to the study being conducted, a statement of the research problem, a list highlighting the review of literature which contributed to the study, the research questions and the ensuing aims and objectives of the study, the scope and limitations of the study, and

finally, the research design and the research methodology which will be followed for conducting the study.

The second chapter, titled '**CONSTITUTIONAL AMENDMENTS – TRACING THE NEED FOR DYNAMISM WITHIN A CONSTITUTION',** shall explore the need for ensuring the flexibility of constitutions by bestowing them with the power of amendment, and also examine the repercussions of a constitution being static and absolute, without the power of amendment. It shall also delve into the position taken by the members of the Indian Constituent Assembly during the framing of the Indian Constitution with regard to the process of amendment, and examine the arguments forwarded on the debate between flexibility and rigidity of a constitution.

The third chapter, titled '**CONSTITUTIONAL AMENDMENTS – LIMITATION AND CONTROL',** shall analyze the necessity of placing limitations on the amending power of constitutions, and attempt to underline the theoretical demarcation between constituent power and legislative power vis-à-vis constitutional amendments. It shall also provide an illustration on the demarcation between explicit and implicit limitations on amending power of the constitution.

The fourth chapter, titled **'REVISITING THE CONSTITUENT ASSEMBLY – THE INDIAN DEBATE ON FLEXIBILITY V. RIGIDITY',** shall analyze the Indian Constituent Assembly's position on the question of constitutional amendments. First, it shall attempt to understand the preliminary position which the Indian founding fathers sought to adopt as a basic framework of the constitution, Subsequently, it shall delve into the various discussions done with regard to Draft Article 304 (the precursor to the present article 368) and see the arguments presented therein. Finally, the chapter shall conclude by providing a brief outline of the procedure of amendment contained within the Indian constitution.

The fifth chapter, titled **'BASIC STRUCTURE – GENESIS, ADOPTION, IMPLEMENTATION AND LEGAL CONNOTATIONS',** attempt to trace the genesis of the basic structure doctrine as a theoretical limitation on constitutional amendment, and its subsequent adoption by the Indian judiciary as an implicit limitation. It shall also contain an analysis of the repercussions of the adoption of this

doctrine within the Indian legal context. An attempt shall also be made to examine if the doctrine has been adopted in any other legal system across the globe, and if it has, then what are the underlying repercussions of its adoption vis-à-vis constitutional amendment.

The sixth chapter, titled '**BASIC STRUCTURE: NECESSITY FOR CONSTITUTIONALISM OR JURISTOCRACY? – AN ANALYSIS,** shall provide an analytical study of the basic structure doctrine's significance and necessity as an implicit limitation on the power of constitutional amendment, and examine whether it is a necessity for ensuring constitutionalism and upholding constitutional supremacy or whether it is an instrument of judicial subversion aimed at undermining the sanctity of the democratic fabric of the country.

The seventh chapter, titled **'CONCLUSION AND SUGGESTIONS,** shall contain a brief conclusion of the study, with remarks on each research question, and an examination of the hypotheses for the study.

1.8 RESEARCH METHODOLOGY

The methodology used in this study is of doctrinal research. The nature of research of this paper is descriptive and analytical, and no analytical study can be complete without an exhaustive and detailed description of the issue. Elements of comparative research are also present in the current study, albeit a formal comparative analysis of two different concepts has not been done herein in the present study, nonetheless, the issues being dealt with in the study are analyzed from the outlook of a comprehensively global constitutional theory, with perspectives from other legal systems across the globe being inculcated and adopted as well.

In this study, both primary and secondary sources of data have been utilized. The primary sources shall comprise of the Constitution of India, Constituent Assembly Debates, national legislations relevant to the issue being studied, and judicial pronouncements made by the Supreme Court and High Courts of India on the concerned issue. The secondary sources shall comprise of books, articles, periodicals, newspapers and reports.

The method of citation used in this study is Bluebook 20th Edition.

2. CONSTITUTIONAL AMENDMENTS – TRACING THE NEED FOR DYNAMISM WITHIN A CONSTITUTION

Time is not static. It is dynamic and prone to change. This implies that everything affected by the passage of time, including the life of a nation, is not static by dynamic, and subject to change. Nations are living entities which undergo an organic growth at social, political, cultural and economic levels. Aspirations and desires of a nation undergo collective change and create a set of new problems over time or alter the existing complexities of the old ones. This makes it impossible for the constitutional norms formulated in one era to address the issues and problems prevalent therein to remain adequate for addressing the issues and problems of future generations.[19] After all, there is no generation which can claim to have a monopoly on wisdom and knowledge or claim that it has an unbridled right to confine the existence of future generations to a particular set of constitutional norms.

A constitution is the fundamental law of the land. Professor Laurence Tribe states that the constitution plays a dual role - on one hand it serves as a blueprint for governmental operations, and on another hand, it is reflective of the most sacrosanct and enduring values of the nation.[20]

It seeks to establish the fundamental organs of the government and administration, describe their structure, composition, powers and principal functions, define and govern the interrelationship of these fundamental organs with one another as well with the people.[21] In the narrow sense of the term, 'constitution may refer to the essential principles or rules to which all legislation, governing authorities and the people themselves are subject; on the other hand, the broad meaning of the term includes within its ambit concepts such as 'rule of law' and 'constitutional conventions' as well, which are adhered to and which governs the actions of all those who are subject to the constitution.[22] In modern times, the constitution is the foremost legal document which lays down both the rights and liberties of the people as well as the structure and duties of the government. A constitution is so pivotal to the existence of a modern liberal

[19] JAIN, *Supra Note* 16, at 1724.
[20] Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97(2) HARVARD LAW REVIEW 433, 441 (1983).
[21] JAIN, *Supra Note* 16, at 02
[22] James Tully, *The Unfreedom of the Moderns in Comparison to their Ideals of Constitutional Democracy*, 65(2) MODERN LAW REVIEW 204, 205 (2002).

democracy that it would not be wrong to assert that without a constitution, there can be no nation.[23]

A constitution may either be a written document which contains precise textual markers on the nuances of legal relationships within the nation, or it may be an unwritten one which is derivable from a series of customs, judicial precedents, legislations and enactments introduced over a period of time.[24] A written constitution represents an identifiable text or set of texts which contain the legal norms at the highest level of the formal legal hierarchy of the nation.[25] For an unwritten constitution, constitutional conventions, which occupy a position between constitutional law and mere political action, play a markedly important role in ensuring adherence to the constitutional principles, although they can be found within the realm of constitutional law all throughout the world.[26]

The source of legitimacy of every constitution which necessitates its binding conformity can be traced from the notion of popular sovereignty. Popular sovereignty is based on the notion that in a liberal democracy, the fountain of all power, including constitutional power and constitutional legitimacy, is derived from the people, and the consent of the public is necessary for continued legitimacy.[27] This implies that any constitution which does not fulfill the aspirations and ideals of the people shall fail the test of legitimacy. This also means that the constitution which is adopted by the people through a special constituent process is superior to the ordinary mandate provided to lawmakers, and it is this superiority which makes the constitution the *grundnorm.*[28] Within the confines of Kelsenian jurisprudence, the *grundnorm* contains the authorizations which create the relevant general norms of the legal system, which are in turn relied upon to create individual norms.[29] The *grundnorm* under the Kelsenian model is the 'basic norm'

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[23] Jiang Shigong, *Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China*, 36(1) MODERN CHINA 12, 13 (2010).
[24] Charles Borheaud, *The Origin and Development of Written Constitutions*, 7(4) POLITICAL SCIENCE QUARTERLY 613, 613 (1892).
[25] Richard S. Kay, *Constituent Authority*, 59(3) THE AMERICAN JOURNAL OF COMPARATIVE LAW 715, 715 (2011).
[26] Max Vetzo, *The Legal Relevance of Constitutional Conventions in the United Kingdom and the Netherlands*, 14(1) UTRECHT LAW REVIEW 143, 143 (2018).
[27] Maru Bazezew, *Constitutionalism*, 3(2) MIZAN LAW REVIEW 358, 360 (2009).
[28] Stephen E. Sachs, *The Unwritten Constitution and Unwritten Law*, UNIVERSITY OF ILLINOIS LAW REVIEW 1797, 1824 (2013).
[29] Harris, *Supra Note* 01, at 103.

which gives legitimacy to all other subsequent norms. The recognition of the constitution as *grundnorm* is consistent with Kelsen's formulation. He had asserted that the 'basic norm' is - *"Coercive acts ought to be performed under the conditions and in the manner which the historically first constitution, and the norms created according to it, prescribe."*[30] This implies that the constitution is the 'basic norm' to which the legitimacy of all other norms within the legal system can be traced.[31]

2.1 INFLUENCES ON CONSTITUTIONAL DRAFTING

The formulation of any legal norm requires a certain degree of clarity on the purposes which the norm seeks to achieve. Without absolute clarity on the aims and objectives of the legal norm, it can never achieve its intended consequence. This notion is even truer for the constitution. Modern constitutions are a representation of positive law. The idea of the constitution being a form of positive law mandates that it must have a law-maker, and it is this authority which is bestowed with what has come to be called 'constituent power'.

Every nation is the result of an amalgamation of coalesced cultures and shared histories. The term 'nation' is distinct from the term 'State' – the former represents a collective psycho-cultural recognition, while the latter refers to an independent and autonomous political entity within a defined territorial region.[32] Modern jurisprudence on constitution drafting states that expert constitution-making has been redefined by democratic participation, which states that it is impossible to author a democratic constitution for a nation, instead, the process of drafting a constitution should be home-grown to reflect the unique needs of the nation.[33] Thomas Paine has similarly remarked – *"A Constitution is the property of a Nation and not those who exercise the Government."*[34] The founding narrative of a nation is the dynamic collective of its history, and a reflection of the collective will and aspirations that the people of the

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[30] Dhananjai Shivakumar, *The Pure Theory as Ideal Type: Defending Kelsen on the Basis of Weberian Methodology*, 105(5) THE YALE LAW JOURNAL 1383, 1388 (1996); see also, Willian Ebenstein, *The Pure Theory of Law: Demythologizing Legal Thought*, 59(3) CALIFORNIA LAW REVIEW 617 (1971).
[31] Graham Hughes, *Validity and Basic Norm*, 59 CALIFORNIA LAW REVIEW 695, 696 (1971).
[32] Mostafa Rejai & Cynthia H. Enloe, *Nation-States and State-Nations,* 13(2) INTERNATIONAL STUDIES QUARTERLY 140, 143 (1969).
[33] Louis Aucoin, *The Role of International Experts in Constitution-Making: Myth and Reality*, 5(1) GEORGETOWN JOURNAL OF INTERNATIONAL AFFAIRS 89, 91 (2004).
[34] II THOMAS PAINE, RIGHTS OF MAN 49 (J.S Jordon, 1792).

nation have. The universal founding values that the nation espouses is imprinted within the constitution.[35]

The needs and necessities of every nation differs on the basis of the shared cultural values that the nation represents. It is these necessities which form the unique backdrop that makes the constitutions of every nation *sui generis.* The German philosopher Jurgen Habermas has argued that constitutional values of states differ on the basis of the shared historical traditions of the nations, and *'Verfassungspatriotismus'*, or constitutional patriotism can only be successfully inculcated by using the shared history as a backdrop.[36] In other words, the formation of every constitution across the world is the result of a unique set of historical conditions which shape the fundamental tenets contained within the constitution. It is only through a shared association with these historical tendencies that Justice H.R Khanna has famously asserted in this vein that the *"framing of a constitution calls for the highest statecraft"* since the practical needs unique to every nation have to be realized and the ideals which have inspired the nation need to be represented within the constitution.*[37]* Montesquieu has also averred that the best constitution for a nation is one which best represents the genius as well as the traditions of the people who live under it.[38] Felix Frankfurter has similarly called a written constitution "*a stream of history*", and argued that to truly understand the meaning of the constitution and its contents, it is necessary to undertake a historical inquiry into the events which influenced the formation of the constitution.[39]

2.2 WHY AMEND CONSTITUTIONS?

When the political philosopher John Locke was tasked with drafting the 'Fundamental Constitution' for the colony of Carolina, he provided that it *"shall be and remain the sacred and unalterable form and rule of government of Carolina forever"*[40] This

[35] Sharon Weintal, *The Challenge of Reconciling Constitutional Eternity Clauses with Popular Sovereignity: Toward Three-Track Democracy in Israel as a Universal and Holistic Constitutional System and Theory*, 44 ISRAEL LAW REVIEW 444, 448 (2011).
[36] Gabor Halmai, *Transitional Constitutional Unamendability?*, 21(3) EUROPEAN JOURNAL OF LAW REFORM 259, 261 (2019).
[37] H.R Khanna, THE MAKING OF INDIA'S CONSTITUTION 01 (Eastern Book Company, 2008).
[38] W.B Munro, *An Ideal State Constitution,* 181(1) THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 01, 01 (1935).
[39] Herman Belz, *History, Theory, and the Constitution,* 11(45) CONSTITUTIONAL COMMENTARY 45, 49 (1994).
[40] David Armitage, *John Locke, Carolina and the Two Treatises of Government,* 32 POLITICAL THEORY 593, 602 (2004).

Lockean notion of an unalterable constitutional structure has, however, not found any preference within constitutional law jurisprudence. Modern constitutions, especially in liberal democracies, undergo a plethora of amendments to their provisions and structure. the German Basic Law of 1949 has been amended over 60 times, the French Fifth Republic Constitution of 1958 has been amended on 25 occasions, the Constitution of Ireland from 1937 has been subjected to amendment on 32 occasions. This is because it has been recognized that the legal norms of one generation cannot be entirely imposed on a future generation. As Thomas Jefferson has famously stated – *"the earth belongs in usufructs to all the living equally, and the dead have neither the powers nor rights over it."*[41] It is imperative that the past does not stifle the development and growth of future generations.

The significance of constitutional amendments is a unique characteristic of written constitutions only. This is because change and amendment in an unwritten constitution are unnecessary. This is because there is no organic legal instrument to whose boundaries the political institutions must circumscribe. This entails that the necessary changes can be introduced through ordinary means such as legislation, judicial interpretation and conventions without resorting to the oft cumbersome means of constitutional amendment. There is no distinction between normal legislation and constitution, and from a legislative standpoint, changes can be introduced relatively easily. The Parliament enjoys absolute sovereignty over the legislative domain since its powers are not constrained by the constitution, and can therefore legislate, repeal and amend any law that it sees fit.[42] It also means that the parliament may remodel the constitution as it pleases since there can never be any entrenched constitutional provisions because a subsequent legislation by the parliament can invariably repeal them.[43] This can be clearly seen from the British example which has an unwritten constitution.

Written constitutions, on the other hand, place formal limitations through codified means on the structure and ambit of governance. Written constitutions do not function

[41] Robert M.S. McDonald, *Thomas Jefferson and Historical Self-Construction: The Earth Belongs to the Living,* 61(2) THE HISTORIAN 289, 289 (1999).
[42] IVOR JENNINGS, THE LAW AND THE CONSTITUTION 105 (University of London Press, 1948).
[43] F.F Ridley, *Defining Constitutional Law in Britain,* 20(2) ANGLO_AMERICAN LAW REVIEW 101, 105 (1981).

on their own, rather, the combined efforts of the custodians of the constitution contribute to their success and longevity. The life of a written constitution is neither logic nor law but experience.[44] In the words of Justice Frankfurter, *"it is not a printed finality, but a dynamic process."*[45] Changes in political society or the needs of the people mandates a formal procedure through which such change can be accommodated into the constitutional framework.[46] The relationship between a written constitution and the rules for its own amendment contained in itself has been compared to the relationship between a lock and key - one cannot work without the other.[47]

The needs and demands of the nation as a collective, as well as the desires and aspirations of the members of the nation as individuals, are affected by time and change is the only continuous constant. Since law is a reflection of society, it must keep up with societal changes. The American political scientist John Burgess regarded the clause allowing for constitutional amendment as *"the most important part of a constitution."*[48]Similarly, the British political scientist Herman Finer has called the clause allowing amendment as *"so fundamental to the constitution that may be called the constitution itself."*[49] The idea of freezing the formulas which are paramount sources of legitimacy for the nation is a questionable and premature limitation on the nation's evolution.

An argument propagating the need for constitutional amendment may also be traced to the writings of the American jurist Oliver Wendell Holmes and his ideas of realist jurisprudence. He famously asserted – *"the life of law has not been logic but experience."* According to Holmes, the syllogism of law was usurped by more practical matters such as the felt necessities of time and the intuitions of public policy, as well as human elements such as the conscious and unconscious prejudices of the judges, and it is these latter facets which have a greater influence in determining the rule of law than

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[44] Fali S. Nariman, *The Silences in our Constitutional Law* in P. ISHWARA BHAT (ED.) CONSTITUTIONALISM AND CONSTITUTIONAL PLURALISM 38 (Lexis Nexis, 2013).
[45] FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 96 (Atheneum, 1965).
[46] X D.D BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 11257 (Lexis Nexis Butterworths Wadhwa Nagpur, 2012)).
[47] ALBERT, *Supra Note* 14, at 01.
[48] JOHN BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 137 (Ginn & Company, Boston, 1893).
[49] HERMAN FINER, THE THEORY AND PRACTICE OF MODERN GOVERNMENT 156 (H. Holt., 1949).

the former.[50] Since experience and societal conventions, *inter alia*, influence the manner in which law is to be implemented and imposed, it is imperative that law is flexible to keep up with the changes within society, and is able to accommodate its learnings through experience into the textual fabric.

The idea of constitutional amendment can be traced to the Constitution of America.[51] The underlying notion was that the American Constitution derived it legitimacy from popular sovereignty, like almost all other constitutions in liberal democracies across the world, and as a corollary, the people also wielded the power to amend and revise the Constitution that they had adopted.[52] Although the Constitution of San Marino is regarded as the oldest codified constitution,[53] its relevance as a doyen of constitutional jurisprudence is limited, and the American Constitution is often considered as the fountain of jurisprudence for codified constitutions. Thomas Jefferson, one of the founding fathers of the American Constitution, famously stated "*We may consider each generation as a distinct nation, with a right, by the will of the majority, to bind themselves, and none to bind the succeeding generation, more than the inhabitants of another country"* [54] The 1793 French Declaration of the Rights of Man, drafted during the same period in history as the American Constitution, also refused entrenched permanence, and advocated that future generations shall always have the right to change and amend their constitution. It stated *"one generation cannot subject to its law future generations".*[55] These words echo the necessity of amendment for every written constitution and highlight the principle of constitutional change that the American Constitution ushered into the jurisprudence of constitutional law.

The American Constitution also provides the most nuanced argument on the necessity of constitutional amendment through the Bill of Rights, a list of ten fundamental principles, adopted by the American Congress through amendment of the American

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[50] Mark Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63(6) VIRGINIA LAW REVIEW 975, 1012 (1977).
[51] CONSTITUTION OF THE UNITED STATES OF AMERICA, 1789, Art. 05.
[52] LESTER BERNHARDT ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 01 (Ann Arbor: University of Michigan Press, 1942).
[53] P. Panico, San Marino: *Private Foundations - A Hidden Secret?*, 15(5) TRUSTS & TRUSTEES 403, 403 (2009).
[54] V.R KRISHNA IYER, CONSTITUTIONAL MISCELLANY 15 (Eastern Book Company, 1986).
[55] DECLARATION OF THE RIGHTS OF MAN AND CITIZEN, 1973, Art. 28.

Constitution in 1791, only two years after the adoption of the Constitution in 1989.[56] The enactment of the Bill of Rights proves that amendments are imperative within a constitutional text since they allow the future governments to change the constitutional text to accommodate shortcomings in the original draft.

Another example from the American Constitution can be the Thirteenth Amendment of 1865, which deemed slavery and involuntary servitude illegal within the United States of America.[57] It fulfilled the Emancipation Proclamation of 1869 issued by President Lincoln, and its text borrowed from the Northwest Ordinance of 1787.[58] Apart from merely making slavery illegal, it also inadvertently prohibited systemic forms of racial subordination and racial supremacy which had enabled the practice of slavery to persist and thrive.[59] The abolition of slavery as a practice signified a marked change in the social dynamics and was revolutionary in character. One author has argued that the abolition of slavery in the United States of America would have been seen as 'insane' even a decade prior to the enactment of the Thirteenth Amendment, but by the time it was passed by the Congress, the permanent and immediate abolition of slavery was acceptable.[60] In less than a year after the passing of the Thirteenth Amendment by the House of Representatives, the requisite ratification by two-third states to the amendment was been secured.[61] The founding fathers of the American Constitution, some of which both condemned the institution of slavery but also owned slaves themselves publicly hoped that the issue would resolve itself when slavery itself would die of natural causes.[62] This happened in the aftermath of the Civil War. The amendment, therefore, facilitated in ushering in transformative constitutionalism through a constitutional amendment, and contributed towards changing the prevalent social norm.

A constitutional democracy entails that whenever a constitutional principle or rule is laid down as the basis of some democratic institution, then it must, in principle, keep

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[56] William J. Brennan Jr., *Why Have a Bill of Rights?*, 26(1) VALPARAISO UNIVERSITY LAW REVIEW 01, 05 (1995).
[57] *Supra Note* 51, 13th Amendment.
[58] Lauren Kares, *Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine*, 80 CORNELL LAW REVIEW 372, 374 (1995).
[59] William M. Carter Jr, *The Thirteenth Amendment and Constitutional Change*, 38 NYU REVIEW OF LAW AND SOCIAL CHANGE 583, 584 (2014).
[60] Sandra L. Rierson, *The Thirteenth Amendment as a Model for Revolution*, 35 VERMONT LAW REVIEW 765,861 (2011).
[61] ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY 316 (W.W Norton & Company, 2014)
[62] Rierson, *Supra Note* 60, at 785.

itself open to democratic challenge and deliberation, which would ultimately lead to amendment, if desired. Reasonable disagreement is always possible and thus no legal norm or provision can be considered to be definitive and permanent. It is important for every legal provision to have the option for democratic review since the ethos of a democracy will be nullified by authoritarian permanence of legal norms.[63] Democratic constitutionalism has been regarded as an ongoing process instead of an end-state since its legitimacy ultimately depends on the mutual relationship between the prevailing legal norms and the democratic practices of disagreement, negotiation, amendment, implementation and review.[64]

In the absence of change, the imposition of the values of one generation over its future generations can, inevitably, lead to conflict. This conflict, when exacerbated by desire for change, risks leading to revolution. Dicey has argued that although a rigid constitution can be used to check gradual innovation, merely because it acts as an impediment to change, it may, in unfavorable situations, lead to revolution.[65]

2.3 FORMAL METHOD OF CONSTITUIONAL AMENDMENT

Constitutional amendments can be distinguished on the basis of procedure utilized to effect change in two ways – formal means and informal means. The former is also referred to as the *de jure* form of amendment while the latter is regarded as the *de facto* form of amendment.

Formal constitutional amendment refers to the procedures enshrined within the constitution itself for its amendment. Since the procedure contained in formal method of constitutional amendment dictates the propensity of constitutional change, it is imperative to ensure that an appropriate balance between stability and flexibility is guaranteed.[66] These provisions play a dual function – they highlight the powers of the government to amend the constitution, but at the same time, also limit the government from transgressing beyond the formal powers contained in the constitutional text. In this sense, the formal provisions of constitutional amendment have been called the

[63] Tully, *Supra Note* 22, at 208.
[64] *Ibid*, at 209.
[65] DICEY, *Supra Note* 04, at 70.
[66] Harry Hobbs & Andrew Totter, *The Constitutional Conventions and Constitutional Change: Making Sense of Multiple Intentions*, 38 ADELAIDE LAW REVIEW 48, 57 (2017).

gatekeepers of the constitutional text since they protect the sanctity of the constitutional provisions by placing procedural limitations on the process of amendment.[67] According to the American scholar Akhil Amar, the formal methods of amendment hold *'unsurpassed importance'* since they are the provisions that define the conditions through which the prevalent constitutional norms can be legally displaced.[68] Formal rules of constitutional amendment, therefore, become the foundational distinction between constitutional revision and constitutional amendment.[69]

The methods of formal amendment may be broadly categorized into three forms – the referendum model, the constituent assembly model, and the legislative model.

The referendum model necessitates any constitutional amendment to be validated and legitimized through popular sovereignty *via* referendum. Constituent power traces its roots to the notion of popular sovereignty, as such, the people are inherently bestowed with the right to exercise this power. As James Wilson, the American statesman had famously stated in a lecture, - "*constituent power flows from the people, and it is from their authority that the constitution originates; for their safety and felicity it is established; and as such, they have the power to mould, preserve, improve, refine and finish as they please. A majority of the society is sufficient for this purpose.*"[70] Within the democratic framework, it is imperative that the outcome of the reform process has the informed consent of the voters, wherein the voters have been allowed to voice their opinions on the change enacted.[71] The referendum system makes this assertion a practical approach. The Swiss Constitution, for example, allows for both partial amendment of the federal constitution as well as the complete revision.[72] Notwithstanding this, both of these procedures must go through a referendum, and be approved by the requisite majority. Interestingly, the Swiss Constitution also allows the people to seek a constitutional amendment *(Volksinitiative)* following which, the federal

[67] Richard Albert, *The Structure of Constitutional Amendment Rules,* 49 WAKE FOREST LAW REVIEW 913, 913 (2014).
[68] Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V,* 94(2) COLUMBIA LAW REVIEW 457, 461 (1994).
[69] Albert, *Supra Note* 67, at 929.
[70] I JAMES WILSON, THE WORKS OF THE HONORABLE JAMES WILSON, LLD 418 (Lorenzo Press, 1804).
[71] Ian Cram, *Amending the Constitution*, 36(1) LEGAL STUDIES 75, 78 (2016).
[72] CONSTITUTION OF SWITZERLAND, 1999, Art. 138-142; see also, Art. 192-195.

government is compelled to take initiative *(Bundesversammlung)* for complying with the constitutional requirements for accomplishing the initiative for amendment.[73] Interestingly, popular referendums can also be a means to limit constitutional amendment. The same shall be discussed in the next chapter.

The constituent assembly model, as the name suggests, depends on the creation of a constituent assembly for altering the constitution. The foundational roots of this model too can be traced to the concept of 'constituent power' being a necessary component for drafting a constitution, albeit, this power is indirectly wielded by the constituent assembly instead of the general populace of the nation. The Costa Rican Constitution, for example, distinguishes between partial amendment and general amendment. A general amendment is a process to introduce more transformative changes to the constitution, and to implement such an amendment, a constituent assembly must be formulated, with a decision to formulate a constituent assembly requiring two-thirds majority in the legislative assembly.[74]

Finally, the third category is the legislative model. Herein, the legislature of the State exercises the authority of effecting constitutional amendment. Notwithstanding the legislative competence though, the process of constitutional amendment is different from that of enacting ordinary legislation. The procedure to amend through ordinary legislative means is usually accompanied by a need to secure supermajorities in the assembly. The contents of Article V of the American Constitution and Article 368 of the Indian Constitution highlight the procedural nuances which the ordinary legislature must go through to implement a constitutional amendment. In the words of Ronald Dworkin, equal concern (for all persons) may be better protected by embedding individual rights into the constitution, to be interpreted by judges rather than elected representatives, and which could only be amended by the support of supermajorities.[75]

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[73] Yaniv Roznai, *The Theory and Practice of Supra-Constitutional Limits on Constitutional Amendments*, 62 International and Comparative Law Quarterly 557, 590 (2013).
[74] CONSTITUTION OF COSTA RICA, 1949, Art. 196; see also Albert, *Supra Note* 67, at 933.
[75] RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 144 (Princeton University Press, 2006); see also, Halmai, *Supra Note* 36, at 266.

2.4 INFORMAL METHOD OF CONSTITUTIONAL AMENDMENT

Informal methods of constitutional amendment are those which do not prescribe to the methods of constitutional change contained within the constitution itself. Interestingly, the rigidity of formal methods of amendment may contribute towards making the informal methods more popular and even more important in ushering in constitutional change. As one author has noted, informal methods of constitutional amendment are subversions of the formal processes embedded in the constitution.[76] Commenting on the American Constitution's rigidity, former President of the United States of America Woodrow Wilson had stated that the difficulty of the process of amendment of the American Constitution through formal means has made the courts more liberal in their interpretation than they would have otherwise been.[77] The two foremost informal means of constitutional amendment are judicial interpretation and constitutional conventions.

2.4.1 JUDICIAL INTERPRETATION AND CONSTITUTIONAL AMENDMENT

Judicial interpretation of a constitution is an elegant way in which the meaning of constitutions undergo change without there being actual change in the provisions themselves. This means that although the actual language of the constitution does not change, the judiciary, through its interpretation, changes the meaning of the provisions to meet the demands raised by society.

The orthodox theory of judicial interpretation is that a judge never creates the law, but only declares it. As William Blackstone has famously expressed - *"the duty of the Court is not to pronounce a new law but to maintain it and expound the old one."*[78] This means that judges are to undertake a literal approach to law wherein the law is to remain unchanged during interpretation. The interpretive process, in this approach, is mechanical and narrow.[79] The written constitution, being the result of positive formation, must also be strictly interpreted in this manner.

On the other hand, the liberal approach perceives that judges should interpret the law, especially the law contained in a written constitution, with insight into the social values

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[76] Oran Doyle, *Informal Constitutional Change*, 65(5) BUFFALO LAW REVIEW 1021, 1023 (2017).
[77] Richard S. Kay, *Formal and Informal Amendment of the United States Constitution*, 66 AMERICAN JOURNAL OF COMPARATIVE LAW 243, 263 (2018).
[78] William S. Brewbaker III, *Found Law, Made Law and Creation: Reconsidering Blackstone's Declaratory Theory*, 22(1) JOURNAL OF LAW AND RELIGION 255, 266 (2006).
[79] JAIN, *Supra Note* 16, at 1671.

and a desire to adapt the written text to meet the changing needs of society. The purpose of courts in this approach is to ensure through interpretation that the constitution does not fall behind the changing and contemporary social needs. Although the words of the constitution remain static, the meaning that they carry becomes dynamic through judicial interpretation.[80] Furthermore, structural changes introduced by the legislature remains constitutionally insecure in the presence of constitutional review until the judiciary has placed its stamp of affirmation to it through interpretation.[81]

The burden of constitutional interpretation is very heavy. This is because if the judicial interpretation of a statute does not reflect the aspirations for which it was formulated, the legislature can simply amend the statute to reflect their aspirations. However, if constitutional interpretation is wrong, and does not reflect the ideals of the constitution, the only means of salvaging the original meaning is through the cumbersome process of constitutional amendment.[82] Interestingly therefore, correcting the unintentional misgivings of judicial interpretation which informally amend the constitution in a manner which is not consistent with the constitutional spirit, can be, *inter alia,* a reason to provide a formal means of constitutional amendment as well.

Justice Holmes in *Missouri v. Holland* promulgated the notion of the 'living constitution' wherein he compares the American Constitution to a living organism whose development could not have been foreseen by even the most gifted of begetters.[83] Due to the cumbersome process of amendment within the American Constitution, it has been argued that change has been made possible within the American constitutional context primarily on account of judicial interpretation. One author has observed that the procedure of amendment of the American Constitution is so rigid that it could only be amended by a revolution.[84] Nevertheless, the utilization of a general language by the framers of the Constitution have enabled the judiciary to interpret the instrument in ways which the framers would have been able to foresee during its formulation.[85]

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[80] *Ibid*, at 1665.
[81] Kay, *Supra Note* 77, at 264.
[82] Thomas E. Baker, *Constitutional Theory in a Nutshell*, 13(1) WILLIAM & MARY BILL OF RIGHTS JOURNAL 57,87 (2004).
[83] Missouri v. Holland, 252 US 416 (1920).
[84] William L. Marbury, *The Limitations upon Amending Power*, 33(2) HARVARD LAW REVIEW 223, 223 (1919).
[85] William H. Rehnquist, *The Notion of a Living Constitution*, 29(2) HARVARD JOURNAL OF LAW & PUBLIC POLICY 401, 402 (2006).

Interestingly, the contribution of the judiciary as an instrument of informal constitutional amendment is higher in legal systems which boast of a strong presence of constitutional judicial review.[86] The British jurist James Bryce has observed that when social change is faced against a rigid constitutional status, then *"flexibility must be supplied from the minds of the judges."*[87]

2.4.2 CONVENTIONS AND CONSTITUTIONAL USAGES

Constitutional conventions are generally unwritten rules which are accepted as the norm after a long duration of usage. The term was conceptualized by A.V Dicey. Conventions play a primary role in governing the fundamental principles of unwritten constitutions. Conversely, in written constitutions, conventions usually operate where the law is silent or where some derogation or shift from the written law is needed to fulfill the demands and aspirations of society.[88] Generally the conventions are not enforceable in a court of law, although certain jurisdictions, bestow judicial recognition over conventions. For example, in India, the Supreme Court has stated that it does not perceive 'constitutional law' and 'constitutional conventions' as two different paradigms, but rather, once a convention has been accepted by the court to exist and function, it becomes a part of the larger realm of constitutional law, and can also be enforced in like manner.[89]

Conventions can informally amend constitutions primarily in two distinct ways. Firstly, practices borne out of constitutional conventions may sometimes supersede formal constitutional provisions. In this scenario, although the provision continues to exist in the constitution, it is not practiced in reality. For example, the Canadian Constitution of 1867 mandated under Section 56 that the Governor General forward copies of all the legislations passed in the Canadian Parliament to the British government, nevertheless, this was stopped as a practice in the year 1942.[90]

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[86] Craig Martin, *The Legitimacy of Informal Constitutional Amendment and the Reinterpretation of Japan's War Powers*, 40(2) FORDHAM INTERNATIONAL LAW JOURNAL 427, 438 (2017).
[87] David Edward, *The Community's Constitution – Rigid or Flexible? The Contemporary Relevance of the Constitutional Thinking of James Bryce* in DEIRDRE M. CURTIN ET.AL. (ED.) INSTITUTIONAL DYNAMICS OF EUROPEAN INTEGRATION 69 (Martinus Nijhoff Publishers, 1994).
[88] Pranav Kaushal & Lakshay Bansal, *Constitutional Convention: A Word Having Greater Significance as the Written Words of the Constitution Itself*, 4 ASIA PACIFIC LAW & POLICY REVIEW 104, 105 (2018).
[89] SC Advocates-on-Record Association v. Union of India, AIR 1994 SC 405.
[90] Andrew Heard, *Constitutional Conventions and Parliament*, CANADIAN PARLIAMENTARY REVIEW 19, 19 (2005).

The second manner is by evolving practices to accommodate change where the written law is either silent or has a gap. The Indian collegium system is one example of such a development. The Indian Constitution mandates that the President of India is empowered to appoint judges to the higher judiciary after consultation with 'judges' of the Supreme Court.[91] Since the number of judges and the exact manner of consultation has not been provided in the provision, the collegium system has been evolved. Notably, the collegium system, although instrumental in upholding the separation of powers, has nevertheless been criticized about fostering favoritism and nepotism and leading to a lack of transparency in the appointment process for the higher judiciary.[92]

[91] CONSTITUTION OF INDIA, 1949, Art. 124 & Art. 217.
[92] P. Puneeth, *Collegium System: Suggestions for Reforms*, 5(1) VIVEKANANDA JOURNAL OF RESEARCH 37, 38 (2016).

3. CONSTITUTIONAL AMENDMENTS – NEED FOR LIMITATION AND CONTROL

Constitutions are generally characterized as either written or unwritten. James Bryce, the British jurist, however, opined that this distinction is superficial and proposed a different characterization. According to him, constitutions could be characterized on the basis of a more essential criterion – the relation of the constitution to the ordinary laws of the country and to the ordinary authority to enact these laws. On the basis of this relationship, he categorized constitutions as either flexible or rigid. Flexible constitutions are those which occupy the same rank as ordinary law, and are therefore subject to ordinary legislative authority. Rigid ones, on the other hand, propose a hierarchical demarcation between constitutional law and other laws, and it is only through a superior authority, such as a constituent assembly, that the superior constitutional law and be changed.[93] Bryce subsequently goes on to highlight that flexible constitutions are more stable compared to rigid ones, yet, he goes on to caution that *"it takes a good deal of knowledge, skill and experience to work a flexible constitution safely."*[94] These observations highlight both the intrinsic necessity of having a flexible constitutional structure which allows for accommodating change, while also showing the necessity of placing some limitations on the power of amendment.

3.1 WHY LIMIT THE POWER TO AMEND?

Justice William Rehnquist, the 16th Chief Justice of the American Supreme Court, had famously asserted in a lecture given in the University of Texas School of Law in 1976 that a 'living constitution' is better than its counterpart, a 'dead constitution'.[95] Justice Rehnquist, subsequently, attempts to distinguish between the two meanings of the term 'living constitution' that he has encountered within the confines of constitutional law jurisprudence.[96] In the same vein, I seek to posit the two meanings attributable to the term 'dead constitution' – firstly, a constitution which does not serve the desires and aspirations of the nation for which it was formulated due to its provisions having

[93] I JAMES BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE 130 (Oxford University Press, 1901).
[94] *Ibid*, at 153.
[95] William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS LAW REVIEW 693, 693 (1976); see also, Rehnquist, *Supra Note* 85, at 401.
[96] *Ibid*, at 402-404.

become redundant on account of extreme rigidity; and secondly, a constitution which has lost its true meaning and ideals due to whimsical amendment on account of its extreme flexibility. In both scenarios, the constitution loses its spirit and purpose and becomes a legal liability. The second scenario highlights the paradoxical position of constitution amendment powers – although these powers are necessary for the survival of the constitution itself, their unchecked and unlimited utilization can also destroy the constitution.[97]

It has generally been recognized that a written constitution necessitates the presence of a provision which allows for its amendment. Constitutional flexibility, albeit to different extents, is desired across the realm of constitutional law jurisprudence. This implies that constitutional amendments are an integral part of the constitution. They allow the constitution to be flexible to the demands of change and necessity. The aspirations and ideals of the people which serve as the primary source of influence for the constitution change over time. Without accommodating these changes, the constitution loses the support of popular sovereignty and also its legitimacy as the *grundnorm.* Instead of evolution through change, there occurs revolution and disintegration of the constitution itself. Having said this, a constitution which is too flexible and which bows to the whims and fancies of all risks losing its character. The fundamental principles of a constitution can be destroyed through whimsical amendment, ultimately making it redundant. It is due to this reason that limitations on constitutional amendment are desirable.

The fundamental proposition for limiting constitutional amendment is that the power to amend does not necessarily mean the power to enact a new constitution. As the American historian Gordon Wood notes, only a *"convention of delegates"* which has been chosen by the people for the express purpose of either forming or altering a constitution could fulfill that purpose, and it is the express reliance upon this authority which has bestowed upon it a status different from the status of the ordinary legislature.[98] The identity and credentials of constitution makers can in this sense be divided into two categories - those whose task it is to draft an entirely new constitution

[97] ALBERT, *Supra Note* 14, at 03.
[98] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 342 (Omohundro Institute and University of North Carolina Press, 1998).

and those who have been empowered to amend it.[99] This positon, therefore, makes a demarcation between extraordinary constituent power and ordinary legislative power. For an amendment by the ordinary legislature to be conceptually valid, it is imperative that it operates within the confines of the existing system contained in the constitutional text and not reconstitute or replace the existing polity, since such an incident would not be amendment but abrogation of the constitution.[100]

The purpose of an amendment must merely be to fine-tune what already exists,[101] which may also include accommodating necessities borne out of social change into the constitutional fold. The American political scientist Walter. F. Murphy has defined amendment as - *"Thus an amendment corrects errors of commission or omission, modifies the system without fundamentally changing its nature that is an amendment operates within the theoretical parameters of the existing Constitution."*[102] The higher hierarchical position bestowed on the power of amendment, when compared to ordinary legislative power, as well as the comparative difficulty of the amending process as against the legislative enactment, is to ensure the entrenchment of the constitution in a meaningful manner.[103]

Another view also stems from the notion that the sacrosanct portions of the constitution must be protected from change. Certain constitutional provisions represent the fundamental ethos of the constitution itself. If they are made amenable to change, then the constitution may lose its character. A system of amendment which places certain fundamental constitutional provisions beyond the ambit of change while allowing others to be flexible to amendment can be an acceptable balance in the debate between rigidity and flexibility of the constitution. The Canadian constitutional law Robert Dawson has famously remarked in this regard that although change and modification are inevitable, it is essential that the fundamental principles of the constitution are rigid

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[99] Andrea Pozas-Loyo & Julio Rios-Figueroa, *The Politics of Amendment Processes: Supreme Court Influence in the Design of Judicial Councils*, 89 TEXAS LAW REVIEW 1807, 1811 (2011).
[100] Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity,* in SANFORD LEVINSON (ED.) RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 177 (Princeton University Press, 1995).
[101] Jason Mazonne, *Unamendments*, 90 IOWA LAW REVIEW 1747, 1754 (2005).
[102] III DR. L.M SINGHVI, CONSTITUTION OF INDIA 3898 (Thomson Reuters, 2013); see also Raghunathrao Ganpatrao v. Union of India, 1993 AIR 1267.
[103] Martin, *Supra Note* 86, at 438.

and stationary, although in other needs, the constitution may bow to the changing needs of time.[104]

Jurisprudential debates on the relationship between morality and law can also shed some light on why it is imperative to place some limitations on constitutional amendment. The Radburch Doctrine, promulgated by the German jurist Gustav Radburch provides an interesting insight.

The doctrine posits that positive law, which has been secured by legislation, takes precedence even when unjust and not beneficial to the people, unless the conflict between the legislation and justice reaches such an intolerable degree that positive law must bow and yield to aspects of justice. He further continues, that when the positive law has not even made an attempt at justice, and when the "core of justice" has been "deliberately betrayed" by the positive law, then it lacks the very nature of law.[105] Radburch's position can be summarized within the maxim *lex injusta non est lex.*

Written constitutions are positive law drafted by a constituent authority. Any constitutional provision, including an amendment, can be invalidated by relying upon this doctrine. Similarly, an attempt at legitimizing an intolerably unjust legislation, or an attempt to bring such an unjust legislation within constitutional limits through constitutional amendment can be nullified by the judiciary by relying upon the position adopted by the Radburch Doctrine.[106]

John Rawls also provides an interesting outlook on the issue. Rawls perceives the Constitution as a reflection of public reason, and therefore, the Constitution must be read in light of public reason. This entails that a constitutional amendment which is contrary to the prevailing notion of public reason can be invalidated and resisted by the judiciary.[107] He elaborates that if an amendment which seeks to repeal the First Amendment of the American Constitution through procedurally valid means, then irrespective of the procedural validity of the amendment, it cannot be sustained since it

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[104] ROBERT MACGREGOR DAWSON, THE GOVERNMENT OF CANADA 129 (University of Toronto Press, 1970).

[105] Brian H. Hix, *Radburch's Formula and Conceptual Analysis*, 56 AMERICAN JOURNAL OF JURISPRUDENCE 45, 46 (2011).; see also Roznai, *Supra Note* 73, at 564.

[106] Seow How Tan, *Radburch's Formula Revisited: The Lex Injusta Non Est Lex Maxim in Constitutional Democracies*, CANADIAN JOURNAL OF LAW & JURISPRUDENCE 01, 08 (2021).

[107] Michael P. Zuckert, *The New Rawls and Constitutional Theory: Does it Really Taste that Much Better*, 11 CONSTITUTIONAL COMMENTARY 227, 240 (1993).

fundamentally contradicts the 'constitutional tradition' of the American Constitution, and the judiciary may invalidate it.[108] The purpose of an amendment, according to Rawls, was to facilitate adjustment and broadening of constitutional values and removing the defects which plague the original text of the constitution. The idea of amendment, therefore, is to help adjust the basic constitutional values to the changing circumstances brought forth by the passage of time or to effect *'a more inclusive'* understanding of those constitutional values by incorporating them into the constitutional text.[109] The Rawlsian invocation does not, however, depend on the perennial conflict between a higher natural law and state-enacted positivist law, with the former being used to invalidate the latter. Rather, it is centered on entrenched constitutional values that develop over the course of a nation's history, values which are core to the constitutional framework and must be protected from abrogation, that forms the backbone of the Rawlsian theory.[110] American legal theorist Lawrence Solum echoes a similar analysis of the Rawlsian theory when he postulates that it is not natural law but legal practice that *'immunizes the freedoms of speech and religion'* from the process of amendment.[111]

The idea that certain constitutional rights are inalienable and non-derogable has also been philosophically explored by certain other writers. Thomas Hobbes, for example, regarded the right of self-defense as inalienable because he asserted that from its alienation, no good can befall the person who alienated it.[112] Baruch Spinoza, similarly postulated that natural rights such as free reason and judgment are not subject to abdication and also cannot be waived even by consent.[113] The French philosopher Condorcet goes a step further and argues that one cannot bind oneself to a majoritarian approach which has violated the rights it once recognized and respected.[114]

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[108] JOHN RAWLS, POLITICAL LIBERALISM 239 (Columbia University press, 1993).

[109] Charles A. Kelbley, *Are There Limits to Constitutional Change – Rawls on Comprehensive Doctrines, Unconstitutional Amendments and the Basis of Equality,* 72(5) FORDHAM LAW REVIEW 1487, 1505 (2004).

[110] *Ibid*, at 1510.

[111] Lawrence B. Solum *Situating Political Liberalism,* 69 CHICAGO-KENT LAW REVIEW 549, 576 (1994)

[112] THOMAS HOBBES, LEVIATHAN 105 (Cambridge University Press, 1904).

[113] George Wright, *Could a Constitutional Amendment be Unconstiutional?,* 22 LOYOLA UNIVERSITY CHICAGO LAW JOURNAL 741, 746 (1991).

[114] MARQUIS DE CORDORCET, SELECTED WRITINGS 222 (Bobbs Merill, 1976).

International treaty obligations can also become a reason why certain constitutional provisions, especially those securing human rights, can become inviolable. This would entail that the rights protected by the ratified international treaty cannot be subjected to amendment in a manner which curtails those rights. For example, the Indian Constitution prescribes that the Indian State must foster respect for international treaty obligations.[115] India acceded to the International Covenant on Civil and Political Rights (hereafter ICCPR) in 1979.[116] It contains a wide range of rights, including but not limited to, the right against arbitrary deprivation of life,[117] protection against torture and punishment,[118] prohibition against slavery,[119] right to recognition as a person before the law,[120] protection against arbitrary deprivation of individual privacy,[121] and the right to freedom of thought, conscience and religion.[122] The constitutional mandate to respect and adhere to its international treaty obligations, as well as the judicial recognition that in the absence of contrary legislation, municipal courts have a duty to respect the rules of international law[123] means that an amendment which curtails one of the rights guaranteed by the ICCPR would be a violation of the constitutional mandate as well as the judicial proclamation regarding respect for international legal commitments. Furthermore, in the absence of a central authority bestowed with the power of imposing binding rules of adherence, parties within international law have developed legal norms to help make instruments of international law binding.[124] The principle of *pacta sunt servanda*, which provides that a State is bound to fulfill its treaty obligations,[125] is one such norm, and it also obligates that parties perform their international legal responsibilities. These issues bring forth that fulfillment of international treaty obligations can also become a hindrance against constitutional amendment if such amendment would risk abrogating a treaty commitment that the party has committed to fulfill.

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[115] *Supra Note* 91, Art. 51(c)
[116] A HANDBOOK ON INTERNATIONAL HUMAN Rights 22 (National human Rights Commission, 2012).
[117] INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1967, Art. 06.
[118] *Ibid*, Art. 07.
[119] *Ibid*, Art. 08.
[120] *Ibid*, Art. 16.
[121] *Ibid*, Art. 17.
[122] *Ibid*, Art. 18.
[123] National Legal Services Authority (NALSA) v. Union of India, AIR 2014 SC 1863.
[124] Vivek Sehrawat, *Implementation of International Law in Indian Legal System*, 31(1) FLORIDA JOURNAL OF INTERNATIONAL LAW 98, 104 (2019).
[125] VIENNA CONVENTION ON LAW OF TREATIES, 1969, Art. 26.

Constitutional amendments can also be used as an instrument to negate the influence and impact of judicial pronouncements. The judiciary, especially in the presence of a well-established institution of judicial review, can become the final authority on both legislative and constitutional interpretation. Judicial interpretation as a form of informal constitutional amendment has already been touched upon in the second chapter. Judicial decisions which are disliked by the legislature or executive can be subverted through legislative change.

The Hungarian constitutional crisis of 2010 wherein the legislature, through amendment, limited the power of the judiciary to review constitutional amendments and reintroduced with retrospective effect, a legislation which had been deemed unconstitutional by the constitutional court,[126] provides a piquant example of how the power of amendment can be misemployed and abused to curb judicial decisions.

In the Indian legal system, the infamous enactment of The Muslim Women (Protection of Rights On Divorce) Act, 1986 following opposition by the Muslim clerics against the *Shah Bano judgment.*[127] As a means to nullify the effects of the impugned order. A constitutional amendment, being higher than ordinary legislation, provides an even greater means to invalidate judicial orders. The Constitution (Forty-Second Amendment) Act, 1976 is the foremost example from the Indian scenario.

Another example is the demand by the South African National Party (Afrikaans) to nullify the abolition of the death penalty by the judiciary in *Makwanyane*[128] by constitutional amendment, a demand which was negated by recommendations of a constitutional review committee a decade later in 2005.[129]

Conversely, judicial interpretation, when left unchecked, can change the meaning of the written constitutional text in ways which are against the constitutional spirit. In his famous dictum, Charles Evans Hughes, the former Chief Justice of the American Supreme Court stated – *"we are under a constitution, but the constitution is what the judges say it is."*[130] Limitations on constitutional amendment become essential also to

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[126] Gabor Halmai, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution,* 19(2) CONSTELLATIONS 182, 192 (2012).
[127] Mohammad Ahmed Khan v. Shah Bano Begun, AIR 1985 SC 945
[128] State v. Makwanyane, 1995 (6) BCLR 665.
[129] ZACHARY ELKINS ET.AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 75 (Cambridge University Press, 2009).
[130] C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S Supreme Court, 1939-1941,* 35(5) AMERICAN POLITICAL SCIENCE REVIEW 890, 890 (1941).

protect the sanctity of the constitution from judicial usurpation. Being the final arbiter of the constitution, the judiciary, through liberal interpretation, can destroy the intent of the constitution. Therefore, limitations become imperative. Interestingly, implicit limitations evolved through judicial activism such as India's basic structure doctrine, although a protection against legislative encroachment of the constitutional spirit, may not be effective against judicial encroachment. This makes formal limitations upon amendment and revision which are applicable to the judiciary as well as the legislature the only safeguards against the possibility of the judiciary resorting to extra-judicial efforts to curb the constitutional spirit.

Finally, it must be highlighted that not every constitution places limitations on amendment. Certain constitutions explicitly grant an unlimited and unfettered scope of amendment. The reason for doing so is rooted in the belief that the constitution derives itself from the people and the people being sovereign must have the power to amend the constitution as they wish without any limitations. The Irish Constitution, for example, explicitly states that *"any provision"* of the Constitution can be amended by following the requisite procedure of passing the proposed amendment in the legislature and subsequent two-third approval by majority through referendum.[131] The power of amendment within the Irish Constitution ultimately resides in the people and it is unfettered. Considerations of supra-constitutional mechanisms such as international law or natural law do not constrain the capacity of the people to amend.[132] The Irish Supreme Court has also opined that once an amendment to the constitution has been approved by the people, there can be no way in which the same can be declared unconstitutional.[133] No organ of the State, including the judiciary, is competent to nullify a decision of amendment taken by the people.[134] This also means that the doctrine of unconstitutional constitutional amendments is inoperative within the Irish legal system since any amendment which has been validly approved by the people with the requisite majority goes beyond the scope of judicial review.

[131] CONSTITUTION OF IRELAND, 1937, Art. 46-47.
[132] Roznai, *Supra Note* 73, at 569.
[133] Riordan v. An Taoiseach, [1999] IESC 1.
[134] Hanafin v. Minister of the Environment, [1996] 2 ILRM 61.

3.2 UNLIMITED ALTERATION– THE RISK OF CONSTITUTIONAL DISMEMBERMENT

Professor Richard Albert has conceptualized the term '*constitutional dismemberment.'* The primary question that he addresses through this concept is – *"when is a constitutional amendment an amendment in name alone?"*[135]

Amendment, in this sense, can be classified into two categories – firstly, one which seeks to introduce some change to the existing constitutional structure; and secondly, which, although amendment in name and procedure, seeks to introduce an entirely new constitutional framework. The first meaning is an amendment in the rudimentary and basic sense and attempts at merely reforming the existing constitutional structure. The second meaning, however, is a complete amendment of the constitution and aims to bring forth constitutional revision.

Professor Albert postulates that the middle ground between these two categories, where an entirely novel framework is formulated through constitutional amendment without breaking the already existing formal constitutional structure is *'constitutional dismemberment'.* He argues that dismemberment amounts to relying on the principles of constitutional alteration to unmake the existing constitution. The process of dismemberment does not formally produce a new constitution, rather, it introduces a transformative change whose effects are incompatible with the existing constitutional framework.[136] This, though, does not mean that a new constitution cannot be incorporated into the existing constitutional framework itself by shrouding it within the 'veil of amendment'.

The next question that arises is - how does one identify a change as being so transformative that it leads to dismemberment? Professor Albert identifies three ways – firstly, a change which goes against the original constitution's entrenched structure (the first structure); secondly, a change which is against the normative constitutional vision of what it must protect (the first principles); and thirdly, a change which is against the understanding of the relevant actors and people at the time when the change was made.[137]

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[135] ALBERT, *Supra Note* 14, *at* 01.
[136] Richard Albert, *Constitutional Amendment and Dismemberment,* 43(1) YALE JOURNAL OF INTERNATIONAL LAW 01, 14 (2018).
[137] *Ibid*, at 51.

Ironically, dismemberment is often the product of formal constitutional amendment by motivated political actors. This ability to dismember the constitution by radically changing and transforming by abiding with the letter of the constitution itself grants the dismemberment legitimacy since it is enacted by adhering with the constitution's guiding principles for amendment. It also protects the amendment from being invalidated by judicial review or constitutional review since the formal procedural requirements that are mandated are followed to effectuate the amendment. Professor Albert calls this the 'rule of mutuality'.[138]

To cite an example of how dismemberment can affect a written constitution, and how an amendment (or a series of amendments) may be regarded as being so transformative as to lead to dismemberment, one may refer to the Portuguese Constitution of 1976 and the change it has undergone over its five-decade existence. This Portuguese Constitution was initially drafted around Marxist-Leninist principles. The Constitution declared Portuguese democracy merely a 'transition to socialism' and considered 'agrarian reform' and 'socialization of the means of production' as the means to the formation of socialist society. António Costa Pinto, a professor at the University of Lisbon, has commented that among all the liberal democracies which emerged from the third wave of democracy, the Portuguese Constitution was the one most anchored in the political spectrum of the left ideology.[139] Two significant constitutional amendments in 1982 and 1989, wherein, among other changes, the Revolutionary Council of Portugal was replaced by a new constitutional court, and Marxist language was replaced with more neutral language within the Portuguese Constitution, a new era was heralded. Richard Albert calls this transformation the *'demarxification'* of the Portuguese legal system.[140] It led to a complete overhaul of the Portuguese Constitution from the Marixst-Leninist principles which had been the core facet of its identity during its formation.

A comparison may also be drawn between dismemberment, as propounded by Professor Albert, with the theory of *'constitutional moments'* that Professor Bruce Ackerman formulated. Ackerman's theory of constitutional moments refers to unique moments in

[138] *Ibid*, at 57.
[139] António *Costa Pinto, Constitution-Making and the Democratization of Portugal: An Enduring Legacy*, 34(1) PORTUGUESE STUDIES, 35, 35 (2018).
[140] ALBERT, *Supra Note* 14, at 09.

a nation's constitutional history where the existing constitutional arrangements are overthrown through transformative change by political actors or bursts of judicial activism, leading to paradigmatic change in society. This implies that changes brought forth in 'constitutional moments' may not be brought forth merely through the formal process of amendment, rather, informal constitutional amendments can also be the cause behind such constitutional change.[141] To substantiate, Ackerman identifies three constitutional moments in America's constitutional history that did not involve formal amendment under Article V - firstly, the debate and passage of the Civil War Amendments; secondly, President Roosevelt's New Deal arrangements ushering in the modern era of regulatory State; and thirdly, the legal revolution which began with the American Supreme Court's decision in *Brown v. Board of Education*[142] and culminated with the passage of the historic Civil Rights Act, 1964.[143] Each of these changes, though not constitutional amendments in the formal sense, brought extraordinary transformative change in the broader domain of constitutional law.

A similar concept has also been formulated by Professor Gary Jacobsohn under the term *'constitutional revolution'* wherein he uses the term to denote the establishment of a new constitutional paradigm after illegally overturning a previous one.[144] These changes within the constitutional structure leave the constitutional document with an altered identity, with the alteration being so extreme that questions on the legitimacy of the changes introduced can be validly raised.[145]

Each of these concepts are theoretically similar in the sense that they try to fill the gap between partial constitutional revision (amendment) and complete constitutional revision (adoption of a new constitution). They attempt to draw the line and answer the question as to what extent can an amendment be formally regarded as one, and when it does it cease to be an amendment of the existing framework and something transform into something entirely new. Notwithstanding the semantic and theoretical differentiations, they highlight that an amendment can nevertheless transgress the

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[141] Walter Dean *Burnham, Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman's We The People*, 108 YALE LAW JOURNAL 1037, 1040 (1999).
[142] Brown v. Board of Education of Topeka, 347 US 483 (1954).
[143] Daniel Taylor Young, *How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling to Evaluate Bruce Ackerman's Theory of Constitutional Change*, 122 YALE LAW JOURNAL 1990, 1998 (2013).
[144] Gary Jeffrey Jacobsohn, *Theorizing the Constitutional Revolution*, 2(1) JOURNAL OF LAW AND COURTS 01, 01 (2014).
[145] *Ibid*, at 09.

existing constitutional structure even when enacted by following the formal method of amendment contained in the constitution itself.

3.3 SOURCES OF LIMITATION – AN ANALYSIS

The most rudimentary form of demarcating limitations on constitutional amendment is by differentiating them on the basis of whether they trace their existence to the constitutional text or not. This gives two broad categorizations of limitation – explicit (formal limitations enshrined within the constitution) and implicit (informal limitations which trace their existence to a source beyond the constitution).

Explicit (formal) procedures of limitation are reflective of the will of the framers of the constitution. The limitations are clear since they are textually represented within the constitution itself, and being a part of the constitutional scheme, are more robust and precise in their application. Roznai argues that these limitations can be typically divided into two forms based on their nature – universal and particular. Universal principles represent certain tents which are universal to all modern democracies, such as separation of powers and rule of law whereas the specific principles represent notions which are intrinsic to certain political cultures while the same may not hold true for others such as a federal distribution of powers, secularism etc.[146] Curiously though, constitutions are usually silent on the repercussions of violating the formal limitations on amendment. Most constitutions do not explicitly provide whether an amendment can be subjected to judicial review on the basis of procedural or substantive non-conformity.

Implicit (informal) procedures on the other hand do not trace their origins to the constitution, but are, like informal procedures of amendment, extrinsic to the constitutional scheme. Carl Schmitt, the German jurist, is credited with having developed the theory of implied limitations on constitutional amendment in his book *'Verfassunghslehre'* which was published in the year 1928. His theory was influenced by the Weimar Constitution of 1919 wherein the mandated procedure of amendment was two-thirds majority of members present and voting in the Reichstag (German Parliament) and if the amendment was concluded by an initiative in response to a

[146] ROZNAI, *Supra Note* 13, at 33.

referendum then a consent of the majority of eligible voters was needed.[147] No formal (explicit) limitations on amendment were placed though. His argument was centered on the concept of 'constituent power' which he distinguished from ordinary power, and mandated that constituent power could only be effectively wielded by either the people or the monarch. Any change in the fundamental constitutional norms could be made only by exercising this power and not ordinary legislative power. He postulated that the amending procedure that was enshrined within the Weimar Constitution could not be used to amend and change the fundamental constitutional norms that made up the constitution.[148]

Implicit limitations are inherent to legal systems which have a powerful and robust mechanism of judicial review since it is the constitutional court which becomes responsible for safeguarding the constitution from whimsical amendment in the absence of explicit limitations. In this regard, one author has argued that implicit limitations on constitutional amendment can always be sourced to some form of judicial activism. The theories of implied limitations, in this manner, become a form of ex-post rationalization by a group of judges of the assumed will of the people whose authority had legitimized the constitution enactment process.[149] Interestingly, the evolution of implicit limitations where the constitution is silent on formal restrictions raises questions on the legitimacy of these limitations since they seek to restrain the unlimited amending power mandated by the constitution itself. This is an issue which will be discussed in a subsequent chapter.

In this present discussion, instead of relying on the rudimentary divisions of explicit and implicit limitations, I present a division of limitations on constitutional amendment on the basis of their nature and scope as well as the source of limitation. Some divisions (supra-national limitations or judicial review for example) can have both explicit and implicit forms in different constitutional systems across the world. Furthermore, due to the unique nature and multi-faceted role of judicial review as a limitation on constitutional amendment, it will be discussed in a separate part of this chapter.

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[147] CONSTITUTION OF GERMANY, 1919, Art. 76.

[148] CARL SCHMITT, CONSTITUTIONAL THEORY 78 (Duke University Press, 2008).

[149] Michael Hein, *Do Constitutional Entrenchment Clauses Matter? Constitutional Review of Constitutional Amendments in Europe*, 18(1) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 78, 86 (2020).

3.2.1 SUPRA-CONSTITUTIONAL CONSIDERATIONS

Heteronomous limitations, also known as supra-constitutional limitations, derive their legitimacy from a source of law other than the constitution itself. This source is either a law which exists beyond the constitutional scheme such as international law or human rights law or a form of non-positivist abstract law such as natural law. The underlying reasoning for this is that the constitution, despite being the legal *grundnorm*, is still human-made positivist law, and therefore, subject to the hierarchically higher natural law or supra-national principles of international law.

These may either be explicitly contained within the constitution or be implicitly formulated through either judicial interpretation or constitutional convention.

In their explicit form, the constitution itself lists certain principle as supra-constitutional and therefore beyond abrogation through constitutional amendment. For example, The Constitution of Bosnia & Herzegovina from 1995 specifically states that the standards contained within the European Convention for the Protection of Human Rights (ECHR) shall have priority and primacy over other law, including amendments made to the constitution.[150] In another instance, the Supreme Court of Philippines had opined in 1973 that although the Constitution of Philippines can be amended, it should not be amended in a manner that is inconsistent with the *jus cogens* principles of international law.[151] Again, the Swiss Constitution of 1999 states that partial constitutional revision should not violate mandatory international law principles.[152]

In their implicit form, the judiciary relies on certain higher principles, often rooted in natural law, to limit constitutional amendment. The German jurist Carl Schmitt has argued that certain constitutional principles such as the type of polity or the fundamental character of the constitution implicitly take on a supra-constitutional character and cannot be destroyed through an amendment of the constitution.

Interestingly, these implicit supra-constitutional principles are relied upon by the judiciary to place implicit limitations on amending powers.[153] The Indian basic structure doctrine is an example of such an incident wherein certain fundamental constitutional principles were held to be sacrosanct and thus not subject to derogation through

[150] CONSTITUTION OF BOSNIA & HERZEGOVINA, 1995, Art. 2(2); see also Roznai, *Supra Note* 73, at 559.
[151] Planas v. Comelec, 49 SCRA 105, 126; see also *Ibid*, at
[152] *Supra Note* 72, Art. 194.
[153] ROZNAI, *Supra Note* 13, at 52.

amendment. Another example is the Colombian 'substitution of the constitution' doctrine which limits amending power by preventing complete constitutional replacement.

3.2.2 AUTONOMOUS LIMITATIONS -

Autonomous limitations are those limitations which derive their validity from the constitutional text itself. They are also called eternity clauses due to the immunity that they enjoy from amendment. These limitations provide a hierarchical division between constitutional provisions by placing certain provisions or constitutional tenets above others. The ones which occupy a lower position in the hierarchy are amendable by either formal or informal means. The constitutional tenets occupying the higher pedestal, on the other hand, are not subject to amendment or derogation. The underlying reason for placing these provisions beyond the purview of change and amendment is because of their extraordinary importance to the constitutional spirit and character. For example, within the American Constitution, only two express limitations have been placed on the power of amendment – firstly, that no state can be deprived of its right to equal suffrage in the United States Senate without its prior consent; and secondly, an expression prohibition on amending the position of slave trade prior to 1808.[154] However, it has been argued that something as crucial to the safeguarding of individual liberties as the Bill of Rights is not susceptible to change or withdrawal through amendment.[155] Similarly, under the Italian Constitution of 1947, the republican character of the Italian State cannot be amended.[156] The German Basic Law of 1949 also places a formal limitation on the amendment of the principles contained under Articles 1-20 and on amendments affecting the federal division of the *Länder*[157] (the German federal division of the nation into sixteen parts, divided between thirteen territorial states and three city states).[158] The Norwegian Constitution, similarly, allows its amendment only to the extent that the constitution does not contradict the constitutional principles embodied within it, with amendment relating merely to the modification of provisions that do not transgress on the constitutional spirit.[159]

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[154] Stephen J. Goldfarb, *An Inquiry into the Politics of the Prohibition of International Slave Trade*, 68(2) AGRICULTURAL SPRING 20, 26 (1994).
[155] Brennan Jr., *Supra Note* 56, at 03.
[156] CONSTITUTION OF ITALY, 1947, Art. 139.
[157] CONSTITUTION OF GERMANY, 1949, Art. 79.
[158] ARTHUR GUNLICKS, THE LÄNDER AND GERMAN FEDERALISM 81 (Manchester University Press, 2003).
[159] CONSTITUTION OF NORWAY, 1814, Art. 112.

The Russian Constitution of 1993 provides a unique and interesting system. It does not merely delineate individual constitutional provisions as eternity clauses but rather places entire chapters within the constitution beyond the scope of amendment. The formal rules of amendment themselves are flexible and several political actors can propose constitutional amendments.[160] Furthermore, the formal procedure of amendment model establishes legislative supremacy through the rules of adoption, wherein amendments are adoption according to the rules of federal law - securing a two-thirds super-majority in the lower house (State Duma) and three-fourths super-majority in the upper house (Federation Council).[161] Legislative supremacy is therefore maintained to enable the adoption of amendments in a manner similar to federal laws, so as to expedite the process of introducing constitutional amendments.[162] Despite the simplistic procedural requirements, the Russian Constitution places the first, second and ninth chapters of the constitution, dealing with the constitutional system of governance, human & civil rights and the procedure of amendment and constitutional revision respectively, beyond the scope of formal amendment.[163] An amendment to these portions of the constitution can only be done after a three-fifth majority of both the lower and upper houses of the Russian Parliament approves the proposal for amendment, following which a constitutional assembly must be formed which either confirms the invariability of these provisions or drafts an entirely new constitution.[164]

The system adopted by the Russian model is unique because of two reasons. Firstly, unlike other eternity clauses which provide that individual provisions are beyond the scope of constitutional amendment, the Russian Constitution acknowledges the unamendability of entire chapters. This entails that the system protects not just individual constitutional provisions but an entire system as sacrosanct for the functioning of the constitution. Secondly, the chapters which are placed beyond the power of amendment cannot be amended by any means, since a proposal for their amendment will either result in the convened constitutional assembly declaring the concerned parts as invariable or an entirely new constitution must be drafted. Therefore,

[160] CONSTITUTION OF RUSSIA, 1993, Art. 134.
[161] *Ibid*, Art. 136.
[162] Bui Ngoc Son, *Russia's Big-Bang Constitutional Amendments*, 53 INTERNATIONAL LAW AND POLITICS 751, 763 (2021).
[163] *Supra Note* 160, Art. 135
[164] Anna Shashkova et. al., *On Modifications to the Constitution of the Russian Federation in 2020*, 8(1) RUSSIAN LAW JOURNAL 60, 79 (2020); see also Son, *Supra Note* 162, at 764.

there is no scope for amending these provisions within the existing constitutional framework. Interestingly, this can be regarded as a form of constitutionally recognizing the Indian basic structure doctrine, wherein certain constitutional parts that are inherently inviolate are deemed unamendable, with the only means of abrogation from them being the adoption of an entirely new constitution.

3.2.3 REQUISITE PROCEDURAL THRESHOLDS -

Certain constitutions attempt to place procedural limitations on constitutional amendment. The purpose of procedural limitations can be two-fold.

Firstly, the procedural limitations may make amendment so difficult that the formal procedure itself can be a limitation against unnecessary amendment. In other words, sometimes, the formal procedure of amendment itself may be so tedious that it can act as an implied limitation.[165] For example, the Dutch Constitution of 1814 prescribes two readings for any amendment to the constitution. The first reading takes place when the lower house of the Dutch Parliament introduces the bill, and once passed by majority in both houses, the house is dissolved and elections take place. Once the house is elected once again, the second reading takes place and the bill must be passed by two-thirds majority by both the houses of the Dutch Parliament.[166] Although the dissolution of the lower house due to introduction of a motion for amendment is in practice coincided with the regular dissolution and election of the house, it, nevertheless, due to its complicated nature, makes the process of amendment extremely difficult.[167]

Secondly, the procedure of amendment may necessitate certain temporal limitations be followed. One for is prescribing a minimum duration for which the proposed amendment must be discussed and deliberated. For example, the 1948 Constitution of South Korea states that proposed amendments must be placed before the public by the president for a period of at least twenty days.[168] Another is a prohibition on discussing constitutional amendments for a particular duration of time, thereby prohibiting political actors from reintroducing a defeated amendment or passing multiple constitutional

[165] Janeke Gerards, *The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing it*, 77 REVUE INTERDISCIPLINAIRE D'ÉTUDES JURIDIQUES 205, 225 (2016).
[166] CONSTITUTION OF NETHERLANDS, 1814, Art. 137.
[167] Gerards 165, *Supra Note*, at 226.
[168] CONSTITUTION OF SOUTH KOREA, 1948, Art. 129.

amendments within a short duration of time wherein they might enjoy majority.[169] The Greek Constitution of 1975 prevents constitutional revision for a period of five years after a successfully completed previous revision.[170]

Apart from these two procedural limitations, mandating a referendum in which a majority of the voters approve the proposed amendment can also be considered a procedural limitation on the amending power of constitutions. This process reconciles the concept of popular sovereignty with constitutional amendment. It means that the same degree of validation which is necessary for exercising constituent power, the support of popular sovereignty, becomes necessary for enacting a constitutional amendment. Relying on popular referendum is a nuanced measure against parliamentary subjugation of the constitution. Although a democratically elected government is elected through popular majority, it can, nevertheless, take action which is not approved by the people.[171] The reduction of fundamental rights or a shift towards authoritarianism will not be supported by the people irrespective of the mandate which they had bestowed during the elections. To protect from such transgressions, allowing amendments of certain important articles only through referendums is one significant way of limiting the amending power.

The Italian constitutional amendment of 2016 which proposed to alter the structure of the Italian Senate and effectively change one-third of the constitution provides an example. The Italian Constitution necessitates that once a proposed constitutional amendment has been passed by absolute majority in each of the two houses of the parliament, it must be referred to the people via referendum wherein it must be then approved by a majority of the total votes.[172] This proposed amendment to alter the structure of the senate was introduced as a simple amendment, albeit, the same was rejected by around 60% of the voters in the referendum,[173] thereby negating the attempt to change a fundamental part of the Italian Constitution.

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[169] Albert, *Supra Note* 67, at 954.
[170] CONSTITUTION OF GREECE, 1975, Art. 110.
[171] Deba Prasad Mohanty, *The Procedure for Constitutional Amendments in the Commonwealth*, 11(1) JOURNAL OF THE INDIAN LAW INSTITUTE 87, 97 (1969).
[172] *Supra Note* 145, Art. 138.
[173] Gianfranco Pasquino & Marco Valbruzzi, *Italy Says No: The 2016 Constitutional Referendum and Its Consequences*, 22(2) JOURNAL OF MODERN ITALIAN STUDIES 145, 146 (2017).

3.2.4 CULTURAL INFLUENCES –

Constitutions are not created in a vacuum. They are, instead, the result of the unique socio-cultural aspirations and shared historical facets that the nation possesses. This implies that differences in socio-cultural and political outlooks can also influence the manner in which the constitution functions. This shared outlook also extends to the desirability of constitutional flexibility. It means that if a culture perceives constitutional flexibility and change as undesirable, then in spite of comparatively simple procedural requirements of amendment, the nation shall refrain from implementing these procedures. [174] The perceptions of the people on the position occupied by the constitution in the legal hierarchy can sometimes function as a more robust limitation on constitutional flexibility than the institutional or formal limitations explicitly imposed by the constitution itself. If the constitution is perceived as a sacred text which must not be tampered with, the normative status ascribed to it shall allow it to remain entrenched and not succumb to change unless such change is absolutely necessary.[175]

The shared attitudes of the collective people can therefore be an informal or implicit limitation against constitutional amendment. The cultural outlook of Japan provides a great example. The Japanese Constitution of 1947 states that an amendment to the constitution can be made by a two-thirds majority in the legislature followed by an approval by majority of a referendum.[176] Although the procedure is comparatively straight-forward, the cultural and political aversion towards constitutional flexibility has ensured that the Constitution of Japan has not been amended even once during its seven-decade long existence.[177] Other constitutions with similar procedural requirements have, on the other hand, been subjected to amendment multiple times over shorter durations of existence.[178] For example, the Indian Constitution, which was enacted merely a few years after the Japanese Constitution, and with similar procedural requirements (apart from the referendum which is not needed in India), has been amended over a hundred times.

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[174] Jonathan L. Marshfield, *The Amendment Effect*, 98 BOSTON UNIVERSITY LAW REVIEW 55, 80 (2018).
[175] Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13(3) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 686, 700 (2015).
[176] CONSTITUTION OF JAPAN, 1947, Art. 96.
[177] Nobuhisa Ishizaka, *Constitutional Reform in Japan*, 33 COLUMBIA JOURNAL OF ASIAN LAW 05, 05 (2019).
[178] Marshfield, *Supra Note* 174, at 80.

It must be noted though that the restraint on amendment of the Japanese Constitution is expressed here in the formal sense. This means that the Japanese Constitution has not been amended textually by the procedure enumerated under Article 96. The judiciary has, though, through interpretation, amended and changed the meanings of existing constitutional provisions, particularly on issues concerning religious freedom[179] and freedom of expression,[180] thereby leading to informal amendment.[181]

3.4 JUDICIAL REVIEW – THE COURT AS THE FINAL ARBITER OF CONSTITUTIONAL AMENDMENTS

The doctrine of judicial review was developed in the landmark case of *Marbury v. Madison*[182] and has since become an integral part of constitutional democracies all over the world, albeit the extent to which it is implemented differs across legal systems. It has become an integral part of the separation of powers doctrine and functions as a mechanism for maintaining the balance between the three different pillars of the State.[183] Broadly speaking, two different forms of judicial review exist – the American format wherein all courts are empowered to adjudicate questions of constitutionality and the European model wherein specific constitutional courts are designated to review questions of constitutionality.[184] Although the power of judicial review of amendments is not ubiquitous, with the British, Dutch and the Scandinavian legal systems not having a robust institution of judicial review until their membership of the European Union (EU),[185] the same has become an important hallmark for maintaining constitutional supremacy and constitutionalism.

Expanding the power of judicial review from legislations to constitutional amendments, it becomes possible for the judiciary to review the constitutionality of amendments as well. The power of judicial review over constitutional amendments can be extend to reviewing both the substantive as well as procedural requirements.

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[179] Kakunaga v. Sekiguchi, 31 Minshu 533 (Sup. Ct. July 13, 1977); Japan v. Nakaya, 42 Minshu 277 (Sup. Ct. June 1, 1988).
[180] Japan v. Osawa 28 Keishu 9 (Sup. Ct. Nov. 6, 1974).
[181] Ishizaka, *Supra Note* 177, at 32.
[182] Marbury v. Madison, 5 U.S. 137 (1803).
[183] Jutta Limbach, *Concept of Supremacy of the Constitution*, 64(1) MODERN LAW REVIEW 01, 05 (2001).
[184] KEMAL GÖZLER, JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS - A COMPARATIVE STUDY 07 (Ekin Press, 2008).
[185] Limbach, *Supra Note* 181, at 05.

The constitutionality of amendments, when adjudicated through the doctrine of judicial review, has two aspects.

The first is determining whether the judiciary has been empowered to exercise its power of review or not. In constitutions where the power of review has been explicitly bestowed upon courts (either constitutional courts or other normal courts without any special designation), the textual limits ascertain the authority of the courts. On the other hand, where the constitution itself is silent on the issue, the power to ascertain judicial competence, ironically, rests on the judiciary. In these instances, as comparative law across the world has shown, with examples of India, Turkey (prior to 1971) and Germany being at the forefront, constitutional silence has been assumed by the judiciary as implicit authority to review amendments.[186] Interestingly, in a rare case of judicial deference to legislative supremacy, the American Supreme Court denied itself the authority to review amendments due to constitutional silence on the issue.[187]

The second is ascertaining the grounds against which the constitutionality of the amendment is to be adjudged. There are two facets to this inquiry – the procedural grounds and the substantive grounds.

The first part dealing with the procedural grounds is simple. The basic premise is that written constitutions which contain a formal procedure of amendment must be adhered by the amending authority. For example, the Austrian Constitution of 1920 mandates that for a partial revision of the constitution, the proposed amendment must be passed with at least half the members of the legislative assembly present and with two-thirds majority, while for a complete revision, there must be a referendum.[188] In the event that these procedural requisites have not been followed, the court can invalidate the amendment on procedural grounds. The importance of procedural thresholds and the manner in which they can act as limitations to amendments have already been discussed above.

The second part on substantive limitations is more complicated. In the presence of explicit eternity clauses, the review process can mandate that no derogation from these sacrosanct principles is permissible. Any amendment which violates the same may be termed unconstitutional on the basis of constitutionally recognized limitations. Despite

[186] Aharon Barak, *Unconstitutional Constitutional Amendments,* 44 ISRAEL LAW REVIEW 321, 333 (2011).
[187] Cameron v. Miller, 307 (US) 433 (1939).
[188] CONSTITUTION OF AUSTRIA, 1920, Art. 44.

this, courts, by exercising judicial activism, place certain implicit substantive limitations on the amending power. This becomes controversial and problematic because it is a transgression on the constitutionally endorsed powers of amendment.

Turkey provides an interesting example of how the judiciary used the explicit (formal) power of judicial review and subsequently expanded the same to formulate implicit (informal) limitations on the amending power.

The Turkish Constitution of 1961 did not contain any provision which expressly allowed the judiciary to review constitutional amendments, nevertheless, the Turkish constitutional court in a 1970 decision[189] assumed an implicit power to review constitutional amendments by opining that constitutional silence on the issue impliedly authorized the court to scrutinize the constitutionality of an amendment and declared the concerned amendment as unconstitutional on procedural grounds. Another case the following year nullified a constitutional amendment for being contradictory to the fundamental constitutional principles.[190] Following this, the Turkish constitutional court was granted explicit powers of judicial review through a constitutional amendment.

A few years later, in 1982, a new Turkish Constitution was adopted, and it too contained an explicit power of judicial review over constitutional amendments. The constitutionality, however, could only be examined with regard to whether the requisite majority needed for validating the amendment, as mandated within the Turkish Constitution, was followed or not.[191] Interestingly though, the constitutional court, in a 2008 decision, declared a constitutional amendment as unconstitutional on the substantive grounds of it being a derogation of the fundamental constitutional character (secularism under Article 2) contained in the Turkish Constitution.[192]

Interestingly, Professor Ergun Özbudun regards the transgression by the Turkish constitutional court on the textual limitations placed by Article 148(2) as an usurpation of power.[193] This is notable since the court considered its powers of constitutional

[189] 8 AMKD 313 (1970), No. 1970/31.
[190] 9 AMKD 416 (1971), No. 1971/37.
[191] CONSTITUTION OF TURKEY, 1948, Art. 148.
[192] Constitutional Court of Turkey, No. 2008/116.
[193] Ergun Özbudun, *Judicial Review of Constitutional Amendments in Turkey*, 15(4) EUROPEAN PUBLIC LAW 533, 537 (2009).

review in declaring an amendment which violated the fundamental constitutional characteristics as more important than the limitations that the constitution placed on its own power. It raises an important question – can the judiciary, in the presence of explicit and formal constitutional powers of amendment review, transcend those powers to protect constitutional sanctity?

There arises another issue with unlimited judicial review of constitutional amendments. This refers to legal discontinuity and uncertainty. The constitution represents the highest law of the land. It is the fundamental legal document from which all other laws trace their legitimacy. This entails that the constitutional framework must represent legal continuity and certainty. Opening up the constitution to judicial review risk inconsistency though since unlike the established meaning of a constitutional provision, judicial opinion is dynamic and subject to future change.

The Honduran Supreme Court's evolving jurisprudence on constitutional entrenchment presents an extreme example of how judicial interpretation can lead to disjointed legalism. The Constitution of Honduras limits the presidential term in-office to only one four-year term,[194] and makes the provision limiting the presidential term an eternity clause that is formally unamendable.[195] In the year 2009, the then president of Honduras Manuel Zelaya attempted to amend this entrenched provision through popular referendum, however, the Honduran Supreme Court, by using the literal rule of interpretation, held that the provision limiting the presidential term was unamendable and approved a military order to oust the president from office according to the constitutional mandate[196] detain President Zelaya on grounds of treason and abuse of authority.[197] Merely six years later, however, the Honduran Supreme Court changed its stance and declared the entrenchment provisions of the constitution as 'unconstitutional' and allowed President Juan Hernandez to seek re-election, thereby negating the one-term limit on presidential incumbency.[198] The latter judgment contradicted itself to facilitate political convenience and failed to give an adequate justification for breaking legal precedent.

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[194] CONSTITUTION OF HONDURAS, 1982, Art. 237
[195] *Ibid,* Art. 374.
[196] *Ibid,* Art. 239.
[197] David Landau et.al., *From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lesons from Honduras*, 8(1) GLOBAL CONSTITUTIONALISM 40, 52 (2019).
[198] *Ibid*, at 53; see also

4. REVISITING THE CONSTITUENT ASSEMBLY – THE INDIAN DEBATE ON FLEXIBILITY V. RIGIDITY

Aristotle had postulated that the most important means of ensuring the stability of a nation's constitution is through inculcating within the citizens a degree on the constitutional spirit, since even the best laws have no moral value unless the citizens have been attuned by the influence and teaching of the constitutional temper.[199] The task of instilling the national spirit into the constitution and ensuring that it is able to fulfill the desires and aspirations of the nation is usually bestowed on a collective of persons. These people, the framers of the constitution, engage in a procedure of negotiation and flexibility, and represent the different aims, opinions and objectives of different sections of society. In this sense, the collective of constitutional framers has been referred to as a *'they'* rather than an *'it'*[200] since the body represents an organic discussion on the future of the nation's highest *corpus juris.*

In India, this authority was the Indian Constituent Assembly, which met over a period of three years and drafted the Indian Constitution. The British Cabinet Mission Plan of 1946, which had come to India to discuss questions relating to Indian independence, suggested the formation of a constituent assembly, consisting of members from all Indian provinces on the basis of proportional representation, to draft a constitution for independent India.[201] This led to the formation of the constituent assembly, albeit with certain modifications in its composition after the partition of India. The Indian Constitution is a product of amalgamation wherein the Constituent Assembly has taken inspiration from a number of foreign constitutions, including the American, British, Irish and Japanese Constitutions, along with the erstwhile Government of India Act, 1935, which preceded the Indian Constitution as the main legal document governing British India,[202] Intriguingly, as the Norweigien philosopher Jon Elster has observed, constitutions are almost always drafted in the wake of a *"crisis of exceptional circumstance of some sort"*, leading to circumstances and conditions that are not

[199] ERNEST BARKER, THE POLITICS OF ARISTOTLE 233 (Oxford University Press, 1962).
[200] Rosalind Dixon, *Constitutional Drafting and Distrust,* 13(4) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 819, 823 (2015).
[201] V.D KULSHRESHTHA, LANDMARKS IN INDIAN LEGAL AND CONSTITUTIONAL HISTORY 415 (Eastern Book Company, 2016).
[202] C.L ANAND, CONSTITUTIONAL LAW AND HISTORY OF GOVERNMENT OF INDIA 72 (Universal Law Publishing Co., 2008).

conducive to good constitution-making.[203] The Indian Constituent Assembly too was forced to function in the wake of the country's bloody partition and the same disrupted the initial composition of the assembly. It also influenced the remaining members to make certain changes in their vision of what the Indian Constitution must be and represent.

Constitution drafting needs clarity. Commendably, the Indian Constituent Assembly had a precise notion of what the Indian Constitution needs to represent. Dr. Sarvepalli Radhakrishnan, the second president of independent India, on the third day of the constituent assembly's congregation, beautifully surmised the objectives that the Indian Constitution was to represent. He stated that the Indian Constitution must be an embodiment of the dreams, aspirations and ideals of the people for whose governance it is being formulated. It must be a representation of the problems which the nation suffers and a the psychological and social evils plaguing the social ethos of the nation. At the same time, it must also be instrumental in ensuring that the people realize and exercise their rights and privileges, while also being true to the democratic character of the nation.[204] This ideal symbolized the sentiments of the members of the constituent assembly, and illustrated the fundamental objectives that the Indian Constitution would encapsulate. Echoing this sentiment, Justice Venkatchaliah has famously remarked that the Indian Constitution is a high watermark of consensus in our history, "*reflecting the best in our traditions, providing a considered response to the needs of the present and being resilient enough to cope with the needs of the future."*[205]

4.1 PRELIMINARY DISCUSSIONS

On 4th November, 1948, after two years of deliberation, a draft of the constitution (hereinafter referred to as Draft Constitution) was introduced to the assembly by Dr. Ambedkar. The federal character of the Indian nation was undebatable and the tenets of federalism formed an important part of the Indian Constitution. Notwithstanding this, a federal constitution must be written, and a written constitution must necessarily be rigid in nature. To circumvent the inherent rigidity and legalism of a federal

[203] Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE LAW JOURNAL 364, 370 (1995).
[204] *Supra Note* 02, at 37.
[205] M.N Venkatchaliah, *Common Law, Humanism and Constitutions,* in *Supra Note* 44, at 56.

constitution, such as the Draft Constitution of India, Dr. Ambedkar argued that the unique setup of constitutional amendment could be a solution. He argued that the power of constitutional amendment contained within the Draft Constitution was two tiered – the first tier contained provisions dealing with the distribution of federal powers between the states and the union, the extent of representation of the states in the Indian Parliament and powers of the constitutional courts; and the second tier contained all other provisions. The provisions contained within the first category could only be amended by a two-third majority in each house of the parliament, followed a ratification by the federal units. The constitutional provisions in the second category could be amended only by two-third majority. Since most of the constitutional provisions fall in the second tier, Dr. Ambedkar declared that the procedure for amendment was indeed flexible since the only limitation on the amending power for most of the provisions was securing a two-third majority in the parliament. When compared to the American and Australian Constitutions, he argued, the means of amendment are flexible and accommodative.[206]

Over the course of the next few days, there occurred a general debate over the constitutional provisions introduced in the Draft Constitution. The process of amendment contained therein was also scrutinized. Some members advocated rigidity instead of flexibility. The reasoning was that a nascent nation such as India, following the brutal partition of the country on communal lines, needed stability more than flexibility. K Santhanam argued that constitutional flexibility cannot always be regarded as a virtue. He argued that the Indian Constitution represented the spinal cord of Indian democracy and if the procedure for amendment is made flexible rather than rigid, the democratic fabric of the nation itself may be destroyed by a party with ample majority in the Indian Parliament. He advocated a procedure for amending the constitution wherein the amendments are passed twice in the parliament within the duration of either six months or one year. This, he argued, would lead to full realization of the consequences of the proposed amendment, and therefore protect the constitution from being changed hastily.[207]

[206] VII CAD, *Supra Note* 03, at 34-38.
[207] *Ibid*, at 264.

A similar sentiment supporting constitutional rigidity was voiced by Mahboob Ali Baig Sahib Bahadur. In reply to Dr. Ambedkar's position that rigidity and legalism must be avoided, he argued that they were indispensable for a written constitution. If the fundamental principles and rights contained within a written constitution are allowed to be whimsically negated through amendment, then there lies no point in them being written and codified in the first place.

Undoubtedly, the most poignant stand on the issue of constitutional amendment at this point of time was taken by Pandit Jawaharlal Nehru. He accepted that although some degree of permanence is desirable, there cannot really be a permanent constitution. A constitution which is excessively rigid risks stagnating the nation's organic growth since it cannot adapt to the changing conditions that the nation goes through. A static constitution which is out of touch with the aspirations of the people, he argued, *"becomes empty, and if it falls behind those aims, it drags the people down."*[208] Therefore, although an attempt must be made to ensure the soundness of the constitutional design and structure, it must nevertheless be flexible to amendment and change. Nehru's primary conviction for advocating for flexibility of amendment was rooted in the belief that the members of the constituent assembly, although elected from the provinces to represent the people, were not truly elected through democratic means of universal adult suffrage. He believed that any congregation of persons who are elected through universal adult suffrage, where every eligible adult of the nation chooses the elected members, has more legitimacy than the Constituent Assembly of India to decide on the constitutional structure since they will truly be representatives of every section of the country's population.

A similar opinion was also proffered by Prof. N.C Ranga, who argued that the Indian Constitution should be flexible rather than rigid. He believed that only when the constitution became functional could the reality be realized and thus it was necessary that the constitutional scheme was flexible enough to accommodate the changes which were necessary.[209] S.V Krishnmurthy also desired flexibility since he believed that it was necessary for the constitution to be able to accommodate change which occurred over time.[210]

[208] *Ibid*, at 318.
[209] *Ibid*, at 352.
[210] *Ibid*, at 384.

4.2 DRAFT ARTICLE 304

Written constitutions usually have a set of articles which specify the procedural rules and substantive limits. These rules of constitutional amendment and change contain a series of individual and collective actions, perpetrated by individuals or groups to bring forth constitutional change.[211] The procedure for amendment in the Indian Constitution is contained under Article 368. This, during the drafting process was contained under Article 304 (hereinafter referred to as Article 304 in this part). To truly appreciate and understand the present iteration of the constitutional provision, it is necessary to understand the backdrop in which the present iteration of the article was born. This part of the chapter is dedicated to the study of the debates and discussions which occurred in this regard.

Article 304 was introduced for scrutiny and debate on 17th September, 1949. The provision introduced by Dr. Ambedkar to the Constituent Assembly consisted of the two different procedures which can be seen in the present iteration of the provision in the Indian Constitution under Article 368. Two streams of arguments, much like the initial apprehensions, one advocating rigidity while another advocating flexibility of the amending process were witnessed.

Advocating for constitutional flexibility, P.S Deshmukh argued that the form of amendment introduced under Article 304 made the procedure of change and amendment very difficult. He argued that only after the constitution began functioning could the real issues and challenges be understood. In the absence of adequate 'safety valves' which would allow change, the entirety of the constitutional framework would disintegrate. To modify the existing structure of Article 304, he introduced three changes – firstly, that the constitution be amended only by simple majority without resorting to two-thirds majority in the parliament; secondly, that for a period of five years from the commencement of the constitution, upon certification by the president that an amendment is not one of substance then the same should be amendable by simple majority; and thirdly, amendments seeking to infringe upon fundamental rights or rights conferring citizenship or consequential rights would be *ultra vires*, thereby protecting the rights and liberties of individuals.[212] Interestingly, Archarya Jugal Kishore also

[211] George Tsebelis, *Constitutional Rigidity Matters: A Veto Players Approach*, BRITISH JOURNAL OF POLITICAL SCIENCE 01, 08 (2021).
[212] *Supra Note* 05, at 1647.

echoed Deshmukh's sentiment of allowing flexibility of amendment for the initial five years after the commencement of the constitution. This, he argued, was imperative since only after the commencement of the constitution could the issues and problems persisting in its functioning be understood, and allowing the parliament to amend accordingly was necessary to solve whatever problems arise.[213] Similar sentiments were also echoed by Babu Ramnarayan Singh, who opined that referring the question of constitutional amendment to the people through a plebiscite to secure a popular verdict on the proposed amendment was the preferable to referring the matter to provincial legislatures for affirmation.[214]

Brajeshwar Prasad too supported constitutional flexibility, albeit he was an advocate of the referendum system of amendment. He believed that resorting to a process of referendum for initiating constitutional change was both democratic as well as a cure against the patent defects of the party system which plagues democracies. The system of amendment under Article 304, argued Prasad, was detestable, since it made the constitution very rigid, and susceptible to destruction.[215] Citing A.V Dicey's opinions on constitutional rigidity, wherein Dicey highlights the perils of an unchangeable constitution by taking cue from the French system, he highlighted that a rigid constitution ultimately leads to a natural tendency of opposition between the letter of the law and the wishes of the sovereign, the people. [216]

H.V Kamath had an intriguing approach to the discussion. He argued that constitutional rigidity is based on the premise that the constituent assembly which has been bestowed the responsibility of drafting the constitution is deemed to be superior to the parliament of the nation, yet, the assembly, unlike the parliament, is not elected through democratic universal adult suffrage. This conundrum, he argued, is precisely the reasoning which prohibits the parliament in England from barring constitutional amendment for any future parliament. Kamath postulated that if the constitution does not bend to social change, and block the future progress of the country due to the inflexibility envisaged by the constituent assembly, it will lead to "*revolution in place of evolution."*[217] He did,

[213] *Ibid,* at 1657.
[214] *Ibid,* P. 1660.
[215] *Ibid,* at 1652
[216] DICEY, *Supra Note* 04, at 70.
[217] *Supra Note* 05, at 1655.

still, recognize the fallacy of making the constitution extremely flexible, and argued that since the Indian Constitution lacked a means of referendum akin to the Irish Constitution, which necessitated a public referendum for any constitutional amendment to be verified,[218] he desired a buffer period of at least six months between the proposed constitutional amendment in the parliament and its passage, so as to allow an proper and adequate discussion on the issue. Interestingly, commenting on the nature of the constituent assembly and how it was a body of people not elected by universal adult suffrage, a motion was introduced by Maulana Hazrat Mohani to adjourn the assembly and form a new one by following the principles of adult suffrage, although unsurprisingly, it was rejected since it did not find any supporters.[219]

Mahavir Tyagi also reiterated the position taken by Kamath on the unelected nature of the Indian Constituent Assembly. He too held a belief that a selected body of representatives did not have the legitimacy to make binding rules which were unchangeable by the elected representatives of the Indian Parliament in the future. A rigid constitution, Tyagi postulated, would ultimately and inevitably become brittle, and break.[220]

On the other end of the spectrum, some such as Naziruddin Ahmed, and R.K Sidhva desired rigidity against flexibility. Nonetheless, the members advocating rigidity instead of flexibility were limited and few when compared to the ones supporting constitutional flexibility.

Dr. Ambedkar, then, proceeded to defend the draft provisions that had been introduced in the constituent assembly. He relied on comparative constitutional jurisprudence to further his arguments on why the method of amendment encapsulated within Article 304 was not entirely rigid and inflexible as had been argued by his peers earlier. The Canadian, Irish, Swiss, Australian and American Constitutions were relied upon.

The Canadian Constitution of 1867, Dr. Ambedkar argued, did not provide for any formal means of constitutional amendment and despite the discontent against the constitution, the people have not introduced a clause empowering an amendment of the constitution. Similarly, the Irish Constitution of 1937 and Swiss Constitution of 1874,

[218] *Supra Note* 131, Art. 46 & 47.
[219] M.V PYLEE, CONSTITUTIONAL AMENDMENTS IN INDIA 14 (Universal Law Publishing Co., 2012).
[220] *Supra Note* 05, at 1659.

despite formally providing for a means of constitutional amendment, had comparatively stringent procedural requirements. The Irish Constitution mandated a referendum to the people for legitimizing any amendment. The Swiss Constitution, after legislative assent, necessitated that two conditions be followed for the amendment to become valid – firstly, that a majority of the cantons, which are constituent units of the Swiss federation that had come together to form the federal nation in 1848,[221] must accept the proposed amendment; and secondly, that there be a referendum in which a majority of the people accept the amendment proposed. The Australian Constitution contains a procedure of amendment wherein the proposed change must be passed by the parliament with absolute majority, and subsequently, referred to the people through a referendum.[222] Finally, the American Constitution can only be amended after acceptance by two-thirds majority in both the houses, and then once it has been ratified by two-third states.[223] In comparison, argued Dr. Amebdkar, Article 304 demarcates between three classes of provisions – one which can be amended by simple majority, one which can be amended by two-thirds majority and finally, one which must be ratified by a majority of the states after securing two-thirds majority in the parliament.[224] The comparative rigidity of the second and third classes is a protection for the fundamental principles of the constitution, and a safeguard against tyranny, oppression and dictatorship by the parliament.

He further assesses the assertion by his peers that the Indian Constituent Assembly is a body not elected through democratic means of universal adult suffrage. He acquiesces the arguments and the position taken by his peers, and yet, argues that an assembly which would have been the result of democratic election cannot be merely considered to have greater political knowledge and wisdom necessary for drafting the constitution.[225] Dr. Ambedkar further asserts that the Constituent Assembly, arguably possesses a *"greater modicum of knowledge and information than the future Parliament of India"* is likely to have and thus, the means of constitutional alteration that has been

[221] Wolf Linder & Adrian Vatter, *Institutions and Outcomes of Swiss Federalism: The Role of Cantons in Swiss Politics*, 24(2) WEST EUROPEAN POLITICS 95, 95 (2001).
[222] CONSTITUTION OF AUSTRALIA, 1901, Art. 128.
[223] *Supra Note* 51, Art. 5.
[224] *Supra Note* 05, at 1665.
[225] *Ibid*, at 1666.

proposed within the confines of Article 304 is "*the best that could be conceived in the circumstances of the case."*[226]

The intention that Dr. Ambedkar fostered for the Indian Constitution during the drafting period was that it should not merely be a document which bestows rights and powers upon all, but also, at the same time, places necessary and reasonable limitations. Without limitations, he argued, there would be *"complete tyranny and complete oppression."* If the legislature is empowered to enact any law, the executive is made free to take any decision and the judiciary is allowed to provide any interpretation of the law, then it would undoubtedly and inevitably result in utter chaos.[227] It is therefore the task of the constitution to place limits, including on the power to amend and the resultant flexibility of the constitution.

It is though these arguments that Dr. Ambedkar defends the position taken by the Draft Committee of the Indian Constituent Assembly on the issue of constitutional amendment. By drawing parallels with other constitutional processes and relying on comparative constitutional jurisprudence to delineate the means of constitutional alteration adopted by other constitutions, he forwards the notion that the Indian method is a balanced approach to the conundrum of constitutional alteration.

Finally, the concluding speech that Dr. Ambedkar presents in the final session of the Indian Constituent Assembly must also be briefly touched upon since it shows the spirit that the assembly had during the drafting phase. Dr. Ambedkar relies on a quote by Thomas Jefferson, one of the founding fathers of the American Constitution, where Jefferson argues against absolute permanence by stating that placing political institutions beyond the ambit of change and modification leads to burdening the future generations with laws of the preceding generations, which in effect leads to the dead imposing their will upon the living.[228] He acquiesces that the Jeffersonian argument against permanence is *'absolutely true'*, and it is important for constituent assemblies to adhere to this principle. He believes that the Indian Constitution's provisions on constitutional amendment justify the flexibility envisaged by Jefferson, and by citing

[226] *Ibid*, at 1667.
[227] *Ibid*, at 1667.
[228] X THOMAS JEFFERSON, THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES 260 (Princeton University Press, 2018).

the provisions on amendment in the Canadian and Australian Constitutions, Dr. Ambedkar postulates that the Indian Constituent Assembly has refrained from placing a 'seal of finality' on the constitutional text and allowed the future generations to mold the constitution as necessary, with the only safeguard being the procedural limitation of special majority in the Indian Parliament.[229]

Therefore, the constituent assembly intended for the Indian Constitution to be a balanced structure. It was to represent both rigidity and flexibility, and allow the future parliaments to introduce and assimilate change into the constitution.

4.3 ARTICLE 368 – FORMAL POWER OF CONSTITUTIONAL AMENDMENT

The Indian Constitution was adopted on 26th November, 1949 and it came into force on 26th January, 1950. Draft Article 304 was incorporated in the final draft of the constitution as Article 368 and it contained the procedural differences that were debated in the constituent assembly. In the seven decades since its adoption, the Indian Constitution has been successfully subjected to amendment one hundred and five times. Ironically, despite the careful consideration and healthy debate over the nature of the Indian Constitution *vis-à-vis* flexibility or rigidity in the constituent assembly, it has nevertheless evolved into a point of contention between the Indian Parliament and the judiciary. The lack of clarity on whether the power of amend under Article 368 grants constituent authority to the Indian Parliament or whether its power is merely limited to amendment instead of revision has led to a number of constitutional crises during the normative decades after independence. The judiciary's evolving position on the question, from unlimited amending power to unlimited power subject to the basic structure doctrine, the dynamics of constitutional change within the Indian Constitution have undergone considerable change over the last seven decades.

Article 368 of the Indian Constitution contains the formal procedure of constitutional amendment. An overly rigid procedure would stifle change while an excessively fluid means of amendment will make it subject to constant alteration. It has three components – firstly, it deals with the amendment of the constitution, secondly, it elaborates on the

[229] XI CAD, *Supra Note* 02, at 978.

bodies which can amend the constitution, and thirdly, the articles prescribe the procedural nuances through which amendment can be initiated.

Furthermore, in its present iteration, it allows for changes of three kinds to the constitution – addition, variation or repeal of 'any provision' of the constitution. The term 'any provision' when literally interpreted means that each and every provision of the constitution can be amended by the procedure enumerated under Article 368. This has led one author to conclude that the provision elicits no restrictions on the formal amending power of the constitution.[230]

H.M Seervai provides an interesting take on the phrase 'any provision'. He argues that 'any' cannot mean all provisions in the constitution since repeal of provisions is one of the three forms of amendment permitted within the text of Article 368 (1). This leads to the logical conclusion that if 'any provision' is taken literally to mean each and every provision then all the constitutional provisions of the Indian Constitution can be repealed, thereby leading to the death of the constitution. Furthermore, clause (2) of Article 368 states that after the proposed amendment has received presidential assent, the constitution shall 'stand amended', however, a constitution where all the provisions have been repealed does not stand at all. This implies that the phrase 'any provision', when read with the three kinds of change allowed – addition, variation or repeal, cannot be considered to mean 'every provision' of the constitution.[231]

The following are the three distinct procedures through which an amendment of the Indian Constitution can be made. [232]

The first involves amendment through simple majority. This procedure is akin to passing any ordinary legislation. Articles such as 4, 6 and 239A of the Indian Constitution can be amended through simple majority in this manner. The amendment of these provisions have comparatively less significance than some others and therefore they have been made amendable by simple majority. Notably, these provisions do not fall within the procedural scope of Article 368 of the Indian Constitution, and are therefore not regarded as amendments to the Constitution in the formal sense.

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[230] SINGHVI, *Supra Note* 102, at 3901.

[231] III H.M SEERVAI, CONSTITUTIONAL LAW OF INDIA 3140-41 (Law and Justice Publishing Co., 2021); see also BASU, *Supra Note* 46, at 11346.

[232] RC Bharadwaj, *Constitution Amendment: Nature and Scope of Amending Process* in R.C BHARADWAJ (ED.) CONSTITUTION AMENDMENT IN INDIA 11 (Northern Book Centre, 1995).

The other two procedures delineate the formal method of constitutional amendment within the Indian Constitution and are contained under Article 368. This article mandates that a bill containing the proposed amendment must be introduced in either house of the parliament. Two procedures may be followed henceforth. Firstly, if the proposed amendment does not lead to any changes in the provisions contained under clause (2) sub-clause (a) to (e) then the same must be passed in each house separately with a majority of the total membership of the house present and voting and subsequently submitted to the President of India for his assent. On the other hand, if the proposed amendment seeks to change anything related to the federal structure of the Indian Constitution and within the provisions contained under clause (2) sub-clause (a) to (e), then after being passed by the majority of both houses in the previously mentioned manner, it must also be ratified by the state-legislatures of at least half the states by resolution, and only after such approval can it be sent to the President for his assent.[233]

The three provisions of amendment in the Indian Constitution can therefore be summarized as follows – firstly, changes to the constitution which can be made with a simple majority in both houses of the parliament and are considered to be formal amendments; secondly, amendments which can only be implemented with special majority in each house and subsequent presidential assent; and thirdly, changes which are to be ratified by at least half the state legislatures by resolution after being approved in each house of the parliament by special majority and subsequently sent to the president for his assent.

These three procedures are designed to bestow a balanced character to the constitution as far as the procedure of amendment is concerned. Indeed, as the learned jurist D.D Basu has remarked – *"The Constitution of India is a living instrument, with capabilities of enormous dynamism made for a progressive society."*[234] The Indian Constitution, contains three distinct forms of amendment. This procedural separation of constitutional provisions based on their nature has been appreciated by K.C Wheare, who has commented that this nuanced position strikes a *'good balance'* between protecting the

[233] *Supra Note* 91, Art. 368.
[234] D.D BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 458 (Lexis Nexis, 2015).

federal structure on one hand, while also allowing the Union government to easily amend the remainder of the Constitution.[235] On the other hand, some authors have deemd the Indian system of constitutional amendment as rigid. [236] It has also been argued that the difficulty in changing certain provisions of the constitution, notably, the ones relating to federalism, has rendered the Indian Constitution inflexible.[237]

Finally, it is important to highlight that the procedure of amendment that is delineated within the constitution must be mandatorily followed to effect an amendment of the constitution. The Supreme Court of India has already iterated this in *Kihota Hollohon*[238]that the power to amend the constitution, notwithstanding its nature as constituent power, is subject to the fulfillment of the procedure mandated. This case is also unique since it marked the first time that a constitutional amendment had been invalidated for failing to fulfill the procedureal requirements. The case was concerned with determining the constitutionality of para.7 of the Tenth Schedule of the Indian Constitution which had the effect of barring the jurisdiction of the courts with regard to a matter concerning the disqualification of a member of either the state legislative assemblies or the Indian Parliament. The court unanimously invalidated the amendment for having changed the power of the constitutional courts without fulfilling the procedural requirements mandated under proviso to Article 368(2).

Interestingly, although the court was unanimous in declaring the amendment as unconstitutional, it imposed the doctrine of severability and held that the invalidity of para.7 did not affect the entire schedule. The minority view, on the other hand, held that since the procedural requirements had not been followed, the doctrine of severability was inapplicable in the present case. In *A.K Roy,*[239] the Court similarly held that constituent power contained under Article 368 of the Constitution, which contains the power to amend through addition, variation or repeal should be exercised only by the Indian Parliament by following the procedural guidelines delineated under 368 and cannot be delegated to any other authority or agency.

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[235] K.C WHEARE, MODERN CONSTITUTIONS 143 (Oxford University Press, 1958).
[236] The British jurist Ivor Jennings considers the Indian Constitution rigid; see IVOR JENNINGS, SOME CHARACTERISTICS OF THE INDIAN CONSTITUTION 10 (Oxford University Press, 1953).
[237] Mazonne, *Supra Note* 101, at 1827.
[238] Kihota Hollohan v. Zachillu, AIR 1993 SC 412.
[239] A.K Roy v. Union of India, AIR 1982 SC 710.

5. BASIC STRUCTURE DOCTRINE – GENESIS, ADOPTION AND LEGAL DEVELOPMENTS - A CRITICAL ANALYSIS

The tension to achieve radical social change while ensuring the preservation of the constitution was recognized by Pandit Nehru during the founding of the Indian republic. This paradoxical urge to ensure continuance of the constitutional framework while also ushering in constitutional change was at the forefront of constitutional issues during the initial decades after independence.[240]. As Professor Upendra Baxi has noted, the judiciary has historically used the power of judicial review to invalidate and deem unconstitutional legislative and executive action, but the Indian Supreme Court is perhaps the first court to assert the power of judicial review over constitutional amendments.[241] The traditional perspective regarding judicial review of constitutional amendments has been to exercise a *'hands-off'* approach to adjudicating the constitutionality of constitutional amendments when no such power is formally bestowed upon the judiciary. The American Supreme Court's opinion to refrain from adjudicating on the constitutionality of amendments[242] is an example of the traditional approach. This made the Indian basic structure doctrine a special form of constitutional adjudication.

The emergence of the basic structure doctrine, which marked a concluding point to this paradoxical struggle under Indian law also became a watershed moment in international constitutional law jurisprudence. This is because its influence has reverberated across jurisdictions and has transcended the limits of territoriality and sovereignty. Since its inception, the doctrine has been quoted and cited directly to invalidate constitutional amendments in a number of legal systems (Pakistan, Kenya, Belize, Bangladesh) and has also been the foundation for other similar judicially evolved doctrines of implied limitations on amending power, the most notable such example being the *'substitution of the constitution'* doctrine evolved by the judiciary.

5.1 GERMAN ORIGINS: A BRIEF OVERVIEW

The basic structure doctrine was formally conceptualized in the landmark *Kesavananda Bharati case* in 1973. This doctrine was a form of implicit or informal limitation on

[240] KRISHNASWAMY 11, *Supra Note,* at xi.
[241] UPENDRA BAXI, COURAGE CRAFT AND CONTENTION 64-65 (N.M Tripathi Pvt. Ltd. Bombay, 1985).
[242] Coleman v. Miller, 307 U.S 433 (1939).

amending power enjoyed by the Indian Parliament. Interestingly, the judiciary's opinion was influenced greatly by German jurisprudence on the issue. This is because, as Professor Ramaswamy Sudarshan has elaborated, a legal postulation like the basic structure doctrine is foreign to and undoubtedly problematic from an Anglo-American legal perspective, the two jurisdictions which have exerted the maximum influence on Indian jurisprudence, nonetheless, the doctrine can find comfortable acceptance within French and German systems wherein such limitations are considered to have a strong basis within a State.[243]

The German influence on the basic structure doctrine is the profound contribution of Professor Dietrich Conrad. Professor Conrad was the Head of Law Department, South Asia Institute, at the University of Heidelberg. His theoretical inclinations on constituent power and the nature and extent of amending power enjoyed by a legislature was influenced by the work of his compatriot Carl Schmitt who has been credited with having conceptualized the concept of implied limitations on constitutional amendment. Schmitt's assertion that constitutional amendment did not amount to a complete change or revision of the constitution, and that such a change could only be effectively wielded by exercising 'constituent power' and not 'amending power' had a profound influence on Conrad's own theoretical position.[244]

This is not surprising in itself because the Weimar Constitution's effects have also been reflected within the German Basic Law of 1948 as well under Article 79 (3). This provision does not however use a term such as 'basic structure' and instead speaks of *'Grundsaetze'*, which are constitutional principles which have been referred to as basic in other provisions of the Basic Law.[245] It explicitly restricts the amending power of the German Parliament by stating that the *"the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the constitution."* [246]

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[243] R. Sudarshan, *Stateness and Democracy in India's Constitution,* in ZOYA HASSAN (ET.AL.) (ED.) INDIA'S LIVING CONSTITUTION 165 (Permanent Black, 2019).

[244] JOEL COLÓN-RÍOS, CONSTITUENT POWER AND THE LAW 209 (Oxford University Press, 2020).

[245] Helmut Goerlich, *Concept of Special Protection for Certain Elements and Principles of the Constitution Against Amendments and Article 79(3), Basic Law of Germany*, 1 NUJS LAW REVIEW 397, 401 (2008).

[246] Monika Polzin, *The Basic-Structure Doctrine and its German and French Origins: A Tale of Migration, Integration, Invention and Forgetting*, 5(1) INDIAN LAW REVIEW 45, 50 (2021); see also *Supra Note* 157, Art. 79.

Conrad's contributions began in 1965, a few years before the Golaknath ruling, when he gave a lecture at the Banaras Hindu University Faculty of Law on the theory of implied restrictions on amending power. In this lecture, Conrad raised some ostensibly simple questions to assert his point. He argued that if the amending power under Article 368 is perceived to be unlimited then could the Indian Parliament, by exercising that power, cause drastic constitutional changes such as amend Article 1 and divide India into two states – Tamilnad and Hind proper; or could Article 21 be abolished by amendment so as to enable the deprivation of the life and liberty of a person without following the authorization of any law? According to Conrad, such changes seemed merely theoretical speculation in the Indian context, and yet, the experiences of his homeland and the bitter history of the Weimar period remained a terrible example that such a terrible form of constitutional usurpation via amendment was indeed possible.[247] The impact of this single lecture by Professor Conrad could not have been predicted by anyone. A paper containing excerpts of this lecture reached M.K Nambiar, the Indian constitutional law expert who cited Conrad's theorizations in his arguments in the *Golaknath case,* nonetheless, the majority opinion of the court in this case did not accept the arguments presented by Nambiar.[248]

Subsequently, Professor Conrad published two articles - the first one was titled *'Limitations of Amendment Procedures and Constituent Power'*[249] and published in 1970, and the second article was titled *'Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration'*[250] and was published in 1978. The first article provided a theoretical analysis on the nature and scope of the doctrine of implied limitations, and the same was elaborated in the Indian context in the aftermath of the *Golaknath judgment* by drawing on the lecture he had earlier presented in 1965. Interestingly, this article was cited numerous times and provided the conceptual backbone to the basic structure doctrine in the *Kesavananda Bharati judgment.*[251] The second article, on the other hand, traces upon the evolution and development of the

[247] Sudarshan, *Supra Note* 243, at 166.
[248] Setu Gupta, *Viccisitudes and Limitations of the Doctrine of Basic Structure,* ILI LAW REVIEW WINTER ISSUE 110, 111 (2016).
[249] Dietrich Conrad, *Limitations of Amendment Procedures and Constituent Power,* INDIAN YEARBOOK OF INTERNATIONAL AFFAIRS 375 (1970).
[250] Dietrich Conrad, *Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration,* 6-7 DELHI LAW REVIEW 01 (1977-1978).
[251] Polzin, *Supra Note* 246, at 55.

doctrine in the aftermath of *Kesavananda* and *Indira Gandhi* judgments, and he attempts to refurbish the doctrine's primary postulations in light of the aforementioned developments. Through the entirety of this journey, Professor Conrad's contributions to Indian jurisprudence have been paramount and deserving of recognition and appreciation.

5.2 FORMULATING THE DOCTRINE – 1950 TO 1973

Heinrich Treipel, the German legal philosopher, has famously asserted – *"Constitutional disputes are always political disputes. This fact sums up the problematical nature of the whole institution."*[252]This assertion becomes poignantly true in the Indian context since the lines between politics and constitutional custody were blurred during the early stages of independent India. The government, fueled by socialist aspirations, wished to bring forth a social revolution and change the social fabric of India by reducing the dichotomous position between the affluent and penurious by introducing land reform measures. The judiciary, on the other hand, assumed the power of judicial review of legislations and executive actions and utilized the same to invalidate and declare unconstitutional those governmental actions which infringed the fundamental right to property under Article 19. The government was unsympathetic to the limitations placed by judicial decisions on its socialistic aspirations, and resorted to constitutional amendment in order to nullify the effect of those decisions which were not in its favor. This led to frequent amendment of the constitution.[253]

These developments marked the beginning of a constitutional dispute between the legislature and the judiciary that lasted for three decades. Although the primary questions of law centered on the constitutional validity of land reform measures, the larger issue was on the extent of amending power that the Indian Parliament wielded by virtue of Article 368 and whether it was subject to any limitations. A related question was whether constitutional amendments were law within the ambit of Article 13, and if yes, could they curtail fundamental rights under Part III of the Indian Constitution, something which was expressly forbidden under Article 13.

[252] Philip Blair, *Law and Politics in Germany*, 26(3) POLITICAL STUDIES 348, 353 (1978).
[253] M.P Singh, *Securing the Independence of the Judiciary*, 10(2) INDIAN INTERNATIONAL & COMPARATIVE LAW REVIEW 245, 256 (2000).

The former Prime Minister of India Indira Gandhi famously declared in her address to the Chief Ministers Conference on Land Reforms and Food Policy, organized on 26th September 1970 - *"Land Reforms is the most crucial test, which our political system must pass, in order to survive."*[254] The saga of land reform in India, however, began two decades earlier, immediately after India's independence, as a means to bring forth social revolution and reduce social inequality. They were considered an important tool for bringing forth socio-economic reforms and revitalizing the agrarian sector in which a majority of the nation's population depended.[255]

Reforms were introduced at the federal level with Uttar Pradesh, Bihar and Madhya Pradesh being the first three states to introduce legislations for initiating land reform measures. Legislations were enacted at the state level because the competency to legislate on land was vested on the states according to the constitution.[256] Large landowners such as the *zamindars* of each of these three states were apprehensive about the constitutionality of these legislations and challenged them for infringing on the fundamental right to property. Interestingly, although the Patna High Court deemed that the Bihar Land Reform Act, 1950 unconstitutional for violating Article 14,[257] the Allahabad High Court considered its counterpart in Uttar Pradesh as valid and constitutional.[258] This raised two issues – firstly, there was a confusion on the jurisprudence pertaining to the land reform legislations due to conflicting judgments by the High Courts prompting appeals to the Supreme Court of India from the High Court decisions; and secondly, judicial review of socialist legislations infringing upon the constitutional right to property became a problem for the governments aspiring to bring forth social revolution.

During this period, the Constituent Assembly was functioning as the interim Parliament of India by exercising the powers under Article 379 since the first elections had still not taken place. The Union Law Minister, Dr. B.R Ambedkar, who was also the chairman of the Constitution's Drafting Committee, was an advocate of the social reforms being introduced. When the Bihar legislation was invalidated, as a reactionary measure, he

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[254] Mohammad Ghouse, *Nehru and Agrarian Reforms,* in RAJEEV DHAWAN & THOMAS PAUL (ED.) NEHRU AND THE CONSTITUTION 77 (New Delhi: Indian Law Institute, 1992).
[255] G. Thimmaiah, *New Perspectives on Land Reforms in India,* 3(2) JOURNAL OF SOCIAL AND ECONOMIC DEVELOPMENT 180, 183 (2001)
[256] *Supra Note* 91, Seventh Schedule, List II – Entry 18.
[257] Kameshwar Singh v. State of Bihar, AIR 1951 Patna 91.
[258] Suryapal Singh v. Government of the State of Uttar Pradesh, 1951 ALJ 365.

sent a lengthy note to the Cabinet Committee on the Constitution on 14th March, 1951, seeking an amendment of Article 31.[259] On the same day, another letter was sent by the Advocate General of Madras, V.K.T Chari to the Law Secretary K.V.K Sundaram suggesting the creation of a separate constitutional schedule under Article 31 which would contain a set of laws that would be deemed retrospectively and prospectively valid notwithstanding anything contained in the Indian Constitution.[260] These two developments would go on to have a profound influence on Indian constitutional jurisprudence.

Two months later, the Constitution (First Amendment) Act, 1950 (hereinafter First Amendment) was introduced and adopted. Prime Minister Nehru recalled while introducing the bill that it had been the intention of the constitution-makers to *"take away the question of zamindari and land reform from the purview of the courts."* He was also scornful that Article 14 had been invoked for invalidating the Bihar legislation, and argued that it would *"make rigid the existing inequities before the law.*" and would be *"dangerous in a changing society and is completely opposed to the whole structure and method of this constitution and what is laid down in the directive principles."*[261] Although land reform was not the only agenda which prompted the introduction of this amendment since the limits on freedom of speech *(Romesh Thapar*[262] *& Brij Bhushan*[263]*)* and the scope of affirmative action measures *(Champakam Dorairajan*[264]*)* also became contentious issues between the government and the judiciary after the judiciary pronounced judgments that were detrimental to the government's stand, the present discussion's scope shall only be related to the developments concerning land reform. The First Amendment, in this regard, added Article 31A and 31B, with the latter also inserting the Ninth Schedule to shield land reform legislations from judicial review and scrutiny.

Zamindars across the country challenged the constitutionality of the amendment by knocking the doors of the Supreme Court under Article 32. One of the grounds cited for challenging the amendment was under Article 13(2) which prohibits the enactment of

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[259] GRANVILLE AUSTIN, WORKING OF A DEMOCRATIC CONSTITUTION - THE INDIAN EXPERIENCE 84 (Oxford University Press, 2013).
[260] *Ibid*, at 85.
[261] H.C.L Merillat, *The Indian Constitution: Property Rights and Social Reform*, 21 OHIO STATE LAW JOURNAL 616, 622 (1960).
[262] Romesh Thapar v. State of Madras, 1950 AIR 124.
[263] Brij Bhushan v. State of Delhi, 1950 Supp. SCR 245.
[264] State of Madras v. Champakam Dorairajan, 1951 AIR 226.

any law which is inconsistent with Part III of the Indian Constitution. This view asserts that constitutional amendments are a form of legislation and therefore cannot abrogate the fundamental rights. The issue was finally settled in *Shankari Prasad,*[265] wherein a five judge bench rejected this notion and unanimously proclaimed that a distinction had been made between 'ordinary law' and 'constitutional amendment' and amendments are beyond the scope of judicial review since they are enacted by exercising 'constituent power' and not 'legislative power'. The net effect of this judgment was that amendments were declared beyond the scope of judicial scrutiny and the First Amendment was upheld as constitutional.

Questions against the constitutionality of an amendment was again raised against the Constitution (Seventeenth Amendment) Act, 1964 (hereinafter Seventeenth Amendment) which had placed a number of legislations in the Ninth Schedule, thereby immunizing them from judicial review. This time, the primary contention presented by the petitioners was regarding the non-conformity of the procedural requirements. It was argued by the petitioners that barring judicial review, including the power under Article 226, was an amendment which hampered the federal structure of the constitution since it intrinsically affected the power of the high courts as well and therefore it was necessary that the amendment be acquiesced by at least half the state legislatures for it to be valid.[266] The matter was taken up in *Sajjan Singh*[267]and the constitutionality of the amendment was upheld by a 3:2 majority. The majority opinions (CJ. Gajendragadkar, J. Wanchoo & J. Dayal) opined that the pith and substance of the amendment was concerned with merely amending the fundamental right to property vis-à-vis judicial review and any curtailment of the powers under Article 226 was incidental.[268] The majority opinion also reiterated the *ratio* laid down in *Shankari Prasad* that the ambit of Article 13(2) was only wide enough to cover ordinary legislation and could not be extended to constitutional amendments.

The minority opinion, though, by J. Hidyatullah and J. Mudholkar, presented a different viewpoint. J. Hidyatullah did not subscribe to the idea that the term 'law' under Article 13(2) did not contain within its ambit constitutional amendments. He also opined that

[265] Shankari Prasad Deo v. Union of India, AIR 1951 SC 458.
[266] Ramanuj Ray Chaudhuri, *The Basic Structure Doctrine: An Axiom in our Constitution,* 5(1) WBNUJS JOURNAL OF INTERNATIONAL LAW AND POLICY REVIEW 113, 116 (2016).
[267] Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.
[268] DHAMIJA, *Supra Note* 17, at 322.

the assurances under Part III are so sacrosanct in nature that it is difficult to assume that they can be subject to amendment by a special majority.[269] J. Mudholkar did not provide a definite opinion on whether the term 'law' under Article 13 contained constitutional amendments or not but he did provide the first jurisprudential foundations to the basic structure doctrine when he commented on the *"intention of the constituent assembly to give permanency to the basic features of the constitution"* and wondered whether amending certain basic features would amount to mere constitutional amendment or rewriting of the constitution itself. Interestingly, J. Mudholkar's opinion that certain fundamental constitutional principles were beyond the scope of amendment due to them being 'basic' to the constitutional framework was influenced by the Pakistani Supreme Court's judgment in *Fazlul Quader Chowdhry v Muhammad Abdul Haque.*[270] It must also be noted that the terms 'basic feature' and 'basic structure' were used by the Indian Supreme Court even before J. Mudholkar's opinion, most notably in *State of West Bengal v. Union of India,*[271] and *Re: Berubari*[272] but their assertion was extremely loose and therefore, it would not be wrong to credit J. Mudholkar with introducing the doctrine as an implied limitation to the powers of amendment in the Indian scenario.

Merely two years later, the question of parliamentary competency to amend the fundamental rights was raised again in *Golaknath*[273]in a bench of eleven judges. The constitutionality of the First, Fourth and Seventeenth Amendments were challenged. Surprisingly, by a narrow margin of 6:5, the majority opinion overruled the earlier law which had been laid down in *Shankari Prasad* and *Sajjan Singh.* Two separate opinions were provided in the majority judgment. CJ Subba Rao, speaking for himself and four other judges, opined that Article 368 merely contained the procedure of amendment and not the power. The power to amend was a part of the Indian Parliament's residuary power under Article 248 since there did not exist a provision in the constitution which explicitly provided for the power to amend. Since the power to amend is a part of Part XI of the Indian Constitution, it also falls within the ambit of the term 'law' under Article 13, and therefore, the express limitation on legislation under clause 2 also applies to constitutional amendments. This makes fundamental rights non-amendable.

[269] Chaudhuri, *Supra Note* 266, at 117.
[270] Fazlul Quader Chowdhry v Muhammad Abdul Haque, PLD 1963 SC 486.
[271] State of West Bengal v. Union of India, 1963 AIR 1241.
[272] Re: Berubari Union v. Unknown, AIR 1960 SC 845.
[273] I.C Golaknath v. Stat of Punjab, AIR 1967 SC 1643.

J. Hidyatullah, in a separate opinion, acquiesced to the opinion taken by CJ Subba Rao and held that an amendment which abridges or takes away fundamental rights would be unconstitutional and invalid since such power is not recognized by the Indian Constitution. Interestingly though, the authoritative opinion of CJ Subba Rao introduced the doctrine of prospective overruling into Indian constitutional law jurisprudence for the first time, a doctrine which was first conceptualized by the American Supreme Court in *Great Northern Railway*,[274] and held that the effect of the *Golaknath* judgment would apply from then onwards. It also categorically held that the First, Fourth and Seventeenth Amendments were valid and *"held the field"* implying that any legislation that were protected by these amendments cannot be questioned.[275]

The *Golaknath* judgment marked a landmark period in the country's jurisprudential history. It became the first instance where the Supreme Court had asserted its stake as the custodian of the country's constitution and placed explicit and substantial limits on the authority exercised by the Indian Parliament as far as constitutional amendments were concerned. To neutralize the effect of the judgment, the oft used route of constitutional amendment was used, and the Constitution (Twenty-Fourth Amendment) Act, 1971 (hereinafter Twenty-Fourth Amendment) was enacted. This amendment changed the dynamics of Articles 13 and 68. In Article 13, it specified that Article shall not apply to any constitutional amendment. In Article 368, it made four changes - firstly, it changed the marginal note from *'Procedure of Amendment of the Constitution'* to *'Power of Parliament to amend the Constitution and Procedure thereof'*; secondly, it delineated that the constitution can be amended by addition, variation or repeal of any constitutional provision; thirdly, to negate the argument in *Golaknath* that legislations and amendments occupied the same status since both of them needed presidential assent to be validated and the president could withhold his assent in both cases, it was stated that once an amendment had been passed in both houses, the president must mandatorily give his assent to the amendment; and fourthly, a clause was added to Article 368 as well declaring that Article 13 would not apply to any constitutional amendment.[276]

[274] Great Northern Railway v. Sunburst Oil & Refining Co. 287 US 358 (1932); see also Chicot County Drainage District v. Baxter State Bank, 308 US 371 (1940).
[275] W.S Hooker Jr, *Prospective Overruling in India: "Golak Nath" and After,* 9(4) JOURNAL OF THE INDIAN LAW INSTITUTE 595, 601 (1967).
[276] JAIN, *Supra Note* 16, at 1740.

The *R.C Cooper case*[277], also known as the *Bank Nationalization Case*, must be briefly discussed here even though it does not directly pertain to the debate on the basic structure. The case was regarding the constitutionality of the Banking Companies (Acquisition and Transfer of Property) Act, 1969 which sought to nationalize fourteen banks. The impugned legislation was held to be unconstitutional by the judiciary for violating Article 31. The Constitution (Twenty-Fifth Amendment) Act, 1972 (hereinafter Twenty-Fifth Amendment) was passed by the parliament to nullify the decision of the court in *R.C Cooper,* and it replaced the word 'compensation' in Article 31 by the word amount.

His Holiness, Swami Kesavananda Bharati was the head of the *Edneer Muth* in Kerala. He had ownership rights over certain pieces of land within the *Muth.* The Kerala Land Reforms Act, 1963 was introduced by the state government of Kerala, through which it sought to acquire private property for land reform, and some of the land chosen for the same belonged to the *Muth*. This legislation was subsequently placed in the protective custody of the Ninth Schedule through the Constitution (Twenty-Ninth Amendment) Act, 1972 (hereinafter Twenty-Ninth Amendment). Swami Kesavananda moved a petition by exercising the powers of Article 32 and challenged the constitutionality of the Twenty-Fourth and Twenty-Fifth and Twenty-Ninth Amendment. This became the historical *Kesavananda Bharati* judgment.[278] A historic bench of thirteen judges was constituted. The hearings went on for six months, from October 1972 to March 1973. Distinguished advocates representing both the petitioners and respondents gave a plethora of arguments, however, the scope of this paper does not allow a thorough examination of each of them. Two positions can be highlighted though, for they represent the two primary perspectives on the legality of constitutional amendments.

The first perspective can be derived from the arguments forwarded by Nani Palkhivala who, was the advocate representing the petitioners. He asserted that a creature of the constitution could not assume constituent power and abrogate the 'essential features' of the constitution through amendment. He accepted that there may be uncertainty in identifying which constitutional features can be given the position of being so essential

[277] R.C Cooper v. Union of India, AIR 1970 SC 564.
[278] Kesavananda Bharati v. State of Kerala, AIR 1873 SC 1461.

that they stood at a higher plane of significance for the constitutional framework when compared to other provisions, yet, doubt and uncertainty are perpetual as long as human agency is involved.[279]

The second position can be traced to H.M Seervai's assertions. He was the advocate representing the state of Kerala, and he rebutted the first position by stating that Article 368 *prima facie* bestowed the power to amend any part of the constitution, without any formal limitation. Furthermore, he argued, the fundamental rights, which were being considered inalienable and sacrosanct, were merely social rights and not human rights, and the Indian people did not possess them by virtue of their existence but only because they had been constitutionally granted those rights. This also implied that these rights can be curtailed as well through amendment. Interestingly, Seervai also acknowledged that certain features of the Indian Constitution were basic and essential (such as parliamentary democracy, federal structure, rule of law & judicial review), although they were not intended by the founding fathers to be permanent since a self-governing government also wielded unlimited constituent power.

Attorney General Niren De also acquiesced to the position taken by Seervai, and argued that written constitutions cannot have an inherent or implicit limitation on the amending power. He explained that the function of an amendment was to 'improve' the constitutional framework, and no one can consider improving the constitution by destroying it.[280]

The *Kesavananda judgment* had eleven separate opinions. The scope of this paper does not allow a complete and thorough analysis of each of these opinions. By a narrow majority of 7:6, (CJ Sikri, J. Shelat, J. Hegde, J. Grover, J. Mukherjea, J. Jaganmohan Reddy, and J. Khanna.) the majority opinion held that the power to amend the constitution flowed from Article 368 and allowed the parliament to amend every part of the constitution, albeit that such power was constrained by its inability to change the basic structure of the constitution so as to change the identity of the constitution itself. In conceptualizing the basic structure doctrine, the 'basic features' theory in J. Mudholkar's dissent played an important role. The judgment also distinguished between ordinary legislation and constitutional amendment and held that the latter was not 'law'

[279] AUSTIN, *Supra Note* 259, at 260-262.
[280] *Ibid*, at 263.

within the meaning of Article 13 and therefore any amendment which infringed or curtailed the fundamental rights under Part III could not declared unconstitutional under Article 13(2). In this manner the *Golaknath* judgment was overruled. Concerning the constitutionality of the three aforementioned constitutional amendments which were challenged, the majority opinion held that the Twenty-Fourth and Twenty-Ninth Amendments were valid in their entirety. The first part of the Twenty-Fifth Amendment was held to be valid. The second part, however, which inserted Article 31C and allowed the government to take away the fundamental rights contained under Articles 14,19 and 21, and also took away the judiciary's jurisdiction to review laws formulated for giving effect to the directive principles under Article 39 (b) and (c) was deemed unconstitutional for violating the basic structure.[281]

The decision concerning the constitutionality of the three amendments discussed herein are not as important for furtherance of Indian constitutional jurisprudence as the assertion by the court that although the parliament was competent to amend any part of the constitution, it could not however amend the constitutional basic structure. This pronouncement has become a landmark development not only in Indian constitutional law, but has also transcended the territorial scope to become a milestone for global constitutional jurisprudence.

Two things must be noted though. Firstly, the judges failed to enumerate an exhaustive list of what entails the constitutional basic structure. Each judge had subjective opinion as to which features fall within the basic structure of the constitution. This has led to considerable uncertainty and ambiguity on the doctrine's scope and this confusion has continued to persist till this day. Although Nani Palkhivala too had accepted during his arguments that formulating a doctrine centered on recognizing some features as essential within a constitutional framework would inevitably lead to confusion and uncertainty over which features are to be recognized as sacrosanct, the issue has not been dealt with convincingly by the judiciary in a definite manner.

Secondly, the judgment had some notable procedural flaws. Although the hearings for the case had gone on for seventy days, the imminent superannuation of CJ. Sikri

[281] Manoj Mate, *Judicial Supremacy in Comparative Constitutional Law*, 92 TULANE LAW REVIEW 392, 416 (2017).

mandated that either a judgment be proclaimed or fresh hearings be conducted after reconstituting the bench. The former route was chosen and allegations of hasty decision making and procedural malfeasances have been levelled on account of the same. Granville Austin has famously stated that *"the bench's glory was in in its decision, not the manner of arriving at it, which reflected ill on itself and on the judiciary as an institution."*[282] Similarly, T.R Andhyarujina has asserted that *"India's greatest constitutional case was regrettably heard and decided in a manner most unconducive to a detached judicial decision."* These postulations highlight the severity of procedural errors.

It must also be noted that the *Kesavananda Bharati judgment* produced two distinct concepts – the basic structure on one hand and basic features or essential features on the other. The former was given by J. Khanna in his concurring majority opinion, wherein he postulated that the only limit on constitutional amending power within the ambit of Article 368 was that it could not *"touch the foundation or alter the basic institutional pattern of the constitution."*[283] The latter was represented in the opinions of the other judges who formed the majority opinion in their identification of certain 'essential features' within the constitution as unamendable. For example, CJ Sikri, while acquiescing that the amending power did not extend to *"abrogating the fundamental features of the constitution so as to alter its identity",* enumerated some characteristics as 'basic' – constitutional supremacy; republican and democratic form of government; secular character of the constitution; separation of powers and federal character of the constitution.[284] Although semantically distinct though, the essence of the two concepts is rooted in the same understanding. The essential features do not represent individual constitutional provisions but reflect overarching constitutional principles which are essential for ensuring the integrity of the constitutional structure as a whole, and whose negation will affect the constitution as a whole instead of individual provisions.

5.3 POST- KESAVANANDA – THE IMMEDIATE IMPLICATIONS

The *Kesavananda Bharati* judgment changed the narrative on the substantive issue over the extent of constitutional amendment. This issue was centered on the confrontation

[282] AUSTIN, *Supra Note* 259, at 259.
[283] KRISHNASWAMY, *Supra Note* 11, at 136.
[284] *Supra Note* 278.

that on one hand the parliament had been given unlimited power of amendment under Article 368 and on the other, the judiciary, with the Supreme Court of India at its forefront, was the constitution's ultimate interpreter and protector. It was conclusively solved when the judiciary asserted itself as the ultimate arbiter of constitutional amendments through the instrument of basic structure review. Since the pronouncement in *Kesavananda* allowed the Indian Parliament to exercise the same unbridled amending power it wished to legitimize through the 24th Amendment, there was not much which the legislature could do to oppose it. It was, in this sense, a tactical and strategic approach by the judiciary to gain leverage over the legislature. The institutional dynamics of the Indian constitutional framework had undergone a profound change.[285]

After the proclamation of the basic structure doctrine, two important developments took place.

The first is the infamous incident where three judges were superseded for the appointment of the Chief Justice of India position. Seniority among the judges was the convention followed for appointing the next chief justice on the former's superannuation. Nonetheless, the political regime of the day under Indira Gandhi challenged the convention and norm of seniority and Justice A.N Ray, who had been one of the judges to give a judgment in favour of the State in *Kesavananda,* was elevated to the position of chief justice by superseding three judges who were his senior.[286] Justices Shelat, Grover and Hegde who were superseded subsequently resigned. Commenting on this episode, Nani Palkhivala has famously asserted that the judgments by Justice Ray in the cases of *R.C Cooper*, *Madhav Rao Scindhia (privy purses case)*[287] *and Kesavananda* had titled the balance in his favor and contributed to him being chosen as the chief justice. [288]

The second is the imposition of national emergency, and a subsequent attempt to subvert the basic structure doctrine through constitutional amendments. On 12th June 1975, the Allahabad High Court declared the election of incumbent Prime Minister Indira Gandhi

[285] Satya Pareek, *Today's Promise. Tomorrow's Constitution: 'Basic Structure, Constitutional Transformations and the Future of Political Progress in India,* 1 NUJS LAW REVIEW 417, 453 (2008).
[286] Manoj Mate, *Rise of Judicial Governance in the Supreme Court of India*, 33 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 170, 205 (2015).
[287] Maharajadhiraja Madhav Rao Scindhia v. Union of India, 1971 AIR 530.
[288] Arghya Sengupta & Jay Vinayak Ojha, *Judicial Appointments in India: From Pillar to Post*, 10 CONSTITUTIONAL COURT REVIEW 43, 45 (2020).

void on account of corrupt election practices. Although the decision was stayed by the Apex Court, and the incumbent was allowed to continue as the prime minister, two limitations were imposed on her – firstly, she was not allowed to draw a salary and secondly, she was not allowed to speak or vote in the Indian Parliament. As a fallout of these developments, national emergency was declared ten days later on 25th June 1975. Therefore, the *"rumblings set off"* by the judgment culminated in the midnight coup that resulted in the imposition of emergency.[289] The government also passed the Constitution (Thirty-Ninth Amendment) Act, 1975 (hereinafter Thirty-Ninth Amendment) which inserted Article 329-A into the constitution. The purpose of this amendment was threefold – firstly, it sought to withdraw the election of the Prime Minister, President, Vice-President and speaker of the Lok Sabha from judicial review; secondly, it sought to specifically nullify the Allahabad High Court judgment declaring the election of Indira Gandhi as void; and thirdly, to exclude the jurisdiction exercised by the Supreme Court of India to hear any appeal.[290] Therefore, the judiciary was barred from scrutinizing the legality of any election for any of the aforementioned offices and a separate body formulated by the Indian Parliament would be vested with the power to resolve any disputes on the matter.[291] Veteran journalist Kuldip Nayar has commented that the amendment was prima facie an attempt to safeguard the election of Prime Minister Indira Gandhi, and the inclusion of the other members was being merely to ensure that the desired objective would not be too obvious.[292] Furthermore, the three election laws – The Representation of People Act, 1951 & 1974 and the Election Laws Amendment Act, 1974 were inserted into the Ninth Schedule of the Constitution, thereby placing another layer of protection against judicial scrutiny.[293] Constitutional jurist S.P Sathe called it *"a personalized amendment…to protect one person's interests."*[294]

Unsurprisingly, the amendment, specifically its clause 4, was challenged in the landmark *Election Case*.[295] This marked the first incidence in independent India's history when an amendment was challenged for being a violation of election laws.

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[289] PRASHANT BHUSHAN, THE CASE THAT SHOOK INDIA 02 (Penguin Radom House Pvt. Ltd., 2018).
[290] JAIN, *Supra Note* 16, at 1744.
[291] Trisha, *The Tug of War Between the Judiciary and the Legislature with Respect to Article 368 of the Constitution of India*, 3(5) JOURNAL OF CONTEMPORARY ISSUES OF LAW 01, 07 (2017).
[292] KULDIP NAYAR, THE JUDGMENT: INSIDE STORY OF THE EMERGENCY IN INDIA 80 (Vikas Publishing House Pvt. Ltd., 1977).
[293] AUSTIN, *Supra Note* 259, at 320.
[294] S.P SATHE, CONSTITUTIONAL AMENDMENTS 1950-1988 28 (N.M Tripathi Pvt. Ltd. Bombay, 1989).
[295] Indira Nehru Gandhi v. Raj Narain, AIR 1975 SCC 2299.

Subversion of the basic structure doctrine was also a point invoked. Interestingly, the five-judge bench consisted of four judges (CJ. Ray, J. Beg, J. Chandrachud & J. Matthew) who had dissented against the majority in the *Kesavananda Bharati judgment*, and J. Khanna who had supported it. The dissenting judges too accepted the doctrine as the prevalent law and applied it. [296] The impugned amendment was therefore declared unconstitutional. Although the judges differed on which 'essential features' of the constitution were curtailed by the amendment (J. Matthew held that the amendment violated the feature of democracy; J. Chandrachud held that it was a violation of the separation of powers doctrine enshrined within the Indian Constitution and the principle of equality of status and opportunity; CJ Ray held that rule of law had been offended), however, they were unanimous in their reasoning that the amendment was unconstitutional for contravening the basic structure doctrine. J. Chandrachud also attempted to delineate a concrete framework for identifying which constitutional provisions could be deemed to be 'basic features'. He posited that in order to ascertain whether a feature can be deemed a 'basic feature', *"one has perforce to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of country's governance."*[297]Interestingly, the bench, while explaining the scope of the basic structure doctrine, limited it to only constitutional amendments, without any applicability against legislations. This position became contentious merely two years later, when the apex court, in another decision, proclaimed that ordinary legislations can be challenged against the basic structure doctrine as long as what was alleged to be a violation of the constitutional basic structure could be located within express constitutional provisions.[298]

The third development is the attempt at reviewing the *Kesavananda Bharati judgment* by another bench of thirteen judges. The Supreme Court of India has a power to review its prior judgments.[299] The power of review is based on the acceptance of universal fallibility, and the acknowledgement that the rectification of an erroneous order stems

[296] Manoj Mate, *Priests in the Temple of Justice* in TERENCE C. HALIDAY (ED.) FATES OF POLITICAL LIBERALISM IN THE POST BRITISH COLONY 134 (Cambridge University Press, 2012).
[297] *Ibid;* see also, Mate, *Supra Note* 281, at 421.
[298] State of Karnataka v. Union of India, (1977) 4 SCC 608.
[299] *Supra Note* 91, Art. 137.

from the fundamental principle that justice is above all.[300] The basic structure doctrine was opposed by the government since its inception. There is however no clarity on how the initiative to review the doctrine came forth. During the hearing of the *Election case,* Attorney General Niren De had sought a review of the doctrine. Subsequently, an application was submitted by him in September, 1975 seeking a hearing on a number of writ petitions filed before various high courts, concerning the violation of the basic structure doctrine through land reform laws. CJ. Ray issued a written order a month later on 20th October, 1975 that the court would have a hearing on November 10 on two issues – firstly, whether or not the basic structure doctrine limited the parliament's power to amend the constitution; and secondly, whether or not the bank nationalization case had been correctly decided.[301] The hearings began on 10th November, and merely two days later, they were abandoned when CJ Ray dissolved the bench. Therefore, the circumstances in which the review petition was undertaken and later abandoned after two days of hearing are shrouded in mystery. The lack of data over this attempt at reviewing the judgement has been surmised to be because the dates on which it took place (10th to 13th November, 1975) was during the period when the national emergency was in effect (began on 25th June, 1975). There was crippling censorship of the press, and a prohibition on publishing any information related to judicial functioning prevented the publication of information over the attempt at reviewing the judgment as well.[302] One author has interestingly alleged that the peculiarity of the attempt at reviewing the judgment was a continuation of the peculiar circumstances in which the *Kesavananda Bharati case* was heard.[303]

5.4 EXPANDING THE DOCTRINE – THREE LANDMARK DEVELOPMENTS

The *Election Case* had concretized the basic structure doctrine as a sacrosanct part of Indian constitutional jurisprudence. The judiciary had once again been able to safeguard the spirit of the constitution from being eroded by whimsical amendment. The doctrine had also survived an attempt at subversion by subjecting it to a review process shrouded

[300] S. Nagraj v. State of Karnataka, (1993) Supp. 4 SCC 595.
[301] AUSTIN, *Supra Note* 259, at 329.
[302] Nikhil Erinjingat, *Kesavananda Bharati Case: A Political Fight Masquerading in Legal Garb,* 1(4) INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES 01, 04 (2018).
[303] ANDHYARUJINA, *Supra Note* 15, at 88.

in mystery and procedural non-conformity. The consolidation of the doctrine as an intrinsic part of the judiciary's effort at ensuring constitutional supremacy and constitutionalism when confronted against parliamentary encroachment was an important milestone in India's constitutional history. It has since been invoked in a plethora of cases, and has been used to deem a number of principles as falling within the ambit of the constitutional basic structure. These range from concrete constitutional principles such as federalism;[304] democracy and free and fair election;[305] secularism;[306] to specific constitutional principles unique to the Indian constitutional framework such as the preamble;[307] economic and social justice with a view of building a welfare state;[308] the power conferred by Art. 32, 136, 141 & 142 on the Supreme Court of India.[309] The scope of this paper does not allow a complete scrutiny of each individual judgment, nonetheless, three landmark developments which contributed to the doctrine's expansion and consolidation within the Indian legal system will be discussed below.

The developments of the *Election case* and the subsequent imposition of emergency paved the way for one final attempt at diluting the judiciary's authority over the constitution. The proposed means was through a constitutional amendment. Initially, a committee was formed under the chairmanship of Swaran Singh (hereinafter known as the Swaran Singh Committee), but when Indira Gandhi realized that the Swaran Singh Committee's report may not fulfil the aspirations she fostered, she allowed the parallel drafting of an amendment for fulfilling her objectives.[310] The Constitution (Forty-Second Amendment) Act, 1976 (hereinafter Forty-Second Amendment) was enacted subsequently. Among others things, there was an amendment to Article 368 by Section 55 of the Forty-Second Amendment, and two densely worded clauses were inserted which prevented the judicial review of any constitutional amendment.[311] Furthermore, Article 31C was amended by Section 4 of the Forty-Second Amendment, and it stated that no law which is made for application of a directive principle under Part IV of the

[304] S.R Bommai v. Union of India, 1994 AIR 1918.
[305] In the Matter of Special Ref. No. 1 of 2002, AIR 2003 SC 87.
[306] Valsamma Paul v. Cochin University & Ors., AIR 1996 SC 1011.
[307] State of UP v. Dina Nath Shukla, AIR 1997 SC 1095.
[308] Bhim Singh Ji v. Union of India, AIR 1981 SC 234.
[309] Delhi Judicial Service Association v. State of Gujarat, 1991 4 SCC 406.
[310] AUSTIN, *Supra Note* 259, at 365.
[311] JAIN, *Supra Note* 16, at 1746.

constitution can be challenged for being inconsistent with any right under Article 14 and 19. Although the Janata Party government which had succeeded Indira Gandhi after the emergency had negated many of the Forty-Second Amendment's provisions, they were unable to repeal it completely and these two provisions continued to operate.

The aforementioned clauses of the Forty-Second Amendment were subsequently challenged in the landmark *Minerva Mills case* two years later.[312] The court invalidated both Section 4 and 55 of the Forty-Second Amendment. In his lead opinion, CJ. Chandrachud reaffirmed the constitutional basic structure, and held that both the impugned sections were unconstitutional since they allowed the parliament to wield unlimited amending power, although *"a limited power of amendment is one of the basic features of the constitution."* He also elaborated on the stand taken by him in the *Election case,* and stated that the fundamental rights enshrined under Articles 14, 19 and 21 formed a *'golden triangle'* that was a part of the constitutional basic structure. Finally, he posited that a balance between the fundamental rights contained under Part III of the constitution and the directive principles under Part IV was *"an essential feature of the basic structure of the constitution."*[313] J. Bhagawati, in his concurring opinion, also held that the a limited power of amendment and judicial review are both basic features of the constitution.[314]

The back-to-back application of the basic doctrine to invalidate amendments in both *Indira Nehru Gandhi* and *Minerva Mills,* provided the doctrine the legitimacy it had required, and also became instrumental in establishing the doctrine as an independent standard of review vis-à-vis constitutional amendments. [315]

The declaration of judicial review as part of the basic structure has meant that any constitutional amendment or legislative action which abrogates this power of judicial review or constraints judicial independence have been deemed unconstitutional. This has reinstated the judiciary's position as the watchdog of the constitution, with a power which cannot be abrogated or curtailed by the parliament. For example, in *P.*

[312] Minerva Mills v. Union of India, (1981) 1 SCR 206.
[313] *Ibid,* see also Mate, *Supra Note* 281, at 423.
[314] Mate, *Supra Note* 296, at 137.
[315] Madhav Khosla, *Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate*, 32 (1) HASTINGS INTERNATIONAL COMPARATIVE LAW REVIEW 55, 94 (2009).

Sambhavamurthy[316] clause 5 of Article 371-D (which was inserted by the Thirty-Second Amendment) and subjected the decision of an administrative tribunal, which is not a court in the strict sense of the term, to rejection or confirmation by the state government was invalidated for violating the basic structure by restricting the power of judicial review and encroaching upon judicial independence.

Similarly, in *L. Chandra Kumar*[317], the court reasserted judicial primacy and invalidated the Administrative Tribunals Act, 1985 as well as certain portions of Articles 323-A and 323-B (which were inserted by the Forty-Second Amendment)[318] for having curtailed the jurisdiction of the higher judiciary and investing it solely on tribunals by concluding that the power conferred on the constitutional courts is a part of the basic structure of the constitution.[319] A hierarchy was also created and appeals from tribunals made created under Article 323-A were made subject to the jurisdiction of the high courts within whose territorial jurisdiction the tribunals were situated. It also explained that although tribunals can be supplementary in their function, they cannot become substitutes for the high courts, and doing so would amount to a violation of the constitutional basic structure.[320]

The second major development that contributed to the expansion of the basic structure doctrine came forth in the landmark case of *Waman Rao.* The judiciary's positivist position during the initial years after India's independence had meant that amendments which might not have survived a scrutiny against the basic structure doctrine were held to be valid and constitutional. This raises a question – could an amendment which has already been subjected to judicial review prior to *Kesavananda Bharati* be challenged again in light of the basic structure doctrine? The same question was raised before the apex court when the constitutionality of the First Amendment (already subjected to review in *Shankari Prasad*) and Fourth Amendment (already subjected to review in *Golaknath*) were subjected to review in *Waman Rao.*[321] The constitutionality of the

[316] P. Sambhamurthy v. State of Andhra Pradesh, AIR 1987 SC. 663
[317] L. Chandra Kumar v. Union of India, 1995 AIR 1151.
[318] K.C Joshi, *Constitutional Status of Tribunals*, 41(1) JOURNAL OF THE INDIAN LAW INSTITUTE 116, 116 (1999).
[319] Manoj Mate, *Elite Constitutionalism and Judicial Assertiveness in the Supreme Court of India,* 28(2) TEMPLE INTERNATIONAL & COMPARATIVE LAW JOURNAL 361, 411 (2014).
[320] P. Leelakrishnan, *Reviewing Decisions of Administrative Tribunal: Paternalising Approach of the Indian Supreme Court and Need for Institutional Reforms*, 54(1) JOURNAL OF THE INDIAN LAW INSTITUTE 01, 06 (2012).
[321] Waman Rao v. Union of India, 1980 SCC 587.

amendments were challenged against the basic structure doctrine. Although the doctrine was reaffirmed here as well by the Apex Court, it stated that they did not *"damage any of the basic or essential structures of the Indian Constitution or its basic structure and are valid and constitutional being within the constituent power of the Parliament"*, and therefore, the amendments were deemed constitutionally valid. It also stated that any laws which had been added into the Ninth Schedule of the constitution after the *Kesavananda Bharati judgment* could be challenged in court.[322] The *Waman Rao* judgment proved to be an important landmark since it showed that the constitutionality of amendments which were deemed constitutional prior to the basic structure doctrine's formation can again be challenged against the doctrine. This development has been called *"digging up old skeletons from the closet"*[323] since it provided an opportunity for reopening previously settled questions of law regarding the validity of constitutional amendments.

The Ninth Schedule was inserted by the First Amendment as a means to prohibit the review of legislations placed within it. Although initially intended as a means to protect agrarian reform legislations from being invalidated by judicial review, it has since then morphed into a repository of laws which have been unequivocally inserted into it so as to protect them from being invalidated by judicial scrutiny. This is evidenced by the statistic that although only 13 agrarian land-reform legislations were part of the Ninth Schedule during its inception in 1951, the number had increased to 284 by the year 2006.[324] This meant that the legislature has often resorted to the convenience of the Ninth Schedule to grant fictional immunity to purportedly unconstitutional laws.[325] The development of the basic structure doctrine and the proclamation of judicial review as a basic feature, when read with the acknowledgement that amendments regarded as constitutional prior to the formation of the basic structure doctrine are justiciable when challenged against the doctrine's tenets, changes the dynamics of the Ninth Schedule. The question which arises in this context is – whether the parliament can immunize legislations from fundamental rights by inserting them into the Ninth Schedule under

[322] Mate, *Supra Note* 319, at 400.
[323] Arjun Badola & Shriram Raghav Rishi, *Kesavananda Bharati v. State of Kerala: A Case Commentary*, 3 INTERNATIONAL JOURNAL OF LEGAL SCIENCES AND INNOVATION 70, 74 (2020).
[324] Milan Dalal, *India's New Constitutionalism: Two Cases that Have Reshaped Indian Law,* 31(2) BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 257, 266 (2008).
[325] Karishma D. Dodeja, *Belling the Cat: The Curious Case of the Ninth Schedule in the Indian Constitution*, 28 NATIONAL LAW SCHOOL OF INDIA REVIEW 01, 03 (2016).

Article 31B, and if yes, then what is the position of judicial review in this scenario? This question was addressed in the landmark case of *I.R Coelho (*hereinafter *Coelho – I).*[326]

A brief background of the case must be discussed. Two legislations, the Guldur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969 and Act and West Bengal Land Holding Revenue Act, 1979 had been inserted into the Ninth Schedule by constitutional amendment (Thirty-Fourth and Sixty-Sixth Amendments respectively) after they had been partially deemed unconstitutional by the judiciary in *Balmadies Plantations*[327] *and Pascihimbanga Rajya Bhumijibi*[328] respectively. The petitioner in *Coelho-I* argued that these insertions validated the legislations after they had been deemed unconstitutional, thus curtailing judicial review which was a part of the constitutional basic structure. The court, by reiterating *Waman Rao* accepted that constitutional amendments made after *Kesavananda Bharati* would be open to judicial review, however, citing certain inconsistencies in *Waman Rao,* referred it to a larger nine-judge bench.[329]

The larger nine-judge bench (hereinafter *Coelho-II*[330] noted that the original intent behind the creation of the Ninth Schedule was for facilitating agrarian reform, but since then, it has been subjected to abuse by the legislature by indiscriminate insertion of laws within its ambit. It addressed the main question and held that laws which, either through an amendment or an insertion in the Ninth Schedule, abrogate the fundamental rights under Part III of the constitution and thus violate the constitutional basic structure, would be susceptible to judicial review and scrutiny. It also reiterated CJ. Chandrachud's opinion in *Minerva Mills* that Articles 14, 19 and 21 formed the *'golden triangle'* and stated that these provisions were part of the *"touchstone"* of the basic structure of the constitution.[331] Finally, the court elaborated that to ascertain whether a law or amendment violates a provision contained under Part III of the constitution, and therefore also violate the basic structure, the actual effect or impact that it exerts on Part III must be tested (Impact Test). Although some confusion occurred regarding the validity of the 'Impact Test' after it was not used for ascertaining the validity of the

[326] I.R Coelho v. State of Tamil Nadu, (1999) 7 SCC 580.
[327] Balmadies Plantations Ltd. v. State of Tamil Nadu, (1972) 2 SCC 133.
[328] Paschimbanga Rajya Bhumijibi Sangha v. State of West Bengal (1986) 90 CWN 1108.
[329] Dodeja, *Supra Note* 325, at 04.
[330] I.R Coelho (Dead) v. State of Tamil Nadu, (2007) 2 SCC 1.
[331] Mate, *Supra Note* 319, at 401.

Constitution (Ninety-Third Amendment) Act, 2005 by J. Bhandari in his opinion in *Ashok Kumar Thakur*,[332] J. Reddy's use of a variation of the 'Impact Test', namely, the 'Essence of the Rights Test' test in *Indian Medical Association*[333] solidified the ruling of *Coelho-II*.

The judgments of *Coelho-I* and *Coelho-II* are important for a number of aspects. Firstly, they affirmed and reiterated the primacy of fundamental rights and reduced the dissolution of these sacrosanct rights by enacting laws and inserting them into the Ninth Schedule. Secondly, the judgments raised the bar for political accountability since the legislature could no longer rely on the fictional immunity granted by the Ninth Schedule to invalid and unconstitutional laws abrogating the fundamental rights. Finally, it reinstated the judiciary's role and tilted the balance in its favour as the protector of the constitutional rights.[334]

5.5 GLOBALIZING THE BASIC STRUCTURE – AN OVERVIEW OF THE DOCTRINE'S APPLICATION ACROSS THE WORLD

The Indian basic structure doctrine has presented an overwhelming opportunity for the judiciary to informally place limits on the amending power in the interests of constitutional sanctity. In this sense, it has had a profound influence on not only the Indian legal system but also on international jurisprudence. At a domestic level, the doctrine led to the culmination of a three-decade long struggle for supremacy between the judiciary and the legislature, and reinstated the Indian Supreme Court's role as the custodian of the constitution. At an international level, it presented an opportunity for courts around the world to place implied limitations on the powers of constitutional amendment within their own respective legal systems and therefore protect the constitution from usurpation. This part shall look at some of these developments.

[332] Ashok Kuma Thakur v. Union of India, (2008) 6 SCC 1; see also M.P Singh, *Ashoka Thakur v. Union of India: A Divided Verdict on an Undivided Social Justice Measure,* 1 NUJS LAW REVIEW 193, 195 (2008).
[333] Indian Medical Assn. v. Union of India, (2011) 7 SCC 179.
[334] Dalal, *Supra Note* 324, at 272.

5.5.1 BANGLADESH – CONSTITUTIONALIZING THE BASIC STRUCTURE

The sovereign country of Bangladesh was born in 1972 after the Simla Agreement was signed between India and Pakistan where the latter recognized Bangladesh's independence[335] and the Constitution of Bangladesh was enacted in the year 1972. The original text of the constitution allowed the amendment of 'any' constitutional provision[336] without any limitations. The powers of amendment in this sense were similar to the Indian Constitution which too does not mandate an explicit or formal limitation on its amendment.

Nonetheless, in a manner similar to the Indian experience, the Supreme Court of Bangladesh recognized implied limits on the power to amend by adopting the Indian basic structure doctrine in the case of *Anwar Hussain Chowdhury v. Bangladesh,*[337] also known as the *'8th Amendment Case'.* In this case, the primary question was regarding the validity of the 8th amendment which affected the judicial review jurisdiction of the Supreme Court of Bangladesh.[338] J. Shahabuddin Ahmed highlighted the intrinsic difference between 'constituent power' and 'amending power' and held that the latter is limited in nature while the former is unlimited and argued that the implied limitation on amending power can be derived from the term 'amendment' itself which does not allow replacement.[339] J. B.H Chowdhury similarly argued that the power to frame a constitution or 'constituent power' is a prime power while the power to amend is derivative of the constitution itself, and this means that amending power is secondary to constituent power.[340] J. A.T.M Afzal, in his dissenting opinion, opined that the power under Article 142 to amend the constitution by addition, alteration, substitution or repeal was plenary and unlimited.

In the year 2005, the High Court Division of the Supreme Court of Bangladesh declared the constitutionality of the Constitution (Fifth Amendment) Act, 1979 which allowed

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[335] Abhishek Choudhary, *Personality, Cognition and International Negotiations The Case of the Simla Agreement,* 20(3) WORLD AFFAIRS: THE JOURNAL OF INTERNATIONAL ISSUES 82, 94 (2016).
[336] CONSTITUTION OF BANGLADESH, 1972, Art. 142.
[337] Anwar Hussain Chowdhury v. Bangladesh, 1989 BLD Spl.1.
[338] ROZNAI, *Supra Note* 13, at 59.
[339] Mohammad Moin Uddin & Rabika Nabi, *Judicial Review of Constitutional Amendments in Light of the Political Question Doctrine: A Comparative Study of the Jurisprudence of Supreme Courts of Bangladesh, India and the United States*, 58(3) JOURNAL OF THE INDIAN LAW INSTITUTE 313, 327 (2016).
[340] Muhammad Ekramul Haque, *The Concept of 'Basic Structure': A Constitutional Perspective from Bangladesh,* XVI(2) THE DHAKA UNIVERSITY STUDIES 123,135 (2005).

the ratification and validation of martial law proclamations to be void and illegal.[341] J. Khairul Huq reiterated the jurisprudence developed in *Anwar Hussain Chowdhury* by stating that the power to amend does not contain the power to 'swallow the constitutional fabric' and the court has the power to nullify any amendment which transgresses upon the constitutional basic structure. Similarly, in another case, the Supreme Court Appellate Division declared the Constitution (Thirteenth Amendment) Act, 1996 which mandates that a government, at the end of its tenure hand over power to a caretaker government rather than itself functioning as the caretaker government until the culmination of next elections[342] as unconstitutional for violating the values of democracy which it regarded as a part of the constitutional basic structure.[343]

Interestingly, the implied limitations of the constitutional basic structure that were adopted from Indian jurisprudence in *Anwar Hussain Chowdhury* have become formal limitations on amendment by virtue of the Constitution (Fifteenth Amendment) Act, 2011 which inserted articles 7A and 7B into the Constitution of Bangladesh. Article 7A made the abrogation or suspension of the constitution an offence ad 7B explicitly delineated certain basic features of the constitution and made them un-amendable. The insertion of these two articles formally narrows down the power contained under Article 142.[344] It also constitutionalizes the basic structure doctrine and prevents the legal principle of the doctrine from being overruled by the judiciary through a larger bench, a possibility if the doctrine had remained merely a product of judicial activism.

5.5.2 PAKISTAN – A SAGA OF LEGAL UNCERTAINTY

The nation of Pakistan presents a curious picture. It has been noted in an earlier part of this chapter that CJ. Cornelius' decision in *Fazlul Quader Choudhary* was one of the inspirations that influenced J. Mudholkar's dissenting opinion in *Sajjan Singh*, which in turn influenced the majority verdict in *Kesavananda.* Therefore, it would not be wrong to surmise that the spiritual beginnings of the basic structure doctrine can be

[341] Bangladesh Italian Marble Works Ltd., v. Bangladesh, BLT (Special) HCD (2006).
[342] A.K.M Masudul Haque, *Emergency Powers and Caretaker Government in Bangladesh,* 1(1) JOURNAL OF THE AUSTRALASIAN LAW TEACHERS Association 81, 84 (2008).
[343] Abdul Mannan Khan vs. Government of Bangladesh, (2012), 64 DLR (AD) 169.
[344] Helal Uddin, *Doctrine of Basic Structure: A Tool for Constitutionalism? Or Usurpation of Constitutional Authority?,* 2 (2) SCLS LAW REVIEW 21, 23 (2019).

traced to Pakistan. Despite these strong beginnings, the legal situation of the doctrine in Pakistan has been ambiguous and uncertain.

The Lahore High Court became the first institution to adopt the Indian iteration of the basic structure doctrine when it stated that the Parliament of Pakistan does not have the sovereign competency to change the constitutional basic structure.[345] Three years later, the Supreme Court of Pakistan changed the law and stated in *Fouji Foundation*[346] that the parliament's power to amend was virtually unrestricted and was therefore competent to amend any provision of the constitution.

A decade later, in *Al-Jehad Trust*[347] it once again cited the doctrine and held that in order to ascertain and adjudicate upon the constitutionality of an amendment, it was necessary to interpret the constitution as a whole by taking into account the constitutional basic structure and constitutional spirit. CJ. Sajjad Ali Shah, a year later in *Mahmood Khan Achakzai,*[348] delineated certain salient features that were beyond the purview of constitutional amendment, but in the final order, the court's authority on the question remained ambiguous.[349] The lack of certainty continued when merely a year later, it was stated by CJ. Ajmal Mian in *Wukula Mahaz Barai Tabafaz Dastoor*[350] that despite the acquiescence of the doctrine in the previous case by CJ. Sajjad Ali Shah, Pakistani courts had never accepted its application, nonetheless, curiously, the court declined to authoritatively decide upon the issue.

In the same year though, in another case, the Supreme Court in a seven-judge bench observed that the constitutional basic structure could not be transgressed by the Parliament of Pakistan.[351] Subsequently, two years later in the case of *Zafar Ali Shah v. Pervez Musharraf* it was held that a constitutional amendment cannot be made against salient constitutional features of 'judicial independence', 'federalism' and 'parliamentary form of government in conformity with Islamic provisions'.[352] One author has interestingly argued that the acceptance and application of the doctrine in this case was not against the parliamentary power of amendment but was only a

[345] Darvesh M. Arbey v. Federation of Pakistan, PLD 1980 Lah. 846.
[346] Fouji Foundation v. Shamimur Rehman, PLD 1983 SC 457.
[347] Al-Jehad Trust v. Federation of Pakistan, PLD 1996 SC 367.
[348] Mahmood Khan Achakzai v. Federation of Pakistan
[349] ROZNAI, *Supra Note* 13, at 61.
[350] Wukula Mahaz Barai Tabafaz Dastoor v. Federation of Pakistan, PLD 1998 SC 1263.
[351] Syed Masroor Ahsan v. Ardeshir Cowasjee, PLD 1998 SC 823.
[352] Zafar Ali Shah v. Pervez Musharraf, PLD 2000 SC 869.

restriction against a military ruler that was aimed at preventing him from altering the bsic structure of the constitution.[353]

The situation in Pakistan remains unclear. The courts in Pakistan have therefore leaned both ways and some benches have accepted the doctrine while others have categorically rejected it.[354] The present statues of the doctrine can be understood from the *Pakistan Lawyers Forum Case*[355]The Supreme Court of Pakistan, in a landmark seventeen judge bench, accepted that although the Constitution of Pakistan has certain basic features, the judiciary is not entitled to defend them. The rejection of the doctrine was asserted on the ground that the Pakistani Parliament wields unfettered power as far as the *substantive* aspects of amendments are concerned, and only for violating the procedural norms can the validity of an amendment be subjected to review by a court.[356] This implies that the doctrine, at least for now, does not have relevance within the Pakistani legal system.

5.5.3 BELIZE – EMULATING THE INDIAN MODEL

In Belize, The Belizean Supreme Court has adopted the basic structure doctrine into its own legal system through two landmark cases. The first relevant case is *Bowen v. Attorney General*[357] where the constitutionality of the Sixth Amendment Bill, 2008, which excluded certain natural resources such as petroleum and minerals from the purview of the constitutional protection of the right to property, was challenge. The government contended that the procedure of amendment within the Belizean Constitution was adhered to[358] and therefore the constitutionality of the amendment could not be challenged. The Belizean Supreme Court rejected this argument and stated that Article 69 merely prescribes the procedure of amendment, and that all laws,

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[353] Dr. Muhammad Mumtaz Ali Khan, *Basic Structure Theory or Doctrine of Necessity? Parliament's Power to Amend the Constitution in India and Pakistan*, 6(2) JOURNAL OF INDIAN STUDIES 213, 222 (2020).
[354] Iftikar Hussain Bhat, *Doctrine of Basic Structure as a Constitutional Safeguard in India: Reflection in the Jurisprudence of Other Countries*, 1(3) INTERNATIONAL JOURNAL OF RESEARCH IN HUMANITIES AND SOCIAL SCIENCES 27, 34 (2013).
[355] Pakistan Lawyers Forum v. Federation of Pakistan, PLD 2005 SC 719.
[356] Matthew J. Nelson, *Indian Basic Structure Jurisprudence in the Islamic Republic of Pakistan: Reconfiguring the Constitutional Politics of Religion,* 13 ASIAN JOURNAL OF COMPARATIVE LAW 333, 351 (2018).
[357] Barry Bowen v. Attorney General of Belize, Claim No. 445 of 2008.
[358] CONSTITUTION OF BELIZE, 1981, Art. 81.

including amendments, must conform to the Belizean Constitution.[359] Therefore, even constitutional amendments must conform to the constitutional basic structure.

This pronouncement prompted the Belizean Parliament to enact the Eighth Amendment Act, 2011 which provided that an amendment which has been passed according to Article 69 cannot be deemed to be void or unconstitutional on the ground that it violates Article 2 which provides for constitutional supremacy. This amendment was challenged in *British Caribbean Bank Ltd*[360] wherein the Supreme Court of Belize declared that although the words of every constitutional provision as well as the preamble are open to amendment, the basic structure of the Belizean Constitution cannot be *"removed, damaged or destroyed."* In light of these observations, which are eerily similar to the Indian Supreme Court's stand in *Kesavananda,* the amendment was deemed to be unconstitutional. The Belizean judiciary has, therefore, openly relied on Indian basic structure jurisprudence and successfully adopted the same into its own jurisdiction as an implied limitation.[361]

5.5.4 AFRICA – A MYRIAD OF DISTINCT OPINIONS

The basic structure doctrine is a form of judicial review and without a robust institution of judicial review, the existence of the doctrine is impossible. In Africa, the jurisprudence allowing judicial review of constitutional amendments is in a nascent stage and very few courts have had the occasion to comment and adjudicate on the validity of constitutional amendments.[362] Nonetheless, the doctrine has found acceptance in Kenya and Tanzania & South Africa present interesting scenarios.

The High Court of Kenya recently invalidated the Constitution of Kenya (Amendment Bill), 2020 by citing the basic structure doctrine.[363] The bill proposed to implement Kenyan President Uhuru Kenyatta's 'Building Bridges Initiative' (BBI amendment) which would drastically alter the constitutional scheme by amending the entirety of the electoral framework through the introduction of new constituencies, an increase in the

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[359] *Ibid,* Art. 68.
[360] British Caribbean Bank Ltd. v. Attorney General Belize, Claim No. 597 of 2011.
[361] Joel Colón-Ríos, *Beyond Parliamentary Sovereignty and Judicial Supremacy: The Doctrine of Implicit Limits to Constitutional Reform in Latin America*, 44 VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW 521, 526 (2013).
[362] Githu Mugai, *Towards a Theory of Constitutional Amendment*, 1 EAST AFRICAN JOURNAL OF HUMAN RIGHTS & DEMOCRACY 01, 07 (2003).
[363] David Ndii v Attorney General, (2020) e-KLR.

number of seats in the Kenyan Parliament and the creation of a Prime Minister, a Deputy Prime Minister and a Leader of Official Opposition position. The court held that the amending procedure was impliedly limited by the basic structure doctrine, and the proposed 'BBI amendment.' The amendment was also a violation of Chapter VI of the Kenyan Constitution of 2010 and also infringed on Article 73(1)(a)(i). Interestingly, Indian constitutional law scholar Gautam Bhatia has called this judgment an *'instant classic'*.[364]

Interestingly, this is not the first time that the basic structure doctrine has been cited by a court in Kenyan jurisprudence, albeit this was the first time when the doctrine was cited in relation to the present 2010 Constitution of Kenya. Earlier, in *Njava. v. Attorney General,*[365] the High Court of Kenya at Nairobi had summarily rejected the claim that the power of constitutional amendment also allows for its replacement, and by relying upon the basic structure doctrine, had asserted that fundamental constitutional change which would invariably amount to replacement can only be done by exercising 'constituent power' and not amending power.

The Tanzanian Constitution of 1977 does not recognize any formal limitations on the power of amendment and merely enlists the procedure that is to be followed for 'modification, correction, repeal or replacement' of those provisions.[366] Nonetheless, the High Court of Tanzania declared an amendment which prohibited the participation of no-party candidates from the general elections as unconstitutional by citing the Indian basic structure doctrine as an implied limitation on the amending power.[367] On an appeal to the decision though, the Court of Appeal of Tanzania overruled the judgment by stating that the inherent lacuna of the basic structure doctrine is the lack of precision that it carries and therefore, the doctrine cannot be applied to the Tanzanian Constitution.[368] Although the recognition afforded to the doctrine was overturned in appeal, the invocation of the doctrine by the Tanzanian High Court nevertheless keeps the door open for further development.

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[364] Gautam Bhatia, *The Kenyan High Court's BBI Judgement: An Instant Classic*, 17 May, 2021 ELEPHANT. (Accessed on 06th June, 2022 from https://www.theelephant.info/op-).
eds/2021/05/17/the-kenyan-high-courts-bbi-judgement-an-instant-classic/).
[365] Njaya & ors v. Attorney General, (2004) LLR 4788 (HCK).
[366] CONSTITUTION OF TANZANIA, 1977, Art. 98.
[367] Mtikila v Attorney General, (10 of 2005) [2006] TZHC 5.
[368] The Court of Appeal of Tanzania, Civil Appeal No. 45 of 2009, The Attorney Gerneral v. Christopher Mtikila

South Africa does not formally recognize the basic structure doctrine. Nevertheless, it has been discussed and debated on by the judiciary as well as jurists. In the case of *Premier of KwaZulu-Natal*,[369] the judiciary, by referring to Indian jurisprudence, held that a constitutional amendment which has been passed by adhering to the requisite procedural guidelines may be unassailable, yet, if it radically restructures and alters the fundamentals of the constitution, then it may not qualify as an amendment at all. Although the doctrine of basic structure was not formally cited in this case, the jurisprudence highlighted was eerily similar to the meaning of amendment which has been developed in the context of basic structure review of amendments. Subsequently, in another case,[370] a similar position was taken by the court and it was held that there are certain inherent constitutional principles which may not be formally delineated as such. Nonetheless, an amendment which adheres to the mandated procedural requirements elucidated in the constitution may not be competent to radically change or alter these framework constitutional principles. According to one author, even prior to the beginning of the 21st century, at least two Justices of the South African Constitutional Court have referenced the basic structure doctrine while analyzing the validity of constitutional amendments.[371] Interestingly, the doctrine came closest to being adopted completely in *United Democratic Movement*[372]where the court assumed the applicability of the doctrine to the South African legal system, nevertheless, ultimately concluded that none of the basic structures had been violated.

5.5.5 COLOMBIA– THE CONSTITUTION REPLACEMENT DOCTRINE

The globalization of a legal doctrine can happen in at least two ways. The first is the literal adoption of a foreign doctrine into the domestic legal system of a country to which it is not indigenous. An example of basic structure globalization from this perspective has been highlighted above. The second is through the development of similar legal principles that are unique to the domestic legal system by deriving influence from the foreign doctrine. Colombia provides a unique insight into this form of globalizing a law.

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[369] Premier of KwaZulu-Natal v. President of South Africa, 1996 (1) SA 769 (CC).
[370] Executive Council of the Western Cape Legislature v. President of the Republic, 1995 10 BCLR 1289 (CC).
[371] Heinz Klug, *Introducing The Devil: An Institutional Analysis of the Power of Constitutional Review*, 13(2) SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 185 (1997).
[372] United Democratic Movement v. President of the Republic of South Africa, (11) BCLR 1179 (2002).

The Constitution of Colombia grants a formal power of judicial review over constitutional amendments to the judiciary,[373] albeit such power of review is only limited to reviewing whether the mandated procedural guidelines have been followed or not and does not extend to scrutinizing the substantive contents of the amendment. This limitation is circumvented by the Colombian judiciary by forming the '*constitutional-replacement'* doctrine or the *'substitution of the constitution'* doctrine. This doctrine is very similar to the Indian basic structure doctrine in the sense that not does it rely on the recognition of certain 'essential' constitutional elements for continuance of the original constitutional framework, but also has relied upon the doctrine for invalidating and declaring unconstitutional amendments that encroach and curtail those 'essential' constitutional elements.[374] The doctrine traces its roots to a decision by the Colombian constitutional court[375] wherein the validity of certain constitutional amendments had been challenged. In this case, a majority of the impugned amendments were upheld, but the decision allowed the court to develop a doctrine which derived itself from implicit constitutional limitations. The court argued that although there did not exist any explicit eternity clauses within the Constitution of Colombia, or any explicit limitations on the amending power, democratic constitutions by their very nature contained implied limits on the amending power.[376] The power of constitutional reform contained within the phrase *"the Constitution can be reformed"* under Article 374 entails that the constitution only authorizes changes to the existing constitution, and does not, in fact, grant the power to replace it.[377]

The court, to derive its powers from implicit constitutional limitations, proposed a five-tiered argument. The first premise argues that the power to review whether the procedural requisites have been adhered to or not also denotes the power to review the competence of the authority seeking to amend the constitution by following those procedures. The second premise states that the power to amend only extends to modification and does not correlate to the power of constitutional replacement. The

[373] CONSTITUTION OF COLOMBIA, 1991, Art. 241 & Art. 379.
[374] Mate, *Supra Note* 281, at 456.
[375] Sentencia 551/03, Colombian Constitutional Court (2003).
[376] Joel Colón-Ríos, *Constitutionalism and Democracy in Latin America*, 20 NEW ZEALAND ASSOCIATION OF COMPARATIVE LAW YEARBOOK 155, 160 (2014).
[377] Joel Colón-Ríos, *Carl Schmitt and Constituent Power in latin American Courts: The Cases of Venezuela and Colombia*, 18(3) CONSTELLATIONS 365, 375 (2011).

third premise amalgamates the first two arguments and postulates that the judiciary is bestowed with the power to review whether the constitution is merely being amended or whether it is being replaced. The fourth premise argues that an analysis of the content of the proposed amendment allows the court to determine whether it is a modification or replacement. Finally, the fifth and final premise states that the power to ascertain whether an amendment seeks to replace the constitution or nor also implies the power to review the content of the constitutional amendment.[378] These arguments form the bedrock of the Colombian doctrine.

The Colombian doctrine of implicit limitations was introduced by the judiciary less than two decades ago. Within this short span of time, the judiciary has been able impart a degree of clarity to the doctrine's applicability that is missing in many similar doctrines of implicit limitation, including the Indian basic structure doctrine. In a case in 2004, the Colombian Constitutional Court expanded upon the doctrine by proposing the *'replacement test'*. The major premise states that a constitutional amendment which replaces an element that is definitive of the constitutional identity (hereinafter *'identity element'*) shall amount to partial constitutional replacement. The minor premise is the assertion that the identity element is replaced by a concrete constitutional amendment.[379] If the conditions are satisfied then an amendment has the effect of being a partial replacement of the constitution.[380]

A year later, in another case[381] concerning the constitutionality of an amendment, the *'replacement test'* was further evolved, and the '*identity element'* was substituted with the *'essential element'* and a seven-tiered test comprising of the following steps was formulated – firstly, the essential element being replaced by the amendment needs to be stated; secondly, the manner in which the essential element underpins and supports multiple constitutional provisions; thirdly, an explanation on why the 'element' in question is essential for the constitution; fourthly, highlighting through evidence how the essential element being demarcated cannot be reduced to a singular constitutional provision; fifthly, demonstrating that labeling an element as 'essential' does not lead to

[378] Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11(2) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 339, 340 (2013).
[379] Sentencia C-970/04, Colombian Constitutional Court (2004).
[380] Bernal, *Supra Note* 378, at 343.
[381] Sentencia C-1040/05, Colombian Constitutional Court (2005).

transforming one or more constitutional provisions into 'eternity clauses'; sixthly, proving that the 'essential' element in question has been substituted by the proposed amendment; and seventhly, showing how the proposed substitution is a contradiction of the original 'essential' element.[382] By relying on this seven-tiered test, the court, for the first time, deemed an amendment unconstitutional for being a replacement of the constitution.

Subsequently, the doctrine and the test have been used to declare an amendment which sought to grant certain categories of temporary employees 'tenure' in the public administration without clearing the threshold of merit as unconstitutional for being a replacement.[383] In another case, an amendment which sought to grant the possibility of presidential re-election to a third term was deemed as replacement and therefore unconstitutional.[384]

[382] Bernal, *Supra Note* 378, at 344.
[383] Sentencia C-588/09, Colombian Constitutional Court (2009).
[384] C-141/10, Colombian Constitutional Court (2010).

6. BASIC STRUCTURE: NECESSITY FOR CONSTITUTIONALISM OR JURISTOCRACY? – AN ANALYSIS

Independent India's constitutional development during the first few decades after independence was marked by clashes between the parliament on one hand and the judiciary on another. The primary cause of conflict was on the relationship between fundamental rights under Part III of the constitution and directive principles under Part IV of the constitution. While the judiciary initially gave primacy to Part III and operated as guardians of the fundamental rights, the parliament, through radical social reform, sought to advance the socio-economic policies enshrined under Part IV.[385] The cases which dealt with the interaction between Part III and Part IV of the constitution, where the Supreme Court of India and the Indian Parliament participated in framing a shared understanding of independent India's first constitutional order has been called by Prof. Upendra Baxi as *"India's first unwritten constitution."*[386] The parliament sought to overcome the judiciary's fastidious guardianship of the fundamental rights through the process of amendment. Curiously though, the judiciary did not exhibit the same zeal to protect the fundamental rights when they were curtailed through constitutional amendment, and for almost two decades, unlimited 'constituent power' was exercised by the parliament over constitutional amendment. Two important characteristics of this period are the a support of constitutional textualism and an obsequious deference by the judiciary towards the parliament.[387] Subsequently, in *Golaknath,* the judiciary interpreted that constitutional amendments are 'law' within the ambit of Article 13(2) and any amendment which infringed upon the fundamental rights contained in part III were deemed unconstitutional. This position was overruled six years later, and in *Kesavananda Bharati,* a landmark thirteen-judge bench held that the parliament wielded unlimited power to amend the constitution, subject only to the restriction that the basic structure of the constitution cannot be changed.

This judgment has proved to be a momentous occasion of constitutional law jurisprudence not only in the Indian context, but also for other legal systems across the

[385] Doughlas V. Verney, *Parliamentary Supremacy Versus Judicial Review: Is a Compromise Possible?*, 27(2) THE JOURNAL OF COMMONWEALTH & COMPARATIVE POLITICS 185, 194 (1989).
[386] BAXI, *Supra Note* 241, at 64-65.
[387] Vivek Krishnamurthy, *Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles*, 34 YALE JOURNAL OF INTERNATIONAL LAW 207, 221 (2009).

world who have borrowed from this doctrine. Domestically, however, it has elicited starkly opposing reactions throughout its existence. Some have regarded it as an instrument which is necessary for ensuring the existence of constitutionalism, while others have opined that it is merely a form of judicial overreach that has given the reins of Indian democracy to the judiciary.

This chapter shall attempt to address this dichotomous perception of the doctrine.

6.1 THE FAILURE OF 13(2) – THE NECESSITY FOR BASIC STRUCTURE REVIEW

The basic structure doctrine is a form of constitutional review which relies upon implied limitations on constitutional amendments. The nature of implied limitations means that it does not have a constitutional basis and therefore does not trace itself from any explicit constitutional provision. This begs the question – does the Indian Constitution contain any explicit limitations on the power of amendment? The constitution, interestingly, does not place any explicit limits on the power of amendment directly, however, through Article 13(2) prohibits the parliament from making any 'law' which contravenes the fundamental rights contained under Part III of the constitution, with these laws to the extent of the contravention being void. Article 13(3) delineates the meaning of 'law' but it does not textually refer to constitutional amendments.

A reliance upon this limitation is only possible if amendments are deemed 'law' within the meaning of Article 13. This realization led the Supreme Court of India to deem amendments 'law' within the ambit of Article 13, and therefore, declare that amendments are subject to the limitation placed by Article 13(2). Since the original marginal note of Article 368 only contained the phrase 'procedure' for amendment, it was surmised that this provision contained only the special procedure to be followed for effecting constitutional amendments, and the power was legislative in nature, derived from the residuary powers of the parliament under Article 248.

This interpretation, however, is flawed for two reasons.

Firstly, by placing amendments within Article 13, it has been given a legislative character. It implies that the parliament exercises legislative power rather than constituent power while enacting constitutional amendments. However, the constitution is an expression of constituent power, and any amendments made to the constitution

must also be through an expression of constituent power. Legislative power, on the other hand, is an inferior 'constituted power'. Legislative power can only be utilized to amend the constitution in a scenario where there exists parliamentary sovereignty, such as Britain, and 'the locus of constituent power' is vested on the parliament rather than the people,[388] who are usually the source of constituent power. And even then, the notion of constituent power in such a scenario is, in reality, the expression of legislative power, aided by the principle of parliamentary sovereignty, which has no formal limitations whatsoever. India does not follow this system, and the parliament is subject to the Constitution of India. Therefore, the notion of constitutional amendments being done through the exercise of legislative power does not hold merit in the Indian scenario.

Secondly, as an extension of the first problem, by regarding constitutional amendment power as an expression of legislative power, the constitutional hierarchy is destroyed. Sudhir Krishnaswamy points out that by placing constitutional amendments within Article 13, and giving it a legislative character to amendments, the hierarchy between legislation and constitutional amendment is negated and both of them are placed on the same pedestal. This also implies that an amended constitutional provision is on the same plane as an ordinary legislation. This leads to two inconsistencies –

i) The parliament derives its legislative power from Article 245, which states *"subject to the provisions of this constitution, the parliament may make laws…"*[389] This establishes a hierarchy between the constitution and the laws, and therefore, ordinary legislative power from Article 245 cannot be used for amending the constitution.[390]

ii) The validity of legislations cannot be adjudged against the constitution, or at least those provisions which have been inserted by amendment, since the constitutional provisions will occupy the same force as the legislations. This will lead to an erosion of constitutional supremacy.

These issues highlight the problems with relying on Article 13(2) as a limitation on the power of amendment. Article 13(2) is therefore inapplicable in its ambit to include

[388] Alan Greene, *Parliamentary Sovereignty and the Locus of Constituent Power in the United Kingdom,* 18(4) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 1166, 1185 (2020).
[389] *Supra Note* 91, at Art. 245.
[390] KRISHNASWAMY, *Supra Note* 11, at 06.

within itself constitutional amendment. In the absence of any other formal limitations, an implied limitation became necessary. Even prior to the enactment of the Constitution of India, J. Blagden had made observations on the power of amendment where he had stated - *"I understand the general rule on the point to be that amendment must be germane to the subject-matter of the proposition and they must not be, in substance, a direct negative of it."*[391] This understanding of amendatory power is consistent with the understanding of the same that was expressed by the majority opinion of *Kesavananda.* Furthermore, the Indian Constitution contains a relatively easy process of amendment. As one author has highlighted, a relatively easy mechanism of amendment paradoxically necessitates the court to adopt a strong form of judicial review to protect the fundamental aspects of the constitution from frequent amendment and abrogation.[392] The absence of eternity clauses which protect the fundamental constitutional principles from being eroded by amendment is contributory factor. Therefore, the logical incapability of relying upon Article 13(2), and the circumstances in which the doctrine was adopted, coupled with the lack of eternity clauses and the risk of constitutional erosion necessitated that the judiciary formulate implied limitations on the power of amendment to protect the constitutional fabric of India.

6.2 BASIC STRUCTURE – AN INSTRUMENT AGAINST DEMOCRATIC SUBVERSION

Professor Conrad's lecture in Banaras Hindu University regarding the limitations on constitutional amendment power, which subsequently proved to be an influence for J. Mudholkar in suggesting implied limitations due to the inviolability of the constitutional basic features, expressed apprehensions that unlimited amending power would inevitably lead to autocratic regimes by subverting the extant constitutional order. These apprehensions have thankfully not turned accurate in the Indian context, barring some attempts such as the Thirty-Ninth and Forty-Second Amendments, although they have proven to be uncannily accurate in our neighboring nations of Pakistan and Bangladesh, where the constitutional framework has been relegated to the whims of the legislature,

[391] TH Vakil v. Bombay Presidency Radio Club Ltd., (1945) 47 BOMLR 428.
[392] Joel Colón-Ríos, *A New Typology of Judicial Review of Legislation*, 3(2) JUDICIAL REVIEW OF LEGISLATION 143, 154 (2014).

and has been used to support the regimes of autocratic rulers.[393] As one author has highlighted in the Pakistani context, although the constitution of 1973 was a significant step towards democratization of the country, it has since become a 'battleground' for leaders, who have added amendments to increase their power and solidify their positions in office.[394] General Zia-Ul-Haq's transcendence to autocracy, wherein he suspended the constitution in July 1977, and subsequently reinstated it after insertion of the Eighth Amendment (which inserted clause 2(b) to Article 58) that tremendously increased the powers of the president and allowed him to dismiss the Prime Minister of Pakistan and dissolve the national and provincial assemblies provides a fearsome example of how amendments may be used for subverting democratic constitutions. This clause has since been used thrice since General Zia's first imposition to dismiss democratically elected governments in 1990, 1993 and 1996.[395]

Similarly, in Bangladesh, Sheikh Mujib-ur-Rahman, who was the face of the Bangladesh liberation war, and who supported democratization of Bangladesh through a Westminster-style parliamentary setup, declared emergency three years after the newly formed constitution's adoption, and through the controversial Fourth Constitutional Amendment of July 1975, turned the nation into a one-party presidential system while also curtailing most of the powers of the judiciary.[396] General Zia-ur-Rehman, following a military coup and assassination of Sheikh Mujib, succeeded him. Although he did not ascend to the presidential role until 1979, he nevertheless functioned as the de-facto ruler of the nation, and also introduced the Fifth Constitutional Amendment, which redefined the principles of Bangladesh as a nation, acted as the harbinger of totalitarianism in Bangladesh for fifteen years by legitimizing

[393] Aratrika Choudhuri & Shivani Kabra, *Determining the Constitutionality of Constitutional Amendments in India, Pakistan and Bangladesh: A Comparative Analysis,* 10 NUJS LAW REVIEW 01, 95 (2017).
[394] Furqan Mohammad, *Exploring Power Politics and Constitutional Subversions in Pakistan: A Political and Constitutional Assessment of Instability in Pakistan*, 7(2) LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW 229, 229 (2010).
[395] Muhammad Nadeem Mirza & Saba Fatima, *Eighteenth Constitutional Amendment and Democratic Consolidation in Pakistan: Sub-Systemic and Normative Institutionalism,* 41(2) PAKISTAN JOURNAL OF HISTORY AND CULTURE 217, 224 (2020).
[396] Shafi M.D Mostofa & D.B Subedi, *Rise of Competitive Authoritarianism in Bangladesh*, 14(3) POLITICS AND RELIGION 01, 08 (2020).

the actions committed under martial law,[397] and led to Islamization of the nation by replacing the secular identity that the original constitution had adopted.[398]

In both of these situations, there did not exist any limitation, either express or implied, on constitutional amendment. Since the scenario discussed above, the Pakistani legal system has rejected the notion of implied limitations on constitutional amendment, while the Bangladeshi legal system has accepted the necessity of limitations on amending power. This development within the Bangladeshi legal system has led to invocation of the constitutional basic structure to declare the aforementioned Fifth Amendment unconstitutional,[399] and the notion of basic structure has since been ratified and codified into the constitutional text through the Fifteenth Constitutional Amendment. It would therefore also not be wrong to surmise that if the basic structure regime and implied limits on constitutional amendments was adopted by the judiciary of Bangladesh when the Fifth Amendment was passed, and used to invalidate the amendment, then the autocratic regime which functioned for almost two decades might not have been successful.

In contrast to these two nations, India hasn't had to face authoritarian regimes which were formed by subverting the democratic fabric of the country. Although constitutional supremacy has been accepted by the judiciary as far back as in 1954,[400] the mere presence of a constitution does not allude to the presence of constitutionalism, with the most sacrosanct identifier of constitutionalism being limited government under a higher law.[401] The attempts by Indira Gandhi to radically change the constitutional framework through the Thirty-Ninth and Forty-Second Amendment (which has been denoted by Senior Advocate Rajeev Dhawan as an attempt to replace the parliamentary system with a presidential system), [402] which can be considered analogous in their ambit and scope to the Eighth Amendment of Pakistan and the Fourth and Fifth Amendments of

[397] Choudhuri & Kabra, *Supra Note* 391, at 24.
[398] Md. Masum Sikdar & Md. Mehedi Hasan Shohag, *Democracy and Authoritarianism: Understanding Three Decades of Bangladesh Politics*, 6(24) RESEARCH ON HUMANITIES AND SOCIAL SCIENCES 01, 12 (2016).
[399] *Supra Note* 337.
[400] Virender Singh v. State of Uttar Pradesh, AIR 1954 SC 447.
[401] Paul J Magnarella, *Comparative Constitutional Law Enterprise*, 30 WILLAMETER LAW REVIEW 509, 510 (1994).
[402] Rajeev Dhawan, *Amending the Amendment: The Constitution (Forty-Fifth Amendment) Bill*, 1978, 20(2) JOURNAL OF THE INDIAN LAW INSTITUTE 249, 249 (1978).

Bangladesh that have been discussed above, could not become successful due to the judiciary's scrutiny of these amendments through the lens of basic structure review in *Indira Nehru Gandhi, Minerva Mills and Waman Rao*. The basic structure doctrine, therefore, became an impediment against constitutional subversion and a means to thwart the attempts at amending the constitution for protecting the identity of the constitution. As Professor R. Sudarshan has poignantly noted – *"The basic structure doctrine remains a shield against predatory subversion of constitutionalism of the kind that was attempted during the Emergency."*[403] A parallel may also be drawn with the already discussed Columbian '*substitution of the constitution'* doctrine, which was relied upon the invalidate amendments which sought to extend the constitutionally mandated presidential term from one term to three terms.[404] These two examples highlight the necessity of limitations in protecting the constitution from being overthrown by amendment.

6.3 TARGETING JURISTOCRACY – ADDRESSING THE CRITICISM OF JUDICIAL OVERREACH

The formal role which courts occupy in a liberal democracy is to interpret the law and not create it. This is consistent with its position in the separation of powers doctrine, or as Montesquieu proclaimed that the judge is *"no more than the mouth that produces the words of the law."*[405] Nonetheless, modern courts have, sometimes, risen to occupy the highest vestiges of power. This is made possible by the willing inclusion of every facet of social life into the legal domain through judicial activism. As Justice Aharon Barak, once asserted, *"nothing falls beyond the purview of judicial review. The world is filled with law; anything and everything is justiciable."*[406] The judiciary becomes the ultimate arbiter and final authority on everything that is even remotely associated with a question of law or justice. It has also prompted courts to transform into major decision-making bodies from a political standpoint as well since what used to remain within the legislature or executive's competence in classical theory has now become a part of the

[403] R. Sudarshan, *Courts and Social Transformation in India*, in ROBERTO GARGARELLA ET.A;., (ED.) COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR 165 (Aldershot: Ashgate, 2006).
[404] *Supra Note* 384.
[405] MONTESQUIEU, SPIRIT OF THE LAWS 209 (University of California Press, 1977).
[406] RAN HIRSCHL, TOWARDS JURISTOCRACY: THE RISE AND ORIGINS OF CONSTITUTIONALISM 169 (Harvard University Press, 2004).

judiciary's domain.[407] The impact of judicial review as an institution, is after all, only partially centered on its formal recognition and existence within the legal domain and far more vitally on *"the vigour and frequency"* of its utilization by the courts.[408] This also implies that judicial review, in the absence of formal limitations, is only restricted by judicial restraint and therefore, criticisms of judicial overreach have become common in jurisdictions without such limitations. Ran Hirschl, the Canadian political scientist has described this phenomenon of the evolution of the judiciary's role as 'juristocracy' – *"the rise of courts to occupy the highest seat of power."*[409]

The basic structure doctrine empowers the Indian Supreme Court to invalidate formal constitutional amendments on the ground that they have violated the constitutional basic structure. This in itself is a power which informally limits the formally unlimited powers of amendment prescribed under Article 368. Basic structure review can be regarded as a form of strong judicial review, which essentially presupposes the judiciary as the "ultimate expositor" of constitutional meaning, and bestowed with the final word in interpreting constitutional meaning.[410] As noted above the doctrine lacks a textual basis. This means that there is no constitutional provision which empowers the doctrine, and it is what the judiciary deems it to be. The doctrine allows the judiciary to determine the constitutionality of an amendment even if the same has been enacted by adhering to the formal constitutional procedure within the constitution. This, in itself, is a questionable extension of the judicial role and power with at least one author citing it as an example of the growth of juristocracy across the globe. [411] One author has even gone on to opine that the doctrine has allowed the judiciary to declare itself supreme, since by virtue of the doctrine, it now has *"an undefined ..and therefore inexhaustible power to annul any amendment to the constitution."*[412] A parallel can also be drawn with the earlier cited Turkish Constitutional Court's invalidation of a constitutional amendment[413] by transgressing the explicit limitations on constitutional judicial review with the Indian formulation of the basic structure doctrine. The willingness of the court to take upon

[407] Ran Hirschl, *"Juristocracy" - Political, not Juridical*, 13(3) THE GOOD SOCIETY 06, 06 (2004).
[408] AREND LIJPHART, PATTERNS OF DEMOCRACY 225 (Yale University Press, 1999).
[409] Albert, *Supra Note* 136, at 66.
[410] Alon Harel & Adam Shinar, BEtween Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review 10(4) International Journal of Constitutional Law 950, 953 (2012).
[411] Nicholas Aroney & Benjamin Saunders, *On Judicial Rascals and Self-Appointed Monarchs: The Rise of Judicial Power in Australia*, 36(2) UNIVERSITY OF QUEENSLAND LAW JOURNAL 221, 224 (2017)
[412] PRAN CHOPRA, SUPREME COURT VERSUS THE CONSTITUTION 27 (New Delhi: Sage Publications, 2006).
[413] See *Supra Note*192.

itself the role of a protector even when the constitution itself places limits on the same is a disturbing trend, albeit the necessity of such activism differs one legal system to another. If an examination of the circumstances that led to the formulation of the doctrine is looked at, the developments on constitutional amendments and the manner in which they were used and misused to legitimize the government's stand on its socialistic aspirations and to nullify judicial opinions respectively paint a worrisome picture. The Twenty-Fourth Amendment had been an attempt to nullify *Golaknath* and also provide constitutional justification for curtailing fundamental rights without the possibility of being subjected to judicial review. The Twenty-Fifth Amendment sought to negate *R.C Cooper* and deprive the judiciary from ascertaining the 'quantum of compensation' when property has been acquired by the State for public use. Professor S.N Mishra, a noted parliamentarian of this period, had poignantly noted that the *"seamless web had been forgotten, parliament had given the country socialism minus democracy."*[414] The Thirty-Ninth and Forty-Second Amendments further consolidated power in the hands of the prime minister, and blatantly sought to curtail the institutions of rule of law, separation of power and judicial independence which are inherent to any democracy. In this backdrop, the basic structure doctrine provided an opportunity for the judiciary to assert itself and protect the constitutional framework from being abrogated. These circumstances justify the doctrine's existence.

A second allegation which has been levelled against the basic structure doctrine as a form of judicial overreach is the manner in which constitutional amendments can be negated and deemed unconstitutional by the judiciary, and the inherent conundrum of the same when compared against the procedural requirements necessary to enact it. The constitution, and by extension, its amendments, occupy a higher hierarchical position than ordinary legislation. This distinction is seen in legislative capacity as well – almost all written constitutions differentiate between ordinary legislation and constitutional amendment, and a higher threshold, usually a supermajority is mandated for passing amendments while a simple majority is considered to be enough for passing ordinary legislation. The distinction between ordinary legislation and constitutional amendments is diluted when the matter is placed for judicial review, since a small bench of judges can invalidate and declare unconstitutional an amendment in the same manner that can

[414] AUSTIN, *Supra Note* 259, at 256.

be adopted to declare a legislation as unconstitutional. This means that unlike legislative authority, which is limited by constitutional protections and the necessity of supermajoritarian affirmation, the judiciary is not limited by any such considerations. Although the Indian Constitution mandates a minimum strength of five for adjudicating on questions of law as to the interpretation of the constitution,[415] the possibility of a five-judge bench invalidating an amendment passed by supermajoritarian affirmation in a democratically elected parliament raises questions over democratic subversion. It also questions how an institution which lacks democratic accountability can usurp and negate the decisions of an institution which is elected through democratic suffrage and is therefore accountable to the people.

This query can be addressed by examining the inherent nature of judicial function when compared against legislative function. Legislative functioning in a democratic setup mandates accountability towards the people. The judicial institution, however, does not mandate similar accountability, and it must only be accountable to the constitution and the law that it seeks to uphold. The power of constitutional review to check unconstitutional considerations by the State is an implicit and inherent feature of written constitutions, and therefore, while exercising constitutional review, the judiciary is accountable to the constitution itself.[416] The judiciary, especially constitutional courts, offer a greater opportunity for reasoned deliberation when compared to the legislature, and the legitimacy of courts can also be derived from their role as forums of disinterested rational deliberation whose only allegiance rests with the letter of law.[417] Patrick Selim Atiyah, the British jurist, has gone as far as to argue that it is judicial independence and non-accountability to the people in a manner comparable to the legislature which makes democracy functional.[418] CJ Aharon Barak enumerates another reason as to why judicial opinion which results in nullifying a State action which has been brought forth through supermajoritarian procedural adherence should not be considered as undermining the democratic character of the nation. The first argument states that judgments by the judiciary are not rooted in their subjective expression and

[415] *Supra Note* 91, Art. 145(3).
[416] Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66(2) HARVARD LAW REVIEW 193, 195-96 (1952).
[417] Md. Abdul Malek, *Vice and Virtue of the Basic Structure Doctrine: A Comparative Analytic Reconsideration of the Indian Sub-Continent's Constitutional Practices*, 43(1) COMMONWEALTH LAW BULLETIN 48, 61 (2017).
[418] Patrick Selim Atiyah, *Judges and Policy*, 15(3) ISRAEL LAW REVIEW 346, 363 (1980).

beliefs, but is rather a representation of the objective beliefs of the law. The judge's opinions are a reflection of the *"fundamental tenets of the people"* and the *"democratic credo"* of the nation, and therefore, an effectuation of the constitution and democracy.[419] This is exemplified within the Indian context by the realization that four of the five judges who reaffirmed the basic structure doctrine in *Indira Nehru Gandhi* had been dissenters in the original *Kesavananda Bharati* judgment. Their acceptance of the doctrine as 'law' and their acceptance in objectively applying its tenets to an amendment which was a violation of the proposed constitutional basic structure highlights the twin facets of accountability towards law and objectivity that judges must uphold in adjudicating.

A third criticism of judicial overreach is the expansion of the basic structure doctrine to issues beyond the originally intended realm of constitutional amendments. In the *Indira Gandhi v. Raj Narain case*, the majority opinion had held that the Indian Constitution already imposes restrictions on ordinary legislative power, and subjecting these legislations to the test of basic structure would rob the legislature of their constitutional powers. This opinion was reaffirmed by J. Krishna Iyer in *Bhim Singhji*[420] when, while examining the constitutionality of the Urban (Ceiling and Regulation Act), 1976, he concluded that the *vires* of an ordinary legislation cannot be adjudged through the basic structure review. The same was reiterated subsequently in *V.C Shukla*[421] and *Kuldip Nayar*,[422] although subsequently, the test of basic structure was expanded to legislations within the Ninth Schedule of the Indian Constitution By *Waman Rao* and *I.R Coelho*. It has also been used to ascertain the constitutionality of a state legislation on affirmative action,[423] invalidate an arbitration law passed by the state of Orissa,[424] and also to declare unconstitutional a legislation dealing with the controversial *Babri Masjid*.[425] It has also been used as a basis for substantive review of ordinary executive action.[426] Scholars have provided conflicting opinions on this expansion. While Arvind Datar, senior advocate in the Indian Supreme Court has argued that the inapplicability of the

[419] Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARVARD LAW REVIEW 19, 51 (2003).
[420] *Supra Not*e 308.
[421] V.C Shukla v. Delhi Administration, (1980) 2 SCC 665.
[422] Kuldip Nayar v. Union of India, (2006) 7 S.C.C. 1.
[423] Indra Sawhney v. Union of India, AIR 2000 SC 498.
[424] G.C Kanungo v. State of Orissa, 1995 AIR 1655.
[425] Dr. M. Ismail Faruqui v. Union of India, AIR 1995 SC 605.
[426] P.M Bhargava v. Union of India, 2004 (6) SCC 661.

doctrine will lead to greater harm,[427] his colleague Raju Ramachandran opines that the doctrine should only restrict itself to constitutional amendments, and the legitimacy of an ordinary legislation should only be adjudged against fundamental rights and procedural competence.[428] The latter view is rooted on the rationale that unreasonable expansion of the scope of the doctrine by including within its ambit legislations and executive actions would undoubtedly amount to judicial overreach and dilution of the democratic framework.[429]

This criticism can be analyzed by looking at the role that the basic structure doctrine was envisaged to play within the Indian legal system. During the early phases of the doctrine, in cases such as *Indira Nehru Gandhi* and *Waman Rao,* the constitutionality of the challenged legislation was intertwined with a constitutional amendment that validated the existence of the legislation. This meant that the constitutionality of the challenged legislation was contingent on the constitutionality of the amendment within whose rubric it was protected and enacted.[430] *Waman Rao* opened the floodgates to applying basic structure review to legislations as well since it held that legislations within the Ninth Schedule can be subjected to basic structure scrutiny. *I.R Coelho* has subsequently contributed to the existing jurisprudence and remarked that the enquiry while applying the basic structure doctrine shall be effect and impact of the law on the rights guaranteed and whether or not they destroy the constitutional basic structure. Upon applying this present degree of scrutiny, it is clear that legislations would also be open to basic structure scrutiny if they destroy or damage the basic structure of the constitution.[431]

A fourth criticism of the basic structure doctrine as a form of *juristocracy* is the expansion of the doctrine into the realm of judicial appointments. Reliance may be placed in this regard to the case of *Supreme Court Advocates-on-Record Association v. Union of India*[432] (hereinafter referred to as *NJAC judgment*). The primary question in this case was concerning the constitutionality of the Constitution (Ninety-ninth Amendment) Act, 2015 which envisaged the formation of a National Judicial

[427] JAIN & NARAYAN, *Supra Note* 12, at 41.
[428] Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine*, B.N KIRPAL (ED.) SUPREME BUT NOT INFALLIBLE 127 (Oxford University Press, 2021).
[429] Gupta, *Supra Note* 10, at 130. (RAADHIKA).
[430] KRISHNASWAMY, *Supra Note* 11, at 102.
[431] *Ibid*, at 103.
[432] Supreme Court Advocates-On-Record Association v. Union of India, (2016) 5 SCC 1

Appointments Commission, a body composed of the Chief Justice of India as the chairperson, two senior-most judges of the Apex Court, the Union Minister of Law and two eminent persons who shall be chosen by a committee composed of the Prime Minister of India and the leader of opposition in the Indian Parliament. The court held that the amendment was unconstitutional and *ratio* was centered on two grounds – firstly, that the Indian Constitution mandates judicial primacy in appointments made to the higher judiciary, and secondly, that such primacy is a part of the constitutional basic structure and therefore cannot be derogated from.[433] Nonetheless, the prior case concerning judicial appointments, notably *Re: Appointment and Transfer of Judges*[434] (hereinafter referred to as *3rd judges case*) did not contain a reference to the basic structure doctrine. In *Supreme Court Advocates-on-Record Association*[435](hereinafter referred to as *2nd judges case*), Justice Verma, in his majority opinion did refer to the doctrine once, albeit it was cited in connection with ensuring judicial independence rather than giving primacy to judicial opinion. The binding *stare decisis* did not, therefore, rely on the basic structure and there was no legal precedent which allowed placing judicial primacy within the constitutional basic structure.[436]

The notion of judicial primacy was non-existent prior to the aforementioned 2nd judges case, and the law laid down in *Sankalchand Himmatlal*[437] and *S.P Gupta*[438]being contrary to the present law makes the burden of judicial overreach even more onerous. J. Chelameswar's dissenting opinion wherein he echoes the sentiment that judicial primacy does not fall within the ambit of the constitutional basic structure and that judicial independence can be maintained without resorting to judicial primacy[439] shows an enlightened perspective on the matter that the majority myopically fails to see. The doctrine of basic structure is intended to be applied to gross structural changes which would result in fundamental changes to the Indian Constitution and alter its core identity, however, placing judicial primacy within the ambit of the basic structure

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[433] Rehan Abeyratne, *Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective*, 49 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 569, 575 (2017).
[434] Re: Appointment and Transfer of Judges, AIR 1999 SC at 1.
[435] *Supra Note* 89.
[436] Anujay Srivastava & Abhijeet Srivastava, *Judicial Appointments, Collegium System, and Unresolved Constitutional Enigmas in India: Proposing an 'Emergency Collegium' and the 'Automatic Elevation Alternative',* 1(4) JUS CORPUS LAW JOURNAL 290, 296 (2021)
[437] Union of India v. Sankalchand Himatlal Sheth, (1977) 4 SCC 193;
[438] S.P. Gupta v. Union of India, (1981) 1 SCC 87.
[439] Dhruva Gandhi, *Fourth Judges' Case A Structure Without A Foundation,* 5(1) WBNUJS INTERNATIONAL JOURNAL OF LAW AND POLICY REVIEW 83, 93 (2016).

without regard for jurisprudential history has raised allegations of overreach.[440] By placing judicial primacy within the ambit of the basic structure, it can also be argued that the judiciary has resorted to safeguarding its own interests by relying upon a judicially evolved doctrine, and whimsically applying the same without justification or explanation.

These criticisms are true to an extent and in fact dilute the integrity of the doctrine. However, if judicial review is accepted as a basic feature of the constitution, then it is also important that independence and impartiality of the judiciary be maintained since without judicial independence and impartiality, judicial review has no meaning. Professor M.P Singh has argued that the most important tenets of judicial independence are the maintenance of its constitutional position and that judicial appointments are placed beyond the reach of the political executive.[441] The notion of judicial independence is fragile and needs to be guarded against the unexpected social, economic and political conditions of society.[442] The judges supersession incident from 1973 following the superannuation of CJ Sikri after the *Kesavananda Bharati verdict* already shows an ominous history of how the legislature has attempted to control and punish the judiciary for going against its interests. In this backdrop, proclaiming that the judicial opinion retains primacy as far as judicial appointments are concerned can be construed as an attempt at protecting judicial independence. The *NJAC judgment* as well as the *2nd judges case* and *3rd* judges case represents attempts at obstructing judicial independence, and therefore, an assertion which secures judicial independence by placing it within the ambit of the basic structure can also be considered a welcome development in upholding separation of powers and the independence of the judiciary.

6.4 ARTICLE 368 – A REMOVAL OF DIFFICULTIES CLAUSE?

It has also been argued that the basic structure doctrine reduces the power of amendment from the constituent power envisaged by the Indian Constituent Assembly during the drafting phase, to a 'removal of difficulties clause'.[443] A removal of difficulties clause (RoD clause henceforth), also known as the Henry VIII clause, traces its roots to the

[440] Abeyratne, *Supra Note* 434, at 599.
[441] Singh, *Supra Note* 253, at 249.
[442] Shaila Arora, *Independence of Judiciary in India,* 4(2) INTERNATIONAL JOURNAL OF LAW MANAGEMENT AND HUMANITIES 714, 715 (2021).
[443] Ramachandran, *Supra Note* 429, at 129.

Local Government Act, 1888 of Britain.[444] The purpose of the RoD clause is to enable the proper functioning of a legislation by enabling the removal of impediments which the legislature might have missed while formulating the legislation. The clause allows a body such as the executive to amend or repeal statutes within a parent legislation so as to enable proper functioning of the parent legislation.[445] The scope of the clause mandates that it only becomes applicable for removing difficulties in giving effect to the legislation from provisions of the legislation itself and not from difficulties arising *aliunde.* This also means that a RoD clause is only implemented during the initial implementation of the legislation concerned. [446]

Interestingly, the President of India has been empowered through a RoD clause by the Indian Constitution to remove difficulties in transition from the Government of India Act,1935 to the Constitution of India.[447] The imposition of the basic structure doctrine practically limits the powers of amendment of the Indian Parliament to only those spheres which do not curtail any of the provisions placed within the ambit of the basic structure. This implies that the amending power of the Indian Parliament only extends to the most rudimentary provisions which dictate trivial matters of either substantive or procedural implication since the significant domains have already been placed under the protection of the basic structure. Due to this limitation, a criticism has been levied that the power to amend under Article 368 has become a glorified RoD clause that only allows constitutional amendment to further facilitate the imposition of its existing provisions rather than introduce actual constitutional change.

Some of the arguments are not without merit. The basic structure doctrine has greatly limited the scope of amending powers under Article 368. Raju Ramchandran has also critiqued the doctrine for being an impediment against constitutional reform.[448] Having said that, barring some specific provisions within Part III of the constitution, the doctrine has essentially denoted abstract concepts such as federalism, secularism,

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[444] Charu Singh, *Implications of Henry VIII Clause in India: A Critique*, 6(4) JOURNAL OF POLITICS & GOVERNANCE 13, 13 (2017).
[445] Priya Garg & Amrita Ghosh, *The Henry VIII Clause: Need to Change the Colour of Our Shades*, 3(3) CONSTITUTIONAL AND ADMINISTRATIVE LAW QUARTERLY 46, 47 (2017).
[446] N.A.K Sarma, *Henry VIII Clause in India*, 15(3) JOURNAL OF THE INDIAN LAW INSTITUTE 460, 465 (1973)
[447] *Supra Note* 91, at Art. 392. (Indian Constitution)
[448] Ramachandran, *Supra Note* 429, at 129.

democratic character and judicial independence as basic constitutional features which cannot be abrogated through amendment. Interestingly, most of these features are also represented within the preamble, and it too has been deemed a part of the constitutional basic structure. Even within Part III, the fundamental tenets of equality, life and right to life have been regarded as fundamental to the constitutional identity and therefore a part of the basic structure. A violation of any of these sacred and unimpeachable principles will lead to an erosion of the constitutional identity and spirit. The Constitution of India is the *Kelsenian grundnorm* for the Indian legal system, and since the power under Article 368 is a power derived from the constitution, it cannot go beyond the constitution itself. Article 368 is not an exercise of the constituent power in its original form, a power which would allow a restructuration of the constitution,[449] but a power which allows constitutional change within the constitutional framework.

Till date, the Constitution of India has gone through one-hundred and four successful constitutional amendments, and more than half of them have occurred after the basic structure doctrine was conceptualized as a limitation on the power of amendment. Most of them have had a profound impact on the constitutional framework as well as the rights and liberties of individuals. The Constitution (Eighty-Sixth Amendment) Act, 2002 inserted Article 21A and bestowed a constitutional right to free and compulsory education till the age of fourteen years. The Seventy-Seventh, Eighty-First, and Eighty-Fifth (Constitutional Amendment) Acts, and recently the Constitution (One-Hundred-and-Third Amendment) Act, 2019 have individually and collectively changed the constitutional framework of affirmative action when compared to the original constitution. These merely include some of the amendments made to Part III of the constitution, a constitutional portion which is often regarded as the hardest to amend due to the sacrosanct nature of the rights contained within it. Other parts of the constitution have also been amended, as and when needed, and a majority of these amendments have also been upheld constitutionally when challenged in a court. Therefore, the criticism that the basic structure doctrine has reduced the powers of amendment to a RoD clause cannot be accepted because the values which the doctrine seeks to protect are such that their impeachment would negate the constitutional spirit

[449] Shouvik Kumar Guha & Moiz Tundawala, *Constitution: Amended it Stands?*, 1 NUJS LAW REVIEW 533, 544 (2008).

itself. Notwithstanding these inviolable constitutional principles, the power of amendment under Article 368 remains unbridled.

6.5 BASIC STRUCTURE AMBIGUITY – ANALYZING APPREHENSIONS OF UNCERTAINTY

Professor Vivek Krishnamurthy has called the *Kesavananda Bharati case* the *"first or second most important case decided by a constitutional court in the twentieth century"*[450] along with the landmark American case of *Brown v. Board of Education*[451] This statement speaks volumes about its influence and significance both within the Indian legal system as well as within international constitutional law jurisprudence. Having said this, the doctrine, like almost every other legal principle, is not perfect. The greatest shortcomings that the doctrine suffers from are an absence of uniformity, fears over misuse due to uncertainty of scope and the fickle unreliability over its application. An opinion has also been raised that this will lead to increased conflicts between the parliament and judiciary. Each of these issues highlight a different facet of the doctrine's imperfection.

Firstly, the doctrine of basic structure is not sourced from within the Indian Constitution. This means that the constitutional text does not formally recognize a basic structure and delineate the features which fall within the basic structure. The lack of formal legitimacy connotes that the doctrine cannot be properly defined. This means that a uniform meaning of the constitutional basic structure cannot be formulated without restricting the future judiciary from adding to the list if the need arises to do so. All the separate opinions in the majority judgment of the *Kesavananda case* contained a different interpretation on what amounts to the constitutional basic structure. The lack of unanimity among the opinions of the judges also does not allow objectivity, and therefore, there exists a risk that the constitutionality of an amendment becomes subject to the subjectivity of the judge before whom the issue is being presented.[452] Having said this, the initial judgment was rife with procedural errors and shortcomings and they impacted the viability of any unanimity of opinion. Despite this, the judges represented

[450] Krishnamurthy, *Supra Note*, at 225.
[451] *Supra Note* 142.
[452] GÖZLER, *Supra Note* 184, at 95.

some of the most sacrosanct constitutional principles within the Indian Constitution and paved the way for further evolution of the doctrine. Their opinions reflected the abstract principles which should be protected by the doctrine, and this position has since then lived up to its role. An analogy can also be drawn with the formal limitations on amendment placed within the Constitution of Russia, which places entire chapters instead of individual constitutional provisions beyond the scope of amendment due to the sacrosanctity of the principles enshrined within those chapter.[453] In India, the landmark judgments of *Indira Nehru Gandhi, Minerva Mills, Waman Rao and I.R Coelho* that followed *Kesavananda,* along with the handful of judgments where the doctrine has either been referenced or relied upon, have reduced the initial uncertainty that *Kesavananda* exemplified and contributed towards making the doctrine an objective instrument.

Secondly, a related shortcoming has been uncertainty of the what forms a part of the 'basic features' of the constitution, and how does the judiciary decide on the constituent elements of the constitutional basic structure. This was poignantly pointed out by J. Ray in his dissenting opinion in *Kesavananda Bharati* that since the Indian Constitution does not differentiate and distinguish between non-essential and essential features within the constitutional text, then how can such a demarcation possibly be made by the judiciary?[454] It is true that the Indian Constitution does not present a hierarchical division of provisions in a formal sense. Yet, it clearly regards certain rights as inviolable, and these rights are contained under Part III and protected by Article 13(2). Although it will certainly be a wrong conjecture to regard the rights contained under Part III to be hierarchically superior to other parts of the constitution, it is nonetheless an example that certain constitutional provisions are more sacrosanct than others. Similarly, following the bleak episode of *ADM Jabalpur*[455] where the judiciary recognized that fundamental rights including the right to liberty and liberty and arbitrary arrest remain suspended during the imposition of emergency, The Forty-Fourth Amendment added a provision that Article 20 and 21 shall remain operative even during a proclamation of national emergency[456] therefore mandating that these rights are so

[453] *Supra Note* 160, Art. 134.
[454] *Supra Note* 278.
[455] ADM Jabalpur v. Shivkant Shukla, 1976 AIR 1207.
[456] *Supra Note* 91, Art. 359.

inviolable that they need to be protected even during a proclamation of national emergency. By analogizing a similar relationship among constitutional principles, it would not be wrong to surmise that certain fundamental constitutional principles exist that are so sacrosanct that they represent the ethos of the Indian Constitution and therefore, must be safeguarded from abrogation. In the absence of any formal eternity clauses, the judiciary is bestowed with the duty to protect and safeguard these principles in its role as the constitutional watchdog. Therefore, even though the constitution may not formally elucidate constitutional provisions as hierarchically superior to one another, the judiciary will not be wrong in identifying certain fundamental constitutional principles and safeguarding them from abrogation through amendment.

Thirdly, it has been argued that adjudging the constitutionality of constitutional amendments on the basis of an implied 'basic structure' exacerbates the conflict between the parliament and the judiciary since the final say on which elements are sacrosanct and essential to the constitutional framework, and therefore must be protected falls exclusively within the judicial domain. [457] There is no merit to this argument. The judiciary, in its adjudicative capacity, is responsible for ensuring that the constitutional tenets are upheld. This is usually done through judicial review of legislations. The basic structure doctrine takes this power one step further, and allows the judiciary to adjudicate on the constitutionality of constitutional amendments against higher constitutional principles which reflect the constitutional spirit. Indeed, as Justice Mclachlin, the former Chief Justice of the Canadian Supreme Court has asserted – *"the elected legislators are subject to the constitution and must stay within its bounds, as must the courts. The courts have a duty to rule on whether the elected legislators have done so."*[458] This implies that in adjudicating upon State action, the court is not encroaching upon legislative or parliamentary supremacy, but is merely expounding the limitations that the constitution has placed upon the legality of such action. In this regard, the judiciary is neither desirous nor expected to enter into any form of conflict with any of the other governmental branches. Finally, even if the argument of the doctrine leading to an increased institutional confrontation is accepted, its importance in upholding constitutionalism trumps it over such considerations. As one author has

[457] M.F Mohallem, Immutable Clauses and Judicial Review in India, Brazil and South Africa: Expanding Constitutional Courts' Authority, 15(15) INTERNATIONAL JOURNAL OF HUMAN RIGHTS 765, 766 (2011).
[458] Beverly Mclachlin, *Charter Myths*, 33 UNIVERSITY OF BRITISH COLUMBIA LAW REVIEW 23, 31 (1999).

highlighted, *"regardless of the confrontational character"* of the doctrine, the doctrine has provided *"more than a strategic interpretation"* to the Indian judiciary to strike down constitutional amendments[459] which are against the tenets of constitutionalism. Therefore, in applying the basic structure review, or any other form of judicial review for that matter, the judiciary is merely fulfilling its constitutionally mandated role to protect the constitution and ensure constitutionalism.

A fourth shortcoming has been over the extent of its application and fears of its misuse. These fears and apprehensions are not without merit since the judiciary's hand cannot be restricted by the legislature and executive. Dietrich Conrad, the conceptual progenitor of the basic structure doctrine had himself cautioned that the doctrine of implied limitations on amendment should be used as a power of last resort and only in cases where the abuse of power and authority was absolutely clear.[460] Judicial restraint is a necessary quality in applying an instrument as broad in its implications as the basic structure doctrine. The legislature is accountable for its actions before the people and the executive is accountable for its actions to the legislature. The judiciary does not have such accountability. There is also no authority to question the judiciary in its application of the doctrine. Furthermore, since judicial review itself has been deemed a part of the basic structure, any attempt to reduce or restrict the applicability of the doctrine through legislative action risks being struck down for being a violation of the doctrine.[461] Therefore, a judiciary which holds itself accountable to the constitutional letter and exercises restraint against whimsical utilization of the doctrine is the only safeguard against its abuse.

Fifthly, due to the doctrine being a purely judicial construct, there exists the possibility that the judiciary of the future may construe its applicability differently than the judiciary which formulated it in the first place. A second risk is that the judiciary may reverse its position on implied limits on constitutional amendments, and allow constitutional abrogation, thus invalidating the original position on implied limits. It has already been held by the Supreme Court of India as far back as in 1955 while overruling

[459] Mohallem, *Supra Note* 458, at 772.
[460] Conrad, *Supra Note* 249, at 415; see also Polzin, *Supra Note* 246, at 56.
[461] Ramachandran. *Supra Note* 429, at 129.

State of Bombay v. United Motors[462] that it is not bound to its previous decisions by any constitutional provision. [463]The Honduran example[464] shows a plausible issue with judicial review of constitutional amendments. Therein, the court reversed its stance on entrenched constitutional provisions to facilitate the president to overcome formal limitations on presidential term. This is possible in the Indian context as well, since the basic structure doctrine depends wholly on judicial interpretation without any positivist bedrock. This criticism is rooted in the belief that a change in judicial opinion can facilitate political decisions as well. This results in fickle uncertainty over the doctrine's application. This is an issue which persists in all the jurisdictions where the doctrine has been implemented. The easiest method of correcting this issue would be to insert, through amendment, a clause into the constitution, therefore making the basic structure doctrine a formal limitation instead of an implicit one, in a manner comparable to the insertion of the doctrine into the Constitution of Bangladesh. A further safeguard can be to turn this clause into an entrenched eternity clause which can only be amended by wielding constituent power, therefore making it a part of the constitutional structure as well.

Sixthly, there is an inherent conundrum of analyzing the validity of a constitutional amendment against other constitutional provisions. To elaborate, a constitutional amendment, once passed, becomes a part of the constitutional framework. Without going into the intricacies of an intra-constitutional hierarchy, where the significance of one constitutional provision can be deemed to be greater than another, an amendment occupies the same importance and significance after its insertion into the constitution as a provision which has originally been a part of it. This means that an amendment, once inserted, also represents the constitutional scheme. Adjudging the constitutionality of an amendment against pre-existing constitutional amendments presents a hierarchical relationship where the amendment occupies a lower position when compared to the already existing provisions since the superiority of the other provisions is what would logically allow the amendment's constitutionality to be measured against them. This poses a problem since divisions are made within the constitution itself. To tackle this issue, the solution envisaged within the Romanian Constitution of 2003 can be relied

[462] State of Bombay v. United Motors, (1953) SCR 1059.
[463] Bengal Immunity v. State of Bihar, (1955) SCR 603.
[464] *Supra Note* 194.

upon. It formally allows judicial review of constitutional amendments[465] but the same only extends to *a priori* review. This means that the constitutional court can only review enactments prior to their enactment, and *posteriori* judicial review of the enacted amendments which have been ratified by the Romanian Parliament and have become a part of the constitutional scheme is not allowed.[466] Therefore, by subjecting an amendment to basic structure review after its procedural requisites are over, and inserting it into the constitution only after it passes the basic structure review can become a solution against such a conundrum.

Finally, attempt to change the constitutional structure for the welfare of the people shall also be invalidated if those changes change any part of the Indian Constitution that has been deemed to fall within the ambit of the basic structure doctrine. This means that an attempt to change the present federal system of India with a unitary bias, a system which has been called as quasi-federal[467] and not subscribing to the general definition of the term federal,[468] might be rejected since the present iteration of federalism has been regarded as part of the basic structure. Another example can be the National Commission to Review the Working of the Constitution was a body formed to review the functioning of the Constitution of India in the year 2002. Speculations about the commission's purpose has ranged from an attempt to rewrite the constitution through an extra-constitutional executive commission to a benign expert-group formed for studying proposals of constitutional reform.[469] Notwithstanding its purpose, the commission made some poignant recommendations on constitutional reform – incorporating provisions related to protection against custodial torture, cruel punishments & procedural safeguards against preventive detention envisaged in the Forty-Fourth Amendment; expansion of the right to life through a right to education till 14 years & right to drinking water ; an amendment to Article 105(2) to ensure parliamentary privileges do not grant immunity against cases of corruption committed by members of parliament etc. The commission's report, due to the nature of recommendations it makes, has been called by Prof. P Ishwara Bhat a *"theme of*

[465] CONSTITUTION OF ROMANIA, 2003, Art. 146.
[466] GÖZLER, *Supra Note* 184, at 07.
[467] K.C WHEARE, FEDERAL GOVERNMENT 27 (Oxford University Press, 1964).
[468] C.H Alexandrowicz has expressed doubts on whether the Indian system of federalism can be considered to justify the traditional definition of the term; see C.H Alexandrowicz, *Is India a Federation?*, 3 (3) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 393, 395 (1954).
[469] KRISHNASWAMY, *Supra Note* 11, at xii.

paradigmatic significance" due to the efforts it makes in bridging the gap between the people and the constitution.[470] The basic structure doctrine, notwithstanding its intentions, becomes a pillar of obstruction in effecting any overarching amendment which may encroach upon any of the features that the judiciary has declared as part of the basic structure.

[470] P. Ishwara Bhat, *Towards Bridging the Gap Between People and the Constitution: A Comment on the NCRWC Report*, 2(1) NALSAR LAW REVIEW 131, 141 (2004-2005).

7. CONCLUSION AND SUGGESTIONS

The present study was undertaken as an attempt to understand and assess the conundrum of balancing constitutional flexibility with special emphasis on the basic structure doctrine's role in sustaining constitutionalism. The present concluding chapter is divided into three parts – the first part contains a summarization of the study's findings; the second part contains a testing of the hypotheses formulated at the beginning of the study; the third part contains suggestions; and the fourth part contains a brief conclusion of the study.

7.1 SUMMARIZATION OF FINDINGS

The provenance of a constitution marks a watershed moment in a nation's history. Every constitution is representative of the culmination of a plethora of unique social, historical and cultural facets. It is a depiction of the aspirations that the people of the nation harbor as a collective. The historical underpinning of the constitution's development, and its emergence from the rich vortex of history makes every constitution *sui generis* in nature. The constitution also characterizes the *Kelsenian grundnorm* within a legal system, therefore being the basic legal norm from which all other legal norms derive their legitimacy. This position makes the constitution the supreme legal norm of the nation.

Having said this, the constitution, like every other facet of law, is affected by the passage of time. Time is dynamic and a harbinger of change. It spares no one and nothing can escape its influence. Notwithstanding its significance, a constitution must also bow to the changes of time. If it doesn't, then it risks becoming redundant and dispensable. It can no longer fulfill the aspirations of the people and therefore begins to lose its legitimacy. Interestingly, this is a problem unique to only written constitutions since unwritten constitutions do not contain a textual boundary and therefore can be amended through ordinary legislative processes. Written constitutions address this problem through a clause that allows for its amendment. The concept of constitutional amendment traces itself from the American Constitution of 1787, and has since then become a *sine qua non* of almost all written constitutions. Amendment allows a constitution to be flexible and authorizes it to formally incorporate necessary changes into the constitutional framework. Formally, the power of amendment is vested on the

legislature, although informally, the judiciary also exercises the power of amendment through constitutional interpretation. Constitutional conventions also become a source of amendment, albeit their influence is generally limited.

Four distinct arguments are generally made regarding the necessity of amendment vis-à-vis a written constitution. The first and foremost reason is that it allows future generations to incorporate change which has become necessary due to changing social dynamics. Secondly, the power to amend allows future generations to incorporate the experience of their past generations into the constitution and therefore improve its functioning and efficiency. A third reason is that the prevalent social circumstances may not allow the incorporation of some fundamental principles such as equality or universal suffrage into the constitution. Including a clause for constitutional amendment allows the incorporation of these changes when the nation is ready to accept them. Slavery in America and its subsequent abolition through an amendment provides a fascinating example. Finally, that an unamendable constitution characterizes a monopolization of the nation's legal future and forces its future generations to adhere to the legal norms contained within it. This is both non-democratic, since it deprives future generations of the opportunity to choose the legal norms which will govern them, and also immoral. Incorporating a clause for constitutional amendment overcomes these two issues and grants future generations the autonomy to decide and govern themselves within the constitutional framework.

The importance of amendments for a written constitution cannot therefore be undermined. After all, a living constitution which caters to change is better than a dead one which is static and redundant. Yet, constitutions do not die only by being unchanged. Conversely, whimsical amendment which deliberately or inadvertently dilutes the constitutional *grundnorm* and erodes constitutionalism can also extirpate a constitution. This means that in the absence of formal or informal limitations, an unlimited power of amendment can contribute to an abrogation of the constitution itself. This necessitates that the power of amendment be made subject to some limitations. There are three primary rationales supporting the argument for limiting the power of constitutional amendment. Firstly, the term 'amendment' by its very nature connotes improvement to an existing framework. It does not allow replacement or erosion. Secondly, the idea that certain principles, either intra-constitutional or supra-

constitutional, are non-derogable and form a sacrosanct part of the constitutional framework mandates that these inviolable principles be protected from volatile and capricious amendment. The third rationale is that unlimited amending power risks causing constitutional dismemberment – an amendment which is amendment in title, although substantively, it radically alters the existing constitutional framework in a manner which goes against the normative constitutional vision of what the constitution seeks to protect.

Although not all constitutions contain some form of limitation on the power of constitutional amendment, most written constitutions either have formal (explicit) limitations placed within their framework, or have informal (implicit) limitations placed upon the formal power of amendment by either judicial intervention or through excessively difficult amending procedures or cultural influences which negatively perceive amendment. The formal limitations are also of two forms – either they are supra-constitutional in scope and place limitations on amending power by prohibiting the abrogation of legal norms beyond the constitutional framework, such as principles of international law, or they are intra-constitutional and prevent the repudiation and annulment of constitutional principles or provisions that are contained within the constitution itself. Unsurprisingly, judicial review also functions as a *de-facto* limitation on the power of amendment, albeit the extent of review jurisdiction and its applicability to both the procedural and substantive aspects of an amendment is not uniform across jurisdictions and differs from one constitution to another.

It is by utilizing this information from global constitutional law jurisprudence that the Indian basic structure doctrine as an implicit limitation on constitutional amendment has been analyzed. The Constitution of India contains a flexible procedure of amendment without any formal limitations. This raises the possibility that the Indian parliament could abrogate constitutional principles and restrict or limit the rights guaranteed by the constitution. Unfortunately, these two concerns were realized soon after independence when the parliament enacted the First Amendment as an attempt to constitutionally justify its efforts to curtail the fundamental right to property in the interests of radical social reform, and prevent the judiciary from interfering through judicial review. The First Amendment added the controversial Ninth Schedule which protected legislations inserted within its ambit from judicial review, and therefore

prevented persons affected by these legislations from seeking relief. The Fourth and Seventeenth Amendments extended the scope of the Ninth Schedule and continued to reduce the judiciary's power of judicial review.

The judiciary could respond in either of two ways to these developments – either it could adopt a literal interpretation and declare the amendment valid in the absence of any textual limitations, or, it could adopt a liberal approach and declare the amendments void for encroaching upon the sacrosanct fundamental rights of property and access to justice. Interestingly, both of these approaches were adopted by the judiciary. Initially, in *Shankari Prasad* and *Sajjan Singh,* the judiciary adopted a textualist approach and showed obsequious deference to the parliament and proclaimed that the parliament did enjoy an unlimited power to amend the constitution. Conversely, merely two years after *Shankari Prasad,* the Supreme Court of India overruled its earlier position, and the ratio of *Golaknath* by a slim 6:5 majority ruled that the constitutional amendments were 'law' within the confines of Article 13(3) and therefore, the power to amend was limited by Article 13(2) which prohibits any law from infringing upon the fundamental rights.
Both of these opinions represent the extreme ends of constitutional flexibility and rigidity and represented different theoretical and jurisprudential conundrums. The first rationale which construed Article 368 as a fountain of unlimited constituent power through which the parliament wielded limitless amending power risked allowing the parliament to abrogate the constitutional principles and even replace the constitution. Pakistan and Bangladesh, who share a legal history with India and have had similar socio-cultural and historical backdrops influence the formation of their constitution have had to face the erosion of constitutionalism due to constitutional abrogation in the pursuit of power.

On the other hand, the second rationale turned made the constitution rigid and inflexible as far as the fundamental rights were concerned. Furthermore, by proclaiming amendments as law, two theoretical conundrums were born. First, since amendments were 'law', they stood on equal footing with legislations and the hierarchical relationship between amendment and constitutional provision became diluted. Second, the parliament traces its legislative power from Article which specifies that such power will be *'subject to the constitution',* yet, by proclaiming that the parliament exercises its

legislative powers for amending the constitution, a logical fallacy and inconsistency is created.

Therefore, a balanced approach became necessary. The basic structure doctrine, formulated in *Kesavananda Bharati*, inadvertently, became the balanced approach. While it granted unlimited amending power to the parliament, being in consonance with the textual contents of Article 368, it subjected this power to an implicit *constitutional basic structure* which could not be rescinded through amendment. The implication of this doctrine was that it remained consistent with the aspirations of a flexible constitution that the forefathers who drafted it had harbored, while also safeguarding the constitution from being *dismembered, rescinded, abrogated* and *replaced* through amendment. This made the doctrine a perfect instrument to foster constitutionalism since by demarcating the basic constitutional principles - the democratic, secular and federal characters of the constitution, the doctrine of separation of powers, rule of law and the power of judicial review, a part of the basic structure, they could not be changed, affected or repudiated through amendment. Although some ambiguity existed pertaining to the scope of the doctrine as well as its applicability, subsequent evolution of the doctrine in *Indira Nehru Gandhi, Minerva Mills, Waman Rao* and *I.R Coelho,* among others, consolidated the doctrine as a binding precedent and implicit limitation on the parliament's power of amendment.

The doctrine has, over the past five decades, become an indispensable part of Indian constitutional law jurisprudence. Interestingly, during this period, there has been a globalization of the doctrine, and it has been adopted within other jurisdictions as well, albeit in different capacities. While some nations, such as Belize, Tanzania and Kenya, have adopted the doctrine's tenets directly from Indian jurisprudence as an implied judicial limitation on the power of unlimited amendment, others, such as South Africa, have not formally recognized the doctrine's application within a *ratio* but have still referenced it in different capacities. Pakistan has had a confounding relationship with the doctrine, and although its judgment *Fazlul Quader Chowdhury* was an important influence for J. Mudholkar in his dissenting opinion of *Golaknath,* the doctrine isn't presently applicable within the Pakistani legal system. Bangladesh and Colombia have also adopted the doctrine, albeit in different capacities. In Bangladesh, the doctrine was initially adopted as a judicial construct, however, over time, it has been inserted into the constitution, and today enjoys constitutional legitimacy. In Colombia, the doctrine was

used as an influence by the judiciary to create its own legal principle (constitution replacement doctrine), which, arguably, has more concrete tenets vis-à-vis its applicability when compared to the basic structure doctrine.

7.2 TESTING THE HYPOTHESIS

The present study contained two hypotheses.

The first hypothesis states – *"There is an active need for limiting the powers of constitutional amendment for safeguarding constitutional supremacy and protecting it from abrogation."* The process of constitutional amendment, especially for a written constitution, is extremely important, yet, there must also be limitations placed on the power to amend. In the absence of any limits, the constitution can be repudiated and replaced and constitutional supremacy will be forced to bow down before *de-facto* parliamentary sovereignty. The term 'amendment' by its very nature implies making an improvement or change to an existing framework. Evidence from Pakistan and Bangladesh, who have had to face constitutional usurpation and abrogation through constitutional amendment, highlights the significance of placing limitations on the amending power of the parliament. Most constitutions across the world place formal limitations on the extent of amending power enjoyed by the parliament, or contain a difficult amending procedure which inadvertently limits the power of amendment. In the absence of formal limitations, reliance is placed upon informal or implied limitations on the amending power of the parliament. The basic structure doctrine itself is an attempt at informally limiting the power of amendment by citing implied limits. Therefore, the first hypothesis has been tested in affirmative on the basis of the analysis carried out.

The second hypothesis states – *"The basic structure doctrine, as an implicit limitation on constitutional amendment, is a necessary safeguard for protection for ensuring constitutional supremacy and championing constitutionalism."* The doctrine was evolved in *Kesavananda Bharati* as a means to limit the parliament's power to amend the constitution. Although the context in *Kesavananda* was relating to property rights, developments in *Indira Gandhi* and *Minerva Mills* subsequently highlighted that the doctrine's implications can become an obstruction against constitutional abrogation and repudiation. The globalization of the doctrine, wherein it has been relied upon to

invalidate amendments that threatened constitutional supremacy in Bangladesh, Pakistan, Kenya, Tanzania and Belize, as well as the influence it had on the Colombian *'constitution replacement doctrine'* which plays a similar role of preventing constitutional erosion within the Colombian legal system shows that the basic structure doctrine has had a profound impact in global constitutional law jurisprudence in upholding constitutional supremacy and championing constitutionalism. Therefore, the second hypothesis has been tested in affirmative on the basis of the analysis carried out.

7.3 SUGGESTIONS

The globalization of the doctrine as well as its hallowed presence in India are testaments to its sacrosanctity. No legal principle is perfect though, and this stands true for the basic structure doctrine as well. In this regard, the following suggestions can be made –

I. The basic structure doctrine's importance in upholding and championing constitutionalism in India and abroad cannot be doubted. Yet, in India, as with a majority of other jurisdictions where the doctrine exists, it persists as an implied limitation without formal legitimacy. This poses two risks – firstly, a larger judicial bench may invalidate the doctrine, and secondly, the judiciary may resort to whimsical application of the doctrine, thus bringing to fruition concerns of *juristocracy.* The judiciary may also change the law on amendment due to political influence or pressure, as the Honduran example has already highlighted. These issues can be addressed by inserting an amendment into the constitution legitimizing the doctrine's existence and bestowing upon it constitutional validation and protection in a manner similar to the Constitution of Bangladesh which has turned the basic structure doctrine into a formal limitation on amendment.

II. The *Kesavananda Bharati judgment* had eleven separate judgments. The majority opinion in the 7:6 judgment used two terms – *basic structure* and *basic features.* While J. HR Khanna relied upon the former term to refer to the constitutional structure as a whole and argue that the only limitation on the amending power of the parliament was that the *"basic institutional pattern of the constitution"* could not be changed, the other judges of the majority opinion,

including CJ Sikri in his leading opinion, as well as some others of the minority opinion, delineated *basic features* that they deemed inviolable. Although these *basic features* represented constitutional principles rather than individual constitutional provisions, the semantic difference of the two phrases has since become a source of jurisprudential ambiguity and scholarly criticism. This issue has not been conclusively addressed by the judiciary even after five decades, and a proper judicial explanation of these two phrases and their applicability will undoubtedly lead to greater clarity in the doctrine's application.

III. Analyzing the constitutionality of constitutional amendments after their insertion into the constitution, notwithstanding the degree of scrutiny, gives rise to a conundrum. An amendment, after its insertion, becomes a part of the constitutional framework, and adjudging the constitutionality of an amendment creates a hierarchical division among constitutional provisions, with original provisions occupying a higher tier than amendments. This leads to a logical inconsistency since no such demarcation is envisaged by the constitution. To overcome this conundrum, and also to ensure that amendments which seek to *dismember*, *repudiate* or *replace* the constitution can be subjected to review, the Romanian model may be adopted. It allows only *a priori* review of amendments. In India, a buffer period can be introduced between the enactment of an amendment and its insertion into the constitution, during which its constitutionality can be challenged. The amendment can only become a part of the constitutional framework after such period has ended without any challenge, or if challenged, once it has been held to be constitutionally valid after subjecting it to basic structure review.

IV. The doctrine is rooted in judicial decision-making and therefore, the fluidity of judicial of judicial opinion entails that there is no fixed scope within which the doctrine shall function. It means that the doctrine's scope can be expanded to include any and every constitutional provision within its ambit, ultimately risking dilution of the doctrine's significance if mundane constitutional principles are transformed into entrenched principles through inclusion within the doctrine. To address this issue, the Constitution of India can adopt a variation of the Russian model which demarcates certain constitutional chapters as

unamendable. In India, instead of chapters, certain constitutional principles which are sacrosanct to the Indian Constitution can be demarcated as forming the constitutional basic structure

V. The basic structure doctrine itself does not have any limitations over its application. The only limitation is judicial restraint. Therefore, to ensure the sacrosanctity of the doctrine is maintained, the judiciary must exercise utmost restraint over its use and only refer to it when constitutional abuse is clear. Furthermore, on account of the significance of the subject-matter that the doctrine deals with, the judiciary can evolve a convention that the doctrine can only be referred to a bench with a strength not less than a constitutional bench, with this rule being applicable to both high courts and the Supreme Court of India. This will reduce nonchalant reference to the doctrine and ensure it is only referenced in matters of utmost importance.

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