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THE DOCTRINE OF BASIC STRUCTURE AND THE LIMITS OF CONSTITUENT POWER: JURISPRUDENTIAL EVOLUTION, THE DIALECTIC OF SOVEREIGNTY, AND THE PRESERVATION OF CONSTITUTIONAL IDENTITY

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Abstract

The doctrine of basic structure represents one of the most consequential conceptual innovations in modern comparative constitutional law. Formulated by the Supreme Court of India in the historic decision of Kesavananda Bharati v. State of Kerala (1973), the doctrine resolved a fierce constitutional battle between parliamentary supremacy and judicial review by establishing that the constituent power to amend the Constitution under Article 368 is inherently limited. While Parliament possesses broad authority to amend, modify, or repeal provisions of the constitutional text to accommodate socio-economic realities, it cannot alter, destroy, or abrogate the basic structureor core identity of the organic document. This paper presents an exhaustive doctrinal and theoretical inquiry into the origin, evolution, and jurisprudential legitimacy of the basic structure doctrine. It traces the early judicial tussle across Shankari Prasad (1951), Sajjan Singh (1965), and the radical overcorrection in Golak Nath (1967), analyzing how the philosophical inputs of German constitutional jurist Dietrich Conrad informed Justice H.R. Khanna decisive formulation. The paper critically interrogates the theoretical tension between original constituent power (pouvoir constituant) and derived amendatory power (pouvoir constituant dérivé), demonstrating that a constituted authority created by the Constitution cannot subvert the constitutional foundation that grants it life. Furthermore, the study explores the subsequent consolidation of the doctrine in landmark crises: the dismantling of electoral autocracy in Indira Nehru Gandhi (1975), the defense of limited amendatory power in Minerva Mills (1980), the protection of judicial independence in the NJAC Case (2015), and the application to federalism and secularism in S.R. Bommai (1994). Finally, addressing enduring critiques concerning counter-majoritarianism, textual vagueness, and judicial supremacism, the paper evaluates the transnational migration of the doctrine across South Asia, Africa, and Latin America, establishing that the doctrine of basic structure serves as the ultimate institutional guardian of constitutional democracy and the Rule of Law.

Keywords: ***Basic Structure Doctrine, Constituent Power, Article 368, Kesavananda Bharati, Judicial Review, Constitutional Identity, Separation of Powers, Rule of Law, Minerva Mills, Unconstitutional Constitutional Amendments.***

1. INTRODUCTION: THE PARADOX OF CONSTITUTIONAL AMENDABILITY

Every written constitution designed to endure across generations faces an existential constitutional paradox: it must balance stability with mutability. If a constitutional text is rendered rigidly immutable, incapable of adapting to changing socio-economic conditions, technological upheavals, and evolving moral standards, it risks violent extra-legal overthrow or obsolescence. As Thomas Jefferson famously cautioned, the earth belongs to the living and not to the dead, and no generation has the moral authority to bind succeeding generations forever. Conversely, if a constitution is made completely fluid and vulnerable to the transient whims of ordinary legislative majorities, it ceases to function as supreme law. It degenerates into a convenient instrument of partisan dominance, paving the path for electoral authoritarianism and the dismantling of democratic institutions from within.

In post-independence India, this fundamental dilemma was framed within the battle over the scope of 'constituent power' under Article 368 of the Constitution. Did the power to amend the Constitution encompass the unlimited authority to rewrite, replace, or abrogate the entire constitutional order, including its democratic foundations? Or was the power of amendment inherently limited by the foundational values, institutional architecture, and normative commitments of the Republic?

The answer was definitively delivered on April 24, 1973, by the Supreme Court of India in Kesavananda Bharati v. State of Kerala. By a razor-thin majority of 7 to 6, a thirteen-judge Constitution Bench formulated the 'Doctrine of Basic Structure.' The Court ruled that while Parliament's constituent power under Article 368 is broad enough to amend any provision of the Constitution, including Fundamental Rights, that power does not extend to damaging, destroying, or altering the basic features or core identity of the organic document. This paper undertakes an extensive doctrinal and jurisprudential analysis of this doctrine, evaluating its historical development, theoretical foundations, landmark applications, and enduring global relevance in constitutional adjudication.

2. THE EARLY TUSSLE: PARLIAMENTARY SUPREMACY VERSUS FUNDAMENTAL RIGHTS

A. The Literalist Deference: Shankari Prasad and Sajjan Singh

The first phase of the Indian amendatory debate arose from the newly independent nation's urgent drive for agrarian reform and the abolition of the feudal Zamindari system. When high courts invalidated land reform legislation on the ground of violating the fundamental right to property under Article 31, Parliament enacted the Constitution (First Amendment) Act, 1951. This amendment introduced Articles 31A and 31B, alongside the Ninth Schedule, creating a constitutional mechanism to shield designated agrarian statutes from judicial review under Part III.

In Sri Shankari Prasad Singh Deo v. Union of India, AIR 1951 SC 458, a five-judge Constitution Bench unanimously upheld the First Amendment. Chief Justice Patanjali Sastri drew a categorical distinction between 'ordinary legislative power' exercised under Article 245/246 and 'constituent power' exercised under Article 368. The Court held that the restrictive phrase 'law' in Article 13(2)—which prohibits the State from making any law taking away or abridging Fundamental Rights—referred exclusively to ordinary statutory enactments and did not encompass constitutional amendments. Consequently, Parliament was held to possess unlimited plenary power to amend any part of the Constitution, including Part III.

This deferential jurisprudence was reiterated fourteen years later in Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845, where the Constitution (Seventeenth Amendment) Act, 1964 was challenged. Chief Justice P.B. Gajendragadkar, speaking for the majority, reaffirmed the ratio of Shankari Prasad. However, Sajjan Singh became historic because of the dissenting doubts articulated by Justice M. Hidayatullah and Justice J.R. Mudholkar.

Justice Mudholkar presciently asked whether the

Constitution did not possess certain basic features that could never be altered by an amendment. He questioned whether Parliament could alter the republican character of the State or abolish judicial review, noting that every written constitution contains foundational presuppositions that cannot be uprooted by a derived authority. This conceptual seed, drawn partly from the Supreme Court of Pakistan's reasoning in Fazlul Quader Chowdhry v. Mohd. Abdul Haque (1963), laid the conceptual foundation for what would later become the basic structure doctrine.

B. The Radical Swing to Immutability: I.C. Golak Nath (1967)

The judicial pendulum swung decisively in I.C. Golak Nath v. State of Punjab, AIR 1967 SC 1643. Confronted with successive constitutional amendments expanding the Ninth Schedule, an eleven-judge Constitution Bench overruled Shankari Prasad and Sajjan Singh by a 6 to 5 majority. Chief Justice K. Subba Rao held that Article 368 merely provided the procedure for amendment and did not confer substantive amendatory power. The power to amend was derived from the residuary legislative entry (Entry 97, List I, Seventh Schedule). Hence, an amendment was 'law' within the meaning of Article 13(2).

The Golak Nath Court concluded that Fundamental Rights in Part III were transcendental and primordial, placing them beyond the reach of constitutional amendment. While the decision was animated by a genuine desire to safeguard civil liberties, its doctrinal reasoning was deeply problematic. By categorizing an Article 368 amendment as ordinary law and declaring Part III completely immutable, Golak Nath created an unyielding constitutional deadlock. It deprived Parliament of the flexibility to pursue legitimate socialist land redistributions and economic reforms, inviting a fierce political and institutional confrontation.

3. THE WATERSHED: KESAVANANDA BHARATI (1973) AND THE BIRTH OF THE DOCTRINE

A. The 24th, 25th, and 29th Amendments and the Political Showdown

In response to Golak Nath and the bank nationalization (Rustom Cavasjee Cooper, 1970) and Privy Purses (Madhav Rao Scindia, 1971) decisions, Prime Minister Indira Gandhi's government enacted sweeping constitutional amendments. The Twenty-Fourth Amendment amended Article 13 and Article 368, expressly asserting that Article 13 did not apply to amendments and that Parliament exercised constituent power. The Twenty-Fifth Amendment curtailed the right to property and introduced Article 31C, giving primacy to Directive Principles under Articles 39(b) and (c) over Fundamental Rights under Articles 14, 19, and 31, while precluding judicial review over whether an enacted law actually gave effect to such policy. The Twenty-Ninth Amendment placed further land reform laws into the Ninth Schedule.

These amendments were directly challenged by His Holiness Kesavananda Bharati Sripadagalvaru, the head of the Edneer Mutt in Kerala, represented by the legendary jurist Nani Palkhivala. The case was heard by a thirteen-judge bench over sixty-eight sitting days, resulting in an extraordinary 703-page judgment comprising eleven separate opinions.

B. Justice H.R. Khanna and the Doctrinal Articulation

The Supreme Court in Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, unanimously overruled Golak Nath, holding that the power to amend was indeed substantive constituent power contained within Article 368, and that constitutional amendments were not ordinary 'laws' under Article 13(2). Consequently, Parliament possessed the power to amend any provision of the Constitution, including Part III.

However, the majority held that the word 'amendment' in Article 368 carried an intrinsic, semantic limitation. The word 'amend' means to improve, modify, or adjust; it does not mean to abrogate, annihilate, or replace the existing Constitution with a new framework. Delivering the critical majority-forming opinion, Justice H.R. Khanna observed:

> *"Amendment of the Constitution necessarily contemplates that the Constitution has not to be abrogated but only had to undergo changes. The word 'amendment' postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed*

> *and done to death; it must continue to exist along with the new changes... The power of amendment under Article 368 does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution."*

Applying this test, the Court upheld the Twenty-Fourth Amendment and the first part of Article 31C, but struck down the unconstitutional second part of Article 31C ('and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy'), affirming that judicial review forms an inviolable part of the basic structure.

C. The Transnational Influence: Dietrich Conrad's Lecture

An intriguing and vital historical dimension of the basic structure doctrine is its comparative intellectual heritage. In February 1965, Dr. Dietrich Conrad, Head of the Law Department at the South Asia Institute of the University of Heidelberg, delivered a lecture at Banaras Hindu University titled 'Limitation of Amendment Procedures and the Constituent Power.' Influenced by the tragic collapse of the Weimar Republic—where Adolf Hitler utilized the formal amendatory procedures of Article 76 to dismantle democracy from within—Conrad argued that any power to amend a constitution is subordinate to the original constituent authority that created the document.

Conrad posited that a power of amendment cannot be utilized to commit constitutional suicide. He illustrated this through hypothetical questions: Could Parliament, by a two-thirds majority under Article 368, abolish the Indian Republic and declare a monarchy? Could it cede sovereignty over a state to a foreign power? Could it permanently abolish Parliament itself? Nani Palkhivala incorporated Conrad's thesis into his arguments, providing the conceptual bridge that shaped the majority's formulation of the basic structure test.

4. THEORETICAL DISSECTION: POUVOIR CONSTITUANT VS. POUVOIR CONSTITUANT DÉRIVÉ

To comprehend the jurisprudential validity of the basic structure doctrine, it is essential to analyze the distinction between original constituent power and derived constituent power, first articulated by Abbé Sieyès during the French Revolution:

1. Original Constituent Power (Pouvoir Constituant Originaire): This is the primordial, sovereign power exercised by the people or an extraordinary constituent assembly (such as the Constituent Assembly of India between 1946 and 1949). It is extra-legal, revolutionary, and unbounded by prior positive constitutional law. It creates the Constitution.

2. Derived/Constituted Amendatory Power (Pouvoir Constituant Dérivé): This is a secondary, derived power established within the constitutional text itself (Article 368). It is an intra-constitutional institution created by the constituent assembly. Because it is a creature of the Constitution, it cannot possess sovereign omnipotence.

A fundamental rule of constitutional logic dictates that a creature of the Constitution cannot elevate itself above the Constitution. When Parliament acts under Article 368, it does not function as the original sovereign people of India; it functions as a constituted body exercising delegated amendatory powers bounded by the framework of the document. To permit a derived authority to destroy the foundational values of the Constitution is to allow the agent to supersede the principal. Therefore, the doctrine of basic structure does not restrict the original sovereign power of the people; it merely enforces the inherent limits of derived amendatory power.

5. CONSOLIDATION THROUGH CRISIS: LANDMARK APPLICATIONS OF THE DOCTRINE

A. The Defense of Democracy: Indira Nehru Gandhi v. Raj Narain (1975)

The first practical test of the basic structure doctrine occurred during the national emergency in Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299. After the Allahabad High Court invalidated Prime Minister Indira Gandhi's election, Parliament enacted the Constitution (Thirty-Ninth Amendment) Act, 1975. The amendment inserted Article 329A(4), which declared that the election of the Prime Minister and the Speaker of the Lok Sabha could not be challenged before any court of law, that all pending election petitions stood abated, and that the election was deemed valid notwithstanding

any judicial finding.

A unanimous five-judge Constitution Bench struck down Article 329A(4) as an unconstitutional assault on the basic structure. The Court held that democracy, free and fair elections, the Rule of Law, and the separation of powers form inviolable components of the basic framework. Article 329A(4) attempted to decide a judicial dispute through an amendatory decree, creating an absolute immunity incompatible with republican equality. The decision proved that the basic structure doctrine was not a mere theoretical abstraction, but an indispensable judicial shield against totalitarianism.

B. Restoring the Equilibrium: Minerva Mills Ltd. v. Union of India (1980)

Following the Emergency, Parliament passed the Constitution (Forty-Second Amendment) Act, 1976. Section 55 inserted Clauses (4) and (5) into Article 368. Clause (4) barred any court from questioning a constitutional amendment on any ground, while Clause (5) declared that there were 'no limitations whatever on the constituent power of Parliament.'

In Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625, the Supreme Court struck down Clauses (4) and (5) of Article 368. Chief Justice Y.V. Chandrachud authored an eloquent defense of limited amendatory power:

> *"The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one... The limited amending power is one of the basic features of Indian Constitution and therefore the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot make that power illimitable."*

Minerva Mills also reaffirmed the foundational harmony between Fundamental Rights and Directive Principles, memorably characterizing them as 'the two wheels of the chariot' of the Constitution.

C. Expanding the Horizon: Federalism, Secularism, and Judicial Independence

Over subsequent decades, the Supreme Court expanded the catalog of basic features to meet emerging constitutional crises:

1. Secularism and Federalism: In S.R. Bommai v. Union of India, (1994) 3 SCC 1, a nine-judge bench held that Secularism and Federalism are essential features of the basic structure. Consequently, the dismissal of state governments that pursued communal and anti-secular policies was upheld under Article 356.
2. Inviolability of High Court and Supreme Court Review: In L. Chandra Kumar v. Union of India, (1997) 3 SCC 261, the Court struck down statutory exclusions of writ jurisdiction under Articles 226 and 32, affirming that judicial review over administrative action is part of the basic structure.
3. The Ninth Schedule Review: In I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1, a unanimous nine-judge bench ruled that laws placed in the Ninth Schedule after April 24, 1973 do not enjoy blanket immunity. If a Ninth Schedule statute violates Fundamental Rights in a manner that damages the basic structure, it will be struck down.
4. **Primacy of Judicial Independence:** In Supreme Court Advocates-on-Record Association v. Union of India (NJAC Case), (2016) 5 SCC 1, the Court struck down the Constitution (Ninety-Ninth Amendment) Act, 2014, holding that judicial primacy in appointments forms an integral part of judicial independence, which is an inviolable facet of the basic structure.

6. CRITICAL CHALLENGES: THE COUNTER-MAJORITARIAN DILEMMA AND JUDICIAL SUPREMACISM

Despite its status as the guardian of Indian democracy, the basic structure doctrine has faced sustained academic, political, and jurisprudential critique across three primary dimensions:

A. The Counter-Majoritarian Difficulty and Democratic Legitimacy

The primary theoretical critique against the doctrine is the counter-majoritarian difficulty. In a constitutional democracy, constitutional amendments require a super-majority (two-thirds of members present and voting in each House, often with ratification by at least half the state legislatures). How can an unelected, unaccountable judiciary invalidate an amendment enacted by the elected representatives of hundreds of millions of citizens based on unwritten constitutional principles?

Critics argue that the doctrine elevates the judiciary into a continuous third chamber of the

legislature, transforming constitutional supremacy into judicial supremacism. The striking down of the NJAC amendment—passed unanimously by both Houses of Parliament and ratified by twenty state assemblies—intensified accusations that the Court utilizes the doctrine to insulate its own institutional prerogatives from democratic accountability.

B. Textual Vagueness and Lack of an Exhaustive Catalog

Unlike the German Basic Law (Article 79(3)), which contains an explicit 'eternity clause' (Ewigkeitsklausel) cataloging non-amendable provisions, the Indian Constitution contains no textual mention of basic structure. Furthermore, the Supreme Court has steadfastly refused to provide an exhaustive definition or closed catalog of what constitutes the basic structure. The determination is made on a case-by-case basis.

Legal scholars argue that this open-ended elasticity creates legal uncertainty. An unwritten standard that expands or contracts based on judicial composition risks degenerating into subjective judicial legislation, allowing judges to strike down policies they personally dislike under the mantle of basic structure.

7. COMPARATIVE CONSTITUTIONAL MIGRATION: THE GLOBAL IMPACT OF AN INDIC JURISPRUDENCE

Despite ongoing theoretical controversies, the doctrine of basic structure has emerged as India's most significant jurisprudential export to global public law. It dismantled the traditional British conception that an amendment to a constitution can never be legally unconstitutional.

Courts across multiple jurisdictions have adopted or adapted the doctrine of unconstitutional constitutional amendments:

1. Bangladesh: In Anwar Hossain Chowdhary v. Bangladesh (1989), the Supreme Court of Bangladesh adopted the basic structure doctrine to strike down the Eighth Amendment, which had decentralized the High Court Division into permanent regional benches, holding that the unitary character of the republic was non-amendable.

2. Pakistan: After decades of ambivalence, the Supreme Court of Pakistan in District Bar Association, Rawalpindi v. Federation of Pakistan (2015) formally accepted that the Constitution of Pakistan possesses a basic structure that limits parliamentary amendatory power.

3. Kenya: In the landmark Building Bridges Initiative (BBI) judgment (President of the Republic of Kenya v. Ndii, 2021), the High Court, Court of Appeal, and Supreme Court of Kenya explicitly relied on Kesavananda Bharati to strike down sweeping constitutional amendments initiated by the executive, affirming that primary constituent power belongs solely to the people.

4. Comparative Constitutional Theory: Global constitutional scholars, including Yaniv Roznai, Sujit Choudhry, and Bruce Ackerman, now recognize the doctrine as an essential comparative mechanism preventing 'autocratic legalism'—where authoritarian regimes hijack formal amendatory procedures to extinguish democracy.

8. CONCLUSION: THE ENDURING GUARDIAN OF CONSTITUTIONAL IDENTITY

The doctrine of basic structure represents the ultimate triumph of constitutionalism over majoritarianism. It established that a constitution is not a sterile piece of paper to be rewritten by temporary legislative majorities, but an organic covenant embodying foundational ideals: democracy, secularism, the Rule of Law, equality, and human dignity.

While legitimate concerns regarding judicial overreach and interpretive elasticity must be vigilantly addressed, the historical record demonstrates that without the basic structure doctrine, India's constitutional democracy would have succumbed to authoritarian dismantling during the dark hours of the mid-1970s. By preserving the delicate equilibrium between parliamentary responsiveness and constitutional permanence, the doctrine ensures that while the branches of the constitutional tree may grow and adapt, its roots remain inviolable.

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