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# CONSTITUTIONAL AMENDMENTS AND THE BASIC STRUCTURE DOCTRINE: A COMPARATIVE PERSPECTIVE

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## **ABSTRACT**

Can a constitution be changed in a way that eviscerates its substance? The "introductory structure" doctrine responds by relating implicit or unequivocal boundaries on correction authority. First developed in India in 1973 and latterly scattered (and disputed) in a number of other authorities, the doctrine has surfaced as a leading point of transnational indigenous education on unamendability, indigenous identity, and judicial review. This composition suggests a relative frame to examine indigenous correction rules and essential limits; maps the development, connection, and spread of the introductory structure doctrine; and discusses how Bangladesh's, Pakistan's, Malaysia's, Kenya's, Germany's, and Colombia's courts have acclimated, or fought it. With the patient strain on popular choice and constitutionalism, the paper assesses doctrinal apologies, popular-legality issues, and institutional design possibilities. It concludes with policy-applicable suggestions to constitution-makers as well as judges considering espousing or developing the doctrine.

**Keywords:** indigenous correction, unamendability, introductory structure doctrine, indigenous identity, judicial review, eternity clauses, popular legality, separation of powers

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## 1. INTRODUCTION

Constitutions are both higher law and living frameworks. Amendment rules mediate that duality: too rigid, and constitutions ossify; too flexible, and their core commitments risk erosion. Since the 1970s, a powerful answer to this problem has circulated under the label “basic structure” doctrine: legislatures may amend, but they may not destroy the constitution’s identity.<sup>1</sup> In India, the doctrine arose as a judicial response to sweeping constitutional changes; elsewhere, courts, drafter, and scholars have adapted it to local contexts, sometimes embracing it, sometimes rejecting it, and often reimagining it.<sup>2</sup>

This paper offers a 360° treatment:

- a) a precise vocabulary for talking about amendment power;
- b) a doctrinal and institutional map across jurisdictions; and
- c) concrete guidance for reformers and judges. Throughout, the analysis foregrounds three persistent tensions:
  1. constituent vs. constituted power;
  2. constitutionalism vs. majoritarianism; and
  3. courts’ role in safeguarding constitutional identity.

## 2. Concepts, Terms, and a Comparative Framework

**Amendment power.** The power to alter the indigenous text through procedures specified in the constitution. generally appertained to as “constituted” or “secondary element” power.<sup>3</sup>

**Constituent power.** The original power of “the people” to adopt or to replace a constitution. To be discerned from standard correction power.

**Unconstitutional indigenous correction.** indigenous correction passed through formal processes that still violate substantial or structural limitations — express (e.g., eternity clauses) or implicit (e.g., introductory structure).

**Eternity clauses.** Clauses that affirmatively set out specific indigenous values to be unamendable (e.g., mortal quality, popular order, federalism). These render limitations textually conspicuous.

**Basic structure doctrine.** A judge-made principle that the correction power can’t be employed to “vacate” or “destroy” the constitution’s structural features — alternatively

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<sup>1</sup> Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

<sup>2</sup> Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017) 3

<sup>3</sup> Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019) 12.

appertained to as its" introductory structure,"" essential features," or" indigenous identity."<sup>4</sup>

**Comparative dimensions.** Five axes are employed in this paper to compare correction administrations Source of limit (unambiguous clause vs. implicit doctrine).

1. Judicial station (weak, dialogic, or strong correction review).
2. Force of guarded attributes (open- concluded or listed).
3. Sensor and test (does the revision" damage or destroy,"" cover," or" dismember" the constitution?)
4. Remedial design (invalidate correction in whole; ramify offending sections; suspend operation; contend on vote orre- enactment).

### **3. India: Birth, Consolidation, and Calibration of the Basic Structure**

#### **Doctrine**

**Origins (1973).** In *Kesavanda Bharati v. State of Kerala* (1973), a 13-judge Supreme Court of India bench expressed the view that Parliament's Article 368 amending power does not extend to eliminating the constitution's "basic structure." There was no exhaustive list, but some of the fundamental features include the primacy of the constitution, republican and democratic nature of the government, secularism, separation of powers, and judicial review.<sup>5</sup>

**Clarifying the doctrine (1980).** *Minerva Mills v. Union of India* (1980) struck down amendments restricting judicial review and sought to enlarge Parliament's amending power to an unlimited one. The Court reasserted that limited amending power cannot be utilized for an unlimited one and judicial review itself is a part of the basic structure.<sup>6</sup>

**Ninth Schedule and rights (2007).** *I.R. Coelho v. State of Tamil Nadu* (2007) brought the post-24 April 1973 laws enshrined in the Ninth Schedule (immunity shield) within the ambit of basic structure review, so that "immunity by placement" could not be resorted to to override fundamental rights or basic structure.<sup>7</sup>

**Judicial appointments (2015).** In *Supreme Court Advocates-on-Record Association v. Union of India* (2015) (the NJAC case), the Court invalidated the 99th Amendment and the NJAC Act

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<sup>4</sup> *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

<sup>5</sup> *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

<sup>6</sup> *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789.

<sup>7</sup> *I.R. Coelho v. State of Tamil Nadu*, AIR 2007 SC 861.

on the ground of offending the basic structure by undermining judicial autonomy and the preeminence of the judiciary in appointments.<sup>8</sup>

**Methodology and tests.** Indian courts use a "damage/destroy" question, which frequently combines structural analysis (division of powers; federalism), rights-based rationality (kernel of basic rights), and institutional logic (judicial review and autonomy) to decide if an amendment oversteps the basic structure line.<sup>9</sup>

## 4. Diffusion and Divergence: Comparative Case Studies

### 4.1 Bangladesh: Adoption and Expansion

Bangladesh's Supreme Court adopted a variant of the Indian doctrine in *Anwar Hossain Chowdhury v. Bangladesh* (1989) (the Eighth Amendment case). The Court invalidated the decentralization of the High Court's jurisdiction as violating the constitution's basic features— independence of the judiciary, unitary character, and separation of powers.<sup>10</sup> Subsequent cases reviewed amendments affecting democratic order and institutional design, extending the doctrine's reach<sup>11</sup>. In effect, Bangladesh constitutionalized the idea that amendment power is limited by implicit fundamentals

**Key features protected:** independence of the judiciary; unitary character of the state; rule of law; democratic order.

**Institutional posture:** strong-form judicial review of amendments, with willingness to invalidate entire amendments when core features are impaired

### 4.2 Pakistan: From Skepticism to "Salient Features"

Pakistan's justice progressed from suspicion to limited acceptance of substantial constraints. before opinions doubted the connection of introductory structure.<sup>12</sup> In *District Bar Association, Rawalpindi v. Federation of Pakistan* (2015) (action in respect of the 18th and 21st amendments), a shattered Supreme Court admired that the constitution has "salient features" (e.g., executive democracy, federalism, and independence of the bar) and that indigenous amendments could be examined for infringing them although the maturity passed

<sup>8</sup> *Supreme Court Advocates-on-Record Association v. Union of India*, AIR 2016 SC 117.

<sup>9</sup> S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (2nd edn, Oxford University Press 2002) 223.

<sup>10</sup> *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1 (Supreme Court of Bangladesh).

<sup>11</sup> *Secretary, Ministry of Finance v. Masdar Hossain*, 52 DLR (AD) (1999).

<sup>12</sup> *Wukala Mahaz Barai Tahafuz Dastoor v. Federation of Pakistan*, PLD 1998 SC 1263.

a commercial borrowing of India's doctrine<sup>13</sup>. The outgrowth is a crossbred amendments are subject to review for transgressing some fundamental lines, but the canon and degree of review are disputed.<sup>14</sup>

Essential features vindicated (questioned):

Executive democracy, federalism, Islamic vittles, judicial independence. Institutional station split Court; expansive review of amendments is present but is exactly cabined and politically charged.

**4.3 Malaysia: Basic Structure through Rights and Judicial Power**

Malaysia's Federal Court has articulated an implicit basic structure constraint, most prominently in *Sivarasa Rasiyah v. Badan Peguam Malaysia* (2010), where the Court suggested that rights in Part II and core structural commitments form part of the constitution's basic fabric.<sup>15</sup> Later decisions have strengthened the judiciary's role in safeguarding constitutional supremacy and judicial power.<sup>16</sup> Malaysian jurisprudence thus folds basic structure reasoning into rights adjudication and separation-of-powers analysis, without an explicit eternity clause. Key features protected: fundamental liberties (Part II), judicial power and review, constitutional supremacy. Institutional posture: growing acceptance of implicit limits; dialogic but firm review when core judicial or rights guarantees are at stake.

**4.4 Kenya: The BBI Litigation and the Limits of Transplant**

In the " Building islets Initiative "( BBI) action, Kenya's High Court( 2021) and Court of Appeal( 2021) embraced a interpretation of introductory structure limits, holding that certain transformative features of the 2010 Constitution could be altered only by the " primary constituent power " via a process more demanding than Composition 257's popular action.<sup>17</sup> In 2022, still, the Supreme Court of Kenya rejected the direct connection of the introductory structure doctrine, while leaving open questions about qualitative limits and the distinction between correction and indigenious "dismemberment."<sup>18</sup> Kenya's experience illustrates both

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<sup>13</sup> District Bar Association, Rawalpindi v. Federation of Pakistan, PLD 2015 SC 401.

<sup>14</sup> Moeen Cheema, "Judicial Review of Constitutional Amendments in Pakistan: Between Judicial Creativity and Constitutional Legitimacy" (2015) 13 International Journal of Constitutional Law 395.

<sup>15</sup> *Sivarasa Rasiyah v. Badan Peguam Malaysia*, [2010] 3 MLJ 333 (Federal Court of Malaysia).

<sup>16</sup> *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat*, [2017] 5 MLJ 526; *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak*, [2018] 1 MLJ 545.

<sup>17</sup> *David Ndi & Others v. Attorney General & Others* [2021] eKLR (High Court of Kenya); *Attorney General & Others v. David Ndi & Others* [2021] eKLR (Court of Appeal of Kenya).

<sup>18</sup> *Attorney General & Others v. David Ndi & Others* [2022] eKLR (Supreme Court of Kenya).

the attraction of implicit limits in transformative constitutions and the institution.

#### **4.5 South Africa: Transformative Constitutionalism without Basic Structure**

South Africa's Constitution of 1996 lacks an express eternity clause, nor has its indigenous Court espoused a introductory structure doctrine formally. The Court rather insists on transformative constitutionalism — adherence to social justice, equivalency, and popular engagement.<sup>19</sup> In instrument of the Constitution of the Republic of South Africa (1996), the Court considered whether the new Constitution met 34 agreed indigenous principles, and, in effect, placed it under an external test of legality.<sup>20</sup> Although this was a special transitional provision, it served to reiterate that some abecedarian principles are politically hardwired. latterly justice, including *United Democratic Movement v. President of the Republic of South Africa* (2002) (the bottom-crossing case), exhibits a concern with indigenous integrity, but the Court has nestled down from overt constraints upon correction power.<sup>21</sup> Rather, it uses proportionality and review grounded on rights, counting on the indigenous textbook's strong Bill of Rights and settled correction procedures involving supermajorities and parochial concurrence.

Key features protected (indirectly): rule of law, multiparty democracy, rights-based order, separation of powers.

Institutional posture: no explicit basic structure doctrine, but strong rights enforcement and participatory constitutional culture serve a similar function.

#### **4.6 Turkey and Hungary: Backsliding and Resistance to Judicial Limits**

Turkey and Hungary illustrate the way in which amendment rules and judicial responses are embedded with authoritarian backsliding.

Turkey. The 1982 Turkish Constitution contains explicit unamendable articles, e.g., the republican nature of the state, secularism, and indivisibility of the state (Articles 1–3).<sup>22</sup> Constitutional reforms throughout the 2000s and 2010s, ratified largely by referendum, have transferred power towards the executive. In *Anayasa Mahkemesi* case law, Turkey's Constitutional Court has invalidated amendments that are inconsistent with unamendable ones (e.g., the 2008 headscarf amendment).<sup>23</sup> Government party political hegemony has stifled

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<sup>19</sup> Karl Klare, “Legal Culture and Transformative Constitutionalism” (1998) 14 *South African Journal on Human Rights* 146.

<sup>20</sup> *Certification of the Constitution of the Republic of South Africa, 1996* (First Certification Judgment), 1996 (4) SA 744 (CC).

<sup>21</sup> *United Democratic Movement v. President of the Republic of South Africa* 2003 (1) SA 495 (CC).

<sup>22</sup> *Constitution of the Republic of Turkey 1982, arts 1–3*.

<sup>23</sup> *Anayasa Mahkemesi (Turkish Constitutional Court), Judgment E.2008/16, K.2008/116 (5 June 2008) (Headscarf Case)*.

the bite of the doctrine nonetheless.

Hungary. Hungary's Fundamental Law of 2011 allows for wide-ranging amendments beyond the remit of meaningful judicial review of substance. The Constitutional Court initially defied substantive review of amendments on grounds of jurisdictional lack.

The Court then, in post-2012 decisions, did begin to look towards "constitutional identity" but did not invalidate amendments. Such reluctance has enabled wide-reaching changes undermining judicial autonomy, media freedom, and checks on executive authority. The Hungarian experience best demonstrates the price of a shortage of or inadequate limitations on amendment power in weak democracies.<sup>24</sup>

Features that are at risk: judicial independence, separation of powers, secularism (Turkey), rule of law (Hungary).

## 5. Normative Debates: Democracy, Judicial Review, and Constitutional Identity

**Institutional posture:** Turkey—formal eternity clauses with partial enforcement; Hungary—no effective substantive review, illustrating judicial abdication.

Debates: Expanded Considerations

Beyond democracy and constitutional identity, additional debates have emerged in the comparative literature:

**Global diffusion vs. local adaptation.** While India's doctrine inspired many, jurisdictions adapt differently. South Africa's rights culture, Turkey's eternity clauses, and Colombia's substitution doctrine reflect different design choices rooted in local political contexts.

**Constitutional resilience.** Basic structure doctrines are tools of resilience, but overuse risks judicial overreach. Underuse, however, can enable authoritarian capture.

**Popular sovereignty.** Some scholars argue that eternity clauses or implicit doctrines actually protect the "people's will" in its deeper, enduring sense, rather than transient majorities.

**Comparative methodology.** Courts cite each other—India, Bangladesh, Kenya, Colombia—in transnational dialogue, showing how constitutional identity is a global conversation

## 6. Institutional Design: Choosing and Tailoring Limits on Amendments

Institutional design determines whether a constitution remains flexible or vulnerable to erosion.

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<sup>24</sup> Gábor Halmai, "The Hungarian Constitutional Court and Constitutional Identity" (2018) 15 *German Law Journal* 23.

Countries espousing limits on correction powers must precisely calibrate between strictness and inflexibility.

Pivotal design variables: unambiguous vs. implicit limits. Germany's eternity clause provides clarity, while India's implicit doctrine offers strictness but also invites judicial creativity.

Judicial review: Strong courts (India, Colombia) can apply substantial limits, but weak or captured courts (Hungary, Turkey) may abnegate responsibility.

Procedural hurdles: Supermajority thresholds, bicameral blessings, or blackballs can guard against flash majorities.

Tiered amendments: Some constitutions allow ordinary amendments but cover "eternal" clauses through advanced hurdles, balancing inflexibility and severity.

Institutional assignments: excessively rigid rules risk locking constitutions in time, while unrestrained correction powers risk indigenous death by a thousand cuts. adapted safeguards should reflect political culture, judicial capacity, and nonfictional experience.

## **7. Lessons Learned and Policy Recommendations**

Comparative analysis provides valuable lessons:

Context is everything: Taking the Indian model wholesale will not work as well as making adjustments for local contexts.

1. Balance flexibility and identity: Constitutions need to enable adaptation while safeguarding core values.
2. Enforce courts without overstepping bounds: Judicial enforcement is required but must be applied with restraint in order to preserve legitimacy.
3. Develop civic culture: Institutional resilience ultimately depends upon the public commitment to constitutionalism, not explicitly enshrined rules.
4. Institutional protections: Tiered processes, amendable participation, and transparent unamendable principles can enhance resilience.
5. Policy guidance: Constitution-makers ought to entrench fundamental principles (democracy, rights, separation of powers) by way of either express eternity clauses or judiciously calibrated doctrines of the judiciary. The judiciary must have a principle-based but restrained approach towards defending constitutional identity while upholding democratic space.

## **8. Conclusion**

The basic structure doctrine is an expression of a cross-national challenge: how to balance constitutional change and constitutional preservation. Comparative practice shows that while some nations contain express eternity clauses and others adopt implicit doctrines, the fundamental goal is common—preserving the identity of the constitution against decay. The doctrine is no guarantee: it is most effective where it is buttressed by autonomous courts, healthy political culture, and citizen devotion to constitutional norms. While democracies face the challenges of populism, drift towards authoritarianism, and constitutional capture, the teachings of the basic structure doctrine continue to be highly applicable. Constitutional identity, once emptied out, is hard to fill in again—so preventive bulwarks become crucial.

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