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REVISITING THE BASIC STRUCTURE DOCTRINE **AFTER FIFTY YEARS: CONSTITUTIONAL** **PRESERVATION AND THE LIMITS OF JUDICIAL POWER**

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Abstract

The Basic Structure Doctrine remains one of the most influential judicial developments in Indian constitutional jurisprudence. This doctrine was born out of the famous *Kesavananda Bharati* case, which held that the Legislative right to amend the Constitution under Article 368 is not unfettered and does not affect the “fundamental structure” of the Constitution. In the past five decades, the doctrine has become an integral part of Indian constitutionalism from being a protection against the state's arbitrary amendment of the constitution. It has been called into service for the defense of democracy, federalism, secularism, judicial review, and the rule of law against being changed by the majority.

Even in its hallowed form, the doctrine is still raising constitutional quandaries about the legitimacy of democracy and the supremacy of the judiciary. Some criticize the doctrine of its lack of textural support, over judgmental discretion and the ability of judges to strike down constitutional amendments through their vote. But supporters believe the doctrine is crucial in maintaining the constitutional identity and the protection of the basic constitutional values from being challenged by any temporary political majority.

The paper critically discusses the development and the current significance of the Basic Structure Doctrine, after half a century of constitutional adjudication. It says that though it is essential to ensure the supremacy of the constitution and the balance of powers, the basic principles of the doctrine are quite necessary to maintained through judicial restraint and doctrinal clarity. The paper also argues that the standards for determining what is integral to the "basic structure" are not clearly defined, which could lead to a broadening of judicial authority to levels which are not constitutionally justifiable. The paper is intended to assess the doctrine via doctrinal study of the most salient cases, and comparative constitutional perspectives, as to whether it remains a constitutional protection necessary for a healthy functioning democracy or if increasingly has turned into an anti-majoritarian doctrine at odds

with democratic constitutionalism.

Introduction

The Indian Constitution provides for a constitutional system of limited government, separation of powers, judicial review, and constitutional supremacy. The conflict between the constitutional supremacy and the power to amend the Constitution has been a crucial issue in Indian constitutional law since the inception of the Constitution.¹

The Supreme Court's interpretation of the amending power became more broad and from Article 368,² Parliament could amend any part of the Constitution, including Fundamental Rights, in the early years of constitutional adjudication, but with the escalation of constitutional conflicts between Parliament and the judiciary in the 1960s and 1970s, this stance was reconsidered.³ This battle culminated in the nine-to-four decision in *Kesavananda Bharati* case before a thirteen-judge bench of the Supreme Court, that established that Parliament's amending power under Article 368 was wide but it could not affect or change the “basic structure” of the Constitution.⁴

The Basic Structure Doctrine was a major watershed moment in Indian constitutionalism. It added substantive restrictions to the freedom of the constitution to be amended even though there were no express restrictions in Art. 368. The Supreme Court has applied the doctrine time and again to strike down constitutional amendments that would impact judicial review, democracy, secularism, federalism, and the independence of the judiciary, to preserve the identity and continuity of the Constitution against any constitutional amendment that would be authoritarian or excessive.⁵

Meanwhile, the doctrine has fanned a continuing controversy about its democratic legitimacy and doctrinal ambivalence. The Basic Structure Doctrine is not a limit as distinct from the limits explicitly spelled out in the constitutional text, but rather it is more of an interpretive process. Limits on the authority of the judiciary to strike down constitutional amendments have only

¹ INDIA CONST. pmbi.

² INDIA CONST. art. 368.

³ *Shankari Prasad Singh Deo v. Union of India*, A.I.R. 1951 S.C. 458 (India); *Sajjan Singh v. State of Rajasthan*, A.I.R. 1965 S.C. 845 (India).

⁴ *Kesavananda Bharati v. State of Kerala*, (1973) 4 S.C.C.

⁵ See, e.g., *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp. S.C.C. 1 (India); *Minerva Mills Ltd. v. Union of India*, (1980) 3 S.C.C. 625 (India); *I.R. Coelho v. State of Tamil Nadu*, (2007) 2 S.C.C. 1 (India).

been exacerbated by the lack of a clear definition of “basic structure”, which critics say allows judges to strike down measures by elected officials.⁶ The Court's ruling in *Supreme Court Advocates-on-Record Association v. Union of India* was particularly significant in which the Supreme Court invalidated the National Judicial Appointments Commission established by the Ninety-Ninth Constitutional Amendment, which was seen by many as an instance of the judiciary using the doctrine to protect institutional interests rather than constitutional identity alone.⁷

However, the doctrine remains relevant and needs to be remembered in the Indian context. The history of Indian Constitution, especially the Emergency period, provides an example of the ways constitutional amendment powers can be exercised to subvert the democratic institutions and civil liberties. The doctrine continues therefore to serve as a protection against constitutional and political destruction by majorities and the concentration of political power. The problem, however, is one of achieving the right balance between constitutional and democratic legitimacy.

This paper suggests that the Basic Structure Doctrine is necessary to safeguard the supremacy of the Constitution and its special role of avoiding authoritarian constitutional change, but requires judicial restraint, principled application and a greater degree of clarity in constitutional reasoning and in the doctrinal criteria. The paper argues that although the doctrine has a necessary constitutional role to play, its growing and uncertain scope could turn a constitutional protection into a “judicial supremacy” that undermines democratic constitutionalism.

I. Evolution of the Basic Structure Doctrine

The Basic Structure Doctrine is a development that illustrates the ongoing conflict between the supremacy of Parliament and the limitations of the Constitution in the Indian constitution. The doctrine did not arise out of the blue in *Kesavananda Bharati case*; it was a gradual evolution from a number of constitutional conflicts between Parliament's amendment powers under Article 368 and Fundamental Rights protection.

The first big constitutional challenge was in *Shankari Prasad case*, where the validity of the First Constitutional Amendment was struck down as it violated the Fundamental Rights part of

⁶ See Upendra Baxi, *The Indian Supreme Court and Politics* 121–25 (Eastern Book Co. 1980).

⁷ *Supreme Court Advocates-on-Record Ass'n v. Union of India*, (2016) 5 S.C.C. 1 (India).

the Constitution.⁸ It rejected this view and it was held that the word 'law' in Article 13 did not apply to the constitutional amendments made under Article 368.⁹ Parliament was thus held competent to amend any provision of the Constitution including Fundamental Rights. This was a broad ruling on the scope of amending power of the parliament.

In the case of *Sajjan Singh v. State of Rajasthan*, the Court again upheld the validity of the Seventeenth Constitutional Amendment,¹⁰ but there were important doubts that started to creep into the minds of the judges. While the Court did not recognize the existence of implied limitations at this point, the roots of the Basic Structure Doctrine had taken root.¹¹ Justice Mudholkar specifically pointed to the existence of some “basic features” of the Constitution which were not subject to amendment by the Parliament.¹²

The Supreme Court in *Golaknath case*¹³ narrowed the scope of Parliament's power and added to the conflict among institutions in the name of Article 13, which defines the concept of ‘law’.¹⁴ Parliament thereupon passed the 24th Constitutional Amendment; this expressly stated Parliament's power to amend any Fundamental Rights under Article 368¹⁵ as well as any other provision of the Constitution.¹⁶

This constitutional conflict was at its peak in the case of *Kesavananda Bharati case*, one of the most significant decisions in Indian constitutional history.¹⁷ Challenges to several constitutional amendments involving the property rights and parliamentary amending power were raised. The judgment was a split decision by a 13-judge bench which was the largest in the history of Indian judiciary. In a seven to six majority decision, the Supreme Court ruled that Parliament has a wide latitude of amending the Constitution under Article 368 but cannot change its “basic structure” or its fundamental constitutional character.¹⁸ The judgment did not give an exhaustive definition of the basic structure of the Constitution. It also implied, however, substantive restrictions on constitutional amendment, as several Judges recognized

⁸ *Shankari Prasad Singh Deo v. Union of India*, A.I.R. 1951 S.C. 458 (India).

⁹ *Id.*

¹⁰ *Sajjan Singh v. State of Rajasthan*, A.I.R. 1965 S.C. 845 (India).

¹¹ *Id.* at 861 (Hidayatullah, J., concurring); *id.* at 863 (Mudholkar, J., concurring).

¹² *Id.* at 863.

¹³ *I.C. Golaknath v. State of Punjab*, A.I.R. 1967 S.C. 1643 (India).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ The Constitution (Twenty-Fourth Amendment) Act, 1971, §§ 2–3.

¹⁷ *Supra* note 4

¹⁸ *Id.*

constitutional principles like constitutional supremacy, republican democracy, secularism, federalism, separation of powers and judicial review as concepts existing outside of the amendments which the Constitution could undergo.¹⁹

Kesavananda Bharati's importance was felt especially during the Emergency. In *Indira Nehru Gandhi v. Raj Narain*, the Supreme Court invalidated clause (4) of Article 329A, which had been added to the Constitution by the Thirty-Ninth Amendment, which aimed at giving judicial immunity to the election of the Prime Minister.²⁰ The Court's opinion in this case illustrated the effective use of the doctrine to prevent 'concentration of power' and safeguard the democratic character of the Constitution during times of Executive dominance.²¹

In *Minerva Mills*, the Supreme Court interpreted the doctrine not as the principle of the Constitution excluding judicial review of law but as a general constitutional theory of harmony between Fundamental Rights and the Directive Principles of State Policy, with the former being limited.²² The judgment also introduced the concept of order and harmony between the Fundamental Rights and the Directive Principles of State Policy.²³ In this case, the Court applied the doctrine to a situation where the Fundamental Rights were curtailed while the DP was enhanced. This case marked a shift in the doctrine from being merely a defensive constitutional principle to a broader constitutional theory of limitation and harmony.²⁴ Later decisions further extended the doctrine. In *Waman Rao v. Union of India*,²⁵ the Court applied the doctrine prospectively and stated that laws made after April 24, 1973, would still be subject to basic structure review and in *I.R. Coelho v. State of Tamil Nadu*,²⁶ the Court ruled that laws added to the Ninth Schedule after *Kesavananda Bharati* would also be vulnerable to basic structure review if they violated basic structure principles.

In the *NJAC* case²⁷, the Supreme Court invalidated the NJAC and the 99th Constitutional Amendment on their basis of judicial independence being a part of the basic structure of the Constitution, which led to further debate around the doctrine, as commentators questioned the

¹⁹ *Id.*

²⁰ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp. S.C.C. 1 (India).

²¹ *Id.*

²² *Minerva Mills*, supra note 4.

²³ *Id.*

²⁴ *Id.*

²⁵ *Waman Rao v. Union of India*, (1981) 2 S.C.C. 362 (India).

²⁶ *I.R. Coelho v. State of Tamil Nadu*, (2007) 2 S.C.C. 1 (India).

²⁷ *Supreme Court Advocates-on-Record Ass'n v. Union of India*, (2016) 5 S.C.C. 1 (India).

Court's use of it in order to maintain the independence of the judiciary.²⁸ The Basic Structure Doctrine has matured from a mere restriction on constitutional amendment over the past five decades to a key tenet of Indian constitutionalism. It now serves not only as a safeguard against the destruction of the constitution, but as a tool for shaping and maintaining constitutional identity. But at the same time, the growing judicial function has energized worries about doctrinal confusion and judicial limits in a democratic constitutional regime.²⁹

II. Constitutional Justifications for the Basic Structure Doctrine

Basic Structure Doctrine is a doctrine that heavily relies on the constitutional principles that lie behind restrictions of Parliament's amendment power. The doctrine therefore is based on the wider constitutional concept that some constitutional values are not susceptible to formal constitutional amendment even.³⁰ The doctrine has been supported by the judiciary over the years using such concepts as the rule of law, separation of powers, limited government, judicial review, federalism, and democracy.

A key reason behind the doctrine is the concept of constitutional supremacy. The Indian Constitution is a product of the people, and Parliament itself has a constitutionally limited role that it cannot exercise outside of the confines of the Constitution.³¹ The Supreme Court repeatedly made it clear that it was not a British constitution, that Parliament was not supreme, but that the Constitution is supreme.³² In other words, Parliament's constitutional amendment power is subordinate to the constitutional structure itself which gives its power, legitimacy and authority.

The theory of limited government also provides support to the doctrine. Restraints on public power and not unlimited institutional power are the bedrock of constitutional democracies. In a world of unlimited parliamentary authority, Parliament could simply pass a law to remove the right to vote, to eliminate judicial review, to abolish federalism, or to change the democratic form of government to some form of authoritarianism without any constitutional amendment. In *Minerva Mills Ltd. v Union of India* this danger was mentioned and it was held that the

²⁸ Id. at 91.

²⁹ See A.G. Noorani, NJAC Judgment: A Critique, 51 *Econ. & Pol. Wkly.* 24, 25–27 (2016).

³⁰ *Kesavananda Bharati*, supra note 4.

³¹ INDIA CONST. pmb1.

³² *Kesavananda Bharati*, supra note 4.

limited amendment power is also a part of the basic structure of the Constitution.³³ The judgment further highlighted that if the constitutional amendment power is unlimited, the difference between ordinary law and constitutional government would be lost.³⁴

Constitutional arguments in favor of the doctrine were greatly bolstered during the Emergency. In the Emergency (1975-77), constitutional changes were made to bring about the centralisation of political power and to diminish institutional accountability. These developments were indicative of the possibility of constitutional amendment powers being used to weaken democratic constitutionalism.³⁵ The doctrine was thus reaffirmed in *Indira Nehru Gandhi v. Raj Narain* and *Minerva Mills* as a protection against an authoritarian constitutional change.³⁶ Preservation of a constitutional identity is another important reason for the doctrine. The Constitution is not only a bundle of separate provisions, but it is a coherent constitutional whole, which is founded on certain values. The Basic Structure Doctrine has thus clearly stated that any amendment in the constitution that changes its basic character would amount to a replacement of the Constitution and not amendment.³⁷ In this respect, Parliament is able to amend the constitution but not its core nature.

The doctrine also has become a fundamental part of the constitutional framework of democracy and free elections. The Court in *Indira Nehru Gandhi* concluded that Democracy, equality and free and fair elections are part of the basic structure of the Constitution.³⁸ The Court held that the very essence of the democratic system is that it must be held to account in elections and that elections must be conducted in an impartial way. If the amendments to the Constitution would remove these checks and balances on the election and judicial processes, they would also damage the democratic underpinnings of the constitutional system.

In like manner, judicial control is always held as a vital part of the basic structure.³⁹ The Supreme Court in *L. Chandra Kumar v. Union of India* has upheld that judicial review under Article 32 and 226 is a part of inviolable constitutional framework and the absence of the

³³ *Minerva Mills*, supra note 4.

³⁴ *Id.*

³⁵ The Constitution (Thirty-Ninth Amendment) Act, 1975; The Constitution (Forty-Second Amendment) Act, 1976.

³⁶ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp. S.C.C. 1 (India); *Minerva Mills Ltd. v. Union of India*, (1980) 3 S.C.C. 625 (India).

³⁷ *Kesavananda Bharati*, supra note 4.

³⁸ *Indira Nehru Gandhi*, 1975 Supp. S.C.C. at 65–66.

³⁹ *L. Chandra Kumar v. Union of India*, (1997) 3 S.C.C. 261 (India).

judicial review would effectively mean the death of accountability under the Constitution and the empowerment of unchecked state power.⁴⁰ The judiciary has also argued that without judicial review, the Constitution's concept of accountability would become meaningless and the legislature and the executive would be able to exercise unlimited power.

Another significant constitutional basis of the doctrine is federalism. The doctrine thus speaks to the preservation of constitutional balance between the Union and State governments and the rule that States are not merely appendages of the Union government.⁴¹ In *S.R. Bommai v. Union of India* court found said that it is a part of India's basic structure as outlined in the Constitution.⁴²

Secularism and the separation of powers have also been called constitutional features that are protected.⁴³ While the Indian Constitution provides for a non-strict separation of powers, it is nevertheless important in ensuring the accountability of institutions and avoiding excessive concentration of power in one organ of government.⁴⁴

The doctrine is still criticised, however, because of the lack of clear doctrinal standards, even though these are constitutional in nature. This lack of a comprehensive list of the elements of the basic structure, coupled with the evolving, different conceptions of constitutional principles by various benches of the Supreme Court, gives the judges too much leeway in interpreting the Constitution and diminishes constitutional predictability, critics contend.⁴⁵ However, advocates argue that the doctrine, codified and interpreted in a rigid way, could work against judicial flexibility and ability to deal with future threats to the constitution.

Finally, it is important to note that the constitutional validity of the Basic Structure Doctrine depends upon a more general principle: that constitutional democracy demands that there should be substantive limits on public power, even including the power of the constituents via constitutional amendment. The doctrine aims to ensure continuity, identity, and normative basis of the constitutional order. But its legitimacy will be safeguarded by judicious reasoning and faithful interpretation of the Constitution, not by unchecked judicial power.

⁴⁰ Id. at 301.

⁴¹ INDIA CONST. arts. 245–263.

⁴² *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. 1, 216 (India).

⁴³ Id. at 304.

⁴⁴ *Kesavananda Bharati*, supra note 4.

⁴⁵ See M.P. Jain, *Indian Constitutional Law* 1742–45 (8th ed. 2018).

III. The Counter-Majoritarian Critique and the Problem of Judicial Supremacy

Despite its strong presence in the current Indian constitutional jurisprudence, Basic Structure Doctrine still raises significant questions about the democratic legitimacy and supremacy of the judiciary. The doctrine gives the judge an unfettered discretion to strike down any constitutional amendment made by Parliament, even those made under the special procedure laid down in Article 368 of the Constitution. The doctrine poses, then, a counter-majoritarian challenge: allowing the judiciary to rule against the will of the people as expressed in their elected representatives without explicit constitutional authority.⁴⁶

One of the main objections to the doctrine is that it is not based on the text. Critics have had it that the Supreme Court, instead of by constitutional language, imposed implied limitations on the Constitution.⁴⁷ This argument is that the doctrine is an act of judicial creation and not an act of constitutional interpretation.

This criticism took on special importance following *Kesavananda Bharati* itself.⁴⁸ There was significant doctrinal ambiguity because various judges associated various constitutional principles with the doctrine of amending power, and saw it as limited. Subsequent judicial decisions added more features to the list of protected constitutional features such as democracy, secularism, judicial review, federalism, rule of law, free elections, and judicial independence,⁴⁹ which critics claim gives too much interpretive discretion to judges and allows for unpredictable constitutional adjudication.

The counter-majoritarian concern is increased as the constitutional amendments provided by Article 368 already demand improved democratic process. Because of the special parliamentary majorities required and in some instances state legislative ratification, critics contend that constitutional amendments have greater democratic legitimacy because they are a result of greater political consensus in representative bodies. Such amendments could thus seem to be at odds with democratic constitutionalism if they are declared unconstitutional by

⁴⁶ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16–23 (2d ed. 1986).

⁴⁷ H.M. Seervai, *Constitutional Law of India* 3152–54 (4th ed. 1996).

⁴⁸ *Kesavananda Bharati*, supra note 4.

⁴⁹ See, e.g., *Minerva Mills Ltd. v. Union of India*, (1980) 3 S.C.C. 625 (India); *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. 1 (India); *I.R. Coelho v. State of Tamil Nadu*, (2007) 2 S.C.C. 1 (India).

the judiciary.⁵⁰

A review of the criticism is frequently done as part of the larger constitutional issue of constituent power. According to this position, constituent power is grounded in popular sovereignty and should not be subject to judicial constraints.⁵¹ Thus, unelected judges should not have the power to define the substantive limits of constitutional change; this should be left to the power of the people expressed through democratic institutions.

The NJAC ruling greatly heightened these fears. This criticism was that the Supreme Court had not only upheld the constitutional identity but also used the doctrine as a means to safeguard the interests of institutions by securing judicial independence from democratic accountability, and enhancing the judicial dominance under the constitution.⁵²⁵³⁵⁴

One big fault is that there are no objective benchmarks to measure judicial decisions on the basic structure concepts. The lack of clarity on the doctrine may deprive judges of a significant degree of predictability, as well as of a degree of constitutional interpretation.⁵⁵ There is a vigorous debate among critics that constitutional adjudication should be value-free and done on constitutional text and on the bases of a few constitutional principles instead of any general constitutional philosophy.⁵⁶

The doctrine has also been blamed for having the ability to undermine the evolution of democracy in constitutionalism. Constitutions are supposed to evolve with the passage of time and with the changes in political, social, and economic circumstances. It has been argued that the doctrine is unduly broad, since it can hinder democratic possibilities of changing constitutional structures as they are needed in the present.⁵⁷ Judges are therefore warned of the danger of over-expansion of the doctrine, because it could freeze constitutional development and give too much constitutional power to judges instead of representative institutions.

But those who support the doctrine would deny that it is in essence anti-democratic. They say

⁵⁰ INDIA CONST. art. 368(2).

⁵¹ Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* 267–69 (1999).

⁵² Supreme Court Advocates-on-Record Ass'n, 5 S.C.C. at 91.

⁵³ *Id.*

⁵⁴ See A.G. Noorani, *supra* note 29, at 25–27.

⁵⁵ Seervai, *supra* note 47, at 3155.

⁵⁶ *Id.*

⁵⁷ Rajeev Dhavan, *The Basic Structure Doctrine: A Critique*, 9 *Indian L. Rev.* 1, 12–15 (2015).

there's more to constitutional democracy than electoral majorities. This means the Basic Structure Doctrine is meant not only to embody majority will, but also to ensure institutional limitations, the rights of minorities, separation of powers and rule of law.⁵⁸ Any temporary political majority cannot have a legitimate objective of destroying the constitutional system that shows how to govern in a democratic fashion.

The supporters also support the doctrine by invoking the history of Indian constitution which shows practical necessity of the doctrine. In the Emergency period, constitutional amendments were used to strengthen the executive, to curtail judicial review, and to challenge constitutional accountability.⁵⁹ The power of the judiciary to set substantive limits was thus a bulwark against the authoritarian shift of the constitution. In this sense, the doctrine does not threaten democracy but, instead, is a means of maintaining constitutional continuity.

But the validity of the doctrine is always dependent on the way it is used. Unprincipled judicial review can become judicial supremacy. This means that the Supreme Court's power under the doctrine must be constrained by careful constitutional interpretation, institutional discipline and clear rationales. If not for these restrictions, the doctrine could be extended beyond the preservation of the constitution into judicial oversight of the evolution of the constitution.

The ongoing struggle of Indian constitutionalism is that it has to strike the right balance between constitutional protection and democratic legitimacy. The Basic Structure Doctrine is a crucial protection against constitutional destruction but its long-term validity depends on judicial decisions made with prudence and that the judiciary is not allowed to turn implied constitutional restrictions into the free reign of the judge.

IV. Comparative Constitutional Perspectives on Limitations on Constitutional Amendment

The concept of restricting the power of constitutional amendment is not entirely peculiar to India and is not necessarily at odds with democratic constitutionalism, as is witnessed by comparative analysis of constitution. There are different constitutional systems that recognize that some constitutional principles have to be protected against majoritarian change. But the way this is done and how much varies from place to place. Where some constitutions explicitly

⁵⁸ Baxi, *supra* note 6, at 128–30.

⁵⁹ *Minerva Mills*, *supra* note 4.

forbid changes to specific constitutional provisions, others are based on judicial interpretation in order to maintain the integrity of the constitution. The Indian Basic Structure Doctrines has a unique place as it imposes substantive limitations on constitutional amendment without incorporating them in the text of the Constitution.

Germany offers one of the most explicit examples of limitations on the powers of amendment to its Constitution. The German Constitutional Court has treated these principles as constitutional foundations which cannot be changed by the legislature and which are protected forever.⁶⁰

The Indian Basic Structure Doctrine can be equated with the Germans' eternity clause as both of them aim to safeguard constitutional identity from destructive constitutional changes, but there is a significant difference.⁶¹ Unlike India, where constitutional interpretation is a judicial process used to construct substantive limitations on constitutional amendment, in Germany, such limitations are found in the constitutional text itself. As such, the Indian doctrine has attracted more criticism on the issues of democratic legitimacy and judicial creativity.

Bangladesh's constitution adopted a doctrine based on the Indian law. In Anwar Hossain Chowdhury case (SC) formally accepted the Basic Structure Doctrine and ruled that Parliament had no power to change the nature of the constitution.⁶² The introduction of the Basic Structure Doctrine by the SC was influenced by the Indian Constitutional system, and some of the principles such as a republican form of government, democracy and judicial independence were recognized as fundamental features in the constitution.⁶³ Pakistan also saw constitutional issues of the limitations on amending the Constitution for the first time in its history. In District Bar Association Rawalpindi v. Federation of Pakistan, the Supreme Court of Pakistan considered whether constitutional amendments could be reviewed on substantive grounds.⁶⁴ The Court was unwilling to follow the Indian principle completely, but some members of the bench recognized that some elements of a constitution, like democracy and judicial independence, have a fundamental importance in the constitutional edifice.⁶⁵ Pakistani constitutional

⁶⁰ Grundgesetz [GG] [Basic Law], art. 79(3), translation at https://www.gesetze-im-internet.de/englisch_gg/.

⁶¹ M.P. Singh, Germany's Eternity Clause and the Indian Basic Structure Doctrine, 10 Nat'l L. Sch. India Rev. 23, 24–26 (1998).

⁶² Anwar Hossain Chowdhury v. Bangladesh, 1989 BLD (Spl.) 1 (Bang.).

⁶³ Id.

⁶⁴ District Bar Ass'n Rawalpindi v. Federation of Pakistan, PLD 2015 SC 401 (Pak.).

⁶⁵ Id.

jurisprudence has thus continued to show an ambivalence between the power of Parliament and the constitution itself.

The U.S. takes a very different constitutional tack. Article V of the U.S. Constitution permits constitutional amendment through rigorous procedural requirements but imposes very few substantive limitations.⁶⁶ The only explicit restriction historically concerned equal representation of states within the Senate without state consent.⁶⁷ American constitutionalism, however, is largely grounded in procedural strictness and only a few exceptions to substantive limits on amendment have been found in the Constitution itself. The U.S. Supreme Court has not formulated a doctrine similar to the Basic Structure Doctrine as in India.

But the counter-majoritarian problem of judicial review remains a topic for debate in American constitutional theory. There is a general concern in democratic theory about judicial power and its power to strike down decisions made by the representative institutions and in America, as in India, the issue of Basic Structure has been debated.⁶⁸

Another relevant comparative example would be that of South Africa. The South African Constitution expressly protects constitutional supremacy, judicial review, and fundamental rights within a transformative constitutional framework.⁶⁹ Constitutional amendments affecting foundational provisions require enhanced procedural safeguards and heightened legislative consensus.⁷⁰ While South Africa does not employ a doctrine identical to India's basic structure jurisprudence, its constitutional design similarly recognizes that constitutional democracy requires protection against arbitrary constitutional transformation.

Comparative constitutional practice thus provides a number of examples of constitutional democracies that either expressly or implicitly limit constitutional amendment. The restrictions, by themselves, are not necessarily incompatible with democracy. Instead, many constitutions provide that excessive constitutional amendment has the potential to weaken the institutions that can sustain constitutional governance.

⁶⁶ U.S. CONST. art. V.

⁶⁷ *Id.*

⁶⁸ Bickel, *supra* note 46, at 16–23.

⁶⁹ S. AFR. CONST., 1996 §§ 1, 2.

⁷⁰ *Id.* § 74.

The unique approach of the Indian one, however, is apparent in the comparative analysis. The Indian Constitution does not explicitly state substantive restrictions on constitutional amendment as is the case in Germany or South Africa. The validity of the Indian doctrine, therefore, is dependent on judicial interpretation and judicial reasoning. The formation of the doctrine through the judiciary accounts for the strong debates on judicial supremacy vs. democratic legitimacy in the Indian constitutional discourse.

But comparative constitutional experience also lends weight to the general thesis that constitutional identity needs to be defended against dominant forces wanting to change the constitution. The constitutionality question is not whether such limitations should be put in place, but where, how, and to what extent, they should be included in a democratic system. The ongoing dilemma in India is that the Basic Structure doctrine be used as a means of constitutional safeguarding, but not as a means of free reign to the judiciary.

V. The Need for Doctrinal Restraint and Clearer Constitutional Standards

However, the continued existence and validity of the Basic Structure Doctrine will rely not just on the goals of the Constitution but also on how judges interpret it. In the past half-century, the doctrine has grown from a narrow constitutional protection to a wide constitutional tool for review. This development has enhanced constitutional protections in a number of salient contexts, but has also raised issues of judicial overreach, doctrinal fusion, and institutional imbalance. In this regard, there is a growing demand for more doctrinal conservatism and more constitutional guidelines on how the doctrine ought to be applied in the future.⁷¹

The doctrine's biggest problem is the lack of a clear judicial process to determine what is the “basic structure” of the constitution. However, there is no uniformity in the interpretation of the doctrine and in different constitutional benches, different constitutional principles have been deemed as basic features of the doctrine.⁷² In this sense, constitutional adjudication under the doctrine can seem more of a matter of judicial discretion than of constitutional principles. This uncertainty can undermine predictability in the constitution and could diminish the confidence in constitutional adjudication.

A more conservative interpretation of the doctrine should lead the judiciary to distinguish

⁷¹ Dhavan, *supra* note 57, at 18–21.

⁷² Jain, *supra* note 45, at 1742–45.

between regular policy debates of the Constitution and real threats to the constitutional identity. Constitutional systems are of course dynamic and change over time in the democratic process, and over-zealous judicial intervention can impede constitutional change.⁷³ The doctrine should, therefore, be restricted to cases of serious and serious infringement upon the core constitutional values of democracy, judicial review, the rule of law, federalism and constitutional supremacy. The judiciary should also have to maintain the transparency and the principle of constitutional reasoning under the doctrine. Some constitutional decisions referring to the doctrine of constitutional identity state general constitutional norms without giving sufficient reasons for the specific amendments to seriously undermine constitutional identity.⁷⁴ This can give the impression that the doctrine can sometimes be used as an elastic judicial tool instead of a limited constitutional protection. More clarity of analysis would help to enhance the legitimacy of judicial review and lessen criticisms of subjectivity or institutional self-interest.

The NJAC judgment provides a good example of this. The discussion on the judgment makes it clear that the Supreme Court, while clearly playing a central role in the constitution, has failed to pay due attention to the democratic concerns of accountability and transparency in the collegium system, even if the judgment was constitutionally valid.⁷⁵ The judiciary, however, must be careful in invoking the doctrine in cases relating directly to its judicial power or institutional authority.

The relationship between constitutional court and democratic institutions is another important aspect to be considered. Constitutional democracy must be both limited and accountable. If the Basic Structure Doctrine is going to have any legitimacy, courts must take note that Parliament has a legitimate constitutional power to seek institutional reforms and constitutional adaptations within the constitutional limits. Judicial overreach may result in an institutional conflict instead of a constitutional balance.

Meanwhile, the complete abandonment or significant weakening of the doctrine would present constitutional dangers. India's constitutional experience during the Emergency period demonstrates that formal constitutional amendment procedures alone cannot guarantee

⁷³ H.M. Seervai, *Constitutional Law of India* 3155–57 (4th ed. 1996).

⁷⁴ *Id.*

⁷⁵ *Supreme Court Advocates-on-Record Ass'n v. Union of India*, (2016) 5 S.C.C. 1 (India); see also A.G. Noorani, *NJAC Judgment: A Critique*, 51 *Econ. & Pol. Wkly.* 24, 25–27 (2016).

protection against authoritarian constitutional transformation.⁷⁶ The doctrine continues to have an important structural role to play because India's constitutional history under the Emergency shows that constitutional amendment alone is inadequate to protect against constitutional changes that are authoritarian in nature. Any effort to remove the doctrine altogether would probably have an adverse effect on the protection of political power in the constitution.

The best constitutional solution is then to strike a balance between absolute parliamentary authority and unlimited judicial authority. Judiciary has a duty to uphold the doctrine as a constitutional measure while at the same time circumscribing its scope by adopting a judicious constitutional approach and institutional constraint. Courts should only apply the doctrine where the constitutional amendments are more than a change of constitutional policy preferences and pose a clear threat to the constitutional identity or structural continuity of the Constitution.

Better doctrinal coherence can also enhance consistency of constitutional interpretation. A more definitive definition of basic structure elements may emerge through future constitutional cases, although this is not either necessary or desirable, it would significantly clarify the issue of interpretation and enhance the legitimacy of constitutional interpretation.⁷⁷

Finally, the long-term viability of the Basic Structure Doctrine is dependent on institutional balance. Constitutional courts ought not to have the unchecked power to shape constitutional development, but rather serve as guardians of constitutional identity. It is not just the power of the judiciary that gives it strength, but the public's trust in the judiciary that it exercises it carefully, transparently and constitutionally. It is not that the doctrine of judicial restraint is inherently illegitimate, but that its legitimacy depends on its application to the constitution in a disciplined way.

Conclusion

The Basic Structure Doctrine still plays a pivotal role in Indian constitutional jurisprudence 50 years after *Kesavananda Bharati case*.⁷⁸ The doctrine thus has been a constitutional protection against potentially harmful constitutional changes, and has been used by the Supreme Court in

⁷⁶ *Minerva Mills*, supra note 4.

⁷⁷ *Singh*, supra note 61, at 29–31.

⁷⁸ *Kesavananda Bharati*, supra note 4.

subsequent constitutional adjudications to safeguard judicial review, democracy, secularism, federalism and constitutional supremacy in India's democratic order.

Meanwhile, the doctrine is one of the most controversial judicial innovations in comparative constitutional law. Against its lack of explicit textual support, its doctrinal ambiguity, and the fact that it is founded on judicial interpretation, there is ongoing serious concern about its democratic legitimacy and institutional balance. The doctrine is of great importance in instances which have a direct impact on the judiciary or its institutional functions.

However, it is not possible to overlook constitutional history of India when criticising the doctrine. The Basic Structure Doctrine was born in part to address these risks to the constitution and remains as a structural protection against the transformation of the constitution for authoritarian ends.⁷⁹ If there are no substantive constitutional restrictions, temporary political majorities may be able to change the constitutional structure in such a way that the constitutional democracy itself is weakened.

The actual issue of the Constitution is not whether parliament or the judiciary should have greater authority but how to strike a proper balance between democratic government and constitutional protection. The doctrine is still legitimate if it is used in a principled, constitutional, and disciplined manner. Under the doctrine of judicial review, the review of a statute must be limited to an action threatening a fundamental constitutional value and not be extended to common political and constitutional issues.⁸⁰

The judiciary will have to interpret and apply the Basic Structure Doctrine judiciously and consistently to ensure its future legitimacy. Doctrinal clarity might help minimize the uncertainty of interpretation and boost public trust in constitutional adjudication. All the while, however, courts need to acknowledge the constitutional function of Parliament in the quest for constitutional reform and democratic adaptation within constitutional bonds.

Finally, the Basic Structure Doctrine is a strength and complexity of Indian constitutionalism. It mirrors the constitutional principle that democracy must be limited but also carries a reminder of the ongoing battle between the judiciary branch and the demands of democracy. Fifty years

⁷⁹ Minerva Mills, supra note 4.

⁸⁰ Dhavan, supra note 57, at 18–21.

later, the doctrine is not unmistakable constitutional success nor a judicial fig leaf. Instead, it remains as a constitutional protection that is always required but always very narrowly drawn and whose authority rests on the commitment to practice constitutional interpretation and respect for constitutional balance.

