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# THE CONFLICT OF CONSTITUENT POWER AND CONSTITUTIONAL POWER

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## 1. Introduction

The relationship between the Constituent Power and the Constituted Power depicts the central conflict in the Indian constitution, which is constitution's democratic origins and its legal stability. The tension is very much visible via the amendment power of the legislature under Article 368<sup>3</sup> and the judiciary's role as the guardian to the constitution's democratic identity. As originalists believe that the Constituent Power acts as the original source of law, representing the identity of the 'people' of the nation that creates a constitution, unlike the Constitutional Power giving rise to the institutions of the Parliament and the Judiciary, that are organs of the constitution itself. The people of the nation serving as the source to all the laws, remain superior to the government institutions which they themselves gives rise to.<sup>4</sup> Thereby Article 368 of the Constitution granting the Parliament the power to amend the constitution cannot go beyond what the origins or the fundamentals of the constitution itself, described as the Basic Structure of the Constitution. This ensures that the institutions created from the Constitution do not violate the sanctity of the Constitution itself, preserving the sovereignty of the people they were designed to serve. The Basic Structure Doctrine, established in the landmark case of *Kesavanandaa Bharti v. State of Kerala*<sup>5</sup>, serves as providing a judicial mechanism to ensure that the 'body' of the Constitution may evolve, while its 'soul' is preserved. The Judiciary thereby being established as the body to determine the Basic Structure of the constitution, along with preserving the same.

This restraint on the amending power of the Parliament, as imposed by the judiciary finds its moral justification in John Rawles's Original Position and the Veil of Ignorance<sup>6</sup>. The theory provides that rational beings in charge of making policies would never approval to a system

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<sup>3</sup> Constitution of India, Article 368.

<sup>4</sup> <https://www.livelaw.in/columns/basic-structure-and-constituent-power-220076>

<sup>5</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

<sup>6</sup> John Rawls, *A Theory of Justice* (Harvard University Press, 1971).

where the fundamental liberties the individuals are violated. The rational actors behind the 'Veil of Ignorance' would naturally protect the 'Basic Structure of the Constitution', ensuring that the fundamental rights remain protected regardless of who may be in the dominance in a political or social status in a given nation state.

In the recent years, this doctrine has evolved into a guardian of the Constitution Identity. In the landmark case of *Anoop Baranwal v. Union of India (2023)*<sup>7</sup> where the concept of independence of democratic institutions is reinforced. Along with the recent Supreme Court judgement on the Abrogation of Special statue of Jammu and Kashmir, in its judgment, *In Re: Article 370 of the Constitution*<sup>8</sup>, stating the provision of Article 370<sup>9</sup> are temporary. reaffirming the federal features of the constitution as part of its Basic Structure.

The conflict between the Constituent Power and the Constitutional Power is highlighted through the evolution of Social Contract theory. Hobbes in his work the *Leviathan*<sup>10</sup>, argues that the people surrender their rights to the absolute sovereign, effectively extinguishing the constituent power in exchange for stability. Opposing to this Locke provides for the ideal of 'Conditional Trust'<sup>11</sup>, where the people entrust the government to protect their natural rights, while retaining their Constituent Power and the will of the people is represented in the Constituent Power, depicting the supremacy of the Constituent power over the Constitutional Power. Rousseau purposes a similar idea where the concept of 'General Will'<sup>12</sup> is introduced, here the Constituent power is permanent and is inalienable thereby no institution can bind the people's will. In India, Judiciary acts as a Locken check on the Legislature as theorised by Hobbes.

The Basic Structure Doctrine acts as the ultimate judicial enforcer to the will of the people represented via the Constituent Power, and the Social Contract bridges the gap between the Constituent Power and the Constitutional Power. By protecting the constitutional essentials that the Legislature that sits behind the Veil of Ignorance, the Judiciary works to ensure that the state remains faithful to the Original Position of the people. By maintaining a clear line

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<sup>7</sup> *Anoop Baranwal v. Union of India*, 2023 LiveLaw (SC) 155.

<sup>8</sup> *In Re: Article 370 of the Constitution*, 2023 INSC 10581, Writ Petition (Civil) No. 1099 of 2019 (Supreme Court of India).

<sup>9</sup> Constitution of India, Article 370.

<sup>10</sup> Thomas Hobbes, *Leviathan* (1651).

<sup>11</sup> John Locke, *Two Treatises of Government* (Cambridge University Press, 1988).

<sup>12</sup> Jean-Jacques Rousseau, *The Social Contract* (Penguin Classics, 1968).

between the original Constituent Power and derived amendment power, the Indian Judiciary ensures that the Constitution remains a living document.

The relationship between the Constituent Power and the Constitutional Power represents the conflict between the democratic origins and the legal stability of the constitution and this tension is managed by the Basic Structure Doctrine which ensures that the institutions created by the Constitution do not violate the sanctity of the constitution that they were designed to serve. The evolution of the Social Contract theory gives us a philosophical understanding of this conflict.

In the Leviathan, Hobbes argues that the people surrender their rights to an absolute sovereign to escape a state of chaos. This action effectively extinguishes their Constituent Power in exchange for stability. Locke proposes a 'Conditional Trust' where the people entrust the government to protect natural rights while retaining their original Constituent Power. Here the will of the people remains supreme over the institutions that they create. Rousseau introduces the concept of 'General Will' where he asserts that the Constituent Power is permanent and inalienable, and where no institution can truly bind the collective will of the people. In India, the Judiciary acts a Lockean check on the Legislature, keeping in check on the use of its powers via amendment from turning into an absolutism as propounded by Hobbes. The Basic Structure Doctrine Serves as the enforcer of the will of people, as an inherent power of the Judiciary.

The doctrine as first established in the *Kesavananda Bharati* case<sup>13</sup>, providing a mechanism to ensure that though the Constitution as may evolve its basic or the fundamentals remain intact, protecting the very identity of the Constitution. The doctrine was first put to test in the case of *Indira Nehru Gandhi v Raj Narain* (1975)<sup>14</sup> where the Supreme Court struck down the 39<sup>th</sup> Amendment Act<sup>15</sup> which was passed to validate the election of the then Prime Minister Indra Gandhi. The court effectively put the election of the PM and the Speaker within the ambit of Judicial review. The aspect of Free and Fair Election were deemed to be part of the Basic Structure of the Constitution.

Following this in the case of *S.R. Bommai v Union of India* (1994)<sup>16</sup>, the Supreme Court

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<sup>13</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

<sup>14</sup> *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1.

<sup>15</sup> The Constitution (Thirty-ninth Amendment) Act, 1975.

<sup>16</sup> *S.R. Bommai v. Union of India*, (1994) 3 SCC 1.

addressed the dismissal of state governments under Article 356<sup>17</sup> and expanded the scope of the Basic Structure Doctrine to include Secularism and Federalism in its ambit. The court ruled that if a state government acts against the secular nature of the Constitution, then it can be dismissed but only after being subjected to judicial review. In *I.R. Coelho v State of Tamil Nadu* (2007)<sup>18</sup>, the Supreme Court ruled in favour of the 9<sup>th</sup> Schedule of the Constitution<sup>19</sup> to be under the ambit of the Basic Structure doctrine and the laws are to be struck down if they are made under it are opposed to the Basic Structure, including Article 14<sup>20</sup>, Article 19<sup>21</sup>, and Article 21<sup>22</sup>, being ruled as the Golden Triangle of the Constitution and labelled as an integral part of the Constitution. The court established the ‘Identity Test’ and ‘Impact Test’ that were to be applied to determine whether something comes under the ambit of the Basic Structure of the Constitution.

A modern interpretation of the doctrine can be studied from the case of *Anoop Barabwal v Union of India* (2023)<sup>23</sup> where the Supreme Court identified the independence of the Election Commission as a core component of the Basic Structure, stating the necessity to preserve the purity of the electoral process as a fundamental to the functioning of the democracy. This was further extended to the 2025 Presidential Reference<sup>24</sup> in regard to the ‘silent veto’ of the Governor. The court ruled that the unelected cannot indefinitely stall a legislation passed by the people’s representatives. This is thereby linked to the Social Contract where the people surrender their power to a state, and thereby it is the duty of the state to take into account the will of the people.

The Case study of the 130<sup>th</sup> Amendment Bill<sup>25</sup> is also important to understand the tension between the Constituted Power and the Constituent Power. The Legislative proposal sought to modify the criminal justice system and the rights of the accused, becoming a focal point for the debate of Basic Structure Doctrine. When looked at with a Social Contract prospective, the Bill sought to limit the state’s authority to redefine the balance between the public order and the

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<sup>17</sup> Constitution of India, Article 356.

<sup>18</sup> *I.R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1.

<sup>19</sup> The Constitution of India, 1950, Ninth Schedule.

<sup>20</sup> Constitution of India, Article 14

<sup>21</sup> Constitution of India, Article 19

<sup>22</sup> Constitution of India, Article 21

<sup>23</sup> *Anoop Baranwal v. Union of India*, (2023) 6 SCC 1.

<sup>24</sup> *In re: Assent, Withholding or Reservation of the Bills by the Governor and the President of India*, 2025 LiveLaw (SC) 1124.

<sup>25</sup> The Constitution (One Hundred and Thirtieth Amendment) Bill, 2025.

individual liberty in the political climate of India. The Bill would have fundamentally altered the procedural safeguards to the members of the legislature, denying them the right to a fair trial and infringing upon Article 21, which as established is recognised as a part of Constitution's Basic Structure in the case of *Minerva Mills*. Here, if the Legislation were to dilute the rights of undertrials and erode the procedural safeguards of the criminal justice system it can only be described as a breach of 'Conditional Trust' as explained by Locke. The bill effectively subverts the Presumption of Innocence by attempting to codify Constitutional Morality. The Prime Minister, Chief Ministers or any Minister serving in the House of Legislature, if remain in judicial custody for 30 consecutive days can be terminated from the post. This effectively gives the power the Executive to control the people's representatives with their term in the House session, and their termination is away only by mere orders of a judicial magistrate. The Bill faces scrutiny over the violation of the Basic Structure Doctrine.<sup>26</sup>, threatening the Parliamentary democracy and the Federal character of the Constitution.

## 2. John Rawls and the Constitutional "Original Position"

The conflict between the Constituent Power and Constituted Power is best explained as the conflict between the absolute will of the people and the restrictions as may be imposed by the legislature and judiciary in form of laws and precedents. With the application of Original Position and Veil of Ignorance, the Basic Structure Doctrine is seen as the ultimate guardian of the Social Contract. In the traditional sense Constituent Power is seen as the unconditioned force that exists prior to any legal enactment, the conflict arises when the Legislature arising out of the Constituted Power overexerts its powers, claiming its jurisdiction over the original will through its power of amendment.

The Rawlsian theory of Original Position proports an impartial condition for the enforcement of principles of justice, without knowing the social standing, talents or knowing conceptions of good, to ensure a fair and rational outcome. This hypothetical situation is achieved via a Vaile of Ignorance, where the actors in charge of enacting such policies themselves do not know their social position in a society. Therefore, following this principle the legislature is expected to use its Constitutional Power in a way that expresses sovereign will, and shall not

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<sup>26</sup> Debby Jain, "Destructive Of Constitution's Basic Structure : Opposition Criticizes Centre's Bill To Remove Ministers On 30-Day Arrest", LiveLaw (Aug. 20, 2025), available at: <https://www.livelaw.in/top-stories/lok-sabha-130th-constitution-amendment-bill-removal-of-minister-from-post-after-30-day-custody-amit-shah-opposition-owaisi-kc-venugopal-301449> (last visited April 14, 2026).

breach the foundational contract. The Judiciary invokes the Basic Structure Doctrine as part of its inherent powers and asserts certain values that are deemed to be fundamental to the constitution itself.

The Original Position asserts that the constitutional principles may be tempered by the majority in a socio-political structure and therefore the need to establish a Basic Structure is essential, binding the Constitutional power of the Legislature.

The same is reflected in the case of *Anoop Baranwal v. Union of India (2023)*<sup>27</sup>, where the Supreme Court had to intervene for the protection of the Election Commission's Independence as this a defiance of the constitutional essence required for a fair and just political stage in the country. Similarly, the 2025 Presidential Reference<sup>28</sup> seeking Advisory Jurisdiction for the Supreme Court under Article 143<sup>29</sup> on the question of the powers held by the Governor of a state. With the growing dissatisfaction of the 'silent veto' held by the Governor, amongst the State Ministries. The power is best described as the Doctrine of Manifest Arbitrariness where the irrational principle of withholding the assent by the Governor, in use of the power of 'silent veto' violates the Social Contract and obstructs the constituent will of the State Legislature.<sup>30</sup> The Supreme Court ruled that a Governor cannot indefinitely withhold assent to a Bill under Article 200<sup>31</sup>. The Court stated that that the delay is a form of constitutional subversion, and reinforced the Federal character enshrined in the Constitution as a form of passive basic feature. The Court ruled that a Governor must grant assent to the bill or return it with a message within a reasonable timeframe.

Ultimately the conflict between the Constituent Power and the Constitutional Power is resolved through the realization that, it is the moral duty of the Constitutional Powers including the Legislature and the Judiciary to uphold the Sovereignty of the Constituent Power or the collective will of the people. This Sovereignty is not absolute and is surrendered to the Constitutional Powers via Social Contract, but the Constitutional Powers have the moral duty

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<sup>27</sup> *Anoop Baranwal v. Union of India*, (2023) 6 SCC 1.

<sup>28</sup> *In re: Assent, Withholding or Reservation of the Bills by the Governor and the President of India*, 2025 LiveLaw (SC) 1124.

<sup>29</sup> Constitution of India, Article 143

<sup>30</sup> V. Sudhish Pai, "Presidential Reference Opinion Turns The Constitution On Its Head", LiveLaw (Nov. 26, 2025), available at: <https://www.livelaw.in/articles/supreme-court-judgment-presidential-reference-opinion-and-constitutional-crisis-311211> (last visited April 14, 2026).

<sup>31</sup> Constitution of India, Article 200

to put themselves in the Veil of Ignorance and uphold this sovereignty. And on the instance of any violation, it is the duty of the Judiciary by using the Basic Structure Doctrine to take corrective measures. The Doctrine ensures that the 'creature' (Legislation) of the Constitution remains faithful to the 'creator' (the peoples original will) of the Constitution.

### 3. The Basic Structure as a Mediator of Sovereignty

In legal theory, sovereignty can be split into two categories, the Constituent Power and the Constituted Power.<sup>32</sup> The former is the original power of the people to create states or otherwise for our convenience the power to form a Social Contract, and the latter is the limited power given to the institutions like the Parliament to function within a state, protecting the fundamental liberties that the people have willingly submitted for their safeguard. Without the Basic Structure Doctrine these two powers are often in conflict as the legislature claiming to represent the current will of the people may attempt to amend the Basic structure by the use of Article 368. The Doctrine acts as a mediator by asserting whether the people of the sovereign and whether their will is being expressed via the Legislative action. It is the role of Judiciary to prevent the Constituted Power from overstepping and ensure that the sovereign or the people's original will remains protected.

It is necessary to differentiate between Amendment and Abrogation, and while the parliament is permitted to changing the laws for the changing needs of the society and adjust its policies with time, it cannot remove the foundations of the constitution. This distinction is necessary for the Sovereign Constitutionalism<sup>33</sup>. It suggests that if the framework is destroyed, the sovereignty of the individual is lost to the sovereignty of the State. And when the Judiciary initiates its power of Judicial review against any Legislative action which may violate the Basic Structure, it is protecting the fundamental will of the people that was first enshrined in the constitution forming its fundamentals, against a temporary action of the legislative which may be done to please the majority.

<sup>32</sup> Priyadarshi Jha, "Basic Structure And Constituent Power", LiveLaw (Jan. 28, 2023), available at: <https://www.livelaw.in/columns/basic-structure-and-constituent-power-220076> (last visited April 14, 2026).

<sup>33</sup> Sanjay Jain, "Grounding the Basic Structure in Legal Theory", (2023) *Madras Law Journal*, available at: [https://repository.nls.ac.in/nls\\_articles/5](https://repository.nls.ac.in/nls_articles/5) (last visited April 15, 2026).

#### 4. Judiciary's role

The Judiciary's role as the guardian of Social Contract is depicted by its duty to maintain the balance of powers between the Constituent Power and the Constituted Power and this duty is primarily exercised via its original jurisdiction of Judicial Review where the court has to determine whether something is part of the Basic Structure of the constitution or not. This Basic Structure Doctrine serves as a fail-safe to ensure that the delegation of powers to amend the constitution are not corrupted into powers to destroy the identity of the constitution itself.

The Philosophy of 'Conditional Trust' as explained by Locke where the people entered into a social contract provides that the people did not transfer absolute power to the state, as opposed by Hobbes, rather they entrusted it for the preservation of their fundamental values. In the Indian context, it is the role of the Judiciary that the 'creature of the constitution', Parliament remains faithful to these values. If the Legislation does attempt to alter the fundamental features of the constitution, the judiciary has the duty to invoke the doctrine of Basic Structure.

Evolving the concept of Social Contract, for a contract to be truly just the principles governing it have to be chosen behind a Veil of Ignorance. Hence no individual knows their place in the society to begin with and therefore any rational being would choose to safeguard the fundamental liberties as established in the Basic Structure Doctrine, putting themselves in the venerable and marginalised position. The Judiciary acts as the institution that embodies the impartial perspective of Veil of Ignorance and while the Legislature in its Constituted Power often drives immediate interests out of a political majority or from a specific demographic, judiciary on the other hand looks at the law and protects the Basic Structure. When the Supreme Court invokes the Basic Structure Doctrine, it is essential an Audit against the Legislative action and asks whether a specific amendment or law.

In *Sita Soren v. Union of India (2024)*<sup>34</sup>, the Supreme Court addressed the scope of parliamentary privileges and ruled that these privileges as a part of Constituted Power are subordinate to the foundations of the Basic structure of the Constitution, with Rule of Law being a part of the same. by holding that bribery in exchange for votes is not protected, the Court reaffirmed Rule of Law as a basic feature. Similarly, as explained earlier in the 2025 Presidential Reference regarding the Governor's 'silent veto' which utilized the Doctrine of

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<sup>34</sup> *Sita Soren v. Union of India, (2024) 3 S.C.R. 462 (India).*

Manifest Arbitrariness, the Court ruled that the Governor cannot indefinitely stall a bill in the state legislation. In the 130<sup>th</sup> Amendment bill, the Judiciary acting as an auditor applied its original jurisdiction and argued for Presumption of Innocence. The Bill seeks to the removal of Prime Minister, Cabinet Ministers and other members of the legislature based on judicial custody of more than 30 days, rather than conviction.

## 5. Conclusion

The Basic Structure Doctrine, as a mediator of sovereignty, signifies evolution of Indian constitutional law. The centre of the conflict between the Constituted Power and Constitutional Power is how can the citizens maintain sovereignty if the amendments of the Basic Structure is allowed. Established in the case of *Kesavananda Bharati v. State of Kerala (1973)*<sup>35</sup>, the doctrine serves as the connection between the people's will and the morality of certain constitutional principles, changing with the everchanging needs and growth of the society. The court further recognises that while Article 368 enables the Parliament to amend the Constitution, it is necessary to distinguish between 'amendment' and 'abrogation'. This distinction is necessary for the Sovereignty of the Constitutionalism. While acknowledging that the people are sovereign, it is also established that via the Social Contract they have limited sovereignty for the safeguard of their fundamental liberties, submitting them willingly to the state. This submission is done via a structured framework that in a form is our Constitution itself, and it is necessary to safeguard the Basic Structure of the Constitution for the purposes of safeguarding the sovereignty of the people that form the will of the Constitution itself. The Doctrine of Basic Structure ensures that the intent of the people is protected from the intent of the Legislature in case of any violation of the Basic Structure as may be determined by the Judiciary.

The moral justification for this judicial restraint on the legislative power comes from Rawl's idea of Original Position and Veil of Ignorance, where rational actors do not know their social or political position and understand that the same can be rights of the minority or the marginalized stripped away by the majority. The 130<sup>th</sup> Amendment Bill serves as a test of this principle as the bill proposed automatic removal of Prime Minister or Chief Minister or any other Minister of the Legislature, if they remained in judicial custody for more than 30 days. Here the Judiciary must act as the rational actor and ask whether a mere arrest devised by the

state's investigation machinery unseat an elected leader before conviction, stripping away their right to the Presumption of Innocence. The Bill disrupts the Democratic Mandate, and while it's the Judiciary's role to mandate 'Constitutional Morality', the same cannot bypass the fundamental principles enshrined in the constitution, to protect all its citizens from arbitrary state action.

The essence of Judiciary lies in its role as the institutional guardian of the Social Contract. It serves as a mediator ensuring that that the Constituted Power never oversteps its bounds over the Constituent Power. The Judiciary acts as a auditor against the Legislature,, using its original jurisdiction of Judicial Review it determines what constitutes to be part of Basic Structure and as the fundamental part of the Constitution. By maintaining clear line between the original will of the people and the derived power of the Legislature, the Judiciary ensures that the Constitution remains a living document. Ultimately, though the sovereignty of the people is surrender to the state via a social contract, in the form of a formal document which here is being described as the Constitution of the country, it is the moral duty of the Judiciary to use the Basic Structure Doctrine to take corrective measures whenever the 'creature' of the Constitution (Legislature) fails the 'creator' (people's will). The Doctrine preserves the constitution's fundamental principles ensuring that while the laws may change to reflect the everchanging needs of the society, the foundational commitment to justice, liberty and equality remains intact.