UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENT: LIMITING AMENDMENT POWER IN INDIA, COLOMBIA AND BENIN

by

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ABSTRACT

This thesis presents an overview of the Doctrine of Unconstitutional Constitutional Amendments as invoked by the Constitutional Courts of India, Colombia and Benin. The application of the doctrine impliedly restricts the power of legislature to amend the basic elements that constitutes the identity of the Constitution. The invocation of the doctrine has been criticized as being undemocratic since it limits the power of the Parliament to amend the Constitution despite any express limitation in the Constitution. However, I will argue that the criticism is misplaced as the doctrine has a constitutional basis and represents the true nature of democracy. Moreover, the application of the doctrine has been employed to control abuse of amendment power by governments to secure permanency in office.

ACKNOWLEDGMENT

I would first like to thank my thesis supervisor Professor Renata Uitz of the Legal Department at Central European University, Budapest, Hungary. The completion of this thesis wouldn't have been possible without her regular comments and remarks on my thesis. I am really grateful to her for providing relevant materials for my thesis and for always being available in case of doubt or trouble in the research.

I would also like to thank Professor, Mathis Moschel for helping me in translating the Benin Constitutional Court judgments. It would have been very difficult to understand the judgments without his help.

I would further like to thank the library staff at Central European University for their assistance in gathering relevant material for completion of this thesis.

Finally, I must express my profound gratitude to my parents for providing me with unfailing support and continuous encouragement throughout my study and through the process of researching and writing this thesis. This accomplishment would not have been possible without them. Thank you.

Siddharth Sijoria

06/04/2018

INTRODUCTION

Constitutional framework contains two distinct kinds of powers. A constituent power that is wielded by the people or their representatives in an Assembly whose main focus is to establish a Constitution, and the constituted powers exercised by different organs of the State like the executive, legislative and judicial branch, that are settled and limited by the Constitution itself.[1] This distinction of power renders a puzzling question. Can legislature, being a constituted authority, amend the Constitution in a way to alter it completely?

Every Constitution contains a procedure for its amendment. Some Constitutions, like Germany[2] and Italy,[3] expressly limit the power of amendment enjoyed by the legislature while others do not. Does absence of express limitation in the Constitution mean that legislature has unlimited power to amend the Constitution? The Indian Supreme Court in *Kesavananda Bharti v. State of Kerela* (1973) ruled that even in the absence of express limitation on amendment power, Parliament cannot amend the basic structure of the Constitution. This means that amendments that are enacted in compliance with the amendment procedure can be declared unconstitutional if they violate the essential features of the Constitution. This power of the Constitutional Court to impliedly restrict the amendment power of the legislature is widely recognized as the doctrine of *Unconstitutional Constitutional Amendment.*[4] Based on this logic, constituted power does not possess the authority to change the basic features proposed by the constituent power, because the constituted powers are regulated by the Constitution and are

[1] Vera Karam de Chueiri 'Is there such thing as Radical Constitution' in Thomas Bustamante & Bernardo Goncalves Fernandes (Eds),' Democratizing Constitutional law', (Springer 2016) at pg 236
[2] German Consti. Art. 79 cl.3
[3] Italian Consti. Art.139
[4] Roznai Yaniv, 'Unconstitutional Constitutional Amendments- The Limits of Amendments Power', (Oxford University Press 2017).

limited by it. Since the invocation of the doctrine by the Indian Supreme Court, several Constitutional Courts have adopted the theory of implied limitation.

In this thesis, I will study the nature and scope of amendment power. I will particularly focus on the evolution of the *Unconstitutional Constitutional Amendment* doctrine in India, Colombia and Benin. I have chosen India as one of my comparator countries because the Indian Supreme Court was the first Court to invoke the theory of implied limitation. The Colombian Constitutional Court is one of the few Courts to invoke the theory to declare the removal of the Presidential term limit to be unconstitutional. The Benin Constitutional Court, on the other hand, has invoked the theory despite an express limitation clause within the Constitution.

I have briefly analyzed the circumstances leading to constitutional challenge of the amendments and the justification given by the Constitutional Courts for invoking doctrine of implied limitation on amendment power. In their respective judgments, the Courts have argued that legislature, being a derivative constituted power, derives its authority from the Constitution and therefore cannot amend the Constitution to alter its core identity.

However, the invocation of the theory has been widely criticized since its inception. Many scholars, including Richard Albert[5] and Jeremy Waldron[6] have criticized the theory for being undemocratic and judicial usurpation of the legislative functions. Legislature, being the representative of the people, should have unrestricted power of amendment since it receives its legitimacy from the consent of the governed.[7] However, the proponents of the theory argue

[5] R. Albert, ' Counterconstitutionalism', Vol 31 Dalhousie, L.J., (2008)

[6] Jeremy Waldron. *Law and Disagreement*. (Oxford: Oxford University Press. 1999) pg. 89

[7] R. Albert, 'Counterconstitutionalism', Vol 31 Dalhousie, L.J., (2008) at pg 47-48

that it represents the true essence of democracy and serves as an important tool employed by the Courts to keep a check upon legislative power. In Chapter 2, I will explore the criticism of the theory and arguments justifying the legitimacy and constitutional basis of the doctrine.

Lastly in Chapter 3, I will offer legitimacy to the doctrine by arguing that since its inception, the doctrine is being invoked against the power grab tactics by the majority government. I will study the relevance of the theory in the light of its application in subsequent cases wherein the government in India, Colombia and Benin used amendment power to make it difficult to dislodge them from power. Its application in these cases shows that the doctrine has evolved itself into an important tool of constitutionalism.

CHAPTER 1: EVOLUTION OF IMPLICIT UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENT

In this chapter, we will discuss the evolution of the Doctrine of Unconstitutional Constitutional Amendment in India, Colombia and Benin Constitutional Courts. The Indian and Colombian Constitution do not contain any implied limitation upon the amending power of the Legislature. However, the Constitution of Benin expressly restricts the power of the amendment.

1.1. EVOLUTION OF BASIC STRUCTURE THEORY IN INDIA

The evolution of basic structure theory in India was the result of several challenges to the land reform legislations. After the Indian independence in 1947, several land laws were enacted for reforming land ownership and tenancy structures.[8] These reforms were driven by Congress government's commitment toward socialist goals enshrined under article 39 (a) and (b) of the Indian constitution that required equitable distribution of resources of production among all citizens and prevention of concentration of wealth in hands of a few.

In the early 1950s, many land owners challenged the constitutional validity of many of these land reform legislations contending violation of their right to own property under article 19 (1) (f) and some of these legislations were declared unconstitutional within the meaning of article 13.[9] The Parliament viewed these decisions as an obstacle in their socialist aspiration. In order to nullify the effects of these judgments, the Constituent Assembly which was functioning as

[8] Venkatesh Nayak, 'The Basic Structure of the Indian Constitution' (Commonwealth Human Right Initiative) available at http://www.constitutionnet.org/sites/default/files/the_basic_structure_of_the_indian_constitution.pdf
[9] 13 (2); The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention. The laws were struck down for being in violation of article 19 (1) (f)

interim Parliament placed the land reforms laws under the Ninth Schedule[10] by enacting First (1st) (1951) and Fourth (4th) (1954) Constitutional Amendment that removed judicial review of such legislations on the ground that they violate part 3 of the Constitution.

The amendments ushered a series of litigation wherein the constitutionality of the amendments were challenged. The argument concerning implied limitations upon parliament's power to amend the constitution were first raised in *Shankari Prasad Deo v Union of India*.[11] The Petitioners contended that Article 13, which prohibits the State from making any 'law' in violation of any fundamental rights provided in part 3 impliedly restricts the amending power of the State. It was argued that a 'constitutional amendment' falls within the ambit of the word 'law' as given under Article 13 and therefore a State cannot enact any amendment that abridges or amend the rights guaranteed in Part 3 of the Constitution. This argument was unanimously rejected by the court which declared that parliament's power to amend the constitution is unbridled. The Court held that though a constitutional amendment was a law, there was a difference between legislative and constituent power, and the word 'law' within the framework of Article 13 did not include an amendment of the constitution made in exercise of constituent power.[12]

[10] Parliament enacted Ninth Schedule to the Constitution through the very first amendment in 1951 as a means of immunising certain laws against judicial review. Under the provisions of Article 31, which themselves were amended several times later, laws placed in the Ninth Schedule -- pertaining to acquisition of private property and compensation payable for such acquisition -- cannot be challenged in a court of law on the ground that they violated the fundamental rights of citizens. This protective umbrella covers more than 250 laws passed by state legislatures with the aim of regulating the size of land holdings and abolishing various tenancy systems. The Ninth Schedule was created with the primary objective of preventing the judiciary - which upheld the citizens' right to property on several occasions - from derailing the Congress party led government's agenda for a social revolution.

[11] AIR 1951 SC 458

[12] H.M Seervai, 'Constitutional Law of India', Vol 3 Fourth Edition Universal Law Publishing 1996 reprint in 2015 at pg 3110

Fourteen years later, the constitutional validity of seventeenth (17th) amendment 1964 was challenged by the petitioner affected by placement of state land reform enactments in ninth schedule through 17th amendment.[13] The majority of the judges dismissed the petition by relying upon the ratio in *Shankari Prasad*. However, two judges of the Supreme Court doubted the conferment of unbridled amendment power in their dissenting opinion. Justice Hidayatullah observed that the 'guarantees of fundamental rights in part 3 makes it difficult to visualize that the fundamental rights as mere playthings of the majority'.[14] Justice Mudholkar wrote that the framers of the Constitution may have sought to attach permanency to certain basic features of the Constitution such as three organs of the State, separation of powers etc. He further doubted if a change in the basic feature of the Constitution could be seen as an 'amendment' within the meaning of Article 368[15] or it would constitute replacement of the Constitution with a wholly new one.

Later in *I.C Golak Nath v State of Punjab*[16] the Court reversed its earlier position of law. It declared the First and the Fourth amendment to be unconstitutional by applying the doctrine of 'Prospective Overruling'.[17] It thoroughly examined Article 368 vis a vis Article 13 to conclude that the word 'law' in article 13 includes a constitutional amendment and thus Parliament had no power to take away or abridge fundamental rights even through an amendment process.[18]

[13] AIR 1965 SC 845
[14] Gautam Bhatia, 'Basic Structure – History and Evolution', Indian Constitutional Law and Philosophy Blog, available at https://indconlawphil.wordpress.com/2013/11/01/basic-structure-i-history-and-evolution/
[15] Article 368 defines the basic procedure for amendment of the Indian Constitution.
[16] AIR 1967 SC 1643
[17] prospective overruling means construing an earlier decision in such a way that it would not have a binding effect to the parties of the original suit or to the cases decided on the basis of that judgment, and yet changing the law, applying it only prospectively to the future cases.
[18] Sunder Raman, 'Amendment Power under the Constitution of India' A Politico Legal Study', Eastern Law House at pg. 96 (1990)

The Petitioners relying on the dissenting opinion of the judges in *Sajjan Singh case* contended that the Constitution is intended to be permanent and thus it cannot be amended in a way that it destroys the basic structure. To substantiate their claim, they made following arguments. Firstly, the word amendment in Article 368 connotes an addition or change in the original document and not replacement. Thus, the broad phraseology in other articles in the Constitution like "repeal or reenact "indicates that Article 368 only enables modification of those articles within the framework of the Constitution and does not permit total abrogation. The Petitioner, to substantiate this claim, used a lecture given by German Scholar Dieter Conrad at Banaras Hindu University in which Conrad had argued that the German Basic Law's eternity clause[19] merely makes explicit what is already implicit i.e indestructibility of the core features of the Constitution.[20] He argued in the lecture that a simple procedure for amendment of the Constitution may allow a ruling party whose majority standing is shrinking to amend the constitution in a way to abolish Constitution and to reintroduce … the rule of Moghal Emperor or the Crown of England.[21] Secondly, Fundamental rights are the part of basic structure and that amendment power can only be used to preserve rather than abridge the essence of guaranteed rights.[22] Thirdly, the power to amend the constitution is derived from the ordinary legislative making power. The content of constitutional amendment is derived from Article 245, 246 and 248 which distributes law making power between the Union and the States. Article 368 only lays down the procedure to be complied with while amending the Constitution.

[19] Article 79 (3) of the German Constitution is referred to as eternity clause as explicitly restricts the power of the amendment unlike India and Colombia where the theory of implied limitation was developed by the Courts.
[20] Christopher J. Beshara, "Basic Structure Doctrines and the Problem of Democratic Subversion: Notes from India", Verfassung und Recht in Ubersee VRU 48 (2015) 99-123 at pg 112
[21] Manoj Mate, Priests in the Temple of Justice: The Indian Legal Complex and Basic Structure Doctrine, in: Terence C. Halliday, Lucien Karpik, Malcolm M. Feeley (eds), *Fates of Political Liberalism in the British Post-Colony*, (Cambridge 2012), p. 120.
[22] Id at pg 98

Therefore, constitutional amendment is law within the term of article 13 and cannot abridge fundamental rights.[23]

On the other hand, the Union submitted that the Parliament's power to amend the constitution is unlimited and the law position as propounded in *Shankari Prasad* and *Sajjan Singh* should be upheld. It made the following argument. Firstly, the amendment power contains no implied limitation on amendment power as a constitutional amendment is enacted in exercise of sovereign power and not the legislative power as provided under article 245, 246 and 248. Thus, an amendment subsumes itself into the structure of the Constitution. Secondly, in absence of any express prohibition on amendment power in Article 368 the Court cannot invoke implied limitation on that power. Thirdly, amending the Constitution according to the changing needs of society protects against violent changes by revolution. Fourthly, the constitution doesn't distinguish between basic and non-basic features. Everything written in the Constitution is basic and can be amended in order to help future growth and progress of the country. Fifthly, the Constituent Assembly Debates does not refer or suggest that fundamental rights are beyond amendment.[24]

After several days of hearing, the Court with a majority of 6 judges against 5 dissenting judges rejected the Union's arguments and held that an amendment cannot abridge fundamental rights. Interestingly, the Court noted that the marginal notes for Article 368 provides for general 'Procedure for amendment'. Thus, amendment power is to be found in ordinary legislative powers. It observed that article 245 which confers legislative powers starts with the phrase "Subject to the provisions of this Constitution' parliament may make any law. Constitutional

[23] Ibid at pg. 98-99
[24] Ibid 99

law being a law under article 13 cannot violate or abridge or repeal any of the guaranteed fundamental rights in Part 3 of the constitution.[25]

The decision in *Golaknath* was heavily criticized by the ruling government which viewed the judgment as an obstacle toward achieving the socio-economic goals. After few weeks of the decision, Congress suffered heavy losses in several state elections. As a consequence, then Member of Parliament, Barrister Nath Pai, introduced a private member bill that sought to restore the supremacy of Parliament's unrestricted amending power. However, the bill was not passed by the parliament. Nonetheless, the parliament again asserted its supremacy by enacting laws to facilitate access to bank credits for agricultural sector for equitable distribution of economic resources by nationalizing banks.[26] But the Court struck down this law by relying on the *Golaknath* case.[27] Another amendment was introduced to abolish *privy purses*[28] guaranteed to erstwhile rulers of India. But even this amendment was declared unconstitutional as the Court observed that Article 291 of the Constitution guarantees justiciable right to property to the rulers of Indian states in their privy purses.[29]

These decisions led to political reactions and created a 'great war… over parliamentary versus judicial supremacy.'[30] As a response, the Congress government enacted the Constitutional

[25] Krishnaswamy Sudhir,' Democracy and Constitutionalism in India a study of basic structure Doctrine', Oxford University Press 2010 at pg 19
[26] Venkatesh Nayak, 'The Basic Structure of the Indian Constitution' (Commonwealth Human Right Initiative) available at http://www.constitutionnet.org/sites/default/files/the_basic_structure_of_the_indian_constitution.pdf
[27] *R.C. Cooper v. Union of India* (1970) 3 SCR 530
[28] Privy Purses was a payment made to the ruling (royal or lower) families of erstwhile princely states as part of their agreements to first integrate with India in 1947, and later to merge their states in 1949 whereby they lost all ruling rights. The Privy Purse was continued to the royal families until the 26th Amendment in 1971, by which all their privileges and allowances from the Central Government ceased to exist, was implemented after a two-year legal battle.
[29] Madhav Rao Scindia v. Union of India (1971) 3 S.C.R 9
[30] Granville Austin, 'Working a Democratic Constitution: The Indian Experience', Oxford University Press, 1999 at pg 198.

Twenty Fourth (24th), Twenty fifth (25th), Twenty Sixth (26th) and Twenty Ninth (29th) Amendment Act 24th amendment which sought to overturn the verdict in *Golak Nath* by amending article 368 and replacing the word 'Procedure' with 'Power' of the Parliament to amend the Constitution. 25th amendment sought to insert new article 31C to insulate judicial review of the laws placed under the 9th schedule. The 26th amendment sought to again abolish privy purses and the status of rulers under the Constitution and the 29th amendment inserted few Acts under the 9th schedule.

The validity of these amendments was challenged in the famous case of *Kesavananda Bharati v. State of Kerela*[31] in the Supreme Court of India and the validity of the *Golak Nath* verdict was also reconsidered in the instant case. After 66 days of hearing, the Supreme Court upheld the 24th, 26th and 29th Amendment Act but declared part of 25th Amendment that insulated judicial review of legislation to be unconstitutional. It overruled the *Golak Nath* verdict, holding that the term 'law' in Article 13 does not include a constitutional amendment and therefore the Parliament can amend any part of the Constitution. However, the majority judgment held that the power to amend the Constitution doesn't incorporate the power to destroy or amend the constitution in a way that it alters its identity or what came to be known as "the Basic Structure of the Constitution".[32] It is the longest judgment by the Indian Supreme Court running into 1505 pages and 11 different opinions. For the purpose of this chapter I have analyzed the majority opinions in response to the argument advanced from both sides to the case.

[31] AIR 1973 SC 1461
[32] Ibid.

The Petitioners in this case argued that certain part of the Constitution are meant to be permanent and there were basic features other than fundamental rights like sovereignty and integrity of India, the people's right to vote, republican form of government, the secularism enshrined in the Constitution, independence of judiciary, separation of power, dual structure of the union, which parliament being a constituted authority, cannot change through an amendment.[33] It was argued that the insertion of article 31C destroys the basic framework of the constitution as it allowed parliament to make laws in excess of legislative competence or in violation of basic human rights without judicial recourse to an affected person.

The respondent challenged the invocation of implied limitation as it would create an unusual political situation in the country and emphasized that the amending power cannot be restricted on the basis of imaginary abuse of power. They also argued that the principle of basic structure introduced vagueness which would be difficult for the Parliament to comprehend and follow for making laws.[34]

Invoking the theory of basic structure, Chief Justice Sikri observed in his judgment that Article 368 should be interpreted in the background of India's history and her aspiration as the constitution is not an ordinary law but a document which, apart from setting up a machinery for government, had a noble and grand vision. The vision was put out in the preamble and was to be carried out by application of directive principle of State policy.[35] The words used in different articles of the Constitution should not be read in vacuum and must be read in reference to the preamble and other important part of the Constitution. According to his view, it was

[33] Sunder Raman, 'Amendment Power under the Constitution of India' A Politico Legal Study', Eastern Law House 1990 at pg 124
[34] Ibid at pg. 129
[35] AIR 1973 SC 1461, para 14 and 15 p.1490

rarely that everything will be expressly mentioned in a written Constitution. It couldn't have been the intention of the constitutional framers to use the word amendment in the widest sense to allow Parliament to amend fundamental features of the Constitution.[36]

He believed that conferment of unlimited power to amend the constitution could be used by a majority government to debar any other party from functioning, establish totalitarianism, enslave the people in the name of democracy. After establishing its purpose, the parliament can make the Constitution unamendable or extremely rigid, thus leading to extra- constitutional revolution.[37]

In response to the Union's submission that every provision of the Constitution was essential, he wrote that every provision of the Constitution did not have the same status as some of them are definitive of the structure. Every provision of the Constitution can be amended in such a way that basic structure of the Constitution remained intact. [38] He did not agree that the doctrine is vague or shadowy idea which the parliamentarian could not understand. He supported his reasoning by citing Lord Reed's observation in *Ridge v Baldvin* that 'it would be wrong to hold that what was not susceptible to exact definition or what could not be cut or dried or nicely weighed or measured was imperceptible and did not exist'.[39] Therefore, the concepts like, democratic order, separation of power and federal nature of the State are some of the features that form the core of the Constitution and are not vague to comprehend. Justices Shehlat and Grover in a separate concurring opinion wrote that the argument of Union that there can be no

[36] Ibid, para 292 and 293 at p. 1534
[37] Ibid, para 295 at p.1534
[38] Ibid para 302 1535
[39] Ibid para 300 at pg. 1535

implied limitations in absence of express limitations is a contradiction in terms as implied limitation can only arise where there are no express limitations.[40]

Justices Hegde and Mukherjee's argument against unlimited amending power was that the people of India had given the Constitution unto themselves and they could not be said to be making the amendment in so far as the two third majority in Parliament[41] did not necessarily represent a majority of the people of India. In this sense Parliament and people could be working at cross purposes, particularly when basic changes in the Constitution were involved.[42] Interestingly, they invoked the moral accountability of the President and held that if the President assents an amendment seeking change in the basic features of the Constitution then he would violate his oath "to protect, preserve and defend the Constitution" under Article 60 of the Constitution.[43]

Justice H. R Khanna's judgment was most crucial in deciding the case and evolvement of basic structure doctrine. While overruling the *Golak Nath* case he observed that it cannot be said that fundamental rights were beyond amendment as the first amendment abridging right to property was enacted by the Constitutional Assembly itself working as the provisional parliament. He emphasized the necessity of amending the Constitution as it was not possible for one generation to find a permanent working solution for all the problems which might be faced by a state in future.[44] He fully agreed with Burke that '*a state without the means of some change is without the means of its conservation. Without such means it might even risk the loss of that part of the*

[40] Ibid para 596 at pg. 1602-03
[41] Article 368 of the Constitution requires 2/3 majority of the Parliament for effecting an amendment.
[42] AIR 1973 SC 1461, para 669 at pg. 1625
[43] Ibid para 670 at pg.1625
[44] Sunder Raman, 'Amendment Power under the Constitution of India' A Politico Legal Study', Eastern Law House 1990 at pg 138

Constitution which it wished the most to preserve'.[45] However, according to him, the Constitution can only be amended in such a way that as a result of the amendment, the old Constitution survived without loss of its identity.[46] In contrast to the Chief Justice Sikri opinion, he held that preamble doesn't constitute basic structure of the Constitution and could not impose any implied limitation on the power of amendment.[47] Thus, *Keshavananda Bharti*, through the above stated opinion inserted the doctrine of implied limitation or Basic Structure doctrine. The judges did not provide an exhaustive list of the basic elements but left it to the judges to discover the elements constituting the basic structure.

In the years following the pronouncement of the verdict, the Court has applied the doctrine to include rule of law,[48] power of judicial review of the High Court and the supreme Court[49], equality,[50] Secularism,[51] secret ballots[52] as some of the basic features of the Constitution. The doctrine has also been made applicable in challenges to constitutionality of ordinary statute. In *Madras Bar Association v Union of India*,[53] the Supreme Court struck down an ordinary statute that vested adjudicatory functions, earlier vested with the High Court, with an alternate tribunal created by the legislation. The Court held that the basic structure of the Constitution was violated in the present case since the parliament did not ensure that newly constituted tribunal conforms to the salient characteristics of the Court sought to be substituted. Similarly, in *Supreme Court Advocates on Record Association v. Union of India*[54], the Court held that for

[45] AIR 1973 SC 1461 para 1395 pp 1846-47
[46] Ibid para 1437, at pg 1859-60
[47] Ibid. para 1484, at pg 1875-76
[48] Indira Gandhi v Raj Narain AIR 1975 SC 2299
[49] L. Chandra Kumar v. Union of India, (1997) 3 SCC 261
[50] National Legal Services Authoriy v Union of India (2014) 5 SCC 438
[51] S.R Bommai v State of Karnataka AIR SC 1994 1918
[52] M Nagraj v Union of India (2006) 8 SCC 212
[53] (2014) 10 SCC 1
[54] 2016) 5 SCC 1. See, para 221.

examining the constitutional validity of an ordinary legislative enactment, all the constitutional provisions, on the basis of which the concerned "basic features" arise, are available to be tested and even the breach of a single provision is sufficient to render the legislation as unconstitutional. Thus, in India the applicability of the basic structure is far wider when compared with Colombia and Benin.

1.2. COLOMBIA AND THE CONSTITUTIONAL REPLACEMENT DOCTRINE

The theory of implied limitation or "Constitutional replacement"[55] doctrine in the Colombian jurisprudence can be traced back to its Constitutional change of 1991.[56] In the new constitutional order the power to amend the Constitution is conferred upon the Congress, the People and the Special Constitutional Assembly[57]. In case the Congress proposes an amendment concerning fundamental rights, it is required to be submitted to a referendum if a given number of citizen's requests. [58] Like India, the Colombian Constitution does not contain any explicit unamendability clause and an amendment could only be declared unconstitutional if it failed to meet the procedural requirement spelt out in the law.[59] Nonetheless, both the Indian and Colombian Constitutional Court are perhaps the most active Courts in developing the doctrine and applying it to strike down significant constitutional amendment.[60]

[55] C- 551/2003
[56] William C. Banks &Edgar Alvarez, e New Colombian Constitution: Democratic Victory or Popular Surrender? University of Miami Inter-American Law Review 10-1-1991 At pg. 80
[57] Section 374 of the Colombian Constitution 1991
[58] Section 377 of the Colombian Constitution 1991
[59] Section 241 and 379 of the Colombian Constitution 1991
[60] For a comparison of the Indian basic structure doctrine and the Colombian substitution of the constitution doctrine as responses to their respective political contexts, see Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 Int'l J. Const. L. 606 (2015)

The Colombian Constitutional Court, from the early 2000's embarked upon a new principle of "Constitutional Replacement" or "Substitution Doctrine" identical to the Basic Structure Theory which aims to impliedly restrict the power of the Congress and the people to amend basic features of the Colombian Constitution. In the following part I will visit the jurisprudential development of the theory by the Constitutional Court. Since the enactment of the 1991 Constitution, there have been 40 distinct packages of constitutional amendment passed until the end of 2015. Several of them have been partially or completely struck down by the Constitutional Court.[61]

The Constitutional Court invoked the theory of implied limitation on amendment power in its decision in case C-551/2003. In this case, the Court broadened the scope of the concept of "procedural error" provided in section 279 of the Constitution. It ruled that the power to amend the Constitution incorporates within its extent the power to introduce changes to the Constitutional text. However, these changes cannot be construed to allow derogation of the constitution or its replacement by a different one. It noted that procedure and substance are related concepts and when the amending power substitutes the Constitution, it acts *ultra vires*.[62] The Court recognized this as "substitution theory."[63]

According to the Court

> In the development of democratic principles and of popular sovereignty, the constituent power lies in the people, who preserve the power to give themselves a Constitution. The original constituent power, then, is not subjected to legal limits and implies, above all, the complete exercise of the political power by the relevant individuals…. On the other hand, the power of reform, or derivative

[61] Espinosa Cepeda Jose Manuel & David Landau,' Colombian Constitutional Law: Leading Cases', Oxford University Press 2017 at pg.327

[62] Roznai Yaniv, 'Unconstitutional Constitutional Amendments- The Limits of Amendments Power', Oxford University Press 2017, at pg 65

[63] Sentencia 551/03, 09.07.2003, cited in Joel I. Colo´n-R´ıos, Carl Schmitt and Constituent Power in Latin American Courts: The Case of Venezuela and Colombia, 18(3) CONSTELLATIONS 365, 373-76 (2011)

> constituent power, refers to the capacity certain organs of the state have, on some occasions by consulting the citizens, to modify the existing Constitution, but within the paths determined by the [current] Constitution itself. This implies that it is a power established by the Constitution, and that is exercised under the conditions set out by the same Constitution.
>
> The derivative constituent power, then, lacks the power to destroy the Constitution. The constituent act establishes the legal order and, because of that, any power of reform is limited only to carrying out a revision. The power of reform, which is constituted power, is not, therefore, authorized to annul or substitute the Constitution from which its competence is derived. The constituted power cannot … grant itself functions that belong to the constituent power and, therefore, cannot carry out a substitution of the Constitution not only because it would then become an original constituent power, but also because it would undermine the basis of its own competence….[64]

The Court has explained the substitution doctrine by distinguishing between "original constituent power," which is the unlimited power of the people to remake their political institutions, and the "derivative constituent power" exercised by constitutional amendment mechanisms provided in the Constitution. The Court emphasized that "it was necessary to take into account the Constitution's principles and values, as well as those in the constitutional bloc"[65] while adjudicating upon the cases pertaining to constitutional amendments.

Thus, the Colombian Constitutional Court creates several layers for amendments.[66] Changes that are mere "amendments" can be made by any of the mechanism provided in the constitution i.e. congressional approval, or the referendum. But the changes which materially replace or substitute basic features of the Constitution can only be done through an extraordinary mechanism of constituent assembly[67].

[64] Opinion in C- 551/2003. Please see, Espinosa Cepeda Jose Manuel & David Landau,' Colombian Constitutional Law: Leading Case', Oxford University Press 2017 at pg. 341 & 342

[65] Opinion in C-551/2003; see Gonzalez Bertomeu, Juan F., '*Relying on the Vibe of the Thing: The Colombian Constitutional Court's Doctrine on the Substitution of the Constitution* '(May 18, 2017) pg 8 . Available at https://papers.ssrn.com/Sol3/papers.cfm?abstract_id=2970851

[66] *See* Vicki C. Jackson, *Unconstitutional Constitutional Amendments: A Window into Constitutional Theory and Transnational Constitutionalism*, *in* Demokratie-Perspektiven festschrift fur brun-Otto Bryde zum 70 Geburgtstag 47 (Herausgegeben von Michael Bauerle et al. eds., 2013).

[67] Section 374 of the Colombian Constitution 1991. Also, see Yaniv Roznai, Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea, The American Journal of Comparative Law, Vol. 61,2013, 657- 720, at pg. 684

Another interesting case concerning replacement doctrine arose in 2005 when Congress enacted a constitutional amendment to establish the possibility of presidential re- election to allow President Alvaro Uribe Velez to run for a subsequent re-election. The challenged involved violation of the basic elements of the Constitution because the constitution explicitly put an embargo upon presidential re-election. [68]

The Petitioner challenged the amendment on the ground that extending the term of the President may lead to abuse of power and could significantly infringe political pluralism and equal participation by citizens which forms one of the essential feature of the Colombian Constitution. The Constitutional Court adjudicated upon the validity of the constitutional amendment and examined whether the amendment constituted "substitution of the Constitution". After examining its key contents the Court upheld the amendment observing;

> It cannot be argued that a system which admits Presidential re-election will lose its democratic nature by that mere fact, or that our Presidential regime will [necessarily] be transformed into an extreme form of Presidentialism. Many examples could be drawn from comparative law where such a mechanism exists and does not imply a non-democratic state. On the contrary, in this kind of system the people, through elections, maintain their role as arbitrators in the processes of power.[69]

However, the Court invalidated a minor clause in the amendment that empowered a non-elected body a temporary authority to legislate without being subject to any form of judicial review[70]. This clause, according to the Court, contradicted the principle of constitutional supremacy and amounted to the formation of a new Constitutional provision that restricted

[68] Opinion in C- 1040/2005. Please see, Espinosa Cepeda Jose Manuel & David Landau,' Colombian Constitutional Law: Leading Case', Oxford University Press 2017 at pg. 341 & 342
[69] Ibid. at pg 347
[70] Opinion in C-551/2003; see Gonzalez Bertomeu, Juan F., '*Relying on the Vibe of the Thing: The Colombian Constitutional Court's Doctrine on the Substitution of the Constitution* '(May 18, 2017) pg 9. Available at https://papers.ssrn.com/Sol3/papers.cfm?abstract_id=2970851

judicial review powers of the Court.[71]Thus, the Court reiterated its holding, observing that constitutional amenders are not sovereign and they have limited competence according to the text adopted by the 1991 Constituent Assembly.

However, in the 2005 case the Court was confronted with a question which it missed to explain in the 2003 case; How to determine the elements which constitute core principles of the Colombian Constitution and the specific constitution rules of interpretation that help in identifying these elements?[72] Whether the implied limitation on Congressional powers is so broad that it cannot make substantial changes to the constitutional texts?

While answering these questions the Court said that recognition of limits on amending powers does not reduce the scope of the Congress from introducing significant amendments to the Constitution to meet the needs and expectations of the evolving society.[73] It further distinguished the cases pertaining to substitution and other types of review stating that in the judgment of substitution, the basic proposition is not enshrined in any article of the Constitution, and it has to be understood in light of the core elements that define its identity. [74] Besides, a judgment of substitution does not verify whether there is a contradiction between provisions, as is the case when reviewing substance, nor does it refer to whether there has been a violation of some intangible provision or principle. While reviewing a challenge contesting violation of the core elements of the Constitution the Court has to look into" (a) whether the

[71] Opinion in C- 1040/2005. Please see, ESPINOSA CEPEDA JOSE MANUEL & DAVID LANDAU,' COLOMBIAN CONSTITUTIONAL LAW: LEADING CASE, Oxford University Press 2017 at pg. 341 & 342
[72] Bernal C Carlos, '*Unconstitutional Constitutional Amendment: in the case study of Colombia: An analysis and Justification and Meaning of the Constitutional Amendment Doctrine'*. I. CON 11 (2013) pg. 343
[73] Opinion in C- 1040/2005. Please see, ESPINOSA CEPEDA JOSE MANUEL & DAVID LANDAU,' COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES', Oxford University Press 2017 at pg. 341 & 344
[74] Ibid. at pg 345

amendment introduces an essential new element in the Constitution; (b) whether it replaces an element originally adopted by the Constituent Assembly, and (c) it compares the new principle with the previous one to confirm, not if they are different, which will always be the case, but if they are different to the point of incompatibility."[75]

After examining the amendment in the light of above stated issues, the Court has to prove that a defining core element of the 1991 Constitution has been replaced by a wholly different one. For doing so, the Court established a seven-tiered test comprising the following steps:" (1) stating what is the essential element of the constitution that is at stake; (2) stating how the essential element underpins several constitutional provisions; (3) explaining why the element is essential; (4) providing evidence that the content of the element cannot be reduced to only one constitutional provision; (5) demonstrating that labelling an element as essential does not amount to labelling one or more constitutional clauses as eternal; (6) proving that the essential element has been substituted by a new one; and (7) explicating that this new element contradicts the essential element or is totally different from it such that the new element is incompatible with other essential elements of the constitution".[76]

Thus, after enunciating the rules of interpretation, Court applied this test to the instant case and allowed presidential re-election and held that a Presidential re-election for a single additional term, subject to a law which ensures the rights of the opposition and equal opportunities for all candidates during the presidential campaign, is not an amendment that substitutes the 1991

[75] Ibid 345
[76] Bernal C Carlos, '*Unconstitutional Constitutional Amendment: in the case study of Colombia: An analysis and Justification and Meaning of the Constitutional Amendment Doctrine'*. I. CON 11 (2013) pg. 344

Constitution into a new one. The elements of a democratic and social state of law were not replaced by the amendment as the people still retained the right to freely decide who to choose as President. The institutions with powers of control and review were not affected. The system of checks and balances, the independence of constitutional bodies was safeguarded, which according to court forms the basic features of the Constitution in Colombia.

Uribe won the re-election in 2006 and served his term until 2010. During his tenure, he remained very popular and enjoyed the support of the Congress. In 2009 and 2010 Uribe's political supporters started gathering the signature of the citizens to call for a referendum to amend the Constitution to allow Uribe run for a third term. After the huge voting at referendum, Congress enacted an amendment to allow the President to stand for a third term. The Court this time ruled the amendment to be unconstitutional as it violated the basic principle of democracy, which would affect the entire constitutional order.[77]

According to the Court:

> allowing second Presidential re-election would seriously undermine the system of check and balance due to certain aspects of the constitutional design concerning the appointment of high Court judges and members of other state agencies, such as the Central Bank. "It would also replace the principles of alternated exercise of political power, the equality among Presidential candidates, and the generality of laws, for this was a constitutional amendment instigated by the then Colombian President Alvaro Uribe with the purpose of making him eligible to run for President for the third time.[78]

The Court also observed that the exercise of referendum as an instrument of constitutional reform is always a manifestation of derivative constituent power and that not even the involvement of the electorate to vote on the proposal after it has been passed by the Congress

[77] C-141 of 2010, Allan R. Brewer-Carıas, General Report: Constitutional Courts as Positive Legislators in Comparative Law, XVIII International Congress Of Comparative Law, International Academy Of Comparative Law 42-44 (Washington, July 26-30, 2010).

[78] Carlos Bernal, Unconstitutional Constitutional Amendment: in the case study of Colombia: An analysis and Justification and Meaning of the Constitutional Amendment Doctrine. I. CON 11 (2013), 339–357 at p. 346

and revised by the Constitutional Court, has sufficient legal force to transform a referendum into a foundational constituent act of the primary or original power. In effect the Court observed that the people are also bound to the Constitution of 1991 and therefore cannot modify its defining elements when they exercise their powers of amendment.[79]

Interestingly, the Court observed that a referendum expressing people's will for reform can be exposed to distinct political forces which might end up modifying the original popular will which does not necessarily coincide with the final text submitted for voting and takes all the weight of the argument that referendum stems exclusively from the People acting as a primary constituency with no limits on their power. "*The intervention of Congress and the final participation of the people, which is reduced to approving or disapproving the normative text submitted for a vote, leaves serious doubts about whether the public is acting in this case as an original constituent power".*[80]

Thus, the Court reiterated its position as declared in the 2005 case that the Constitution can only be replaced through the mechanism of Constituent Assembly which enjoys constitutional supremacy under the Constitution of 1991.[81] Thus, for the first time, after its declaration in 2003, the court invoked the Constitutional Replacement Doctrine to invalidate an amendment.

[79] Espinosa Cepeda Jose Manuel & David Landau,' *Colombian Constitutional Law: Leading Cases*', Oxford University Press 2017 at pg 352.
[80] Ibid at pg 353
[81] Ibid at pg 354

1.3. IMPLIED LIMITATION THEORY IN BENIN

Benin is a Francophile country in western Africa. It is interesting to study the development of unconstitutional constitutional amendment doctrine by the Constitutional Court because unlike India and Colombia, the constitution contains implied limitation or unamendable clauses within the text of the Constitution. Title XI (Article 154 to 156) of the Benin Constitution prescribes the law pertaining to amendment of the Constitution. The Constitution under Article 154 prescribes for the procedure to be followed while enacting an amendment. Article 155 requires a referendum in case the Parliament cannot garner the 4/5 majority to pass the amendment in house. Article 156[82] of the Benin Constitution expressly restricts the amendment power of the Parliament. Despite the presence of express limitations on amendment power the Constitutional Court of Benin in three cases expanded the meaning and scope of limitation beyond the text of the article 156.

In the first case[83] the Constitutional Court was required to decide if the Parliament, as a constituted authority extent its mandate through a constitutional amendment in view of article 80 that restricts the tenure of member of parliament to four years.

This case arose as the result of adoption of law No. (2006/13) in June 2006 when the Unicameral Parliament in Benin enacted a constitutional amendment to modify Article 80 in order to increase the tenure of the Parliament from four years to five years with immediate effects. [84] The Court declared the amendment as unconstitutional. It observed

[82] No procedure for revision may be instituted or continued when it shall undermine the integrity of the territory. The republican form of government and the secularity of the State may not be made the object of a revision.
[83] DCC 06/ 074, July 8,2006
[84] Translation of the Judgment from French to English available at: http://www.constitutionnet.org/case-law/report/dcc-06-074

> Parliament's midterm extension of its mandate is a violation of the national consensus, expressed in the preamble of the Constitution, to wholly reject any confiscation and personalization of power. More specifically, article 80 of the Constitution which limits the length of each parliamentary term to four years constitutes the Beninese people's explicit expression of that fundamental opposition.

Although the Constitution provides clear procedures for its amendment, the Beninese people's determination to establish the rule of law, a plural democracy, and protect legal security and national cohesion requires all amendments to take into account that national consensus as expressed in the preamble of the 1990 Constitution."[85]

This is very novel and unprecedented of a country to find a ruling of substantive unconstitutionality beyond the expressed implied limitation found in the constitution. The Court invoked national consensus as an essential or basic constitutional principle which became decisive factor for holding the challenged law as unconstitutional. The principle of national consensus does not find a mention in the in the Constitution but was evolved by the Court as Beninese people strict stand against any form of confiscation of power.

It observed that even if the Constitution provides for its own amendment, in addition to rule of law and plurality of democracy, national consensus should also form an important feature to be considered and incorporated in a constitutional amendment.[86] In Court's view, Article 80 contains a specific intent and national consensus against confiscation of power which the Parliament sought to amend through the law in question.

[85] Ibid
[86] Ibid

The declaration of the unconstitutionality of the amendment met several criticisms for its novel invention of national consensus as an unamendable principle despite defined express limitation. However, in subsequent cases the Constitutional Court, developed other set of unamendable principles which formed as essential features of the Constitution.

In September 2011, the Parliament adopted a referendum Law No. 2011/27 to regulate the organisation of constitutional referendum in the Benin. Article 6 of the Benin Constitution provides for mechanism to be followed when referring a question in a referendum. The Constitution provides that the unamendable provision under Article 156 cannot be referred for amendment. In the referendum of 2011 the questions pertained to modifying the minimum and maximum age requirement for the President[87], removal of Presidential term limit[88] and modification of Presidential nature of Benin's Political system.[89]

The Constitutional Court in its case numbered *DCC 11- 067* ascertained the constitutionality of the referendum. The Court in order to decide its validity framed three questions as following.
(1) Is article 6's exclusion of the clauses relating to presidential age and term limits and the presidential nature of the political system of the state contrary to the Constitution?
(2) Can constituted authorities (which both parliament and the President are) submit to referendum questions that threaten the fundamental options (choices) the Beninese people made during the Sovereign National Conference of 1990?

[87] Article 44 of the Benin Constitution provides that the President should at least be of 40 years old but not more than 70 years old at the date of the filing of his candidacy;
[88] Article 42; The President of the Republic shall be elected by direct universal suffrage for a mandate of five years, renewable only one time.
In any case, no one shall be able to exercise more than two presidential mandates.
[89] Article 54; Provides for a Presidential form of Political System

(3) Can the Constitutional Court read into the Constitution's eternity clause (article 156) other clauses which the latter does not explicitly contain?[90]

While answering the three questions it declared the referendum to be unconstitutional and observed;

> Law no 2011/27 regulating constitutional referendums is unconstitutional to the extent that it excludes from the list of provisions that cannot be subject of a referendum articles 42, 44 and 54 of the Constitution on presidential term limits, the minimum and maximum age for President, and the presidential nature of the political system, respectively.
>
> Even if the Constitution does not explicitly say so, the contents of articles 42, 44 and 54 of the Constitution must, by necessity, constitute an integral part of the eternity clause of article 156 of the Constitution as they are an expression of some of the fundamental option or choices determined by the constituent power during the sovereign national conference of February 1990.[91]

Again, in this decision the Court implicitly added immutable clauses other than those explicitly mentioned therein in Article 156. Limiting Presidential term to two years as given in Article 42 and Presidential candidate age requirement in Article 44 doesn't provide that they these provisions sought to enjoy a kind of permanency and form a part of constitution's 'eternity clause' as declared by the Court. For holding so, the Court interpreted and applied notion of fundamental objectives of constituent power which led to adoption of constitution as a standard for controlling article 6 and in deciding the validity of the questions referred therein in a referendum.

The court invoked the preamble of the constitution and recounted the historical events like violation of human rights, undemocratic rule and abuse of power which defined the struggle and ultimate adoption of the Constitution in 1990. According to the Court, the adoption of the Constitution defined the new tenets of the political and constitutional dispensation that emerged

[90] Translated version of the decision in DCC 11- 067 available at Constitution net; https://www.constitutionnet.org/case-law/report/dcc-11-067
[91] Ibid

from the constitution building process. It further noted that embracement of democracy and rejection of confiscation and personalisation of power. These tenets in Court's view formed the basic structure of Benin's Constitution which cannot be amended by the Parliament in its capacity as constituent power.

According to the Court, these principles will be weakened and eroded if the question in the referendum were allowed to take place as it will defeat the fundamental objectives of the 1990 Constitution which seeks to establish a society based on democracy, rule of law and respect for human rights and national consensus.

Interestingly the Court's view on limiting the President term was similar to the holding in *Third Presidential Term Case* by Colombian Constitutional Court as discussed earlier in this chapter. It observed that the democracy implies theoretical possibility of each citizen to govern and also be able to govern in return. This rotation can only be realised if the Constitution and other legal framework provide equality of opportunity to citizens to get elected. Absence of term limits on how long a person can hold power signifies a risk of confiscation and personalisation of power by one person at the expense of society at large. The preamble of the Benin Constitution recognises this problem and prohibits personalisation of power. Thus, the Court declared the limit on Presidential term forms the part of basic structure and cannot be amended by the Parliament.

The Court also took into consideration the prevailing social atmosphere in Benin at the time of referendum which would have been upheld by the people. It ruled that the referendum can be used to manipulate Constitution. Therefore, on the basis of reading of the Constitution, the term

limit clause must be read as an implicit 'eternity clause' establishing constitutional bloc of supra constitutional principle.

The third constitutional Court decision in *DCC- 14 – 199*[92] is one of its kind and depicts unique extension of the implied limitation doctrine. It involved a constitutional challenge to the contents of open letter written by a minister, Mr. Latifou Daboutou, to the President of the Republic requesting him to revise the Constitution to allow himself to run for a third Presidential term. The Court held that the speech of the Minister violated article 34[93] which requires every citizen to abide by the Constitutional Court orders as the open letter provokes for violation of one of the basic feature of the Constitution enshrined in Article 42 i.e Presidential term limit as decided in *DCC 11- 06.*

The contents of the open letter were widely published in the newspapers on 24 August 2014 and the relevant part stated;

> Indeed, Mr. President, know that in case of revision of the Constitution of 11 December 1990 and even though Article 42 remained unchanged, Benin will have a new constitution by the fact of the constitutional amendment. To do this, all possible that it introduces the Court of Auditors and the limitations of economic crimes ... etc.
>
> Under these conditions (after the entry into force of the new constitution changed), your candidacy for the 2016 presidential election would be consistent with the new Constitution and therefore admissible."

On the basis of the abovementioned statement the Court observed

> Considering moreover that Title XI of the Constitution establishes and provides the framework for the revision of the Constitution of 11 December 1990; that a constant case law by the Court outlines the limits and modalities of such a revision; that whether the revision is done by Parliament or by

[92] Translated version of the decision. I would extent my gratitude for translation to Professor Mathias Moschel, Professor of Law, Central European University, Budapest

[93] Every Beninese citizen, civilian or military has the sacred duty to respect, in all circumstances, the Constitution and the constitutional order and laws and regulations of the Republic

> referendum; that the revision must be done in the prescribed forms - except for those clauses that are explicitly excluded from any revision and that are characterized as intangible clauses - which guarantees the stability of the Constitution by adapting it to the new aspirations of the sovereign people; that the revision of the Constitution which results from the implementation of the derived constituent power cannot destroy the existing constitutional order and substitute it with a new constitutional order; that therefore the revision cannot have the goal to create a new Republic as would like Mr. Latifou DABOUTOU; that the coming of a new Republic can only occur by the original constituent power which is different from the derived constituent power which is established and provided for directly by the Constitution itself; that therefore the Court states and judges that by inviting the President of the Republic, at the end of his second and last mandate, in an open and widely diffused letter, to revise the Constitution to introduce a new mandate, Mr. Latifou DABOUTOU has violated the Constitution.[94]

The finding of the Court suggests that any alteration of the basic structure of the Benin Constitution requires formation of an original constituent power like a Constituent Assembly and Parliament being a derived constituent power cannot violate the basic structure. Through this judgment the Constitutional Court declared itself as the final arbiter to decide upon the question of what constitutes basic structure and established the principle as developed by the Indian and Colombian Constitution that any alteration to the basic structure would require exercise of original constituent power.

[94] Translated version of the decision. I would extend my gratitude for translation to Professor Mathias Moschel, Professor of Law, Central European University, Budapest

CHAPTER 2. CRITICISM AND DEFENSE OF THE DOCTRINE

After discussing the evolution of implied limitation in Chapter 1, in this chapter I explore the criticism raised against the theory for being a facet of judicial overreach not traceable within the text Constitution itself. After analyzing the criticism, I also provide the constitutional basis and significance for the theory.

2.1. CRITICISM OF THE IMPLIED LIMITATION DOCTRINE

The invocation of theory of implied limitation on amendment power by the Judicial branch has met several criticisms since its inception. Many scholars and constitutional experts have denounced the theory as undemocratic and counter majoritarian in character, giving unelected judges vast political powers not given to them by the Constitution.[95] They view the invocation of implied limitation doctrine as an act of judicial overreach to limit what was not specifically limited by the Constitution.

2.1.1 UNDEMOCRATIC NATURE OF THE THEORY

The doctrine is seen to violate the concept of popular sovereignty in democracy as the final say concerning societal issues must be left to the majority acting through their elected representative. Parliament being the representative of the people, should be viewed as people themselves who are in fact 'fountain of all power' which can amend the constitution as they please.[96] The theory by protecting the original tenets of the constitution is also criticized as it

[95] Raju Ramchandran, 'The Supreme Court and the Basic Structure Doctrine' in '*Supreme but not Infallible',* New Delhi: (Oxford University Press, 2000) at pg 108
[96] *Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 COLUM. L. REV. 457, 470–471(1994).*

robs the present generation to decide for itself. Jefferson was of the view that each generation should be free to adapt the constitution to the conditions of its time and the amendment power is necessary so that a constitution does not contain 'time worn adages or hollow shibboleths', or a lifeless museum piece".[97] Walter Dellinger further supports this claim by observing that '*An unamendable constitution, adopted by a generation long since dead, could hardly be viewed as a manifestation of the consent of those being governed*.'[98] Therefore, the Constitution must be regarded as 'living document' designed to serve present and future generation, reflecting their fears, hopes, aspiration, needs and desires. The legislature thus, should have the power to amend constitution according to changing needs.

The implied limitation doctrine incorporates high degree of abstraction and its features are broad, open textured, and can be subjected to multiple interpretations.[99] Some critics argue that the doctrine's abstract formulation and vagueness has allowed the courts to enjoy unlimited judicial power making the judiciary 'the most powerful organ of the State'.[100] The non-exhaustive nature of identifying the basic elements creates confusion and leads to inconsistent application[101] and leaves the discretion with the judges to brand anything as a basic feature of the Constitution.[102] Critics suggests that the Constitutional Courts, in the interest of certainty

[97] Earl Warren, CJ in Trop v Dulles 356 U.S. 86 (1958) 103.

[98] *Walter Dellinger, The Legitimacy of Constitutional Change: Rethinking the Amendment Process, 97 HARVARD L. REV. 386, 387 (1983).*

[99] Pran Chopra (ed) 'The Supreme Court v the Constitution A Challenge to Federalism', (Sage Publication, New Delhi, 2006) 70–9, 137–46.

[100] Sanjit Kumar Chakraborty, 'Constitutional Amendment in India: An Analytical Reconsideration of the Doctrine of "Basic Structure"', National University of Juridical Science, Calcutta (22 November 2008 at pg 54

[101] M Jafar Ullah Talukder and M Jashim Ali Chowdhury, 'Determining the Province of Judicial Review: A Re-evaluation of "Basic Structure" of the Constitution of Bangladesh' (2009) 2(2) Metro Univ J.

[102] Omar and Hossain, 'Constitutionalism, Parliamentary Supremacy, and Judicial Review: A Short Rejoinder to Hoque' The Daily Star (Issue No: 215)

and predictability of the basic features while making laws, should come up with exhaustive and concrete list of basic elements of the Constitution.[103]

Critics argue that democracy allows people to decide their agreement and disagreement with parliamentary decisions by exercising their right to vote. The constitution is being framed for the people and the people are the original constituent power. If they disagree with any political action, then they will express their opinion through vote.[104] Richard Albert, claims that the theory of implied limitation and express constitutional limitation on amendment power undermines participatory democracy. He believes that '*Unamendability is objectionable as a matter of theory because they chill constitutional discourse and prevent reconsideration of the constitutional text, the very document that is embodiment of a people's nationhood and their vision for themselves and their state... unamendable clauses are supraconstitutional because only they limit the universe of constitutional possibilities that are open to the people.'*[105]
Bernal has argued that Constitutions, like Colombia and Benin, which include referendums as means of Constitutional change should require a less exacting standard for judicial review as referendum mirrors opinion of the governed. He writes that '*the more a constitutional amendment is the result of a procedure observing the rules of deliberative democracy, the less intensive should be the judicial review.'*[106] Thus, adoption of the doctrine by the Colombian and Benin Constitutional Court vitiates the process of deliberative democracy expressly provided in their Constitution. If a referendum concerning any amendment is answered

[103] Pran Chopra (ed) '*The Supreme Court v the Constitution.* A Challenge to Federalism', (Sage Publication, New Delhi, 2006) at pg. 127

[104] Vera Karam de Chueiri 'Is there such thing as Radical Constitution' in Thomas Bustamante & Bernardo Goncalves Fernandes (Eds),' Democratizing Constitutional law', Springer at pg 243

[105] R. Albert, 'Counterconstitutionalism', Dalhousie L.J., Vol 31. 2008, at pg 47-48

[106] Bernal Pulido, Carlos. 2013 'Unconstitutional constitutional amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine', International Journal of Constitutional Law (I-CON) 11(2): 339–357 at pg 357

positively by the people, then judicial review must be restricted to procedural compliance by the legislature.

2.1.2 THEORY AS A FACET OF JUDICIAL OVERREACH

The theory also invites criticism for being judge centric rather than based on some rational basis. In the absence of a provision containing implied limitation in the Constitution, the impact and consequences of the doctrine cannot be ascertained. For instance, Jeremy Waldron, in his book "Law and Disagreement", writes that the decision of what is amendable and what is not is not based on any set of principles or rationality but on preferences constructed out of variety of coherent individual choices.[107] The lack of standard in judicial review results in creation of a "government of judges" which can render decisions more regressive in recognizing rights as compared to decisions made by a democratically elected parliament.[108] The criticism is exemplified by the decision of the United States Supreme Court in *Lochner v New York*[109] wherein it declared unconstitutional a law establishing maximum working hours for bakers in protection of their labor rights[110] which was later on reversed.

Moreover, judicial review of constitutional amendments exacerbates the tension between legislature and the judiciary as the doctrine deprives the parliament of the opportunity to decide what elements constitutes essential elements of the Constitution and leaves the final say

[107] Jeremy Waldron. 'Law and Disagreement.' Oxford University Press.at pg. 89 (1994)

[108] Gonzalo Andres Ramirez-Cleves, 'The Unconstitutionality of Constitutional Amendments in Colombia: The Tension Between Majoritarian Democracy and Constitutional Democracy' in Thomas Bustamante & Bernardo Goncalves Fernandes (Eds),' Democratizing Constitutional law', Springer at pg 219

[109] 198 U.S. 45 (1905)

[110] Mark Tushnet, 'Taking the Constitution away from Courts', (Princeton University Press 1999) at pg 127

exclusively in the hands of Courts.[111] Thus, in absence of any rational criteria for adjudicating cases relating to violation of essential features of the Constitution, the judges establish their own supremacy which was not provided to them under the Constitution.

2.2. ESTABLISHING LEGITIMACY OF THE DOCTRINE

In response to the criticism that implied limitation doctrine is undemocratic and counter majoritarian, the following claims are made. First, even in a democracy, certain decisions must not be left to the majority. Second, the degree of representation and public support a government enjoys in modern democracies is questionable. Thirdly, the framing of the preamble to the Constitution suggest sthat it is meant to resemble a social contract, where the people have power to resolve certain rights themselves. Lastly, the model of Constitutional sovereignty implies limits on legislative powers.[112]

In the next sub chapters I will justify the legitimacy of the doctrine by arguing that the doctrine has a democratic basis in theory and instead of being a facet of judicial overreach signifies an important judicial function.

2.2.1 DEMOCRATIC BASIS OF THE THEORY

The proponents of the theory believe that the "true nature of democracy" requires that a particular form of government must contain certain intrinsic values that are considered to be

[111] M.F Mohallem, 'Immutable Clauses and Judicial Review in India, Brazil and South Africa. Expanding Constitutional Courts' Authority', Vol 15. No. 15, The International Journal of Human Rights, (2011) at pg. 765-766

[112]Gautam Bhatia, 'Basic Structure – II: The Argument from Democracy', available at https://indconlawphil.wordpress.com/2013/11/04/basic-structure-ii-the-argument-from-democracy/

basic or that it serves to promote such value.[113] Freeman, develops on these value system by distinguishing procedural democracy with substantive democracy and arguing that democracy, in addition to the principle of majoritarianism, also includes other values like respect for individual rights, rule of law among other within its definition.[114] These values constitute necessary conditions for generic constitutional governance. What the renowned American legal philosopher, Lon Fuller, called the ‘‘inner morality of law’.[115]

Drawing further on these values, Sudhir Krishnaswamy defends the legitimacy of the theory from the point of Constitutional theory which comprises two major parts, an account of the authority of the Constitutions and an account of the way the constitution should be interpreted.[116] He assesses the legitimacy of the doctrine by arguing that “legal norms which guide judicial decision making include those norms which are written into the Constitution as well as those norms developed by the Court interpreting the constitutional text (intrinsic values).[117] These legal norms remain subject to the expression of constituent power.[118] In cases where these norms are indeterminate or under determinate, the decision maker enjoys some discretion in interpreting a particular norm. What judges have the duty to do is to see that an amendment the Parliament seeks to bring in the Constitution is in consonance with such principles and identities that defines the Constitution.

[113] Ibid. quoting Isiah Berlin’s observation that oppression is oppression, whether it is imposed upon me by one person or by ninety-nine out of a hundred
[114] Samuel Freeman, ‘Constitutional Democracy and Legitimacy of Judicial Review’, Law and Philosophy, Vol. 9, No. 4 (1990 - 1991), pp. 327-370, published by Springer at pg. 340
[115] Lon Fuller, ‘The Morality of Law’, 42 (Yale Univ. Press 1964).
[116] Joseph Raz, ‘On the Authority and Interpretation of the Constitution: Some Preliminaries’, in L. Alexander (ed) Constitutionalism, Cambridge University Press 1988, p. 157
[117] Krishnaswamy Sudhir,’ Democracy and Constitutionalism in India a study of basic structure Doctrine’, Oxford University Press 2010 at pg 167
[118] Martin Loughlin and Neil Walker, ‘Introduction’ in Loughlin and Walker (eds), ‘The Paradox of Constitutionalism: Constituent Power and Constitutional Form Oxford University at pg 1-2

The democratic basis for implied limitation also arises from the difference between the constituent power and constituted power. Constituent power refers to the power to establish the constitutional order of a state.[119] The institution it creates for law making i.e. the Parliament or the Congress is the constituted power.

In the 17th century, George Lawson distinguished the two powers by claiming that constituted power to make law is inferior to the constituent power of Constitution making. The later power is the power to 'constitute, abolish, alter, reform forms of government', which is exercised when government breaches people's trust.[120] The constituted power cannot act against the power which formed it or alter its own foundation.[121] Contrary to the claim that Parliaments are sovereign and the doctrine of implied limitation is an act of judicial overreach, the actual 'sovereign is the one who makes the Constitution and establishes a new political and legal order'.[122]

The Constituent power establishes the Constitution and creates the executive, legislature and the judiciary. Therefore, the power of the legislature is subordinate to that of the Constitution and coordinate with other branches of the State.[123] Legislature lacks the power to destroy or reform the Constitution in a way that it replaces its basic features. The invocation of the theory by the judiciary should be seen as a facet of check and balance and an important tool in performance of Court's role as the guardian of the Constitution to protect it from loss of its

[119] Roznai Yaniv, *'Unconstitutional Constitutional Amendments- The Limits of Amendments Power',* Oxford University Press 2017, at pg 105
[120] George Lawson, Politica Sacra et Civilis (Conal Condren ed., Cambridge University Press 1992) at pg 47-48.
[121] Daniel Defoe, 'The original power of the Collective Body of the People of England, Examined and asserted',1702
[122] Andreas Kalyvas, 'Popular Sovereignty, Democracy and Constituent Power', 2005, Constellations 223,226
[123] Roznai Yaniv, *'Unconstitutional Constitutional Amendments- The Limits of Amendments Power',* Oxford University Press 2017, at pg 110

identity and basic elements. A close observation of the judgments studied in the first chapter makes it clear that the Court did not hold that basic elements cannot be amended but rather that parliament being a constituted authority cannot amend it.

2.2.2 MEANING OF CONTITUTIONAL IDENTITY?

One question that arises is what the Court means by identity? In the preceding sub chapter, we discussed the criticism that in absence of expressed limitations, the doctrine lacks rational criteria for determination of basic elements of the Constitution and depends on judicial preferences. However, this claim is misplaced. Reforming a constitution is different from re-forming the constitution.[124] Aristotle questioned that "*On what principles ought we to say that a state has retained its identity, or, conversely, that it has lost its identity and become a different State*?"[125] His answer was that a State's identity is changed when the Constitution changes as a result of disruption in its essential commitments, much as a chorus is a different chorus when it appears in a tragedy rather than a comedy.[126] Thomas Reid observed that "continued uninterrupted existence… necessarily implied in its identity'.[127] The Indian Supreme Court defined these basic features as ' those political, moral and legal principles which are reflected in several articles in the Constitution the collection of which together make the core normative identity of the Constitution'.[128] Thus if legislature enacts any amendment which affects the inner unity and coherent identity of the Constitution, the doctrine of implied limitation allows

[124] Walter F. Murphy, 'Slaughter-House, Civil Right, and Limits on Constitutional Change,' 32 AM. J. JURIS. 1, 17 (1987)
[125] ARISTOTLE, 'THE POLITICS OF ARISTOTLE '98 (Ernest Barker trans., Oxford Univ. Press 1962).
[126] Id 99
[127] Quoted in Udo Thiel, Individuation, in 1 CAMBRIDGE HISTORY OF SEVENTEENTH CENTURY PHILOSOPHY 253 (Daniel Garber & Michael Ayers eds., Cambridge Univ. Press 1998).
[128] Raghunathrao Ganpatrao Etc v. Union of India 1993 AIR 1267

the Court to uphold its core values and the principles by holding such amendment unconstitutional.[129]

It can be seen from the first chapter that the principles that the Court declared unamendable signifies that the theory has been applied to discover the elements that form the Constitutional identity by relying on the unique history and circumstances of the State. Further, features like secularism, form of government, rule of law, equality of political opportunities form the basis of any modern constitution and it cannot be said that the elements discovered by the Court in their assessment were some extra constitutional principle. We will see in the next chapter that the doctrine has been used to protect the Constitution against power grab tactics by the majority.

2.2.3 A FACET OF JUDICIAL FUNCTION

The judiciary, unlike the executive and legislature, exercises independent authority and the maximum impact of its decision upon the society is negligible as compared to other branches of government. Therefore, it may be argued that *ex majore cautela,*[130] the judiciary is the ideal institution to vest the highest power of the State (of overruling the decisions of the popular majority), as it has the least ability to abuse that power and all the vast implications that it carries.[131] Further, the Courts are considered to be superior to legislatures as a forum for rational deliberation and the legitimacy of the courts arises from rational deliberations and therefore Constitutional Courts are, in comparison to elected Parliaments are much better suited for disinterested deliberation and public reason – giving.[132]

[129] Md. Abdul Malek, 'Vice and virtue of the Basic Structure Doctrine: A Comparative Analytic Reconsideration of the Indian sub-continent's Constitutional Practices', Commonwealth Law Bulletin 2017, 43:1, 48-74

[130] for greater caution

[131] Gautam Bhatia, 'Basic Structure – II: The Argument from Democracy', available at https://indconlawphil.wordpress.com/2013/11/04/basic-structure-ii-the-argument-from-democracy/

[132] Conrado Hübner Mends, Constitutional Courts and Deliberative Democracy (Oxford University Press, 2013) at pg 78

It is further important to vest the judiciary with such power because most of the fundamental rights and challenge to the violation of basic structure of the Constitution are claimed against the Parliament representing majority. Therefore, allowing the Parliament to be the final arbiter on questions of violation of basic features of the Constitution will amount to it judging its own cause in matters in which it has close and intimate interest.[133]The invocation of the theory by the judiciary cannot be described as judicial overreach but must be seen as an important tool to perform its role as guardian of the Constitution to protect the foundational elements of the Constitution.

The criticism of the development of the implied limitation doctrine beyond express limitations by the Benin Constitutional Court is also very weak. A comparative analysis of express limitation clauses depicts that concepts such as 'Republic' or the 'Rule of Law' enjoy a degree of interpretation that can be extended or restricted, resulting in minimalist or maximalist interpretation in assessing irreplaceable elements.[134] For instance, the French and Italian Constitution contain the eternity clause related with the concept of 'Republic', and the concept has been given maximalist interpretation, so that "Republic" should be understood not only as that regime which differs from monarchy, but also a regime that establishes and guarantees the separation of power, the principle of Constitutional supremacy, protection of rights, rule of law and possibility of judicial review of laws, among others.[135]

[133] Ibid
[134] Gonzalo Andres Ramirez-Cleves, 'The Unconstitutionality of Constitutional Amendments in Colombia: The Tension Between Majoritarian Democracy and Constitutional Democracy' in Thomas Bustamante & Bernardo Goncalves Fernandes (Eds),' Democratizing Constitutional law', (Springer 2016) at pg 225
[135] Ibid

This jurisprudential expansion of the scope of the eternity clause is justified because the constituent power set fundamental goals and principles that have become indispensable for meaningful existence of a democracy. The Constitutional Court acts as the guardian of these principles. Thus, the Court decisions in Benin should be viewed as the guide of the sovereign will to protect it from violating, or being manipulated into violating its own fundamental objectives.[136]

Therefore, in view of the abovementioned, it is difficult to argue that the doctrine of implied limitation is undemocratic. We have seen from the preceding sub chapter that invocation of the doctrine furthers the true nature of democracy by allowing the Court to decide if a constitutional amendment is within the framework of the Constitution. Judicial review of amendments, thus, should be viewed as a facet of separation of power that allows the Court to keep check upon legislative powers.

[136] Commentary on Benin Constitutional Court judgment October 20, 2011 available at https://www.constitutionnet.org/case-law/report/dcc-11-067

CHAPTER 3: RELEVANCE AGAINST ABUSIVE CONSTITUTIONALISM

In this chapter, I will be discussing the phenomenon of use of amendment power for introducing constitutional change in order to undermine democracy. David Landau calls this phenomenon "Abusive Constitutionalism".[137] He argues that powerful incumbent presidents and political parties can manufacture constitutional change so as to make themselves very difficult to dislodge and to control institutions like courts that places checks upon their powers.[138] Hitler's abuse of Constitutional Emergency power to overthrow the Weimer

[137] Landau David, 'Abusive Constitutionalism', University of California, Davis, 2013 (Vol: 47;189) at pg. 191
[138] Ibid

Republic and install an authoritarian regime can be referred to as an example of this phenomenon.[139]

In a Constitutional Democracy, the struggle for power between different political groups is inevitable. Existence of amendment power becomes susceptible to abuse when political actors tend to employ this power for political gains. Landau argues that the concept of Militant Democracy and the doctrine of Unconstitutional Constitutional Amendment can be used to prevent this struggle from turning into Abusive Constitutionalism.[140] For the purpose of this chapter, I will focus on the instances where amendment powers were employed by political actors to perpetuate political powers and the intervention of the Constitutional Courts to invalidate such amendments by invoking the doctrine of Unconstitutional Constitutional Amendment to protect basic features of the constitution.

As discussed in the preceding chapters, the constitutional guarantee of democracy, rule of law and liberty are some of the principles that constitute the basic features of the constitution. One of the means of subverting these guarantee is via constitutional amendment.[141] In a dominant party democracy system, imposition of substantive constraint on the amending power serves as a hedge against polity's uncertain commitment to rule of law.[142] However, despite the existence of the restraint, the political parties enact amendments that tends to violate these features. In these situations, the Constitutional Court use the basic structure theory as a remedy, like it did in India and Colombia, for such odious constitutional amendment.[143] Originally the

[139] David Fontana, 'Government in Opposition', 119 YALE L.J. (2009) 548, at pg 598
[140] Landau David, 'Abusive Constitutionalism', University of California, Davis, 2013 (Vol: 47;189) at pg. 193-194
[141] Ibid at 100
[142] Yaniv Roznai, 'Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea', The American Journal of Comparative Law, Vol. 61,2013, 657- 720, at p. 657
[143] David Landau, 'Abusive Constitutionalism', University of California, Davis, 2013 (Vol: 47;189) p 190

application of the theory was restricted to a constitutional amendment but now the doctrine is also invoked in challenges to ordinary legislations and executive actions which seeks to undermine the unwritten constitutional values.[144]

3.1. INDIA

In India, the two kinds of abuse which were witnessed since the judgment of *Kesavananda Bharati* were removal of judicial review of constitutional amendments from the Courts and supersession of judges for writing judgments against the government.

In one of the early cases concerning constitutional amendment Chief Justice K. Subba Rao spoke of the risk that might emanate from the "brute majority"[145] and remarked that Congress Party without Nehru's Statesmanship might abridge various rights in pursuit of socialist utopia.[146] In this case the Chief Justice observed;

> If the fundamentals would be amenable to the ordinary process of amendment with special majority… the institutions of the President can be abolished, the parliamentary executive can be removed, the fundamental rights can be abrogated, the concept of federalism can be obliterated and in short the sovereign democratic republic can be converted into a totalitarian system of government.[147]

Thus, for the first time the Supreme Court held that the Parliament cannot enact any constitutional amendment that abridges fundamental rights of the citizens.[148] However, as discussed in the first chapter, after the *Golak Nath* Judgment, the government reacted by

[144] Christopher J. Beshara, "Basic Structure Doctrines and the Problem of Democratic Subversion: Notes from India", Verfassung und Recht in Ubersee VRU 48 (2015) 99-123 at pg 101
[145] I.C Golak Nath V. State of Punjab, (1967) 2 S.C.R 762 at. 869-70
[146] Granville Austin, Working of a Democratic Constitution: A History of Indian Experience, New York 1999, at pg. 200
[147] I.C Golak Nath V. State of Punjab, (1967) 2 S.C.R 762 at. 806
[148] As discussed in the first chapter, the Supreme Court held that the Constitutional law is a law under Article 13 and therefore no law can be made that abridges fundamental rights.

resorting to constitutional amendment to overrule the effect of the judgment. Later in the *Kesavananda Bharati Case*, the Supreme Court overruled the *Golak Nath* but established the doctrine of basic structure of the constitution.

The decision in *Kesavananda* had an immediate reaction from the government. For the first time, the three senior most judges who decided against the government's stand were superseded and A.N Ray was appointed as the Chief Justice of the Supreme Court.[149] The Prime Minister justified the supersession by arguing that an "accommodating" Supreme Court was critical to the Social Revolution success.[150] However, Granville Austin observed that the real reason behind the supersession was Raj Narain's election petition filed against Indira Gandhi in the Allahabad High Court. Narain contested the election against Indira Gandhi in the 1971 elections, and had filed a petition claiming that her victory was tainted by electoral corruption.[151]

On 12 June 1975, the Allahabad High Court set aside Indira Gandhi's election on the charges of electoral corruption. Thereafter, she appealed to the Supreme Court which granted her interim relief by partly staying the High Court judgment and allowed her to continue as the Prime Minister without having any right to vote in the Parliament.[152] On 25th June the same year during the pendency of the appeal, she declared an "internal emergency" under article 352 of the Indian Constitution which led to arrest of political dissenters, suspension of right to move the courts for enforcement of fundamental rights, and suppression of the press freedom.[153]

[149] Roznai Yaniv, *'Unconstitutional Constitutional Amendments- The Limits of Amendments Power',* Oxford University Press 2017, at pg 45
[150] Granville Austin, Working of a Democratic Constitution: A History of Indian Experience, New York 1999, at pg. 278
[151] Ibid p 281
[152] Ibid p 295
[153] Ibid p 309-11

During the emergency, the Congress government passed two constitutional amendments to nullify the effect of the Allahabad High Court judgment. The Constitution Thirty-Eighth (38) Amendment Act 1975, which insulated proclamation of emergency, presidential ordinances, and declaration of President's Rule from judicial review. The Constitution Thirty-Ninth (39) Amendment Act 1975 which retrospectively repealed the electoral laws which Indira Gandhi had violated, and insulated the Court from reviewing the validity of the Prime Minister's election.[154]

Interestingly the then Attorney General argued that the Allahabad High Court's decision was overruled since the 39th Amendment had extinguished the legal basis for its finding against the Prime Minister. However, the Counsel for Narain responded that the 39 Amendment was itself void since it violated the basic structure of the Indian Constitution. Therefore, in *Indira Gandhi v Raj Narain*, the Court was to consider the correctness of the *Kesavananda case*.

After a careful and long hearing the Court dismissed the argument of the government and invoked the basic structure doctrine to invalidate the 39th Amendment Act that sought to remove judicial review of the Prime Minister's election. It further declared that the abrogation of judicial review violated the principle of rule of law, judicial resolution of electoral disputes and the principle of free and fair election which formed integral part of the basic structure of the constitution.[155] Thus, invocation of the basic structure doctrine helped the Court against the abuse of amendment power.

[154] Ibid,. p. 319
[155] Indira Gandhi v. Raj Narain (*The Election Case)* AIR 1975 S.C. 2299 at para 59, 213, 341-43 and 681

However, even after two Supreme Court landmark judgments holding judicial review as an essential facet of basic structure the Congress government enacted the Forty-Second (42) Constitution Amendment Act 1976, which amended article 368 of the Indian Constitution and aimed at removing all limits upon the constituent power to amend the constitution by again insulating judicial review of constitutional amendment. Later in *Minerva Mills v Union of India*[156] the Supreme Court struck down the amendment and declared that basic structure is itself part of the Constitution basic structure and cannot be removed by an amendment. Surprisingly Justice Y.Y Chandrachud who ruled against implied limitation on amendment power in *Kesavananda Bharati Case* ruled otherwise in this case. In his judgment, he observed;

> *Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our 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 by the exercise of that power convert the limited power into an unlimited one.*[157]

Thus, *Minerva Minerals* put a quietus to the issue concerning the validity of the basic structure theory and the doctrine was accepted as a limit on the constitutional amendment power of the Indian Parliament.

Later in *Bommai* case,[158] the court widened the application of the basic structure doctrine beyond constitutional amendment. In this case, the Supreme Court was asked to review the decision of the Congress government (Centre) to dismiss six State Governments ruled by the Hindu aligned BJP party by invoking emergency power under article 356 of the Indian

[156] AIR 1980 SC 1789
[157] R.C. Bhardwaj, 'Constitution Amendment in India', (Sixth ed.) 1995 New Delhi: Northern Book Centre. p. 12.
[158] S.R Bommai v Union of India 1994 (3) SCC 1

Constitution. The said provision allowed the central government to dismiss a state government by proclaiming President rule in case of failure of the constitutional machinery in that State. The Congress justified the imposition of President rule in the wake of violence triggered by Babri Masjid Demolition[159] and argued that imposition was necessary to protect the Secular nature of the constitution.[160] However, the BJP claimed that the imposition was done in bad faith in order to dismantle the proper functioning of the State government.

This was an interesting case from the perspective that the Court was asked to review the validity of the President's political decision vis-a-vis basic structure doctrine. The Court ruled for the first time that the basic structure had application beyond constitutional amendment and held that the President exercise of discretion must comply with the basic features of the constitution. Therefore, the dismissal in some states was upheld as complying with the basic features. However, in respect of certain States the Court noted that a dismissal would be unconstitutional if it seeks to undermine any of the basic feature of the Constitution. Justice Sawant in the instant case noted that "*the temptation of the political parties or parties in power … to destabilize or sack a government in the State not run by the same political party"* would constitute violation of the principle of federalism which is an essential feature of the Constitution[161] and therefore the proclamation under article 356 would be closely scrutinized to discover signs of motives inconsistent with the dictates of basic structure doctrine.[162]

[159] n 6 December 1992, a large crowd of Hindu Kar Sevaks (activists) demolished the 16th-century Babri Mosque in the city of Ayodhya, in Uttar Pradesh. The demolition occurred after a political rally at the site turned violent.
[160] Christopher J. Beshara, "Basic Structure Doctrines and the Problem of Democratic Subversion: Notes from India", Verfassung und Recht in Ubersee VRU 48 (2015) 99-123 at pg 120
[161] S.R Bommai v Union of India 1994 (3) SCC 1, para 104
[162] Ibid para 96

Thus, the Supreme Court broadened the scope of the basic structure beyond constitutional amendment in order to protect the constitution not only against any offending amendment, but also against any act of the government that might violate the basic structure. Now, the application of the doctrine also extends to "*any policy or decision of the government which would undermine the independence of judiciary."*[163] Therefore, the Supreme Court has always invoked the doctrine to protect the constitution against any threat by parliament whether it was an amendment to the constitution or any policy or legislative decision.

Now we will carefully examine the application of doctrine in a Hyper Presidential System like Colombia as a measure against Abusive Constitutionalism.

[163] Brij Mohan Lal v Union of India, (2012) 5 SCR 305

3.2. COLOMBIA AND BENIN

In this sub chapter, I will study the importance of theory in Presidential System. Since in Colombia and Benin, the theory was invoked to declare removal of the presidential term limit unconstitutional, I have studied the relevance of the theory in both countries together in this sub chapter.

The application of the theory to declare removal of term limits has raised several questions against implied limitation on amendment granting the presidential re-election. Scholars have written extensively for the need for Presidential term limit to be removed for carrying out State policies.[164] If the removal of term limit is decided by people by exercising their right to participate in democratic referendum, like it occurred in Colombia and Benin, then the People's will must be upheld. The reason for removal of limits on Presidential tenure serves an illiberal restriction on the choice of the polity from retaining an executive who it may otherwise wish to keep. The polity can always vote the executive out of the office if it so chooses, and therefore there is no need for limiting candidate's right to participate in election.[165] Mainwaring and Scully argue that 'because of fixed terms of office, if a president is unable to implement her/his program, there is no alternative but deadlock'.[166] Therefore, the invocation of theory has been rejected as it dilutes the importance of deliberative democracy.

However, term limit serves an essential purpose of restraining political power invoked for manufacturing permanency in office. Moreover, limiting presidential terms is not a new concept. In Greece, a one year limitation was imposed on some officials elected by random

[164] See Juan J. Linz, 'Presidential or Parliamentary Democracy: Does it make a Difference?' in 'The failure of Presidential Democracy', eds. Juan J. Linz and Arturo Valenzula, 1994
[165] U.S. Term Limits v. Thornton, 512 U.S. 1286 (1994)
[166] Scott Mainwarring & Timothy R. Scully, 'Building Democratic Institutions: Party System in Latin America. See in Jide O Nzelibe and Matthew C. Stephenson, 'Complementary Constraints: Separation of Power, Rational Voting and Constitutional Design, 123 Harv L. Rev. 618, at pg 643-45

lottery.[167] In Athens, there was a two terms' restriction on individuals forming a part of the governing council.[168] Democracy in ancient Greece, like the Colombian and Benin Court held, required that the citizens should have opportunity of both "ruling and being ruled in turn" and this could only be observed with strict limitation on tenure in Public offices.[169]

In a Presidential Regime, removal of term limits may lead to a one man dominated political and constitutional system, what H. Kwasi Prempeh calls 'absolute presidentialism'.[170] Carlos Bernal argues that in a Hyper Presidential regime the doctrine has an important role to play in order to protect the Constitution from amendments that seek to destroy basic features of the Constitution. For instance, the Constitutional Court decision holding the amendment granting a third Presidential term unconstitutional was crucial to prevent the principle of check and balance as one more term would allow the President to appoint public officers responsible for checking him and therefore it would become impossible to achieve constitutionalism.[171] Thus in this case the Court did prevent a significant erosion of democracy by preventing a strong president from holding onto power indefinitely.[172]

Further, the term limits also encourage political competition and participation as incumbency for a long period of time can serve as a barrier to entry for other candidates who might refrain from contesting against the established incumbent.[173] As Kwasi Prempeh argued, absolute presidentialism leads to one man dominated system, term limits promote a party based, as opposed to personality based notion of democracy. Limit on re-election assumes that no one

[167] Charles C Hignett, 'A History of the Athenian Constitution to the End of the Fifth Century B.C 237 (1952)
[168] Gideon Doran & Michael Harris, Term Limits 5, 2001.
[169] Ibid
[170] Prempeh, H.K, 'Constitutional Autochthony and the Invention and Survival of "Absolute Presidentialism" in Postcolonial Africa', in Comparative Constitutional Design and Legal Culture', (ed. Gunter Frankberg), Edward Elgar Publishers, 209-233,at pg 209 (2013)
[171] Carlos C Bernal, 'Unconstitutional Constitutional Amendment: in the case study of Colombia: An analysis and Justification and Meaning of the Constitutional Amendment Doctrine'. I. CON 11 (2013) pg 351
[172] Landau David, 'Abusive Constitutionalism', University of California, Davis, 2013 (Vol: 47;189) at pg.203
[173] Einer Elhauge, 'Are Term Limits Undemocratic', 64 U. Chi. L. Rev. 83, 154-65 (1997)

individual has monopoly on the skills needed to govern.[174]

In the light of lack of actual incidents of abuse in Colombia and Benin, Bernal tries to focus on the importance of the doctrine by focusing on the problems which other Hyper Presidential regimes have faced by the use of amendment powers. He tries to frame an imaginary constitutional amendment that seeks to replace the deliberative nature of democracy with socialist democracy[175] or extend Presidential tenure from five to seven years. He argues that these amendments are possible in a Hyper Presidential system where the constitutional balance of power tilts more in favour of the President than the Congress and such constitutional pre-eminence coupled with democratic legitimacy may allow the President to misuse the authority to garner majority support for a constitutional amendment through the practice of 'clientelismo'.[176]

Given the potential misuse of the amendment powers in a Hyper Presidential system it can be said that the doctrine of Constitutional Replacement is justified in a political context in which some reasonable conditions of fairness and stability have not been met yet.[177] Thus, its commendable that there has not been any attempt by President Uribe to bring in any amendment to overturn the holding of the judgment.

[174] Tom Ginsburg, James Melton & Zachary Elkins, "On the Evasion of Executive Term Limits" (University of Chicago Public Law & Legal Theory Working Paper No. 328, at pg 8 (2010)

[175] His imaginary amendment encompasses some of the changes to the Constitution of Venezuela proposed by President Chavez in 2007.

[176] This is the practice of obtaining votes with promises of government post or other privileges. The parliamentary majority required by art. 375 of the Colombian Constitution in order to pass a constitutional amendment is not difficult to obtain. This article states that an amendment "must be approved in two ordinary and consecutive periods. Following approval in the first period by the majority of those present, the proposal will be published by the government. In the second period, approval will require the vote of the majority of the members of each chamber."

[177] Carlos C Bernal, 'Unconstitutional Constitutional Amendment: in the case study of Colombia: An analysis and Justification and Meaning of the Constitutional Amendment Doctrine'. I. CON 11 (2013) pg 352

Conclusion

The importance of the doctrine lies in its being illustrative rather than an exhaustive list of elements which constitute basic structure. With changing times, there can be new trends of constitutional abuse and in such circumstances the doctrine can be invoked against new emerging threats. Its flexibility allows judges to defend the constitutional order without being constrained by the limits of constitutional text[178]. From the Indian experience, it can be seen that from *Kesavananda* until *S.R Bommai* it was believed that the doctrine only applied to constitutional amendment. Its invocation in *Bommai* in India and in the *third Presidential term cases* in Colombia and Benin reflect that the doctrine is aimed at a moving target and tends to protect constitution from substantial movement along the spectrum towards authoritarianism, rather than protecting any single constitutional principle in isolation.[179]

One of the problems associated with the theory is that while ordinary judicial review can set aside political action, the judicial decision might in turn be overridden by constitutional amendment.[180] However, it has to be appreciated that the political entities both in India and Colombia, except in few cases which I highlighted in this chapter, have both respected the invocation of the doctrine and respected the decisions of the Courts.

[178] S*ee* Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961, 1002 (2011) [hereinafter *Courts*] (noting that the basic structure approach may be valuable because it may not be "apparent from the outset of a democracy which provisions may prove to be central," and that ex ante exposition of the provisions may be impossible).
[179] Landau David, 'Abusive Constitutionalism', University of California, Davis, 2013 (Vol: 47;189) at pg.235
[180] S*ee* Miguel Schor, *The Strange Cases of* Marbury *and* Lochner *in the Constitutional Imagination*, 87 TEX. L. REV. 1463, 1477-80 (2009) (arguing that foreign countries adopted easier amendment thresholds and other mechanisms partly because of unrestrained fear of judicial power as expressed through *Lochner*).

CONCLUSION

Lord Byron famously wrote, "*A thousand years scarce serve to form a state; an hour may lay it in the dust".* An analysis of the judgments in the three jurisdictions of India, Colombia and Benin, depicts that the invocation of the theory by the Constitutional Court was employed as an important tool to protect certain essential elements of the Constitution that give meaningful existence to a State. The theory seeks to protect certain promises and guarantees including democratic state of government, secularism, fundamental rights, which the Constitution made to its citizens at the time of its inception.

However, we saw that the theory was denounced by several scholars and jurists as usurpation of legislative function by Courts and thus robbing the present generation of the opportunity to make changes in the Constitution according to changing times. This is supported by the fact that true sovereignty lies with the people and Parliament represents the collective will of the sovereign. Christopher Eisgruber wrote that '*a constitutional procedure that enables people to entrench good rules and institutions will also enable them to entrench bad rules and institutions. People must have the freedom to make controversial political choices, and that freedom will necessarily entail the freedom to choose badly*'.[181]

However, his view on sovereignty of people can be confused with majoritarian politics. In pursuit of a constitutional amendment supported by the majority of the population the dissent or concern of the minority may be stifled due to their sheer number. In this regard, Frank Michelman argues that decisions taken by the people in constituting their community have to

[181] C.L Eisgruber, 'Constitutional Self Government', (Harvard University Press, 2001) at pg 120

lie beyond the reach of the majority, such as the limits of governmental powers, the commitments with human dignity, self-determination, liberty and equality etc.[182]

I also believe that people may be aroused with passion and in pursuit of passion they may give their consent to parliament to change the existing constitutional order. But will it be acceptable to vest Parliament with immense power to amend the Constitution and replace the democratic nature of the state with a totalitarian one? May the people who accepted constitutional democracy, democratically or constitutionally authorize such a political change? May the system validly claim to draw its authority from the consent of the governed?[183] In my opinion, such a transmutation would violate the very essence of separation of power and the doctrine of constitutionalism. The importance of the theory lies in extending aid to the judiciary to perform its role as guardian of the Constitution and allowing it to keep a check upon legislative power by reviewing an amendment's compliance with essential features of the Constitution.

Constitutional Amendments enacted in furtherance of popular will may contain passions of hope but not necessarily reasons. Hopes and passions may blind people to the consequences that may result from a political decision arising from their beliefs. Thus, if one organ of State is able to influence the passion of the masses, then the theory of check and balance requires that another body must be able to counter passion. The theory as adopted by Courts allows the judiciary to play a key role in reasoning public passion with constitutional commitments. Alexander Hamilton observed that the passions of men will not conform to the dictates of reason and justice without constraint.[184] Thus rather than seeing the evolution of the theory as

[182] Frank Michelman, 'Brennan and democracy', (Princeton University Press, 1999)
[183] See Murphy, at pg 179 (1995)
[184] Alexander Hamilton, 'The Federalist Paper' No. 15 (1787)

a facet of judicial overreach, it must be seen as an important development in the realm of constitutionalism.

Moreover, the application of the theory by Courts in recognizing concepts like secularism, democracy, equality of political opportunity, amongst others, signifies that the doctrine contains rational criteria in reviewing amendments and serves as an essential tool against power grab tactics adopted by the executives for scoring political gains.

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