

**Lions above the Throne: Exploring Subjectivity in Basic Structure Doctrine of India
and Constitutional Replacement Doctrine of Colombia**

by Suhail Farooq Khan

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ABSTRACT

This thesis aims to undertake a comparative analysis of the doctrine of unconstitutional constitutional amendments developed in two divergent legal systems: India, representing the common law tradition, and Colombia, rooted in the civil law tradition. While extensive literature exists on the evolution of the Basic Structure Doctrine in India and the Constitutional Replacement Doctrine in Colombia, a direct comparative study between these two doctrinal frameworks remains absent from current scholarship.

This research attempts to address that gap by examining i) how the Courts in their respective jurisdictions have interpreted their constitutional provisions to conclude implied limitations on the amending power, grounded in the distinction between original and derived constituent power, even in case of absence of eternity clauses. It explores how the constitutional provision for convening a constituent assembly has influenced the judicial reasoning in Colombia to a degree, and if there is a potential point of convergence with India.

The thesis further evaluates ii) if the seven-step approach under Constitutional Replacement Doctrine offer a more structured and objective alternative to the abstract and subjectivity application of the Basic Structure Doctrine in India.

Through detailed doctrinal and case law analysis, the thesis finds that both jurisdictions converge in recognising limits on constitutional amendment based on constituent power theory, although the provision for convening a constituent assembly in Colombia enabled its Court to articulate this distinction more systematically, where in India, its Court had to struggle for decades to make such distinction.

On the second question, the analysis reveals that, despite its structured and systematic methodology, the Colombian approach is not immune to subjectivity and faces the same issue of abstraction present in India. Ultimately, the thesis concludes that Colombia's model does not present a viable constitutional transplant for India.

AUTHOR'S DECLARATION

I, the undersigned, Suhail Farooq Khan, candidate for the LLM degree in Comparative Constitutional Law declare herewith that the present thesis titled “Lions above the Throne: Exploring Subjectivity in Basic Structure Doctrine of India and Constitutional Replacement Doctrine of Colombia” is exclusively my own work, based on my research and only such external information as properly credited in notes and bibliography. I declare that no unidentified and illegitimate use was made of the work of others, and no part of the thesis infringes on any person's or institution's copyright.

I also declare that no part of the thesis has been submitted in this form to any other institution of higher education for an academic degree.

Vienna, 16 June 2025

Suhail Farooq Khan

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TABLE OF CONTENTS

I. INTRODUCTION	1
I.I Implied limitation on constitutional amendment power	2
I.II Unconstitutional Constitutional Amendment	3
I.III Context and research question for the Thesis	4
I.III.I Research Question	4
I.III.II Context	5
I.V Methodology	8
I.V Structure of the Thesis	9
II. ORIGINAL CONSTITUENT POWER AND DERIVED CONSTITUENT POWER	11
II.I INDIA	11
II.I.I Origins of implied limitations	12
II.I.II Basic Structure Doctrine	14
II.I.III Distinction between constituent power and constituted power	16
II.II COLOMBIA	17
II.II.I Basis for substantial review of constitutional amendment	17
II.II.II Foundational logic	18
II.III CONCLUSION	20
III. IDENTITY TEST AND QUESTION OF SUBJECTIVITY	21
III.I BASIC STRUCTURE DOCTRINE	21
III.I.I Various tests created by the Court	23
III.I.II Uneven application of Basic Structure Doctrine	25
Guarding the Courts	25
III.I.III Overlooking Basic Features	27
III.I.IV Basic Structure review for ordinary legislations	28
III.II CONSTITUTIONAL REPLACEMENT DOCTRINE	30
III.II.I Identity test	31
III.II.II Seven-step Approach	33

III.II.III Identity test under Seven-step Approach	34
III.II.IV Constitutional Replacement Doctrine in action	35
a. Presidential Re-election cases	35
b. Judicial reform of 2015	36
c. Other Instances	36
III.III ISSUE OF SUBJECTIVITY REMAINS	37
IV. COMPARISON BETWEEN TWO DOCTRINES	40
IV.I Similarities	40
IV.II Avoidance of crystallisation	43
V. CONCLUSION.....	46
BIBLIOGRAPHY	51

I. INTRODUCTION

In the contemporary era of constitutionalism, there is a near-universal emphasis on the importance of principles such as the rule of law, the protection of fundamental rights, the separation of powers, religious liberty, and the institutionalisation of liberal democracy. The Constitution serves as a crucial mechanism for enshrining these principles, providing a textual safeguard intended to preserve them in the face of future political uncertainties. Beyond its role in institutional design, the Constitution also aspires to shape the citizenry itself, promoting civic virtues and a collective political identity aligned with democratic norms. Any attempt by the executive or legislature to curtail or circumvent these constitutional mandates is thus interpreted as a direct assault on foundational democratic objectives.

Within this context, the mechanism for constitutional amendment assumes a pivotal role in either advancing the transformative objectives of the constitutional order or, conversely, in undermining them. Through the very provisions enshrined within the Constitution itself, the amendment process may be utilised to reinforce the democratic and liberal aspirations of the state or to recalibrate, and potentially dilute the foundational principles and goals originally envisioned by the constitutional framers. In such instances, the very purpose and legitimacy of the constitutional amendment mechanism come under scrutiny, prompting critical inquiry into whether this process is intended to serve as a tool for incremental reform within the established constitutional framework, or it can be wielded to fundamentally alter the constitutional identity and objectives envisioned by its framers.

In practice, political actors have used this mechanism to a) strip the courts of their powers and its jurisdiction¹, b) creating parallel judicial court system for enabling judicial capture², c) removing term-limits for chief executives³, d) attack guaranteed equality for all persons before the law⁴, e) separation of powers and to

¹ L Chandra Kumar v Union of India (1997) 3 SCC 261 (SC).

² Madras Bar Association v Union of India & Anr (2021) 3 SCC 1 (SC).

³ Constitutional Court of Colombia, Judgment C-141/10 (26 February 2010).

⁴ Janhit Abhiyan v Union of India (2022) 3 SCC 1540 (SC).

restructure legislatures for passing such constitutional amendments in future smoothly⁵. By using the legal mechanism for constitutional amendment, the amendment procedure is utilised to undermine the core principles of the constitutional document, and the tactics for making such changes are provided in the instrument itself. Thus, it creates a unique problem where the political actors can abuse the constitution with recourse to the constitution's own formal amendment rules.⁶ In the real-world scenario, this mechanism is not immune from being abused and can be used for making or unmaking the constitutional document itself.

I.I Implied limitation on constitutional amendment power

To safeguard the Constitution from the risk of being subverted through its own mechanisms, constitutional designers across jurisdictions have grappled with the challenge of imposing meaningful constraints on the power to amend.

To address this constitutional dilemma, the constitutional designers can explicitly restrict the amending authority by protecting certain fundamental principles or core constitutional provisions in order to preserve the constitution's essential identity and grant the courts with jurisdiction to review amendments not only on procedural but also substantive grounds in form of eternity clauses.⁷

However, the question remains whether in cases where a country's constitution does not have such eternity clauses, can the constitutional courts review such amendments not only on procedural, but on substantive grounds as well. To answer this conundrum, the courts have developed the doctrine of **ex-post immutability**.

Under this approach, even in cases where a constitutional text lacks an explicit eternity clause, it still grants the courts with jurisdiction to review amendments on substantive grounds, and the amendments, even in cases where the amending authority has complied with the prescribed procedural requirements. Such amendments still remain subject to judicial scrutiny if it is determined that such amendment alters or compromises the

⁵ Albert Richard, 'Amendment and Revision in the Unmaking of Constitution' in David Landau and Hanna Lerner (eds), *Handbook on Comparative Constitution-Making* (Edward Elgar Publishing 2018) 291.

⁶ Albert Richard, 'Constitutional Amendment and Dismemberment' (2018) 43 *Yale Journal of International Law* 29; Also See: John Burgess, *Political Science and Comparative Constitutional Law*, vol 1 (Ginn & Company 1893) 137.

⁷ Mila Versteeg and Emily Zackin, 'Constitutions Un-entrenched: Toward an Alternative Theory of Constitutional Design' (2016) *American Political Science Review*; Also see: Albert Richard, 'Amendment and Revision in the Unmaking of Constitution' in David Landau and Hanna Lerner (eds), *Handbook on Comparative Constitution-Making* (Edward Elgar Publishing 2018).

“basic structure” or “salient features” of the constitution. In such cases, the amendment may be declared invalid and struck down.⁸

Under this *implicit* limitation on amendment power, these fundamental features are considered so essential to the Constitution’s operation, the stability of the constitutional order, and the preservation of its identity, that any attempt to amend them, regardless of adherence to procedural form, fails the test of constitutional legitimacy. In this sense, the judiciary acts as a guardian of the Constitution's foundational principles, ensuring that no amendment can lawfully erode its essential character. For Sieyes, this distinction of differentiating between constituent power and constituted power is key to limiting and reviewing the constitutional amendments.⁹

I.II Unconstitutional Constitutional Amendment

A version of the theory of unconstitutional constitutional amendment, which is relevant for this thesis, is one of the most debated doctrines in comparative constitutional law based on such distinction. It is a concept that is relied on to void a constitutional amendment that violates substantive parts of written or unwritten part of the constitution even in such cases where the amendment in consideration is procedurally sound.¹⁰

The argument of this theory is primarily based on the distinction between constituent power and constituted power.¹¹ Constituent power, according to Schmitt, is understood as the ‘almighty power’ which rests with sovereign, either the people or the monarch, and this power is utilized and able to decide on fundamental questions relating to the manner and form of its own political existence, which include questions of form of government, introduction of fundamental rights, separation of powers, etc.¹² The constituted power, on the other hand, is the derivative power given to amending authority, by the constitution itself, to amend and add, delete or change the provisions of the Constitution; to improve the working of the constitution and bring it in

⁸ Sergio Verdugo, *Is it Time to Abandon the Theory of Constituent Power?* (Oxford University Press & New York University School of Law 2023) 3.

⁹ Conall Towe, ‘Constituent Power and Doctrines of Unconstitutional Constitutional Amendments’ (2020) *Trinity College Law Review* <https://trinitycollegelawreview.org/constituent-power-and-doctrines-of-unconstitutional-constitutional-amendments/> accessed 22 April 2025.

¹⁰ Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (1st edn, Oxford University Press 2017).

¹¹ *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789.

¹² Carl Schmitt, *Verfassungslehre* (3rd edn, Duncker & Humblot 1960) 77.

harmony with the changing times. Therefore, constituted power is limited in its application and must be utilized under the oversight and overarch of the constitutional framework.¹³

What follows from this difference is that the amendment power which the amending authority holds is delegated legal competence, limited both explicitly and implicitly. Firstly, it is limited substantively by those explicit limitations stipulated in the constitution, and secondly, the body which holds the amendment power in trust cannot use it to destroy the constitution itself from which this body's authority is derived in the first place. Thus, amendment power is the internal method that the constitution provides for its self-preservation. By destroying the constitution, the delegated amending power thus undermines its own *raison d'être*. Amending the constitution in a way that would destroy the old and create a new constitution would be an action *ultra vires*.

The doctrine of unconstitutional constitutional amendment has an imprint across the jurisdictions of the world, with some countries accepting it and others altogether rejecting its application. Nevertheless, the debate about the doctrine's suitability has ceased, and now the question and research has moved towards the analysis of the doctrine's success and shortcomings.¹⁴

I.III Context and research question for the Thesis

I.III.I Research Question

First, *the thesis analyses how the India Supreme Court - common law jurisdiction, and the Colombian Constitutional Court - civil law tradition, has interpreted the distinction between original constituent power and derived constituent power based on their respective constitutional provisions.*

The research aims to demonstrate how both Courts have asserted the authority to conduct substantive review of constitutional amendments, and explore the provision of convening a constituent assembly in Colombia has allowed its Court to systematically articulate this distinction, an approach that has posed challenges for

¹³ Yaniv Roznai, 'The Basic Structure Doctrine arrives in Kenya: Winds of Change for Constitutionalism in Africa?' (VerfBlog, 19 May 2021) <https://verfassungsblog.de/the-basic-structure-doctrine-arrives-in-kenya/> doi:10.17176/20210519-175102-0 accessed 11 March 2025.

¹⁴ Beatrice Monciunskaitė, 'Unconstitutional Constitutional Amendments' in *Max Planck Encyclopedia of Comparative Constitutional Law* [MPECCoL] (Oxford Constitutional Law 2024).

the Indian Supreme Court due to textual limitations in the Indian Constitution. The thesis investigates whether a conceptual convergence exists between the two jurisdictions in this understanding of such distinction.

Second, *the thesis compares the Colombian Constitutional Court's structured seven-step approach for identifying "essential elements" as a viable and more systematic alternative to the Indian Supreme Court's Basic Structure Doctrine, which is often criticized for its abstract and subjective nature.*

Alternatively, the thesis considers the possibility that both approaches may be afflicted by similar conceptual or practical deficiencies. In that event, the analysis will seek to explain the underlying reasons for such limitations.

I.III.II Context

I. The Indian Supreme Court's landmark judgment in *Kesavananda Bharati*¹⁵ marked a pivotal moment in constitutional jurisprudence by establishing an implied limitation on the constitutional amendment process. The Court held that while Parliament possesses wide-ranging powers to amend the Constitution under Article 368, this authority does not extend to altering its "basic structure." This concept, now known as the *Basic Structure Doctrine*, originated from the Court's reasoning that certain foundational principles of the Constitution are inviolable, regardless of the procedural legitimacy of an amendment. The judgment has since influenced constitutional discourse beyond India, notably inspiring similar doctrines in other jurisdictions.

This doctrine was further clarified in the *Minerva Mills*¹⁶ judgment wherein the Supreme Court famously articulated its essence: while Parliament may amend the Constitution to suit contemporary needs, *it cannot destroy its identity*. This sentiment underscores the Court's dual responsibility: to serve as the guardian of the Constitution, and to ensure its continuity as a transformative legal and political document. Since its introduction, the doctrine has remained central to debates concerning the limits of Parliament's amending powers, especially in instances where amendments risk undermining fundamental constitutional values.

¹⁵ *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461; (1973) 4 SCC 225.

¹⁶ *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789.

The Basic Structure Doctrine, as explained by the Supreme Court, is based on the idea of theory of unconstitutional constitutional amendment according to which even in the absence of substantive or procedural limitations on the constitutional amendment power, there is still *ex-post immutability* by which the constitutional document cannot be amended in a manner that such use of this mechanism changes the “basic structure” of the constitution and transforms its identity.

Despite periodic political resistance, the Court has upheld the doctrine’s relevance. Parliament’s use of its amending power has, on multiple occasions, prompted judicial scrutiny, particularly when such amendments have appeared to conflict with these constitutional principles.¹⁷ While these amendments may not always alter the formal structure, they can gradually reshape the constitutional ethos, effectively reconstructing the legal and political order under the guise of continuity. The judiciary, through the Basic Structure Doctrine, thus acts as a safeguard against such incremental yet fundamental changes.

Nevertheless, the doctrine has not been without criticism. One of the most prominent concerns is the lack of a clear standard or framework for determining what constitutes this “basic structure.” Due to the nature of Indian judicial practice, where concurring and dissenting opinions coexist, judgments often reflect divergent reasoning even in case the judges reach the same conclusion. For instance, in *Kesavananda Bharati*, the judges were divided on which elements specifically formed the basic structure, resulting in a lack of clarity and consistency.

This ambiguity has only deepened over time. The Supreme Court has, through numerous decisions, identified various components of the basic structure, such as the supremacy of the Constitution, the rule of law, and judicial review. However, it has never provided an exhaustive list. This leaves Parliament in a precarious position, unable to anticipate whether a proposed amendment might be invalidated for infringing on the Constitution’s basic structure. This judicial indeterminacy, critics argue, hampers legislative clarity and can potentially stifle necessary reforms.¹⁸

¹⁷ A Sethi, ‘The Indian Supreme Court and Constitutional Amendments: Insights for the Debate on the Comparative Political Process Theory and the Comparative Representative Reinforcement Theory’ (2025) *Global Constitutionalism* 1–25, doi:10.1017/S2045381724000248.

¹⁸ *District Bar Association (Rawalpindi) v Federation of Pakistan* PLD 2015 SC 401 (Supreme Court of Pakistan).

Annex I presents a table showing how the Supreme Court has progressively broadened the range of constitutional features considered part of the Basic Structure Doctrine through various judgments. While this expansion reflects growing judicial engagement with the doctrine, the table also highlights a lack of consistent majority agreement on any single feature. The use of green tiles marks instances where within the same case, some judges agree on a particular feature being part of the basic structure, while others dissent, revealing internal divisions. (Recently, in *Janhit Abhiyan*¹⁹, Chief Justice Lalit, in his dissent, recognised equality and non-discrimination as basic structure elements.)

II. The Indian experience has also influenced constitutional jurisprudence in other nations, notably Colombia. The Constitutional Court of Colombia, despite being procedurally constrained to review amendments only for procedural compliance under Articles 241 and 379 of the 1991 Constitution, has developed a parallel theory known as the *Constitutional Replacement Doctrine*. This doctrine, rooted in the same theoretical foundation as India's *Basic Structure Doctrine*, distinguishes between "constituent power" (which can create or replace the Constitution) and "constituted power" (which can only amend it). According to the Colombian Court, amendments that substitute or eliminate essential elements of the Constitution amount to a "replacement" rather than reform, and are thus impermissible.²⁰

While similar in philosophical grounding, the Colombian approach is distinct. Unlike India's doctrine, which suggests that certain constitutional clauses are beyond amendment, the Colombian Court does not label any provision as eternal.²¹ Instead, it assesses whether an amendment changes an "essential element" of the Constitution, thereby transforming its identity. Initially assessed through a five-tiered framework²², this test was revised in 2005 to a more detailed seven-tiered approach, incorporating the concept of "essential elements" over "identity elements".²³

Importantly, Colombia's constitutional framework allows for convening a Constituent Assembly under Article 376, providing a clear procedural path for full constitutional replacement, an option absent in the Indian system.

¹⁹ *Janhit Abhiyan v Union of India* (2022) 3 SCC 1540 (SC).

²⁰ Constitutional Court of Colombia, Judgment C-970/2004.

²¹ Constitutional Court of Colombia, Judgment C-1200/2003.

²² Constitutional Court of Colombia, Judgment C-551/2003.

²³ Constitutional Court of Colombia, Judgment C-1040/2005.

This institutional feature reinforces the distinction between amendment and replacement, allowing for comprehensive reform while upholding limits on ordinary amendment powers.

III. Based on the Colombian Constitutional Court's consistent application and development of the Constitutional Replacement Doctrine across successive judgments, and its ability to revisit and refine the doctrine over decades due to a clear distinction between constituent power and constituted power, this thesis will investigate whether the structured seven-step approach used in Colombia can help mitigate the inherent subjectivity associated with India's Basic Structure Doctrine. The research will explore whether adopting a similarly systematic framework in India could bring greater clarity, predictability, and coherence to judicial review of constitutional amendments, particularly in determining what constitutes the Constitution's "basic structure."

I.V Methodology

Out of the five research methodologies outlined by Vicki C Jackson for the comparative study of constitutional law, the approach which is most relevant for the thesis is *conceptual functionalism*.²⁴

In the thesis, I will analyse the institution i.e., the judiciary and how the doctrine of unconstitutional constitutional amendment functions in the respective jurisdictions and importantly attempt to examine how it works in the domestic settings, with the approach of analysis about cause and effect of behaviour shown by an institution is most suitable.

The conceptual functionalism approach will be utilized for explaining how India, common law jurisdiction and Colombia, a civil law jurisdiction have adopted different strategies to solve the same problem of circumventing the textual limitations on the Courts to only review the constitutional amendments on procedural grounds.

²⁴ V C Jackson, 'Comparative Constitutional Law: Methodologies' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 62.

Under this approach, I will further test the model of Basic Structure Doctrine as is in India with Colombia's Constitutional Replacement Doctrine on the question of abstraction in identification test and issue of subjectivity; and can the Colombia's seven-step approach provide an answer to such abstraction problem, or is it riddled with same.

The choice of comparators is based on Hirshcl's '*most similar case principle*' for choosing India and Colombia.²⁵ I will explain how the constitutional provisions in India and Colombia, and existence of a provision for drafting a new constitution plays any role in understanding the distinction in constituent power to empower the Court to review such amendments on substantive grounds. Additionally, by this comparison, I will try to analyse if the Colombian approach can provide a better identity test for the Basic Structure Doctrine to answer of subjectivity.

I.V Structure of the Thesis

This thesis is divided into with five sections. The introduction serves as the first section including the research question and provides the contextual background for the comparative study of implied limitation on constitutional amendment mechanism in India and Colombia. It also sets out the conceptual framework concerning implied limitations and judicial review of constitutional amendments.

The second section examines the evolution of the Basic Structure Doctrine in India, focusing on the interpretation of Article 368 and how the Indian Supreme Court, over the years, has understood the distinction between original and derived constituent power. It also analyses how the Colombian Constitutional Court has relied on Article 376, which permits the convocation of a constituent assembly, to develop the Constitutional Replacement Doctrine. Despite differing constitutional texts, this part evaluates whether there is substantive convergence in both jurisdictions' understanding of unconstitutional constitutional amendments making a case for comparison.

²⁵ R Hirschl, 'Case Selection and Research Design in Comparative Constitutional Studies' in R Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP 2014) 245, 251.

The third section evaluates the Indian Supreme Court's approach to identifying "basic features" of the Basic Structure Doctrine under various tests highlighting the doctrine's inconsistent and subjective application. This is compared with Colombia's more structured seven-step framework, including the identity test, assessing if it also suffers from such indeterminacy.

The fourth section examines the working of the two doctrines: their similarities and how the issue of subjectivity plagues both the doctrines whereby transplant of Constitutional Replacement Doctrine will not provide a solution to the abstraction problem in the Basic Structure Doctrine in India. This section also explains why the Indian Supreme Court and the Colombian Constitutional Court has consciously chosen to explain their respective tests in broad and generalised form to avoid crystallisation of constitutional principles.

The final section summarises the key findings, and how the Courts have positioned themselves in their respective jurisdictions as *the lions above the throne*.

II. ORIGINAL CONSTITUENT POWER AND DERIVED CONSTITUENT POWER

This section explores the evolution of the Indian Supreme Court's recognition of implied limitations on Parliament's power to amend the Constitution. It traces the jurisprudential development and judicial interpretation of Article 368 and the phrase "constituent power" within the provision, culminating in the landmark *Kesavananda Bharati* judgment, where the Basic Structure Doctrine was first articulated. The analysis examines how the Court, through its subsequent rulings, refined its position by distinguishing between "original constituent power" and "derived constituent power."

The second part explores the Constitutional Court's interpretation of Article 376 and how the provision for convening a constituent assembly has enabled it to structurally develop the Constitutional Replacement Doctrine. It begins by explicating the foundational rationale underlying limitations on amendment powers and delineating the core principles to make the distinction between reforming the Constitution and replacing it with a new one if an essential element is altered.

The conclusion summarises the findings between the two jurisprudential approaches on convergence leading towards directly comparing the two doctrines for the purpose of second section.

II.I INDIA

Article 368 of the Constitution of India, 1949, provides for the mechanism for constitutional amendment, granting empowering the Parliament "to amend, by addition, variation, or repeal, any provision of the Constitution"²⁶. This provision characterizes the amending authority exercised as 'constituent power' and prescribes the procedural framework for such amendments. The Indian Constitution does not contain any eternity clause and limit on the exercise of this power of the Parliament on any substantive grounds except procedurally.

²⁶ Constitution of India 1949, art 368, pt XX.

II.I.I Origins of implied limitations

In the early years, debates over the question of implied substantive limitations on the power to amend were closely tied to the issue of amending fundamental rights, especially the right to property. In its first decade, the Supreme Court of India rejected the idea of any implied or ex-post limitations on the constitutional amendment process. In *Shankari Prasad*²⁷, the Court upheld the view that the amending power under Article 368 based on the textual interpretation, was unrestricted, including the ability to amend the Fundamental Rights Chapter. However, as Parliament increasingly attempted to modify the Constitution in the 1960s, judicial perspectives began to evolve.

In *Sajjan Singh v. State of Rajasthan*²⁸, while the majority reiterated its earlier view of Parliament's unrestricted authority to amend any part of the Constitution, two concurring judges, influenced by the developments in the Supreme Court of Pakistan²⁹, raised critical concerns. They questioned whether the term "amend" in Article 368 implied any substantive limitations and whether there were "basic features" of the Constitution that could not be amended. Justice Mudholkar, in his opinion, questioned whether Parliament should be seen merely as a delegate of constitutional authority and expressed doubts about the adequacy of procedural safeguards in the amendment process to protect fundamental rights.³⁰

Building upon this reasoning, the Court in *Golaknath*³¹ overruled its earlier precedents and determined that constitutional amendments enacted by Parliament were subject to limitation. The Court reasoned that Article 368 merely delineated the procedure for amending the Constitution, with the actual power conferred upon Parliament was under the residuary powers in the Seventh Schedule, in conjunction with Article 246.³²

The Court held that constitutional amendments were legislative in nature and should be treated as "laws" under Article 13 of the Constitution, meaning that Parliament could not alter Part III, which enshrines Fundamental Rights.

²⁷ *Shankari Prasad Deo v Union of India* (1952) 1 SCR 89.

²⁸ *Sajjan Singh v State of Rajasthan* AIR 1965 SC 845.

²⁹ *Fazlul Quader Chowdhry v Mohd Abdul Haque* 1963 PLD 486.

³⁰ *Sajjan Singh v State of Rajasthan* AIR 1965 SC 845, 969 (Mudholkar J); Also see: Soli Sorabjee, Arvind Datar and Nani Palkhivala, *The Courtroom Genius* (LexisNexis 2012).

³¹ *Golaknath v State of Punjab* AIR 1967 SC 1643.

³² Constitution of India 1950, arts 245, 246; List I, 7th Schedule, entry 97.

In its interpretation, the Court reasoned that the term "law" was sufficiently broad to encompass constitutional amendments and that such amendments could be subjected to judicial review if they contravened fundamental rights.³³ This perspective effectively equated constitutional amendments with ordinary legislative acts, albeit requiring a qualified majority, and removed their hierarchical distinction.³⁴ Consequently, the Court affirmed its authority to review constitutional amendments for potential violations of fundamental rights. The key advantage of this implied limitation on the amendment process was its provision of an explicit safeguard, with Part III acting as an "eternity clause" to protect fundamental rights from alteration or abrogation through constitutional amendments.³⁵

The *Golaknath* case marked the first instance in which the Supreme Court imposed limitations on Parliament's power to amend the Constitution.³⁶

In reaction to this judgment, Parliament passed the 24th Amendment to the Constitution, which explicitly conferred upon Parliament the authority to amend any part of the Constitution, including Part III. This amendment effectively overruled the *Golaknath* and reaffirmed that Parliament could modify or even repeal fundamental rights. The validity of this amendment, along with other amendments that restricted the fundamental right to property, was challenged in the landmark case of *Keshavananda Bharati v. State of Kerala*.

³³ *Golaknath v State of Punjab* AIR 1967 SC 1643, 1658 (Subba Rao CJ).

³⁴ Article 13 of Indian Constitution, 1949 states:

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, be void.

3. In this article, unless the context otherwise requires,-

- a. "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
- b. "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

In *Golaknath*, the Court reasoning was for allowing review of constitutional amendment was that the term "law" under Article 13(3) was wide enough to include constitutional amendment under it, and the Constitution under Article 13(2) has empowered the Court to review any "law" if it contravenes with Fundamental Rights.

³⁵ Sudhir Krishnaswamy, *Democracy and Constitutionalism in India* (Oxford University Press 2009) 23.

³⁶ S P Sathe, 'India: From Positivism to Structuralism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (2007) 215, 242–43.

II.I.II Basic Structure Doctrine

In *Keshavananda Bharati*³⁷, the 13-judge bench, the largest in the history of the Supreme Court, addressed the constitutionality of the 24th, 25th, and 29th constitutional amendments. The Court overruled the *Golaknath* decision and discarded its reasoning that Article 13 could be used as a basis for judicial review of constitutional amendments. Instead, the Court reestablished the distinction between constitutional amendment acts and ordinary legislative acts, thereby reinstating the hierarchy between them and accepted limitation on amendment power based on Basic Structure Doctrine. This landmark judgment resulted in the delivery of eleven separate opinions, making it a complex case to decipher the majority opinion and the reasoning behind the question of implied limitations on the constitutional amendment process.

The constitutional methodologies employed by the judges to reach the conclusion of implied limitations varied. Justice Khanna relied on textualism, interpreting the language of Article 368 to infer implied limitations on the amending power. Justice Sikri, on the other hand, adopted purposive interpretation, reading Article 368 in conjunction with other constitutional provisions and Preamble of the Constitution. Justice Mathew utilized constituent assembly debates, emphasizing the distinction between constituent power and constituted power, to support the conclusion that there were inherent limits to Parliament's amending authority.

Chief Justice Sikri opined that Parliament's power to amend the Constitution did not extend to the authority to "completely change the fundamental features of the Constitution so as to destroy its identity."³⁸ Similarly, Justice Khanna argued that the Basic Structure Doctrine imposed limitations on Parliament, particularly in cases where the amendment process was used to "abrogate the Constitution or alter its basic structure or framework."³⁹ Justices Hegde and Mukherjea also believed that the amending power did not encompass the authority to "destroy or emasculate the basic elements or fundamental features of the Constitution."⁴⁰

Despite these varying interpretative approaches, all judges converged on the recognition of implied limitations on the amending power.

³⁷ *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461.

³⁸ *Ibid*, 405 (Sikri CJ).

³⁹ *Ibid* 824 (Khanna J).

⁴⁰ *Ibid* 512 (Hegde and Mukherjea JJ).

In the *Keshavananda Bharati* case, while the judges who formed the majority on the inherent and implied limitations of Parliament's power to amend the Constitution ultimately reached the same conclusion, their reasoning, interpretative aids, and understanding of Article 368 and the overall constitutional framework varied significantly.⁴¹ To address the limitation imposed by the concept of "constituent power" as referenced in Article 368, the Supreme Court in the *Keshavananda Bharati* case did not establish a specific textual framework for recognizing implied restrictions on the constitutional amendment process.⁴² Among the judges, only Justice Khanna articulated the view that Article 368 confers the authority to amend all provisions of the Constitution.⁴³ However, he emphasized that following such an amendment, a core element of the original Constitution must persist. His interpretation draws upon Article 368(2), which states that the "Constitution shall stand amended,"⁴⁴ thereby implying continuity rather than complete transformation.

Rajeev Dhavan's analysis highlights that the decision represented a plurality opinion, with six judges in the majority, four in the minority, and three offering crossbench opinions. Dhavan observes that even among the nine judges who endorsed some form of Basic Structure Doctrine, their reasoning diverged, with each judge relying on different interpretive approaches.⁴⁵

A key takeaway from this analysis is that while the Court effectively developed the Basic Structure Doctrine to review the substance of constitutional amendments, it did not establish a clear standard or consistent framework for judicial review of such amendments. This lack of clarity regarding the judicial exercise in assessing amendments left the application of this doctrine open to interpretation, thus leaving the practical scope of judicial review uncertain and subject to varying judicial perspectives.

⁴¹ Ibid (n 36) [1480]–[1481].

⁴² *Keshavananda Bharati v State of Kerala* (1973) 4 SCC 225.

⁴³ Ibid (Khanna J).

⁴⁴ Constitution of India 1950, art 368(2).

⁴⁵ Sudhir Krishnaswamy, *Democracy and Constitutionalism in India* (Oxford University Press 2009) 27; Rajeev Dhavan, *Parliamentary Sovereignty and the Supreme Court* (Sterling Publishers 1978) 141.

II.I.III Distinction between constituent power and constituted power

In the immediate case involving a challenge to constitutional amendment, the Court in *Indira Gandhi*⁴⁶ held that the Article 368 of the Constitution did not confer on the Parliament to make a different Constitution, and the power under the said provision was not the original constituent power.⁴⁷

In *Minerva Mills*⁴⁸ accepting the assertion of Khanna J. in *Keshavananda Bharati* and refining the reasoning further, the Court summarized its power of reviewing constitutional amendments in the famous expression:

“the power to destroy is not a power to amend. 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.”⁴⁹

In *I.R. Coelho*⁵⁰, the Supreme Court building on this reasoning provided for the justification for recognition of distinction between original constituent power and derived constituent power under Basic Structure Doctrine as under:

“The distinction is drawn ... between making of a Constitution by a Constituent Assembly which was not subject to restraints by any external Authority as a plenary law making power and a power to amend the Constitution, a derivative power, derived from the Constitution and subject to the limitations imposed by the Constitution ... The power for amendment cannot be equated with such power of framing the Constitution.”⁵¹

Through a series of case-by-case approach, the Indian Supreme Court continuously refined its rationale for endorsing the theory of unconstitutional constitutional amendments. Over time, the Supreme Court has acknowledged the conceptual distinction between constituent power, the original authority to frame a constitution, and derived constituent power, as envisaged under Article 368, which is confined to amending the constitutional text, with the latter limited in scope and not extending to fundamentally altering, repealing,

⁴⁶ *Indira Gandhi v Raj Narain* AIR 1975 SC 2299.

⁴⁷ *Ibid* para 521.

⁴⁸ *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789.

⁴⁹ *Ibid*, para 240.

⁵⁰ *I R Coelho v State of Tamil Nadu* (2007) 2 SCC 1, 861.

⁵¹ *I R Coelho v State of Tamil Nadu* (2007) 2 SCC 1, 861, [150].

or abrogating the Constitution in its entirety and this constituent power the Parliament is conferred with is a constituent power with the exception of not amending the basic structure of the constitution.⁵²

II.II COLOMBIA

The 1991 Constitution of Colombia establishes a dual mechanism for constitutional amendment. Article 114 empowers the Congress of the Republic to initiate amendments, while Articles 103 and 241(2) provide for constitutional change via referenda or the convocation of a constituent assembly. Notably, the Constitution lacks an eternity clause, leaving all provisions theoretically amendable. Although the Constitutional Court holds a role in overseeing constitutional amendments, its jurisdiction is confined to procedural review and not on substantive grounds.

II.II.I Basis for substantial review of constitutional amendment

Article 241(1) empowers the Court to adjudicate challenges to constitutional amendments “exclusively for of procedure in their formation.”⁵³ It is not vested with the authority to review the substantive content of constitutional reforms, thereby confining its jurisdiction to procedural compliance alone.

Nonetheless, the Constitutional Court has held that it is empower to review of constitutional amendment on two main grounds. First, such amendments can be invalidated in case of clear violations of procedural norms during the amendment process.⁵⁴ Second, recognising implied limitations under the framework of the Constitutional Replacement Doctrine, the Court can review amendments that, in effect, substitute essential components of the Constitution, thereby exceeding the legitimate authority of Congress, which is confined to modifying, not replacing, the constitutional structure.⁵⁵

The power of the Constitutional Court to substantive review of constitutional amendments was based on the idea of difference between constituent power and derived constituted power. The logic for its acceptance in

⁵² PJ Yap, ‘The Conundrum of Unconstitutional Constitutional Amendments’ (2015) 4(1) *Global Constitutionalism* 120, doi:10.1017/S2045381714000100.

⁵³ Constitution of Colombia 1991, art 241(1)–(2).

⁵⁴ Constitutional Court of Colombia, Decision C-313/2004 (Judge Jaime Córdoba Triviño).

⁵⁵ David Fernando Cruz-Gutiérrez, ‘Flexible Constitutions and Transitional Justice: Questioning the Use of the Amendment Power in Transitional Justice Contexts’ (2022) (9) *Latin American Law Review* 107 <https://doi.org/10.29263/lar09.2022.06>.

the jurisprudence is based on Article 376 of the constitution. The said provision provides for convening of Constituent Assembly whose term and jurisdiction shall be determined by the law passed by the Congress on which people will vote for approval of its constitution. By this provision, the Colombian Constitution has already by its text provided for the distinction between the amending bodies and the limited authority of the Congress in amending the constitution; with the original constituent power for replacing the existing constitution and drafting a new one by convening a constituent assembly.⁵⁶

This logic was followed by the Court in Judgment *C-1040/2005*⁵⁷, where it stated that the power of the Congress to amend and reform the Constitutional text is derived from the document itself. The status of this power of reform is of derivative status. The amending body can only reform or amend the Constitution but cannot replace or substitute it with another constitution. If the Congress crosses this line, it will be violating its constitutional powers and competence. Therefore, the Constitutional Court can strike down such amendments on substantive grounds of review based on the constitutional competence.⁵⁸

II.II.II Foundational logic

In its analysis, the Constitutional Court operates on two premises: (i) that the Congress and the amending body do not possess original constituent power but rather exercise a limited power during the amendment process; and (ii) that the Constitution contains essential elements that constitute its core identity, which cannot be replaced by an amendment.⁵⁹

According to Cleves, this exercise underscores the Constitution's inherently political character and serves to limit the scope of Congress' amending power to preserve such character.⁶⁰ The Constitutional Replacement Doctrine, thus, determines whether a proposed amendment so radically transforms the Constitution that it effectively results in its replacement, rather than reform.⁶¹

⁵⁶ Yaniv Roznai, 'Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea' (2013) 61 *American Journal of Comparative Law* 657, 683 <http://dx.doi.org/10.5131/AJCL.2012.0027>.

⁵⁷ Constitutional Court of Colombia, Judgment C-1040/2005.

⁵⁸ Yaniv Roznai, 'Constitutional Unamendability in Latin America Gone Wrong?' in Richard Albert, Carlos Bernal and Juliano Zaiden Benvindo (eds), *Constitutional Change and Transformation in Latin America* (Hart Publishing 2019) 105.

⁵⁹ Constitutional Court of Colombia, Judgment C-1040/2005.

⁶⁰ Gonzalo Ramírez Cleves, *Límites a la reforma constitucional en Colombia* (Universidad Externado de Colombia 2005) 485.

⁶¹ David Fernando Cruz-Gutiérrez, 'Flexible Constitutions and Transitional Justice: Questioning the Use of the Amendment Power in Transitional Justice Contexts' (2022) (9) *Latin American Law Review* 108 <https://doi.org/10.29263/lar09.2022.06>.

The Constitutional Replacement Doctrine strategically circumvents the limitations imposed by Article 241(1) of the Colombian Constitution by grounding itself in a five premises, articulated by Carlos Bernal.

According to Bernal⁶², the logic of the doctrine unfolds as follows:

- First Premise: The Court's power to review the procedures for constitutional amendment necessarily includes the authority to evaluate whether the amending body acted within its constitutional competence.
- Second Premise: The power to amend the Constitution does not include the power to replace it. The amending authority is empowered only to modify existing constitutional provisions, not to transform the Constitution's fundamental identity.
- Third Premise: Based on this logic, the Court has the authority to review whether a proposed amendment constitutes a modification or a replacement.
- Fourth Premise: Determining whether a constitutional amendment modifies or replaces the Constitution requires a substantive analysis of its content, not merely a formal or procedural one.
- Conclusion: Therefore, the Court is competent to review the content of constitutional amendments to ensure that they do not amount to an "unconstitutional" replacement of the Constitution.⁶³

This reasoning constitutes the conceptual basis of the Constitutional Replacement Doctrine, supporting the Constitutional Court's authority to exercise substantive oversight over constitutional amendments, even where the Constitution does not expressly confer such power.

Through this doctrine, akin to the Basic Structure Doctrine, the Court engages in substantive review of amendments even when the procedural requirements have been duly observed.

⁶² Carlos Bernal, 'Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' (2013) 11 *International Journal of Constitutional Law*, <https://doi.org/10.1093/icon/mot007>.

⁶³ Ibid 340.

II.III CONCLUSION

The evolution of the Basic Structure Doctrine in India and the Constitutional Replacement Doctrine in Colombia has followed divergent trajectories, shaped significantly by the respective constitutional texts governing amendment procedures and the presence or absence of provisions for convening a constituent assembly.

In the Indian context, Article 368 designates Parliament's amending authority as an exercise of “constituent power,” which, during the formative years of constitutional jurisprudence, was interpreted by the Supreme Court as conferring virtually unfettered amending authority. However, in response to a series of constitutional amendments in the 1960s and 1970s, the Court adopted a more pragmatic stance. In *Golak Nath*, it initially sought to shield fundamental rights from the scope of amendment. This judicial approach was overturned and culminated in the formulation of the Basic Structure Doctrine in *Kesavananda Bharati*, which imposed substantive limitations on Parliament’s amending power. Through subsequent decisions, the Court further developed this doctrine, effectively circumventing Article 368’s broad assertion of “constituent power” by recognizing a distinction between original constituent power and derivative constituent power, the latter being constrained by the Constitution’s foundational principles.

In contrast, the Colombian Constitutional Court's jurisprudence has been more structurally grounded from the outset, due to Article 376 in the Constitution, which explicitly provides for convening a constituent assembly to enact or replace the Constitution. Drawing upon this provision, the Court distinguished at an early stage between original constituent power and derivative constituent power, thereby justifying its authority to engage in substantive judicial review of constitutional amendments. This textual clarity has allowed the Colombian Court to consistently develop the Constitutional Replacement Doctrine.

Despite differences in constitutional text and methodology, the Indian Supreme Court’s interpretation of derived constituent power follows the same logic of the Colombian jurisprudence.⁶⁴

⁶⁴ Sujit Choudhry, ‘The Indian Basic Structure Doctrine and Comparative Constitutional Law’ (2008) 6 *International Journal of Constitutional Law* 332.

III. IDENTITY TEST AND QUESTION OF SUBJECTIVITY

This section analyses the Indian Supreme Court's evolution of tests to identify the basic features of the Constitution under the Basic Structure Doctrine. It focuses on the fragmented judicial reasoning in *Kesavananda Bharati*, underscoring the lack of a coherent rationale among the judges. The discussion extends to subsequent developments, examining how the Court has articulated tests to determine the Constitution's "essential features." Furthermore, the section explores how the inherent subjectivity and conceptual ambiguity in Basic Structure Doctrine has led to its uneven application across cases which has enabled the judiciary to broaden its jurisdiction, power of review and solidify its autonomy at the expense of other branches, raising concerns about the balance of power among the branches of government.

In the following part, I examine the seven-step framework utilized within Colombia's Constitutional Replacement Doctrine, emphasizing the Colombian Constitutional Court's application of its structured methodology. The analysis highlights the Court's progressive refinement of the doctrine, notably through the formal adoption of this seven-step approach. Particular emphasis is placed on the integration of the identity test within the framework, which serves to delineate the fundamental elements of the constitutional order. The section concludes with a critical assessment of this framework, arguing that, notwithstanding its systematic structure, Constitutional Replacement Doctrine exhibits a high degree of abstraction and subjectivity, ultimately falling short of providing a clear and objective standard for judicial review of constitutional amendments.

III.I BASIC STRUCTURE DOCTRINE

In *Keshavananda*, the Supreme Court announced the arrival of Basic Structure Doctrine in its jurisprudence, but the mode to specify by which the basic features were to be identified was left for the later decisions to

elaborate.⁶⁵ The Supreme Court did this task on a case-to-case basis and expanded the list of "basic features" which the Parliament cannot amend.

In the immediate case involving Basic Structure Doctrine, the Court in *Indira Gandhi*⁶⁶, two main approaches emerged for identifying the basic features of the Constitution. Justice Krishna Iyer believed that the basic features were not strictly confined to the constitutional text but were instead found outside of it, existing in a sense "hovering over" the provisions of the Constitution. On the other hand, Justice Mathew viewed the basic structure doctrine as a "brooding omnipresence" above the text of the Constitution as conception was "too vague and indefinite to provide a yardstick" for judicial determination.⁶⁷ He stressed that the basic structure should be tied to the text of the Constitution, but did not offer a concrete method for identifying these features. Justice Chandrachud turned to constitutional history to determine the basic features relevant to the case, though, like Mathew J., he did not develop a comprehensive theoretical approach.⁶⁸

Justice Bhagwati, in *Minerva Mills*⁶⁹, took Mathew J.'s view further by asserting that the "basic features should be identified by first examining specific provisions within the Constitution itself, before looking at extra-textual sources such as constitutional history or the Preamble".⁷⁰ under this structural approach, certain fundamental rights read harmonious with the structure of the constitution could provide a framework for the purpose of identification of basic features. This approach was subsequently adopted by the Court in future cases. However, Justice Bhagwati's method did not resolve the issue of abstraction that Justice Mathew had highlighted, leaving the identification of basic features an inherently complex and open-ended process.

Equality as a basic feature can illustrate this point. By adopting Bhagwati's approach, the identification of the basic feature of equality can shift depending on which provisions of the Constitution are read in isolation or in combination. Article 14, which guarantees equality before the law, if read in isolation, its scope appears broader, offering general protection against discrimination but not necessarily deeper. However, when read in conjunction with other related provisions such as Articles 15, 16, 17, and 25, which provide more specific

⁶⁵ Sudhir Krishnaswamy, *Democracy and Constitutionalism in India* (Oxford University Press 2009) 131.

⁶⁶ *Indira Gandhi v Raj Narain* AIR 1975 SC 2299.

⁶⁷ *Ibid*, *Indira Gandhi v Raj Narain*, 357 (Mathew J).

⁶⁸ *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789, 42, 53–57.

⁶⁹ *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789.

⁷⁰ Shree Agnihotri, 'Interpreting without Bannisters? The Abstraction Problem Afflicting the Basic Structure Doctrine' (2024) 8(3) *Indian Law Review* 235, doi: 10.1080/24730580.2024.2376474.

forms of equality protection such as equality in public employment, prohibition of untouchability, and protection against discrimination, the scope of equality is defined more concretely but becomes narrower in its application.⁷¹

Another significant challenge with Bhagwati's approach is the assumption of a harmonious structure within the constitutional text, implying that there are no conflicts between different provisions. Bhagwati, recognizing this potential issue, acknowledged that in cases of conflicting provisions, Parliament would not be bound by the Basic Structure Doctrine when resolving such conflicts through amendments.⁷² Thus, the structural argument brings attention to the subjectivity inherent in this approach, as it relies on the interpretation and balancing of different constitutional provisions, which is based on judicial discretion and perspectives and personal proclivities of individual judges. Thus, the flexibility of this doctrine, while offering judicial protection of key constitutional principles, also leads to uncertainties and inconsistencies in its application.

III.I.I Various tests created by the Court

To address this conundrum, the Supreme Court, in *M. Nagaraj*⁷³, accepted the reasoning of Chandrachud in *Indira Gandhi* to develop the working test in matters of Basic Structure Doctrine he stated as under:

"for determining whether a particular feature of the Constitution is a part of its basic structure, one has per force to examine in each individual case the place of the particular feature in the scheme of the Constitution, its object and purpose and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of the country's governance."⁷⁴

Based on this position, the Court introduced the “width test” and the “identity test” while adjudicating the constitutionality of amendments to identify the basic features under Basic Structure Doctrine. Under the width test, the Court evaluates the *impact* of the constitutional amendment, examining how it affects the constitutional framework. The identity test, on the other hand, is used to identify the essential elements of the

⁷¹ Ibid 236.

⁷² *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789, 112 (Bhagwati J).

⁷³ *M Nagaraj v Union of India* (2006) 8 SCC 212.

⁷⁴ *Indira Nehru Gandhi v. Raj Narain*, (1975) 2 SCC 159.

Constitution that must be preserved.⁷⁵ This dual approach helps in determining whether an amendment alters the core principles that define the Constitution.

This methodology of this test is as under:

1. Width test - the Court expands the interpretation and effect of the amendment to its widest possible meaning to ascertain if it violates a constitutional principle.
2. Identity test - if the amendment passes the first step, the Court moves on to the identity test, it must be established that the said principle violated is so fundamental to the constitutional framework that it alters/destroys its identity.

Further elaborating on this point, Agnihotri notes that the Supreme Court considers that basic features must be explicitly present in the constitutional text but may also be derived from a holistic reading of the Constitution. These features are those that provide coherence to the overall framework of the Constitution.⁷⁶

In *I.R. Coelho*⁷⁷, the Court expanded these tests by introducing the “rights test” and the “essence of rights test”. Under the rights test, constitutional amendments which affect Part III are subjected to this review on the touchstone of Articles 14, 15, 16, 19, and 21. Under essence of rights test, scrutinizing amendments which in a situation may substantially alter the entire Fundamental Rights Chapter is reviewed to ascertain if it affects the “essence” of those rights enshrined in Part III of the Constitution. The Court in *Coelho* emphasized that these provisions represent core constitutional values, and any amendment “which, if allowed to be abrogated, would change completely the nature of the Constitution”.⁷⁸

This approach of using specific Articles from the text to identify basic features streamlined the review process and provided a clearer method for identifying constitutional amendments that may be unconstitutional. However, it also led to the establishment of a hierarchical system in which certain Fundamental Rights, and some constitutional values within Part III were given a higher level of scrutiny. For example, provisions like

⁷⁵ Ibid 102–107.

⁷⁶ Shree Agnihotri, ‘Interpreting without Bannisters? The Abstraction Problem Afflicting the Basic Structure Doctrine’ (2024) 8(3) *Indian Law Review* 237, DOI: 10.1080/24730580.2024.2376474.

⁷⁷ *I R Coelho v State of Tamil Nadu* (2007) 2 SCC 1, 861.

⁷⁸ Ibid, *I.R. Coelho*, 109.

Article 17 (prohibition of untouchability) and Articles 25, 26, 29, and 30 (which deal with minority rights) are subject to a lower level of scrutiny which may narrow the scope and formulate a concrete list of principles for this test. However, this approach will again raise questions about the methods used to identify basic features and the potential for inconsistencies in applying the hierarchy of scrutiny to different provisions of the Constitution.

III.I.II Uneven application of Basic Structure Doctrine

Among the 103 constitutional amendments, 22 have been contested in the courts on the grounds of violating the basic structure of the Constitution, with seven of these amendments being declared ultra vires. A majority of the amendments that were either fully or partially struck down involved issues pertaining to the powers and jurisdiction of the Supreme Court and High Courts. This reflects the Court's role in safeguarding judicial authority and maintaining the separation of powers within the constitutional framework.

Guarding the Courts

In *Minerva Mills*⁷⁹, the Supreme Court invalidated a provision of the 42nd Amendment that excluded laws violating Part III (Fundamental Rights) from judicial review if such laws were enacted in pursuit of the Directive Principles of State Policy. The Court, building upon the principles established in *Keshavananda Bharati*, reaffirmed that judicial review is an integral component of the basic structure of the Constitution. As a result, the provision in the 42nd Amendment that sought to limit judicial review was struck down, ensuring that laws infringing upon fundamental rights remained subject to scrutiny by the judiciary.

In *Sambamurthy*⁸⁰, the Supreme Court reviewed the 32nd Amendment, which transferred the jurisdiction of High Courts in certain matters to the Administrative Tribunals. The Court held this provision to be unconstitutional, recognizing judicial review as an essential part of the rule of law. However, the Court also acknowledged that the exclusion of High Court jurisdiction would not necessarily breach the basic structure of the Constitution, provided that the constitutional amendment established an alternate and effective judicial review mechanism.⁸¹

⁷⁹ *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789.

⁸⁰ *P Sambamurthy v State of Andhra Pradesh* (1987) 1 SCC 362.

⁸¹ *Ibid.* 5.

In contrast to the decision in *Sambamurthy*, the Supreme Court in *L. Chandra Kumar*⁸² held that the exclusion of the jurisdiction of High Courts, even if an alternate judicial review mechanism is provided, would violate the Basic Structure Doctrine. The Court emphasized that the High Courts, under Article 226 of the Constitution, possess the inherent power of judicial review, and any attempt to diminish or exclude this power would undermine the framework of the Constitution.⁸³

The Court's role in protecting its own jurisdiction was further extended to its involvement in the appointment of judges, where it specifically defined basic features of judicial review and the independence of the judiciary in a manner to shield itself from executive influence in judicial appointments. In *NJAC*⁸⁴ case, the Court struck down the 99th Constitutional Amendment, which sought to establish the National Judicial Appointments Commission (NJAC) to replace the existing collegium system. Under the collegium system, the Chief Justice of India and the four senior-most judges of the Supreme Court have primacy over the executive in recommending judicial appointments and transfers.

The National Judicial Appointment Commission (NJAC) proposed a commission with six members: three judges from the Supreme Court and three others, including the Union Law Minister and two eminent persons, ensuring no branch held overall majority. However, the Court, in its judgment, interpreted the independence of the judiciary as a basic feature of the Constitution, asserting that the judiciary must retain primacy in the appointment process.⁸⁵

This interpretative creativity and the judiciary's expanded role is a subject of criticism. Critics argue that it reflects the inconsistencies and inadequacies of the Basic Structure Doctrine, which primarily focuses on judicial review, thereby providing the judiciary with significant control over the process of judicial appointments and potentially undermining the broader balance of powers in the Constitution.⁸⁶

⁸² *L Chandra Kumar v Union of India*, (1997) 3 SCC 261.

⁸³ *Ibid* 99.

⁸⁴ *Supreme Courts Advocate on Records v Union of India* (2016) 5 SCC 1.

⁸⁵ Gautam Bhatia, 'The Sole Route to an Independent Judiciary? The Primacy of Judges in Appointment' in Sengupta and Sharma (eds), *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* (Oxford University Press 2018) 138.

⁸⁶ Raju Ramachandran and Mythili Vijay Kumar Thallam, 'The Obvious Foundation Test: Re-Inventing the Basic Structure Doctrine' in Sengupta and Sharma (eds), *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* (Oxford University Press 2018) 109, 118.

III.I.III Overlooking Basic Features

The following cases illustrate the Court's application of the doctrine appears uneven, allowing certain egregious provisions in constitutional amendments to pass through.

In *Indira Gandhi*⁸⁷, the Court considered the 39th Amendment, which removed its jurisdiction over challenges related to the elections of the President, Vice President, Prime Minister, and the Speaker of the House of the People. Having recognized principles such as rule of law, democracy, and equality before the law as basic features of the Constitution, the Court held that the removal of its jurisdiction specifically over electoral matters was unconstitutional. This decision underscored the Court's commitment to judicial review as a basic feature of the Constitution, but it also revealed a selective approach to the application of the Basic Structure Doctrine, as similar provisions affecting other aspects of the Constitution were allowed to stand.

Similarly, in *Kihoto Hollohan*⁸⁸, the 52nd Constitutional Amendment was challenged, which introduced Tenth Schedule to address anti-defection activities by providing for the disqualification of members in Parliament and State Legislatures. Under this amendment, firstly, the Speaker of the House was granted the authority to decide on matters related to disqualification, and secondly, judicial review was excluded from these decisions. The Court upheld the Tenth Schedule in part, reasoning that democracy is a basic feature of the Constitution, and that defections led to unstable governments, thus justifying the amendment. On the matter of judicial review concerning the Speaker's decisions on defection, the Court declared that such part of the constitutional amendment was *ultra vires*, and decisions of the Speaker was still subject to judicial scrutiny in cases where the Speaker's actions was found to be mala fide, arbitrary, or perverse.⁸⁹

However, an alternative reading of the amendment could have been utilised to strike down the first part on the same feature of democracy for discouraging dissent within political parties, internal democracy within political parties, suppressing freedom of speech, and undermining parliamentary democracy to uphold such part of amendment.

⁸⁷ *Indira Gandhi v Raj Narain*

⁸⁸ *Kihoto Hollohan v Zachillhu* (1992) 2 Supp SCC 651.

⁸⁹ GC Malhotra, *Anti-defection Law in India and the Commonwealth* (Oxford University Press 2006) 5.

These cases illustrate a significant aspect of the Supreme Court's application of this doctrine, where it has strategically used the doctrine to shield its own jurisdiction from executive interference, particularly in matters of judicial appointments, and to protect its power of judicial review. Additionally, this protective stance seems to contrast with the Court's approach towards constitutional amendments that have the potential to undermine the foundational principles of equality and democracy within the Constitution. *Janhit Abhiyan*⁹⁰ is a notable example.

In this case, the 103rd Constitutional Amendment, which provided for up to 10% reservation in public education and employment for economically weaker sections (EWS), was challenged.⁹¹ The amendment excluded Scheduled Castes (SCs), Scheduled Tribes (STs), and Other Backward Classes (OBCs), groups which constitute a large portion under the criteria for economically weaker sections, from the benefits of this reservation. The Court upheld the amendment, effectively undoing decades of jurisprudence on equality and affirmative action. The Court stated that “mere violation of the rule of equality does not breach the basic structure of the Constitution unless the violation is a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice”.⁹²

This ruling significantly shifted the interpretation of equality as a basic feature, removing substantive equality as part of the overall basic feature and departure from previous understanding of historical injustices and removing caste-based exclusion as a ground of basic structure review no longer available.⁹³ By doing so, the Court narrowed the scope of the Basic Structure Doctrine regarding equality, particularly in the context of reservation policies.

III.IV Basic Structure review for ordinary legislations

Another significant concern with the application of this doctrine in India arises in relation to the review of ordinary legislation. In *Indira Gandhi*, the Court held that Parliament's legislative power was not subject to

⁹⁰ *Janhit Abhiyan v Union of India* (2022) 3 SCC 1540 (SC).

⁹¹ This EWS reservation is seen by many as dilution of very purpose of affirmative action and bestowing benefits to the Upper Castes, the privileged groups who have not faced historical and systemic discrimination.

⁹² *Janhit Abhiyan v Union of India* 79.7 (Maheshwari J, Trivedi and Pardiwala JJ concurring).

⁹³ Shree Agnihotri, 'Interpreting without Bannisters? The Abstraction Problem Afflicting the Basic Structure Doctrine' (2024) 8(3) *Indian Law Review* 243, doi: 10.1080/24730580.2024.2376474.

the basic structure test.⁹⁴ According to this view, an ordinary law could only be invalidated if it exceeded the legislature's competence under the Seventh Schedule, or if it violated Part III of the Constitution.⁹⁵

However, this repeated position of law was negated in *I.R. Coelho*⁹⁶, in which the Court held that the ordinary laws placed in the Ninth Schedule of the Constitution, to overcome the testing of such laws under fundamental rights review, can be reviewed under Basic Structure Doctrine. The Ninth Schedule was inserted in the Constitution by the First Constitutional Amendment, by the constituent assembly itself, in which legislative laws were added via constitutional amendment, so that such laws could not be reviewed if they were contrary to the Fundamental Rights. The Court's rationale was that allowing Parliament to bypass judicial review by placing laws in the Ninth Schedule would threaten the foundational values of the Constitution, enabling indirect violations of its basic structure.

While this decision expands the Court's power to review ordinary laws for compliance with constitutional principles, it is important to highlight the conceptual and practical difficulties of applying the Basic Structure Doctrine to such cases. In particular, the abstraction problem and vague nature of "essence of rights" test makes it challenging to determine whether specific provisions of a legislation infringe on the basic structure, especially when the alleged violation pertains to a narrowly defined right not clearly elevated to the level of a constitutional essential.⁹⁷

In *Madras Bar Association*⁹⁸, the Court applied the Basic Structure Doctrine to assess the constitutionality of the National Tax Tribunal Act and held that specific elements such as the prescribed minimum age for appointment, the lack of sufficient judicial representation on selection committees, and the conditions of service and tenure for tribunal members were inconsistent with the basic features of judicial independence and separation of powers. This case again illustrates the proposition that the Supreme Court has utilised Basic Structure Doctrine as a tool to protect its role, independence and safeguarding its judicial review powers.

⁹⁴ *Indira Gandhi v Raj Narain* AIR 1975 SC 2299, 865.

⁹⁵ *Kuldip Nayar v Union of India* AIR 2006 SC 3127, 107.

⁹⁶ *I R Coelho v State of Tamil Nadu* (2007) 2 SCC 1, 861.

⁹⁷ Jawahar Trisha, 'The Basic Structure Doctrine: Scope and Applicability' (2022) 4 *Indian Journal of Law & Legal Research* 1, 8.

⁹⁸ *Madras Bar Association v Union of India* (Civil Appeal No 502 of 2021) SC.

In light of these challenges, the next part will examine the Constitutional Replacement Doctrine developed by the Colombian Constitutional Court and assess whether this approach offers viable solution to the interpretive and normative ambiguities currently in the Basic Structure Doctrine.

III.II CONSTITUTIONAL REPLACEMENT DOCTRINE

In judgment *C-551/2003*⁹⁹, the question to be addressed was whether by call for a referendum, provisions protecting basic rights and values such as structure of the Congress and of Public Administration, and management of funds can be amended through people's participation. The Colombian Constitutional Court introduced the Constitutional Replacement Doctrine, asserting its authority to review constitutional amendments on substantive grounds.

The Court emphasized that while the power to amend the Constitution permits changes to its articles, it does not extend to altering or replacing its fundamental characteristics, and a form of State that is republican and democratic under the Rule of Law, cannot be replaced by a constitutional amendment. Consequently, the Court's jurisdiction to assess constitutional amendments is not confined to procedural aspects but includes evaluating whether an amendment constitutes a "reform" or an actual "replacement," based on its material content.¹⁰⁰ The Court maintained that the Constitution does not authorize the amending power to supplant the Constitution itself; thus, an amendment should be considered a replacement only if it fundamentally transforms the Constitution's identity.

In judgment *C-1200/2003*¹⁰¹, the issue involved a proposed constitutional amendment that sought to modify the structure and functions of the Commission of Accusations in the House of Representatives. The Commission is responsible for investigating and prosecuting high-ranking officials, including the President. Additionally, the question was whether by means of a constitutional act, the President can be empowered to issue legal norms within two months for adjusting new adversarial criminal system in case the Congress failed

⁹⁹ Constitutional Court of Colombia, Judgment C-551/2003.

¹⁰⁰ Nggilu N, Moha MR, Sinaga MR and Rachmaniar A, 'Judicial Review of Constitutional Amendments: Comparison between India, Germany, Colombia, and the Relevancy with Indonesia' (2024) 8(1) *Lex Scientia Law Review* 280, <https://doi.org/10.15294/lsr.v8i1.1901>.

¹⁰¹ Constitutional Court of Colombia, Judgment C-1200/2003.

to pass laws until June 20, 2004. The Court, rejecting the lawsuit, further developed the Constitutional Replacement Doctrine, distinguishing between constitutional "reform" and "replacement." The Court clarified that a "reform" modifies the Constitution's text while preserving its fundamental identity. Conversely, an amendment that substantially alters the Constitution's defining principles constitutes a "replacement."¹⁰² The Court emphasized that this doctrine does not equate to establishing "eternity clauses" or declaring certain provisions unamendable; rather, it serves to prevent amendments that fundamentally transform the Constitution's core structure and principles.¹⁰³

III.II.I Identity test

In Judgment C-970/2004¹⁰⁴, constitutionality of the second paragraph of Article 4 of the transitional provisions of Legislative Act No. 03 of 2002 was before the Court. This provision granted the President of the Republic extraordinary legislative powers to issue laws necessary for the implementation of the accusatory criminal justice system, should Congress fail to enact them by June 20, 2004. The Colombian Constitutional Court introduced a structured test to determine whether a constitutional amendment constitutes a replacement under the doctrine. This test is grounded in the premise that an amendment is a constitutional replacement if it alters an essential element defining the Constitution's identity.

The Court's methodology follows approach:

1. Major Premise: A constitutional amendment is a replacement if it substitutes an essential element of the Constitution.
2. Minor Premise: The amendment in question replaces an essential element.¹⁰⁵

In assessing the replacement test, under the major premise, the Court will consider a constitutional amendment as a constitutional replacement if the defining "identity element" of the constitution is replaced. Bernal has

¹⁰² Gonzalo Andrés Ramírez-Clevés, 'The Unconstitutionality of Constitutional Amendments in Colombia: The Tension Between Majoritarian Democracy and Constitutional Democracy' in Thomas Bustamante and Bernardo Gonçalves Fernandes (eds), *Democratizing Constitutional Law: Perspectives on Legal Theory and the Legitimacy of Constitutionalism* (Springer 2016) 222, https://doi.org/10.1007/978-3-319-28371-5_10.

¹⁰³ Carlos Bernal, 'Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' (2013) 11 *International Journal of Constitutional Law* 343, <https://doi.org/10.1093/icon/mot007>.

¹⁰⁴ Constitutional Court of Colombia, Judgment C-970/2004.

¹⁰⁵ Bernal, 'Unconstitutional Constitutional Amendments' (n103) 343.

provided the formula of how this replacement test works. For him, the structure of the replacement test is based on the formula and structure moving from major premise and minor premise to the conclusion as follows:

Under the identity test, the Constitutional Court operates on the principle that a constitutional amendment constitutes an unconstitutional replacement when it alters or substitutes a defining identity element of the Constitution. Bernal has formalized this structure, outlining how the replacement test progresses from a major premise, through a minor premise, to a conclusion. Bernal has articulated this logical framework into a syllogistic reasoning as under:

“(1) $(x)(RIEx \rightarrow CRx)$ (2) $RIEa$ (3) CRA MP (1, 2)

The major premise (1) is a general rule. According to this rule, the Constitutional Court ought to label as constitutional replacement (CR) every amendment (x) meeting the condition of replacing an identity element (RIE), that is, an element defining the identity of the Colombian Constitution. The minor premise (2), meanwhile, consists in the assertion that an amendment (a) meets the condition mentioned in the antecedent of the general rule (1). Finally, the conclusion (3) constitutes a particular rule, which follows by modus ponens (MP) from the major and the minor premises. According to this rule, the amendment (a) ought to be considered as a substitution of the constitution (CRA). ”¹⁰⁶

Under the framework of replacement test, the Constitutional Court identified the rule of law, separation of powers, and the republican and democratic form of government as core, essential elements of the 1991 Constitution.¹⁰⁷

However, this syllogistic formula presupposes the Court's ability to accurately identify (1) what constitutes an essential element and (2) whether the amendment effectively replaces it. For Bernal, the Court has not articulated any explicit criteria for determining which provisions or principles qualify as "essential." This lack

¹⁰⁶ Ibid reference 11.

¹⁰⁷ Constitutional Court of Colombia, Judgment C-551/2003.

of definitional clarity has generated difficulties in the consistent application of the doctrine for its conceptual vagueness and the broad discretionary authority it affords the Court.¹⁰⁸

In response to these concerns, and to bring greater clarity to Constitutional Replacement Doctrine, the Constitutional Court improved the identity test with a more structured and comprehensive seven-tiered approach for evaluating whether an amendment constitutes a substitution of the Constitution.

III.II.II Seven-step Approach

In its Judgment *C-1040/2005*¹⁰⁹, the Colombian Constitutional Court reviewed the constitutionality of an amendment to Article 197 of the Constitution, which allowed the sitting President to run for a second consecutive term. While the Court ultimately deemed the amendment constitutional, it refined the original replacement test, expanding it into a more detailed seven-step process for evaluating constitutional amendments. This seven-step approach test includes the following stages: (1) identifying the essential constitutional element in question; (2) understanding how this element supports various constitutional provisions; (3) explaining why this element is deemed essential; (4) providing evidence that this element is fundamental to the Constitution's integrity; (5) clarifying that labelling an element as essential does not amount to labelling one or more constitutional clauses as eternal; (6) demonstrating that the essential element has been substituted or replaced; and (7) illustrating that the new element introduced contradicts the essential element and is incompatible with other core principles of the Constitution.¹¹⁰

In applying this seven-step approach, the Court must establish, in step (3), that the amendment indeed replaces an essential constitutional element. Steps (2) and (4) offer guidance on how to substantiate the evidence

¹⁰⁸ Carlos Bernal, 'Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' (2013) 11 *International Journal of Constitutional Law* 343, <https://doi.org/10.1093/icon/mot007>.

¹⁰⁹ Constitutional Court of Colombia, Judgment C-1040/2005.

¹¹⁰ Carlos Bernal, 'Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' (2013) 11 *International Journal of Constitutional Law* 344, <https://doi.org/10.1093/icon/mot007>; Nggilu N, Moha MR, Sinaga MR and Rachmaniar A, 'Judicial Review of Constitutional Amendments: Comparison between India, Germany, Colombia, and the Relevancy with Indonesia' (2024) 8(1) *Lex Scientia Law Review* 284, <https://doi.org/10.15294/lslr.v8i1.1901>; Gonzalo Andrés Ramírez-Clevés, 'The Unconstitutionality of Constitutional Amendments in Colombia: The Tension Between Majoritarian Democracy and Constitutional Democracy' in Thomas Bustamante and Bernardo Gonçalves Fernandes (eds), *Democratizing Constitutional Law: Perspectives on Legal Theory and the Legitimacy of Constitutionalism* (Springer 2016) 223, https://doi.org/10.1007/978-3-319-28371-5_10.

necessary for such a determination. Step (7) presupposes that the content of the amendment introduces a new element that both replaces the original and conflicts with other fundamental constitutional elements.¹¹¹

III.II.III Identity test under Seven-step Approach

The Colombian Constitutional Court, through a series of rulings, has progressively developed the methodology for identifying essential constitutional elements under its seven-step framework of the constitutional replacement doctrine.

In Decision *C-1200/2003*, the Court clarified that not all constitutional amendments constitute a replacement. A replacement occurs when an amendment is so substantial that it effectively transforms the existing Constitution into a completely different one.

The Court outlined a four-part methodology for applying the Constitutional Replacement Doctrine. First, the allegedly replaced essential element must be identified. This element should not be linked to a single provision but must be inferred from a structural reading of the Constitution. Second, to demonstrate that an element is essential, it must be embedded across various provisions, reflecting the Court's refusal to establish formal eternity clauses. Further, the amendment must introduce a new element that is fundamentally incompatible with the identified essential element. Lastly, the new element introduced by the constitutional amendment must be so distinct that it is incompatible with the constitutional identity. This assessment is not based on the quantity of provisions altered, but rather on the significance and systemic impact of those changes.¹¹²

The identity test applied here is based on the premise that the new element must conflict with the existing elements so deeply with the constitutional core that both cannot coexist within the same constitutional framework, thereby disrupting the integrity of the constitutional order.

¹¹¹ Carlos Bernal, 'Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' (2013) 11 *International Journal of Constitutional Law* 344, <https://doi.org/10.1093/icon/mot007>.

¹¹² Sabrina Ragone, 'The "Basic Structure" of the Constitution as an Enforceable Yardstick in Comparative Constitutional Adjudication' (2019) 11(3) *RECHTD. Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito* 333, <https://doi.org/10.4013/rechtd.2019.113.02>.

III.II.IV Constitutional Replacement Doctrine in action

a. *Presidential Re-election cases*

In Judgment *C-1040/2005*, the Constitutional Court applied the Constitutional Replacement Doctrine to evaluate the legitimacy of an amendment permitting a second consecutive presidential term. The Court concluded that this amendment was constitutional, determining that allowing a single instance of re-election did not amount to a replacement of the fundamental principle of separation of powers.¹¹³ It emphasized that the institutional design of the Constitution, particularly the intricate procedures for appointing officials to key state bodies limited the potential for presidential dominance, thereby preserving the system of checks and balances.¹¹⁴ Additionally, the Court empowered the Congress to enact legislation ensuring fair competition among candidates during the electoral process. Importantly, the Court clarified that its decision was restricted to the specific issue of a second consecutive term and did not imply approval of indefinite re-elections.¹¹⁵

In Decision *C-141/2010*, the Constitutional Court examined the constitutionality of a proposed referendum intended to permit incumbent President to pursue a third consecutive presidential term. The Court held the initiative *ultra vires*, concluding that it was substitution of the Constitution, not reform.¹¹⁶ The Court reasoned that extending presidential tenure to twelve consecutive years would fundamentally alter the institutional balance envisioned in the Constitution. It highlighted the heightened risk of executive overreach, particularly through increased presidential influence over the appointment of officials to oversight bodies. Additionally, the Court expressed concern that such prolonged incumbency would distort democratic competition, as a third-term president could exert disproportionate control over both the legislative branch and the media environment, thereby undermining political pluralism and electoral fairness. Ultimately, the Court held that the proposed reform contravened the essential principle of "separation of powers".¹¹⁷

¹¹³ Rosalind Dixon and David Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13(3) *International Journal of Constitutional Law* 616.

¹¹⁴ Decision C-1040/2005, § 7.10.4.1(ii).

¹¹⁵ Gonzalo Andrés Ramírez-Cleves, 'The Unconstitutionality of Constitutional Amendments in Colombia: The Tension Between Majoritarian Democracy and Constitutional Democracy' in Thomas Bustamante and Bernardo Gonçalves Fernandes (eds), *Democratizing Constitutional Law: Perspectives on Legal Theory and the Legitimacy of Constitutionalism* (Springer 2016) 211, https://doi.org/10.1007/978-3-319-28371-5_10.

¹¹⁶ David Landau, 'Political Institutions and Judicial Role in Comparative Constitutional Law' (2010) 51 *Harvard International Law Journal* 319, 321.

¹¹⁷ Rosalind Dixon and David Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13(3) *International Journal of Constitutional Law* 617.

These two cases underscore the subjectivity of the Constitutional Court in reviewing amendments under the doctrine, where the same argument utilised in second re-election case could have been relied on by the Court to strike down amendment in the first re-election case.

b. Judicial reform of 2015

In Decision *C-285/2016*¹¹⁸, the Court struck down the amendment for creation of Judicial Governance Council along with new Management Office of the Judicial Branch, reasoning that the new body was created to replace existing institution responsible for government and administration of Judiciary. The Court held that essential element of the Constitution, namely separation of powers, judicial independence and principle of self-government of the judiciary were violated. The new system, according to the Court, lacked autonomous management of judiciary.

Again, in Decision *C-373/2016*¹¹⁹, the Court struck down Commission of Aforados (CA) which replaced the previous institution to prosecute criminal and disciplinary offences by the justices of the various Courts and Attorney General. According to the Court, creation of CA replaced the essential element of separation of powers, autonomy and judicial independence found in the Constitution.¹²⁰

These cases underscore the use of the doctrine to protect the judicial branch from interference from the executive and insulate itself from the interference to protect its autonomy and governance.

c. Other Instances

In *C-588/2009*¹²¹, the Court reviewed the amendment to Article 125 of the Constitution, 1991 which enabled the possibility of provisional and commissioned employees to be named without public competition. Consequently, they can gain tenure without passing necessary exam of merits. The Court held that this amendment replaced the essential principles of merit equality, and constitutional principle of administrative career.¹²²

¹¹⁸ Constitutional Court of Colombia, Decision *C-285/2016*.

¹¹⁹ Constitutional Court of Colombia, Decision *C-373/2016*.

¹²⁰ Mario Alberto Cajas-Sarria, 'Judicial Review of Constitutional Amendments in Colombia: A Political and Historical Perspective, 1955–2016' (2017) 5(3) *The Theory and Practice of Legislation* 267, <https://doi.org/10.1080/20508840.2017.1407397>.

¹²¹ Constitutional Court of Colombia, Judgment *C-588/2009*.

¹²² Gonzalo Andrés Ramírez-Cleves, 'The Unconstitutionality of Constitutional Amendments in Colombia: The Tension Between Majoritarian Democracy and Constitutional Democracy' in Thomas Bustamante and Bernardo Gonçalves Fernandes (eds),

In addition to the aforementioned test, the Court developed the “effectiveness test” to evaluate constitutional amendments by examining three key criteria: (a) whether the reform is substantive rather than merely superficial, meaning the amended provision appears unchanged but in effect is significantly altered; (b) whether the amendment avoids conferring specific advantages or privileges on any individual or group; and (c) whether the amendment facilitates an indirect substitution of a constitutional article or provision. This doctrine is also referred as the “constitutional fraud” doctrine.¹²³

In judgment *C-249/2012*¹²⁴, like the abovementioned judgment, the Court declared Legislative Act No. 4/2011 as unconstitutional, the reasoning based on the amendment established advantages scores for commissioned and provisional employees which replaced the essential elements of merit, equality and constitutional principle of administrative career.

In Decision *C-1056/2012*¹²⁵, the Constitutional Court examined Legislative Act No. 1 of 2011, which amended Article 183 of the 1991 Constitution. This amendment introduced the loss of investiture for Congress members who breached rules on conflicts of interest and incompatibilities during legislative deliberations.¹²⁶ The Court ruled that applying these conflict-of-interest provisions to the process of discussing and approving in working of the Congress, therefore, the constitutional amendment amounted to replacement. Furthermore, the Court found that this amendment violated constitutional principles related to maintaining public morality within a democratic system.¹²⁷

III.III ISSUE OF SUBJECTIVITY REMAINS

The Colombian Constitutional Court’s application of the identity test within the Constitutional Replacement Doctrine has drawn various critiques. One major concern relates to the identification of essential elements.

Democratizing Constitutional Law: Perspectives on Legal Theory and the Legitimacy of Constitutionalism (Springer 2016) 221 https://doi.org/10.1007/978-3-319-28371-5_10.

¹²³ Ibid 223.

¹²⁴ Colombian Constitutional Court, Judgment C-249/2012.

¹²⁵ Constitutional Court of Colombia, Judgment C-1056/2012.

¹²⁶ Ibid 110.

¹²⁷ Carlos Bernal, ‘Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine’ (2013) 11 *International Journal of Constitutional Law* 346, n 16, <https://doi.org/10.1093/icon/mot007>.

Like the Indian Supreme Court's reasoning, under the seven-step approach, the Court presumes a coherent and internally harmonious constitutional structure, overlooking inherent contradictions. Uprimny points out that the 1991 Constitution embodies a dual character: it contains both progressive, rights-based provisions and elements aligned with neoliberal economic principles.¹²⁸ This internal tension suggests that the presence of conflicting values is intrinsic to the constitutional text itself. Therefore, the mere existence of a conflict between a newly introduced amendment and pre-existing essential elements should not automatically imply that the Constitution has been substituted or fundamentally altered.¹²⁹

Additionally, the subjectivity involved in identifying essential elements has been acknowledged by the Colombian Constitutional Court itself. In the abovementioned Judgment *C-1040/2005*, the Court conceded that the application of the Constitutional Replacement Doctrine allows for interpretive flexibility and may admit a "diversity of formulations."¹³⁰ González-Bertomeu critiques this position, noting that the Court appears to assume that such subjectivity can be set aside in particularly clear cases, suggesting that, even where an essential element is replaced, it may not always lead to a finding of constitutional substitution unless the alteration is unmistakably fundamental.¹³¹

This reflects a parallel with the Indian Supreme Court's approach in identifying "essential features," where such features of basic structure of the constitution are similarly broad and open-ended. In the Colombian context, principles such as separation of powers, principle of administrative career, meritocracy, and equality are articulated in generalized terms, requiring interpretation that is sensitive to Colombia's unique institutional and socio-political conditions.

For Bernal, the seven-step test developed by the Colombian Constitutional Court offers limited clarity on how to concretely identify what constitutes an essential element. The framework lacks a consistent and objective criterion for distinguishing these foundational principles. In practice, adjudicating between competing

¹²⁸ Mauricio García Villegas and Rodrigo Uprimny, 'Tribunal Constitucional e emancipação social na Colômbia' in Boaventura de Sousa Santos (ed), *Democratizar a democracia: Os caminhos da democracia participativa* (Civilização Brasileira 2002) 298–339.

¹²⁹ Bernal, 'Unconstitutional Constitutional Amendments' (n127) 344.

¹³⁰ Juan F González-Bertomeu, 'The Colombian Constitutional Court's Doctrine on the Substitution of the Constitution' in Richard Albert, Carlos Bernal and Juliano Zaiden Benvindo (eds), *Constitutional Change and Transformation in Latin America* (Hart Publishing 2019) 133.

¹³¹ Ibid.

understandings of essential elements and determining whether a newly introduced element is incompatible with other existing elements presupposes a prior, and often indeterminate, understanding of both the identity of such elements and the implications of the reform.¹³² As a result, the application of the identity test risks becoming a circular exercise, where the conclusion depends heavily on assumptions made at the outset regarding the content and hierarchy of constitutional principles.¹³³

¹³² Bernal, 'Unconstitutional Constitutional Amendments' (n127) 345.

¹³³ Juan F González-Bertomeu, 'The Colombian Constitutional Court's Doctrine on the Substitution of the Constitution' in Richard Albert, Carlos Bernal and Juliano Zaiden Benvindo (eds), *Constitutional Change and Transformation in Latin America* (Hart Publishing 2019) 134.

IV. COMPARISON BETWEEN TWO DOCTRINES

This section summarises the findings from the above discussion and provides the comparison between the working of the two doctrines: their similarities, merits and demerits and how the issue of subjectivity looms large in both the approaches whereby transplant of Constitutional Replacement Doctrine will not provide a solution to the abstraction problem in the Basic Structure Doctrine in India.

IV.I Similarities

The Basic Structure Doctrine, as developed by the Indian Supreme Court, represents a form of ex post immutability, empowering the judiciary to review constitutional amendments not only for procedural grounds but also on their substance. Central to this review process in the India context are interpretative tools such as the “rights test” and the “essence of rights” test, which have used to fortify Part III of the Constitution, effectively insulating fundamental rights from legislative intrusion. Alongside these, the “width” and “identity” test have allowed the Court to evaluate amendments within a broader constitutional context, promoting a structural interpretation whereby the constitution is seen as one harmonious document which enables the Court to effectively use this doctrine.

Nevertheless, as previously discussed, this characterization is flawed on several fronts. A critical contention is that, over the course of seventy years and following the enactment of more than one hundred constitutional amendments, the principle of harmonious construction can prove to be untenable. As demonstrated earlier, this approach introduces an element of subjectivity, influenced by the individual preferences of the judges, particularly regarding which provisions of Part III are engaged in the review process, thus determining the scope and depth of the doctrine.

Annex I demonstrates that this doctrinal framework is characterized by significant abstraction and conceptual ambiguity. Despite their persuasive rhetoric, the tests lack a consistent, objective method for identifying what constitutes a “basic feature.” The presence of judicial disagreement, even within individual cases, over the identification of a basic feature, as indicated by the green tiles, underscores a fragmented and subjective application of the doctrine. This suggests a trial-and-error judicial approach, wherein particular constitutional

principles are applied selectively, often shaped by the prevailing political or institutional considerations. Consequently, Fundamental Rights under Part III have been afforded enhanced protection, reflecting the history of frequent amendments targeting such provisions.

An additional concern is the observable tendency of the Court to invoke the Basic Structure Doctrine with greater vigour when its institutional authority such as judicial review, judicial appointments, or jurisdiction is perceived to be under threat. In these instances, the Court has paradoxically relied on identical principles to validate one constitutional amendment while subsequently invalidating another amendment of a comparable character (*Sambamurthy and L Chandra Kumar*). This pattern generates inconsistencies that undermine the coherence of the doctrine and bolster criticisms regarding judicial overreach.

In case of Colombia's Constitutional Replacement Doctrine, it represents a more methodical and systematically applied form of ex post immutability. Similar to the Indian approach, it empowers the Constitutional Court to review amendments that comply with procedural requirements but potentially undermine the Constitution's core identity. However, the Colombian Court distinguishes itself by utilizing a more structured analytical framework, particularly exemplified by its seven-step process, which seeks to elucidate both the doctrine's objectives and the standards for determining the Constitution's essential elements.

This methodology is likewise founded on a structural interpretation of the Constitution. Rather than focusing on specific provisions, the Court assesses essential element under the identity test in the context of the Constitution's comprehensive coherence and design. It examines whether the proposed amendment displaces a preexisting essential element and whether it generates systemic inconsistencies within the constitutional order. By doing so, this approach aims to circumvent the elevation of specific provisions as eternity clauses while effectively safeguarding those elements deemed vital to constitutional identity.

Nonetheless, this structured framework is not free from the abstraction issues that similarly affect the Indian model. The Court openly recognizes the inherent subjectivity in discerning what constitutes essential elements. A significant critique highlights that the 1991 Colombian Constitution, as a product of negotiated compromise among diverse political actors, frequently embodies internal tensions such as robust rights-based provisions

juxtaposed with comparatively weak institutional enforcement mechanisms.¹³⁴ This structural discord undermines the assumption of a cohesive constitutional entirety, which underpins the validity of the seven-step methodology.

Despite its structured and analytically rigorous framework, the seven-step approach under the Constitutional Replacement Doctrine lacks precise and consistently applicable criteria to direct the review of constitutional amendments. By defining essential elements in broad and abstract terms, the Colombian Court, akin to India, create a circular reasoning that aligns with the already desired judicial outcome with designation of such element as “essential”. This conceptual malleability diminishes the doctrine’s capacity for predictable application and intensifies concerns about excessive judicial discretion in constitutional interpretation, thereby constraining its efficacy as a limitation on the amendment power.

Additionally, Bernal offers a critique of the second step in the Colombian test, which mandates that an essential element must be embedded in multiple constitutional provisions. He contends that this requirement is both unnecessary and potentially misleading, particularly given the Court’s reluctance to designate any single provision as immutable or “eternal.” Bernal substantiates his argument by referencing the right to freedom of expression, which is exclusively articulated in Article 20 but remains fundamental to the operation of a deliberative democracy.¹³⁵ He asserts that the importance of such rights should not be undermined simply because they are confined to a single constitutional clause.

This indicates that even a seemingly structured framework under the seven-step approach may suffer from both over-inclusiveness and under-inclusiveness, contingent upon the interpretation by the judges. This parallels the “essence of rights” test employed in India, where the selection of specific provisions subjected to heightened scrutiny critically shapes the breadth and intensity of constitutional amendment review. Consequently, this determines the scope of fundamental rights protection and delineates the extent to which the amending authority may modify these rights without altering their essential character.

¹³⁴ Aman T Mehta, *Dealing with Dialogue: The (Mis)Application of Dialogic Judicial Review in India & Comparative Constitutional Dialogue* (2024) CEU eTD Collection 49–50.

¹³⁵ Bernal, ‘Unconstitutional Constitutional Amendments’ (n123) 345.

*Janhit Abhiyan*¹³⁶ serves as a pivotal case where the Indian Court upheld the amendment, exemplifying the complexities of basic structure review, particularly concerning repeated modifications to Articles 15 and 16 by Parliament. Unlike prior amendments, which aimed to extend affirmative action to marginalized communities in education, employment, and promotions, the 103rd Constitutional Amendment fundamentally altered this framework by permitting affirmative action based on “economically weaker sections” of society. Notably, this amendment excluded Scheduled Castes, Scheduled Tribes, and Other Backward Classes, groups constituting over seventy percent of the population and representing a majority within economically disadvantaged demographics from benefiting under this provision. Consequently, the foundational rationale for affirmative action in India, historically grounded in addressing systemic discrimination and social and educational marginalization, was significantly diluted, shifting focus solely to economic criteria while disregarding enduring social realities.

This highlights that every amendment upheld by the Courts impacts the doctrines in future assessments of constitutional amendment challenges as previous understanding of the structure of constitution and identity of a specific element by reference to the provisions may have also been impacted.

IV.II Avoidance of crystallisation

The Basic Structure Doctrine and the Constitutional Replacement Doctrine, within their respective jurisdictions, define “basic features” and “essential elements” in broad, generalised, and inherently open-ended terms.

The trend towards maintaining such broad doctrines of unconstitutional constitutional amendment in both India and Colombia reflects an intention to preserve expansive judicial review within their respective legal systems. By articulating constitutional principles in generalised terms, the Courts circumvent the limitations of a narrow review approach, which might struggle to effectively assess constitutional replacements or substitutions enacted through incremental amendments. Furthermore, Landau and Dixon contend that under the narrow approach, individual constitutional changes in isolation may not imperil essential elements of constitutional identity, their cumulative effect, when considered as a package, can pose a significant threat to

¹³⁶ *Janhit Abhiyan v Union of India* (2022) 3 SCC 1540 (SC).

democratic governance.¹³⁷ It is argued that a clearly defined and crystallized list of foundational principles would not enable courts to determine when such cumulative changes have eroded the core of the constitution.¹³⁸

By maintaining a broad and generalised catalogue of constitutional principles, the Courts is able to evaluate the effects of amendments in a comprehensive manner, thereby effectively addressing potential threats. This expansive approach enables the Court to consider the impact of amendments on the Constitution's overall framework, particularly in instances involving the dilution or replacement of identified fundamental principles. However, as demonstrated, this approach has also contributed towards subjectivity and abstraction within both doctrines. The nature and scope of various tests employed to identify "basic features" in India and "essential elements" in Colombia is undermined by a shared problem of abstraction and subjectivity. In both jurisdictions, the determination of whether a constitutional amendment violates the basic structure or substitutes an identity element is contingent upon the Courts' subjective interpretation of the constitutional framework and the relevant domestic context under this. Broad approach.

This interpretative process is shaped by an evaluation of how the amendment mechanism has historically been employed by political actors, alongside the potential risks associated with such uses of power. This is exemplified in two significant Colombian cases regarding the re-election of an incumbent President. In the first case, the Court allowed a second term, considering the political environment and the weakening of political parties, while recognizing that a second term could strain the constitutional framework, but did not fundamentally compromise institutional integrity. However, in the latter case challenging constitutional amendment permitting a third consecutive term, the Court deemed it unconstitutional, arguing that twelve consecutive years in office would effectively "collapse the principle of separation of powers"¹³⁹ reflecting the Court's role in such broad reviewing of amendments within the domestic political context.

¹³⁷ Rosalind Dixon and David Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13(3) *International Journal of Constitutional Law* 606, 624.

¹³⁸ *Ibid*, 625.

¹³⁹ Constitutional Court of Colombia, Judgment C-141/10, 6.3.7.

These instances reveal a consistent avoidance of crystallisation of principles to preserve judicial flexibility with the purpose of allowing adaptation of existing precedents to future constitutional challenges. especially given the frequent, politically driven use of amendments in India and Colombia.

Given its inherent characteristics, the Constitutional Replacement Doctrine may be ill-equipped to resolve the issue of judicial subjectivity that is prevalent in the Indian context. It can thus be argued that both doctrines operate concurrently, reflecting parallel challenges in their application.

V. CONCLUSION

The research undertaken in this thesis has revealed key insights into the doctrine of unconstitutional constitutional amendment in the context of India and Colombia.

I. With respect to first question related to the distinction between constituent power and derived constituent power, the Colombian Constitutional Court has benefitted from Article 376, which provides a clear constitutional mechanism for convening a constituent assembly. This provision has enabled the Court to structurally recognise the implied limitations on the amending power by accepting that the amending authorities under Articles 103 and 114 only possesses derived constituent power which can utilised only for reform, not substitution. The clarity and systemic separation between original and derived constituent power has allowed the Colombian Court to ground its reasoning in a more stable jurisprudential framework.

In contrast, the Indian Supreme Court initially struggled to articulate this distinction, particularly due to the absence of an eternity clause and the explicit reference to “constituent power” in Article 368. In the early decades, the Court faced significant challenges in reconciling the idea of implied limitations with the constitutional text. However, over time, and particularly following the development of the Basic Structure Doctrine, the Court has progressively refined its reasoning. It ultimately accepted that while Parliament may exercise constituent power, such power cannot be used to “destroy” the basic structure of the Constitution. The term “destroy” is used consistently to signify alterations so fundamental that they transform the identity of the Constitution.

Through the gradual evolution of its jurisprudence, the Indian Supreme Court has effectively embraced the classical distinction between original and derived constituent power, thereby bringing its approach closer to that of the Colombian Constitutional Court. This convergence reflects a shared constitutional understanding: *any amendment which modifies a provision in such a manner that it interferes with an essential element or a basic feature, altering the identity of the Constitution or makes it unworkable with other elements or basic features, must be declared unconstitutional.*

For instance, the Indian Supreme Court in *M. Nagaraj* held that an amendment affecting the principle of equality, if enacted without safeguards such as judicial review, another basic feature, would violate the basic structure. This reasoning parallels the Colombian Constitutional Court's position in its 1994 judgment¹⁴⁰, where it invalidated a reform that undermined essential element of development of personality which affected another essential element of liberal and democratic character of the state.

II. On the question of whether the structured seven-step approach adopted by the Colombian Constitutional Court offers a viable framework to resolve the abstraction problem and subjectivity inherent in India's Basic Structure Doctrine, the research demonstrates that both approaches face similar challenges in their respective identity tests. In both jurisdictions, the Courts have developed a series of tests to identify "basic features" and "essential elements" through case-by-case adjudication, often relying on broad and generalised constitutional principles. This methodology, while allowing flexibility, has also contributed to a lack of doctrinal precision and a persistent degree of subjectivity.

It is argued that such approach is deliberately adopted by both the Courts to avoid crystallising a fixed list of unamendable principles, thereby preserving the judicial discretion necessary to review constitutional amendments within evolving political and legal contexts. However, this same strategy has led to inconsistencies in the application of the respective doctrines, where the identification and interpretation of basic features or essential elements may justify either upholding or invalidating an amendment based on similar reasoning. The Courts have acknowledged this indeterminacy and attempted to justify it through the lens of holistic reading and structural interpretation of the Constitution.

The research finds that this justification is insufficient, particularly given that both the Indian and Colombian Constitutions contain conflicting provisions, often the result of political compromises made during the drafting process for the adoption of a broad and flexible approach for identifying constitutional principles. This approach is largely based on the experience of attempts by political actors to amend the constitution in ways that threaten the rule of law, judicial independence, and desire by incumbents to retain power. This contextual

¹⁴⁰ Constitutional Court of Colombia, Judgment C-221/94.

reality shaped the judicial preference for a broad and generalised standard over rigid and narrowly defined tests.

In Colombia, this trajectory was significantly influenced by the question of extending Presidential term limits to benefit the incumbent. The Constitutional Court is widely regarded as an institution enjoying high levels of public trust and approval. This legitimacy, combined with the weakening of political parties and fragmentation within the Congress, framed President Uribe's attempt to amend presidential term limits as a move to concentrate power, potentially undermining the role of the legislature. In response, by invoking the Constitutional Replacement Doctrine, the Court asserted its role as guardian of the Constitution.

Building on the lessons from its earlier judgment on presidential re-election and recognising the limitations of its previous identity test, the Court introduced the seven-step test to streamline the process of identity test. While this framework brought greater procedural clarity, the Court deliberately retained a broad and generalised interpretive approach, consciously avoiding the constraints of a narrowly defined approach. This balance allows the Court to invalidate amendments that, though enacted incrementally, risk causing substantial harm to democracy and the functional integrity of the constitutional order.

In the case of India, the Supreme Court experienced a significant loss of public trust and institutional legitimacy due to its role during the Emergency period (1975–1977), particularly in failing to protect fundamental rights of citizens. In the aftermath, amid the weakening of the dominant party system, the Court strategically employed the Basic Structure Doctrine to review and invalidate amendments enacted during that turbulent era, thereby restoring its credibility and reasserting its role as the guardian of the Constitution.

Over the following decades, this objective was largely achieved by the Court, and it continued to evolve the Basic Structure Doctrine, introducing new tests within its broad and flexible framework. By maintaining discretion in identifying basic features on a case-by-case basis, the Court has progressively refined the doctrine to address inherent inconsistencies, enabling it to review constitutional amendments that would otherwise evade invalidation under a narrow approach. The Supreme Court follows the same logic of Colombian Constitutional Court of being the institution which is above political considerations and insulated from such

branches (a result by using this doctrine is further its role and autonomy) making them better equipped to protect the democracy and constitutional order from the political authorities.

This development has elevated the respective Courts to a position beyond that of constitutional guardians - transforming them into institutions that, metaphorically, stand as *lions above the throne*. By consistently invoking this doctrine, the Courts have expanded their own jurisdiction, positioning themselves as a check on the authority of other institutions and review their actions while simultaneously insulating themselves from equivalent scrutiny. Thus, they rely on the very principles that justify limitations on others to place themselves beyond similar limitations.

Annex - I

	Supremacy of Cons	Rule of law	Separation of powers	Independence of judiciary	Judicial review	Jurisdiction of High Court	Federalism	Secularism	Sovereignty	Unity and integrity	Republican & democratic nature	Parliamentary form of Gov	Free & fair elections
Keshavnanda Bharati													
Sikri	✓		✓				✓	✓			✓		
Shelat & Grover	✓		✓		✓		✓	✓	✓	✓	✓		
Hedge & Mukherjea					✓				✓	✓	✓		
Reddy								✓	✓		✓	✓	
Khanna					✓								
Indira Gandhi													
Chandrasekhud	✓	✓	✓					✓	✓		✓		
Khanna		✓						✓			✓		✓
Beg	✓		✓										
Mathew		✓			✓								
Ray		✓											
Minerva Mills													
Chandrasekhud					✓								
Bhagwati					✓								
L Chandra Kumar						✓							
Ganpatrao	✓							✓			✓		
Sampat Kumar													
Bhagwati					✓								
Misra					✓								
	Supremacy of Cons	Rule of Law	Separation of Powers	Independence of judiciary	Judicial review	Jurisdiction of High Courts	Federalism	Secularism	Sovereignty	Unity and integrity	Republican & democratic nature	Parliamentary form of Gov	Free & fair elections
Sambhamurthy			✓										
I R Coelho			✓		✓			✓					
Mar. Bar Assn.				✓	✓								
NJAC			✓	✓									

BIBLIOGRAPHY

Constitutions

- Constitution of India, 1949.
- Constitution of Colombia, 1991.

India Cases

- L Chandra Kumar v Union of India (1997) 3 SCC 261.
- Madras Bar Association v Union of India (Civil Appeal No 502 of 2021) SC.
- Janhit Abhiyan v Union of India (2022) 3 SCC 1540 (SC).
- Minerva Mills Ltd v Union of India AIR 1980 SC 1789.
- Kesavananda Bharati v State of Kerala AIR 1973 SC 1461; (1973) 4 SCC 225.
- Shankari Prasad Deo v Union of India (1952) 1 SCR 89.
- Sajjan Singh v State of Rajasthan AIR 1965 SC 845.
- Golaknath v State of Punjab AIR 1967 SC 1643.
- Indira Gandhi v Raj Narain AIR 1975 SC 2299.
- I R Coelho v State of Tamil Nadu (2007) 2 SCC 1, 861.
- M Nagaraj v Union of India (2006) 8 SCC 212.
- P Sambamurthy v State of Andhra Pradesh (1987) 1 SCC 362.
- Supreme Court Advocates-on-Record Association v Union of India (2016) 5 SCC 1.
- Kihoto Hollohan v Zachillhu (1992) 2 Supp SCC 651.
- Kuldip Nayar v Union of India AIR 2006 SC 3127.

Colombia Cases

- Constitutional Court of Colombia, *Judgment C-221/94* (1994).
- Constitutional Court of Colombia, *Judgment C-1200/03* (2003).
- Constitutional Court of Colombia, *Judgment C-551/03* (2003).
- Constitutional Court of Colombia, *Judgment C-313/04* (2004).

- Constitutional Court of Colombia, *Judgment C-970/04* (2004).
- Constitutional Court of Colombia, *Judgment C-1040/05* (2005).
- Constitutional Court of Colombia, *Judgment C-141/10* (2010).
- Colombian Constitutional Court, *Judgment C-249/12* (2012).
- Constitutional Court of Colombia, *Judgment C-1056/12* (2012).
- Constitutional Court of Colombia, *Judgment C-285/16* (2016).
- Constitutional Court of Colombia, *Judgment C-373/16* (2016).

Pakistan Cases

- District Bar Association (Rawalpindi) v Federation of Pakistan PLD 2015 SC 401.
- Fazlul Quader Chowdhry v Mohd Abdul Haque 1963 PLD 486.

Books

- Burgess J, *Political Science and Comparative Constitutional Law*, vol 1 (Ginn & Company 1893).
- Dhavan R, *Parliamentary Sovereignty and the Supreme Court* (Sterling Publishers 1978).
- Krishnaswamy S, *Democracy and Constitutionalism in India* (Oxford University Press 2009).
- Malhotra GC, *Anti-defection Law in India and the Commonwealth* (Oxford University Press 2006).
- Ramírez Cleves G, *Límites a la reforma constitucional en Colombia* (Universidad Externado de Colombia 2005).
- Roznai Y, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (1st edn, Oxford University Press 2017).
- Schmitt C, *Verfassungslehre* (3rd edn, Duncker & Humblot 1960).
- Sorabjee S, Datar A and Palkhivala N, *The Courtroom Genius* (LexisNexis 2012).
- Verdugo S, *Is it Time to Abandon the Theory of Constituent Power?* (Oxford University Press & New York University School of Law 2023).

Chapters in Edited Volumes

- Albert R, ‘Amendment and Revision in the Unmaking of Constitution’ in David Landau and Hanna Lerner (eds), *Handbook on Comparative Constitution-Making* (Edward Elgar Publishing 2018).
- Bhatia G, ‘The Sole Route to an Independent Judiciary? The Primacy of Judges in Appointment’ in Sengupta and Sharma (eds), *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* (Oxford University Press 2018).
- González-Bertomeu JF, ‘The Colombian Constitutional Court’s Doctrine on the Substitution of the Constitution’ in Richard Albert, Carlos Bernal and Julianio Zaiden Benvindo (eds), *Constitutional Change and Transformation in Latin America* (Hart Publishing 2019).
- Hirschl R, ‘Case Selection and Research Design in Comparative Constitutional Studies’ in R Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP 2014).
- Jackson VC, ‘Comparative Constitutional Law: Methodologies’ in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012).
- Ramachandran R and Thallam MVK, ‘The Obvious Foundation Test: Re-Inventing the Basic Structure Doctrine’ in Sengupta and Sharma (eds), *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* (Oxford University Press 2018).
- Ramírez-Cleves GA, ‘The Unconstitutionality of Constitutional Amendments in Colombia: The Tension Between Majoritarian Democracy and Constitutional Democracy’ in Thomas Bustamante and Bernardo Gonçalves Fernandes (eds), *Democratizing Constitutional Law* (Springer 2016) 211 https://doi.org/10.1007/978-3-319-28371-5_10.
- Roznai Y, ‘Constitutional Unamendability in Latin America Gone Wrong?’ in Richard Albert, Carlos Bernal and Julianio Zaiden Benvindo (eds), *Constitutional Change and Transformation in Latin America* (Hart Publishing 2019).
- Sathe SP, ‘India: From Positivism to Structuralism’ in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press 2007).
- García Villegas M and Uprimny R, ‘Tribunal Constitucional e emancipação social na Colômbia’ in Boaventura de Sousa Santos (ed), *Democratizar a democracia: Os caminhos da democracia participativa* (Civilização Brasileira 2002) 298–339.

Journal Articles

- Albert R, 'Constitutional Amendment and Dismemberment' (2018) 43 *Yale Journal of International Law* 29.
- Bernal C, 'Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' (2013) 11 *International Journal of Constitutional Law* <https://doi.org/10.1093/icon/mot007>.
- Choudhry S, 'The Indian Basic Structure Doctrine and Comparative Constitutional Law' (2008) 6 *International Journal of Constitutional Law* 332.
- Cruz-Gutiérrez DF, 'Flexible Constitutions and Transitional Justice: Questioning the Use of the Amendment Power in Transitional Justice Contexts' (2022) 9 *Latin American Law Review* 107 <https://doi.org/10.29263/lar09.2022.06>.
- Dixon R and Landau D, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13(3) *International Journal of Constitutional Law* 617.
- Jawahar T, 'The Basic Structure Doctrine: Scope and Applicability' (2022) 4 *Indian Journal of Law & Legal Research* 1, 8.
- Landau D, 'Political Institutions and Judicial Role in Comparative Constitutional Law' (2010) 51 *Harvard International Law Journal* 319.
- Monciunskaitė B, 'Unconstitutional Constitutional Amendments' in *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford Constitutional Law 2024).
- Nggilu N, Moha MR, Sinaga MR and Rachmaniar A, 'Judicial Review of Constitutional Amendments: Comparison between India, Germany, Colombia, and the Relevancy with Indonesia' (2024) 8(1) *Lex Scientia Law Review* 280 <https://doi.org/10.15294/lslr.v8i1.1901>.
- Ragone S, 'The "Basic Structure" of the Constitution as an Enforceable Yardstick in Comparative Constitutional Adjudication' (2019) 11(3) *RECHTD* 333 <https://doi.org/10.4013/rechtd.2019.113.02>.

- Roznai Y, ‘Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea’ (2013) 61 *American Journal of Comparative Law* 657 <http://dx.doi.org/10.5131/AJCL.2012.0027>.
- Sethi A, ‘The Indian Supreme Court and Constitutional Amendments: Insights for the Debate on the Comparative Political Process Theory and the Comparative Representative Reinforcement Theory’ (2025) *Global Constitutionalism* 1–25 <https://doi.org/10.1017/S2045381724000248>.
- Yap PJ, ‘The Conundrum of Unconstitutional Constitutional Amendments’ (2015) 4(1) *Global Constitutionalism* 120 <https://doi.org/10.1017/S2045381714000100>.
- Agnihotri S, ‘Interpreting without Bannisters? The Abstraction Problem Afflicting the Basic Structure Doctrine’ (2024) 8(3) *Indian Law Review* 235 <https://doi.org/10.1080/24730580.2024.2376474>.

Online Articles and Blogs

- Roznai Y, ‘The Basic Structure Doctrine arrives in Kenya: Winds of Change for Constitutionalism in Africa?’ (VerfBlog, 19 May 2021) <https://verfassungsblog.de/the-basic-structure-doctrine-arrives-in-kenya/> doi:10.17176/20210519-175102-0 accessed 11 March 2025.
- Towe C, ‘Constituent Power and Doctrines of Unconstitutional Constitutional Amendments’ (2020) *Trinity College Law Review* <https://trinitycollegelawreview.org/constituent-power-and-doctrines-ofunconstitutional-constitutional-amendments/> accessed 22 April 2025.
- Mehta AT, *Dealing with Dialogue: The (Mis)Application of Dialogic Judicial Review in India & Comparative Constitutional Dialogue* (2024) CEU eTD Collection.