
A STUDY ON THE DOCTRINE OF BASIC STRUCTURE ACROSS JURISDICTIONS

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ABSTRACT

The Doctrine of Basic Structure stands as a cornerstone of constitutional jurisprudence, articulating the principle that while constitutions may evolve through amendment, their essential identity must remain intact. Originating in India through the landmark *Kesavananda Bharati v. State of Kerala* (1973) decision, the doctrine limits the amending power of Parliament to protect the fundamental features of the Constitution, such as democracy, rule of law, judicial independence, and federalism. This judicial innovation has since influenced constitutional thought across multiple jurisdictions, where courts have confronted similar tensions between constitutional flexibility and permanence.

This paper undertakes a comparative and doctrinal study of the Basic Structure Doctrine as developed in India and its reception in Bangladesh, Pakistan, Malaysia, Kenya, and Germany. It analyzes how these jurisdictions have applied or adapted the principle to curb constitutional amendments that threaten democratic values or institutional balance. Through this comparative inquiry, the paper explores broader questions regarding the legitimacy of judicial review over constitutional amendments and the limits of parliamentary sovereignty.

The study concludes that the Basic Structure Doctrine has evolved into a global constitutional principle that safeguards the spirit of constitutionalism against majoritarian or authoritarian impulses. By preserving the enduring values of justice, liberty, and constitutional supremacy, the doctrine reaffirms the judiciary's role as the guardian of democratic integrity and constitutional continuity.

Keywords: Basic Structure Doctrine, constitutional amendment, judicial review, constitutionalism, democracy, rule of law, comparative study

INTRODUCTION

The **BSD**, as articulated by the Apex Court in *The K.Bharati constitutional bench ruling*¹, marked a transformative moment in constitutional jurisprudence not only in India but across other jurisdictions which have been engaged with the doctrine, either directly or through analogous principles. The doctrine, which holds that certain foundational features of a constitution are beyond the reach of constitutional amendments, represents a judicial innovation intended to preserve constitutional identity and prevent democratic erosion through majoritarian overreach. In India, the BSD emerged as a significant response to the challenges posed by the potential misuse of constitutional amendment powers. Recognizing that unchecked legislative authority could lead to the erosion of fundamental constitutional principles, the judiciary stepped in to ensure that such powers would not be exercised arbitrarily. This development represented a conscious effort to protect the Constitution's core values from being undermined through successive amendments that might alter its essential character. It reflected the judiciary's commitment to preserving the foundational framework upon which Indian democracy rests.

The doctrine effectively introduced a system of judicial review specifically focused on the scope and limits of constitutional amendments. By asserting its authority to examine whether amendments impinge upon the Constitution's basic structure, the judiciary carved out a role that went beyond simple interpretation of the law. Instead, the courts took on the responsibility of safeguarding constitutional integrity, acting as a bulwark against any attempt to distort or diminish the Constitution's fundamental principles. This judicial oversight became essential in maintaining the balance between necessary constitutional flexibility and rigid protection of core ideals. The assertion of this judicial power fundamentally altered the traditional relationship among the legislature and the judiciary. Where once Parliament held near absolute authority to amend the Constitution, the courts' intervention placed clear constraints on that power. This redefinition of power dynamics underscored the judiciary's critical role in upholding the ROL and ensuring that constitutional governance remains stable and consistent. It positioned the judiciary as a key protector of democracy, responsible for preventing any overreach that might threaten the Constitution's foundational structure. Moreover, the doctrine emphasized the importance of constitutional continuity and stability amidst political and social change. By limiting the ambit of permissible amendments, the judiciary ensured that the

¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 S.C.C. 225 (India).

Constitution may adapt over time without compromising its essential identity. This approach balanced the necessity for adaptability with the necessity of preserving longstanding values such as democracy, justice, and fundamental rights. In doing so, the judiciary helped to maintain public confidence in the constitutional framework and prevented abrupt or destabilizing shifts in governance.

Ultimately, the emergence of this Doctrine marked a turning point in Indian constitutional law. It affirmed the principle that the Constitution is not static but responsive to change whose core principles must be shielded from potential political expediency. By positioning itself as a guardian of constitutional integrity, the judiciary affirmed its responsibility to uphold the Constitution's foundational ideals and protect them from erosion. This doctrine has since become a cornerstone of constitutional jurisprudence, symbolizing the vital role of courts in maintaining the balance between change and preservation in a democratic society. What began as a response to domestic political and constitutional crises has now taken on a broader, global significance. The Indian model has inspired debates and legal developments in numerous jurisdictions, leading to a **transnational migration of constitutional ideas**. Courts and scholars around the world have increasingly recognized the need to place **substantive limits on the power to amend**, especially in states governed by democratic standards are fragile or under threat. The **judicial endorsement of implicit or explicit amendment constraints** is seen not as a violation of democratic principles, but as a necessary safeguard to protect constitutionalism itself.

1. GLOBALIZING THE BASIC STRUCTURE—AN OVERVIEW OF THE BASIC STRUCTURE DOCTRINE'S APPLICATION ACROSS THE WORLD

The power of the doctrine is most clearly observable in **South Asian nations** with common colonial pasts and similar constitutional structures. In **Bangladesh**, the Apex court explicitly adopted this doctrine in *Anwar Hossain Chowdhury v. Bangladesh* (1989)², declaring that certain elements of the Constitution are unamendable, even by a supermajority in Parliament. The court emphasized that the Constitution is a "politico legal document" containing "eternal principles" that cannot be undermined by transient political majorities. The doctrine in Bangladesh has served as a bulwark against authoritarian tendencies and has reaffirmed the

² *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl.) 1 (Bangl.).

role of the judiciary in preserving democratic order.

In **Pakistan**, the reception of the doctrine has been more cautious and complex. Initially reluctant to embrace such a limitation on parliamentary authority, the Pakistani judiciary began to warm to the idea, especially in recent years where concerns about constitutional stability and military influence have intensified. Although not explicitly referred to as the “BSD,” the concept of judicially enforceable implied limitations on constitutional amendments has gained traction in cases like *District Bar Association Rawalpindi v. Federation of Pakistan* (2015)³, where the Apex court scrutinized constitutional changes for their potential to undermine judicial independence. Outside the South Asian region, the **German Basic Law (Grundgesetz)** provides one of the clearest examples of a formal constitutional entrenchment of basic structure principles. Article 79(3), known as the “**Eternity Clause**”, forbids amendments to core constitutional features, including the federal structure, rule of law, and human dignity. Unlike

India, where the doctrine is judicially crafted, Germany’s protection arises from a **textual provision**, reflecting a postwar determination to prevent a recurrence of authoritarianism. The German Federal Constitutional Court has strongly enforced this clause, creating a jurisprudence that effectively limits the amending power to protect democratic constitutionalism.

In **Kenya**, the idea of constitutional “inalterability” emerged through judicial interpretation during challenges to constitutional reforms. In the *Building Bridges Initiative (BBI)* case, the

Kenyan HC stated that there exist “primary structure provisions” of the Constitution which cannot be amended through ordinary processes and require recourse to the **constituent power** a sovereign process involving the people directly. This judgment echoed the logic of the DBS and emphasized that the constitution is not a mere legal document but a social contract whose foundational features must be preserved. Similarly, **Malaysia** has experienced judicial conversations surrounding the limits of constitutional amendments, particularly in with respect to the judiciary’s independence and separation of powers. Although the Federal Court of Malaysia has not formally adopted the doctrine, the courts have resisted certain legislative amendments on the facts that they violate the underlying spirit of constitutional democracy.

³ *District Bar Ass’n Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401 (Pak.).

Moreover, constitutional courts in **Colombia, Uganda, Turkey**, and even **Belize** have engaged with the concept of **unconstitutional constitutional amendments**, showing a convergence towards recognizing that not all formal amendments are substantively valid. These jurisdictions, though diverse in their legal traditions, share a growing concern over authoritarian encroachments masked as lawful amendments. In such contexts, the judiciary has begun to play an increasingly interventionist role, framing **substantive limits as a defense against the erosion of foundational norms**. The diffusion of this Doctrine globally illustrates **a larger trend in comparative constitutional law**: the realization that constitutions require mechanisms to protect themselves from within. That is, democracies can be subverted through seemingly legal means such as amendments passed by compliant legislatures which necessitates a countervailing power to ensure that constitutional change does not devour constitutionalism. This trend supports the concept that **constitutional supremacy cannot be compromised even by super majoritarian acts**, and that **judicial review of amendments** is not antidemocratic, but rather a commitment to deeper constitutional values like dignity, equality, ROL, and SOP.

Thus, the DBS, though a judicial innovation specific to India, has resonated with courts worldwide that face similar challenges to constitutional endurance and democratic integrity. Whether embedded textually as in Germany or developed jurisprudentially as in India and Bangladesh, the doctrine or its equivalents signal a **constitutional awakening**: a recognition that foundational values are not subject to the whims of transient power. As constitutional democracies grapple with rising populism, hyper amendment, and institutional degradation, the global relevance of the DBS is likely to grow. It serves not only as a theoretical check on power but as a **practical tool to protect the spirit of constitutionalism in the 21st century**.

1.1 BANGALDESH CONSTITUTIONALIZING THE BASIC STRUCTURE

The evolution of this Doctrine in Bangladesh presents a compelling illustration of how a postcolonial nation reconciles constitutional sovereignty with democratic resilience. Following its independence from Pakistan in 1971, Bangladesh adopted its first Constitution in 1972.⁴ The Preamble of the Constitution captured the essence of popular sovereignty, nationalism, democracy, and socialism as the guiding values of the newly formed republic.

⁴ See The Constitution of the People's Republic of Bangladesh, Preamble (1972) (Bangl.).

However, it did not anticipate the necessity of limiting Parliament's amending powers, believing that political representatives would always work in public interest. The framers of the Constitution, influenced by democratic models such as those in India and the United Kingdom, granted the Parliament unfettered authority to revise the Constitution. Article 142 empowered Parliament to alter, repeal, or substitute any provision.⁵ This mirrored India's original Article 368, which did not expressly bar amendments to fundamental rights or basic features.⁶ Yet, unlike India, where a long constitutional debate unfolded before basic structure limits emerged, Bangladesh was relatively quick to witness judicial intervention.

The seminal case of *Anwar Hussain Chowdhury v. Bangladesh*,⁷ also known as the 8th Amendment Case, arose when the Constitution was amended to decentralize the HC Division.

The primary issue was whether such structural alterations infringed upon the Constitution's inherent design. Justice Shahabuddin Ahmed's opinion laid the groundwork for recognizing implied limits on Parliament's power to amend. He distinguished between 'constituent power', which is original and sovereign, and 'amending power', which is delegated and therefore subordinate.⁸ He further argued that while amendments may update or modify, they must not destroy or replace the core principles of the Constitution. Supporting this view, Justice B.H. Chowdhury stressed that amending power must not be used to subvert the very identity of the Constitution. He warned that granting Parliament such unrestrained authority could open the door to authoritarianism. In contrast, Justice A.T.M. Afzal offered a dissenting view.⁹ He argued that since Article 142 allows addition, alteration, substitution, or repeal, the power to amend was plenary and comprehensive. His view leaned toward parliamentary supremacy and questioned whether judicially inferred limitations were consistent with constitutional design.

Despite the dissent, the majority view in the 8th Amendment Case laid the foundation for a robust doctrine of implied limitations. This was a significant milestone in Bangladeshi constitutionalism as it signified a shift from purely textual interpretation to a more value based reading of the Constitution. It also implicitly endorsed the Indian this doctrine as a persuasive tool in safeguarding constitutional democracy. The doctrine evolved further when the High

⁵ Id. art. 142

⁶ See INDIA CONST. art. 368

⁷ *Anwar Hussain Chowdhury v. Bangladesh*, 41 DLR (AD) 165 (1989) (Bangl.).

⁸ Id. at 185–86 (Shahabuddin Ahmed, J., concurring).

⁹ Id. at 207–09 (A.T.M. Afzal, J., dissenting).

Court Division, in 2005, invalidated the Constitution (Fifth Amendment) Act, 1979.¹⁰ This amendment had retrospectively validated military rule and actions taken under martial law. The Court held such ratification to be unconstitutional. Justice Khairul Haque asserted that no amendment, however procedurally sound, could violate the 'constitutional fabric' by legalizing unconstitutional regimes. The decision was a powerful affirmation of judicial oversight over constitutional amendments.

The Supreme Court's later decision in the case concerning the Thirteenth Amendment added another layer of significance. This amendment had introduced a caretaker government system to oversee elections, a provision meant to ensure neutrality. However, the SC ruled in 2011 that it was inconsistent with representative democracy, a basic structure of the Constitution.¹¹ The Court emphasized that even well-intentioned reforms could not override constitutional essentials such as democratic governance.¹² The trajectory of this doctrine in Bangladesh reached a pivotal stage with the enactment of the Fifteenth Amendment in 2011.¹³ This amendment explicitly incorporated the doctrine into the constitutional framework, thereby codifying what had previously existed as a creation of the journey. It added Article 7A, criminalizing the abrogation or suspension of the Constitution, and Article 7B, which identified unamendable provisions such as the rule of law, judicial independence, separation of powers, and sovereignty of the people.¹⁴

By formally entrenching these principles, Bangladesh ensured that neither Parliament nor the judiciary could negate or dilute them in future. This move is unprecedented among constitutional democracies, where this Doctrine typically remains a product of judicial interpretation. Bangladesh's example represents a rare convergence of judicial reasoning and legislative endorsement, effectively granting the doctrine full constitutional status. The journey of this doctrine in Bangladesh reflects an evolving constitutional consciousness. From a phase of unrestricted parliamentary supremacy, the nation has embraced a model of constitutionalism that values stability, judicial independence, and democracy. The 15th Amendment, while controversial in some quarters for its expansive scope, marks a definitive statement that certain

¹⁰ Bangladesh Italian Marble Works Ltd. v. Bangladesh, 14 BLC (HCD) 693 (2006) (Bangl.).

¹¹ Abdul Mannan Khan v. Bangladesh, Civil Appeal No. 6 of 2000 (App. Div. 2011) (Bangl.).

¹² Id. at 43–44.

¹³ The Constitution (Fifteenth Amendment) Act, 2011 (Act No. XIV of 2011) (Bangl.).

¹⁴ The Constitution of Bangladesh, art. 7A (2011), art. 7B.

constitutional norms are beyond amendment. In doing so, Bangladesh not only mirrors India's legal philosophy but also sets a unique precedent in global constitutional jurisprudence.

1.2 PAKISTAN

The constitutional trajectory of Pakistan presents a tale of frequent legal interruptions, military interludes, and an unresolved tug-of-war between constitutionalism and authoritarianism. In this volatile environment, the BSD has experienced a fragmented and sporadic engagement within judicial reasoning. While the concept never achieved entrenched status in Pakistan's legal framework, its conceptual origins predate its firm establishment in India, revealing a shared intellectual lineage.

1. Early Conceptual Signals: Justice Cornelius and Constitutional Limits

The first faint echoes of the BSD in Pakistan can be discerned in Justice A.R. Cornelius's reflections in *Fazlul Quader* case. Cornelius emphasized that a constitution is not merely a mechanical document but is animated by a moral and legal conscience, which no institution should be allowed to violate. Without invoking explicit textual limitations, he hinted at the existence of substantive boundaries that restrain the state.¹⁵ His outlook, which promoted an internal check on excesses of constitutional authority, subtly influenced judicial thought beyond Pakistan's borders. Legal scholars observe that Justice Mudholkar's notable observations in *Sajjan Singh* case which sowed the seeds of the BSD in India bear an intellectual resemblance to Cornelius's constitutional idealism. Thus, Pakistan contributed, albeit indirectly, to the formulation of one of India's most foundational constitutional principles.

2. Inconsistent Engagement and Doctrinal Uncertainty

Despite such early normative insights, Pakistani jurisprudence never consistently upheld or enforced the idea of immutable constitutional features.¹⁶ The Lahore High Court, at one point, posited that Pakistan's Parliament lacked absolute authority and could not tamper with the Constitution's foundational structure. However, this was a short-lived interpretation. In a

¹⁵ PAULA R. NEWBERG, *JUDGING THE STATE: COURTS AND CONSTITUTIONAL POLITICS IN PAKISTAN* 51–54 (Cambridge Univ. Press 1995).

¹⁶ *Mehmood Khan Achakzai v. Federation of Pakistan*, PLD 1997 Quetta 1 (Pak.); see also OSAMA SIDDIQUE, *PAKISTAN'S EXPERIENCE WITH FORMAL LAW: AN ALIEN JUSTICE* (Cambridge Univ. Press 2013).

contrasting and decisive turn, the Apex court of Pakistan, in *Fouji Foundation v. Shamimur Rehman* (1983), rejected any doctrine of implied constitutional limitations. It upheld that Parliament retained full authority to modify the Constitution, dismissing any interpretation that placed substantive restrictions on its constituent power.

3. Doctrinal Revival Amidst Institutional Crises

Despite the setback in *Fouji Foundation*, the 1990s witnessed renewed engagement with structural limitations on constitutional amendment. In *Al-Jehad Trust case* (1996), the Court signaled that any interpretation of the Constitution must respect its integrated and value-laden framework. While not directly invoking the BSD, the decision hinted at the need to preserve the Constitution's inherent philosophy. This direction was reinforced in *Mahmood Khan Achakzai case*, where Chief Justice Sajjad Ali Shah asserted that certain constitutional features namely federalism, democracy, and judicial autonomy were foundational and hence inviolable.¹⁷ Yet, the ruling did not elevate these features to the level of a justiciable doctrine, leaving its application vague and non-binding. Further ambiguity arose in *Wukala Mahaz Barai Tahafuz Dastoor case* (1998), where the Court, despite referencing the BSD in dicta, clarified that Pakistan's judiciary had never formally accepted it as enforceable law. Notably, the same year, a separate seven-judge bench made a contradictory statement affirming that constitutional amendments could not dismantle the document's essential characteristics. This inconsistency only deepened the doctrine's uncertain status.

4. Defensive Use During Military Regimes

The doctrine made a strategic reappearance in *Zafar Ali Shah v. General Pervez Musharraf* (2000), where the Court, though validating Musharraf's coup under the doctrine of necessity, declared that certain features Islamic principles, separation of powers, and federalism must not be compromised¹⁸. However, critics argue that this was less a principled assertion of constitutional sanctity and more a tactical constraint against military overreach. In this case, the BSD functioned more as a shield against executive lawlessness than as a judicially

¹⁷ YASSER KURESHI, *SEEKING SUPREMACY: THE PURSUIT OF JUDICIAL POWER IN PAKISTAN* 164–66 (Cambridge Univ. Press 2022) (discussing the case commonly attributed to Mahmood Khan Achakzai and Sajjad Ali Shah's remarks on foundational features).

¹⁸ *Zafar Ali Shah v. General Pervez Musharraf*, PLD 2000 SC 869, 1156–57 (Pak.)

enforceable limitation on legislative amendment power.¹⁹

5. Final Rejection and Present Legal Standing

The matter was decisively settled in the legal dispute brought by the Pakistan Lawyers Forum challenging the Federation, where the Apex Court unequivocally held that the judiciary could not review constitutional amendments on their substance. The judgment underscored that only procedural defects in the amendment process were open to judicial scrutiny, thereby extinguishing any possibility of applying the BSD as a tool to restrain Parliament. This decision firmly reasserted the supremacy of Parliament in the field of constitutional amendment, aligning Pakistan's position with a model of formal legal sovereignty, and distancing it from normative or substantive constitutionalism.²⁰

In contemporary Pakistan, the BSD occupies a liminal space frequently cited in academic circles and occasionally alluded to in courtrooms, but devoid of legal enforceability²¹. Its doctrinal trajectory has been reactive, fragmented, and politically contingent, shaped more by the exigencies of military rule and political survival than by principled jurisprudence. Unlike in India or Bangladesh, where the BSD has matured into an essential component of constitutional identity, Pakistan's judiciary has neither consistently upheld nor decisively discarded the doctrine. As a result, it survives only as a constitutional metaphor, not as a rule of law.

1.3 BELIZE – EMULATING THE INDIAN MODEL

The constitutional jurisprudence of Belize, despite its modest geopolitical profile, has played a surprisingly robust role in the international diffusion of the BSD(BSD). Inspired explicitly by Indian constitutional law, the judiciary in Belize has embraced the notion that even duly enacted constitutional amendments are not immune from substantive limitations. This marks a

¹⁹ Osama Siddique, *Judicialization of Politics in Pakistan: The Supreme Court after the Lawyers' Movement*, in *Unstable Constitutionalism* 187, 193 (Mark Tushnet & Madhav Khosla eds., Cambridge Univ. Press 2015) (noting the Court's tendency to couch political compromises in normative constitutional language).

²⁰ Yasser Kureshi, *Seeking Supremacy: The Pursuit of Judicial Power in Pakistan* 175–78 (Cambridge Univ. Press 2022).

²¹ Osama Siddique, *Judicialization of Politics in Pakistan: The Supreme Court After the Lawyers' Movement*, in *Unstable Constitutionalism* 187, 193–94 (Mark Tushnet & Madhav Khosla eds., Cambridge Univ. Press 2015).

rare and significant instance of cross-jurisdictional transplantation of one of India's most foundational doctrines into another common law constitutional order.

1. Bowen Case: Origin of Basic Structure Principles in Belize

The landmark moment in Belize's adoption of the BSD arrived with the decision in *Bowen v. Attorney General* (2010), wherein the constitutionality of the Sixth Amendment Bill, 2008 was directly challenged. This amendment attempted to exclude key national resources such as petroleum and minerals from constitutional protection under the right to property. The government justified its action by citing Article 69 of the Belize Constitution, which provides the formal procedure for enacting constitutional amendments. However, the Belize Apex court firmly rejected this procedural argument, holding that compliance with the amendment procedure did not automatically confer substantive validity. The Court underscored that Article 2, which proclaims constitutional supremacy, imposed binding limits on all exercises of public power including constituent power²². Consequently, even amendments that follow the procedure laid down in Article 69 could be declared invalid if they derogate from the Constitution's core values. In effect, the Court concluded that the power to amend did not extend to dismantling the fundamental structure or spirit of the Constitution.

2. Legislative Response and Judicial Reaffirmation

In reaction to this judicial assertion of constitutional supremacy, the Belizean Parliament enacted the Eighth Amendment Act, 2011, which sought to immunize constitutional amendments from judicial review. The amendment proclaimed that any constitutional change enacted under Article 69 could not be invalidated on the ground that it contravened Article 2 or any other provision. This legislative attempt to circumvent judicial oversight triggered another round of constitutional litigation, culminating in the watershed decision in *British Caribbean Bank Ltd. v. Attorney General* (2012)²³. Here, the Apex court stood its ground and reiterated its earlier position in *Bowen*, affirming that constitutional amendments are not beyond judicial scrutiny.

The Court elaborated that the Constitution must be read in light of its enduring normative

²² BELIZE CONST. art. 2 ("This Constitution is the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.").

²³ *British Caribbean Bank Ltd. v. Attorney General*, Claim No. 597 of 2011 (Sup. Ct. Belize).

architecture, and that Parliament's amending power could not be interpreted to "eliminate, impair, or neutralize" the essential features that give the Constitution its identity. This included principles such as separation of powers, judicial independence, democratic governance, and the ROL.

3. Indian Influence and Transnational Constitutional Borrowing

A remarkable feature of Belize's jurisprudence in this area is its open reliance on Indian precedents, particularly the Supreme Court's decision in *The K.Bharati* constitutional bench ruling. The Belizean judiciary explicitly invoked Indian case law, finding resonance with the proposition that while the Constitution is a living document capable of evolution, it is anchored by unalterable principles that ensure its legitimacy and coherence across time.

This comparative constitutional approach demonstrates the growing influence of South–South legal dialogue, where developing democracies learn not just from Western constitutional models but also from each other's postcolonial constitutional innovations. In citing *Kesavananda*, the Belizean Court endorsed the Indian doctrine that amendment power is not synonymous with absolute sovereignty; it is circumscribed by the Constitution's foundational commitments.

4. Doctrinal Significance and Global Implications

The legal narrative emerging from Belize is both normatively rich and jurisprudentially significant. Unlike many jurisdictions where courts have shied away from imposing implied limitations on constitutional amendment powers, Belize has decisively embraced the BSD as a tool to maintain constitutional integrity. Its judiciary has shown a willingness to stand up against legislative overreach, reaffirming that constitutional supremacy is not merely procedural, but substantive and value-driven.

By fortifying the BSD within its legal system, Belize has carved a distinctive path in comparative constitutional law, illustrating that constitutional identity is not solely the domain of large federal republics like India.²⁴ Smaller nations, too, can contribute meaningfully to global constitutional norms through judicial innovation and principled adjudication.

²⁴ Yaniv Roznai, "Unconstitutional Constitutional Amendments": *The Limits of Amendment Powers* 144–48 (Oxford Univ. Press 2017).

The jurisprudence of Belize represents a compelling case of doctrinal cross-pollination and principled resistance to majoritarianism. Drawing heavily from Indian constitutional reasoning, its judiciary has institutionalized the BSD as a safeguard against erosion of core constitutional values. In doing so, Belize exemplifies how comparative judicial borrowing can fortify democratic resilience, especially in small constitutional democracies. Its experience offers a powerful template for other nations facing similar dilemmas between constitutional permanence and democratic flexibility.

1.4 AFRICA AND THE BSD: A CONTINENT OF CONSTITUTIONAL CONTRASTS

1.4.1 A FRAGMENTED BUT EVOLVING JURISPRUDENTIAL LANDSCAPE

Africa comprises fifty-four sovereign states, each bearing the imprint of a distinctive constitutional evolution shaped by complex historical trajectories, particularly colonial domination, nationalist liberation movements, and postindependence democratization efforts. Right after the decolonization, several African nations adopted constitutions inspired by their erstwhile colonial powers, often characterized by an overconcentration of authority in the executive and limited judicial oversight. This legacy contributed to a climate wherein constitutional amendments were frequently employed to entrench authoritarian regimes, thereby weakening democratic safeguards. Over time, however, a gradual jurisprudential shift has emerged, marked by increased judicial engagement and the advent of participatory constitutionalism, thus paving the way for the cautious consideration of doctrines such as the BSD.²⁵

In contrast to India where this Doctrine was firmly enunciated by the Apex Court in *Kesavananda Bharati v. State of Kerala* as a judicial response to expansive parliamentary power the African context reflects a variegated and unsettled application of the doctrine. In Kenya, the judiciary has demonstrated a progressive orientation, particularly through its jurisprudence in the Building Bridges Initiative (BBI) case, wherein the High Court and the Court of Appeal invoked the notion of a basic structure to curtail indiscriminate constitutional amendments. These judgments emphasized the inviolability of constitutional identity, popular sovereignty, and the imperative of preserving foundational values²⁶. By contrast, Tanzanian courts have

²⁵ Tom Ginsburg, *Constitutional Courts in New Democracies: Understanding Variation in East Asia and Eastern Europe*, 2 REV. L. & ECON. 101, 111–12 (2006)

²⁶ See Yash Pal Ghai, *Constitutionalism and the Challenge of Ethnicity: Managing Diversity in Africa*, 59 U.

explicitly rejected the application of such a doctrine, instead affirming the supremacy of Parliament in matters of constitutional reform and resisting any judicially imposed substantive limitations on amendment powers.

South Africa occupies a nuanced position within this spectrum. Although the Constitutional Court has not formally adopted this Doctrine, it has repeatedly underscored the sacrosanct nature of constitutional principles such as the ROL, human dignity, and the separation of powers. This jurisprudential posture, while doctrinally distinct from the Indian model, exhibits an implicit endorsement of the idea that certain constitutional features possess an entrenched and unalterable character²⁷. Thus, the African engagement with the Doctrine remains fragmented, context specific, and dynamic illustrating a continent in the midst of reimagining the contours of constitutional supremacy, democratic resilience, and judicial autonomy.

1.4.2 KENYA: A JUDICIAL EMBRACE OF THE DOCTRINE

Kenya stands as a beacon in Africa's constitutional jurisprudence due to its judiciary's proactive stance in defending the Constitution's integrity. The turning point came with the High Court's decision in *David Ndii & Others v. Attorney General & Others*,²⁸ which invalidated the Building Bridges Initiative (BBI), a sweeping constitutional amendment effort orchestrated by the executive. The BBI sought to restructure Kenya's political architecture by introducing 70 new constituencies, reintroducing the office of Prime Minister, and altering the roles of various institutions. The Court declared the BBI unconstitutional, grounding its reasoning in a version of the BSD. It held that certain "eternity clauses" such as constitutional supremacy, rule of law, separation of powers, and sovereignty of the people form the Constitution's core and could not be amended by ordinary parliamentary procedure. Only the exercise of the primary constituent power through a referendum could authorize such transformations. This decision is historically significant because it situates Kenya among a rare group of jurisdictions where the judiciary has openly declared that the constitution contains unamendable features. The Court not only referenced Indian jurisprudence but also integrated

TORONTO L.J. 51, 58–60 (2009); also Jill Cottrell Ghai, *Kenya's 2010 Constitution and the Search for a Stable Constitutional Order*, 9 INT'L J. CONST. L. 529, 534–35 (2011).

²⁷ Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* 270–72 (Cambridge Univ. Press 2013).

²⁸ *David Ndii & Others v. Attorney General & Others*, High Court of Kenya at Nairobi, Constitutional Petition No. E282 of 2020 (2021) (Kenya).

political theory, including the distinction between constituent and constituted powers, thereby enriching its own constitutional doctrine.

Earlier, in *Njoya v. Attorney General*,²⁹ the High Court had also touched upon this idea. The case dealt with the reform process preceding the enactment of the 2010 Constitution. The Court opined that only the people, as bearers of constituent power, could fundamentally alter the constitutional order. This recognition of popular sovereignty as the fountainhead of constitutional legitimacy laid the groundwork for the later development in *Ndii*. Critically, these decisions signal a judicial willingness in Kenya to act as a counter majoritarian institution. In a political environment often prone to executive dominance and ethnic factionalism, the BSD in Kenya functions as a critical mechanism for preserving constitutional balance.

1.4.3 TANZANIA: A DOCTRINAL REJECTION, BUT NOT WITHOUT RESONANCE

Tanzania offers a compelling and distinct narrative in the African engagement with the BSD (BSD). The country's 1977 Constitution, crafted during a period of single party dominance and postcolonial consolidation, provides broad and flexible provisions for constitutional amendments. With few explicit substantive limitations, the Tanzanian constitutional framework appears to prioritise political adaptability over entrenched constitutional rigidity. This design reflects a foundational belief in parliamentary supremacy and the desire to preserve legislative discretion in shaping the evolving needs of the nation. However, this fluidity has also created scope for potential overreach, particularly where constitutional amendments threaten core democratic values. A significant challenge to this framework arose in a case that tested the boundaries of constitutional flexibility. An amendment had barred individuals from contesting elections without being affiliated with a registered political party. This effectively excluded independent candidates from the democratic process, consolidating political power within the party system and limiting citizens' right to political participation. The case prompted critical constitutional scrutiny, with the High Court of Tanzania delivering a judgment that resonated with foundational democratic ideals. In a bold move, the Court struck down the amendment, arguing that it infringed upon the democratic essence of the Constitution by

²⁹ *Njoya & Others v. Attorney General & Others*, [2004] LLR 4788 (HCK) (Kenya).

suppressing political pluralism and marginalizing nonparty voices in electoral politics.

In its judgment, the High Court made explicit reference to the Indian BSD, drawing a parallel between Tanzania's democratic values and those upheld by Indian constitutional jurisprudence. The judges reasoned that even in the absence of textual eternity clauses or entrenched provisions, certain principles such as representative democracy, political equality, and citizen participation are so integral to the constitutional order that they must be preserved beyond legislative interference. By invoking BSD principles, the Court essentially introduced the idea that some fundamental aspects of the Tanzanian Constitution are implicitly immune from amendment, thereby challenging the prevailing assumption of absolute parliamentary sovereignty.

However, this progressive jurisprudence faced immediate resistance. The Court of Appeal reversed the High Court's decision, expressing strong disapproval of the reliance on foreign constitutional doctrines. The appellate court underscored that the Tanzanian Constitution does not contain any implied limitations on the amendment process and firmly rejected the notion that the judiciary could read such limitations into the text. According to the Court of Appeal, importing doctrines like the BSD developed in the Indian legal context was inappropriate for

Tanzania's sociopolitical realities. This reversal reaffirmed a textualist and formalist approach, where the Constitution is seen as amendable in its entirety through the procedures outlined by the legislature, without substantive constraints.

The clash between the High Court and the Court of Appeal highlights a fundamental tension within Tanzanian constitutionalism: whether to prioritise doctrinal coherence and judicial innovation or to adhere strictly to political pragmatism and legislative supremacy. The High Court's ruling attempted to assert the judiciary's role as a guardian of constitutional democracy, placing substantive limits on political power to preserve core democratic principles. In contrast, the Court of Appeal's decision reflected a conservative posture, wary of upsetting the constitutional balance by judicially inferring limits not expressly mentioned in the constitutional text. This divergence reveals a judiciary torn between embracing evolving global norms and maintaining fidelity to Tanzania's historical legal framework³⁰. Despite the setback,

³⁰ Issa G. Shivji, *The Rule of Law and Ujamaa in the Ideological Formation of Tanzania*, 1 SOC. & LEGAL STUD. 147, 153–55 (1992) (discussing Tanzania's foundational commitment to parliamentary sovereignty and minimal judicial interference).

the case left an enduring imprint on Tanzanian constitutional discourse. The High Court's judgment, although overturned, demonstrated an emerging awareness within segments of the judiciary about the need to insulate constitutional identity from political encroachment. By engaging with comparative jurisprudence and recognizing the potential for implicit constitutional limits, the Tanzanian judiciary opened a critical dialogue on the role of courts in defending democratic norms. This judicial consciousness, though currently constrained, may gain momentum in the future, particularly as demands for greater accountability and constitutional protection grow among civil society and legal scholars.

Thus, the Tanzanian experience with the BSD underscores both the promise and the challenges of transplanting global constitutional ideas into local legal contexts. While institutional conservatism and a formalist reading of constitutional text currently dominate higher judicial thinking, the willingness of the High Court to engage with BSD principles represents a quiet yet meaningful shift toward judicial recognition of constitutional limits. As Tanzania continues to navigate the complexities of postcolonial governance and constitutional reform, the seeds of the BSD though resisted may eventually take root, offering a framework for defending the integrity of democratic constitutionalism in the face of political expediency.

1.4.4 SOUTH AFRICA: A SUBTLE ALIGNMENT WITHOUT EXPLICIT ADOPTION

South Africa's constitutional framework, forged in the aftermath of apartheid, is globally recognized for its transformative character and deep entrenchment of democratic values. While the South African judiciary does not explicitly endorse the Indian-origin Basic Structure

Doctrine, the Constitutional Court's jurisprudence reveals a nuanced fidelity to similar structural constraints on constitutional amendments.³¹

The South African Constitution of 1996 begins with foundational values such as human dignity, equality, and freedom, set out in Chapter 1³². These are not only symbolic ideals but also entrenched clauses that require heightened procedural safeguards for amendment, suggesting a deliberate constitutional hierarchy³³. Scholars and courts alike have viewed these

³¹ Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* 152–55 (Cambridge Univ. Press 2013).

³² S. AFR. CONST., 1996, ch. 1, § 1.

³³ Id. § 74(1)–(2); see also Richard Calland, *The Constitution at Twenty: Context and Trends*, in *The Constitution in the Classroom: Law and Education in South Africa 1994–2008* 29, 32 (2009).

provisions as forming the bedrock of South Africa's democratic order, indicating an implicit structuralism akin to the BSD. The Constitutional Court has repeatedly emphasized that constitutional amendments must conform to the overarching principles of constitutionalism and democratic governance. In various judgments, including disputes over the separation of powers and legislative accountability, the Court has underscored that even formal amendments cannot invalidate core constitutional values. While these rulings avoid doctrinal borrowing from India, their reasoning aligns with a structural understanding of constitutional integrity.

Academic literature from South African legal scholars such as Heinz Klug and Theunis Roux has highlighted this point: South Africa's constitutional jurisprudence demonstrates an implicit resistance to radical constitutional alteration, especially where such changes might erode the

Constitution's transformative goals. These include non-racialism, participatory democracy, and judicial independence values that are treated as inviolable within the constitutional architecture.

Thus, South Africa offers a model where the substantive limits on constitutional amendments are preserved through value-based interpretation rather than through a rigid judicial doctrine. This approach reflects a form of constitutional morality that resists authoritarian backsliding, even if not framed under the banner of the Basic Structure Doctrine. It shows how countries with strong constitutional traditions can safeguard democratic structures without adopting foreign doctrines wholesale, instead relying on indigenous legal reasoning and normative constitutional culture.

1.4.5 BROADER IMPLICATIONS AND EMERGING TRENDS

The African engagement with the Basic Structure principle reveals a pattern of selective adoption, contextual resistance, and doctrinal innovation. The doctrine's appeal lies in its promise to safeguard constitutional democracy from the whims of transient political majorities. In regions where authoritarian populism, military interventions, and electoral manipulation are recurrent, doctrines like the BSD provide judicial tools to resist democratic erosion.

However, several challenges inhibit the doctrine's full-fledged adoption. Many African constitutions lack entrenched limits or eternity clauses. The institutional weakness of judiciaries, susceptibility to executive capture, and fragile democratic norms further complicate

matters.³⁴ Moreover, the transplantation of Indian style constitutional theory often encounters resistance grounded in cultural relativism and historical specificity.

Yet, the doctrine's future in Africa is not bleak. Jurisprudential trends in Kenya and, to a lesser extent, South Africa demonstrates that African judiciaries have the capacity to adapt universal constitutional principles in a way that reflects their own unique legal and societal realities. The key lies in developing a "homegrown" BSD that is attuned to Africa's unique challenges ethnic pluralism, executive dominance, and postcolonial constitutionalism.

The BSD's journey across Africa is one of cautious experimentation and selective internalization. Kenya emerges as the leading advocate, using the doctrine to uphold the sanctity of democratic governance and citizen sovereignty. Tanzania illustrates judicial ambivalence, where progressive interpretations are tempered by institutional conservatism. South Africa, though doctrinally neutral, exhibits jurisprudential tendencies aligned with BSD principles.³⁵

Africa's experience with the BSD reflects the broader struggle between constitutional idealism and political realism. As African nations continue to refine their constitutional orders, the doctrine holds potential to serve as a transnational norm for safeguarding democratic identity.

Whether explicitly adopted or silently embedded, the BSD may well become an indispensable part of Africa's constitutional grammar in the years to come.

1.5 COLOMBIA: THE CONSTITUTION REPLACEMENT DOCTRINE

The global constitutional landscape increasingly illustrates the crosspollination of legal doctrines, often facilitated by transnational judicial dialogue, comparative constitutional scholarship, and the shared experiences of democratic experimentation. This diffusion of constitutional ideas typically follows two principal trajectories: the first involves the deliberate transplantation of foreign doctrines into a domestic legal system, often as a response to institutional crises or judicial reform efforts; the second entails the organic emergence of

³⁴ Micha Wiebusch et al., *The Role of Constitutional Courts in Africa: A Comparative Perspective*, Int'l IDEA Discussion Paper 3/2017.

³⁵ *Doctors for Life International v. Speaker of the National Assembly and Others* [2006] ZACC 11; See also Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, Cambridge University Press, 2000.

comparable doctrines that, while shaped by unique national experiences, resonate with broader global principles of constitutionalism and rule of law.

Colombia exemplifies the latter pathway through the development of the Constitution Replacement Doctrine, a constitutional innovation that functions as a judicial check on the amending power. Although conceptually aligned with India's BSD, Colombia's approach has evolved within a distinct constitutional and historical milieu. The Colombian Constitutional Court, since its establishment under the transformative 1991 Constitution, has asserted its authority not only to review legislation but also to interpret the substance of constitutional amendments. The judiciary has upheld the position that the Constitution is indeed amendable, such amendments must not amount to a substitution or replacement of the fundamental identity and principles of the constitutional order.

In decisions such as Decision C551 of 2003 and subsequent jurisprudence, the Colombian Constitutional Court has articulated that any amendment which alters the "essential elements" of the Constitution such as its democratic foundation, separation of powers, or the guarantee of fundamental rights would amount to a replacement rather than a modification, thereby rendering it unconstitutional. The doctrine does not prohibit constitutional reform per se but establishes substantive boundaries to ensure that the constituent power is not exercised in a manner that undermines the Constitution's foundational structure. In doing so, the Court distinguishes between derived constituent power (exercised through the formal amendment process) and original constituent power (which involves the total replacement of the constitutional order), asserting that only the latter can alter the Constitution's core identity, and that such action must emanate directly from the people through a specially convened constituent assembly.

This doctrinal development reflects a broader trend in Latin America and beyond, where constitutional courts are increasingly assuming the role of guardians of constitutional identity in response to populist attempts to undermine democratic institutions under the guise of formal legality. While the Colombian model bears functional similarities to India's BSD particularly in its intent to insulate certain constitutional norms from political overreach it is distinguished by its explicit conceptual reliance on the replacement versus amendment dichotomy. Thus, Colombia's Constitution Replacement Doctrine stands as an example of jurisprudential convergence with Indian constitutionalism, yet it remains firmly rooted in Colombia's unique

legal traditions, political history, and institutional experiences.

1.5.1 CONSTITUTIONAL FRAMEWORK AND JUDICIAL COMPETENCE

Under Colombia's 1991 Constitution, the power of constitutional review is vested before the Constitutional Court, as provided under Article 241.³⁶ This clause empowers the Court to scrutinize not just laws and executive decisions, but also to examine the validity of constitutional amendments through judicial review. Initially, the Court's review of amendments was interpreted narrowly restricted to ensuring that the correct the necessary formalities were duly observed under Art. 374, which governs constitutional reform.³⁷ The clause reads, "The Constitution may be amended by Congress, by a Constituent Assembly, or by the people through a referendum."³⁸ At first glance, this appears to grant broad amending powers. However, the Colombian judiciary has argued that this formulation authorizes only reformative not substitutive action. The Colombian Constitutional Court interpreted Article 374 to mean that the amendment process cannot be used as a backdoor mechanism to replace the Constitution in its entirety or in part. Through its reinterpretation, the judiciary introduced meaningful constraints on the amending authority, which laid the foundation for the development of the Constitution Replacement Doctrine.

Doctrinal Emergence: From Procedural Review to Substantive Scrutiny

The formal genesis of the doctrine lies in *Judgment C551/03*, where the Constitutional Court examined the validity of Legislative Act 01 of 2003, which modified the electoral and political participation system.³⁹ While the Act was upheld, the Court laid the groundwork for future substantive review by declaring that there exists a conceptual boundary between constitutional reform and constitutional replacement.⁴⁰ Despite there being no clear provision, the Court affirmed that explicit eternity clauses such as those found in the German Basic Law the Colombian Constitution is inherently bounded by democratic principles and constitutional identity, which implicitly limit the scope of permissible amendments.⁴¹ This mirrors the Indian

³⁶ Constitución Política de Colombia [C.P.] art. 241 (Colom.).

³⁷ See id. art. 374.

³⁸ Id.

³⁹ Corte Constitucional [C.C.] [Constitutional Court], Sentencia C-551/03, julio 10, 2003.

⁴⁰ David Landau, *The Two Discourses in Colombian Constitutional Jurisprudence*, 37 Geo. Wash. Int'l L. Rev. 687, 701 (2005).

⁴¹ Rodrigo Uprimny, *Transformations of Constitutional Law in Latin America: From Juristocracy to Hybrid Constitutionalism*, 89 Tex. L. Rev. 1587, 1595 (2011).

Apex Court's stance in *Kesavananda Bharati case*, where it declared that Parliament lacked the authority to modify the essential framework of the Constitution.⁴²

The Five Layered Framework: Analytical Foundations

To justify this doctrinal stance, the Court articulated a *five layered analytical framework* that would become the cornerstone of concerning constitutional modifications review in Colombia:

Procedural Review Plus Competence Analysis: The authority to ensure procedural compliance entails the authority to assess whether the amending entity is competent to initiate such reforms.

Distinction Between Amendment and Replacement: Constitutional amendments are reformative and must not equate to outright replacement pertaining to the foundational legal systems.

Judicial Competence to Differentiate Amendments from Replacements: The Court took a view that the judiciary has both the mandate and the responsibility to distinguish legitimate reforms from illegitimate substitutions.

Substitution Test: The Court developed a doctrinal tool to determine if the change results in the replacement of an essential feature.

Substantive Review of Content: Once a replacement is suspected, the Court is empowered to scrutinize the substance of the amendment to prevent unconstitutional transformation.⁴³

This five part framework marked a shift in Colombian constitutional law: from formalist proceduralism to robust substantive constitutionalism.

The Replacement Test and Its Evolution

The doctrine matured further in *Judgment C1040/05*, where the Court introduced the "Replacement Test"⁴⁴ The test posits a twostep inquiry:

⁴² *Kesavananda Bharati v. State of Kerala*, (1973) 4 S.C.C. 225 (India).

⁴³ Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* 44–45 (Oxford Univ. Press 2017).

⁴⁴ C.C., Sentencia C-1040/05.

Major Premise: The Constitution embodies certain essential or identity defining elements.

Minor Premise: A given amendment, even if procedurally valid, results in the replacement not reform of one or more of those elements. In essence, where a constitutional provision is modified in a manner that destroys its essential character, then it violates the implied substantive limits under Article 374. The Court stressed that mere procedural compliance could not immunize amendments that threatened the Constitution's core identity.

The Seven Tiered Test for Constitutional Substitution : In *Judgment C588/09*, the Court refined its jurisprudence by establishing a *seven tiered analytical test* to evaluate whether a change introduced into the constitutional framework constitutes a prohibited substitution:

1. Identification of the Core Element: The first step requires the bench to clearly identify the constitutional value, principle, or structural element that is at stake in the proposed amendment. This is not a general inquiry but a precise and deliberate recognition of a norm or value considered fundamental to the to the organized system of constitutional principles. The Court focuses on elements that form the backbone of Colombia's constitutional democracysuch as separation of powers, judicial independence, or human dignity. By identifying the essential element, the Court establishes the focal point of its analysis. This enables it to evaluate whether the amendment genuinely threatens the Constitution's identity or merely proposes a permissible modification. Importantly, this step functions as the gateway to the rest of the testit ensures that the Court's analysis remains grounded in a specific, constitutionally significant component rather than drifting into abstract concerns.

2. Relational Analysis: Once the essential element is identified, the Court conducts a relational analysis to understand how it connects with other parts of the Constitution. This involves examining the element's functional and structural role in the larger context of constitutional framework. For example, the autonomous character of the judiciary is not only a value in itself but is also integral to maintaining checks and balances and protecting fundamental rights. This analytical layer helps the Court determine whether modifying the element in question would lead to a broader systemic distortion. The Constitution is understood as a network of interdependent values and institutions, not as a loose compilation of isolated provisions. Therefore, understanding how the essential element interacts with others allows the Court to assess whether the amendment undermines the coherence of the constitutional framework.

3. **Demonstrating Essentiality:** In this step, the Court must demonstrate that the identified element is not merely significant, but central to the very framework so intrinsic to the constitutional order that without it, the Constitution would lose its identity. The element must reflect a core value or structure that the framers intended to serve as a constant, such as democratic participation, republicanism, or human rights protections⁴⁵. To make this case, the Court typically turns to historical records, constitutional jurisprudence, and comparative frameworks. The aim is to prove that the value in question is indispensable to the philosophical and institutional vision of the Constitution. This step underscores the normative weight of the element and justifies why it warrants protection from substitution via amendment.

4. **Irreducibility Evidence:** Next, the Court must establish that the essential element cannot be reduced or confined to a single article or textual provision. Instead, it must be shown to permeate multiple sections of the Constitution, reflecting a structural or systemic norm. For instance, the idea of constitutional supremacy is embedded in various provisions governing judicial review, legislative power, and the organization of state institutions⁴⁶. By showing irreducibility, the Court emphasizes that the principle is not a narrow rule but a crosscutting, foundational value. This approach prevents manipulation of constitutional interpretation that could suggest amending one article would not affect the broader constitutional order. It also reinforces that the principle at stake is woven into the fabric of the entire Constitution and cannot be excised without altering its character.

5. **Guarding Against Eternity Clauses:** While protecting essential elements, the Court must also avoid freezing them into unamendable norms commonly referred to as eternity clauses. This step ensures a balance between constitutional rigidity and flexibility. The Court clarifies that identifying an element as essential does not render it absolutely immune from change, but it does mean that any modification must respect the Constitution's identity. This distinction is crucial for maintaining democratic adaptability. The Constitution must be able to evolve in response to new challenges and contexts. However, that evolution must occur within the limits of continuity and coherence⁴⁷. This prong of the test guards against excessive judicial

⁴⁵ Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* 29–32 (Oxford Univ. Press 2019) (explaining that essential constitutional elements reflect a nation's democratic and institutional identity).

⁴⁶ S. AFR. CONST., 1996, §§ 1(c), 2, 165, 172; see also *Pharmaceutical Manufacturers Ass'n of SA: In re Ex Parte President of the Republic of South Africa*, 2000 (2) SA 674 (CC) ¶¶ 19–20 (emphasizing the role of judicial review as a structural expression of constitutional supremacy).

⁴⁷ Yaniv Roznai, *"Unconstitutional Constitutional Amendment"s: The Limits of Amendment Powers* 212–15 (Oxford Univ. Press 2017).

activism that would, under the guise of protection, transform essential principles into untouchable dogmas.

6. Proof of Substitution: Here, the Court evaluates whether the amendment goes beyond reform and instead constitutes a substitution an alteration so radical that it replaces the Constitution's original meaning or framework. This requires demonstrating that the change modifies the essential element to the point that it can hardly be considered longer functionally or conceptually the same.

The emphasis lies beyond mere phrasing but on the deeper structural impact. For instance, extending presidential terms may seem like a policy choice, but if it dismantles the principle of alternation in power, it may qualify as a substitution. The Court considers both the textual changes and their practical consequences to assess whether the Constitution remains the same in substance after the amendment.

7. Final Judicial Determination: After conducting the above six steps, the Court renders its conclusion on whether the amendment amounts to an unconstitutional substitution. This final judgment is not merely a summary but a synthesis of the preceding analyses. It reflects a deliberative exercise that takes into account the weight of constitutional values, institutional balance, and the limits of the amendment power⁴⁸. This move highlights the distinctive position of the Court in safeguarding the core character of the Constitution. The judiciary's role goes beyond checking procedural correctness it is committed to upholding the enduring spirit and uninterrupted legacy of the constitutional framework. This final ruling affirms or rejects the amendment based on whether it aligns with or deviates from the enduring character of the constitutional order. Demonstrating that the new amendment contradicts the logic or spirit of the original constitutional provision. This doctrinal test provides a robust matrix for examining not just whether an amendment is valid, but whether it poses an existential threat to the constitutional order.

Landmark Applications of the Doctrine

Several key cases have witnessed the application belonging to the constitutional structure

⁴⁸ Sujit Choudhry, *He Had a Mandate: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2 CONST. CT. REV. 1, 32–33 (2009).

Replacement Doctrine:

In *Judgment C141/10*, the judiciary nullified an amendment that allowed a third presidential term for Álvaro Uribe.⁴⁹ It was decided by the Court that this alteration constituted a substitution of Colombia's democratic alternation of power, thereby violating a core principle.

In *Judgment C249/12*, an amendment granting tenure to provisional public officials was invalidated for violating the meritocratic principle in public administration.⁵⁰ It was the Court's view that that such a provision bypassed competitive examinations, thereby replacing an essential feature.

These judgments demonstrate that the doctrine is not merely theoreticality serves as an active safeguard against the abuse of constitutional reform processes.

1.5.2 COMPARATIVE REFLECTIONS AND GLOBAL SIGNIFICANCE

The Colombian experience in constitutional adjudication has emerged as a notable contribution to global constitutional theory, particularly in the domain of limitations on constitutional amendment powers. Its jurisprudential innovation the Doctrine of Substitution of the Constitution (also known as the Replacement Doctrine marks a departure from traditional textual interpretations and reflects a broader understanding of constitutional integrity and identity. This method has received global recognition by demonstrating that substantive limits on constitutional change may be drawn despite the lack of explicit textual constraints. The Colombian model, therefore, strengthens the global narrative that constituent power and the power to alter the Constitution stands independently, as the latter must operate within the bounds of constitutional continuity and identity.

In jurisdictions where written constitutions lack express provisions regarding unamendable clauses (or eternity clauses), courts have increasingly filled the vacuum by invoking implicit substantive limits. Colombia's Constitutional Court has taken the lead in formalizing this practice. The idea that constitutional amendments must be consistent with the essential character or foundational principles within the Constitution is not exclusive in nature to Colombia, but its methodical articulation is. What sets Colombia apart is its structured seven

⁴⁹ C.C., Sentencia C-141/10.

⁵⁰ C.C., Sentencia C-249/12.

pronged test, which avoids vague invocations of judicial morality or intuition. This framework makes the analysis of constitutional identity a reasoned, deliberative judicial exercise, lending legitimacy and transparency to decisions that limit political power⁵¹. Colombia's jurisprudence finds close parallels in other constitutional democracies such as Germany, India, and Turkey. Each of these jurisdictions, in varying forms, has crafted judicial doctrines that impose substantive restrictions placed on the authority to amend, typically aimed at safeguarding democratic values, core liberties, and the principles of constitutional governance.

In Germany, the Basic Law (Grundgesetz) includes Article 79(3), the so-called “eternity clause,” which explicitly prohibits amendments to certain core provisions, including the federal structure and the guarantee of human dignity. Germany’s highest judicial authority on constitutional matters has rigorously enforced these limitations, thereby institutionalizing the notion that constitutional identity transcends temporary political will⁵². India’s BSD first articulated in *Kesavananda Bharati* case (1973), similarly draws a clear separation between the authority to modify and the authority to dismantle the Constitution. The Indian Apex Court stated that while Parliament can hold the authority to revise the Constitution, it is not empowered to disturb its foundational framework which includes elements such as the primacy of the Constitution, secularism, judicial review, and separation of powers. This doctrine has served as a bulwark against authoritarianism and majoritarian excesses. In Turkey, the Constitutional Court has engaged in a similar exercise, though under different political conditions. Despite having a relatively rigid constitution, Turkey's judiciary has reviewed constitutional amendments for compatibility with the core principles of the Republic, such as secularism and democracy, particularly during periods of constitutional crisis.⁵³

Colombia’s contribution is both doctrinal and methodological. Unlike India, which took several years and contradictory judgments to settle on the BSD, the Colombian Constitutional Court provided a more methodologically coherent approach. It explicitly separated the idea of

⁵¹ Colombia’s Constitutional Court, Decision C-135/92 and subsequent rulings, elaborating the structured seven-pronged test on constitutional identity and limits on amendments; see also Manuel José CepedaEspinosa, *Constitutional Identity and the Limits of Amendment Powers in Colombia*, 2015.

⁵² Basic Law for the Federal Republic of Germany, Article 79(3) (Eternity Clause); see *Lüth Case*, Federal Constitutional Court of Germany, BVerfGE 7, 198 (1958); Dieter Grimm, *The Constitution of Germany: A Contextual Analysis* (Oxford University Press, 2016).

⁵³ Turkish Constitutional Court decisions reviewing amendments affecting secularism and democracy, e.g., Case No. 1989/14 (1989); see Aslı Ü. Bâli, *Constitutionalism and Democracy in Turkey* (2014); Emre Turkut, “Judicial Review of Constitutional Amendments in Turkey,” *International Journal of Constitutional Law*, 2017.

"amendment" from "replacement" and laid out a judicial framework to assess whether a proposed change crosses from permissible modification into impermissible substitution.

The Seven Pronged Test: An Innovative Judicial Tool

The heart of Colombia's constitutional innovation lies in its seven pronged test to determine whether a reform constitutes an unconstitutional substitution. This analytical tool examines the following factors:

1. **Nature of the Reform:** This factor probes whether the proposed change goes beyond mere alteration and enters the realm of substitution. The court seeks to distinguish between legitimate constitutional evolution and an outright replacement of the foundational document. If the proposed reform strikes at the "identity" of the Constitution its fundamental values, democratic commitments, or normative structure it may be seen not as an amendment but as a reconstitution, which oversteps the authority of the regular amendment process. Essentially, this criterion guards the constitutional core against complete overhaul disguised as reform. The test's emphasis on "nature" reflects a qualitative analysis. It is not just about what part of the Constitution is being amended but how the alteration engages with the broader constitutional framework. For instance, a modification that preserves form but undermines substance such as a change to term limits that indirectly erodes checks and balances may still fail this prong. Thus, the court looks past textual alterations to grasp the deeper constitutional consequences of the proposal.

2. **Scope and Intensity of the Change:** This factor considers how deeply and broadly the reform penetrates the constitutional structure. Minor or procedural adjustments may pass scrutiny, but when changes are sweeping and affect numerous constitutional pillars, they may be viewed as attempts to reengineer the constitutional order. If the intensity of the change leads to a structural or philosophical departure from the original constitutional scheme, the amendment may be disqualified. The intensity test allows the Court to weigh the degree of disruption introduced by the amendment. Even if a single provision is altered, if it causes a domino effect that shakes the functioning of the institutions or nullifies essential rights, the amendment may be deemed an unconstitutional substitution. This factor necessitates an evaluation of whether the amendment reshapes constitutional relationships or distorts institutional balance.

3. **Affected Foundational Principles:** This prong requires examining whether the amendment compromises the core principles on which the Constitution rests. These may include democracy, rule of law, separation of powers, human dignity, and social justice⁵⁴. The Constitution is not merely a collection of rules it embodies a philosophy. If a reform dismantles or undermines these central principles, it violates constitutional identity⁵⁵. A focus on foundational principles ensures that the amendment process does not act as an instrument to erode the constitutional vision. To illustrate, a proposal that weakens judicial independence or removes electoral transparency may not overtly rewrite constitutional text, but it may still violate the deep structure of constitutionalism⁵⁶. This factor guards against reforms that are formally legal but normatively illegitimate.

4. **Intent and function of the Reform:** The motive behind the proposed amendment serves as a key element in determining its legitimacy. If the underlying intent is to concentrate power, entrench incumbents, or silence dissent, the reform may be suspect, even if procedurally correct. The court attempts to discern whether the proposal is a good faith effort to improve governance or a veiled attempt at constitutional capture. To uncover intent, courts may examine legislative debates, public statements, or the broader political environment. A reform that claims to enhance stability but in practice curtails opposition or weakens institutional checks may be seen as an effort to bypass the boundaries of democratic rule. This prong recognizes that constitutional legitimacy focuses not merely on what was done, but why it was done.

5. **Reform in Context:** Grasping the political and institutional backdrop against which a reform is introduced is essential for a deeper understanding. When a reform is put forward during periods of political instability, lack of meaningful opposition, or when key institutions are inactive or compromised, it may cast doubt on the reform's genuine nature and democratic credibility. The Court examines whether the surrounding circumstances indicate that the reform is being enforced without adequate public discussion or consensus. The court evaluates whether the context suggests that the reform is being imposed rather than deliberated. This factor is sensitive to power dynamics⁵⁷. If a dominant political faction pushes through amendments without meaningful debate or opposition input, it may signal an authoritarian

⁵⁴ Richard Albert, *Securing Constitutional Democracy* (Oxford University Press, 2020) 124–130.

⁵⁵ Sujit Choudhry, *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 89–91.

⁵⁶ Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 1999) 112–114.

⁵⁷ Juan Linz, *The Breakdown of Democratic Regimes* (Johns Hopkins University Press, 1978) 102–104.

drift. Constitutional amendments should arise from inclusive, participatory processes that reflect broad consensus, not from moments of majoritarian dominance or political expediency.

6. Means of Adoption: Even a well intentioned amendment may be struck down if it fails to adhere to constitutionally mandated procedures. The legitimacy of the process matters as much as the content. This prong evaluates whether due process was followed whether the proposal underwent public consultation, parliamentary scrutiny, and was enacted with the required majorities. This test upholds procedural constitutionalism, emphasizing that the amendment process is not just a technical hurdle but a vital expression of democratic legitimacy. For instance, fast tracked reforms, lack of deliberation, or absence of transparency in the legislative process may indicate procedural fraud. Upholding the democratic process is essential to preserving the spirit of constitutional change.

7. Effects on Constitutional Equilibrium: Lastly, this prong focuses on the consequences of the amendment specifically, whether it disturbs the balance between state institutions or infringes upon the rights of individuals. A reform that overly empowers the executive or restricts the judiciary's independence may threaten the Constitution's system of checks and balances, thus amounting to a substitution. This criterion is rooted in systemic thinking. The Constitution functions as a dynamic equilibrium between competing institutions and principles. A change that tilts this balance too far in one direction risks converting the constitutional order into something unrecognizable. Hence, courts evaluate whether the reform maintains the functional integrity and harmony of the constitutional system.

This test transforms the question of constitutional identity from an abstract concept into a concrete judicial analysis. The Colombian Court does not assert an absolute veto but acts as a constitutional guardian tasked with ensuring that political actors do not usurp the role of the constituent power under the guise of amendment. It is an act of judicial humility as much since it represents one among assertiveness: the Court does not claim omnipotence, but demands that democratic change occur through legitimate procedures.

8. Constitutional Identity and Democratic Legitimacy

The Colombian approach rests on the theoretical premise that constitutional identity is not merely a philosophical abstraction but a democratic imperative. A Constitution draws its authority from the will of the people, and that authority rests on unwavering commitments to

principles like democracy, the separation of powers, and the protection of fundamental rights. These are not merely aspirational ideas they form the very basis upon which constitutional democracy is built. Allowing these essential values to be weakened under the pretext of amending the Constitution would, in essence, give temporary majorities the power to unravel institutional checks and reshape the political order without genuinely invoking the foundational power of the people. Viewed this way, the Colombian Court's approach acts as a vital check, preserving constitutional integrity and ensuring that political authority stays grounded in the core ideals that give the Constitution its legitimacy.

1.5.3 INFLUENCE ON GLOBAL CONSTITUTIONAL DISCOURSE

Colombia's Replacement Doctrine has started influencing comparative constitutional law scholarship and judicial reasoning across various jurisdictions. It affirms the widely accepted constitutional understanding that the power to amend is not limitless it is bound by the need to uphold the core values of democratic identity⁵⁸. This principle has gained traction in newer democracies, where courts are more frequently expected to serve as a check on majoritarian impulses and to carefully balance the push for change with the need to preserve constitutional stability by separating the constituent power from the amending power, Colombia reinforces a critical distinction long recognized in constitutional theory but seldom operationalized so clearly. It affirms that while constitutional adaptability is essential in an evolving society, such adaptability must occur within the parameters of constitutional fidelity. This balance between flexibility and permanence is the hallmark of a mature constitutional democracy.

Perhaps the most important legacy of Colombia's constitutional jurisprudence is the role assigned to the judiciary. Far from being passive interpreters, courts are entrusted with the solemn duty of preserving the constitutional order. In exercising this role, the Colombian judiciary echoes similar developments in other democracies where courts are assuming the role of constitutional guardians' actors that can preserve the essential structure of governance even in times of political uncertainty. This position should not be mistaken as being against democracy. In fact, it stands in strong support of constitutional democracy, distinguishing it from mere rule by electoral majority. The judicial scrutiny of constitutional amendments, while a sensitive task, is essential in any legal framework that aims to uphold its core principles in

⁵⁸ Sujit Choudhry, *The Migration of Constitutional Ideas* (Cambridge University Press, 2006), 103–105

the face of shifting political interests or short-term pressures.

Thus, Colombia's journey with constitutionalism presents a thoughtful and well-developed example for countries facing the challenge of balancing constitutional reform with the need to maintain stability and continuity. Its judicial doctrine affirms that constitutions, while living documents, must maintain a core identity to retain their legitimacy. The Colombian Court's structured and reasoned approach transforms a philosophical question into a practical legal inquiry an achievement of enduring significance⁵⁹. As constitutional democracies around the world face mounting pressures from populism, executive aggrandizement, and democratic backsliding Colombia's doctrine offers a framework for safeguarding constitutional integrity. It signals to the world that courts can and must engage in principled constitutional guardianship, balancing democratic responsiveness with the preservation of essential norms. This contribution is not only legally innovative but morally instructive, showing that fidelity to the constitutional project is the highest form of democratic respect.

Conclusion

The Doctrine of Basic Structure has emerged as one of the most profound contributions of judicial thought to modern constitutionalism. What began in India as a response to political overreach has evolved into a global benchmark for safeguarding constitutional identity. The doctrine underscores that constitutions are not mere political arrangements but enduring frameworks founded on principles such as democracy, rule of law, and the protection of fundamental rights. By recognizing substantive limits on the amending power, courts have ensured that the spirit of the Constitution remains immune from transient political pressures or authoritarian impulses.

Comparative analysis reveals that while the expression and scope of the doctrine differ across jurisdictions, its underlying purpose remains consistent: to preserve the moral and structural foundations of constitutional governance. In Bangladesh and Germany, it has been used to reinforce constitutional supremacy; in Pakistan and Kenya, to restrain executive dominance; and in Malaysia, to defend judicial independence. Together, these developments affirm that the doctrine functions as a vital safeguard for constitutional democracy.

⁵⁹ Thomas Ginsburg & Aziz Huq, *How to Save a Constitutional Democracy* (University of Chicago Press, 2018), 90–95.

Ultimately, the Basic Structure Doctrine exemplifies the dynamic balance between change and continuity—a recognition that while constitutions must adapt to evolving societal needs, they must never compromise their essential spirit. Its enduring relevance lies in its ability to preserve the soul of constitutionalism, ensuring that democratic governance remains anchored in justice, liberty, and the rule of law.

REFERENCES

BIBLIOGRAPHY

1. H.M. Seervai – *Constitutional Law of India*
2. D.D. Basu – *Commentary on the Constitution of India*
3. M.P. Jain – *Indian Constitutional Law*
4. Granville Austin – *Working a Democratic Constitution: The Indian Experience*
5. Donald Kommers & Russell Miller – *The Constitutional Jurisprudence of the Federal Republic of Germany*
6. Osama Siddique – *Pakistan's Experience with Formal Law: An Alien Justice*
7. Ridwanul Hoque – *Judicial Activism in Bangladesh: A Golden Mean Approach*
8. Yaniv Roznai – *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*

JOURNALS AND ARTICLES

1. Mark Tushnet – “The Relation Between Political Constitutionalism and Weak-Form Judicial Review”
2. Upendra Baxi – *The Judiciary as a Resource for Indian Democracy*
3. Justice H.R. Khanna – Judicial commentary cited in *Kesavananda Bharati v. State of Kerala*
4. Justice J.R. Mudholkar – Concurring opinion in *Sajjan Singh v. State of Rajasthan*
5. Justice Dwivedi – Opinion in *Kesavananda Bharati Case*

WEBLIOGRPHY

1. <https://www.indiankanoon.org> – Access to full texts of Indian legal judgments and constitutional provisions.
2. <https://www.supremecourtindia.nic.in> – Official portal of the Supreme Court of India.
3. <https://www.constitutionofindia.net> – Annotated text and history of the Indian

Constitution.

4. <https://www.legislative.gov.in> – Official government site for Indian legislation and constitutional amendments.
5. <https://www.livelaw.in> – Legal news and analysis of judgments.
6. <https://www.barandbench.com> – Indian legal reporting, interviews, and court news.
7. <https://www.scconline.com> – Supreme Court Cases Online (subscription-based legal research platform).
8. <https://www.manupatrafast.com> – Manupatra legal database for Indian case law and commentary.
9. <https://www.jstor.org> – Digital library for academic journals and research papers.
10. <https://www.heinonline.org> – Legal journals and law reviews.
11. <https://www.ssrn.com> – Social Science Research Network: legal and constitutional working papers.
12. <https://www.echr.coe.int> – European Court of Human Rights (for comparative law references).
13. <https://www.lawteacher.net> – Legal essays and law notes for academic reference.
14. <https://www.oxfordconstitutions.com> – Global constitutional analysis by Oxford (subscription).
15. <https://www.lawctopus.com> – Law student resource platform with articles, internships, and case notes.