
UNDERSTANDING THE BASIC STRUCTURE DOCTRINE: LOGIC, TESTS, AND JUDICIAL SUBJECTIVITY

Suhail Farooq Khan, Assistant Professor of Law, KCEF Law College, Pulwama

ABSTRACT

The Basic Structure Doctrine represents one of the most significant developments in Indian constitutional jurisprudence and a major contribution to global constitutional theory. Developed by the Supreme Court of India in the landmark decision of *Kesavananda Bharati v. State of Kerala* (1973)¹, the doctrine establishes that Parliament's power to amend the Constitution under Article 368 is subject to substantive limitations. Although Parliament may amend any provision of the Constitution, it cannot alter or destroy the Constitution's "basic structure." This principle functions as a safeguard against constitutional amendments that threaten the foundational values of the constitutional order. While the doctrine has been widely celebrated for protecting democratic governance, judicial review, and fundamental rights, it has also generated significant theoretical and practical debates. This paper examines the conceptual foundations, judicial tests, and evolving application of the Basic Structure Doctrine in Indian constitutional law. It argues that although the doctrine serves an important role in preventing authoritarian constitutional change, its methodological framework remains conceptually indeterminate. The Supreme Court has attempted to operationalise the doctrine through various tests, including the *width test*, *identity test*, *rights test*, and *essence of rights test*. However, their application has been uneven and sometimes inconsistent. In particular, the Court has often invoked the doctrine with greater intensity in cases involving threats to judicial authority while adopting a more restrained approach in cases affecting other constitutional principles such as equality and democratic representation. This pattern raises important questions about subjectivity and institutional bias in constitutional adjudication.

¹ *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461; (1973) 4 SCC 225.

Introduction

Modern constitutional democracies are founded upon a set of fundamental principles designed to regulate political power and safeguard individual liberties. These principles typically include the rule of law, separation of powers, democratic governance, protection of fundamental rights, equality before the law, and the institutional independence of key constitutional bodies.² Written constitutions function as the primary mechanism through which these commitments are articulated and entrenched. By codifying such foundational values, constitutions seek to provide stability and continuity in political governance while protecting individual rights against arbitrary state action.³

Within this constitutional framework, the amendment process occupies a central role. Constitutional amendment procedures enable the constitutional order to evolve in response to changing social, economic, and political circumstances.⁴ Without the possibility of amendment, constitutions risk becoming rigid and disconnected from contemporary realities. At the same time, however, amendment mechanisms present inherent risks. The same procedures that allow constitutional adaptation may also be used to undermine the foundational principles that constitutions are intended to protect.

Comparative constitutional experience demonstrates that political actors have sometimes used amendment procedures to consolidate power or weaken institutional safeguards.⁵ Constitutional amendments have been employed to limit judicial review, restructure judicial institutions, extend executive tenure, alter electoral systems, and dilute protections for minority groups.⁶ In extreme cases, constitutional amendments have been used to transform democratic systems into authoritarian regimes.

² L Chandra Kumar v Union of India (1997) 3 SCC 261 (SC).; Madras Bar Association v Union of India & Anr (2021) 3 SCC 1 (SC).

³ 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.

⁴ 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).

⁵ 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.

⁶ *Ibid* 4.

These developments raise a fundamental question about the limits of constitutional change. Specifically, they provoke debate about whether the power to amend a constitution also includes the power to fundamentally transform its identity. If the amendment power is unlimited, then the constitutional order may potentially be dismantled through the very procedures designed to preserve it.

The Indian Supreme Court addressed this dilemma through the development of the Basic Structure Doctrine.⁷ According to this doctrine, Parliament possesses broad powers to amend the Constitution under Article 368, but those powers are not unlimited.⁸ Parliament may amend any provision of the Constitution, but it cannot alter or destroy its “basic structure”.⁹

Since its articulation in 1973, the Basic Structure Doctrine has become a defining feature of Indian Constitutional Law. The doctrine has been invoked to invalidate several constitutional amendments and has influenced constitutional courts in other jurisdictions.¹⁰ At the same time, it has generated considerable scholarly debate regarding its conceptual foundations and practical implications.

This paper examines the evolution and application of the Basic Structure Doctrine in Indian constitutional jurisprudence. It focuses on the logic underlying the doctrine, the judicial tests developed to operationalise it, and the challenges arising from its application. In particular, the paper argues that the doctrine’s methodological ambiguity has introduced significant judicial discretion, resulting in uneven application and raising concerns regarding subjectivity in constitutional adjudication.

I. Theoretical Foundations: Constituent Power and Constitutional Amendment

The theoretical basis of limitations on constitutional amendment powers is classically rooted in the distinction between constituent power and constituted power. This distinction has long been central to constitutional theory and has played a significant role in shaping the doctrine of

⁷ 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.

⁸ Kesavananda Bharati v State of Kerala AIR 1973 SC 1461; (1973) 4 SCC 225.

⁹ Sudhir Krishnaswamy, *Democracy and Constitutionalism in India* (Oxford University Press 2009) 27; Rajeev Dhavan, *Parliamentary Sovereignty and the Supreme Court* (Sterling Publishers 1978) 141.

¹⁰ 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>.

unconstitutional constitutional amendments.¹¹

According to Schmitt, constituent power refers to the original sovereign authority of a political community to establish its constitutional order.¹² It represents the ultimate source of constitutional legitimacy and is typically associated with the collective will of the people acting to determine the fundamental structure of political governance.¹³ Constituent power encompasses decisions regarding the form of government, the distribution of political authority, and the recognition of fundamental rights.

In contrast, constituted powers are derivative authorities created by the constitution itself.¹⁴ These include the legislative, executive, and judicial institutions established by the constitutional framework. Unlike constituent power, which is original and unlimited, constituted powers operate within the boundaries defined by the constitution.

The power to amend the constitution belongs to the category of constituted powers. Although constitutional amendments allow modifications to the constitutional text, the amending authority derives its legitimacy from the constitution itself. Consequently, the amendment power must operate within the limits of the constitutional framework.

The implication of this distinction is that the power to amend a constitution cannot legitimately be used to destroy the constitutional order that confers that power. If an amendment fundamentally transforms the identity of the constitution, it effectively creates a new constitutional order. Such an act falls within the domain of constituent power rather than constituted power.¹⁵

This conceptual framework forms the basis of the theory of unconstitutional constitutional amendments. According to this theory, constitutional amendments may be invalid even when they comply with procedural requirements if they violate fundamental principles underlying the

¹¹ Beatrice Monciunskaitė, 'Unconstitutional Constitutional Amendments' in *Max Planck Encyclopedia of Comparative Constitutional Law* [MPECCoL] (Oxford Constitutional Law 2024). *Also See*: Constitutional Court of Colombia, Judgment C-1040/2005.

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

¹³ Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (1st edn, Oxford University Press 2017).

¹⁴ 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 03 March 2026.

¹⁵ *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789.

constitutional order.¹⁶ Courts that adopt this theory recognize that certain constitutional principles possess a higher normative status and cannot be altered through ordinary amendment procedures.

II. Unconstitutional Constitutional Amendment in India: Emergence of the Basic Structure Doctrine

The Basic Structure Doctrine was formally articulated by the Supreme Court of India in the landmark case of *Kesavananda Bharati v. State of Kerala*¹⁷. The case arose in the context of constitutional amendments enacted by Parliament that sought to expand legislative power over property rights and limit judicial review.

Prior to this decision, the Supreme Court had delivered several judgments concerning the scope of Parliament's amending power under Article 368. In *Shankari Prasad*, the Court had suggested that Parliament possessed extensive authority to amend the Constitution, including the power to modify fundamental rights.¹⁸

However, concerns gradually emerged regarding the potential misuse of the amendment power was articulated in dissenting opinion in *Sajjan Singh*¹⁹ and in *Golaknath*²⁰ in which Part III (Fundamental Rights) were removed from the purview of constitutional amendment. Political tensions during the late 1960s and early 1970s heightened fears that the constitutional amendment process might be used to undermine constitutional safeguards.²¹

In *Kesavananda Bharati*, a thirteen-judge bench of the Supreme Court considered the extent of Parliament's amending power. The Court delivered a complex judgment consisting of multiple opinions. By a narrow majority, the Court held that while Parliament has the power to amend any provision of the Constitution, it cannot alter its basic structure.²²

The judgment did not provide a definitive list of basic features. Instead, individual judges suggested various principles that might fall within this category. These included the "supremacy

¹⁶ Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (1st edn, Oxford University Press 2017).

¹⁷ AIR 1973 SC 1461; (1973) 4 SCC 225.

¹⁸ *Shankari Prasad Deo v Union of India* (1952) 1 SCR 89.

¹⁹ *Sajjan Singh v State of Rajasthan* AIR 1965 SC 845.

²⁰ *Golaknath v State of Punjab* AIR 1967 SC 1643.

²¹ Soli Sorabjee and Arvind Datar, *Nani Palkhivala, The Courtroom Genius* (LexisNexis 2012).

²² *Supra* n(8), para 405, 824, 512.

of the Constitution”, “the rule of law”, “separation of powers”, “federalism”, “judicial review”, and “the protection of fundamental rights”.

Because the Court did not articulate a clear methodology for identifying basic features, the doctrine evolved gradually through subsequent cases.²³ Over time, the Supreme Court expanded the list of principles considered part of the basic structure, including democracy, secularism, and the independence of the judiciary.

III. Identifying Basic Features: Structural and Interpretative Approaches

One of the central challenges of the Basic Structure Doctrine lies in identifying which constitutional principles constitute basic features. Since the doctrine was articulated without a precise methodology for basic structure, the Supreme Court has relied on various interpretative approaches. In the *Kesavananda Bharati* judgment, the judges adopted differing logics and methodologies to determine what constitutes the basic elements of the Constitution.

Sikri, J. emphasised the underlying principles that animate the constitutional framework. According to this view, the basic structure consists of overarching values that give coherence to the constitutional order.²⁴ These principles may not always be explicitly stated in the constitutional text but may be inferred from the overall structure of the Constitution.

Khanna, J. emphasises on the textual grounding. According to this perspective, the identification of basic features should remain closely connected to the provisions of the constitutional text.²⁵ Without such grounding, the doctrine risks becoming excessively vague and indeterminate. Mathew, J. relies on constitutional history. By examining the historical context in which the Constitution was framed, courts may identify the fundamental principles that the framers intended to preserve.

Hegde, J. and Mukherjea, J. provided a more structured interpretative method, which treats the Constitution as an integrated framework.²⁶ Under this approach, constitutional provisions are interpreted in relation to one another in order to identify the underlying institutional and

²³ Supra n(9), 131.

²⁴ *Kesavananda Bharati v State of Kerala*, 405 (Sikri CJ).

²⁵ Ibid 824 (Khanna J).

²⁶ Ibid 512 (Hegde and Mukherjea JJ).

normative structure of the Constitution. However, even this structural approach does not eliminate the problem of abstraction.

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.²⁷ As a result, the identification of basic features remains an inherently interpretative exercise.

IV. Judicial Tests Developed by the Supreme Court

In an effort to provide greater clarity, the Supreme Court in subsequent judgments has developed several doctrinal tests to determine whether a constitutional amendment violates the basic structure.

One of the most significant developments occurred in *M. Nagaraj v. Union of India*²⁸, where the Court articulated a framework for evaluating amendments. According to the Court, determining whether a constitutional feature forms part of the basic structure required examining its place within the constitutional scheme, the objectives underlying it, and the consequences of its removal.

Building upon this reasoning, the Court introduced two primary analytical tools: the width test and the identity test.

The width test expands the interpretation and scope of constitutional amendment, and examines the scope and impact of a constitutional amendment. The Court interprets the amendment broadly to determine its potential effect on the constitutional framework.

If the amendment survives this stage, the Court proceeds to the identity test. This test evaluates whether the amendment alters or destroys the fundamental identity of the Constitution. If the amendment fundamentally transforms the constitutional structure, it may be declared invalid.²⁹

Further, in *I.R. Coelho v. State of Tamil Nadu*³⁰, the Court introduced additional analytical tools

²⁷ Rajeev Dhavan, *Parliamentary Sovereignty and the Supreme Court* (Sterling Publishers 1978) 141.

²⁸ *M Nagaraj v Union of India* (2006) 8 SCC 212.

²⁹ 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.

³⁰ *I.R. Coelho v State of Tamil Nadu* (2007) 2 SCC 1, 861.

known as the rights test and the essence of rights test. 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.

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, scrutinising 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* emphasised that these provisions represent core constitutional values, and any amendment “which, if allowed to be abrogated, would completely change the nature of the Constitution”.³¹

While these tests represent efforts to operationalize the doctrine, they remain flexible and leave significant room for judicial interpretation.

V. Uneven Application of the Doctrine

Despite the development of these doctrinal tests, the application of the Basic Structure Doctrine has not been entirely consistent.

Out of more than one hundred constitutional amendments enacted since the adoption of the Constitution, only a limited number have been invalidated on basic structure grounds. Moreover, the cases in which the doctrine has been applied reveal a notable pattern.

One argument against Basic Structure Doctrine is the Supreme Court has frequently invoked the doctrine in cases involving potential restrictions on judicial authority.³² For example, the Court struck down provisions of the Forty-Second Constitutional Amendment that attempted to limit judicial review.³³ In doing so, the Court reaffirmed that judicial review constitutes a central component of the basic structure.

In *Sambhamurthy*, the Court held transfer of the jurisdiction of High Courts to administrative

³¹ Ibid, I.R. Coelho, 109.

³² 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.

³³ *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789.

tribunals unconstitutional, against the basic feature of judicial power, while recognising such exclusion of jurisdiction can be legal if an alternate and effective mechanism is established.³⁴ However, in *L Chandra Kumar*, the Court held that even in case an alternate mechanism is provided, exclusion of jurisdiction of High Courts would still be violative of Basic Structure Doctrine.³⁵

Another example is the decision striking down the Ninety-Ninth Constitutional Amendment establishing the National Judicial Appointments Commission is another prominent example. The Court held that the amendment undermined judicial independence and therefore violated the basic structure.³⁶

These decisions reflect an institutional interest in preserving judicial authority. By invoking the doctrine primarily in cases affecting judicial power, the Court may appear to prioritize institutional self-preservation.

VI. Cases Where Basic Features Were Overlooked

In contrast to its assertive stance in cases involving judicial independence, the Court has sometimes adopted a more cautious approach when reviewing amendments affecting other constitutional principles.

In *Kihoto Hollohan*, the Supreme Court upheld the anti-defection provisions introduced through the Tenth Schedule despite concerns that such provisions may weaken deliberative democracy by discouraging dissent within political parties.³⁷ The Court reasoned that democracy as a basic feature and unstable governments due to defections justified the amendment. However, the same logic can be utilised against such measures based on internal party democracy, freedom of speech in Parliament and within party ranks, and process of deliberative and participatory democracy.

Similarly, in *Janhit Abhiyan*, the Court upheld the 103rd Constitutional Amendment introducing reservations for economically weaker sections. Critics argue that this decision

³⁴ *P Sambamurthy v State of Andhra Pradesh* (1987) 1 SCC 362.

³⁵ *L Chandra Kumar v Union of India*, (1997) 3 SCC 261.

³⁶ *Supreme Court Advocate on Records v Union of India* (2016) 5 SCC 1.

³⁷ *Kihoto Hollohan v Zachillhu* (1992) 2 Supp SCC 651.

significantly altered the constitutional understanding of equality by prioritizing economic criteria over historical discrimination.³⁸

These decisions show that the application of the Basic Structure Doctrine can differ depending on the constitutional principle at issue. They also demonstrate how the Court has sometimes used the doctrine strategically to safeguard its own institutional independence from interference by other branches of government. However, the same level of strict scrutiny is not always evident when the Court upholds constitutional amendments that may significantly affect foundational principles such as equality and democracy.

VII. The Problem of Subjectivity remains

One of the most significant criticisms of the Basic Structure Doctrine concerns the absence of a clear and objective method for identifying basic features.³⁹

Although the Supreme Court has developed several interpretative tests, these tests rely heavily on judicial judgment. Concepts such as constitutional identity and the essence of rights are inherently abstract and difficult to define precisely. As a result, different judges may reach different conclusions regarding whether a particular amendment threatens the basic structure of the Constitution.

Moreover, the pattern of cases suggests that the doctrine has been invoked most vigorously in cases involving threats to judicial authority. While the protection of judicial independence is undoubtedly important, the selective application of the doctrine may create the perception that it functions as an instrument of judicial self-preservation.

These concerns highlight the tension between the doctrine's role as a constitutional safeguard and the risks associated with broad judicial discretion.

Conclusion

The Basic Structure Doctrine represents one of the most significant innovations in modern constitutional jurisprudence. By establishing substantive limits on constitutional amendments,

³⁸ *Janhit Abhiyan v Union of India* (2022) 3 SCC 1540 (SC).

³⁹ 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

the doctrine seeks to protect the core identity of the Constitution against majoritarian political pressures.

At the same time, the doctrine continues to face important theoretical and practical challenges. The absence of a clear methodology for identifying basic features has created conceptual ambiguity and expanded judicial discretion. Furthermore, the uneven application of the doctrine across different categories of cases raises concerns regarding doctrinal coherence and institutional neutrality.

For the Basic Structure Doctrine to maintain its legitimacy as a constitutional safeguard, greater clarity is required regarding the criteria used to identify basic features and the principles guiding their application.

Without such methodological refinement, the doctrine risks being perceived not only as a guardian of constitutional identity but also as a flexible instrument of judicial power.