

TODAY'S PROMISE, TOMORROW'S CONSTITUTION: 'BASIC STRUCTURE', CONSTITUTIONAL TRANSFORMATIONS AND THE FUTURE OF POLITICAL PROGRESS IN INDIA

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*The judgment in **Kesavananda Bharati** is considered by many as an attempt to rewrite the Indian Constitution. In arriving at the conclusions, the court propounded the 'basic structure doctrine' that identified certain constitutional features as so essential that they could not be altered. In this essay, I recount the development of **Kesavananda's** doctrine and the implications that might follow. In particular, I explore the limits of constitutional development in India and sketch out a broader role for constituent power beyond the Constitution. I argue that the 'basic structure doctrine', though extremely significant, upsets key philosophical assumptions about constitutive sovereignty and the limits of constitutional authority, largely because of the way it has evolved. I mark the misjudgments that have been woven into the doctrine, a significant time is spent in extricating it out of this mess and my sentiment through the paper is that 'basic structure doctrine' can retain its legitimacy only to the extent to which it can adapt itself to a philosophically*

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*affluent framework of constitutional democracy, one which respects both the inevitability as well as minimalism of judicial role. My task takes me through landmark decisions in **Nagaraj** and **Coelho** and I explain how they herald a new beginning in the right direction. Towards the end, I call for a structural shift in the competing perceptions the doctrine enjoys in the ranks of judiciary and the Parliament in an effort to raise them to the task of constitutional accountability. This is a conversation about the most enduring contribution to Indian constitutionalism.*

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I. AN INTRODUCTION - A FRAMEWORK FOR DEBATING 'BASIC STRUCTURE'²

It is tricky to be new-fangled about old themes, especially so when such ideas still continue as the staple feed of contemporary scholarship. But given their extensive appeal and presence, it is far less tricky to be persuaded about the usefulness of debating such popular themes in the manner of their significance. 'basic structure doctrine' is one such recurring theme in the dynamics of Indian constitutional thinking. Roughly put, the doctrine speaks on behalf on constitutional essentialism and suggests that constitutional amendments cannot embrace repeal of such essentials which define the constitutional identity. Any such development, under the doctrine, is seen as a fundamental breach of the Constitution's 'basic structure' and is struck down as unconstitutional. Over time, the Supreme Court of India has deliberated upon the suitability of these amendments on the self-styled benchmarks of structural essentialism and much of the debate on the doctrine is centered around the limits of such craft. Vigorously debated since its inception in *Kesavananda Bharati*³, the doctrine continues to be a central feature of recent institutional contests over constitutional identity and change.

The story of how 'basic structure' has reshaped post-emergency constitutional thought in India has been often told and conclusions drawn about the institutional harvests in the process. However, despite their alarming incidence, these narratives are disquietingly similar in the nature of conclusions they endorse. The questions about constitutional faith and fidelity, structural essentialism, limits of political progress and operational scope of the doctrine have been answered in near-identical fashion. Taken together, these answers have fed stereotypes about the adaptability of the Indian Constitution, institutional choices under the doctrine and the course of constitutionalism itself. Some of what I attempt in this essay could be identified as a theoretical revamp of these stereotypes in the political backdrop of 'basic structure doctrine'. One of the central premises of the essay is that feasible answers to questions relating to constitutional change, identity and progress can be found only within a theoretically adequate, empirically sound and philosophically prosperous framework of constitutional democracy, a framework that does not presuppose the tension between constitutionalism and democracy. The limits of institutional behavior, both judicial and legislative, could be accurately defined only within this framework. A theory that tells us why we should have something like a 'basic structure review' of the Constitution should also ideally guide us about the methodology of its practice. The 'why' of theory should define the 'how' of practice. But this hardly ever gets done over here in India. The principal motivation behind this essay then, is to seek the philosophical ground

² See *Kesavananda Bharati v. State of Kerala and Another*, AIR 1973 SC 1461. Basically, the idea that a few features of the constitutional structure are so fundamental that the Constitution cannot survive without them and together they constitute an inviolable core called the Basic Structure of the Indian Constitution.

³ *Id.*

beneath the institution of 'basic structure review', to reconcile the two worlds of theory and practice and finally, to evaluate the implications that might follow in future. Seen as such, the 'why' and 'how' of 'basic structure review' are two parallel themes through this essay. The essay is divided roughly into four parts with compartments within each one of them.

The first part begins on a political narrative of the birth of the doctrine. It traces the evolving jurisprudence of essentialism in the turbulent backdrop of the late sixties and early seventies. This is done with specific references to a series of landmark decisions that mark the journey from *Golak Nath*⁴ to *Kesavananda Bharati*. The constitutional amendments elicited as State responses to these cases are also studied. Owing to a great diversity of opinions on how best to interpret this phase of constitutional development in India, I have a set task before me – that of restatement and clarification. At the end of this part, I expect to see myself as having reiterated what the courts actually said, what they could have meant and how they should be interpreted for times to come. The second part attempts a theoretical sketch of the logic behind implied limitations on the amending power under Article 368 of the Indian Constitution. Drawing on from works of Dieter Conrad, John Rawls, Bruce Ackerman and Laurence Tribe, this part weighs a range of semantic, historical and philosophical arguments in exploring the theoretical core of amendment provisions under a constitution. This theoretical framework is then employed to tell apart constituent power, amending power and legislative power under a framework of political organization. It is in fact one of the principal arguments of this essay that Article 368 of the Indian Constitution, despite its differently worded text, is only a measure of the amending power under the Indian Constitution. This is on account of the nature and methodology of its existent practice in Indian politics. And to the extent Article 368 deals with amending power, its operation is guided by the demands of constitutional essentialism. While maintaining this distinction, the essay acknowledges the possibility of extra-constitutional transition reaped through the constituent power, but fails to source this power from any provisions of the Indian Constitution. So even once we agree that there indeed is constituent power, creeping somewhere in the Indian Constitution, we do not yet know where it is. It is visibly my sentiment through this essay that Indian politics is yet to square itself with the implications of a constituent power and its presence in the text of Article 368 is amateurishly rushed, incredibly inappropriate, unprincipled and stands on a philosophical eggshell that could give way this moment or the next.

The third part of the essay seeks an understanding of the journey traversed by the 'basic structure doctrine' over the course of last three and a half decades. Drawing on from the 'why' of 'basic structure', this part is an attempt to map the 'how' of 'basic structure review' by studying two recent and important cases at the Supreme Court. The Supreme Court's judgments in *Nagaraj*⁵ and

⁴ I.C. Golak Nath v. State of Punjab, AIR 1967 SC 1643.

⁵ M. Nagaraj and Ors v. Union of India and Ors. (2006) 8 SCC 212.

*Coelho*⁶ are brought for critical examination with a view to understand the present nature and extent of review under the 'basic structure doctrine'. Given the fact that much of the legitimacy of 'basic structure' idea is shaped by a consistent practice of its review by the courts, a critical understanding of the tests evolved by the courts becomes imperative. *Nagaraj* and *Coelho* are studied here to understand the various tests that the Supreme Court has devised for a balanced review under the 'basic structure doctrine'. Among these, 'Identity Test' or 'Essence of Rights Test' and 'Width Test' are of special consequence. It is crucial to examine the space which these tests leave for constitutional development on its own so as to ensure that constitutional adaptability is not frustrated through the over-zealous defense of essentialism. The tests conceptualized by the courts, therefore, need to be perceptible to the compulsions of representative politics and public policymaking in India. The point about the kind of politics we have in India and the burdens it casts on the fragile institutional design is explored at greater length in this part to temper the understanding of the courts.

The central theme through this part, and one which may be recounted elsewhere as well, is that the reasons for both a limited amending power as well as a meaningful level of constitutional adaptability can be found in a sound theoretical framework of constitutional democracy. Both the limited amending power and the requirement of constitutional progress, rather than opposing each other, can be effectively reconciled within such a framework. And answers to what all could be amended, how they could be amended and what are the limits of such constitutional transition could then be reasonably explored by staying within this framework of constitutional democracy. An appropriate theory of constitutional democracy respects both the need for constitutional progress as well as the constraints of intemperate adaptability and looks to the interaction between the two to find a middle ground of political sustenance. Clearly then, one must understand that there is no unassailable good in either constitutional essentialism or freewheeling constitutional change and whatever good we ascribe to them borrows a great deal from how much good they in turn bring to constitutional democracy. A defense of either position which is indifferent to the demands of constitutional democracy signals a negative forecast for political sustenance. This part ends by examining the extent to which the review tests proposed in *Nagaraj* and *Coelho* are receptive to this sentiment of sustainable constitutional change.

Finally, the last part seeks to suggest ways in which the legislative and judicial institutions in India could get interested in the meaning and practice of constitutional democracy. Recognising 'basic structure doctrine' as a crucial component of this aspiration, this part calls for studied shifts in institutional behavior to accommodate the essence of constitutional democracy within the functioning of courts and legislatures. Among other things, it suggests means of instituting an accountable mechanism of 'basic structure review' to counter charges of 'Judicial Paternalism'. The part emphasizes that the variability of norms and

⁶ I.R. Coelho (dead) by L.Rs v. State of Tamil Nadu, AIR 2007 SC 861.

expectations that judicial and legislative institutions hold each other to matter deeply for instituting a meaningful level of accountability within the fold of Indian politics. More importantly, it previews a theoretical outline of constitutional democracy that clearly understands the contribution which constitutionalism and democracy together make to a political scheme, while remaining attentive to their unique visage. It weighs the critical contribution which the doctrine has made to Indian constitutionalism and ends by warning against any attempt to dislodge the balance that constitutional essentialism has brought to the centre of Indian politics.

II. 'ESSENTIAL FEATURES' CASE: AN ANALYSIS

Ever since 1973, *Kesavananda Bharati*⁷ or the 'Essential Features Case', as it is often called, has been a subject of widespread commentary and debate.⁸ The arguments before the court, and the conclusions of the court, demand a brief review with a view to appreciate and understand the implications of the case. I start off by examining the historical antecedents of the litigation to understand the immediate background behind *Kesavananda*.

A. THE BACKGROUND

His Holiness Kesavananda Bharati, Sri Padagalavaru of Kerala filed a petition under Article 32 of the Constitution for the enforcement of his Fundamental Rights (FRs) under Articles 14, 19(1) (f), 25, 26, 31(1) and 31(2) of the Constitution. He prayed that the provisions of the Kerala Land Reforms Act, 1963 as amended in 1969 and later in 1971 be declared unconstitutional, *ultra vires* and void. The recent constitutional amendments effected as a response to *Golak Nath*⁹, Bank Nationalisation¹⁰ and Privy Purses¹¹ cases denied him relief as a result of which he amended his petition challenging even the validity of these constitutional amendments. The constitutional amendments that were challenged included the 24th, 25th, 26th and 29th Amendment Acts as they together, had woven a cloak of immunity around land reforms legislations such as the one in question.¹² The 24th Amendment had amended Article 368, 25th Amendment had amended Article 31 and

⁷ AIR 1973 SC 1461.

⁸ The case is also called the Fundamental Rights Case. Though the case had more to do with validity of constitutional amendments than Fundamental Rights (FRs) as such, the name was popularized by the press as it was a sequel to *Golak Nath* which had held FRs unalterable.

⁹ I.C. *Golak Nath*, *supra* note 4.

¹⁰ R.C. Cooper v. Union of India (1970) 3 S.C.R. 530.

¹¹ Madhav Rao Scindia v. Union of India (1971) 3 S.C.R. 9.

¹² It may be observed that the challenges to the 1st, the 17th, the 25th, the 26th and the 29th amendments were in the context of right to property. The 24th Amendment sought changes in Article 368 itself but challenge to it was also made in the contextual environment of state-led property-acquisition and land reform legislations. 1st and 17th constitutional amendments had been unsuccessfully challenged previously in *Sankari Prasad*, AIR 1951 SC 458 and *Sajjan Singh*, AIR 1965 SC 845.

inserted a new Article 31(C), 26th Amendment abolished ‘privy purses’ and the status of native rulers, and finally, two Kerala Acts were inserted into Ninth Schedule through the 29th Amendment. Since eleven judges had decided *Golak Nath* and the law laid down in that judgment was substantially in issue, a larger bench of thirteen judges was constituted to hear *Kesavananda Bharati*. The Bench consisted of Justices Sikri, Khanna, Shelat, Hegde, Grover, Ray, Reddy, Palekar, Mathew, Beg, Dwivedi, Mukherjea and Chandrachud.¹³

The Constitution (Twenty-Fourth Amendment) Act in effect declared that FRs under the constitutional scheme could be amended without restraint since no power of judicial review of constitutional amendments rested in Article 13 of the Indian Constitution. Notwithstanding anything in the Constitution, Article 368, was amended to permit Parliament, in exercise of its constituent power¹⁴ to amend by way of addition, variation, or repeal, *any* provision of the Constitution in accordance with the procedure in the article.¹⁵ The use of italicized words in the amended Article 368 suggests that it was designed to grant express power to the Parliament to amend any part of the Constitution, including FRs. The argument of legislative power as taken in *Golak Nath* was sought to be weakened by including the word ‘constituent power’ in the article itself.¹⁶ *Golak Nath* reasoned that the power to amend the Constitution was not sourced from Article 368 as it just laid the procedure of constitutional amendments. Since the power of amendment was not expressly conferred by any article or legislative entry in the Constitution, it had to be sourced from the residuary legislative power of the Parliament under Article 248. Since the residuary power under Part XI was subject to the provisions of the Constitution, the power of amendment was read in as regulated by Article 13.¹⁷

¹³ *Supra* note 7.

¹⁴ This is the current usage in the text of Article 368. Clause (5) of Article 368 uses the word ‘constituent power’ to drive home the point about the over-arching nature of the unlimited power sought by the government during the emergency. Clause 5 was inserted through the Constitution (Forty-second Amendment) Act, 1976 to ride over any theoretical objection to the unlimited amending role Parliament saw for itself. This was especially since the constituent power, as a concept, is not bound by the existing constitutional scheme and it could have embraced repeal of its essential features as well. However, clauses (4) and (5) of Article 368 were later held as *ultra vires* on account of them excluding judicial review, a basic feature of the Constitution. See *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789.

¹⁵ See the text of the amendment in Article 368(1) of the Indian Constitution.

¹⁶ For greater detail, see M.P. JAIN, *INDIAN CONSTITUTIONAL LAW* 1627-28 (2003). Prof. Jain engages into an extensive discussion of the changes that were made through these amendments as a response to the arguments sustained in *Golak Nath*’s case.

¹⁷ See Article 245 of the Indian Constitution; Article 245(1) makes the operation of legislative powers under Part XI subject to the provisions of the Constitution. Drawn through this tenuous link, the connection resulted in amendment being treated as ‘law’ for the purposes of Article 13. However, this should not be construed to mean that there was no difference between ordinary law and constitutional law. First, what amounts to constitutional law needs to be discussed in broad detail before we start corresponding it with the law made under legislative powers under Part XI of the Indian Constitution. And even once we have a clear understanding of the unique countenance of constitutional law, we do not need to confuse its similar treatment under Article 13 as reflective of their sameness. It is quite

The Constitution (Twenty-Fourth Amendment) Act countered this conclusion reached in *Golak Nath*. After the Amendment, the original Article 368 was re-numbered sub-clause (2) and the words “it shall be presented to the President for his assent and upon his assent being given to the Bill” were substituted by “it shall be presented to the President who shall give his assent to the Bill and thereupon” the Constitution shall stand amended in accordance with the terms of the bill. A plausible conclusion that could be drawn from here was that assent to a constitutional amendment was no more left at the presidential judgment and the president had to give his assent, or so it seemed.¹⁸ The other part of the Amendment declared that nothing in Article 13 shall apply to any amendment carried out in sync with Article 368. This provision, read along with the amendments made to Article 368, effected a complete judicial lay-off in cases concerning themselves with constitutional amendments.

The Constitution (Twenty-Fifth Amendment) Act, amended Articles 31(2) and Article 31(2) (a). It substituted the word ‘amount’ for the word ‘compensation’ and excluded the application of Article 19(1) (f) to a law made under Article 31(2). This was done to remove any contention that the government was bound to give adequate compensation for any property acquired by it.¹⁹ Article 19(1)(f) was delinked from Article 31(2) and the position before *Golak Nath* was restored as both the articles

possible, I argue, that Article 13 may be alive to the different nature of constitutional law and ordinary law but as long as it misinterprets its own role in the constitutional scheme, it does not see, and mistakenly so, the reason to treat them differently. Article 13 might see itself as an instrument to secure the paramount nature of FRs but in doing so, it must be respectful of the overriding existence of Basic Features of the Constitution over and above FRs. In this way, Article 13 should resist the temptation of misreading its limited role in the project of constitutional preservation. It is a remedy for a limited nature of ills borne out by legislative indiscretion and should not hold out hope for those who see it as a ‘one size fits all’ nominee for constitutional gate keeping. Specifically, the nature and methodology of review under Article 13 cannot hope, in its present form, to find answers to the questions raised by constitutional amendments. The benchmarks as well as the scope of review under Article 13 need to be considerably revised to respond to concerns raised by constitutional amendments. The practical appeal and theoretical strength of this proposal, however, may be carefully studied somewhere else as a different project altogether.

¹⁸ This was done with a view to locate a difference between ordinary law and a law made under constituent power. One reason why this difference was not acknowledged by the *Golak Nath* court was because of the striking similarity in the procedure for passage of both laws. Through the Twenty-fourth Amendment, the Parliament attempted to drive home the point regarding legislative power-constituent power divide and strengthened the construction by making the amendment process under Article 368 different from an ordinary law making process. While in cases of ordinary legislative enactments, legislatures required presidential assent who could deny it once, the same could not be done for constitutional amendments. After Twenty-fourth Amendment, the president was left with no other choice but to give his assent to constitutional amendments.

¹⁹ After the Amendment, the compensation provided by the government in lieu of the acquisition of property could not be called in question in a court of law. The clear mandate of Twenty-fifth Amendment being that it did away with judicial review of the adequacy of the compensation upon government’s acquisition of property.

were constructed as mutually exclusive before the decision in *Golak Nath*. Through its inclusion of Article 31-C, the Twenty-Fifth Amendment also empowered Parliament and State Legislatures to enact law giving effect to the policy of the state towards securing the Directive Principles (DPs) in clause (b) or clause (c) of Article 39. Such a law could not be questioned on the ground that it took away or abridged any of the rights guaranteed by Articles 14, 19 and 31.²⁰ Furthermore, a declaration in the law that it was enacted to give effect to a policy under Articles 39(b) and (c) would immunize the law from such a challenge in the court.²¹ The Twenty-Sixth Amendment abolished 'privy purses' in Article 362 and repealed Article 291 that provided recognition to the erstwhile rulers. The Constitution (Twenty-Ninth Amendment) Act, brought the *Kerala Land Reforms (Amendment) Acts* in the Ninth Schedule of the Constitution, making them immune from attack on the pretext that its operation resulted in abridgement or violation of FRs.

The petitioner's contention was that the Constitution envisages a democracy which ensures freedom and dignity of the individual. With a view to realize this mandate and to prevent misuse or abuse of power, the Indian Constitution, created a system of limitations, checks and balances.²² Article 13(2) of the Constitution, as it stood prior to the Twenty-fourth Amendment, provided that the state shall not make any law which takes away or abridges the rights guaranteed under Part III of the Constitution. The word 'law' in Article 13 was construed by the Supreme Court in *Golak Nath* case as including in its purview, constitutional amendments. It was thus argued in *Golak Nath* that the Parliament, could not through an amendment, abridge or take away the FRs in exercise of its power under Article 368. The Twenty-Fourth Amendment sought to supersede that judgment by positioning itself in a way that excluded constitutional amendments from the application of Article 13(2). The petitioners put forward their objections to this development and their argument reflected the view that any amending body organized, within the statutory scheme, howsoever apparently unlimited its power, cannot by its very structure exceed its constitutional authority. Having armed itself with the mandate under the Twenty-fourth Amendment, Parliament enacted the Twenty-fifth Amendment through which the state empowered itself to deprive anyone of property in return for an amount fixed by the executive and such amount was not open to judicial scrutiny, however irrational or arbitrary the executive action might be.²³

²⁰ The effect of this clause was far reaching. It marked a reversal of sorts from the Constitution's conventional understanding that DPs were subservient to FRs, at least in terms of their enforcement and protection. Through the Twenty-fifth Amendment, this relationship between Part III and IV was sought to be reversed and DPs contained in Articles 39(b) and (c) were given precedence over Arts. 14, 19 and 31. However, it is worth pondering over if this was a result of any principled affinity towards the DPs over and above FRs or just a State diktat to effect a policy measure.

²¹ Earlier, a state law could claim immunity from challenge only after receiving the assent of the President.

²² See *GOBIND DAS, SUPREME COURT IN QUEST OF IDENTITY 70 (2000)*.

²³ *Id.*

It was therefore urged by the petitioners that such a state action might even result in virtually abrogating any of the other FRs, the exercise of which would be impeded by the deprivation of property without proper compensation.²⁴ Illustrations were provided that suggested that publishers may be deprived of their printing presses, professionals of their assets, trade unions of their funds and religious institutions of their endowments in the name of acquiring property.²⁵ The petitioners also contended that insertion of Article 31-C which could potentially override FRs set in Articles 14, 19 and 21 on the pretext of government's social and economic policy could subvert several essential features. This argument was also strengthened by the fact that Article 31-C expressly provided that no law for giving effect to DPs could be called in courts of law on the grounds that it does not give effect to such policy.²⁶

If seen as such, the government first tried to acquire unlimited amending power to give effect to certain constitutional mandates enshrined in Part IV and subsequent thereto, even tried to take away the court's essential power of reviewing the propriety of such exercise of power. For the purposes of the operation of the law, it was sufficient if the government believed that a law needed immunity because its operation was aimed towards achieving the socio-economic balance envisaged under Part IV of the Constitution. The newly inserted Article 31-C also permitted the state legislatures to enact similar laws, subject to the assent of the President. Though the petition in *Kesavananda* primarily revolved around these issues, the deliberations in the case would widen over time to include in its ambit, issues having far and wide implications even outside this case. The case was to discuss issues relating to the nature of Indian Constitution, the amending power envisaged therein, the extent to which legislative purpose could override or abrogate FRs through constitutional amendments, the relationship between Part III and Part IV of the Constitution and similar other issues that were to map the constitutional course for years to come. The court heard arguments for sixty-nine days spread over five months. The hearing, in all probability, would have continued had it not been compelled to conclude owing to retirement of Chief Justice Sikri.²⁷

B. KESAVANANDA'S JUDGMENT

The monumental judgment in what is popularly known as 'Essential Features Case' was delivered on April 24, 1973. The judgment ran into over 700 closely printed pages in the official law reports. In spite of the length, *Kesavananda* is not considered a case that resolved any specific issue relating to the parties therein; it rather, took upon itself the task of elaborating at length the constitutional jurisprudence of amendments in the Indian framework. The Constitutional Bench of thirteen judges responded with eleven judgments, with only two combines of

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*, 72. Chief Justice Sikri retired a day after the judgment was delivered.

Shelat J. and Mukerjea J. (first) and Hegde J. and Grover J. (second) teaming up for writing combined judgments. The court was pressed for time and there was little discussion amongst the judges. Out of the judges, Justices Sikri, Shelat, Hegde, Grover, Reddy and Mukherjea delivered against the state. Justice Khanna was halfway between both the sides. Therefore, it was observed that all the post-election (1971) appointees except Justice Mukerjea voted in favour of the State while all the pre-election appointees except Justice A.N. Ray, voted against the state.²⁸ By the end of the deliberations, a view, which seemed to have gained the acceptance of six judges in dissent, was the tacit view that in certain areas, the essence of each article could not be corroded even through the seeming unbridled amending power. This was to have interesting parallels with *Nagara*²⁹ case thirty-five years hence where a similar view was voiced by the court in an unanimous judgment. The immediate issues concerning the parties were remitted to a Constitutional Bench for disposal and the Bench was to determine the validity of Twenty-sixth Amendment. The court hardly knew at that time that its disposal of the matter to a Constitution bench to decide upon the validity of Twenty-sixth Amendment would, in course of time, come back to haunt it by challenging the legal effect of the summary statement. To many, the judgment as a whole might seem to be a futile exercise, there being no majority decision on any significant point that the court was called upon to decide. Notwithstanding the generality of discussion, nine judges managed to produce a summary statement which purported to overrule *Golak Nath* and admitted the validity of all amendments except one. The summary read as:³⁰

“The view by the majority in these writ petitions is as follow: (1) *Golak Nath*’s Case is overruled; (2) Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution; (3) The Constitution (Twenty-fourth Amendment) Act, 1971 is valid; (4) Section 2(a) and 2(b) of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid; (5) The first part of Section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid. The second part, namely, ‘and no law containing a declaration that it is for giving effect to such policy shall be called to question in any court on the ground that it does not give effect to such policy’ is invalid; (6) The Constitution (Twenty-ninth Amendment) Act, 1971, is valid. The Constitution Bench will determine the validity of the Constitution (Twenty-sixth Amendment) Act, 1971 in accordance with law.”

²⁸ *Id.*, 74.

²⁹ *Supra* note 5.

³⁰ See H.M SEERVAI, CONSTITUTIONAL LAW OF INDIA 3113 (2006).

The majority of judges who overruled *Golak Nath* did so on one or more of the following grounds that Seervai has discussed in detail in his book, *Constitutional Law of India*.³¹ Of them, some are of fundamental importance to the present day deliberations on the constituent power and legislative power divide. Of them, the first one relates to the nature and history of residuary power under the Indian Constitution. It is felt that only those subjects that were not anticipated or could not have been anticipated by the Constituent Assembly made their way into the residuary list. It is hard to believe that a constituent assembly could not have anticipated or amply discussed the provisions relating to constitutional amendments so much so that the amending power was derived from the residuary power under Article 248.³² On technical grounds, it may be said that since states also have a limited role in amendments under the proviso to Article 368, amending power could not be derived from Article 248 since it only conceptualised parliamentary role for residuary subjects. This argument stood to counter the view that amending power under the Indian Constitution sourced their authority from the residuary power under Article 248. To the extent constitutional amendments were not discussed in the Part XI,³³ it was a result of the difference between constituent and legislative power. Article 368, it was felt, distributed constituent power and not legislative power and hence, the subject of amendment did not find its way in distribution of legislative power. It was also argued by Seervai that Article 368 was not merely procedural but also conferred substantive power, for, on the procedure being followed, the product was a substantive amendment of the Constitution. Looking back to the text of draft Article 305, Seervai showed that when the framers intended to limit the power of amendment, they expressly did so and they could have done the same with Article 368 had they been convinced of any limitation on the amending power.³⁴ And if the express declaration of invalidity contained in Article 13(2) was to prevent an amendment of FRs, any amendment of the other parts of the Constitution would become equally untenable since Article 245 was "subject to the provisions of this Constitution".³⁵ This is because any amendment of the Constitution would contravene one or more articles of the Constitution and would no more be subject to its provisions. Either all articles are amendable or no article is amendable, which would be absurd in face of the presence of Article 368 in the Constitution.³⁶ However, it be noted that this argument sustains itself only till the extent amending power seems to derive its authority from Article 248. What Seervai wanted to see in the particular case was certainly the acknowledgment of unbridled amending power under Article 368. But what we can take back from Seervai's arguments, and particularly so in the backdrop of the overruling of *Golak Nath* in

³¹ For a discussion of the grounds on which *Golak Nath* was overruled, *Id.* Seervai compiled up a list of arguments that could have gone against the interpretation in *Golak Nath* during that monumental litigation.

³² *Id.*

³³ Part XI of the Indian Constitution discusses the legislative powers.

³⁴ SEERVAI, *supra* note 30.

³⁵ *Supra* note 17.

³⁶ SEERVAI, *supra* note 30, 3115.

Kesavananda and the subsequent emergence of the ‘basic structure doctrine’, is the understanding that the power to amend the Constitution is present in Article 368 itself and need not be sourced back from residuary power of the Parliament.

Eventually, six judges decided the case in favour of the petitioners and six in favour of the State. Justice Khanna agreed with none of the twelve judges and decided the case midway, between the two conflicting viewpoints. He held:

“The power of amendment was limited and it did not enable Parliament to alter the basic structure or framework of the Constitution. The substantive part of Article 31-C which abrogated the FRs was valid on the ground that it did not alter the basic structure of the Constitution. However, the later part of Article 31-C which ousted the court’s jurisdiction was invalid.”³⁷

It can only be attributed to an odd foible of fate that in a case involving thirteen judges where six decided for and six against the State, judgment of Justice Khanna with which none of the 12 judges completely agreed has become the law of the land. On the issue of the amending power under Article 368, Justice Khanna was against vesting of unlimited power with the Parliament. The judgment of Justice Khanna read along with the other six judges thus constituted the majority view of the Supreme Court. Though a degree of consensus appears to have been reached, the summary statement camouflages a vast degree of dissensions which revealed themselves in course of individual judgments. Four judges had refused to sign the summary which was signed by the other nine.³⁸

The consequence was that the Court could not stand firm, it could not stand united. The case left the country baffled and it took some time before the true import and implications of the case on the national life could be gauged in their entirety. The varying interpretations of so many judges dispersed the issues and diffused the truth. The government had keenly followed this litigation. The judgment was delivered on 24 April, 1973 which was Chief Justice Sikri’s last day in office.³⁹ It had been the practice till then that the successor to the outgoing Chief Justice was announced in advance, sometimes two months prior to the impending retirement but in all cases, always earlier than the actual date of retirement.⁴⁰ In the

³⁷ DAS, *supra* note 22, 73.

³⁸ *Id.*, Commenting on the deliberations of the case, Chandrachud J. concluded -

“.....So let me express the hope that the long debate and these long opinions will serve to secure at least one blessing-the welfare of the common man. We are all conscious that this vast country has vast problems and it is not easy to realise the dream of the Father of the Nation to wipe every tear from every eye. But, if despite the large powers now conceded to the Parliament, the social objectives are going to be a dustbin of sentiments, then woe betide those in whom the country has placed such massive faith.”

³⁹ *Id.*

⁴⁰ *Id.*

present case, no announcement was made till the day of the judgment when Chief Justice Sikri was leaving office.⁴¹ On April 25, 1973, a day after the judgment, Justice A.N. Ray was appointed the Chief Justice of India, succeeding Chief Justice Sikri and superseding three senior judges. Justices Shelat, Hegde and Grover, who were superseded, resigned thereafter.⁴²

It was no coincidence that Justice Ray had dissented from the majority in three important cases – Bank Nationalisation, Privy Purses and *Kesavananda Bharati*. The appointment of Justice Ray as Chief Justice, and the ensuing supersession of other senior judges was widely commented on and criticized by a large section of the members of bar, press and the civil society. After the elevation of Justice Ray, Late Mohan Kumaramangalam, the then Union Minister for steel and a close aide of Indira Gandhi, is reported to have remarked to Ray C.J. with a hint of jocularity: “Such posts are a reward for political services rendered.”⁴³ Ray C.J. is said to have replied: “I do not recall any political service to anybody except to truth and justice.”⁴⁴ Indeed it might have been that truth and justice made him believe in no limits to constitutional change and in the righteousness of parliamentary measures employed to seek acknowledgment of such license.

1. What Did the Court Hold and What Could It Mean?

The immediate application of *Kesavananda's* principle was made to assess the constitutional validity of the Twenty-fourth Amendment. The arguments against an unlimited amending power were based on the fear that such power, if conceded, could put FRs and other valuable features of the Constitution in peril.⁴⁵ This argument was met, says Seervai, as it has always been met by saying, in the words of Privy Council, that “...the fear of abuse of power was not an argument against its existence”,⁴⁶ although actual abuse of power would be struck down.⁴⁷ In *Kesavananda*, the government's argument was that, though its power of amending the Constitution, after the twenty-fourth Amendment, was limitless and it could destroy human freedoms under Article 31-C, the legislature will not use the power.⁴⁸ The apprehension to this view was raised among the Bench itself where

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*, 75.

⁴⁴ *Id.*

⁴⁵ SEERVAI, *Supra* note 30, 3115.

⁴⁶ *Id.* See the decisions of the Privy Council in the cases of *Bank of Toronto v. Lambe* (1887) 12 App. Cas. 575, 586; *Att.-Gen. for Ontario v. Att.-Gen. for Canada* (1912) A.C. 571 at 582.

⁴⁷ SEERVAI also cites Broom's *LEGAL MAXIMS* xiii (2008), to gauge the meaning of the maxim – “*Ab abusu ad usum non valet consequentia*” and arrive at the conclusion that – No valid conclusion as to the use of a thing can be drawn from its abuse.

⁴⁸ To support its claims, the government cited the British example wherein in theory, the British Parliament possessed the power to repeal great charters of liberty like the Magna Carta (1215), the Bill of Rights (1688) and the Act of Settlement (1700) as easily as it could repeal a Dog Act, but these great charters have remained unchanged. See M.V. Kamath's discussion of *Golak Nath* and *Kesavananda Bharati* Cases in M.V. Kamath, NANI A. PALKHIVALA: A LIFE at

the concern was that if the argument of fear were to be taken to its logical end, then not only the FRs but many other important provisions of the Constitution would also have to be declared non-amendable.⁴⁹ Looking back, it seems that the court pursued the logical end of the argument but was, nevertheless, more inclined to buy Privy Council's argument over the poet's musings. The entire Twenty-fourth Amendment was held valid. However there was a rider attached to the exercise of amending power under the amended Article 368, that Parliament could amend a FR subject to the over-all restriction of non-amendability of a 'basic feature' of the Constitution. It was also felt that the overruling of *Golak Nath* restored the status quo as prevailed before *Golak Nath* making the Twenty-fourth Amendment unnecessary. In this sense, *Kesavananda* had achieved for the government, what the government itself wanted to achieve through the Twenty-fourth Amendment.

As regards the Twenty-fifth Amendment, it was upheld subject to the following qualifications:⁵⁰

- (1) Although 'amount' was not the same concept as 'compensation', the courts could not go into the question of adequacy of 'amount' payable for property acquired or requisitioned. However the 'amount' could not be illusory or arbitrary and should bear some reasonable relationship with the original value of the property in question.
- (2) The non-application of Article 19(1) (f) to a law enacted under Article 31(2) as the amendment had restored the *status quo* as existed before the decision in *Golak Nath* when Supreme Court regarded Article 19(1) (f) and Article 31(2) as mutually exclusive.
- (3) The first part of Article 31-C that purported to make legislations immune on the grounds of their abridgment of Articles 14, 19 and 31 was upheld chiefly on the basis that it identified a limited class of legislation aimed at securing the mandate under Articles 39(b) and (c). Hence, no delegation of amending power was required.
- (4) The second part of Article 31-C was held invalid. The purport of this ruling was that while a law enacted at implementing Articles 39(b) and (c) would not have been challenged under Articles 14, 19 and 31, nevertheless, the courts had the power to ascertain

188. The answer to this, according to Nani Palkhivala was contained in the words of W.B. Yeats: "No government has the right, whether to flatter fanatics or in mere vagueness of mind, to forge an instrument of tyranny and say that it will never be used."

⁴⁹ SEERVAI, *supra* note 30, 11.

⁵⁰ See ¶ 2210-33 of *Kesavananda* judgment in Manupatra citation (MANU/SC/0445/1973, AIR 1973 SC 1461).

⁵¹ *Id.*, ¶ 2235.

whether the impugned law does in fact achieve the objectives inherent in Articles 39(b) and (c) or not *or* was this privilege being misused for some collateral purpose. This could not have happened if the second part of Article 31-C would have continued to be in force. The court struck it down and held that no legislature by its own declaration can make a law challenge-proof.

With regards to the validity of Twenty-ninth Amendment, main argument on behalf of the petitioners was confined to the relationship between Article 31A and Article 31B. It was contended that Article 31B was intimately linked with Article 31A and, therefore, only those legislative enactments which fell under Article 31A could be included in the Ninth Schedule under Article 31B.⁵¹ This matter, the Court felt, was no longer open to argument as the same issues had already been settled by a series of decisions like *State of Bihar v. Maharajadhiraj Sir Kameshwar Singh of Darbhanga and Ors*,⁵² *Visweshwar Rao v. The State of Madhya Pradesh*⁵³ and *N.B. Jeejeebhoy v. Assistant Collector, Thana Prant, Thana*.⁵⁴ In all these cases it was held that Article 31B was independent of Article 31A. A matter which was settled for all these years could not be re-opened. It was still to be open, however, for the Court to decide whether the Acts included in the Ninth Schedule by Twenty-ninth Amendment or any of their provision abrogated any of the basic elements of the constitutional structure or denuded the Constitution of its identity. The issue of validity of the Twenty-sixth Amendment was left to a Constitution Bench to decide upon its accordance with the law laid down in *Kesavananda*.

2. The Academy Comes to Debate – Kesavananda's Reception

Commentaries by eminent Indian thinkers about the implications of *Kesavananda* judgment did not clear the air around how it might be read in future. Each one of them had their own understanding of the ruling in *Kesavananda* and the implications that might have followed. Attributable primarily to the lengthy nature of the judgment and the wide divergences in the opinions on the Bench, one would find conflicting views on different aspects of the decision.⁵⁵ Justice Jagamohan Reddy, in his book, *Social Justice and the Constitution*, later said that eight judges had held that there are 'basic features' in the Constitution.⁵⁶ According to Justice Khanna, the majority in the case numbered seven, and nine judges signed the statement indicating that this was the view of the majority – even though two among the nine had been in the minority in their individual opinions.⁵⁷ The same view was taken by Nani Palkhivala as well.⁵⁸

⁵² [1952] S.C.R. 889.

⁵³ [1952] S.C.R. 102.

⁵⁴ [1965] 1 S.C.R. 636.

⁵⁵ See GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION* 268 (1999). Austin analysed ten of the expert opinions that followed the pronouncement in *Kesavananda*.

⁵⁶ REDDY, *SOCIAL JUSTICE AND THE CONSTITUTION*, 34, quoted in *Id.*, 268.

⁵⁷ Justice Khanna affirmed this in a personal interview with Granville Austin.

⁵⁸ *Id.*

On the other hand, the statement of the nine judges was discredited by Seervai and Dhavan.⁵⁹ Seervai submitted that the summary signed by nine judges had no legal effect at all, and was not the law declared under Article 141, because: (a) the order of disposal passed in the case by the Full Bench was an unanimous order and no occasion arose for determining what the majority of judges had decided; (b) the law according to which the petition relating to Twenty-sixth Amendment was principally to be found in *Kesavananda* and since the summary statement was not clear, it was now on the Constitution Bench to find for itself what the law in *Kesavananda* exactly was. No petition could be adjudged without going and ascertaining the law that was to govern the case. (c) Since no declaration of law that affects the rights of parties can be made till the parties have been heard, no plausible and legal conclusion could follow until the petition relating to Twenty-sixth Amendment was disposed off.

It is certainly amusing to see a court discussing, deliberating and deciding all the major issues in the case but remitting one issue to a smaller bench to dispose off according to the law laid down in the immediate case. Had the Full Bench decided to dispose off the petitions after a further hearing in which the judgment could have been further discussed and dissected, the Full Bench could have found the law for itself. In that event, Seervai would not have had the opulence of citing this infirmity to question the legality of the summary statement. Among other things that might have been responsible for overlook must have been the time constraints imposed upon the bench by Justice Beg's illness and Chief Justice Sikri's impending European trip and the retirement that was to follow.⁶⁰ According to Dhavan, the summary found acceptance only among six judges.⁶¹ He added that Justice Palekar had signed the statement by "accident", and Chandrachud

⁵⁹ SEERVAI, *supra* note 30, 11. Also see, RAJEEV DHAVAN, SUPREME COURT AND PARLIAMENTARY SOVEREIGNTY, 68.

⁶⁰ To everyone's surprise and more so of the Bench itself, Justice Beg was taken ill midway during the hearings which led everyone to speculate that the government was playing its cards well. Justice Beg was increasingly being seen as a nominee of the government at the Court who feigned sickness to delay the hearings beyond Chief Justice Sikri's retirement with a view to start the proceedings all over again. Complicating the situation was Chief Justice Sikri's planned trip to Europe upon the conclusion of hearings and the retirement thereafter. It was felt that if the case was not decided before Justice Sikri's retirement, the Court could have been forced to consider the case afresh or to drop the case altogether, a possibility that could have indeed materialised itself as a blot on the face of Indian polity. The conundrum was resolved by the extremely considerate gesture of Nani Palkhivala who offered to file written submissions so that Justice Beg could go through them while at his home. For a detailed discussion on the unusual happenings on the Bench during and after the hearings and preceding the judgment, see *supra* note 55, 269. Also see KAMATH, *supra* note 48, 184. Nani Palkhivala is reported to have said –

“This case is one of the most momentous in the history of democracy and beyond doubt the most important in the history of this country. It would be a thousand pities if the real legal issues get side-tracked on technicalities or by extraneous considerations or are marred by any bitterness or acrimony.”

⁶¹ See DHAVAN, SUPRA NOTE 59, 154. Also see Dhavan's discussion of the 'basic structure doctrine' at 168.

and Khanna “really belonged to the minority”.⁶² While saying this, he hoped that the ‘summary statement’ would be rejected as either too ambiguous or misleading. Upendra Baxi, on the other hand, asked how an understanding of the Court’s conclusions was to be arrived at if the ‘statement’ of nine judges was disregarded. Baxi also thought these opinions generated ‘many paradoxes’, raised ‘many varied and profound questions’, and were ‘likely to create an illiterate Bar in the country’, because no one would have read the lengthy opinions in their entirety.⁶³ Justice Chandrachud thought of the opinions as an ‘excessive indulgence’ that could have been halved. Justice Reddy many years later thought that the ‘statement’ was operative part of the judgment and conveyed the same to Granville Austin in a personal interview.⁶⁴ Hardly had the ink dried on *Kesavananda* and the dust over the supersession settled, that the court was faced with Indira Gandhi’s election appeal in June, 1975. The case that later came to be known as ‘Elections Case’ was to settle discrepancies arising out of *Kesavananda*’s judgment.⁶⁵ There were rumblings but if the courts were to falter, could the Indian Parliament be expected to do any better?

C. THE SIGNIFICANCE OF KESAVANANDA

In spite of the wide divergence of opinions in the judgment, *Kesavananda* had indeed broken new ground and the end result of the case on the whole was satisfactory, balanced and reasonable. In *Kesavananda*, Professor P.K. Tripathi saw an attempt by the court to wrest finality to itself. Though highly critiqued on account of not having a clear majority opinion, the practical underpinnings of hearings process would make one believe that this was the closest, *Kesavananda* Court could have come in reconciling the viewpoints of the different brother judges. *Kesavananda* ruling can certainly be seen as an improvement over the formulation in *Golak Nath*, in at least two significant ways:

1. It was stated earlier that there are several other parts of the Constitution that are important, if not more, than in the same way as FRs. But *Golak Nath* had confined such an understanding only to FRs. What *Kesavananda* did was to recognize certain other parts as constituting the ‘basic structure’ of the Constitution that cannot be undermined by way of a constitutional amendment.
2. *Golak Nath* made all the FRs non-amendable which according to many and especially the government was too rigid a formulation. *Kesavananda* introduced some flexibility in this regard and held that – Not all FRs *en bloc* are part of the basic structure of the

⁶² *Id.*

⁶³ See Austin’s discussion of Baxi’s views on the case at 268-69.

⁶⁴ *Id.*

⁶⁵ See *Indira Nehru Gandhi v. Raj Narain* for a better discussion and exposition of the doctrine.

Constitution. Only those FRs are non-amendable that are held to be a part of the 'basic structure'.

The *Kesavananda* judgment provided good leeway to the Parliament to make necessary adjustments in the constitutional fabric from time to time in furtherance of the country's socio-economic agenda. The summary statement that was signed with a view to reconcile similar viewpoints and have a clear idea of the ruling in this case incidentally ended up as being the source of much of the confusion that followed *Kesavananda*. Justice Chandrachud's and Justice Palekar's conclusions put them at odds with the other seven justices who had signed the summary statement. Later, it was revealed that they had signed it to acknowledge that the summary was the view of the majority, namely the other seven justices. In acknowledgment of the majority view, Justice Chandrachud and Justice Palekar signed the summary statement that endorsed the theory of 'basic structure' even while themselves individually believing in the Parliament's unlimited amending power. Yet, as Granville Austin put it, their signing of the summary when the four 'minority judges' declined to acknowledge the majority view may be seen as their sympathy for the majority position.⁶⁶

Kesavananda also answered the question left unanswered in *Golak Nath*, namely, can Parliament, under Article 368, rewrite the entire Constitution and bring in a new Constitution? *Kesavananda*'s categorical reply to this was that Parliament can do only that which does not alter the 'basic structure' of the Constitution or go beyond that. In this regard, it is submitted that the questions, namely – 'Whether the Constitution can be abrogated' and 'Whether the Constitution can be abrogated by parliament in exercise of its amending power under Article 368' are two different questions altogether differing in their nature, scope and implications. *Kesavananda* categorically denied this privilege to the Parliament in as much as repealing of a Constitution would definitely violate its 'basic structure'. On an even closer examination, one might be excused for believing that *Golak Nath* had not really been completely overruled. One's conception of whether *Golak Nath* was overruled or not is intrinsically integrated to his idea of what exactly it stood for. It is true that the whole court seems to have agreed that such constitutional amendment was not a law within the meaning of Article 13, and therefore, did not operate as a limitation on the amending power under Article 368.⁶⁷ To this extent, *Golak Nath* was overruled. But in effect, so far as the power

⁶⁶ See AUSTIN, *supra* note 55, 267. Austin says that Justice Chandrachud personally told him when interviewed – "The statement is not what each of us decided, but what we as a court decided. This is the ratio of all the thirteen judges. We summed up the result of the case." Rajeev Dhavan also says that Justice Chandrachud's affirmation of his support to the summary came in the *Kesavananda* Review hearings. See RAJEEV DHAVAN, *THE SUPREME COURT OF INDIA* 420 (1977).

⁶⁷ See JAIN, *supra* note 16, 1629. Jain discusses the opinions of Justice Hegde and Justice Mukherjea on the difference between constitutional law and ordinary law. Hegde and Mukherjea, JJ., stated in this connection: "An examination of the various provisions of

of amendment was concerned, the objective basis of *Golak Nath* was in fact, strengthened in as much as the Court propounded the theory of inviolability of 'essential features' under the constitutional framework.

Neither did *Kesavananda* concede an unbridled exercise of amending power to the Parliament under Article 368. The amending power was now subject to one very important qualification - that the amending power could not be exercised in such a manner as to destroy or emasculate the 'basic or essential features' of the Constitution. From then on, a constitutional amendment that violated the 'basic structure' of the Constitution was to be held *ultra vires* the Constitution. This meant that the power of amendment under Article 368 was not absolutely unlimited and the courts could still go into the question whether or not an amendment destroyed the 'basic structure' of the Constitution. It is true that the 'basic structure doctrine' seemed most unsustainable when propounded but over time, it has established itself as the most assertive benchmark of constitutional spirit and philosophy. As we discuss today, it continues to act as the enabling instrument that helps us test constitutional change on the benchmark of constitutional legitimacy. It will continue to do so in the future; but it will also run the risk of being played down as creature of an unelected mandate. In the next part, I discuss how we could effectively respond to some of these criticisms at a philosophical plane in a manner that could deepen the legitimacy of 'basic structure doctrine'. Moving away from the courts and cases, I intend to explore the theoretical core of the arguments that fall in favour of constitutional essentialism generally and the doctrine in particular. This part intends to understand the use of amendments as a means of constitutional progress and the reasons for its responsive use. It would study *Kesavananda* in a philosophical framework that it designs in response to the questions surrounding the political limits of a Constitution.

III. THE NATURE OF POSSIBILITIES FOR CONSTITUTIONAL CHANGE IN INDIA

Coming after *Kesavananda's* analysis, the subject of this part invokes easy memories of Forrest Gump, the character Tom Hanks played in a movie by the same name. In the movie, Forrest Gump famously went on to say –“Life is like a box of chocolates. You never know what you're gonna get.”⁶⁸ While making the statement, Gump would have hardly realised how true the statement was if placed in the context of constitutional interpretation. What Gump said, fourteen years ago, while reminiscing about his dead mother, could be effectively employed today

our Constitution shows that it has made a distinction between 'the Constitution' and 'the laws'." It was asserted that the Constitution-makers did not use the expression 'law' in Article 13 as including 'constitutional law'. This would thus mean that Article 368 confers power to abridge a FR or any other part of the Constitution. To this extent, therefore, *Golak Nath* was overruled.

⁶⁸ I am thankfully indebted to Professor J.M. Balkin, Yale Law School, title of whose musings in the *1995 Constitutional Stupidities Symposium* forced me to seriously reflect upon the 'Box of Chocolates' logic.

to reminisce the course constitutional interpretation has taken. While we might have a good deal of idea as to what all the Constitution might say about the things we see in its text, I wonder if we know what it indeed says and what we may finally get to. The fact that the constitutions are susceptible to competing perceptions and may not bring what they promise is a settled truth of constitutional interpretation. Yet this essay is a feeble attempt at gauging what the Indian Constitution, in all possibilities, might have to say about political change and the manner in which it may come. My attempt seeks a principled understanding of the modes of constitutional change and this enquiry, when properly resolved, should tell us something about the nature of the Indian Constitution and what is it likely to hold in future. In this part, I engage with Constitutional amendments as they are easily the most visible and definite mode of Constitutional development in India. They also happen to be the most controversial.

A. THE LIMITED MEANING AND FUNCTION OF AMENDMENT

I begin by asking – What do we mean by an amendment? For some of us seemingly face problems in acknowledging the plain-meaning, limitedly-connotative, strict interpretation of the word as its intended charter of purpose. Knowing that there are many who relate to this ideological predicament, I wonder if the true intent and scope of a power is realized in its proverbial practical usage or its rampant, unbridled and unfettered exercise, the practicality derived from the logically implied limitations on the power itself while unimpeded exercise governed by none. Is it even plausible to entertain the argument that amending clauses in the Constitution could be indifferent to the Constitution itself in their unbridled exercise? In pressing upon my core argument, which essentially is that we have compelling reasons to justify discernable limits to constitutional change brought through Article 368, I look to semantics, history, logic but not law. Semantics first, what does the word ‘amendment’ mean? What could it logically⁶⁹ connote? What could its purposive place in the Constitution? Does it stand over and above the constitutional text or is it limited by the constitutional limitations? Before answering any of these, it would help to evaluate the import of word ‘amend’.

From a plethora of meanings, the one that makes perfect sense to me is the one that suggests - “To amend means to improve by way of addition, deletion or substitution”.⁷⁰ Though not to be found separately and singularly in any one of the many sources, it is a logical account from their readings. A keen observation of the extended definition would make us appreciate that there are two parts of the characterization – one that answers ‘what does it mean to amend’ while the other delving into the modes of amendment. The modes of amendment are qualified by the presence of the word ‘improve’. These modes may be exercised to the extent they facilitate such improvement. The consideration of improvement is a logically

⁶⁹ Notice the use of ‘logically’ in place of ‘possibly’.

⁷⁰ See generally, Meaning of the Entry –‘Amend’ in BLACK’S LAW DICTIONARY, OXFORD LEGAL DICTIONARY, OXFORD ADVANCED LEARNERS ENGLISH DICTIONARY etc. The meaning here has been evolved after a logically conscientious reading of the meanings in these texts.

binding one. The Parliament therefore can amend, by way of addition, deletion or substitution, any provision in the Constitution as long as it improves upon the constitutional parchment (or does not hinder its progress). The word 'amend' implies minor changes, adaptations or modifications in the constitutional framework. If situated within the Constitutional context, an amendment would reveal itself to mean any adaptation or modification made in the Constitutional text to ride over a difficulty in working a constitution. There is a convincing semantic view that the word 'amend' means correcting or improving, not deconstructing, reconstructing, or replacing and abandoning the fundamental principles of a constitution. And that valid amendments can operate only within the existing political system; they cannot replace the polity. Amendments are in fact and should be seen as just one of the many provisions in the constitutional stricture to ride over any difficulty that might come government's way in realization of constitutional mandate. Amendments are not to deliberate upon the suitability of a monarchy over a democratic state or vice versa. The use of the amending power could be justified only within the limits of parliamentary function and the Parliament, in exercise of its amending power, cannot attain a result beyond those limits. This is a view which finds acceptance in constitutions of a few major legal systems of the world.⁷¹ A result beyond the constitutional limits can be achieved, in my view, only through a referendum which has been sparingly discussed, if at all, in the Indian polity. The nature of democratic authorization that a momentous political shift commands in a polity could be reached only through a mechanism like referendum. But the remarkable absence of any such discussion in this direction indicates the lack of public anticipation towards a revolutionary constitutional change. Or it could also be read in as a measure of public reluctance to accept or even think of such a revolution as a distinct possibility as it is averse to the prospect of its realization. In either case, it does signify that the Indian populace is not ready for this kind of change, preparations for which had already started in the summer of 1975.

If asked to identify explicit limitations on the amending power in light of this reading⁷², I would fail to identify even one. Because, simply put, there aren't

⁷¹ For example, Article 139 of the Italian Constitution entrenches the republican form of government and prevents it from being a subject of constitutional amendment. Similarly Article 112 of the Norwegian Constitution and Section 3 of Article 79 of the German Constitution both say that certain basic principles of the Constitution cannot be contradicted by amendments. Also see Article 97 of the Japanese Constitution which says –

“The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolable.”

(At <http://www.solon.org/Constitutions/Japan/English/english-Constitution.html>)

Marked as Supreme Law under Chapter X of the Japanese Constitution, the inviolability of fundamental human rights in Japan is quite like the inviolability of 'basic features' of the Indian Constitution. Though not explicitly recognized in India, the argument for entrenchment is similar across legal systems.

⁷² The reading suggests that constitutional amendments are only necessitated for improvement and in any case, should not end up weakening the Constitution.

any explicit limitations on the amending power.⁷³ Though integrated into the practice of courts through the ‘basic structure doctrine’, the semantic reason is yet to influence the text of amending provisions under the Indian Constitution. This is because the text of Article 368 still does not acknowledge any limitations on its exercise. There is an implicit rider though – that, all amendments be geared for constitutional progress (improvement). While it is a different question if ‘X’ or ‘Y’ amendment improves upon the Constitution, this rider, nevertheless, identifies, a plausible category of amendments as unfeasible – those, which rather than improving, end up weakening the constitutional structure. This conclusion, we must notice, is an implicitly clear consequence of our reading. The implicit conclusion suggests that all the amendments are feasible as long as they do not violate the constitutional conscience or weaken the constitutional framework. If they manage to ignore these parameters and violate the constitutional conscience, they should be struck down as unconstitutional. It is in apprehension of these possibilities that a thorough consideration of the implied limitations on the amending power seems inevitable. They are implied but they are limitations still; mere variance in nature does not make them any less significant when considering the extent of amending power. The fact that they were considered so elementary and paramount that they were not explicitly mentioned but thought as naturally implied only adds to their vitality and liveliness.

1. How Do Constitutions Guide the Amending Process?

As I said earlier, our understanding of whether a particular constitutional amendment is valid or not is co-extensive with our understanding of what all changes are retrogressive to the constitutional spirit. This understanding has certainly evolved in the last sixty years of Indian constitutionalism and will continue to evolve as we work the Constitution in the future. ‘Working a constitution’ could mean using the Constitution as a guide to pursue its various mandates: mandates, that have been placed there by the people for the people. A constitution encapsulates in itself the national dream and working a constitution is quite like chasing that dream without losing your steps. As Professor Tribe puts it – “The constitution serves both as a blueprint for government operations and as an authoritative statement of the nation’s most important and enduring values.”⁷⁴ It reflects the aspirations of the people and the ways those dreams be pursued with a view to realize them. For Tribe and for many like him, the constitution does provide guidance of a sort—“not decisive, but suggestive”—for assessing the appropriateness of proposed amendments.⁷⁵ The constitution, then, can surely be understood as unified, although not wholly coherent, by certain underlying political ideals: representative democracy, federalism, separation

⁷³ See generally, SHIVA RAO (ed.), *THE FRAMING OF INDIA’S CONSTITUTION, A STUDY*, New Delhi: The Indian Institute of Public Administration, 1968.

⁷⁴ See Laurence H. Tribe, *A Constitution We Are Amending – In Defense of A Restrained Judicial Role*, *HARVARD LAW REVIEW*, December 1983, 441.

⁷⁵ *Id.*

of powers, equality before the law and procedural fairness.⁷⁶ There obviously is a connection between all of them and that link becomes clear once the constitution is understood as a whole in the context of political purpose and resources. If seen as such, the constitution does indeed act as a good guide in deliberating upon the suitability of constitutional amendments. The underlying ideals, political, socio-economic or legal, in the Indian Constitution would reflect the essential aspects of Indian constitutionalism which cannot be bartered away in form of an amendment. Indian Constitution, cannot therefore, authorize an amendment which runs over the entire point of having a constitution in the first place. We could hypothesise such a situation in case of a 'No Constitution Amendment', an amendment which repeals the entire constitution and subjects our political future to the wisdom of a few good men. These are the very considerations, seemingly unlikely now, but distinctly probable in future, that shelter the implied limitations argument on the amending power of the Parliament.

Charles A. Kelbley, in his searching piece on Rawlesian perspective of constitutional change, treads a similar terrain when he asks if a proper understanding of American Constitution in light of these considerations require us to say that "certain rights and liberties must be a part of our Constitution".⁷⁷ He further asks if there are no circumstances in which constitutional change can reasonably embrace the repeal of 'constitutional essentials'.⁷⁸ We are quite familiar with this question in the Indian context and situating Kelbley's view in India, we might ask - Does Article 368 permits a more or less complete reversal of our constitutional traditions and principles? Or are there 'constitutional essentials' and therefore substantive limits imposed on valid constitutional amendments? How do we define these 'constitutional essentials'? And who monitors the breach of these substantive limits? A host of questions indeed! But questions they are of immense consequence since they make us realise the normative ambiguity that could be encountered in principled defense of such philosophy. I argue, in fact reiterate, that there are limits to what can qualify as a valid amendment to the Constitution. This is so even when the amending procedures provided for in the Constitution are fully and correctly followed.⁷⁹ Even as we contest the exactness of these limits, the fact that there *are* limits on the power should lead us to a consensual ground for furthering our discussion.

⁷⁶ In furtherance of the same argument, Professor Tribe rubbishes the view that Constitution is a mere assortment of unconnected rules and standards.

⁷⁷ Charles A. Kelbley, "Are There Limits to Constitutional Change – Rawls on Comprehensive Doctrines, Unconstitutional Amendments and the Basis of Equality" in the Symposium Issue on Rawls and the Law, *FORDHAM LAW REVIEW*, April, 2004, 1487.

⁷⁸ *Id.*

⁷⁹ See Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 163 (Sanford Levinson ed., 1995). For an extensive and insightful review of the essays collected in *Responding to Imperfection*, see Frank I. Michelman, *Thirteen Easy Pieces*, 93 *MICH. L. REV.* 1297 (1995). In *Thirteen Easy Pieces*, Michelman charts the course of the debate surrounding the constitutional amendments.

What is meant by ‘substantive limits’? For the moment, let us say that it refers to constraints on changes to the core content of the Constitution; constraints arising from existing core freedoms set forth in its text, especially in the Bill of Rights or FRs, those imposed by long-standing political practices and traditions; or constraints resulting from a principled understanding of the purposes and aims of the Constitution and the amending power set forth therein. The question might arise as to what does a principled understanding of the Constitution entail. To this, my categorical answer is that a Constitution is rooted in its distinct culture, a culture of thought, ideals, aspirations that legitimise the processes of Constitution-making and much of how Constitution is seen in the public sphere depends on how well we do in meeting these ideals. The Constitution is the mirror that reflects the long-standing aspirations of the constitutional subjects. It is a reminder to us and our future generations that the Constitution was intended to achieve certain cherished imperatives that constituted its identity. It requires, therefore, no easy reason, to unburden it of the very reasons of its existence. Any such move in this direction is a frontal attack on the moral worth of those who gave the Constitution to us.⁸⁰

⁸⁰ See, GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION – CORNERSTONE OF A NATION*, Bombay: Oxford University Press, 1972 (Classic Reissue) at Chapter 11, p 257. It is not without reason that commentators often look to the Constituent Assembly debates in ascertaining the expected nature and extent of application of amending power under Article 368. If we look to the debates and to the events around that time, we would realise that there were different views on the flexibility of the Indian Constitution. As Granville Austin very helpfully points out, the draft constitutions prepared by K.M. Munshi and K.T. Shah recommended that all amendments needed to be ratified by two-thirds of provincial legislatures in addition to the two-thirds majority they required in the Parliament. Both of them were later to reform their proposals wherein in Munshi’s case, the ratification would be required only in one half of the provinces whereas in Shah’s proposal, an additional requirement of popular referendum was inserted. The draft Constitution prepared through the Sapru Report provided for a special mechanism for effecting consequential amendments and an advanced six-month notice was to be given before initiating discussion on the floor of the house. The amendment had to garner two-thirds majority both at the Parliament as well as the provincial ratification. In addition to this, certain vital provisions, which were to be listed in a schedule, were to be excluded from amendments for five years.

Austin’s references include the various draft constitutions by the members of the Constituent Assembly, collection of papers from these members as well as the Nehru Report and Sapru Report. In light of this discussion, it would not help to assume that the Constituent Assembly did not anticipate the damage that unbridled amending power could reap. There were concrete apprehensions as is evident from Austin’s book though it is a different fact that none of these apprehensions rose in a stature which could ensure the presence of entrenchment provisions in the Constitution. These discussions nevertheless shed important light on the conceptualization of amending power in the Indian Constitution. *See also*, RAJEEV BHARGAVA (ed.), *POLITICS AND ETHICS OF THE INDIAN CONSTITUTION*, Oxford: New Delhi, 2008, 1-40 at 5. Bhargava, in introducing this collection of essays, makes a strong appeal for understanding the Indian Constitution in conjunction with the Constituent Assembly Debates to erect a higher theoretical plane where justifications behind values in the Constitution may be suitably located. He feels that a philosophical treatment of such values is ‘woefully incomplete’ without the study of debate behind them.

It questions their existence as beings with political voice and puts an even bigger question mark on their place in history of political culture. We may choose to reject some or all of these ideals which they chose, to reconsider them, to override them, or to recast them, but as long as we retain some commitment to the Constitution—as long as we are ‘amending it instead of discarding it’—we cannot simply ignore the fundamental norms of political organisation.⁸¹

If this construction is valid, an amendment would mean no more than an arrangement within the constitutional parameters towards realization of one or more of the aspirations embodied in the Constitution. It also necessarily implies modification in the ways already prescribed under the Constitution to achieve these ends.⁸² The resort to amendment, Tribe says, should be seen as a break from the past, a transitional phase, a point of discontinuity, a point at which “something less radical than revolution but distinctly more radical than ordinary legal evolution is called for”.⁸³ Tribe justifies his observations by saying that amendments reflect a point where the content of the Constitution is changed to bring in certain new features in the text – an exercise that involves a debate between “what should be in the Constitution” vs “what is in the Constitution”.⁸⁴ The amending exercise would invariably end in putting the former over the existing constitutional content. But it would do so only with the provisions concerning the subject matter of the proposed amendment. An amendment would change certain constitutional provisions but the rest of the Constitution would remain the same. An amendment would never allow a complete overhaul of the entire constitutional framework in name of suitable adaptations. This dilemma manifested itself quite famously in Taiwan where certain constitutional amendments were challenged on the grounds that they violated basic principles on which the Taiwanese Constitution

⁸¹ TRIBE, *supra* note 74, 22, 441. In addition to the moral and political guidance provided by the Constitution, Tribe identifies more strategic reasons for taking existing constitutional norms into account when assessing the merits of a proposed amendment. Foremost of which is - one can neither favor nor oppose an amendment without at least paying attention to how it either accords or clashes with basic constitutional postulates— postulates which have till now formed the basis of our actions and those that a given amendment might, after all, be construed to displace.

⁸² Sometimes experience dictates that a certain way of doing things be modified to achieve better results in an efficient manner. If this is so, amendments of rules, regulations and procedures prescribed under the Constitution is but a legitimate necessity, if we keep in the mind the implicit functionalism of the constitutional role. These procedures hardly mean anything without the objectives they are intended to achieve and that, which are spread over the Constitution. To give effect to a constitutional provision, it is quite justified to amend by way of addition, variation or repeal any provision of the Constitution. The value of administrative flexibility is a point which I discuss in greater detail when discussing the merits of the tests propounded in Nagaraj.

⁸³ TRIBE, *supra* note 74, 22, 436. For Tribe, an amendment is “a resort to constitutional politics as opposed to constitutional law.” Though not having entirely grasped the law-politics divide, I do believe that an amendment certainly marks a departure from the existing scheme of constitutional law.

⁸⁴ *Id.*

was based and the court's response was quite like ours.⁸⁵ Circumstances might have indeed changed but thankfully not in a manner to allow such a drastic step.

However, a textual understanding of the amending clause in the Indian Constitution, as it stands today, would bring us to a different conclusion. The wordings of Article 368 would have us believe that the Constitution never ever envisaged any limits on the amending power of the Parliament. But the reminder that Art 368, as it stands today, in itself, has been at the receiving end of this power and is quite different from it used to be before the 24th Amendment only compounds our confusion. Of all things it does, it does not assign a distinctively limited overtone to the amending clause and leaves us in a constitutional quandary of immense proportions. One could certainly argue that Article 368 therefore permits any amendment to the Constitution that is secured by means of following the procedures of Article 368, by its terms at least, Article 368 itself does not preclude any substance from forming part of an amendment. Although this is very probably the canonical understanding of Article 368 for most Indian lawyers, it is not at all my position. What, then, explains my opposition to the near-absolute, unbridled and unqualified exercise of the amending power, which Article 368, would appear to allow?

2. What Might We Risk through Unbridled Amendments?

To appreciate my musings, one would have to consider the kind of make-believe developments that raised this issue for the distinguished German scholar, Dieter Conrad. At a time when the established law on constitutional amendments suggested plenary powers for the Parliament without any limitations, implied or otherwise on its exercise, Conrad made some uneasy remarks about the future of Indian Constitution. In a speech which is often credited with introducing the theory of Implied Limitations in India's practice of constitutional government, Conrad said:

⁸⁵ See (Andy Y. Sun ed.), J.Y. INTERPRETATION No. 499 (March 24, 2000). In responding to challenges raised against these amendments for breach of their substantive limits, the Constitutional Court of Taiwan, China, said –

“Although the Amendments to the Constitution have equal status with the constitutional provisions, any amendment that alters the existing constitutional provisions concerning the fundamental nature of governing norms and order and, hence, the foundation of the Constitution's very existence destroys the integrity and fabric of the Constitution itself. As a result, such an amendment shall be deemed improper. Among the constitutional provisions, principles such as establishing a democratic republic under Article 1, sovereignty of and by the people under Article 2, protection of the FRs of the people under Chapter Two as well as the check and balance of governmental powers are some of the most critical and fundamental tenets of the Constitution as a process derived from these principles forms the foundation for the existence of the current Constitution and all [governmental] bodies installed hereunder must abide by this process.”

“Perhaps the position of the Supreme Court is influenced by the fact that it has not so far been confronted with any extreme type of constitutional amendments. It is duty of the jurist, though, to anticipate extreme cases of conflict, and sometimes only extreme tests reveal the true nature of a legal concept. So, if for the purpose of legal discussion, I may propose some fictive amendment laws to you, could it still be considered a valid exercise of the amendment power conferred by Article 368 if two-thirds majority changed Article I by dividing India into two states of Tamilnad and Hind proper? Could a constitutional amendment abolish Article 21, to the effect that forthwith a person could be deprived of his life or personal liberty without authorization by law? Could the ruling party, if it sees its majority shrinking, amend Article 368 to the effect that amending power, from thereon, would rest with the President acting on the advice of the Prime Minister? Could the amending power used to abolish the Constitution, and reintroduce, let’s say, the rule of a Moghul emperor or the Crown of England?”⁸⁶

I do not intend, by citing Conrad’s apprehensions, to provoke easy answers. Neither do I say that in the absence of implied limitations under Article 368, we necessarily foresee an extreme situation as was foreseen by Conrad. What I merely say is that, upon our continued dereliction of the necessary implications of amending clauses in Indian Constitution, we might run the risk of trivializing these distinct possibilities, which have, upon their materialization, critical consequences for the constitutional life and law in India. Conrad was not alone in appreciating these possibilities. He was to be joined by the eminent political theorist Rawls, when the latter in his *Political Liberalism* series, raised similar questions in the American setting. Rawls wondered if an amendment repealing the First Amendment and recognizing one religion as the state religion would pass court’s scrutiny. His specific enquiry was –

⁸⁶ See, R Sudarshan, ‘*Stateness*’ and *Democracy in India’s Constitution* in *INDIA’S LIVING CONSTITUTION* 166 (R Sudarshan, Sridharan eds, 2000). Professor Sudarshan reminds us that the Conrad’s significant contribution to Indian constitutionalism should be commemorated with a special volume of essays around the theme of his work on Indian Constitutional jurisprudence. Also see generally, *Sanctity of the Constitution* (Dieter Conrad – The man behind the ‘basic structure’ doctrine) in A.G. NOORANI, *CONSTITUTIONAL QUESTIONS & CITIZENS’ RIGHTS* xiii-iv (2006). The discussion around Professor Conrad’s work borrows in part from a *Frontline* article dated 11 May 2001. See *FRONTLINE*, Volume 18 - Issue 09, Apr. 28 - May 11, 2001. Conrad’s own views were published in *Delhi Law Review* long back. See D Conrad, *Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration*, 6 & 7 *DELHI L. REV.* 18 (1977 & 1978).

“Whether an amendment to repeal the First Amendment, say, and to make a particular religion the state religion or the constitutional repeal of Equality Clause, with all consequences of that, qualify as valid amendments?”⁸⁷

In asking these questions, Rawls’s rumination was not just academic; he was seeking practical reasons that the Court might have for holding striking down these amendments, even when they have come off careful and complete adherence to the stringent ‘supermajority procedures’ set forth in Article V of the US Constitution?⁸⁸

Rawls’ principal reason for endorsing court’s judgment against these amendments had much do with the nature and purposes of these amendments, characterized as contrasting to the actual amendments that had been made a part of American Constitution. The purposes he discerned and some of which I endorse, include ‘adjusting and broadening constitutional values and removing weaknesses and defects of the original document.’⁸⁹ Rawls’s complete explanation merits a discussion here. If Rawls is to be believed, an amendment is not ‘merely a change’.⁹⁰ According to him, one idea of an amendment is to adjust basic constitutional values to changing circumstances, or to effect a ‘more inclusive understanding of those values by incorporating it in the Constitution.’⁹¹ Another idea of amendment for Rawls is institutional adaptation with a view to remove weaknesses that come to

⁸⁷ KELBLEY, *supra* note 77, 23, 1505. See Kelbley on what Rawls might have considered as unconstitutional amendments and what reasons would have held him to that conclusion.

⁸⁸ For a better understanding of the amending processes in the American framework, *see* ARTICLE V OF THE US CONSTITUTION. The procedures read with the two express limitations provide a rough reference for gauging the nature and place of amendments in American constitutionalism. The text of Article V says –

“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several states, shall call for a convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several states, or by convention in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of first Article; and that no State without its Consent, shall be deprived of its equal Suffrage in the Senate.”

First and Fourth Clauses in the Ninth Section of the First Article dealt with migration or importation of persons (slaves) and Capitation or direct taxes respectively.

⁸⁹ KELBLEY, *supra* note 77, 23.

⁹⁰ *Id.*

⁹¹ *Id.*, to support this idea, Kelbley cites the examples of the three amendments relating to Civil War, Nineteenth Amendment which grants women the Right to Vote and the Equal Rights Amendment that attempted to adjust the American constitutional values to changing patterns of American life and understanding.

light through subsequent constitutional practice.⁹² My conception of the amending role would, to Rawls's credit, borrow from both the ideas and perceive amendments as the instruments of cleansing the constitutional clutter by removing the, now-obsolete, traditional and outlived provisions while at the same time, broadening it to accommodate the prevalent value-based constitutional understanding.

According to Rawls, amendments were not meant to dismantle the structure of the Constitution or repeal 'constitutional essentials', such as Part III of the Indian Constitution. They still aren't meant to.⁹³ Rather, their primary function is to adjust, broaden, improve, and correct what is already contained in the Indian Constitution.⁹⁴ In this light, what should the Court do or say in regard to the hypothetical amendment that repeals the Article Fourteen's 'Equal Protection Clause'? The Court could then say, if persuaded by Rawlesian logic, that an amendment to repeal Article 14 and replace it with its opposite fundamentally contradicts the constitutional tradition of the largest democratic regime in the world and given the crucial place of Article 14 in the Indian Constitution, the amendment embraces a result beyond its legitimate reach. It is unacceptable and therefore unsound. Does this mean that the FRs and the other similar provisions are entrenched? Well, they are entrenched in the sense of being validated and repeatedly confirmed by long constitutional practice and through their deep-rootedness in elementary concepts like rule of law. They may be amended in the ways mentioned above but not simply repealed and reversed, certainly not through the amending procedure under Article 368. Should that happen, it would be a constitutional collapse, or a constitutional revolution in the proper sense, and not a valid amendment of the Constitution.

3. The Reasons for Entrenchment

However, what are the factors that demand such entrenchment? Why is it that some parts are entrenched while others are not? How do we distinguish between the two categories and what role do the courts have in maintaining this distinction? I hold that the successful practice of constitutional ideas and principles over sixty years indeed places restrictions on what can now count as an amendment to the Constitution.⁹⁵ These restrictions operate not in a way to entirely discount the possibility of such repeal and reversion but only to prevent its happening through the amending channels in the Constitution. A tradition or practice can be definitely unseated but the more grounded a tradition be, more likely is it that the

⁹² *Id.*, for the second idea, he cites the amendments that concern themselves with the institutional design of government i.e. presidential form of government, taxing powers of the union, policy-oriented amendments.

⁹³ Amendments do not really pose a contesting ground against major constitutional transformations. They weren't and still aren't, by their very nature, conceptualized as tools of radical transformation.

⁹⁴ KELBLEY, *supra* note 77, 23, 1510.

⁹⁵ *Id.*

attempt to unsettle it would have to meet higher benchmarks of legitimacy. These restrictions, which Rawls had in mind, can be read with my understanding through this essay to mean that amending exercise under Article 368 does not possess that level of legitimacy which could unsettle such tradition.

As far as the court is concerned, to the question of what tradition is entrenched and what is not, how does a practice become a constitutional tradition, Rawls appears to have left the question to be determined by a 'reasonable' balance of political values.⁹⁶ He refrains from taking a hard and fast position on to what outcome that reasonable balance would lead.⁹⁷ This is a question that has to be resolved necessarily on a case to case basis. To assess what broader understanding does present practices commit itself to, one might ask the question – Whether there has been a significant departure from the longstanding political practices on that particular issue. The question would necessarily involve a discussion of the present day conception of the same provisions in the backdrop of the emerging public opinion and political atmosphere. If satisfactorily resolved, the next step would be to answer – Whether there are substantive reasons to drop the existent understanding and adopt a new understanding? One could argue, in the American context that today's circumstances are arguably far different from those of the framers, when fears of foreigners becoming President in the early decades of the nation were more understandable and perhaps well-grounded.⁹⁸ If the same logic is pursued on Indian shores, there is a credible argument that the experiences from the 1975 emergency provide us a reasonably understandable basis to question the unbridled amending power.⁹⁹ Circumstances, arguably, aren't as different here as they are in the United States of America and there do not seem to be substantive reasons either to drop the existent apprehensiveness about the unchecked parliamentary license. However, this necessarily is a fanatically contested domain, and I would do well for the time-being by resisting this political pull of finding issue-based answers to these questions. However, somewhere down the essay, I discuss the argument that holds out for not seeking a constitutional response to all our problems. There, I discuss in brief, what we entail in not understanding the limits of the Constitution itself in defining answers to all our questions, some of which are plainly political.

⁹⁶ *Id.*

⁹⁷ *Id.*, also see Commonwealth Interview with John Rawls at 618 in COLLECTED PAPERS 616 (Samuel Freeman ed., 1999). In the interview, Rawls expressed no opinion as to what the situation would have been had the Supreme Court not made the decision it made in *Roe v. Wade*. Rawls' apprehension, though certainly quite appealing, would have been far more helpful had he engaged himself with the 'balance of political values' in *Roe v. Wade*.

⁹⁸ *Id.*, 1509, Also see Editorial, *A Constitutional Anachronism*, NEW YORK TIMES, Sept. 6, 2003, (suggesting that the Constitution should be amended pursuant to present proposals now before the Congress to permit foreign-born citizens to be eligible for the Office of the President).

⁹⁹ Particularly so in the backdrop of the draconian provisions that were effectuated through the 42nd Constitutional Amendment. See generally, P.N. DHAR, INDIRA GANDHI, THE 'EMERGENCY', AND INDIAN DEMOCRACY 221-68 (2000), for a descriptive account of the executive functioning during the Emergency.

Back to logic and more particularly, of the Rawlesian kind, repealing of Article 14 Clause and endangering equal protection would introduce an “unreasonable doctrine into the very core of our constitutional framework”, turning the central aspects of our constitutional traditions upside down.¹⁰⁰ Rawls’ reasoning is of course persuasive and the defense is not borne out of thin air and As Kelbley puts it, we should note that we are not invoking “perennial conflict between legal positivism and natural law, and taking the side of the latter in repudiating amendments that repeal core constitutional freedoms”.¹⁰¹ Rather, we employ “long-standing tradition and the successful practice of the Constitution’s principles and values over the course of our history” in defense of those core freedoms.¹⁰² But does that mean that such freedoms do not have a core content that is sought to be protected through such entrenchment? Or is it that their entrenchment is premised largely on their integrity with the constitutional tradition? I argue that their legitimacy to the existing scheme and the entrenchment that follows is a function both of its independent moral value as well as its integrity with constitutional tradition. And to the extent such entrenchment is influenced by its independent existence, it is important to evaluate and identify traditions that may be entrenched. The respect for tradition in constitutional practice is based on common assumptions about the righteousness of a particular practice, its compatibility with an existing scheme and its evolving endorsement and legitimacy. These assumptions largely work in favour of traditional practices and we should be careful when thinking about disturbing such tradition but this apart from being a cautionary tale, is not sufficient to conclude that tradition cannot be deserted when times require.¹⁰³ Should tradition

¹⁰⁰ KELBLEY, *supra* note 77, 23, 1511.

¹⁰¹ KELBLEY, *supra* note 77, 23, This is despite Tribe’s invocation of “what is and what ought to be” debate. This debate, at one level, would naturally involve some deliberation on what should exist in and what should go off the Constitution. However, borrowing from Rawls, Kelbley argues for limiting the range of ends that this debate seeks by entrenching core traditional practices from infringement. *Also see*, Lawrence B. Solum, *Situating Political Liberalism*, 69 CHICAGO KENT LAW REV. 549, 550 No.8 (1994). Solum believes that for Rawls it is “not natural law but legal practice that immunizes the freedoms of speech and religion from the amendment process”.

¹⁰² Kelbley, *Id.*

¹⁰³ *See* CASS SUNSTEIN, *DESIGNING DEMOCRACIES – WHAT CONSTITUTIONS DO* 69 (2001). Professor Sunstein discusses the fruitfulness of tradition in understanding constitutional development and says that the courts deliberating on any interpretation of the Constitution should be cautious about disrupting long-standing practices but such caution alone is not sufficient for them to decide on the appropriate moral content of the rights or mandates in the Constitution. It is only one of the factors and to what extent can it influence constitutional interpretation is indeed debatable. At the very least, this debate has saw two ends of understanding, one which views the Constitution as ‘preservative’ and the other which views the Constitution as a tool for ‘transformation’. Understandably the ‘preservative’ argument holds out for those on side of tradition while the ‘transformative’ character takes the judges away from traditional aspects of constitutional practice. This distinction which Sunstein reiterates, though common in Indian constitutionalism, is very instructive in understanding the fact that despite agreement on the reasons of constitutional interpretation, how judges interpret depends a great deal on what they think are they interpreting – a ‘preservative’ Constitution or a ‘transformative’ Constitution? *Also see*, LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (New York: Basic Books, 1999) where Lessig distinguishes between the two kinds of constitutions.

be entrenched and if yes in what manner is a question best resolved by examining the larger purpose of calling it a tradition in the first place.¹⁰⁴ It is on the basis of this enquiry that one would characterize the repeal of the fundamental clauses as a constitutional collapse – a breakdown of the existent constitutional structure. But if longstanding tradition and practice entrench fundamental features and immunize core constitutional provisions from repeal, they also introduce a barrier into the amending clause that is plainly absent from its text and perhaps even contrary to its spirit.¹⁰⁵ Moreover, deciding when and where to apply that barrier to amendments does indeed pose great difficulties of all kinds.¹⁰⁶

However, this should not entirely be understood as discounting radical changes to the Constitution. I have repeatedly emphasized that the questions, namely “Whether the Constitution can be abrogated” and “Whether the Constitution can be abrogated by Parliament in exercise of its amending power under Article 368” are two entirely different questions altogether differing in their nature, scope and implications. *Kesavananda* categorically denied this privilege to the Parliament in as much as repealing of a constitution would definitely violate its ‘basic structure’. For me, this points towards an increasing consensus on the practical justifications of locating essential differences in the matrix of constituent, amending and legislative power. This is largely to grasp the nature and level of discontinuity that is brought through such mechanisms and to fathom ways of adapting to it in a feasible manner. The nature of transition and method in which it is reaped in all these circumstances needs critical evaluation if we are to make sense of political ‘progress’ in fair measure. But what exactly, given the silence of the Constitutional text, could make us appreciate this proposal? How can we come close to the task of understanding the disparity in the nature and method of constitutional change? What will it take us to believe that the nature, extent and implications of amending power, constituent power and legislative power diverge considerably in face of their respective operations? Experience, as it has played out, in my view, would tell us that these three powers cannot be clubbed together, not at least in the provisional way they have been so far.

¹⁰⁴ The argument for tradition assumes, in my view, that traditionalism has good answers to the questions of interpretation.

¹⁰⁵ *Id.*

¹⁰⁶ For a more complex and relatable view, see generally, William Harris, *Revisiting the Constitutional Polity: The Limits of Textual Amendability* in *THE INTERPRETABLE CONSTITUTION* (1993). Harris argues that the form, design, or wholeness of the constitutional document must be respected and left intact outside this transition phase. Also see its reference in Kelbley’s piece – “Are There Limits to Constitutional Change”. Harris’s account would also have us believe that Article 368 in India and Article V in USA should not be viewed as a freestanding provision, for one provision of the document cannot be so interpreted so as to allow the destruction of the whole text. “As far as the use of Article V in the American context is concerned, any change or amendment”, according to Harris, “must continue to make sense within the preexisting scheme of constitutional meaning”.

B. THE CATEGORIES AND METHODS OF POLITICAL DEVELOPMENT - LEGISLATIONS, AMENDMENTS AND THE CONSTITUENT POWER

I have discussed in detail how *Golak Nath* in 1967 studied Article 368 as an extension of legislative power under Part XI of the Indian Constitution. Though that construction was categorically overruled in *Kesavananda Bharati*, Article 368 from thereon began to be largely understood as the repository of constituent power. This might have been on account of the constitutional amendment leading to the inclusion of words 'constituent power' in the text of Article 368 to counter the judgment in *Golak Nath*. What is truly surprising is how easily these readings of Article 368 could go on to suggest the legislative nature of power or the constituent character of it, but comfortably ignored the very patent and hardly ambiguous amending power that reflected right through the provision. Part XX of the Indian Constitution talks about the amendment of the Constitution and the long title of Article 368 clearly says that Article 368 discusses the "power of Parliament to amend the Constitution and procedure therefore". What exactly I wonder, apart from a kind of unprincipled understanding, an irresponsible judgment and an overwhelming sense of adhocism would make one reach a conclusion like what Parliament and Judiciary reached in the early seventies? Until of course, they had something else in mind which they didn't share with us. Because without the Parliament telling us what constituent power is and what are its frontiers, nothing apart from our own conscience prevents us from reaching the conclusion, that the power to divide India, or to make it a Hindu state or even to segregate the Indians on caste is the same as the power of changing salaries of public officials. Similarly, what made the judiciary believe that Article 368, which had till now been used for constitutional amendments, could be at first, a legislative power¹⁰⁷ and then, a constituent power¹⁰⁸ but never an amending power? Did it actually believe that Parliament could invoke constituent power as is laid out in Article 368? If indeed it did, how did it think would 'basic structure doctrine' dictate the terms of this power? And if it didn't think so, given the fact that nothing prevented the Parliament from invoking constituent power, what peculiar circumstances compelled the court to read constituent power under Article 368? The answers to these questions may never be found as they themselves must have had in mind but I can suggest broad reasons for what inspired this significant phase of Indian politics.

1. The Promise of Constituent Power

It is my vehement argument that neither the judiciary nor the Parliament once understood in entirety, what could a constituent power mean yet both of them saw the promise which it could realise for them. And this is why, despite a lack of discussion on the meaning of constituent power, both the institutions

¹⁰⁷ SEERVAI, *supra* note 32, 11.

¹⁰⁸ The constituent nature of the power under Article 368 has been suggested in numerous cases including of course, *Kesavananda* judgment.

robustly facilitated its entry into the constitutional text. Not for anything else, but for their understanding that constituent power was an answer to the problems each faced at the time. To the Parliament, it would give the unbridled power to mould Constitution in the way it wished towards an inclusive social agenda; for the judiciary, it gave an opportunity to stabilize 'basic structure doctrine' on a higher plane, distinct from ordinary lawmaking. In saying that there were no limits on operation of Article 368 and yet subjecting it to the 'basic structure doctrine', the judiciary saw itself gaining a strategic leverage over Parliament. Since *Kesavananda* had achieved for Parliament what Parliament itself sought through the Twenty-fourth Amendment, there was not much which the Parliament could oppose of *Kesavananda*. Yet, it clearly understood the limits which such doctrine would cast on its autonomy in future. A review of the judgment was soon sought, the bench reconsidered the mandate of *Kesavananda*, and thanks largely to Nani Palkhivala's impassioned defense of the 'essential features', the doctrine emerged much stronger than it had when *Kesavananda's* verdict was out. Through a strange turn of events, first the overruling of *Golak Nath*, then the introduction of 'basic structure doctrine' itself and then the unexpected result of the review, the institutional dynamics in India had changed forever. Parliament saw itself bound by the doctrine, working constantly to find a way around it and judiciary saw the completion of a major strategic conquest. In two years from then, the Supreme Court once again considered the implications of the doctrine, in a case that famously involved the election of the then Prime Minister, Indira Gandhi. This case came to be known as the 'Elections Case'. Since then, the Parliament and the judiciary have debated endlessly on the propriety of the limits cast by 'basic structure doctrine'. And it would be only fair to say that the doctrine has been a zealous defender of Indian constitutionalism yet at the same time, it has been the principal reason for its many contradictions.

Most notable among these contradictions is the lack of conceptual clarity this doctrine brought to constituent power debate in the Indian Constitution. If we read the text of Article 368, we would not probably miss the presence of word 'constituent power'. Does it mean that Article 368 of the Indian Constitution legitimizes the use of constituent power? In the absence of any explanations so far, both the judiciary and Parliament seem to answer that question in affirmative. Yet, nowhere have they discussed how this has to be done, or when it would be necessitated? For the exercise of legislative power, they lay down procedures, draw State lists and Union lists, make it subject to the provisions of the Constitution yet for a power much more transformative in nature, they do not have any identifiable parameter for its practice. Perhaps, that is the true character of Constituent power – it does not need to confirm to any structure, norms or expectations. It is revolutionary and all-encompassing in its use. But this alone, cannot explain the ignorance Indian Constitution wields with respect to constituent power. The reason for this ignorance has to be found somewhere else. Both the judiciary and the Parliament in India, I argue, did not completely understand the nature and meaning of constituent power when they debated it in the early seventies. And the lack of direction in the Indian Constitution about constituent power is a direct bi-emergence of this ignorance. As a consequence hereof, though

'constituent power' is clearly present in the Indian Constitution, we do not yet know what its presence means for the Indian Constitution and what news it has for the future of constitutional change in India. Let me illustrate this ignorance, and the difficulty that is borne out of it, by focusing back on the working of 'basic structure doctrine'. Almost at the same time when Judiciary confirmed its endorsement of 'basic structure doctrine', it also confirmed, much more categorically, the constituent nature of the power under Article 368. What peculiar understanding did the judiciary have of 'constituent power' which made it believe that the highest of all power, the constituent power, the power through which constitutions come to exist and perish, would be particularly sensitive to an obscure doctrine of 'constitutional essentials'? What made it think that a power which, in all its sovereign wisdom, questions the place of Constitution itself, would be emotional about the federalism of the polity or secular nature of it? Was it a genuine hope or an abysmally low level of ignorance, accentuated in great measure by the pressing demands of inter-institutional dialogue? A probable combination of both, I argue, resulted in the endorsement of the presence of constituent power under Article 368. And though it did not raise any awkward questions then, it clearly does so now and in a manner that threatens the legitimacy of the 'basic structure doctrine'. Why do I say so?

The core of my argument is that constituent power relates to the principle of popular sovereignty and the exercise of such sovereign power at the times of Constitution-making influences future attempts at achieving transformative constitutional change. This is not to suggest however that any later day attempts at invoking the constituent power have to be confined within the limits of the Constitution. The constituent power does not correspond directly or exclusively to the Constitution, it corresponds to the polity as a whole and to the extent that polity is sought to be transformed through sovereign virtue, the Constitution can change without limits. The constituent power should not then be seen as a power that changes constitutions or repeals them but as an outlet to achieve major transformative changes in the polity as a whole. It is unlikely that each one of such transformations would imply a constitutional repeal or a popular uprising and it is quite possible that revolutionary changes to the existing polity take place without abandoning the Constitution and simply through an exercise of the constituent power which only changes a part of it. The logic of constituent power is not adequately grasped by focusing just at popular revolutions but by thinking of it as a means to achieve thoughtful and well-deliberated evolution from the past.¹⁰⁹ We have to move from an understanding which tells us that constituent power has some inherent connection with the Constitution and that it is invoked either to suspend it or to reframe it. The interaction of constituent power with the Constitution is only to the extent to which Constitution hides in itself the character of the polity. Though all of us already understand that Constitution reflects the nature of polity,

¹⁰⁹ See SARBANI SEN, *THE CONSTITUTION OF INDIA – POPULAR SOVEREIGNTY AND DEMOCRATIC TRANSFORMATIONS*, 5-23 (2007). For an extensive discussion on the means of invoking popular sovereignty see Sen's discussion of Jurgen Habermas's 'republican' and Bruce Ackerman's 'democratic' framework of popular sovereignty.

I make this point to emphasise a significant truth of political evolution. Most of the defining characteristics of a polity are found in a Constitution and thus major shifts in nature of the polity can be realized by changing the Constitution through the exercise of constituent power. But there are some evolving characteristics which may not be found in the Constitution or it is distinctly possible that the Constitution and the polity it represents may not have answers to some of our problems which are of a recent visage. Framing answers to such problems may require a new constitution, a major rethinking of values and practices enshrined in the Constitution and it is there again that a constituent power may be invoked.

It is therefore, I argue, necessary to understand constituent power as not bound by the Constitution *per se* but in doing so, we need not expect constituent power to steamroll the Constitution every time it is invoked.¹¹⁰ What consequences are brought through such exercise depend upon the distance that is sought to be covered through such exercise - the distance between the present (which we have inherited from past efforts of Constitution-building) and the future that we seek to secure for ourselves. What happens to the existing Constitution in such transformative moments depends, therefore, on the nature and implications of this journey traversing the past, present and the future of polity. It is truly possible that we may have major changes within the Constitution or outside it, we may have a constitution or we may not.¹¹¹ My argument is best reflected in the suggestion that to the extent we want to effect revolutionary changes in the Constitution, we are free to do so except that such revolutionary transition calls for a level of deliberative legitimacy that is achieved only through the constituent power. So if we are to transform the federal nature of the Indian polity, we could do it by exercising the constituent power.

2. The Naivety of the Indian Supreme Court

I will have time later to explain in brief what constituent power might look like in the Indian context but for now, I examine how 'basic structure doctrine' interacts with a traditional account of constituent power. How does 'basic structure doctrine' come to terms with this traditional account? We are unlikely to forget that after a great deal of discussion on the nature of Article 368 in the late sixties and the early seventies, the 'constituent' nature of it was affirmed first by the legislature and then by the judiciary. I attend to the misjudgment of both these great institutions

¹¹⁰ *Id.* at 25. Sarbani Sen understands Indian constitutional tradition to be best represented through the 'Ackermanian distinction' between normal democratic discourses and those that involve 'leader-citizen engagement' in a debate involving higher law principles. Such cases of higher lawmaking, even though happening within an institutionalised constitutional structure, can lead to transformative constitutional achievements.

¹¹¹ For a general discussion on the direction transformative politics might take, See BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION*, New Haven: Yale University Press, 1992. Also see by the same author, *WE, THE PEOPLE*, Volume I, 'Foundations' and Volume 2, 'Transformations', Cambridge: The Belknap Press of Harvard University Press, 1991.

and show how acutely ignorant both these institutions were of the contradictions that their reading could give birth to. I turn to judiciary first. If *Kesavananda* is to be read carefully and patiently, it says that there are no limitations on the exercise of Article 368 (which is a constituent power) yet it is subject to the 'basic structure doctrine'. On a basic level, it meant that the exercise of constituent power could not violate the basic features of the Indian Constitution and the judiciary would sit in judgment over any such exercise in future with its own list of what it thinks matters the most. There truly is a problem here. Even more so if an extraordinarily protracted litigation and an awfully long judgment takes you to a conclusion that challenges the basic assumptions of constitutional government. The need for and the practical appeal of 'basic structure review' is high on my mind but so is the theoretical soundness of the traditional account of constituent power. And it is truly difficult to reconcile both the theoretical and practical appeal in the *Kesavananda* judgment.

The problem with court's reasoning here is that it is seemingly ambivalent about the meaning of constituent power and too eager on the pragmatics of its judgment, all of it in an unintelligible manner. Because even on the most traditional accounts of constituent power, a host of features which judiciary counts as constituting the basic structure of the Indian Constitution buckle in the face of constituent power. For example, the federal nature of the Indian Constitution, secularism etc. In fact, constituent power exists to change features as the nature of federation or indirect democracy. *Kesavananda* seems ignorant of this fact of constitutional politics. Each one of the essential features, according to *Kesavananda*, could not be bypassed even through the constituent power. This argument which was largely agreed upon now by the courts before *Coelho* trembles on a fragile foundation.¹¹² Unsound as it is in itself, I argue that it soon became the principal reason behind many other complications that still seek redress to this day.

Chief among those was the inter-institutional conflict for supremacy that grew directly out of this judgment. Parliament might have had its own reasons not to acknowledge *Kesavananda* but the court's logic made the parliamentary disagreement look justified and to an extent, even a reasonable response an unreasonable proposal. What else was the Parliament to do if *Kesavananda* was to tell it that the courts from then on were to sit in judgment over even the exercise of the constituent power? That the highest power in a polity was subject to unqualified judicial scrutiny, that a court could question the collective wisdom of the polity was remarkably naïve, surreal and illegitimate. I understand that the

¹¹² See I.R. Coelho (dead) by L.Rs v. State of Tamil Nadu, AIR 2007 SC 861. See para 121 of the AIR judgment where in summing up the nature of amending power, the court said – "[T]he power of amending the Constitution is a species of the law making power, which is the genus". This suggests that Coelho held the view that Article 368 is not truly and essentially a 'constituent power'. Coelho is an exception to a long list of cases which have always held Article 368 to fall in the nature of constituent power. See Coelho at p 873 in para 55 where the court cites H.M Seervai to support its view that amending power was a derivative power and thus a power which derived its authority from the Constitution.

motivation behind doing something like this might have been fair but the casual methodology of its execution was self-defeating. It did not do anything to convince anyone or solve any problem decisively. I do not conclusively know if judiciary clearly intended this or it was an unintended consequence of its own ambivalence and misjudgment but whatever it was and whatever it has resulted into, the record can be set straight even now through the reconciliatory argument I suggest shortly.

3. The Misjudgment of the Indian Parliament and the Continuing Mystery of Constituent Power

Moving next to the Parliament, I suggest that there was nothing wrong with the suggestion that Article 368 contained in it the constituent power of Indian polity apart from the fact that a closer examination of the provisions of Article 368 and the uses to which it has been put into before and after 1973 would take us to a completely different conclusion about the nature of power therein. A conclusion which suggests that Article 368 dealt with the provisions of amendment under the Indian Constitution and it was largely used for bringing amendments except for a few occasions where it sought to introduce drastic constitutional changes under the guise of amendment. The amending power under Article 368 could not have been legitimately made a constituent power overnight to ride over a judicial verdict. The birth of a constituent power in a polity in such a knee-jerk manner is unheard of in constitutional democracies. Like I said, there is indeed no prohibition in making Article 368 a repository of constituent power but such an effort is expected to carry with it the stamp of deliberative legitimacy which such a power demands. The constitutional amendment which did so, however, had neither deliberative legitimacy nor any substantive legitimacy for the ends it sought. It neither spoke of any procedure of its exercise apart from the one which was employed earlier to bring about amendments. The Parliament thought that the mere inclusion of the word 'constituent' would give it unchecked license over the content and design of the Constitution. But it was seriously mistaken. It confused the inclusion of phrase 'constituent power' as reflecting the actual residence of constituent power under Article 368. And therefore why, mere inclusion of the word 'constituent' did not achieve for Parliament anything apart from giving it one possible semantic argument to agitate before the court.

In its confusion, the Parliament missed the opportunity to facilitate the actual entry of constituent power under Article 368. After the Twenty-fourth Amendment or in the amendment itself, Parliament could have set possible guidelines about the nature and authority of constituent power, its limits and the way in which it was to be invoked demarking it from the then-existing amending power and legislative power. Parliament missed this opportunity. The entire problem with parliamentary handling of this issue around that time is that it did not, even once, give the respect which constituent power demands as the highest level of constitutional politics. As the highest kind of politics, distinctive from the flow of normal politics, invocation of constituent power is expected to involve extensive deliberation, have higher benchmarks, detailed procedures which cannot be circumvented and most of all, it should have a legitimacy which comes only through

some sort of popular engagement. All this is to ensure that constituent power indeed remains at the highest tier of politics, distinguishable from the regular breed of lawmaking and is resorted to only in the most exceptional circumstances. Constituent power cannot anywhere be seen as a regular practice of constitutional politics; it is a rare breed and exists on a higher plane and is used in rare moments of sovereign exercise. Parliamentary understanding of the constituent power nearly relegated it to the normal level of politics where it could be exercised as freely and frequently as amendments used to be brought. And if the institutional narrative is considered, constituent power has been invoked nearly seventy times since the Twenty-fourth Amendment. Though it is debatable what kind of higher lawmaking or politics have we engaged in at each one of these seventy occasions. On occasions, we have invoked constituent power to re-letter sub-clauses in articles of the Constitution.¹¹³ Two things are reflected through this practice – first, how dissimilar conceptions of transformative politics we hold in relation to other countries and second, how nostalgia and idleness are central to our demands for seizing control of this transformative process. Truly, nothing else but for our dissimilar conceptions and a sense of creeping joblessness could even try to explain our popular engagement in issues noted above.

The other explanation, obviously, is that we have been fooled big time. Since this is an explanation I am more inclined towards, I argue that mere inclusion of word 'constituent power' under Article 368 does not actually make it a repository of such power and that the Parliament rushed its entry into Article 368 without ever trying to understand what is involved in invoking constituent power. This understanding about the nature and practice of constituent power is still absent from the present-day politics in India and to the extent such absence continues, this institutional tomfoolery would continue unabated. The entire mischief of which we have been meek witnesses began when Parliament was first lured by the promise of constituent power after *Golak Nath*. It tried to counter the decision in *Golak Nath* through the insertion of the phrase 'constituent power'. This was, however, without any discussion about what such power implied in the Indian context. Parliamentary understanding on this issue was soon countered with judicial craft when court suggested that constituent power was subject to the qualification of 'basic structure doctrine'. The end result of this inter-institutional dialogue looked like a mess and the philosophical foundations of 'basic structure doctrine' and constituent power have been upturned many times over since then. Both these ideas, from then on, have trembled uncertainly on their weak foundations, their future always a puzzling mystery.

¹¹³ See M.V. PYLEE, CONSTITUTIONAL AMENDMENTS IN INDIA 314 (2006). The constituent power that is present in the text of Article 368 has been invoked through The Constitution (Seventy-Fifth Amendment) Act, 1993 for re-lettering sub-clauses in Article 323B of the Constitution., through Sixtieth Amendment, 1988 for revising of tax ceilings from Rs 250 to Rs 2500 under Article 276 of the Indian Constitution (See p 264) and through Forty-First Amendment, 1976 for revising of retirement age for members of State Public Service Commissions from 60 to 62 under Article 276 (See p 177 -178).

What I do here then may be understood as an attempt to reconcile their conflicting existence and tie some loose ends to structure an understanding which could accommodate both the argument of ‘basic structure review’ and the constituent power. I believe that Indian polity needs both the institutions of ‘basic structure review’ as well as the constituent power not while they are contradicting each other but when they can be reconciled and suitably placed in the existing political framework. I suggest that Indian Constitution does not have a mechanism for invoking constituent power and despite its differently worded text, Article 368 is only a measure of the amending power. This is on account of the nature and method of its practice in the past even after ‘constituent power’ was added to its text. The ends to which Article 368 have been employed since then clearly suggests that it is still largely used as an amending power. If this be so, it is amending power, and not constituent power that manifests itself under Article 368. I do not deny the possibility of locating constituent power somewhere in the Constitution but I honestly do not know where it could be located at present. The task of locating constituent power has to be done with parallel commitment towards finding means and limits within which it may be invoked and the feasible modes of popular engagement in these times. But before I frame the broad outline of such constituent power, let us first understand the effect of my argument about the presence of amending power under Article 368 on the practice of ‘basic structure review’.

4. The Chain of Deliberative Legitimacy and the Ladder of Political Progress

My argument is that there are three powers that aid the processes of political development. They are – legislative power, amending power and constituent power. Legislative power in the Indian context is located in Part XI of the Indian Constitution, amending power is present under Article 368 while we are still debating where the constituent power could be located. It is possible that both the amending power as well as constituent power may be located within the premise of Article 368 in future but certainly not in its present form. We have this problem of identification only because constituent power has never been systematically discussed in India and no agreement reached on what it means. As and when we converge on a principled understanding of constituent power in the Indian Constitution, we will also have to agree upon the mechanism of its operation. The constituent power, by its very nature, is all-encompassing and the substantive ends sought through such sovereign power cannot be put to scrutiny though it may be seen if correct procedure has been followed in invoking it. The amending power may be subject to the ‘basic structure review’ as has been done in the past and the legislative power would be tempered through judicial review under Article 13 of the Indian Constitution. The constituent power, under this construction, would not be subservient to the ‘essential features’ of the Indian Constitution and could even go on to change them. ‘Basic structure review’ would thus be a mechanism to check only the seemingly unbridled reach of constitutional amendments. Though there are no explicit limits on the exercise of amending power yet constitutional amendments so brought would have to be careful enough not to infringe upon or violate the ‘basic structure’ of the Indian Constitution. In their

doing so, the particular constitutional amendments could be struck down by the courts. My argument addresses two fallacies that are patent in the existing scheme of 'basic structure review'. First, it projected itself as one-size-fits-all solution for constitutional gate-keeping which is precisely not the case since I argue that 'basic structure review' could only bind the exercise of amending power. And second, my suggestion avoids a possible face-off between constituent power and 'basic structure review' by not pitting them against each other. This illustrates and in fact preserves the higher nature of constitutional politics that is so often associated with the exercise of constituent power.

More importantly, it also affirms and reinforces the philosophical foundations of popular sovereignty. It sends an important message across to the courts – that they (courts) exist to guard the people and the Constitution against legislative indiscretion when the people do not govern themselves in times of normal politics. However, they are not there to check the people themselves when people engage in higher level of constitutional politics. Such level of constitutional politics is not supervised by judgment of the courts but by the deliberative will of the people themselves. The power to scrutinize legislative action accrues to the judiciary only on account of the rules inscribed in the Constitution at the times of Constitution-making. And the courts are empowered to judge the validity of legislative and executive action by the rules, keeping within the boundaries of normal politics. When the Constitution itself is questioned, in moments of higher politics, the court does not have any say in the outcome that may follow. We, the people validate judicial role through the Constitution, same as we do for legislatures and executive, and whenever we come together and decide to abandon the existing constitutional system through our exercise of constituent power, we are free to do so. As I have said earlier, this does not mean that every time we invoke the constituent power, we abandon constitutions or we initiate revolutionary struggles for power. Since some parts of the Constitution may be more important than the others while others much more important than the rest, constituent power is invoked to effect any change that may be brought to the most important features of the Constitution. The more significant a change may be, more likely is it that the procedure for affecting it would be more arduous, difficult and demand a higher level of deliberative legitimacy.

Seen in this way, while legislative enactments may be passed with a simple majority in the Parliament, constitutional amendments have to be endorsed by a two-thirds majority of those present and voting and such majority should not be less than the simple majority of the house. It is evident that the procedure becomes more tenuous as more substantive changes are sought to be effected. On the same token, a constituent power, as and when it is invoked, will face an even higher set of benchmarks, a demanding majority and a higher level of legitimacy through direct or indirect means of popular engagement. What should also be evident is the fact that the level of judicial scrutiny on these developments progressively declines as we move from the legislative power to constituent power. This is an important point to keep in mind – that the more deliberated a development is, less intensely is it going to be scrutinized. The level of scrutiny employed at all these moments of legislative enactments or constitutional amendments is only an

extra measure of later precaution to offset the level of deliberation that may have been involved in these processes at the beginning. And to act as a safety valve to detect any infirmity that flows out from the lack of deliberative legitimacy. Since deliberative legitimacy increases from the exercise of legislative power to constituent power, judicial scrutiny decreases simultaneously and almost becomes nil for the exercise of constituent power. My argument recognizes this truth about the progressive decline in scrutiny with rise in deliberative legitimacy, an understanding of which is not evident in the present-day Indian politics where even the exercise of constituent power is subject to 'basic structure doctrine'. One could say that the courts are aware that Article 368 is not a repository of constituent power but only of amending power and since amending power is subject to the doctrine, the present practice is justified. But this is a difficult argument to sustain, at least for the courts because I wonder what made them affirm the constituent nature of Article 368 each time the question came to them. Hopefully, this clears the air about how such powers may be understood in the Indian Constitution and what level of judicial scrutiny attached to them. The other significant task, obviously, is to sketch the framework within which constituent power could be invoked in India. This is a theme I briefly discuss in the next part of this essay.

If seen as I have seen it above, an amendment under Art 368 results in a different (not necessarily new) framework from the existing one (because for all practical purposes, we have an improved upon or altered Constitution) but since the process is overseen by the Constitution, the outcome as well as the means qualify as something less than revolutionary, hence the usage. A normal legal evolution, as I see it, would be the enactment, development, modification of laws under the existing or the altered constitutional scheme i.e. such an evolution did exist prior to and would continue to exist after the constitutional amendment *but* only under the Constitution. After an amendment, we more or less have the same constitutional scheme with a few alterations in the provisions relating to the subject that formed the core of amendment. If constitutional amendment comes in the way of such evolution, the evolutionary process would have to mould itself accordingly to the new amended charter. It then, is clearly seen to be subservient to such amending exercise. The parameters for such an evolution would necessarily be decided by the Constitution, which itself becomes the subject of change in constitutional amendments. Further, this amending exercise draws its legitimacy from the text of Art 368 of the Constitution. It would be safe to presume then that the amending power is subservient to the Constitution. (As it is borne out of and draws its legitimacy from the constitutional text). The amending exercise cannot 'logically' be then assumed to be over and above the Constitution.

Basing upon this, I propose a framework where both the normal evolutionary exercise (herein as legislative exercise) as well as the amending exercise are subservient to the constitutional framework. The difference is only in the modes of their respective operations and their differing effects. The amending power can be exercised to alter the Constitution and therefore affects the legislative exercise *as* constitutional framework dictates the broad guidelines for the legislative exercise. Since amending clauses are the Constitution's only hope of adaptation

with the changed circumstances (among the not-so-revolutionary, radical options), amending clauses like Article 368 can practically affect all that which comes under the constitutional structure. But this is only so long as the amending exercise pays due diligence to the constitutional parameters. The moment it attempts to disregard these limitations, it no longer remains a legitimate exercise because an amending exercise under the Constitution can validly exist only with the limitations imposed upon itself by the Constitution. This construction gives us good reason to place these powers on a hierarchical setup wherein Constitution looms large over both the legislative as well as well amending power. The amending power, thanks to its capability to affect the Constitution (albeit in a limited manner) finds itself in a superior position to the legislative power. The legislative power can affect neither the amending power nor the Constitution and hence is placed at the lowest rung of the set up. The concluding setup, though analogously arrived, is clear and consistent with a principled understanding of the constitutional charter. After the amendment, the normal legal evolution would continue unabated till a point comes when a constitutional amendment is again necessitated resulting in a different setup under which the evolutionary cycle would continue likewise. Tribe's reference to a point of discontinuity stands a bit justified here. What could happen in cases where constitutional change imply complete disregard to constitutional parameters as usual, qualifies as a different, though not wholly unconnected, question altogether. What remains clear is the fact that such an arrangement is not plausibly possible under the existing constitutional set up.

5. Higher Lawmaking and The Authority of Constituent Power

The divergence reached through the exercise of these powers is unsurprising in as much as all the three modes are conceptually aimed at achieving different results. Those who believe that such a divergence is just an essential by-emergence of the constitutional working should ponder on the seemingly endless diversity that could be attained through the exercise of any of these powers. Diversity is not the moot point here; what is at issue is the seeming ease with which such diversity could be attained. Could diversity traverse to imbibe and shadow in itself the logically implied limitations on the respective spheres of power? Before allying to any firm conclusions, we should necessarily analyse the respective places of these powers in the scheme of constitutional design. The exercise would reveal in time that certain powers cannot be legibly recognized as deriving their legitimate authority from the constitutional text while the others can most easily be. To put across my point in a simpler manner, I ask if these powers could be exercised with or without the constitutional endorsement. In case they could, could they be still be looked upon as legitimate exercises? The answer to this is simple – There are certain powers that emanate from the constitutional text and as such, a constitutional repeal would naturally withdraw any sense of legitimacy associated with the exercise of that power. A power that came into being through the Constitution cannot possibly be expected to survive without the constitutional endorsement. At the same time, there are powers in exercise of which, the constitutional document itself took shape. If seen and scrutinized closely,

one would realize that constitutional legitimacy¹¹⁴ developed through exercise of these powers. Constituent power, I argue, is precisely such power and constitutional legitimacy is shaped from its exercise in times of Constitution-making.

On the other hand, legislative power and amending power under the Constitution owe their legitimate authority to the constitutional scheme of powers. Both legislative power and amending power exist to work under a constitution and to achieve goals set for them by the Constitution i.e. for legislative power, to make laws keeping within the limits set by the Constitution and for amending power, to amend the Constitution.¹¹⁵ My attempt, through this essay, is to press a call for first, understanding and then maintaining this distinction between the powers. I maintain that constituent power lends legitimacy to the existence (birth) of the Constitution and the Constitutional text from then on, gives birth to legislative power and amending power. Both these powers, though capable of being understood independently on their own, do not mean anything without the Constitution. Without the Constitution, amend what? And amend how? Similarly, laws can be made without the Constitution but who makes them and how? And what all areas do lawmakers make law on and with what precise objective in mind? Some of these questions are reasonably answered only through the Constitution. Clearly then, these two powers of lawmaking and amendment are subservient to the Constitutional text and they exist because the Constitution exists. In the same way, the Constitution comes into existence by the exercise of constituent power and constitutional authority cannot escape from its origins in the power of sovereign to constitute. I further this argument to mean that the constituent power neither comes nor goes with the birth of the Constitution; it is perpetually at large restrained only by the limits it sets for itself through the modes it designs. Sometimes, such limits may be inscribed in the Constitution itself insofar as it may lay down ways and means to re-invoke this power. Modern constitutionalism has always involved itself, inconclusively though, with the extent to which such modes actually limit this constituent power. This tension can be decisively eased, in my view, if efforts are taken to study the legitimacy of constituent power.

The legitimacy of constituent power is premised on the indisputably higher nature of collective authority that is wielded when 'people' as a whole engage themselves with political decision-making. This power is the power to constitute afresh, re-organise thoroughly and to reconsider the direction which constitutional form itself might take in future. In exercise of this power lies the realization of the 'of the people, by the people, for the people' sentiment of political organisation. The activity of political organisation and the consequences that flow from it are all judged on how effectively they imbibe and correspond to this participatory sentiment. This participatory sentiment hides in it a great measure of deliberative legitimacy and popular consensus, two important starting points for the activity of political organisation. But the limit to such kind of political

¹¹⁴ Constitutional legitimacy is used to convey the legitimacy flowing from the Constitution.

¹¹⁵ See Part XI of the Constitution of India to understand how the extent of the exercise of legislative power is subject to the other provisions of the Constitution.

organisation which calls for a major redrawing of working limits of the polity comes naturally when thinking of the exceptional nature of its incidence. Largely because of its scale and the colossal burdens it casts on the existing institutional structure, the difficulty in catching collective opinion and the impracticability of the idea in ideologically plural societies, constituent power remains as a measure of exceptional choice in exceptional circumstances. In all other times, the lack of deliberative legitimacy is sought to be compensated by progressively-rigorous mechanisms of scrutiny. The limits on constituent power are thus not drawn by any principled understanding of the concept but by a practical view of its functioning. In fact, to the extent of its exceptionality, the logical appeal of constituent power lies precisely in the possibility of avoiding its frequent invocation. So even though there are no theoretical limits, there remains a certain rank of complexity which lays the rules for its practice. In constitutional politics, such unwritten rules often are of much greater use and importance than conventional modes of organizing power.

6. 'Unwritten' Constitutionalism and the Limits of Constitutive Authority

What do the unwritten rules suggest about the limits of constituent power? I view them as suggesting that the limits of constituent power are not entirely drawn but certainly influenced by previous exercises of collective engagement of a similar nature. That is to say that if India were to invoke constituent power at time 'X', then its further invocation of constituent power at time 'Y' cannot be prevented through such an invocation. Though the exercise at 'X' can certainly lay down the rules and procedure under supervision of which such a measure may be repeated at 'Y'. These rules which may be laid in the Constitution or somewhere else where the people put it, should not ideally be bypassed or circumvented under any circumstance. There is an argument that such mechanism of constituent power invocation would sow the seeds of its own destruction by making the procedure unreasonably rigid and inflexible. I truly have no answer to that. I am unconvinced first, to buy the possibility of unreasonable inflexibility and second, to totally understand the reason for anyone doing so. Because whatever they do and however they do it does not only bind the future generations but also the present of which they are a part. I think the level of rigidity or flexibility inherent in such mechanisms is greatly tempered by the political environment and experience of the polity and in fact, is demanded by them. There is a possibility that in course of time such mechanisms might outlive their meaningful existence, like in times when electoral colleges are no more, or when political organisation is carried out on a different basis of assessing voter's choice or when electoral processes are significantly reformed. These times would obviously call for a systematic reconsideration of existing mechanisms of invoking constituent power. There is not much we achieve or contribute by discussing what may happen anyway and what we have least bit of idea about and much better indeed to say that the practice of constituent power by the rules already laid down should be internalized in political practice. These rules can obviously come up for revision the next time such constituent power is invoked and the inflexibility or rigidity of the rules is an impediment only till the next time of its invocation.

This much about the procedural limits of exercising constituent power should also make us think about the more interesting substantive limits that may operate on such power. Could there be any substantive limits on the ends that may be sought through the exercise of constituent power? Practically speaking, none which I see. By its very nature as the one-of-its-kind sovereign exercise of collective authority, constituent power is not limited from seeking any range of ends that it may want. This is because nothing from the past or present exists with the level of legitimate authority to challenge an act like the invocation of constituent power. Anything which has similar bearings of collective authority is also rendered small in front of a revised collective mandate. This bit should have been obvious to many just as I asked the question. But looking deeper we may realise that there exists something with as much if not more legitimate authority as the constituent power – the means through which we invoke and execute the constituent power. Our belief in the promise of constituent power should also make us believe in the equal legitimacy of the means required to sustain it. The rights of political participation, free speech, expression and liberty are crucial for the sheltering the exercise of constituent power. Any belief in constituent power is therefore, hollow without a proper understanding of how that power is realized in a polity through these rights. Collective voice remains the fundamental basis of the ‘constituent power’ idea and any such exercise which corrodes this foundation would also end up weakening the legitimacy of constituent power itself. To assert the legitimacy of constituent power is to strongly reinforce the argument for protection of rights which form the basis of such power. Political rights of speech and participation, therefore I argue, form the essential core or the ‘basic structure’ of a framework of politics that values constituent power. These core freedoms cannot be infringed for reasons of state as their infringement would mark the beginning of the end for the future of politics.

I mean if we can carve out a whole new doctrine out of implied limitations, then we should also be doing something even more obvious, though in an implied manner i.e. to put our weight behind constituent power. The logic of implied limitations tells us not one thing but many. These things, despite being logically appealing and obvious, are not discoverable in the written Constitution; they are unwritten rules to be found in the unwritten Constitution. The unwritten Constitution lurks behind in the shadow of the written one throwing light on what the written Constitution means and not just appears to say. It forges a connection between the text and the principle and its practice in constitutional government. The unwritten Constitution weaves a body of thought around the written Constitution in a way that constitutional practice swings between the two without disturbing the principles underlying the Constitution. In a way, the unwritten Constitution makes the written one more effective, flexible and meaningful. The unwritten Constitution is a mirror image of written Constitution except for the gaps which it fills and the threads it weaves between the distinct parts of the written parchment. We can view the written Constitution as an uneasy cluster of aspirations, interests, principles, obligations, rights, rules that we authorize through Constitution-making.¹¹⁶ Unwritten Constitution is all about making sense of these

¹¹⁶ TRIBE, *supra* note 74, 22. Laurence Tribe dismisses the view that the Constitution is a mere assortment of rules and standards and emphasises its unity through certain core ideals

rules - to make intra-constitutional connections evident, to read between the lines, to understand the text in context – keeping within the bounds set by the core constitutional principles. Understood as such, the unwritten Constitution works to enforce the written Constitution.

'Doctrine of implied limitations', in my view, emerges directly from unwritten constitutionalism. It establishes itself on a principled understanding of the Constitution and its meaningful place and purpose in the political framework. This principled understanding tells us clearly that these implied limitations on amending power work not against the forces of constitutional progress but against the winds of political chaos and disorder. They are there to guard against the possibility of an illegitimate transition and to facilitate orderly change within the constitutional parameters. I suggest that the possibility of an illegitimate transition is greatly diminished in times when we invoke the constituent power playing by the rules for its invocation. These implied limitations fade away in the moment of such unmistakably explicit political practice. And the implied superiority of the constituent power to reconsider principles and to redesign the political framework is clearly borne out in such times. The natural conclusion I seek to draw from our discussion of such moments of higher politics is that the superiority of the constituent power and its vitality to a sound political framework is as implied, if not more, as the implied limitations on the amending power. And that the legitimacy of implied amending limitations or the 'basic structure doctrine' stands to be greatly accentuated if they understand their own limitations and appreciate the natural superiority of constituent power over their existence. Implied limitations on the amending power exist for a limited purpose and it is critical that we understand that such purpose does not involve checking future exercises of constituent power. Therefore thus, constituent power is an implied exception to the 'basic structure doctrine' and the political rights of Constitution-making an exception to the overarching reach of constituent power.

In clear terms, it means that 'basic structure doctrine' does not operate when constituent power is invoked. In addition, an exercise of constituent power cannot trample upon the political rights of speech and expression since these rights lay the foundation of its exercise. Any attempt at trampling these rights, however well-authorised it may be, is illegitimate and critically questions the legitimacy of the exercise of constituent power. This limitation is borne out by the higher nature of constituent power itself as I argue that the higher nature of constituent power can be preserved and sustained only if we realise the higher nature of rights that form the basis of such exercise and view it as a limitation on the exercise of constituent power. While saying this, I must disclaim that this limitation works only against infringement and not modification or alteration of the ways in which such rights be enforced. It is

which outlines the manner of judging the appropriateness of constitutional change. Tribe's most recent book is appropriately titled 'THE INVISIBLE CONSTITUTION' (2008). Though I have not yet read it, the name adequately reveals the idea of debate.

worth reiterating that I discussed the rights of speech and expression here as they clearly correspond to political practice and my doing so does not mean that any more rights do not relate to political practice as they do. Any other right which is shown to lay the basis of political activity would also fall in the same category of substantive limitations on constituent power. In the next part, I try to understand how amending power locates itself in the framework of political development I have outlined above. Specifically, I discuss the issues of deliberative legitimacy and institutional roles in endorsing the implied limitations on the power of constitutional amendments and ask if it is the change, or the methodology thereof, which forms the basis of such limitations, whatever they may be. The other task which I set for myself is to introduce a few themes that seem to endorse my conclusions about the nature of amending power and constituent power. Basing upon my discussion of these themes, I seek to evaluate the consequence which such understanding brings to the review of constitutional amendments by the Indian judiciary. This discussion hopes to build the groundwork standing upon which we might locate the nature and scope of such review. In particular, this discussion hopes to form the basis of a greater discussion in the next part about the kind of review Indian judiciary might have in mind after the decisions in *Nagaraj* and *Coelho*.

C. RETHINKING 'TRANSITION' IN LEGAL SYSTEMS – IS CHANGE REALLY AN ISSUE?

“The solidity of the constitutional world rests on the possibility of other constitutional worlds, or revised versions of the present one, being brought into being in its place.”

– William Harris¹¹⁷

Coming as a prologue to the debate about the nature and extent of judicial review, this part revisits the conceptual design of the framework within which transition may be understood and reviewed in legal systems. The first theme in the next part takes us to the important question of what, exactly, is at issue when we think of transition in legal systems? Is it the change, the methodology thereof, or its after-effects or a possible combination of all? How exactly to articulate our principal reason for resistance to constitutional change? How perceptive is my argument to this resistance and in what ways does it shape my response about the level of review that be employed against constitutional amendments? I explore these questions over the next few pages but before I really get to answers, a few key strings of my thesis may be reiterated. Together they say-Constituent power, conceptually understood, stands on a superior plane over amending power which in turn stands over the legislative power in the Indian Constitution. This designs a hierarchised structure of the three powers which sanction political development in Indian polity. Their superiority in relation to each other is on account of the greater deliberative legitimacy they enjoy as a direct result of the progressively rigid procedures that attend their exercise. The greater the deliberation involved in such mechanisms, the

¹¹⁷ See WILLIAM HARRIS, *THE INTERPRETABLE CONSTITUTION*, 165-66 (1993).

lesser level of judicial scrutiny follows their exercise. In concert they suggest that it is the level of legitimacy conveyed through such modes of political development that effectively lays the design of their review. For our debate, it means that legitimacy counts crucially in moments of political development.

1. The Debate Over Norms of Legitimacy

If seen as such, it is not really the change which is at issue; it is rather the level of legitimacy which such change carries with itself. And therefore then, what lies at the centre of the debate is what kind of change is brought through what means of political development. Judicial scrutiny is employed to check if the ends of political development (regular law-making, amending or transformative) correspond suitably with the means through which such development is realized (legislative, amending and constituent powers). On this note, we must make a distinction between amendments that employ the procedure under Article 368 and amend the Indian Constitution and those that use Article 368 to bring about a more or less a complete revolution of the polity by the sovereign. Both of them, despite being couched under Article 368 now, are not the same. They are significantly different from each other in terms of legitimacy they carry with themselves. As Walter Murphy says, "some change is not the same as any change".¹¹⁸ The distinction between 'some change' and 'any change' is best understood in light of my argument about the legitimacy they hold. Murphy believes that a change must be evaluated in terms of norms governing "the political desirability, the procedural propriety, or the substantive legitimacy of any specific proposal for change".¹¹⁹ For him, these three considerations represent the legitimacy of transition sought through these means. The three considerations, while being important do not seem comprehensively sufficient and I am keen on another significant enquiry i.e. the effect an amendment would have on the future of the constitutional life and its subjects. This enquiry relating to constitutional stability needs to be interwoven with the enquiry into substantive legitimacy.¹²⁰ Thus, according to me, political desirability, procedural propriety, its effect on the other parts of the Constitution (associated burdens) or substantive legitimacy should provide us a necessary understanding of the full implications of any proposed change. The burdens here

¹¹⁸ MURPHY, *supra* note 79, 23; *see also* KELBLEY, *supra* note 77, 23, 1512. Kelbley describes Murphy's position as quite similar to that of Rawls on the validity of constitutional change. To illustrate this similarity, Kelbley brings to fore Murphy's discussion of Edmund Burke in MERLIN'S MEMORY. Burke's reflections on the revolution in France in the late eighteenth century provides the backdrop. Burke is understood to have held that 'some change' was not only a desirable but an essential means of constitutional preservation.

¹¹⁹ *Id.*

¹²⁰ Though it is arguable that systemic stability is the only consideration that shapes substantive legitimacy. Murphy must have had it in his mind but he did not acknowledge the significance which such stability holds in moments of political transition. I do it on his behalf.

are to be necessarily evaluated on the first three yardsticks.¹²¹ Concerns of political desirability and substantive legitimacy are well conveyed to the sovereign in times when we exercise constituent power and thus there need not be a review of such exercise on these benchmarks. This is not to mean that these benchmarks are not important but only that they would have already been considered at length through some sort of popular engagement in the process. The review of constituent power on grounds of procedural propriety remains and it has been discussed earlier. The enquiry into the systemic stability becomes more pressing in case of constitutional amendments since such amendments are constrained from effecting major transformations that may threaten the existing system. In case of constituent power, the absence of constraints on its exercise, other than the obligation not to attack rights of political activity, brings the bar of systemic stability much lower than it is in case of amendments. In amendments, the change has to adjust itself to the Constitution; in the exercise of constituent power, there is no system which the power has to confirm to. Systemic stability is a natural thing to consider if we are alive to the limited mandate of amendments in effecting constitutional change.

Suppose, for example, to quote Murphy's example in Merlin's Memory, what if the people decide to get rid of constitutional democracy in return for a "charismatic leader's promise of prosperity in a time of a severe economic crisis".¹²² The people can very well agree to such a transformation but they certainly cannot do so within the four walls of the existing Constitution. Murphy should be credited for asking: "May 'We the people' who accepted constitutional democracy, democratically or constitutionally authorize such a political transmutation?"¹²³ I think, as does Murphy, that they cannot, and for a variety of reasons, all of which, according to me, point to the necessity for substantive limits on the exercise of amending power. This only means that such a change cannot be effected through the means reflected in Article 368 of the Indian Constitution and such a change can be very well reached through the exercise of constituent power. William Harris, in his *The Interpretable Constitution*, presents a commendable analysis - a double-stranded view of constitutional change. Harris revisits the same debate about the difference between the two positions in the American context and I seem to be supported by him when he says - Changes through Article V have to confirm to

¹²¹ By quoting burdens, I intend to discuss the effect a particular amendment has on the stability of the document. In wake of a proposed amendment, courts would do well to explore the question - if the Constitution would be able to survive the tumultuous aftereffects of the amendment. For there is a logical presumption that an amendment would continue to exist within the pre-existing Constitution and in no case, result in an altogether new document. The philosophy of the proposed amendment should be consistent to that of the Constitution and if not, should at least restrain itself from damaging the structural framework of the Constitution. This consideration is immensely important as without its qualification, an amendment would no longer be an amendment but turn into a systemic overhaul of the nation's ideals and values. An amendment, if not sensitive to systemic stability, could claim to have drawn substantive constitutional legitimacy in dismantling the Constitution itself.

¹²² MURPHY, *supra* note 79, 23.

¹²³ MURPHY, *supra* note 79, 23, 175.

the “wholeness” of the Constitution; on the other hand, the whole people, in virtue of their ultimate sovereignty, may suspend the system by which it was previously represented. He puts the distinction crisply when he says –

“The verification of the sovereign Constitution maker is precisely in its capacity to remake what it has made, when it acts as sovereign, on a view of its whole enterprise—and only then. But in the practical Article V amending process, when the machinery of government is acting as the agent of the people in its sovereign capacity, the notion of limits not only makes sense; it is necessary.”¹²⁴

History of the human civilization stands witness to the fact that extraordinary measures are employed to deal with extraordinary situations and I forcefully submit that a constitutional amendment is certainly not an extraordinary measure for extraordinary change. It is an ordinary procedure employed in the Indian Constitution to deal with and ride over the difficulties that present themselves in the normal course of constitutional governance. What measures are to be employed to deal with extraordinary situations is a different question altogether and I have discussed how it may be answered. But for the time being, Parliament might take consolation in the belief that future would never ever present Constitution with a crisis where Parliament would be called upon to repeal a Constitution in the same manner as it changes the salaries of public officials.¹²⁵ The practical justifications for the restrictive connotation imparted by the judiciary to the expression ‘amend’ in Article 368 are manifold but I choose one for discussion. To what extent may we see two-thirds majority in the Parliament as an authoritative statement of majority’s view on critical issues of utmost consequence. It is a fact that the two-thirds majority in Parliament does not even constitute the simple majority of the voting population (segment that can think on issues) in the country. Much less than that, it represents around one-fourth of the national mandate.¹²⁶ However, this is an old disclaimer to democratic organization and not much can be gained by reiterating it over and over again. Though this construction, if valid,

¹²⁴ HARRIS, *supra* note 117, 46, 193.

¹²⁵ As far as the issue of repealing of Constitution is concerned, a national referendum seems a distinctly possible candidate for discussion. The contours of this framework require an intensive debate within and outside the legal academy and between the political stakeholders themselves. This would leave us an opportunity to question some of our unexamined beliefs and much precious time to reorganize and restructure a political fabric that is left behind. It would give us reason foremost to study the uneasy relationship between the amending power and constituent power.

¹²⁶ In a country where 50-60 percent of the voting population votes, a two-thirds majority hardly accounts for even one-fourth of the national view. It follows from here that no enterprise as fundamental as repealing of the Constitution that will have a definitive bearing on the lives of citizens should be undertaken with a narrow support base of one-fourth of the population. This being an old critique of the first past *the post* electoral system, run-offs could possibly offset the lack of legitimacy inherent in such a narrow base. However, there are limits on political agency which foreclose this possibility.

certainly points towards the desirability of some sort of national consensus through a referendum or regional conventions to effect as radical a change as repealing or abrogation of the Constitution. There is a wide difference between the public perception and the political perception of the same issue and when issues as vital as these are concerned, it would be constitutionally prudent and democratically justifiable to let public perception judge on its own. The fact that legislatures and Parliaments are representative of popular faith is justified to an extent but not beyond which it tries to usurp the popular mandate.¹²⁷ We should realize that implied limitations were not aimed at preventing constitutional change but to facilitate them within the constitutional parameters without subversion of constitutional identity. Subversion and change are not the same thing in the same sense and have far different implications in their respective operations. What could a change mean without the Constitution? Could a change survive itself on its own without the constitutional endorsement?

‘Implied Limitation Doctrine’ sought to ensure that if change had to come, it came in an orderly fashion. Amendments are aimed at facilitating the processes and provisions envisaged under that particular Constitution and if seen as such, amending power is clearly subservient to the constitutional framework. Subservience justified, a Constitution cannot be amended in a manner to abrogate itself of the essential features that form the constitutional identity. In the same manner as a body doesn’t mean anything without a soul, Constitution does not mean anything without its identity. An amendment clause is put in the Constitution for its own benefit. It is not the other way round – that, a Constitution is at the disposal of amending power of the parliament. An amendment is there for the Constitution *but* the Constitution is *not* there for the amending power. It is beyond the competence of any branch of the state to amend the Constitution in a manner that its identity is violated. The branches of the government, their respective fields of operation and the limitations therein are all creatures of the Constitution and the Constitution, its master. It would be an assault on public reason to even entertain possibilities of a master being enslaved by its creature. To amend with indifference to the constitutional essentials would be tantamount to enslavement of the constitutional spirit.¹²⁸ However despite this unavoidable dependence on

¹²⁷ See “Ireland rejects EU reform treaty”, BBC News Online Portal, 13 June 2008 at <http://news.bbc.co.uk/2/hi/europe/7453560.stm>. (Last visited on September 12, 2008) Also see “French say firm ‘No’ to EU treaty”, BBC News Online Portal, 30 May, 2005 at http://news.bbc.co.uk/2/hi/europ_e/4592243.stm. (Last visited on April 15, 2008). Recent examples have revealed in Ireland and France that their national population has rejected some proposals through referendum process that were already passed by the respective national Parliaments. These proposals had to be dropped midway on account of them being unacceptable to the sovereign as an entity. The point that I intend to drive home through these well-known experiences is the fact that there is a considerable and justifiable difference in public perception and perception of political branches. Referendum, both in France and Ireland, came up in relation to the EU Constitution. French rejected the EU Constitution in 2005 whereas Irish citizenry voted against the proposed Lisbon Reform Treaty in 2008.

¹²⁸ See Laurence H. Tribe, Constitution as Point of View 3-4 (Apr. 1981) (unpublished manuscript on file with Harvard Law School Library) as cited in TRIBE, *supra* note 74, 440.

what is essential and what is not,¹²⁹ Tribe feels that ‘the Constitution’—wherever we draw its boundaries and however we read its contents—is not simply a mirror, nor is it an empty vessel whose users may pour into it whatever they will.¹³⁰ The Constitution tells us something, and what it says—although necessarily read through judicial lenses—must be the touchstone for evaluating the substantive appropriateness of any proposed amendment.¹³¹ In short, remembering that it is an amendment to the Constitution we are considering may be almost as important as remembering that it is a Constitution we are, in the end, amending.¹³² As Forrest Gump would have understood, amending clauses convert the Constitution into a box of chocolates. We never really know what we are going to find in it, though with some understanding of what would definitely not be along with the chocolates in the box – amendments which breach the core of the Constitution.

2. The ‘Means and Ends’ of Constitutional Development

With some grounding in the dilemmas of Forrest Gump, comes the very important issue of normative constraints on the political practice that entails a detailed discussion of the ‘means and ends debate’. Since it is the kind of change which is at issue and not the change itself, a critical discussion of the ends to

¹²⁹ The question that whether Indian Constitution reflects a socio-economic mandate or not is a question which, if discussed, would greatly determine the substantive limits on amending power. If answered in affirmative, a substantive erosion of certain socio-economic connotative constituents would be unwarranted until and unless there is an empirically compelling argument that suggests that either these mandates have already been achieved or these mandates do not, in any way, in the present public view, represent the overarching considerations for the Constitution. How do we go about the task of identifying and affirming certain constitutional essentials that fix these limits is what needs a thorough consideration. Do certain essentials, in face of their realization or otherwise, outlive their purposive utility and hence, become redundant in the approaching constitutional scheme? All these questions necessarily need to be answered to arrive at a coherent understanding of legitimate constitutional change.

¹³⁰ *Id.*

¹³¹ *Id.*, Also see generally, Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking The Amendment Process*, 97 Harv. L. Rev. 386 (1983). In this article Professor Dellinger debates the traditional view that judicial abstention from amendment process is demanded by the text of Article V of the American Constitution and suggests that judicial absence is subverses the possibility of legitimate constitutional change. He then goes on to structure a model of Judicial Review in the case of amendments. The nondeferential model of judicial review proposed hereby is countered by Laurence Tribe’s defense of a restrained judicial role. Both Dellinger and Tribe engaged in a debate over the place of judicial role in constitutional amendments through the pages of Ninety-seventh volume of Harvard Law Review in 1983.

¹³² The similarity with *McCulloch v Maryland*, 17 U.S. 316 (1819) can hardly be missed. In this case, Chief Justice Marshall’s famous remark on the distinctive character of constitutional interpretation that it is important to understand that after all “it is a constitution we are expounding” was hailed by Justice Felix Frankfurter as “the single most important utterance in the literature of constitutional law – most important because most comprehensive and most comprehending”. See Felix Frankfurter, *John Marshall and the Judicial Function*, 69 Harv. L. Rev. 217, 219 (1955).

which amendments are employed becomes indispensable. To add to it, the fact that procedural propriety happens to be one of the yardsticks on which amendments are chastised, the means of effecting amendments cannot also be ignored altogether. The debate owes its existence to varied understanding of the legitimacy of an amendment as drawn from the means employed at times, and from the viewpoint of the ends they are employed to at others. Simply put, for a great variety of reasons, a cross section of the academy believes that procedural propriety as dictated by the Constitution should be the only yardstick on which amendments might be judged. While there is always the other side which believes it alone cannot be the sole criterion in the process of judgment and it has to be complemented by an examination of the principal objectives behind the amendment as well. How do we extricate ourselves out this fix of means and ends of constitutional change? How does my understanding of amending power respond to this predicament?

If asked to take sides, I would accord priority to latter. I would contend that there is no such thing as the right means without the right ends. Processes are right or wrong, legitimate or illegitimate, depending upon the ends to which they are employed.¹³³ However, that is not to say that the legitimacy of constitutional change is only on account of its substantive mandate and not at all due to the procedural rigor that attends such change. The legitimacy of constitutional change is in fact, on account of the critical contribution which both procedure and substantive ends bring to its practice and one cannot sustain the amendment without the other. However, there are limits to the ends sought through the amendment. These limits are not born out of thin air – they are limits which an upright understanding of the amending process brings to its exercise. The amending process, if properly understood in terms of what it is and what is it for, places limits on the kind of ends that could be reached using the amending power. These limits are implicit but they are an important reminder nevertheless of the limited role which amending processes have in the project of political development. These limits, far from being unaffected by the procedure, I have earlier said, are in fact determined by the level of legitimacy which such procedure reflects. The nature of the amending power as well as the level of deliberative legitimacy which the amending process imbibes in itself jointly determine the level of scrutiny that follows constitutional amendments. The level of scrutiny employed in turn, determines in practice, what is allowed to be changed and what is not through an amendment. So it is not that the limits on amending power are sketched without any reference to the procedure of amendment. Both the nature and procedure of amendments are critically important to truly understand what these limits may be. My thesis suggests that the nature of amendment and its procedure under Article 368 of the Indian Constitution identifies a kind of amendment which cannot be effected through the amending exercise – amendments that violate the ‘basic structure’ of the Indian Constitution.

¹³³ I am not considering the classic debate between legality and legitimacy. I may be excused for the time being if I say I am for both a legal and legitimate transition. Yet, the functional nature of constitutional development and its peculiar role in different legal systems must not be discarded while we are at the task of evaluating the change.

What this means is the simple fact that amendments are not conceptualized as tools which permit such radical transformation. They are meant only for those cases where the 'basic structure' of the Constitution is not infringed. Seen as such, procedural propriety is a legitimizing factor only for a limited class of amendments, those which do not violate 'basic structure'. Those which do are no amendments at all. It might be something else altogether and it does not help to evaluate its procedural propriety. The procedure under Article 368 is meant for amendments and amendments are not tools of radical transformation. So any attempt at achieving a radical constitutional transformation fails to qualify as an amendment in the first stage itself. In case of an amendment under Article 368, where though the procedural guidelines may have been followed, its employment towards an extra-constitutional end tarnishes the entire amending process and procedural propriety alone cannot do enough to salvage it from being identified as unconstitutional. Therefore, when I said earlier that there is no such thing as the right means without the right ends, I meant to convey this logic – that an amendment which is indifferent to its own limitations is no amendment at all. There is no vigor in the argument that constitutional means (procedure set down in the Constitution) can be employed to effect unconstitutional or extra-constitutional ends, legitimacy of which would then be derived from the examination whether proper procedure was followed. I vehemently believe that as long as we are amending the Constitution, the means are right only to the extent that they are geared towards achieving the constitutionally permissible ends. Under Article 368, there is no procedure for subverting the Constitution; there is only a procedure for an amendment. But what could such right ends look like? And more importantly who resolves and with reference to what, the questions of what is permissible or impermissible for constitutional amendments to embrace in India?

If seen as such, 'right ends' would include in its ambit those means that indeed strengthen the Constitutional structure as well as those that do not but at least abstain from weakening it (permissible limits).¹³⁴ This observation would be examined in greater detail in the ensuing discussion. The means are necessarily an important consideration but never the sufficient consideration to gauge the vires of an amendment. A sufficient argument in favour or against an amendment would necessarily emerge only after a sincere discussion of the parameters listed above i.e., political desirability, procedural propriety and substantive legitimacy. It is the balance of this examination that should weigh in the minds of the legislatures as well as the courts while deciding on the substantive limits on amending power. For Murphy, a constitutional democracy could permit a radical transformation, but only to a "system that would enlarge reason's empire or strengthen its reign".¹³⁵ Though Murphy, and

¹³⁴ KELBLEY, *supra* note 77, 22, 1514. (For a short but illuminating account of Stephen Macedo's views on substantive limits to amending function.) In effect, Macedo argues that certain parts of the Constitution are more fundamental than other provisions, and an amendment that repealed fundamental constitutional freedoms would be unintelligible and revolting from the perspective of the Constitution as a whole.

¹³⁵ For critical analysis of Murphy's position, see John R. Vile, *The Case Against Implicit Limits on the Constitutional Amending Process*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT*, 191, 196-201 (Sanford Levinson ed., 1995).

understandably so, refrains from answering how it may happen.¹³⁶ My conception is somewhat different here and as I see it, though an amendment ideally should strengthen the constitutional essentials, the fact that it does not would do little in proving its unconstitutionality until and unless the amendment itself violates the constitutional identity. There is a difference between strengthening the constitutional commitment and eroding the parchment of those commitments and it is only the latter that is instrumental in negating an amendment. A legitimate amending function would vacillate between the two ends, without touching upon the latter as it marks the end of the band to which permissible limits might be stretched.

3. The Inevitability of Judicial Role

On the other hand, John Vile, in launching a strong attack on the judgment of the courts in ascertaining what exactly would enlarge reason's empire, says that – “To empower the courts not simply to review the procedures whereby amendments were adopted but also to void amendments on the basis of their substantive content would surely threaten the notion of a government founded on the consent of the governed.”¹³⁷ In responding to Viles' attempt at perfecting an opposition to substantive review by the courts, I would only say that the review process, either it be of procedure or of substantive content, only seeks to ensure that the ‘consent of the governed’ indeed prevails and nothing else.¹³⁸ And there certainly are better ways for the government of committing itself to the consent of the governed i.e. by going to the governed themselves in case it wants to sidestep such substantive limits. The review process of amendments is a safety valve to ensure that the government does not quote public consent in supporting its bartering away of the most cherished and enduring public values.¹³⁹ To contemplate a court reading its own value-judgment that falls neither towards the

¹³⁶ MURPHY, *supra* note 79, 23. It must truly be difficult to determine what constitutes reason first, and second, what would strengthen its empire.

¹³⁷ VILE, *supra* note 135, 52.

¹³⁸ See M.P. Singh, *Ashoka Thakur v. Union of India: A Divided Verdict On An Undivided Social Justice Measure*, 1 NUJS L. REV. 193, 197 (2008) (Professor Singh understands precisely the indispensable role that the courts have in defending the Constitution and says–

“Courts may be and are often projected as anti-democratic institution and any number of examples may be pressed into service to prove that point. Even on the issue of reservations, several examples may be given to prove that the courts could have done better by not entering into the controversy. But if all controversies could have been sorted out by vote, the courts would have been unnecessary”.

This constitutes, in my view, a commendable response to John Vile's skepticism.)

¹³⁹ See Pratap Bhanu Mehta, *The Inner Conflict of Constitutionalism – Judicial Review and the ‘Basic Structure’* in INDIA'S LIVING CONSTITUTION, 179, 186 (Hasan, Sridharan & Sudarshan, eds. 2002). Another old but interesting perspective is offered by Pratap Mehta as he says that the role of the courts is seen as legitimate largely as a consequence of political inactivity. His reasoning that the exercise of judicial power is increasingly being seen not as a threat to majoritarian rule but as a response to its ineffectiveness is highly persuasive. He goes on to say, “We are resorting to judiciaries basically because we cannot help but do so”.

Constitution nor towards the governed would be to stretch our vile imagination a bit too far. The court is faced with the task of evaluating the proposed amendments on standard benchmarks of constitutionalism. That evaluation, like any other, involves a judgment on part of the judges and much of what gets seen as judicial overreach in these matters is no such thing.

Ideally speaking, the courts may be seen as a hindrance only to the abuse of such consent. Thus, there may be rare cases where courts might indeed have faltered but rarities provide us with neither enough credence nor reason to question a general role of the courts in gauging the constitutional propriety of amendments. At least till the time when the government seeks the more legitimate option of invoking the constituent power. Having said that, the question of how the court channels its discretion in such cases continues to be important to our debate. It is a question that begs our attention since a great deal of anxiety with judicial role in constitutional gate-keeping of this kind revolves around the threats borne out through institutional indiscretion on part of the judiciary. The court has a specific role to determine what constitutes 'basic structure' in India and then to employ its understanding in preventing its infringement through the amending process. In the next part, we go back to two cases at the Supreme Court of India that involved questions of 'basic structure review' and how it has to be reorganised within a framework which respects the centrality of the legislative role in securing constitutional directives of social justice and equality. *Nagaraj*¹⁴⁰ and *Coelho*¹⁴¹ came in quick succession to each other and together they lay the basis on which 'basic structure review' might be reorganised in Indian politics. In what follows, I analyse the ways in which these cases propose a restructuring of the review process and explore the level of compatibility my thesis holds with respect to the vision of *Nagaraj* and *Coelho*.

IV. A 'NEW DEAL' FOR BASIC STRUCTURE: THE VISION OF *NAGARAJ* AND *COELHO*

The judgments in *Nagaraj* and *Coelho* came in 2006 and 2007 respectively. Both of them are flag bearers of an old tradition of contest centered around the 'basic structure doctrine'. This contest is well-recorded in our political narrative and has significantly steered the governing outlook towards the major public policy issues of our times such as reservations, land reforms, religion etc. However, what seems lacking from this well-liked narrative is an understanding of how closely the 'doctrine of basic features' is susceptible to scheming use by the political process. The wide variety of circumstance and reasons under which 'basic structure' has purportedly come to defend the Indian Constitution really makes one wonder if there truly is so much we need to be anxious of and guard

¹⁴⁰ See *M. Nagaraj and Ors v. Union of India and Ors.*; (2006) 8 SCC 212, AIR 2007 SC 71, MANU/SC/4560/2006. In referring to specific discussion from these two cases, I use the Manupatra citation.

¹⁴¹ *I.R. Coelho (Dead) By LRs v. State of Tamil Nadu and Ors*; 2007 (1) SCALE 197, AIR 2007 SC 861, MANU/SC/0595/2007. I use the Manupatra citation for reference.

against. While this is a general apprehension I have, I understand it to be shared by many others shaped in great measure by the indiscriminate use the doctrine has been put to over the last two decades. If we look closely, we would realise that the 'basic structure doctrine' has had a continuous presence in nearly all significant debates over government policy through this period and the wholesale manner of its invocation at every strategic step of daily politics is indeed a matter of examination, if not foreboding.

A. THE SPECIAL CHARACTER OF BASIC STRUCTURE DOCTRINE

It does not raise eyebrows anymore when 'basic structure' of the Indian Constitution is claimed to have been breached for such cries are fairly common in the current political discourse. Such moral ambivalence, with due respect to the motivation behind it, remains deeply regrettable. There are specific reasons why this is so and I discuss them in brief here. First, the 'doctrine of basic features' was born out of an apprehension of constitutional collapse, an anxiety which is exceptional in the life of a Constitution. Even by the most stretched account, it normally does not recur on a monthly basis.¹⁴² We can disagree amongst ourselves about the many problems which each one of us have with the regular breed of Indian politics and the threat it poses to the Indian Constitution but if we must be sincere, we must also agree that we are not living under a constant threat of constitutional collapse. This doctrine arose out of special circumstances and its evolution since its birth should have been in the spirit of its singular role. Quite noticeably, this has not been the case. The doctrine has been used like any other legal principle unresponsive to any restraint that its special stature demands from itself. The indifference is so palpable that almost every major state effort towards realising the constitutional directives under Part III and IV and especially those relating to reservation in educational institutions, freedom of religion, special status of minority institutions, introduction of a common civil code etc. have been mired in claims of structural breach. And the fact that pursuit of constitutional mandate breaches the 'basic structure' says something about both the pursuit as well as our loose understanding of the doctrine. Quite unlike its special role, the 'doctrine of basic features' is an integral part of everyman's litigation strategy at the Supreme Court.¹⁴³ As a result of which the aspiration for such breach is higher than ever

¹⁴² This is when I assume that even after counting for all exceptions, at least one case is agitated before the Supreme Court on the grounds of the breach of Basic Structure every month. I am certain though that the real figures with the Registrar of the Supreme Court would reveal a far more appalling frequency of such alleged breach.

¹⁴³ See M.P. Singh, *Ashoka Thakur v. Union of India: A Divided Verdict On An Undivided Social Justice Measure*, I: 2, NUJS LAW REVIEW, 193, 200 (2008) (One of the earliest proponents of judicial restraint in matters relating to Basic Structure has been Professor M.P. Singh. It has been his consistent view that - "In principle courts are not expected to take up policy matters but even if they do so they do it in a very narrowly tailored exceptional situation where the policy is clearly against the Constitution or its core values..." Professor Singh's view reflects an uneasiness with the disturbing consequences

before. Since claims relating to the breach of 'basic structure' have important consequences hanging in the balance of their decision, the doctrine often adopts serious ideological overtones and draws itself to the centre of political debates. Attributable to this wide presence is the possibility of a scheming use I warned of earlier in this part.

As I understand it, the 'basic structure doctrine' was meant for special use in times when constitutional amendments threatened the fundamental structure of the Constitution. The special stature anticipates a careful use of the doctrine so as to ensure that its unique place is preserved. Vital as the doctrine was, even more important was to exercise some restraint and to ensure its meaningful use. As we debate today, it becomes clear that this has not been the case. 'Basic structure doctrine' has been taken recourse to over and over again with little concern about its restrained use. The doctrine has been extensively used in affecting policy decisions and its indifferent use is the root cause of the resentment that has brewed against it. Over time, it has been used less for constitutional gate-keeping in times of crisis and more for decisively influencing the course which state policy might take in future. Its broad presence in major debates on appropriateness of state policy over the last two decades has seen it decide the fate of many such policies. For some, it may be a distinct way of safeguarding the Constitution but for many like me who are also interested in long-term policy implications of such practice, it signifies an ill-advised, insensitive and short-sighted attempt. This is because its repeated use is going to impair the doctrine itself and it is likely that the idea of constitutional essentialism might not get the respect it deserves from the political institutions. It is even more likely that the doctrine might lose its special character and such institutions might start trying to find ways of bypassing its moral authority. This is something which we should understand in time. My apprehension has a simple rationale behind it. It tells us that the 'basic structure doctrine' is indeed special, it is a powerful tool we have for constitutional preservation but its special character as well as its authority is severely threatened in a culture of unresponsive use.

B. THE BACKGROUND OF NAGARAJ AND COELHO

My sense is that the doctrine never correctly understood its own limitations inside and outside the Constitution and such misconstruction was further facilitated by its extensive unexamined use in daily political space. Within the boundaries set by the Constitution, the doctrine had a very important role but the

that unrestrained judicial behavior has brought to the centre of reservation debates. I distinctly remember him telling me some months back that much of the confusion and anxiety related to the 'basic structure doctrine' is because of the unaccountable way it has been practiced by the courts. If I extend Professor Singh's argument, there is a possibility that the more courts entertain challenges to reservation on vague grounds, the more is probability of error and confusion. Before engaging itself in such political debates, the courts must assess the costs that may be incurred as a result of this confusion).

key role also demanded a careful use of the doctrine. The limitations of the doctrine outside the Constitution have been discussed in earlier parts where I seek out a broader role for constituent power beyond the constitutional text. I argue that it is possible that the extensive use might have been occasioned by circumstances of politics but it certainly found a legitimate cover in the loose understanding of the doctrine. Judicial understanding and articulation of the doctrine was incomplete, imprecise and indistinct without a proper realization of the limits of its moral authority. Such ambiguity over the exact nature and extent of limits imposed by the 'basic structure' provided a cover hiding behind which the doctrine was used to settle important political debates. Confusion always prevailed and a consensus eluded in most judicial debates about the category of state action that could be examined for structural breach. Even when some sense of conclusion seemed near, incongruity of opinion on the scope of 'basic structure' and the tests that could be employed to detect a breach prevented a consistent understanding of the doctrinal function and process. Nearly thirty years after the doctrine took roots in the Indian political landscape, the confusion was more palpable and the inter-branch strain¹⁴⁴ more menacing than it was ever before. Today, *Nagaraj* and *Coelho* have become significant moments in the life of Indian Constitution since they together represent a sincere attempt at resolving some of this long-standing confusion. *Nagaraj* arose by way of challenges to a series of constitutional amendments that sought to facilitate reservations in matters of public employment¹⁴⁵ while *Coelho* emerged in response to the doubts surrounding the effect of 'basic structure doctrine' on the nature of protection granted by the Ninth Schedule.¹⁴⁶ Both these decisions complement each other in structuring a matter-of-fact assessment of the doctrine and a method of its application. Though both the decisions came little apart from each other, I read them together in this part and discuss what these decisions hold for the future of 'basic structure doctrine'. My specific leaning is on the direction which these decisions give to present debates on the nature and amplitude of the protection that the doctrine affords to essential features of the Constitution and how such protection squares off the protection under Ninth Schedule. Three questions which are integral to these debates are – (1) What constitutes the 'basic structure' of the Indian

¹⁴⁴ Meaning hereby the interaction between the judicial and legislative institutions in India.

¹⁴⁵ See (2006) 8 SCC 212, AIR 2007 SC 7, MANU/SC/4560/2006. I refer to the Manupatra citation MANU/SC/4560/2006 where the opening note in *Nagaraj*'s judgment by Honourable Justice S.H. Kapadia says – "The width and amplitude of the right to equal opportunity in public employment, in the context of reservation, broadly falls for consideration in these writ petitions under Article 32 of the Constitution".

¹⁴⁶ See 2007(1) SCALE 197, 2007 AIR (SC) 86, MANU/SC/0595/2007. I refer to Manupatra citation MANU/SC/0595/2007 where the opening note in *Coelho*'s judgment by Justice Y.K. Sabharwal reads -

"In these matters we are confronted with a very important yet not very easy task of determining the nature and character of protection provided by Article 31-B of the Constitution of India, 1950 (for short, the 'Constitution') to the laws added to the Ninth Schedule by amendments made after 24th April, 1973."

Keshavananda's judgment was out on this day.

Constitution? (2) How do we understand if a law or an amendment violates the Basic Structure? (3) What possible consequences might invocation of the doctrine bring for the constitutional amendment and the laws protected through it? These three enquiries are crucially interlinked and an understanding of one without the other is hardly obliging.

C. THE MEANING OF NAGARAJ'S ENQUIRY – CONSTITUTIONAL FORM VS CONSTITUTIONAL PRINCIPLE

I begin with the first enquiry to understand the sense in which 'basic structure doctrine' interacts with fundamental rights under the Indian Constitution. Part III of the Indian Constitution holds several rights which have been understood as fundamental to the meaningful existence of its subjects.¹⁴⁷ These rights include amongst others Right to Equality before law, Right to Equality of Opportunity in matters of public employment, Right to Protection of life and personal liberty, Right against Exploitation, Right to Freedom of Religion etc. The first question is in fact an attempt to gauge if all of these rights which are present in Part III constitute the 'basic structure' in the logic that violation of any of these provisions also leads to the violation of 'basic structure' of the Indian Constitution. When delving deeper in this enquiry, we must recognize that the Constitution is committed to principles, and the state is committed to normative realisation of these principles. These principles might manifest themselves in the Constitution in various forms in or over various articles. Specific provisions are present in the Constitution to enforce the differing mandates emerging out of the same principle like let us say equality. The differing mandates have a common thread running through all of them as they are united by their common commitment to an overarching principle which constitutes the identity of these related provisions and which is the 'basic feature' of the Constitution. An important principle might be reflected in the constitutional text at various points, in its various parts, its fallouts might be experienced through various schedules to the Constitution. The task before those who analyse claims of breach is then to discover the common identity of inter-related constitutional provisions. This necessarily brings us to the form and substance paradigm – where the Constitution-makers committed us to a principle in substance and its pursuit, its practice could be effected through various channels of which articles in the Constitution are mere parts. Text of the various articles of the Constitution represent in them the different forms through which the substance (constitutional principle like equality) could be realized.

If this be true, it is quite possible that the state might change its opinion on how best to achieve these principled ends or how best to pursue a constitutional principle. Certain ways might be legitimized through successful practice while the others might give way to better options in face of their not-so-successful practice.

¹⁴⁷ In fact, Part III extends from Article 12 to Article 35 of the Indian Constitution and between these, only provisions from Article 14 to Article 32 guarantee FRs. Part III is considered synonymous with FRs as a result of this broad presence.

Furthermore, the ways state employs to realize these principles might change with time, divergent public opinion and the concomitant shift in state policy. The state is certainly the best judge to decide for itself the best way to realize any constitutional end. This is due to its inherent superior capability to assess and employ its resources in achieving the state interests which are in turn, reflected in the Indian Constitution. What *Nagaraj* meant was indeed this – That, the state is best placed to find a way for following a constitutional agenda. It certainly does not have the choice to decide if it would follow it or not; but once it commits itself to a constitutional principle, it is the state's prerogative, its own judgment and discretion which should decisively count in finding a way for its practice. In the immediate context of *Nagaraj*, what it means is that the 'basic structure doctrine' prevents only the violation of the core principle (identity) at the heart of these inter-related articles. The doctrine, nowhere, in any way, discounts a shift from one way to the other in realising a constitutional principle. These provisions are enabling in nature in as much as they facilitate realization of that core constitutional principle. However, the enabling nature of the these provisions do not make such provisions fundamental in themselves since a shift does not mean that the principle cannot be operationalised or enabled anymore. It can certainly be enabled, though through a different route. People will continue to have an enforceable Right to Equality even without a FR to catch-up rule or consequential seniority since catching up is not the fundamental thesis of Indian Constitution. It is in fact, the principle of equality which is a fundamental feature here. The state, in designing its policies, should ensure that this vital principle of equality is not trampled upon. Down here, I explore in some detail what my reading of *Nagaraj* means and how it works for constitutional governance.

The state is only limited to the extent that its choice of one way over the other should not violate the central commitment of equality. This is the logical end in the debate. As and when the state violates the core of equality, the citizen has a remedy – to petition the courts of the land to strike down the infringing state action on the grounds of 'basic structure', if it comes through an amendment. Let it be amply clear, for once and all, that enabling provisions, varying enforcement mechanisms and state opinion on backwardness and adequate representation cannot be, under any circumstance, recognized as the fundamental structure of the Constitution. By their very nature, they are bound to change, with disquieting regularity with geographies of time, location and circumstance. On the other hand, fundamental tenets of the Constitution are foundational – they are at the core of its existence. They are central to the Constitution's functioning. Constitution retains its existence on these foundations as they preserve the Constitution in its essence.¹⁴⁸ This is not to mark out possibilities of structural adjustment in the

¹⁴⁸ See Virendra Kumar, *Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance*, 49:3, JOURNAL OF THE INDIAN LAW INSTITUTE, 365, 385 (2007) (Professor Virendra Kumar believes that there is a difference between the FRs and the values that structure such FRs. He views the values to have an overarching influence and says that it is totally possible to hold that violation of FRs in certain situations, may not infringe the foundational value in their backdrop. This is a point which I have been emphasizing in my analysis as well).

foundations with time. Foundations might shift, fundamental values might assume a different meaning with time but they will remain to be integral to constitutional core of principles, the core on which the Constitution would be legitimately sustained. That is to say that they would retain their existential nature. And even as we contemplate such fundamental structural shift, it would be a rarity, an extraordinary development in constitutional practice when such moments confront us. It is difficult to contemplate such change in the familiar framework of constitutional development - one which is shaped by constitutional amendments through the exercise of amending power. This reflects my consistent and unflinching belief that amendments have a conceptually-limited role in constitutional development and it is limited by the existing Constitution.¹⁴⁹

1. No Fundamental Right to 'Catch-Up Rule' - Constitutional Essentialism vs Political Adhocism

What is important here is to realize that interim mechanisms and adhoc policies of the state geared towards achieving a larger, fundamental standard of equality cannot by itself become fundamental. Such an understanding would create more problems than it would ever promise to solve. It is imperative to appreciate the extensive differences, both philosophical and practical, that lie at the formulation of fundamental constitutional values and context-ridden, adhoc policy structures of the state. The difference is that of constitutional essentialism and political adhocism. Fundamental would only be the principle and not the way these principles are sought to be realised. Such mechanisms which facilitate 'equality of opportunity in public employment' guarantees of Article 16 of the Indian Constitution are adhoc arrangements. They could be suitably modified with time or even be abandoned for a more convenient and efficient reservation policy, largely dependent on the state's own understanding of the best way to pursue constitutional ends. And such understanding will change as it is governed by a host of factors, both within and outside the constitutional domain. And this is precisely why I believe that there is no fundamentally enforceable right to consequential seniority or to any catch-up rule under the Indian Constitution. It is not fundamental in the sense that the state might decide to opt for a policy 'A' over policy 'B' which supported consequential seniority. As the *Nagaraj* bench believed – These practices were derived from service jurisprudence and are not

¹⁴⁹See ¶19 of *Nagaraj's supra* note 145, 4576. *Nagaraj* said –

“There are, beyond the words of particular provisions, systematic principles underlying and connecting the provisions of the Constitution. These principles give coherence to the Constitution and make it an organic whole. These principles are part of Constitutional law even if they are not expressly stated in the form of rules. An instance is the principle of reasonableness which connects Articles 14, 19 and 21. Some of these principles may be so important and fundamental, as to qualify as 'essential features' or part of the 'basic structure' of the Constitution, that is to say, they are not open to amendment. It is only by linking provisions to such overarching principles that one would be able to distinguish essential from less essential features of the Constitution.”

constitutional principles. Practices such as consequential seniority or catch-up rule cannot be equated with axioms like secularism, federalism etc.¹⁵⁰ The Bench forcefully asserted that obliteration or insertion of these concepts do not change 'Equality Code' under the Indian Constitution and therefore is not violative of the 'basic structure' of the Constitution. Some flexibility in matters relating to state policy is in fact desirable since there is no fundamental relationship of such policy with the Constitution. State's policy and practice on these lines is clearly based on its own assessment of backwardness, representation and efficiency. Reasonably then, there is no centrality of consequential seniority to the Indian Constitution. These are mere enabling provisions, one of the many ways of realising the constitutionally-empowered mandate of equality. They illustrate different means to reach the common end of equality and such means cannot then be reasonably termed as fundamental. Only the end, I reiterate, could be termed as fundamental to the Constitution.

2. The 'Identity' & 'Width' Test: Assessing the Effect of an Amendment

Having reached an understanding that it is the core principle stretching over constitutional provisions that is of essence in determining the '*basic structure*' of the Constitution, we should perhaps ask – Do we have an understanding on how all might this core be threatened? *Nagaraj's* answer to this question is now known as the 'Width Test' – the test to ascertain the 'width' of effect any amendment might have on the Constitution, and obliquely on the principles which are at its core. The width of effect would in turn decide the legitimate scope [width] of the amending powers. *Nagaraj's* was an inclusive approach that would enquire if the core of the Constitution or its basic structure has been affected [violated] by the impugned amendment. And in reaching a conclusion, it would liberally consider the widest effects of the amendment. The 'Width Test' would contemplate all probable ramifications of the amendment to see if the 'basic structure' of the Constitution is at threat, under any construction, through this amendment. The 'Width Test' is not as much a test as it is a guidance under which the courts would have to consider the widest ramifications of an amendment while judging its validity. It is only when the width of the amendment or its widest ramifications are in harmony with the 'basic structure' of the Constitution that the amendment would be upheld. Even a distant possibility of breach through a liberal construction would suffice to strike it down. *Nagaraj's* view on this is reflective of my own views in this regard. They together count as saying –

1. Each one of these Constitutional provisions that are categorized as rights under Part III have intrinsic value content. Many of these rights are part of a mechanism geared towards realising a common constitutional principle. For example, Article 14, 15 and 16 of the Indian Constitution are committed to the common principle of equality. Reasonably then, if an amendment is to be

¹⁵⁰ See ¶ 67, *Id.*

struck down under the 'basic structure' formulation, the central principle of these inter-related provisions should be at threat. A mere violation of one of these enabling provisions would not be of much consequence under the Doctrine as long as such violation does not infringe upon the central thesis of equality. Redress for marginal encroachment cannot be found under the 'basic structure doctrine'.¹⁵¹

2. In considering the effect of an amendment on the constitutional core, it is important to keep in mind the widest ramifications of the amendment. It is imperative to contemplate and consider every way in which the 'basic structure' of the Constitution might be threatened through the impugned amendment. The amendment would stand as constitutional only after a satisfactory understanding as to its effect on the constitutional core is reached by the courts. To sustain itself, the amendment should not violate such core in the widest interpretation given to it.

D. THE 'RIGHTS TEST' IN COELHO – “NOT THE FORM BUT THE CONSEQUENCE”

Before long, *Coelho* followed *Nagaraj*. In *Coelho*, the Supreme Court confronted itself with two issues - the first relating to determination of the nature and character of the protection extended by Article 31-B of the Indian Constitution and the other concerning the development of a sustainable test to identify the limits of constitutional change. The first issue was largely borne out of confusion prevailing since *Kesavananda's* judgment in 1973. In the political backdrop of Emergency, *Kesavananda's* formulation acquired immense significance and was the subject of keen study in a string of cases – from *Raj Narain*, *Minerva Mills* to *Waman Rao*, *S.R. Bommai* and others throughout the last quarter of the court's history in the twentieth century. Owing to elementary nature of the issues at hand and the complexity of the debate, *Coelho* inherited a jurisprudence of confusion, repetitive at most times and self-contradictory now and then. *Coelho* was seen as the court's last chance of extricating itself out of this confusion. In *Coelho*, the court had an opportunity to assert itself in clear terms. The second issue was no less significant. How well the court would have steered itself out of the confusion would have largely depended on how well the court could develop and rationalize a test for 'basic Structure'.¹⁵² Both issues were intrinsically related to the fate and

¹⁵¹ Some of these provisions are enabling in nature in as much as they have a common content, in the way that these provisions are committed to realising a common constitutional principle like Equality or Reasonableness. However, the converse does not apply. That is to say we do not have as many separate core values under Part III as there are different rights enshrined in that part.

¹⁵² See AIR 1975 SC 2299. The working test which gave some sort of guidance to analyse claims of structural breach was given by Chief Justice Y.V. Chandrachud in *Indira Gandhi v Rajnarain* or *Elections Case* as it is popularly known. The gist of his proposal suggested that for

legitimacy of the Indian Constitution. And thus, *Coelho* became important even before the judgment was out.

On the first issue, the court's response was categorical. In examining the nature of immunity extended through Article 31-B, the court decided that its effect was to confer validity on already enacted laws which would be otherwise void for violating one or more of the FRs conferred by Part III (FRs). Situating this proposition in the context of 'basic structure doctrine', the court pondered if Parliament, exercising constituent power¹⁵³ cannot enact an amendment destroying the 'essential features' of the Constitution, could the same Parliament, in exercise of its constituent power be allowed to produce the same result by protecting laws, enacted in the exercise of legislative power? It was an important question that made sense. If attainment of an objective is precluded even under the exercise of the highest authority, the same objective cannot be legitimately reached under the exercise of an inferior authority for it would amount to a fraud on the Constitution. *Coelho* reasoned on the same lines. It said –

1. A partial encroachment of rights guaranteed under Part III would not in itself amount to the violation of 'basic structure' and it is only the violation of 'basic structure' that is precluded from the immunity extended through Article 31-B together with the Ninth Schedule. That is to say, a constitutional amendment, supported by Article 31-B cannot extend its protective umbrella to a legislation that violates 'basic structure' of the Constitution. In simpler terms, a constitutional amendment which in substance, violates 'basic structure' of the Indian Constitution does not receive immunity from judicial review under Article 31-B.

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

¹⁵³ Constituent Power was the court's own invocation. In asking the same question, I would replace 'constituent power' with 'amending power'. Like I have said time and again, Indian courts often get it wrong when they assume constitutional amendments are passed under the authority of constituent power. I have dealt with elaborate reasons to explain why this is so. Courts have repeatedly confused amending power for constituent power, attentive only to the constitutional text and not to the kind of political practice. For examples of such confusion, see generally the discussion on the authority of amendments in Sankari Prasad 1952 SCR 89, Waman Rao in AIR 1981 SC 271, *Also see* ¶ 68 of Nagaraj's judgment (MANU/SC/4560/2006) which says – "Though the amending power in Constitution is in the nature of a constituent power and differs in content from the legislative power, the limitations imposed on the constituent power may be substantive as well as procedural." Both the reason and cure for such misunderstanding has been identified by me earlier in the article. *Coelho supra* note 14 refers to the earlier understanding a few times in its judgment and though it does clarify once that the power of amending the Constitution is a species of law making power and not constituent power itself, it never ever categorically shrieks away from the earlier position.

2. With regards to the prevailing confusion about the inviolability of FRs, the court said in essence – There are implied limitations on the amending power of the Parliament and such limitations emerge only in form of the ‘basic features’ of the Indian Constitution. Part III rights are limitations on the amending power only to the extent they are a part of the ‘basic structure’. At the same time, the court reiterated that it is possible that all Part III rights might not be a part of the ‘basic structure’ of the Constitution. A direct implication follows – Under no circumstance a Part III right which is a part of the ‘basic structure’ of the Indian Constitution can be infringed upon.
3. Finally, the court was faced with the second issue of evolving a feasible test for identifying, asserting and shielding the ‘basic structure’ of the Indian Constitution. *Coelho* found the shield in ‘direct impact and effect’ test, i.e., ‘rights test’. The test said that it is not the form of an amendment but the consequence thereof which would be the determinative factor in ascertaining if ‘basic structure’ of the Constitution is at threat.¹⁵⁴ To facilitate an understanding of the substantive effect of an amendment, the court laid these guidelines through a two-step scrutiny of Ninth Schedule laws –The court has to examine the terms of the statute, the nature of the rights involved, etc. to determine whether in effect and substance the statute violates the provisions of Part III. If on such examination, the answer is in the affirmative, the further examination to be undertaken is whether the violation found is destructive of the ‘basic structure doctrine’.

E. THE FATE OF NINTH SCHEDULE LAWS

Coelho ended by pressing for an examination to find if a Ninth Schedule law or the amendment is destructive of the ‘basic structure doctrine’. This enquiry set the benchmark of propriety that amendments needed to meet to avoid being called unconstitutional. Under no circumstances could such amendments be violative of ‘basic structure’. If they afforded protection to laws that infringed ‘basic structure’, that protection would be withdrawn and the law would be assailed under the regular procedure of judicial review. However, *Coelho* did not provide any guidelines to complement the process of inquiry to determine breach. It is here that I think *Nagaraj*’s formulation becomes important. *Nagaraj*, contrary to popular perception, is important as it aids the two-step process in *Coelho*. If *Nagaraj* be read along with *Coelho*, the third step in the inquiry might positively influence our chances of reaching a safe judgment. In ascertaining if an amendment is violative of ‘basic structure’, the court should consider if the essence of the right is being

¹⁵⁴ See *Coelho* ¶ 81, *supra* note 146.

violated.¹⁵⁵ This is a logical extension from *Coelho* and *Nagaraj* – It is only when the amendment or the Ninth Schedule law threatens the core of the rights that the amendment would be considered as infringing upon the ‘basic structure’ of the Constitution. A semantic approach should give way to a liberal interpretation to contemplate the widest ramifications of the proposed arrangement. And such ramifications should be studied to enquire if a core constitutional principle or provision is being violated. Mere encroachment upon enabling provisions under Part III would neither have such wide ramifications nor would they threaten the core of the Constitution. However, there still remain some Ninth Schedule Laws whose constitutionality was upheld by the courts before the judgment in *Kesavananda* came out in 1973. In this context, *Coelho* clearly stated that those laws whose constitutionality was upheld by the courts before *Kesavananda* would not come up for consideration before the courts on the grounds that they violate the ‘basic structure’ of the Indian Constitution. However, if any of the pre-1973 Ninth Schedule laws remain unchallenged till now, could they also be scrutinized for infraction of ‘basic structure’? I think not for *Coelho* talks about the doctrinal applicability to laws included in the Ninth Schedule only after *Keshavananda*. It is to address these cases, I think, that normal judicial review under the Constitution should be restructured rather than looking up to ‘basic structure review’. In sum, all laws that were extended protection of Ninth Schedule after the judgment in *Kesavananda* could be challenged to see if they violated ‘basic structure’ of the Indian Constitution.

Questions have often been raised about the fate of laws that infringe upon the ‘basic structure’ of the Indian Constitution and no certain answer exists as to whether the doctrine is applicable to categories other than amendments. This question of applicability becomes important to foreclose any apprehension that there may be laws that might violate ‘basic structure’ of the Indian Constitution yet escape its clutches. *Coelho* gives a clear direction to this debate by suggesting that it is not only the constitutional amendment that puts a law into Ninth Schedule that would be up for scrutiny but also the real content of the Ninth Schedule law itself. If the amendment violates the ‘basic structure’, then the protection afforded by the amendment would be withdrawn and if even after that, the law breaches Basic Structure, then it would have to be struck down by judicial review. However, *Coelho* remains silent about the fate of laws that directly infringe the ‘basic structure’ without any involvement of the amending process. Could ‘basic structure doctrine’ directly apply to them to make them unconstitutional through the process of ‘judicial review’? My view is that extending the scope of ‘basic structure doctrine’ to normal laws at once is an appealing idea but it brings back the possibility of extensive and indifferent use that I warned of in earlier parts. The only way ahead

¹⁵⁵ See *Coelho* ¶ 76, *supra* note 146. There is also a difference between the ‘rights test’ and the ‘essence of right test’. Both form part of application of the basic structure doctrine. When through an exercise of amending power, an entire chapter is made inapplicable, ‘the essence of the right’ test as suggested in *Nagaraj*’s (MANU/SC/4560/2006) case will have no applicability. According to *Coelho* (MANU/SC/0595/2007), in such a situation, it is ‘right test’ which is more appropriate to judge the validity of the law.

in this dilemma is a careful restructuring of judicial review process to trap laws that infringe 'basic structure' of the Indian Constitution without actually invoking the 'basic structure doctrine'.

I mean to say that it is highly unlikely and even injurious that a law which violates the 'basic structure' of the Indian Constitution would not be trapped under the normal judicial review mechanism since it is expected to be unconstitutional anyway. A law which violates 'basic structure' is also likely to violate one of the FRs or exceed its authority or might be inconsistent with other parts of the Constitution and as such, we need not really invoke the 'doctrine of basic features' to strike it down. The law can be struck down under the general considerations of constitutionality, competence and consistency involved in the judicial review mechanism under Articles 13, 32, 131-142, 225-227 of the Indian Constitution, if only this mechanism can be perceptive enough in time. It is difficult for me to think of a condition where a law violative of 'basic structure' of the Indian Constitution would not fail in even one of these considerations and may be enacted under the competent authority consistent with other parts of the Constitution. My argument is that a law that is likely to violate 'basic structure' should fail in the first place to pass the judicial scrutiny sanctioned under the constitutional provisions I discussed above. If this is so, this debate about the application of the 'basic structure doctrine' to normal laws is merely academic. Neither does it say anything new nor does it promise anything worthwhile. 'Basic structure doctrine' is a special doctrine for singular use in cases of amendments because constitutional amendments do not go through the normal judicial scrutiny. The use of the 'basic structure' doctrine is a testimony to the special role of amendments in a constitutional framework and we should debate this doctrine in a manner that its very specific use special character are preserved. The modes of enquiry proposed in *Nagaraj* and *Coelho* recognise the imperativeness of this special character and mark an earnest effort in tapping the indifferent political use of the doctrine.¹⁵⁶ I have not discussed these two judgments in extensive detail and my analysis here was restricted to the question of nature and extent protection provided by the doctrine. However, the question of preventing basic structural breach by general laws without invoking the 'basic structure review' does pose a challenge for future work on this theme. In the next part of this essay, I take with me some of the key arguments from my analysis of these two cases and see how they may work to foster a greater regard for the doctrine of 'basic features'. I also seek to weave together the separate strands of my thesis into one and bring some sense of conclusion to a host of enquiries I undertook at the beginning of this journey.

¹⁵⁶ KUMAR, *supra* note 148, 58, 396. Professor Virendra Kumar finds the discussion in *Coelho* unique in many ways, including its analysis and unanimity. By reason of being an unanimous judgment of nine judges, he feels, it significantly reduces the possibility of differing interpretations of the law laid down by it. That in turn, makes the judgment "certain, definite, clearly understood and easily applicable".

V. A PROPOSAL FOR CONSTITUTIONAL ACCOUNTABILITY

Suggestions have been made with disquieting regularity about the need to curb judicial discretion in matters relating to the operation of ‘basic structure doctrine’. As I have shown, the tests proposed in *Nagaraj* and *Coelho* when read together provide an effective restraint on the consequences of such discretion. Both of them try to understand the governing philosophy behind the doctrine and evolve tests that are sensitive to an assault on the central tenets themselves and not the enabling provisions of such principles. However, *Nagaraj* and *Coelho* alone cannot script success for the doctrine since it requires a responsive judicial behavior in equal parts to guard the sentiment of constitutional essentialism. In seeking ways of ensuring this, I came across some tentative ideas that need further debate to assess their individual merit and contribution to a balanced and careful practice of the ‘basic structure doctrine’. The most striking among those was the suggestion that some sort of a limit must be imposed on judiciary to counter possibilities of unresponsive judicial conduct in future. This feeling, in fact, signifies an optimism that judiciary would always be alive to the moral authority of the doctrine and the consequences that an uncaring attitude may bring for its integrity. Having said that, does there remain a possibility to put judicial accountability on a more sound footing? An accountable judicial review can allay much of the fears associated with the nature, authority and methodology of ‘basic structure review’. How could such accountability be reached?¹⁵⁷

A. CONSTITUTIONAL INTERPRETATION AS PART OF THE CONSTITUTION

My idea is that to the extent Parliament considers constitutional interpretation by the courts as a part of the Constitution, such constitutional interpretation is subject to the ‘basic structure doctrine’ and any such interpretation cannot embrace an infringement of constitutional essentials. However, there are a few qualifications to such understanding and I explain how they make my idea work. My proposal picks from the respondent’s arguments in *Nagaraj* where the counsels on behalf of the Union of India reasoned that the government indeed had the authority to pass amendments that bypassed previous judicial decisions in matters of reservation in public employment. They explained that the Parliament

¹⁵⁷ See Dr. Uday Raj Rai, *In Defense of Judicial Activism: A Politico-Legal Analysis of the Doctrine of Basic Structure*, III, INDIAN JURIDICAL REVIEW, 1, 37, (2006) (Dr Rai views this accountability can be reached in some measure if the Supreme Court ceases to be resistant to the idea that judiciary is also ‘state’ within the meaning of Article 12 of the Indian Constitution. Though it is an important point and was also suggested during a recent Judicial Review Workshop at NUJS by a colleague named Rohan Sahai, the more important point is to assess the cost at which such accountability comes. I welcome any such move but with careful measure of what it brings along with itself).

had such authority since judicial interpretation of public employment clauses in the Constitution was a part of the Constitution itself and the Parliament had the power to amend any provision of the Constitution under Article 368.¹⁵⁸

Rewarding as the idea is for the Parliament, it also has interesting implications, some of which I explore here. I am somewhat apprehensive about the proposal partly because I can see the concealed motivation behind any such argument. However that alone should not lead us to dismiss the possibility of such construction. If we refresh our political memory, we are sure to come across significant examples of expedient political practice seeking refuge in amending power while responding to the court's interpretation of a constitutional provision. The practice, for reasons good or bad, has frequently been contested in the court as being violative of 'basic structure' of the Indian Constitution. It is said that these amendments are preordained to reverse a few 'uncomfortable' judicial decisions. We saw it happening after *Golak Nath*, it came back again in *Raj Narain* and we have had its glimpses through the late nineties as the parliament sought to perfect its response to court's judgments in reservation cases. We must say that these are not the only examples but just a few examples that have etched themselves in the public discourse. They would nevertheless suffice to drive our point across.

This political practice has often been questioned, as it is seen as an effort to undermine judicial authority in a constitutional democracy. The parliament's response was that the court's interpretation of the Constitution was an integral part of the Constitution, which they have the power to amend under Article 368. If it is to be believed, then we have to conclude that Parliament, under Article 368 cannot only amend the provisions of the Constitution *but* also the court's interpretation of constitutional provisions. We understand that there are evident, self-explanatory problems with this formulation. It is worth reiterating that the Parliament, *legitimately*, in exercise of its power under Article 368 can only amend that, which is there is the written Constitution i.e. provisions that are a part of the Constitution. This is clearly underscored in the language of Article 368 which reads as – "Notwithstanding anything in the Constitution, Parliament may in exercise of constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article."¹⁵⁹

¹⁵⁸ See ¶ 9 of Nagaraj judgment, *supra* note 5. I quote from the text of the reported judgment where the Bench discusses the arguments advanced on behalf of the respondents –

"Constitution, according to the respondents, is not merely what it says. It is what the last interpretation of the relevant provision of the Constitution given by the Supreme Court which prevails as a law. The interpretation placed on the Constitution by the Court becomes part of the Constitution and, therefore, it is open to amendment under Article 368. An interpretation placed by the Court on any provision of the Constitution gets inbuilt in the provisions interpreted. Such articles are capable of amendment under Article 368."

¹⁵⁹ See the text of Article 368 of the Indian Constitution.

Each time Parliament had to reverse a judicial decision, Parliament proclaimed that the contested constitutional interpretation was a part of the Constitution and as such, could be influenced through Article 368. However in contrast, Parliament was hardly alive to the constitutional obligations that arose by virtue of such interpretation being a part of the Constitution. The Parliament would usually be forgetful of the existence of such interpretation in a way that raised interesting questions about the equally intriguing parliamentary behavior. If not the constitutional obligations, what could explain Parliament's repeated insistence on understanding constitutional interpretation as a part of the Constitution? It would not be wholly incorrect to suggest that reasons for the Parliamentary behavior might not entirely lie in law. Such behavior can most aptly be understood as being shaped by the changing contours of interaction between law and politics. And if this be so, reasons may be sought partly in law and partly, in *politics*. Parliament looked up to law, to Article 368 of the Constitution, to assert its power to affect judicial decisions. And this power was essentially political, one which gave the Parliament a magic wand to significantly alter the course of judicial development. To put it simply, Parliament sought a means in 'law' (Article 368) to effect a 'political' end.¹⁶⁰

Even as it sought its ends, parliamentary ardor skipped a critical step. It should have realized that for the 'law' to operate, judicial interpretation should have been a part of the constitutional provisions when the amendment was sought (Note the language of Article 368). The Parliament was never keen on this as it could have bound its actions in future and in the long run, could have even proved to be a self-defeating exercise. But in missing that step, Parliament missed the constitutional shield (both legal and legitimate) that could have underscored its actions, thereby immunizing it from counter-attacks. Now there is an inherent problem. Judicial interpretation of the Constitution has never manifested itself as a provision of the Constitution so as to qualify for the amending exercise under Article 368. What it signifies is that judicial interpretation of the constitutional provisions cannot be amended (reversed) under Article 368 without making it a part of the Constitution. This result can be achieved through an amending exercise sanctioned through Article 368 of the Constitution. In clarifying on the form, content and meaning of a constitutional provision, it is within the legitimate bounds of the parliament to include, by way of an amendment, the judicial interpretation of that provision as a part of that article. Such amendment would naturally have to be effected according to the procedure prescribed under Article 368. So, if the Parliament insists that judicial interpretation of Constitution provisions are indeed a part of the Constitution, it might as well, for the sake of clarity, go a step ahead and acknowledge it through an amendment. Contrary to what we have been made

¹⁶⁰ RAI, *supra* note 157, 65, 25. I must put on record my deep appreciation of Dr. Uday Raj Rai who gauged this critical omission in his recent defense of judicial activism. In his article, he says – "The special point to be noted is that the political wing was not satisfied in using the amending power to overrule the court, it rather started the practice of gradually excluding the jurisdiction of the court in different matters."

to believe all this while, it is not all that difficult for the Parliament to profess its commitment to court's interpretation, if it really wants to. All this could be readily achieved by way of a constitutional amendment. In fact, it could achieve much more than what seems at the face of it.

B. THE ROLE OF THE PROPOSED SHIFT

A constitutional amendment seeking to include court's interpretation as a part of the Constitution would most notably, add clarity, provide stability while ensuring legitimate and methodical transition in constitutional development. But the discreet consequences that might follow are much more imperative in constitutional dynamics. The arrangement is important for the two consequences that are immediate consequences of the amendment. In wake of the amendment, it would become increasingly difficult for the Parliament to effect a turnaround and pass another amendment that would, effectively, reverse the judicial decisions. This is self-evident as the Parliament would have real problems going against a decision which it endorsed and even deemed proper enough to be a part of the Constitution. Problems would frequently manifest themselves through questions of credibility, constitutional commitment, ethics, principles and not infrequently on allegations of political expediency and convenience. It would be, I believe, embarrassing for the parliament to digress from its own path, one which it treaded not so long ago. If and when the Parliament decides to do so, it would have to back its actions with exceptionally strong reasons and need to convince itself of the inevitability of such a drastic step. Having said this, these situations are not entirely unimaginable and Parliament might have good reasons to resist a judicial decision by way of an amendment. This behavioral shift may arise out of exceptional circumstances – one, when the court falters and the other, when the Parliament formally abandons its pledge to constitutional supremacy. Whatever may be the case, a paradigm shift as this is bound to be scrutinized carefully on the benchmarks of constitutionality.

1. Restraining Judicial Behaviour Through Basic Structure

What the arrangement promises is a marked shift in the way Parliament has seen and resorted to constitutional amendments. If this arrangement is institutionalised, we have very good chances of preventing the abuse of amending power and to immune it from its deliberate usage in assailing judicial decisions. Additionally, it also removes the normative ambiguity and haziness that prevails in wake of a judicial decision about its correct interpretation. While reflecting the parliamentary opinion for the judicial development, it also lends force to the Parliament's view that judicial interpretations of constitutional provisions are a part of the Constitution. In this scheme, we can reasonably assume that the Parliament would find it extremely difficult to reverse those judicial decisions which would not be a part of the Constitution. And reversing the decisions that have been incorporated in the Constitution by Parliament itself would be no less difficult for it would be awfully embarrassing. However, the discreet consequences that follow are far more interesting and certainly more important. The arrangement, till now, gave us the

impression that it was a safeguard against the Parliamentary tendency to attack judicial decisions without any basis. Clearly, the impression does not reflect all. This structural adjustment is important for the unique way in which it seeks to prevent irresponsible judicial and parliamentary behavior. The scheme contributes in a manner where its checks are directed not at the Parliament alone *but* also against the judicial politics, and in a much more significant manner. Since the judicial interpretations would manifest themselves in the Constitution by way of a constitutional amendment, each one of such interpretations could be scrutinized on the 'basic structure doctrine'. This is an important point worth noting.

Any such judicial interpretation could be then contested in the court as it has been brought by a constitutional amendment. If seen as such, the 'basic structure doctrine', that only limited amending power of the Parliament till now would also effectively keep a tab on any judicial interpretation that seeks its way into the Constitution. Despite the fact that it would only be an amendment that would be challenged, in effect, it would be the substantive content of the amendment i.e. the judicial interpretation, which would be scrutinized. To put it differently, it identifies *the* kind of judicial interpretation that can make its way into the Constitution i.e. those constitutional interpretations that do not denigrate the 'basic structure' of the Constitution. In realising this scheme, the Parliament's amending power would be reasserted, judicial interpretation would be legitimized and the 'basic structure' of the Constitution preserved. All this would be done without either, expanding upon the scope of institutional powers or delimiting their functional space. What follows would only be a result of careful and clear articulation of respective positions, some of which remained to be acknowledged before. If seen in perspective, the arrangement marks an affirmation of legislative view that judicial interpretation of a particular constitutional provision is a part of the Constitution. In affirming this, it would subject varying judicial interpretations to the 'basic structure test' to determine if judicial interpretations could also pose a threat to fundamental features of the Constitution. This is a significant enquiry, one which could positively influence the face of constitutional interpretation in times to come.

Having said that, it is also distinctly possible that the Parliament might not see this scheme as the best way to affect the course of constitutional development. It must be keen on affecting the course but the prospect of acknowledging it through a constitutional amendment that will be put on scrutiny might just be too unexciting. Once acknowledged through an amendment, judicial interpretation of a constitutional provision would broadly define the limits of parliamentary action with regards to that provision. Parliamentary enthusiasm might have its day the moment it realizes that the amendment would significantly bind its actions in the future. There are valid reasons for this reluctance. After all, no Parliament prefers to put on record its acknowledgement of a certain judicial verdict much in the same way as no Parliament likes to surrender itself before judicial authority. On the contrary, a dynamic and spirited structure of internal checks and balances is a much sought-after arrangement in any constitutional democracy. In this predicament, the Parliament must weigh its options. It must

contemplate if it has alternatives to *legitimately* retain the means to counter uncomfortable judicial decisions? The Parliament must also ponder on the 'legality' of such means. Can the old political practice of reversing judicial decisions through constitutional amendments be identified as legal or legitimate? Given the fact that the Parliament, in exercise of its power to alter the Constitution, seeks to affect something that is not a part of the Constitution, can such exercise be identified as 'legitimate'? There are easy answers to these uneasy questions which we need not reiterate. It is our understanding that the Parliament would like to have an avenue, which is both legal as well as legitimate. What does this avenue look like?

2. The Moral Authority of 'Constitutional' Means

If Parliament wants to have a 'legal' and 'legitimate' check on judicial development, if it wants to confine its growth within the constitutional parameters, Parliament must itself first look for constitutional means. And that would imply that the Parliament must amend the Constitution to include constitutional interpretation of a particular provision as a part of the Constitutional text. It is only then that it can legitimately remind judiciary of its constitutional limits. Once a certain constitutional interpretation becomes a part of the Constitution, Parliament legally and legitimately retains the power to influence that interpretation, as and when the need be. On the other hand, it should not expect judicial adherence to constitutional limits in times when it is itself flouting such limits. That is to say when Parliament itself is illegitimately using Article 368 to reverse judicial decisions, what moral authority does it have to expect the judiciary to act within its institutional bounds? How does it expect the judiciary to respond to a frontal attack on its institutional sovereignty? In this contested terrain, it becomes imperative for the Parliament to seek constitutional means to pursue its ends. It is only then that it can really impress the judiciary to act within the constitutional periphery. It is by no means an unintelligible proposition. By acting under the Constitution, the Parliament would place itself on a high ground in as much as it would compel the judicial behaviour to conform to constitutional stricture. The Parliament has harmed itself, more than anyone else, by restraining itself from acknowledging Constitution as the foundation that informs its actions.

In stark contrast is the vigorously pursued and abundantly visible judicial pledge to the Constitution over the last three decades. In its pledge, the judiciary saw a shield that could defend its expansive, inventive and at times even indifferent interpretative behaviour on the ruse of constitutional morality. When vulnerable, judiciary took shelter in the vagueness of the Constitutional text and employed its limited resources playfully well to park itself on a superior plane. It was a cautiously calibrated judicial ploy that was partly abetted by parliamentary naivety and partly executed by judicial diplomacy. And therefore, identically in contrast today are the competing ranks both the institutions enjoy in the public sphere. Parliament must realize now that its repeated attempts at reversing judicial decisions have further edged it away from constitutional practice. It must remember that a legitimate inter-institutional engagement cannot be found outside the confines of the Indian Constitution. Extra-constitutional means would, as they have in the

past, only fan the flames of judicial-legislative exchange without seeking a consensus. Both the institutions must look up to the Constitution in their own ways to find a way out of this conundrum. Because without it, the situation can only exacerbate. Parliament can redeem itself by seeking a 'constitutional' way. If the Parliament wants to respond to an uncomfortable judicial decision, it must find a response inside the Constitution. By including an undiscerning judicial interpretation in the Constitution through an amendment, the Parliament can lawfully alter its growth as the substantive content of the amendment can be challenged under the 'basic structure doctrine'. The moment it effects such an amendment, it is not the Parliament that is put on test but the judicial interpretation it espouses through the amending process. That is to say that even though the amending exercise would be in question, it is the judicial interpretation that would be truly scrutinized. Constitutional amendment is just the pretext on which the 'basic structure doctrine' would be invoked. In the event of an amendment being struck down, it would actually be a judicial belief that would have been rebuffed as unconstitutional. Should it happen, it would be a defining moment in the judicial-legislative debate and a significant feat in constitutional politics.

3. Facilitating The 'Curative' Nature of Amendments

It seems that the seeds for this transition had already been sown in the winter of 2006. In hearing upon the writ petitions against a series of amendments expanding the operational scope of reservations in public employment, the Court opined in *Nagaraj* - "It is important to bear in mind the nature of constitutional amendments. They are curative by nature".¹⁶¹ It was a significant pronouncement which acknowledged that amendments could be resorted to improve upon the existing public employment policy. The then existent policy was modified by effectively annulling the judicial decisions through a series of amendments (Seventy-Amendment Act, 1995 and Eighty-Fifth Amendment Act, 2001) that limited the operational scope of reservations in public employment. It was curative in as much as it sought to cure the ills borne out of judicial policy. The Parliament can preemptively seek the same curative remedy to disengage itself from an over-reaching judicial pronouncement. If the pronouncement does not qualify the test of 'basic structure', Parliament would have effectively extricated itself out of such a fix. It is pre-emptive in nature as it prevents an erroneous judicial opinion from making its way into the Constitution. In most of the cases, such a situation will not even arise. The Judiciary hopefully, will keep away from transgressing its constitutional limits rather than face embarrassment from 'basic structure doctrine'. In case the contested judicial

¹⁶¹ See ¶ 71 of *Nagaraj*, *Supra* note 5. Also see SINGH, *supra* note 143, at 55, 211. Professor Singh argues, borrowing from Waman Rao (AIR 1981 SC 271) and *Nagaraj*, *Supra* note 5. That interpretation of the Constitution by the courts can also damage the basic structure and "the Parliament and the amending body owes a duty to the Constitution to repair that damage. If Parliament fails to repair the damage, it shall be deemed to be conniving in damaging the 'basic structure' of the Constitution." My proposal here suggests a shift through which such connivance could be prevented and court's faltering could be effectively checked.

opinion is not revoked, the judicial policy would be strengthened and it would become increasingly difficult for the Parliament to reject its adoption. Parliament would need very compelling reasons to go against a judicial policy that has been affirmed twice before. However, the power of affecting such an opinion would always remain with the Parliament. As and when it uses that power, it might be questioned under the 'basic structure doctrine'. If the Parliament can convincingly qualify its decision on compelling grounds relating to change in circumstances, public opinion and the changed state prerogatives, the parliamentary policy would stay.

4. Constitution's Concierge: Inter-Institutional Checks and Balances

The proposed arrangement should also mark a shift in the parliamentary perception of the 'basic structure doctrine'. For decades now, Parliament has viewed the doctrine as something, which it should be wary of. With time, such perception has gained strength. To be fair to the Parliament, the 'basic structure doctrine' has never been very receptive to its exigencies. The perception was further perpetuated by the judicial attitude towards the doctrine. The judicial pronouncements, situated in the capricious political landscape of the seventies, had the resultant effect of showcasing the doctrine as a judicial cure for parliamentary ills. Though internalized over the years, the perception must change now. With the proposed arrangement, the 'basic structure doctrine' should establish itself as a safety-valve for the Constitution, resisting both parliamentary as well as judicial excesses. 'basic structure doctrine', by its very essence, is a constitutional concierge and not merely a judicial invention to check parliamentary behaviour. If this arrangement is facilitated, it would become sufficiently clear that the doctrine is as attentive to consequences of judicial overreach as it is to parliamentary laxity. Equally alive then the Parliament should also be to the far-reaching implications of this structural arrangement. It is far-reaching for the manner it sets the contesting institutions to counterbalance each other's intemperance. And it does so by striking a robust balance between the judiciary and the Parliament. From now on, both these institutions have 'constitutional' remedies (remedies inside the Constitution) to counter institutional disregard for the fundamental constitutional structure. Parliament can resort to a constitutional amendment and the judiciary can look up to its power of judicial review to moderate the actions of the other institution. Common to both is their final resort to 'basic structure doctrine', whether it is invoked by way of a constitutional amendment or by judicial review. It leads us to a self-regulatory mechanism where one would regulate the other by regulating himself. Here, the Parliament would hesitate before interfering with the judicial process and the judiciary would think twice before tinkering with the executive policy of the state as both would be wary of the counter-balancing powers vested in each other. The scheme would realize with itself, a system of 'judicial checks against parliamentary arbitrariness' and 'parliamentary checks against judicial indiscretion'. I believe that the Parliament has a small price to pay for attaining such a desirable structural shift in constitutional dynamics. Parliament must seize initiative and redeem its pledge to the Constitution.

On this note, I end the discussion in this part and move towards a brief summary of arguments that my paper has advanced so far. In doing so, I briefly engage with the meaning of constitutional democracy in India and the extent to which such meaning can hold a functional understanding of the constitution. It is entirely possible that the concrete merit of my proposals might seem far-fetched and deeply political but I put them before you to assess both the possibility and desirability of their presence. I remain anxious as all of you are in gauging the level of promise they hold, if at all

VI. IN CONCLUSION - THE SUBTLE HINTS OF CONSTITUTIONAL DEMOCRACY

Prominent among the ideas that I have shared through this essay are the philosophical strength of the 'basic structure doctrine', the higher nature of constituent politics and thereby the higher pedigree of constituent power, over and above the limits cast by the Constitution. Thereafter, I discuss the nature and hierarchy of the modes of constitutional progress in the Indian polity. However, the argument that I am most interested in repeating is that which says that there are no limitations which the 'basic structure doctrine' casts on the exercise of constituent power and the doctrine should evolve with a proper understanding of its limits both within and outside the Constitution. I am also interested in reminding all once again that though the text of Article 368 suggests otherwise, we do not truly know yet the residence of constituent power under the Indian Constitution. What is operational through Article 368 through its present form is only the amending power and to the extent political exercise of Article 368 endorses my conclusion, we must step up efforts to either locate or to design afresh the constituent power in the Indian polity. The reason why I devoted a considerable time to *Kesavananda Bharati* was to understand what it truly meant so that the debate following it could be studied without confusion. But the debate which I consider most important is the one relating to the two cases of *Nagaraj* and *Coelho* since they mark a long-due departure from the inherited confusion on the nature and extent of 'basic structure review' relating to the Ninth Schedule laws. I have tried to understand how this influences the course of further progress in this direction and sincerely hope that more literature is devoted to understanding the precise significance of these two decisions to current debates on public policy. Towards the end, I call for an intelligent shift in the attitude of political and judicial institutions towards the 'basic structure doctrine' and propose a way wherein both institutions could raise themselves to the task of constitutional accountability. I anticipate forceful censure of my suggestions and use this occasion to explain the motivation behind them.

It has been my view since long that answers to fundamental questions of constitutional transformations, political sovereignty and essential features of the Constitution cannot be found in an empty space. Since each one of these issues are deeply influenced by the other, sustainable answers can only be found within a philosophically prosperous and empirically sound framework of discussion, one which is alive to interconnectedness of these issues. Borrowing from political

empiricism, my essay hides behind it an attempt to understand a theory of constitutional democracy in India. Preliminary fretfulness with some of my proposals be moderately justified at times but consistent antagonism towards a culture of inter-institutional faith and accommodation that I propose in the last part and to a revisionist dialogue in democracy mostly relates to an amateurish idea of democratic functioning which fails to take note of the means and ends of democratic organisation. Such opposition internalizes the innate goodness of 'electocratic' performance as over and above any subtle hints which political functionalism might leave for our understanding – that it is often not the processes (means) of political representation alone but the providence of representation (ends) itself which should matter in democracies, most of them all in constitutional democracies like India. Mark the words – constitutional democracy. A democracy indeed but a constitutional one – one where Constitution dictates and is not dictated. Often in the world's largest democracy, the understandable jest to identify 'electocracy' (a culture of elections) as the definitive puritanical scale hugely overlooks the perceivable burdens of democratic organization as majoritarianism, constitutional unaccountability, non-participatory citizenship and even undemocracy. Correspondingly, a constitutional democracy identifies the constitutional document - the principles, ideas, aspirations and sentiments of 'We the People', as the supreme benchmark of democratic functioning and assigns the Supreme Court of India, the task to shield its foundation from impairment. So, a good deal of what gets thrown at the judiciary for doing its job should ideally be thrown at the Constitution itself if probably, the time has come to place the Constitution at the altar of democracy.

It is my understanding that much of the tussle between the political and judicial institutions of modern India has a whole lot to do with questions of popular sovereignty and how we see it being transmitted – either through 'majoritarian democracy' as many see it or through 'constitutional democracy' as we aspire for and have experienced in parts? And perhaps may well be reflected in the question – Are we a 'constitutional' democracy or a 'democratic' Constitution after all? This is a relevant enquiry and we can no longer afford to ignore it while understanding constitutional development in India. The ultimate sovereignty of 'We the People' is precisely in our capability to choose one over the other and give to ourselves a political organization which best reflects this sovereign sentiment. We invoked this sovereign power when we gave to ourselves The Indian Constitution in 1950 and since then, the Indian Constitution has been seen as the ultimate repository of our sentiments. And therefore, till a point comes when we have definitive understanding of these questions and when we invoke this constitutive sovereignty again, and most certainly till the point where we remain a constitutional democracy, reasons we have many to repose our faith in the Indian Constitution and hope that 'basic structure doctrine' does enough to guard it from democratic devastation.

All of us must understand and I guess we already do, without being hard-pressed against our different views of the world that democracy is not cooked overnight with a 'blend to taste' prescription of ingredients as rule of law, rights, liberties and promises. Neither is it consumed the very next day; it requires a

culture of liberal constitutionalism to preserve it, and to prevent it from getting spoilt in the sun. The language of rights and the rhetoric of democracy without an idea of why or how such rights connect to our political existence, in what ways they improve its meaning and what would happen to each without the other, constitutes an empty promise. Such uneducated promises augur well for a good political speech but we are likely to confound the mess once the applause dies down. Democracy without liberal constitutionalism is a myth - in fact, a 'fill in the blanks' moment of political evolution. Any sincere effort at preventing such embarrassment needs to make sense of the questions that pose these blanks and involves, amongst other things, a grasp of history and the direction it has set us onto. We must realise that these questions have aged and evolved over time but their fundamental anatomy remains the same. They are but different ways of asking the same question about the best way to perfect our political organisation. A suitable answer, therefore, does not lie in abandoning the past but only in explaining it, in appreciating the linkages which it has forged with the present, in studying how we have responded to this call till now and in evolving strategies that value what political experience teaches us – that there are no magical answers. No effort is sincere and no answer sustainable till we begin to understand that there are no push-button solutions to questions of political development. Each answer we find is deeply connected with the other and this treasure-hunt is largely reliant on our ability to recognize and link up the various clues keeping within the limits of political framework.