Constitution As Fundamental Law: Preserving Its Identity With Change

Mahendra Pal Singh†

The article scrutinizes the effect of changes in the Constitution, by way of constitutional amendments, to the identity of the Constitution. Mapping the historical perspective of the constitutional amendments under the Constitution of India, the author revisits the debates on the doctrine of basic structure expounded by the Supreme Court of India. It critically reflects upon the basic structure doctrine as an aspect of constitutionalism and argues that the invocation of the doctrine of basic structure as the last resort reflects the political stability and maturity of the Constitution.

INTRODUCTION

The Constitution of a country is foundational to its public law. Public law differs from private law. While the former regulates the conduct of the state and its organs the latter regulates the conduct of the people in that state. Historically in the Middle Ages these two divisions in law were known as ‘fundamental law’ and ‘ordinary law’ respectively. While the ordinary law could be made by the ruler the fundamental law was invoked from reason or supernatural powers. Instances of such invocation are legion in the history of mankind and the concept of natural law is attributable to it even in the modern legal theory. In course of time and especially with the emergence of positivism the fundamental law also became a human creation in the form of a written or unwritten constitution whose authorship was attributed to the people as a whole of that country. This fact was given legal recognition initially in the earliest surviving example of a written constitution, the Constitution of the United States, in Marbury v. Madison in 1803 in which the Supreme Court of the United States unanimously attributed the creation of the Constitution to the people of the United States.2 All organs of the state could be created and exercise powers only in accordance with the Constitution and not otherwise. Despite the controversies surrounding Marbury v. Madison ever since the Constitution has been the ‘fundamental law’ of the land. Since then most of the countries around the globe, somewhat slowly and cautiously until the middle of the twentieth century but quite fast and vigorously afterwards, have

† Vice Chancellor, National University of Juridical Sciences; formerly Professor of Law, University of Delhi. Substantial part of this paper has been picked up from my paper India, in HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY, 165ff (Dawn Oliver & Carlo Fusaro (eds.), 2011). I am grateful to Professor Dawn Oliver for having permitted me to use portions of my paper.

1. For details see, M. LOCHHEAD, FOUNDATIONS OF PUBLIC LAW 1 (2010).
adopted written constitutions. Almost all these constitutions have acquired the character of the ‘fundamental law’ of the respective countries. Many of these countries have established effective institutions to enforce their constitutions as law. Some of them, particularly the ones that follow the common law tradition, assign this job to ordinary courts of law while others, especially those which follow the civil law tradition, assign it either to special courts constituted exclusively for this purpose or to some other body or institution other than courts.

As the constitution replaces the ‘fundamental law’ it is attributed the same sort of immutability as the ‘fundamental law’ even though it is a human and not divine or nature’s creation. While as a matter of hard fact not all people participate in the making of the constitution it is presumed to be their creation at a special moment in the life of a nation called the ‘constitutional moment’. As the ‘constitutional moment’ comes once in a while in the life of a nation the product of that moment which becomes the defining feature of that nation must be preserved until that moment is repeated. It is for this reason that even if a constitution provides, and almost every constitution does provide, for its amendment or change it should be resorted sparingly and within certain limits. Otherwise the constitution will lose that sanctity which is assigned to it as the fundamental law of a country. At the same time the constitution will also lose that sanctity which comes out of its relevance to the society if it does not meet the requirements of the changing times and demands in the life of that society. Therefore, it is also equally important that the constitution must keep pace with the changing times. Drawing this balance between continuity and change is a delicate task which must be performed either by formal process of amendment of the constitution or through its interpretation and practical application. In either case the question arises of the limits within which either of the two alternatives can be resorted. In this background I try to project the Constitution of India as to how and to what extent it has been able to maintain its character of fundamental law keeping pace with changing times and demands of the society.

I. CONSTITUTION OF INDIA

The Constitution of India is the longest surviving constitution in Asia next only to the Constitution of Japan. One of the reasons for its survival has been its adaptability to the changing times and situations. Such changes are much more frequent and often unexpected in developing and unstable societies than in the developed and stable societies like those of Japan or of the West. Accordingly the Constitution has gone through small and major amendments at an average rate of more than one a year, but it has retained its basic structure. The Constitution has been amended 95 times up to January 2010.
length would lead to legalism and rigidity. Fortunately, this did not happen and as expected by the Constitution-makers it has proved to be quite flexible and received some favorable comments from some foreign scholars. K.C. Wheare saw in it wise variety, while Glanville Austin found the amending process as 'one of the most ably conceived aspects of the Constitution'. The number of times and the ease with which the Constitution has been amended amply prove this point. In the family of constitutions the Constitution of India is said to belong to the Euro-American tradition. But within that tradition, in view of the inheritance of the common law tradition during the British period for over 150 years it is closer to the constitutions in the common law countries such as, Australia, Canada and the USA rather than the constitutions of the civil law countries such as France or Germany.

Although the Constitution does not have a supremacy clause, in line with the common law countries it is considered to be the highest law of the land enforceable by the courts. The Constitution can be changed only in accordance with the procedure for its amendment provided in it and not otherwise. Any law inconsistent with the Constitution is no law and can be so declared by the courts. The constitutionality of laws can be questioned in any court but a matter involving a substantial question of law involving the interpretation of the Constitution must be decided initially by the High Courts and finally by the Supreme Court. Infringement of FRs can be challenged directly in the High Courts as well as in the Supreme Court. The right to approach the Supreme Court directly for the enforcement of FRs is one of the FRs. The Supreme Court has exclusive original jurisdiction to decide legal dispute between the Centre and the States as well as between different states. Like all other common law countries, and unlike the civil law countries, the same courts decide constitutional as well as other disputes. There is no separate constitutional court deciding exclusively constitutional disputes as in the civil law countries. This is also a reflection of recognition of the unity of law in the common law system while the civil law system maintains the duality of the public and private law.

5. K.C. Wheare, Modern Constitutions 143 (1958).
6. G. Austin, The Indian Constitution: Cornerstone of a Nation 255 (2010). See also Oliver & Fissaro, supra note 7 at 425 where the editors note: "India's Constitution is probably the most sophisticated one in establishing a great variety of procedures to adapt and change its arrangements based upon the careful selection of different matters (almost a model of variable rigidity or even flexible rigidity, if an oxymoron is tolerated here)."
7. Id. at 32.
9. Id. Art. 32.
II. Changing the Constitution

It has already been noted that like living and organic instruments, constitutions also change and must change to keep pace with changes in society. These changes, however, occur in a systematic way, and if there is no system they are moulded into a system. Among the various forms in which these changes take place in India are formal amendments, legislation, judicial interpretation, conventions, and international law.

Let me elaborate my point only with reference to formal amendment of the Constitution.10

Change through amendment:

As the constitution is conceived and made to survive if not forever at least for the indefinite future, it must provide for its change for ensuring its survival in the changing world. The Constitution of India provides for its change in the following three ways:

1. Some provisions of the Constitution can be changed by an ordinary law of Parliament without any additional requirements for or conditions of a special majority in the Parliament or participation of the States. These provisions expressly lay down that they are of this kind until Parliament provides otherwise or they are subject to a law made by Parliament; examples are Articles 124 and 125 relating respectively to the number of judges in the Supreme Court and their emoluments. The Constitution has quite a few such provisions.

2. Some provisions of the Constitution may be changed by an ordinary law of Parliament with additional requirements or formalities such as a requirement of presidential recommendation, or consultation of or request from the States; examples are Article 3 relating to alteration in the States and Article 169 relating to the creation or abolition of the upper house in the legislature of a State.

3. There is a special procedure for amendment in Article 368, which reads as follows:

   Power of Parliament to amend the Constitution and procedure therefore:—

   (1) Notwithstanding anything in this Constitution, Parliament may in exercise of its 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.

   (2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total

10. For changes in other ways, see Oliver & Fusaro, supra note †.
membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, 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:

Provided that if such amendment seeks to make any change in—

(a) Article 54, Article 55, Article 73, Article 162 or Article 241, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article,

the amendment shall also require to be ratified by the legislature of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

(3) Nothing in Article 13 shall apply to any amendment made under this article.

The following two clauses added by the Constitution 42nd Amendment 1976 to Article 368 as above were invalidated by the Supreme Court in Minerva Mills Ltd v Union of India:11

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty-second Amendment) Act, 1976 shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation, or repeal, the provisions of this Constitution under this article.

Before its amendment Article 368 was substantially what is now clause (2) above with the marginal note: ‘Procedure for amendment of the Constitution’.

The story of the changes in Article 368 is an interesting lesson on how constitutions change.

In making the above provisions the Constitution-makers were conscious that in view of the length of the Constitution and the difficulties within which it was to work they should reduce rigidity and legalism and provide for a flexible

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amendment procedure. Accordingly they made these provisions without facing much controversy or debate.\textsuperscript{12} While distinguishing amendments from ordinary legislation they provided for a special majority in the two Houses of Parliament but even in respect of federal arrangements they did not provide for any special majority of the States for the approval of any amendments that affected those arrangements. Instead of one-third or three-quarters of the States approving such amendments they settled at 50 per cent of the states. Dr. Ambedkar, the main architect of the Constitution, informed the Constituent Assembly that the Constitution provided for a flexible federation.\textsuperscript{13} Experience with the amending process proves him right as some of the major amendments to the Constitution were piloted by Dr. Ambedkar himself as law minister, some others were carried out during his lifetime and many more afterwards. To date, as we have already noted, the Constitution has been amended as many as 95 times.\textsuperscript{14}

III. ADJUSTING THE CONSTITUTION TO SOCIAL AND POLITICAL EXIGENCIES

The first amendment to the Constitution having far-reaching consequences for its nature and character came within one year of its commencement even before the Parliament came into existence and the Constituent Assembly discharged its functions as an interim measure.\textsuperscript{15} There were several reasons for the amendment. First, some of the agrarian reform legislation enacted since Independence for which the national independence leaders had long been fighting for, were found to be inconsistent with the Fundamental Rights (FRs) and were declared invalid by some of the courts.\textsuperscript{16} Secondly, the constitutional goal of social revolution expressed in the Directive Principles of State Policy (DPs) could not be realised because the courts found conflict between State action in pursuance of DPs and FRs and held that in the case of such conflict the former had to give way to the latter.\textsuperscript{17} Some of the nationalisation laws were also found inconsistent with the FRs, and the right to freedom of speech and expression could not be subjected to restrictions on the ground of incitement to commit offences.\textsuperscript{18} All of these unexpected consequences of the Constitution led to major amendments. The political leaders in power, especially the All India Congress Party led by Nehru, saw in such an interpretation of the Constitution defeat of all that they had fought for during the British regime. Therefore, they embarked upon amendments of the Constitution ignoring,

\textsuperscript{12} Austin, supra note 6, at 255.

\textsuperscript{13} Id. at 255.

\textsuperscript{14} As on 18 December, 2010. The 95th Amendment came into effect on 25 January 2010.

\textsuperscript{15} A detailed and authentic account of all the amendments until 1985 is given in G. Austin, Working a Democratic Constitution: The Indian Experience (1999).

\textsuperscript{16} See Kameshwar Singh v. State, AIR 1951 Patna 91.

\textsuperscript{17} State of Madras v. Champakam Dorairajan, AIR 1951 SC 226.

\textsuperscript{18} See Chiranjit Lal v. Union of India, AIR 1951 SC 41. See also State of Bihar v. Shaialabala Devi, AIR 1952 SC 329.
among others, the advice of the then President of India to wait until the first elections and constitution of Parliament under the Constitution. Consequently two new articles, Article 31A and Article 31B were introduced in the chapter on FRs with retrospective effect, excluding respectively the laws for the acquisition of estates relating to agrarian reforms or taking over of management of any property or the rights of business managers from the operation of FRs, and giving immunity from challenge to the laws listed in a schedule—Ninth Schedule—introduced by the amendment. Simultaneously the right to freedom of speech in Article 19(1)(a) was subjected to laws imposing reasonable restrictions on grounds of incitement to an offence, and the right to carry on any trade, profession or business was subjected to state monopoly. Finally, the equality provisions that prohibited discrimination on the basis of religion, race, caste, sex etc. in general and in admission to educational institutions in particular, were subjected to the measures taken in pursuance of DP's for the promotion of the educational and economic interests of weaker sections of the society, especially of the Scheduled Castes and Scheduled Tribes.19 In this way all provisions of FRs that appeared to be standing in the way of social revolution or change were modified or removed.

These amendments, especially the introduction of Articles 31A and 31B, were challenged in the Supreme Court in Shankar Prasad Singh Deo v. Union of India20 on the ground of violation of Article 13(2) which prohibits the making of any law abridging fundamental rights. The Supreme Court, however, unanimously dismissed the petition drawing a distinction between an ordinary law and an amendment of the Constitution in so far as the former is made in the exercise of legislative power under the Constitution while the latter is made in the exercise of the constituent power.

In spite of the drastic curtailment of property rights and its approval by the Court, these rights continued to irritate governments by getting in the way of agrarian reforms and acquisition of property either on the issue of compensation or otherwise. Similarly, challenge to nationalisation laws was perceived in the provisions of Part XII relating to freedom of trade and commerce.21 Accordingly, once again the 4th Amendment Act, 1955 amended Articles 31 and 31A, introduced a few more Acts in the Ninth Schedule, and replaced Article 305 by a new provision protecting nationalisation laws from the freedom of trade and commerce. In between the 2nd and 3rd amendments in 1952 and 1954, were inconsequential measures making minor adjustments. The Constitution 5th Amendment Act, 1955 authorised the President to

19. Supra note 8, Art 15 (4).
20. AIR 1951 SC 458.
prescribe a time limit under Article 3 within which an affected State may express its views on the decision of Parliament under that Article so as to remove the possibility of unreasonable delay in the matter on the part of that State. The Constitution 6th Amendment Act, 1956 removed some difficulties that arose in respect of tax on inter-state sales, and the Constitution 7th Amendment Act, 1956 made a major reorganization of the States on linguistic lines which brought many consequential changes in the Constitution. All subsequent amendments up to the Constitution 15th Amendment Act 1963 related either to the adjustment of territories, or some changes in some offices which did not lead to any controversy. The Constitution 16th Amendment Act, 1963 strengthened the national unity strand of the Constitution by introducing the words 'sovereignty and integrity of India' in Article 19(2) and in the oath of candidates for election to Parliament and State legislatures.

The Constitution 17th Amendment Act 1964, which once again amended the property right exceptions in Article 31A and introduced several new Acts in the Ninth Schedule, was challenged in the Supreme Court in Sajjan Singh v. State of Rajasthan.22 This time besides the issues raised in Shankari Prasad the issue of curtailing the power of the High Courts under Article 226 in those matters in which it could be exercised before the amendment was also raised, because any change in Article 226 required reference of a proposed amendment to the States under the proviso to Article 368. Once again, following Shankari Prasad, the Court rejected the challenge to the amendment of FRs and did not find much force in the argument on Article 226 because the amendment did not touch that Article. Any effect on the jurisdiction of the High Courts was seen as merely consequential on the non-existence of an FR for which the High Courts could be approached during the subsistence of that right. But unlike Shankari Prasad in Sajjan Singh the Court was divided 3 to 2. While three of the judges fully endorsed Shankari Prasad, two of them in their separate but concurring opinions expressed doubts whether FRs created no limitation on the power of amendment and could be amended as easily as had been the case until then.

Perhaps this split in the Court and change in its members as well as in the political scene23 led to challenge once again in Golak Nath v. State of Punjab24 to the validity of the 1st, 4th and 17th Amendments on additional grounds that an amendment of the Constitution did not stand on the same footing as the original Constitution insofar as the Constitution was made in the exercise of

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23. Until the death of the first Prime Minister of India, Jawaharlal Nehru, in mid 1964 the All India Congress Party ruled at the Union as well as in the States. After his death, quickly followed by the death of his successor Lal Bahadur Shastri in January 1966, dissensions had emerged within the Party which led to split in the Party in several States in 1967 and later at the national level in 1969.
constituent power while the power of amendment is a kind of legislative power. Accordingly an amendment is subject to the test of whether it is consistent with the Constitution, especially with the FRs to which the Constitution assigns a special place by expressly prohibiting the making of any law that abridges those rights and by declaring it void if made in contravention of this prohibition. Relying upon this argument a Court split by 6 to 5 held that an amendment was a law subject to the Constitution and as Article 13(2) expressly prohibited abridgement of FRs by any law and Article 13(3), which defined ‘law’, did not exclude an amendment from the definition of ‘law’, the challenged amendments were invalid to the extent they abridged the FRs. The Court, however, gave a prospective operation to its ruling leaving the existing amendments undisturbed but prohibiting any future amendments that abridged the FRs.

In view of some preceding and subsequent events, primarily the Chief Justice’s becoming an opposition candidate for the election of the President of India after resigning from his office, but also the growing tussle between the supporters of socialism and liberalism among the political leaders and parties, the judgment acquired political dimensions. By this time cracks had started emerging in the Indian National Congress that ruled throughout the country, at the Centre as well as in the States. Though the then Prime Minister Indira Gandhi retained her hold on the party at the Centre, splits had taken place in the party in the States. Golak Nath was the product of such a climate. Later in 1969 a vertical division took place in the party at the national level, making the position of the Prime Minister slightly precarious. After that, two of her major decisions, the nationalisation of major banks and the abolition of Privy Purses (annual payments made to former Indian rulers), were invalidated by the Supreme Court creating an apparent conflict between the Court and the then government. The Prime Minister sought a premature dissolution of the lower house of Parliament and won a massive mandate strengthening her hand for any constitutional changes. With this support from the people and representation in Parliament she moved to remove the constitutional hurdles in the path of her policy of poverty removal. Accordingly, several important amendments to the Constitution were proposed. The first of them—the Constitution 24th Amendment Act, 1971—removed the limitation on the power of amendment of the Constitution laid down in Golak Nath. Accordingly, a clause was added in Article 13 making it clear that an amendment to the Constitution was not included within the definition of law in that Article. Article 368 was reworded as given above including the re-assertion of the addition in Article 13. Equipped with this power, the 25th Amendment Act, 1971 further amended the property

25  Austin, supra note 15, at 196.
26  Rustam Cavasjee Cooper v. Union of India, AIR 1970 SC 564.
28  Constitution of India 18th–23rd amendments were merely insignificant and incidental.
right in Article 31 replacing the word 'compensation' by 'amount' and adding a new Article 31-C giving priority to DPs in Article 39(b) and (c) relating to the control and distribution of the material resources of society over FRs in Articles 14, 19 and 31 and debarring the courts from making any enquiry if a law included a declaration that it was made in pursuance of those DPs. By the 26th Amendment Act, 1971 references to privy purses were removed from the Constitution and a new Article 363A was inserted expressly de-recognizing former rulers and abolishing their purses. Further by the 29th Amendment Act, 1972 two Kerala laws and by 34th Amendment Act, 1974, many more laws from different States were inserted in the Ninth Schedule.

The inclusion of Kerala legislation, however, led to the famous Kesavananda Bharati v. State of Kerala case in which the Supreme Court divided by 7 to 6 overruled Golak Nath, and upheld the validity of the 24th Amendment amending Articles 13 and 368 but invalidated the portion of Article 31C which had been inserted by the 25th Amendment and which excluded judicial review of legislation made in pursuance of Article 31C. The basis of the decision was that although any provision of the Constitution including the FRs could be amended, no amendment could change the basic structure of the Constitution; the court can examine whether an amendment changes the basic structure of the Constitution and invalidate such an amendment if it comes to the conclusion that it changes the basic structure. On the contents of the basic structure the judges in their separate opinions mentioned such features as the republican form of government, a democratic polity, the federal structure, judicial review, separation of powers, and so on.

Soon after Kesavananda the then Chief Justice of India retired. In his place, discarding the existing convention of appointing the next senior judge of the Supreme Court, the President appointed the judge fourth in seniority: This was taken as a step to undermine the independence of the judiciary. In the growing dissatisfaction against the government led by Mrs. Gandhi, on 12 June 1975 the Allahabad High Court invalidated her election to Parliament from her constituency and also disqualified her from contesting any election for the next six years as a result of corrupt practices in her election. Having failed to get adequate relief from the Supreme Court she advised the President to impose a state of Emergency on the ground of internal disturbance while there was already a state of Emergency in force on the ground of external aggression and war. During the Emergency, while most of the leaders of opposition, including Members of Parliament, were in detention, the Constitution was amended several times in quick succession. While the 35th, 36th and 37th amendments were incidental, the 38th Amendment 1975 directly related to Mrs. Gandhi's personal position in so far as it debarred judicial review of the President's satisfaction as to the grounds for imposing any kind of Emergency.

More clearly, the 39th Amendment excluded from the jurisdiction of the courts election disputes including any pending dispute relating to the election of the Prime Minister and the Speaker and assigned them to a special authority to be established. Much legislation including the Representation of the People Act along with its amendments after the Allahabad decision were also included in the Ninth Schedule followed by further inclusions by the 40th Amendment 1976, taking the total count to 188.

The validity of the 39th amendment, however, came into question in *Indira Nehru Gandhi v. Raj Narain* 30 arising from Mrs. Gandhi’s appeal in the Supreme Court against the Allahabad High Court decision in her election matter. Relying upon *Kesavananda* the Court invalidated the main provisions of this amendment, especially the ones that provided for the abatement of the pending proceedings, and upheld the election of the Prime Minister notwithstanding any decision of any court. Different judges gave different reasons for arriving at their conclusions, but *Kesavananda* was the foundation for all of them. The appeal was finally decided in favour of Mrs. Gandhi in view of the retrospective changes in the election law but *Kesavananda*, which was subject of controversy until then, became entrenched. Subsequently an effort was made to get *Kesavananda* overruled by a larger bench of the Supreme Court, but in view of strong arguments against the legitimacy of such an attempt and differences of opinions among the judges, the attempt was aborted by the Chief Justice by dissolving the bench and the matter was not pursued any further. 31 With that it became clear that the basic structure doctrine would survive.

However, in view of her past experience with the courts and her inability to get rid of *Kesavananda*, Mrs. Gandhi sought to review the whole Constitution and carry out such amendments as were conducive to the implementation of her policies of poverty removal through a socialist pattern of society. Accordingly a Committee chaired by Swaran Singh, a senior Congress Party leader, was set up to suggest comprehensive amendments of the Constitution. During this period the state of Emergency was in full swing; FRs were suspended and opposition leaders were in detention. Following the Swaran Singh Committee report, the 42nd Amendment Act, 1976 made about 60 significant changes in the Constitution. These included replacing the expressions ‘sovereign democratic republic’ by the words ‘sovereign socialist secular democratic republic’ and the ‘unity of the Nation’ by the words ‘unity and integrity of the Nation’ in the Preamble; giving all DPs overriding effect in Article 31C over FRs in Articles 14, 19 and 31; introducing a new Article 31D saving laws preventing anti-national activities from challenge under Articles 14, 19 or 31; introduction of Article 32A denying the Supreme Court’s jurisdiction over State laws vis-à-vis FRs; addition of DPs for the welfare of children, legal aid,

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participation of workers in the management of industries, and protection of
the environment; introduction of Fundamental Duties of citizens; making the
advice of the Council of Ministers binding on the President; denying the High
Court’s jurisdiction to judge the constitutional validity of Central legislation; a
requirement of a two-thirds majority of the Court for invalidation of a Central
or State law; curtailment of the powers of High Courts under Articles 226 and
227; denial of their power to invalidate Central laws and special provisions
for pending petitions; the deployment of Central armed forces in the States;
provision for an all India judicial service; introduction of a new Part XIVA
providing for administrative tribunals and excluding the jurisdiction of the
courts to review their decisions except by special leave petition to the Supreme
Court under Article 136; provision for declaration of a state of Emergency in
any part of the country; strengthening of Centre’s hold over the States during
the Central rule and weakening of the position of FRs during the state of
Emergency; inclusion of clauses (4) and (5) in Article 368 given above; and
expansion of Central heads of legislation at the expense of the States.

Soon after the commencement of the 42nd Amendment the Emergency
was revoked and fresh elections were held resulting in Mrs. Gandhi’s personal
and party defeat in elections. Much of what she had done by the 38th,
39th and 42nd Amendments was undone by the new government and the
Constitution was restored to its position as it had been by the 43rd and 44th
Amendments in 1978 and 1979 respectively. A noticeable change brought by
the 44th Amendment was repeal of the right to property in Articles 19(1)(f)
and 31 and its introduction in brief and simple form in a new Article 300A
which reads: ‘No person shall be deprived of his property save by authority
of law.’ The 44th Amendment has also introduced several safeguards in the
Emergency provisions specifically replacing words ‘internal disturbance’ by
‘armed rebellion’, and better parliamentary control and non-suspension of the
FRs to life and liberty during a state of Emergency. The Supreme Court later
invalidated several provisions of the 42nd Amendment, which the 43rd and
44th Amendments left unchanged.

One of the most important and earliest decisions in this regard is Minerva
Mills32 which entrenched the basic structure doctrine in the Constitution.
Invalidating clauses (4) and (5) of Article 368 which made constitutional
amendments immune from challenge in courts retrospectively was unanimously
declared unconstitutional by a five judge bench of the Court on the ground
that non-amendability of the basic structure of the Constitution is one of its
basic features. ‘Indeed,’ observed the Court ‘a limited amending power is one
of the basic features of our Constitution and therefore, limitations on that
power cannot be destroyed.’33 Any amendment of the Constitution that makes

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32. Supra note 11.
33. AIR 1980 SC 1789 at 1798.
amendments changing the basic structure of the Constitution immune from challenge in the courts is, therefore, impermissible and invalid. It also invalidated by 4:1 that part of Article 31C which authorised the overriding of FRs in Articles 14 and 19 in pursuance of any of the DPs and restored the original position as upheld in Kesavananda. In another decision upholding the position laid down in Kesavananda the Court held that while Articles 31A and 31B and the Ninth Schedule were immune from challenge, any additions to the Ninth Schedule after that decision that is after 23 April 1973 could be challenged on the ground of violation of the basic structure. However, no such law has ever been challenged even though the Court has unanimously reiterated this proposition in a larger bench decision. In my view such a challenge may not be possible in view of the law laid down by the Court in Indira Nehru Gandhi and reiterated in subsequent cases that the basic structure doctrine applies only to constitutional amendments and not to ordinary legislation enacted by a legislature in the exercise of legislative powers.

Soon after Minerva Mills doubts were expressed about its authority as a binding precedent. But ignoring these doubts in SP Sampath Kumar v Union of India, without invalidating the exclusion of the jurisdiction of the High Courts in Article 323A introduced by the 42nd Amendment, the Supreme Court conceded that alternative judicial forums could be created by law but the law must ensure that such forum is no less effective than that of the High Courts under Article 226 and directed suitable amendments in the law to save it from unconstitutionality. Following Sampath Kumar in P Sambhamurthy v. State of AP the Supreme Court unanimously invalidated clause (5) of Article 371D introduced by 32nd Amendment in 1974. The clause provided that the final order of the Administrative Tribunal to be set up under clause (3) of that Article shall become effective upon its confirmation by the Government or on the expiry of three months. The proviso to clause (5) authorised the Government to modify or annul any order of the Tribunal. The Court held that the proviso was ‘violative of the rule of law which is clearly a basic and essential feature of the Constitution’. As the main part of clause (5) was related to the proviso and did not have any rationale for its independent existence the entire clause was invalidated. Later in L. Chandra Kumar v Union of India a seven
judge bench of the Supreme Court unanimously invalidated those clauses of Articles 323A and 323B introduced by the 42nd Amendment which excluded the jurisdiction of the Supreme Court under Article 32 and of the High Courts under Article 226. Holding that judicial review was one of the basic features of the Constitution which could not be diluted by transferring judicial power to the administrative tribunals and excluding the review of their determinations under Articles 32 or 226, the Court conceded that if the tribunals were as independent from the executive as the High Courts exclusion of High Courts’ supervisory jurisdiction could be justified but not otherwise.

Preceding L. Chandra Kumar in Kihoto Holhan v. Zanchiltu the Supreme Court invalidated paragraph 7 of the Tenth Schedule to the Constitution introduced by the 52nd Amendment Act, 1985 that debarred the jurisdiction of all courts ‘in respect of any matter connected with the disqualification of a member’ of Parliament or State legislature on the ground that the paragraph had the effect of amending the powers of the Supreme Court and the High Courts without following the procedure required in the proviso to Article 368(2). The Court had earlier rejected the same argument in Sajjan Singh. If the Sajjan Singh situation arises today perhaps the Court will tend to follow Kihoto Holhan.

IV. THE BASIC STRUCTURE DOCTRINE

The basic structure has been an issue in several other cases too, but in all of them the Court has upheld the amendments. For example, in Raghunathrao Ganpatrao v. Union of India the Supreme Court upheld the 26th Amendment Act 1971 that derecognised the former Indian rulers and abolished their privy purses and other privileges because the amendment was consistent with the basic features of the Constitution such as republicanism, human dignity and equality. Similarly in M. Nagaraj v. Union of India the Court unanimously upheld several amendments making special provisions for the Scheduled Castes (SCs) and the Scheduled Tribes (STs) in Article 16 which guarantees equality of opportunity in matters of state employment as well as in Article 335 which requires the state to give special consideration to the interests of SCs and STs in the matter of state employment. The fact that these amendments overruled decisions of the Court did not make any difference. Again, in I.R. Coelho v. Union of India a nine judge bench unanimously held that though the validity of the laws included in the Ninth Schedule after Kesavananda could be tested on the anvil of the basic structure doctrine, it declined to test the validity of any amendment that introduced these Acts into the Ninth Schedule. Once again in Ashok Kumar v. Union of India the Court upheld the validity

43. Raghunathrao Ganpatrao v. Union of India, AIR 1993 SC 1267.
of the 93rd Amendment of the Constitution introducing clause (5) in Article 15 under which, notwithstanding anything in Article 15 or Article 19(1)(g), a State can make any special provision for the advancement of any socially or educationally backward class or the SCs or STs in so far as such provisions relate to their admission to educational institutions. More recently the Court has also upheld the provisions for reservation for women and SCs and STs in village panchayats and municipalities introduced in the Constitution respectively by 73rd and 74th Amendment Acts of 1992. With these precedents before us and no more attempts to change the Constitution such as were necessitated in its infancy or later for political reasons during early years of Mrs. Gandhi from 1967 to 1976, it now seems on all sides that in its basic essentials the Constitution is becoming internalised among all sections and institutions of society and the body politic. The Supreme Court has also admitted that the basic structure may be damaged by its interpretation and application of the Constitution: in that case the amending body is justified in overruling the Court by amendment and restoring the basic structure of the Constitution. Such a conclusion is supported by the Court's remarks in Waman Rao and Nagaraj. In Waman Rao, relying upon the history of the 1st Amendment, the Court drew the conclusion that Articles 31A and 31B strengthened, instead of weakening the basic structure of the Constitution. Similarly, in Nagaraj the respondents argued that 'the power under Article 368 has to keep the Constitution in repair as and when it becomes necessary and thereby protect and preserve the basic structure' while the Court admitted that the challenged amendments were 'curative by nature'. Thus, the Courts as well as other branches of the state representing the people must respect the basic structure of the Constitution on behalf of the people as well as for themselves.

Revisiting the Basic Structure Doctrine

In the nature of things some differences will persist as to what exactly is the basic structure of the Constitution. The judicial precedents so far have established that democracy, republicanism, independence of the judiciary, judicial review, secularism, federalism, rule of law, harmony and balance between FRs and DPs, equality and the non-amendability of the basic structure of the Constitution, are components of the basic structure of the Constitution. An enormous literature has developed around this issue in India and abroad. Legal scholars and practitioners around the world today accept that the document that emerges at the 'constitutional moments' has an identity which must be preserved. This does not mean that every detail in the Constitution is to be preserved. But just as a house does not lose its identity so long as you are decorating and repairing it on the same foundations on which

it was built, so a Constitution does not lose its identity if it is changed according to the requirements of changing times so long as its basic foundations are maintained.\textsuperscript{49} Following my engagement with the issue elsewhere,\textsuperscript{50} I summarise the issue as follows.

In \textit{Nagaraj} the Court laid down that if an amendment is challenged for violation of the basic structure of the Constitution, ‘twin tests have to be satisfied, namely, the “width test” and the test of “identity”’.\textsuperscript{51} With reference to the challenged amendments in the case the Court held: ‘Applying the “width test”, we do not find obliteration of any of the constitutional limitations. Applying the test of “identity”, we do not find any alteration in the existing structure of the equality code.’\textsuperscript{52} Relying upon the earlier precedents it clarified that not an amendment of a particular article but an amendment that adversely affects or destroys the wider principles of the Constitution such as democracy, secularism, equality or republicanism, or one that changes the identity of the Constitution is impermissible.\textsuperscript{53} “To destroy its identity is to abrogate the basic structure of the Constitution’, the Court concluded.\textsuperscript{54} Later in \textit{Coelho} the Court varied the test in its application to FRs insofar as the Court read \textit{Nagaraj} to have held that in respect of the amendments of the fundamental rights it is not the change in a particular article but the change in the essence of the right must be the test for the change in identity. It laid down that if the ‘triangle of Article 21 read with Article 14 and Article 19 is sought to be eliminated not only the “essence of right” test but also the “rights test” has to apply.’\textsuperscript{55} Pointing out the difference between the ‘rights test’ and ‘essence of right’ test, the Court observed that both form part of the basic structure doctrine, but:\textsuperscript{56}

When in a controlled Constitution conferring limited power of amendment, an entire chapter is made inapplicable, ‘the essence of right’ test as applied in M. Nagaraj case will have no applicability. In such a situation, to judge the validity of the law, it is the ‘rights test’ which is more appropriate.

I am not quite sure of these conclusions of the Court because I could not locate the use of the expression ‘essence of right’ in \textit{Nagaraj.} With reference to amendments in the Ninth Schedule, holding that each amendment must be

\textsuperscript{49} See Joe\textsc{phine} Re\textsc{x}, \textit{Between Authority and Interpretation} 370 (2009); The point of my book is to warn against confusing change with loss of identity and against the spurious arguments it breeds. Dispelling errors is all that a general theory of the constitution can aspire to achieve.

\textsuperscript{50} Supra note 37.

\textsuperscript{51} (2006) 8 SCC 212 at 268.

\textsuperscript{52} Id. at 269.

\textsuperscript{53} Id.

\textsuperscript{54} Id.

\textsuperscript{55} (2007) 2 SCC 1 at 108.

\textsuperscript{56} Id.
judged on its own merits, the Court in Coelho concluded: 57

The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge.

While the Court is still struggling to find an objective test, which in the nature of the things may be difficult to lay down, the following test laid down by one of the foremost architects of the basic structure doctrine in India—Dieter Conrad—appears to be convincing: 58

[From the fact that the constitutional provision does not mention limitations it must be concluded that the amending power is intended to be very wide. Only clearest cases of transgression would justify judicial intervention, as a remedy of last resort. Regularly, such cases will be discernible by an element of abuse of power, of some collateral purpose appearing behind the purported scope of the amendment. In the absence of such elements a general presumption of constitutionality must operate even more than in the case of ordinary legislation.

From the precedents so far it appears that the Court in India has been consciously or unconsciously following this approach towards constitutional amendments. 59 It may be hoped that with political stability and maturity as well as better understanding of the Constitution the challenge to constitutional amendments, as is already the visible trend, will be rare and the doctrine of basic structure will stay in reserve as a safety valve.

** CONCLUSION **

I started with describing constitutional law as incarnation or transformation of fundamental law that lies within the domain of public law. Even though unlike the fundamental law of early times, which was assigned some sort of superhuman or divine origins, the constitutional law has become man made positive law, it has not lost its character as fundamental law. It is not only desirable but required that the constitution must not lose its pedigree so long as we are envisaging and designing a sustainable orderly society. Such a society will always require adherence to certain fundamental values that continue to grow and vary with the growth and variance in the society. These values cannot, therefore, be fixed for ever in the form of hard and fast rules without the possibility of any change in their contents. That is why even a man-made constitution has to be read and interpreted not like an ordinary legislation.

57. * Id. at 111.*
but rather as an organic law which gives birth to or creates possibility for the creation of legislation. In the evolution of law since the Roman times this distinction between legislation and organic law has always been maintained in the Western literature. The Romans expressed it as lex and ius, the Germans as das Gesetz and das Recht and French as la loi and le droit. In modern times constitutional law is part of allgemeines Staatsrecht or droit politique in Germany and France respectively. 60 Though not a parallel example, but rather the reverse of it, could perhaps be drawn between dharma and rajadharma in the ancient Indian literature.

Because of such pedigree and nature of the constitution, the constitution has to be read as droit politique which may roughly be translated as politically “right”. Whatever is politically “right”, not in terms of day to day party or group politics but in terms of politically fair and just, must be read into the constitution. As “[t]he written Constitution is neither a lawyer’s contract nor a layman’s document” but a “political artefact”, 61 only by resorting a public law perspective, by viewing the constitution as an exercise in statecraft that functions according to the precepts of droit politique, will it be possible to address the fundamental issues. 62 These considerations are relevant for the purpose of determining the constitutionality of legislative and executive acts of the state as well as the validity of the constitutional amendments. In a recent comparative study of as many as sixteen constitutions, including the Constitution of India, on constitutional change, the editors have concluded that “[a]ll constitutional arrangements include superconstitutional provisions or principles which are regarded as unamendable.” 63 Although it is undeniably true that flexibility is “one of the major keys to constitutional longevity” 64 and “[a] quantitative and qualitative excess of procedural requirements for constitutional change is to be avoided,” 65 change should not be confused with loss of identity. 66 Concentrating his study on India, Israel and Ireland, Gary Jacobsohn has argued that “constitutional identity involves more than just the official character of a nation; it incorporates the prescriptive constitution as well, which includes long standing commitments and sanctioned practices that may be at odds with the language of the document currently in force.” 67 Though it may not be an exactly apt example, but the Supreme Court’s holding that secularism is part of the basic structure of the Constitution goes very well with the well-recognized long tradition of India. 68

60. LOUGHLIN, supra note 1, at 8-9.
61. Id. at 298.
62. Id. at 310-11.
63. OLIVER & FUSARO, supra note 1 at 428.
64. GARY J JACOBSON, CONSTITUTIONAL IDENTITY 324 (2010).
65. OLIVER & FUSARO, supra note 1 at 431.
66. JACOBSON, supra note 64, at 325.
67. Id. at 345.