

# CONSTITUTION: AMENDED IT STANDS?

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*Unlike almost all legislative creations, the Constitution of a nation is intended to provide an enduring instrument to serve through aeons of time without frequent revision. Yet it is true nonetheless that the very purpose for its formation is to meet the needs of all generations alike, past, present or future. Fulfilment of such lofty goals cannot be dreamt of unless the constitutional text is subjected to modifications designed to meet the needs of the day. Any amendment to the 'fundamental law of the land', that is, the Constitution obviously has significant ramifications on the institutional structure of the nation. This article attempts to explore the reach of the amending power, its need thereof, its position vis-à-vis constituent power and the reason why it should be subjected to certain restrictions like the one that the Indian judiciary had attempted through the evolution of the Basic Structure Doctrine.*

## I. INTRODUCTION

“The structure has been erected by architects of consummate skill and fidelity; its foundations are solid; its compartments are beautiful as well as useful; its arrangements are full of wisdom and order; and its defences are impregnable from without. It has been reared for immortality, if the work of man may justly aspire to such a title. It may, nevertheless, perish in an hour by the folly, or corruption, or negligence of its only keepers, The People.”

-Joseph Story.<sup>1</sup>

Every political society aspires to create an order based on the shared values of its constituent elements. More often than not, such values are found encapsulated in the Constitution that is in reality a sanctimonious text punctuated explicitly or implicitly by the common economic, political and social commitments

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<sup>1</sup> Quoted by Sachchidananda Sinha, Constituent Assembly Debates (CAD), Vol. 1 1 (1989); Joseph Story had stated the aforementioned words in his *Commentaries*, while describing the Union under the U.S. Constitution with the purpose of inculcating among the new generations a profound reverence for the Union.

of the people. With a view to realizing this cherished societal goal, the Constitution institutionalizes numerous entities, bestowing them with the power and authority that may be needed for the accomplishment of the humongous task at hand. For the delicate constitutional edifice to survive, it is therefore intrinsically important for the creatures of the Constitution to act in exercise of, and not in derogation of, their ordained textual and moral responsibilities. It is necessary to protect the essential components of the Constitution so that they may not be tampered with or demolished by the folly of the profligates who “are rewarded, because they flatter the people, in order to betray them”.<sup>2</sup> Herein lies the eternal significance of Justice Storey’s word of caution.

A careful scrutiny of *Political Science and Comparative Constitutional Law*, penned by John Burgess, will reveal the vision of three fundamental structural constituents of a Constitution that can be looked upon as a wholesome and evolving organism.<sup>3</sup> The foremost among these three is based on the rationalization that in order to pave the way for the gradual evolution of the constitutional principles and contents in keeping with the inter-temporal changes of societal demands, some form of structural organization of the State becomes necessary, if not indispensable. Popularly referred to as the ‘amending clause’, this provision is unlikely to ever lose its relevance so long as the human society remains in a constant state of flux. The power that this clause seeks to provide is similarly referred to as the ‘amending power’. Such power eagerly awaits to be wielded in order to achieve the goal of, for want of a better word, ‘streamlining’ the Constitution. Such reorganization becomes especially necessary if the Constitution is to shed the appendages that have worn down through repeated usage and the ravages of time, thereby losing much of their contemporary relevance. If the said relevance is to be preserved, then those appendages need to be replaced with provisions that will enable the nation to function effectively and uphold the fundamental, basic principles that the Constitution and by proxy, the national citizens have sworn to protect and represent.

This article seeks, in its entirety, to ascertain the nature of the process of constitutional amendment. It begins with an exploration into the reasons which contribute to the necessity of any modification of the constitutional provisions that are thought to be sacred and thus beyond such attempts. In doing so, we have also sought to bring to the forefront the extent to which the meaning and scope of the term ‘amendment’ can be extended and the possible ramifications of any undue extension of such sort. The discussion then turns to a brief overview of the different amendment procedures envisaged in the Constitution of India and the requirement for curbing unrestricted amendatory power. A comparison has then sought to be made between constituent power and amending power and finally, the existence of the Basic Structure Doctrine as an inherent limitation to constitutional amendment has been remarked upon.

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<sup>2</sup> *Id.*

<sup>3</sup> A. LAKSHMINATH, BASIC STRUCTURE AND CONSTITUTIONAL AMENDMENTS: LIMITATIONS AND JUSTICIABILITY 28 (2002).

## II. NECESSITY FOR AMENDMENT AND THE PERILS IT BRINGS WITH IT

To command respect and reverence from posterity, the Constitution ought not to impose fetters and shackles on the progress of civilization by prescribing rigid guidelines and unalterable norms that would create obstacles in the path of the future generations wishing to change, alter or replace them - for no generation has a monopoly on wisdom.<sup>4</sup> Orderly growth of the Constitution mandates a constitutional device for change and that brings one to the process of constitutional amendment. Stability and continuity are lofty goals that every state strives to achieve, but such efforts are doomed to failure unless the State is entrusted with a certain scale of power necessary for the maintenance of the social order. The million-dollar question is whether the citizen, in return for protection from anarchic chaos, is willing to give *carte blanche* to the government. This is because when the government is armed with such unbridled power, there is always the risk that it may overstep its authority, thereby turning into a tyrannical autocracy. The very fear of the State machinery running amok unchecked had given birth to the hallowed concept of Constitutionalism, which in its turn, through its libertarian and procedural aspects, seeks to impose certain checks and balances on the Government, under the aegis of the implied limitation doctrine.<sup>5</sup> Such a mechanism is not an abstract concept; it owes its origin to the demands made by the relationship between the government and the governed. However, as Garner James had observed far back in time, “human societies grow and develop with the lapse of time and unless a provision is made for such constitutional readjustment as their internal development requires, they must stagnate or retrogress”.<sup>6</sup> The said remark assumes all the more significance in the light of the fact that in a democratic form of government like the one existing in the Indian scenario, the aspirations and ideologies of the general population must be reflected in the Constitutional provisions. Since such normative values seldom stand unaffected with the passage of time, therefore the Constitution can scarcely afford to remain static, lest it runs the risk of stagnation and ultimately, degeneration. The relevance of the Constitution to the polity starts to decay when the former becomes anachronistic due to lack of flexibility. The lack of room for any legal manoeuvre to prevent such an unpalatable occurrence may increase exponentially the risk of a bloody revolution by the distraught people, as foreseen by Macaulay.<sup>7</sup> Therein lies the necessity of constitutional amendment, if one is to pay heed to the words of Brougham: “Constitution must grow if they are of any value, they have roots, they are ripe, they endure, if they strike no root bear no fruit, swiftly decay and are long perish”.<sup>8</sup>

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<sup>4</sup> See Justice H.R. Khanna's opinion in *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461 para 1445.

<sup>5</sup> Satchidananda Mishra, *Amendment of Indian Constitution: an Overview*, in *Constitution and Constitutionalism in India*, 46 (Surya Narayan Misra et al eds., 1999); the intricacies of the implied limitation doctrine have been explained in details in the later part of this article.

<sup>6</sup> KANHAIYALAL SHARMA, *RECONSTITUTION OF THE CONSTITUTION OF INDIA* 358 (2002).

<sup>7</sup> See generally T.B. MACAULAY, *HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II VOLUME 1* 99-132 (1979).

<sup>8</sup> Mishra, *supra* note 5.

A Constitution that is not amenable to amendment seems to be, according to Thomas Paine, ‘a contradiction in term’. In Mulford’s view, such a Constitution

“[...] is the worst tyranny of time, or rather the very tyranny of time. It makes an earthly providence of a convention which was adjourned without day. It places the sceptre over a free people in the hands of dead men, and the only office left to the people is to build thrones out of the stones of their sepulchres.”<sup>9</sup>

With the development, growth and expansion of the community, the Constitution to contain provisions for its amendment, otherwise it becomes relegated to a mere contractual deed between the Government and the people, fraught with inadequacy and imperfection. Opposed to that there is the risk of subjecting the very existence of the principles protected by the Constitution to the whims of a so-called majority momentarily engrossed in some new idea, which is what is likely to happen if the modes of Constitutional amendment are made too pliable. The scope of the term ‘amendment’, however, seemingly fails to keep pace with the degree of desirability of existence that it invokes. Many debates have been voiced surrounding this issue and the ones relating to the extent of amending power and the checks and balances imposed on the same. Nevertheless, the current position is far from certain. Perhaps it all comes down to the matter of the degree of flexibility with which one is willing to perceive the constitutional sanctity on the one hand and the need to match the stride of changing needs and demands of human society and human psyche on the other. The very meaning of the word ‘amendment’ has been subjected to so much controversy that one wonders where to begin. A layman will perhaps be best advised to look upon the word as one meaning ‘slight change’ or even an ‘improvement’ in most of the occasions. The significance of the term implies such an addition or change within the lines of the original instrument as will better carry out the purpose for which such instrument was framed. However, when used in the constitutional context, the same term acquires complex nuances like alteration, revision, repeal, addition, variation or even deletion, all the said actions being applicable to constitutional provisions through mechanisms prescribed by the Constitution itself. For scholars like Burrill, amendment is the correction of an error in any process of law, either by consent or upon motion of the court in which the proceeding is pending.<sup>10</sup> Tempered by reason, such an outlook seems to indicate the seeds of a corrective instrument in the amendment procedure, not so much used to right a wrong, than to modify the existing provisions in accordance with the changing times. To mend and not to end the Constitution, that seems the objective of amendment, or as Herman Finer might have said, to deconstitute and reconstitute are what amendment is all about.<sup>11</sup> Not all academic writings, however, dwell solely upon the distinction between ordinary and constitutional amendments. Thomas Cooley for example, in his

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<sup>9</sup> J.W. GARNER, *POLITICAL SCIENCE AND GOVERNMENT* 538-539 (1928).

<sup>10</sup> ALEXANDER M. BURRILL, *A LAW DICTIONARY AND GLOSSARY* 92 (1867).

<sup>11</sup> LAKSHMINATH, *Supra* note 3.

discourse on the American Constitution, categorically observes that “*the power of amendment was introduced for preservation not destruction*”.<sup>12</sup> The term ‘amendment’, as Jason Mazzone notes, refers “*not to making any kind of change to the existing document, but to fine-tuning what is already in place*”.<sup>13</sup> It is “*not the pursuit of something new, but an intervention, shown by experience to be necessary in order to keep the Constitution on its original course*”.<sup>14</sup>

Keeping such divergences in view, one may reach a conclusion that an amendment is not a term of art, nor has it acquired any precise or definite legal meaning; instead, it is a word of rather ambiguous import and elastic ambit. Having said so, certain important ingredients of the term amendment can no doubt be identified amidst the jumble of scholarly opinions:

1. to improve or better;
2. to remove an error;
3. to make change which may not improve the instrument but which does not alter or destroy the basic features of the instrument; or
4. to make any change whatsoever.

While the former three ingredients may be accepted as forming part of the amendatory process, one must be more circumspect insofar as the last element is concerned. An interpretation of the scope of an amendment as encompassing any change whatsoever may have alarming consequences on the foundational values of the constitutional system. What emerges is that an amendment is a tool available with the legislators by virtue of which necessary modifications or alterations can be made to the Constitution, without in any manner robbing it of its identity. This does not, however, imply that there are entrenched provisions in the Constitution that can never be changed. Only the process of amendment cannot be used to make modifications that are more than mere amendments to the existing Constitution. Such drastic changes require ‘higher law making’ –the articulation of new principles by the citizenry in a period of constitutional politics, the kind that occur following a revolution or some other seismic event that alters the course of life going forward.<sup>15</sup>

The very essence of a written Constitution like the Indian Constitution stems from the mode of its amendment, which provides an insight into the degree of rigidity that it seeks to espouse. Having said that, blind acceptance of the widest possible import given to a constitutional amendment will signify surrender to the whims of majoritarianism. The legislature of the day, hijacked by individual, group and institutional interests and temporary impulses or permanent passions may use its authority to inflict torture on the Constitution. Leaving the door open

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<sup>12</sup> Cooley, T.M. *The Power to Amend the Federal Constitution*, 2 MICH. L.J. 110 (1893).

<sup>13</sup> Mazzone J, *Unamendments*, 90 IOWA L. REV. 1747 (2005).

<sup>14</sup> *Id.*

<sup>15</sup> B. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6 (1991).

for it to act arbitrarily as observed during the imposition of national emergency in 1975, in blithe oblivion of its limits would essentially mean legitimizing constitutional hara-kiri, since history has testified time and again of absolute power bringing about absolute corruption.

Instilling certain safeguards like avoiding light or wanton constitutional changes, ensuring that the people affected by any change are given a suitable opportunity to be heard, exercising care so as not to infringe the fundamental rights of individuals, abhorring unilateral changes in the federal (or rather, quasi-federal) structure on the part of the Union or the States etc. are but some of the feasible measures that can be undertaken in order to ensure that a change that is destined to come should arrive in a semblance of order. Unless an amendment facilitates and supplements the constitutional scheme and the underlying principles, exercise of amending power is merely reduced to a subversion of the constitutional framework. That is what is meant to be conveyed by the implied limitation doctrine. One may wish to seek to champion the cause of the imposition of inherent limitations on amending powers as is common in the constitutions professing a federal nature. However, it would be fatally wrong if such effort begins with the rigid assumption that the Constitution is in essence nothing but an agreement between the politico and the polity, the rigidity of which precludes any change in the allocation of powers as had been envisaged at the moment of its inception. Such an assumption will no doubt be instrumental in the defeat of the very purpose of the said amendment. Perhaps it is for this very reason that the framers of the Indian Constitution did not attempt to place any express limitations on the amending power of the Parliament. On the other hand, attempts to place such limitations are clearly visible in provisions like Article V of the US Constitution, precluding any amendment affecting the equal suffrage of the states in Senate, or Article 89 of the Constitution of 5<sup>th</sup> French Republic 1958, which puts the republican form of government beyond the purview of constitutional amendment, or Article 217B of the Brazilian Constitution that seeks to protect the sanctity of the federation republic in vocal terms.

### III. A BRIEF LOOK AT THE DIVERSITY OF AMENDMENT PROCEDURES UNDER THE INDIAN CONSTITUTION – WHY THERE IS NEED FOR RESTRAINTS

The Indian Constitution is apparently the gift of the nation to itself, despite comments being made with regard to the fictional nature of representation posed by the Constituent Assembly as far as ‘We, the People’ are concerned. Of the several aspects of the Constitution, the amending process is, whether the most ably conceived one or not, certainly one of those influenced by diversification, with both *de jure* (formal) as well as *de facto* (informal) modes of changes being prescribed. The former model can be adopted via constitutional mechanisms themselves, through either direct or indirect participation by the people. While direct participation through initiation and referendum has been provided for in certain constitutions like that of Switzerland, the Indian Constitution on the other

hand provides for indirect participation in constitutional modification through political representatives, as is seen from the wordings of Art. 368. Informal changes, at the other end of the spectrum, can be accomplished by following the paths of judicial activism, executive actions and even desuetude under certain circumstances. There is no dearth of examples as far as judicial activism in the Indian scenario is concerned, one of the many path-breaking occasions being the emergence of the Basic Structure Doctrine in the case of *Kesavananda Bharati v State of Kerala*.<sup>16</sup> The initiation and continuation of the Planning Process at the insistence of Nehru is an instance where executive action was instrumental in constitutional modification. The provision of amendment by desuetude is a fascinating one. It simply means treating disuse of any constitutional provision as a sort of modification of the Constitution, albeit only to a limited extent. The rationale behind such an action is that since no constitutional provision is a dead letter per se, hence the prolonged absence of enforcement of the same, even without repeal, spells the death for such provision.<sup>17</sup> Mention can be made in this context of Article 44 of the Indian Constitution, providing for a uniform civil code, that provides an illustration of the aforesaid process of amendment. The aforesaid article enjoins upon the State “to endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India”. Being a part of the Directive Principles of State Policy, this provision has never had any judicial force whatsoever. Nor does it specify any time schedule for the enactment of a Common Civil Code and the judiciary, in its normal role, serves little judicial purpose by harping on it.<sup>18</sup> It is true that the Indian Constitution follows the English practice of not providing any overt recognition to the concept of self-amendment through desuetude, but in the light of the fact that constitutional provisions such as Article 44 do exist that need, if not abolition, then at least modification, the time has perhaps come for India to rethink its stance vis-à-vis desuetude.

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<sup>16</sup> (1973) 4 SCC 225.

<sup>17</sup> Desuetude is the doctrine that long and continued non-use of a law renders it invalid, at least in the sense that courts will no longer tolerate punishing its transgressors; see Linda Rogers and William Rogers, *Desuetude as a Defense*, 52 IOWA L. REV. 1 (1966). Although Scotland remains the only Anglo-American system to have formally recognized the doctrine through the decision in *O’Hanlon v. Myers*, 10 Rich. 128 (S.C. 1856) (see generally J.R. Philip, *Some Reflections on Desuetude*, 43 JURIDICAL REVIEW 260-267 (1931)), still it has in course of time, permeated in jurisprudence such as that of the United States too, as seen in *U.S. v. Elliott*, 266 F. Supp. 318, (D.C.N.Y. 1967). In this case, the accused had allegedly transgressed the provisions of a statute, 18 U.S.C. 956, enacted as far back as in 1917. It prohibited conspiracies within the United States to destroy property in foreign nations with which the United States is at peace. The judiciary held that there was “little analytical aid in merely applying, or refusing to apply, the rubric of desuetude. The problem must be approached in terms of that fundamental fairness owed to the particular defendant that is the heart of due process.” (Elliot, *id.*, 326) For a more detailed analysis of the doctrine of desuetude, see generally PETER SUBER, *THE PARADOX OF SELF-AMENDMENT: A STUDY OF LAW, LOGIC, OMNIPOTENCE AND CHANGE*, Section 19 (1990).

<sup>18</sup> Sharad Joshi, *Common Civil Code Sans Coercion*, available at [http://www.ccsindia.org/article/people\\_sj\\_commoncivilcode.asp](http://www.ccsindia.org/article/people_sj_commoncivilcode.asp) (Last visited on September 4, 2008).

If one accepts the fact that the Constituent Assembly provided an even platform for representation to the Indian polity, with whom lies the ultimate constituent power, then the logical corollary follows that the same power has been properly conferred by the Assembly upon the Parliament and the President of India, subjected to the ratification of majority States in certain special occasions. Hence the amending powers of the Parliament should be unfettered by limitations of any kind, because parliamentary action is necessitated by the need and will of the same '*We, the People*'. However, the same concern against the emergence of a tyrannical government as has been mentioned earlier requires that power to be subjected to the bonds of doctrines like that of Basic Structure. The significances of all amendments are not the same and any attempt to distort that reality would be a fool's errand indeed. Concepts like the fundamental rights or secularism are so ingrained in the constitutional psyche that any amendment trying to override the same will be accused and rightly so, of subverting the constitutional scheme. Majority of amendments, if not all, are indeed guided by political considerations, but that doesn't necessarily imply that their existence is fraught with controversy. However, those trying to subvert the Constitution by destroying its very fabric are bound to attract controversy as well as criticism and it is indeed desirable that such amendments should pass such baptism by fire if they are to affect what the framers of the Constitution had desired for the people to have. It is for such reasons that concepts like judicial review have always remained an integral part of the Constitution and will definitely continue to be so in the future, notwithstanding efforts on the part of the politicians, succumbing to the pressure of the various interest groups, to extend the so-called protection of the Ninth Schedule to every conceivable piece of legislation and amendments thereof. While the fact remains true that for a Constitution to live, like any other organism, it must grow, one must be cautioned lest such growth exceeds the organism's ability to sustain itself.

#### IV. OK, WE ARE EMPOWERED, BUT HOW? – CONSTITUENT POWER VIS-À-VIS AMENDING POWER

The question of legitimacy has often appeared as the proverbial 'bee in the bonnet' to the greatest of constitutionalists, cutting him short in the midst of many a lengthy discourse about various abstractions that adorn the constitutional scheme. It is true that Constitution is indeed the 'law of the land', reigning supreme over all other legislations and providing that touchstone to test the validity of the same. However, that rather leaves open the ground for certain questions to arise regarding the nature and scope of such power as resides in that document; in whom is the power vested, the people of the land or their governing representative? To what extent can the power be exercised? Is it limited to preserving status quo or does it allow small changes to take place in the constitutional doctrine? Can such modification be extended to the point of creating something new altogether? Queries such as these are bound to crop up in view of the fact that the political myths and rituals that form the subject of sociological study are almost akin to the source of addiction that is religion. Civic and political theology constitute an integral part of it, with the nature of the sovereign who is the Civic God per se, being the subject matter of intellectual discourses in the backdrop of constitutional framework.

Reflections on the concepts of sovereignty and constituent power in particular, seem to reproduce theological arguments that had once passed into the realm of unawareness and invite the application of general theological outlooks in the constitutional context. Popular opinion on this point is, as usual, divided, with scholars like Carl Schmitt and Ernst Kantorowicz agreeing on the essential aspect of pursuing a theological solution to yield a satisfactory amount of constituent power, but differing on the nature of such theology.<sup>19</sup> Fellow intellectuals like Bruce Ackermann and Antonio Negri, on the other hand, appear to be averse altogether to approach the question of constituent power from the standpoint of political theology.<sup>20</sup>

When a legislation is being conceived of, if a person participates in the process, surely then it can be concluded that the said person is, in fact, putting the seal of legitimacy on the said legislation. That is not to say that there exists only one means to achieve that end. Direct participation can be dispensed with if one is willing to extend his recognition, albeit in a passive manner, to a procedure which he never actively participated in. What is necessary for the success of such a mode of a creation gaining proper recognition is that somebody has to initiate that process and his active participation in the said process has to prove capable of inciting enough zeal in the collective minds of the society; so much so that his creation attains the degree of legitimacy that is so very essential for its survival. Customarily, legal continuity through the millennia of a civilization's existence has been able to supply the necessary stimulant. More often than not, the Divine nature of a creation's origin has been enough to initiate a chain reaction of sorts that has culminated in civilized recognition of that creation and incorporation of the same within the societal norms. So, proceeding along that line, if one set of law gains its validity, at least in part, from its predecessor, then ultimately, the 'first set of legal norms', so to say, seems to be the source from which stems the validity of its successors and the creator of the same should rank the highest of all legal authorities. The same thread of thought has been voiced in Kelsenian theory of Positivism, which recognizes the framer of the historically first constitution to be the wielder of the greatest clout ever in the jurisprudential history of constitutionalism. Naturally this brings forth the query as to how exactly is a Constitution conceived of. The exercise of constituent power is often associated with violent and bloody revolutions, something that is natural to occur when the legal order breaks down, yielding place for a new one to fill the vacuous state of anarchy. However, exercise of such power is not an instrument to bring about the revolution, but rather to put an end to the same. It is to achieve such an end that one needs to pave the way for a new legal order. Those who do not engage in active participation in such exercise through creating the mandates for the nascent order can nevertheless play their part in adhering to the principles that lend validity to such mandates. In this way, the co-existence of the two apparently contradictory methods of granting legitimacy to a legal creation is ensured. Interestingly enough,

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<sup>19</sup> See generally Lior Barshack, *Constituent Power as Body: Outline of a Constitutional Theology*, 56 U. TORONTO L.J. 185 (2006).

<sup>20</sup> *Id.*

this line of agreement brings one closer to the conclusion that it is not upon some abstract assessment of truth or reason that the validity of a law depends, but on the sheer force of, if one may say so, popular whim fanned by the rather intoxicating exercise of sovereign power.

The Indian position regarding this aspect seems to be rather unique. One has to remember that the British Parliament has derived its legislative sovereignty not from any express sanction of the British mass, but rather from a manner of passive consent expressed by the people in the said sovereignty, as a side effect of the Parliament's intimate relationship with the British Crown. During 1947, when India was granted independence, in a rather strange gesture, the British sought to grant the newly-born Indian states legislative power as well as a protective machinery of the validity of the said power in the shape of a Constitution, something which they themselves lacked. On the one hand, the British looked upon the Indian Constitution as an instrument that derives its authority from another piece of legislation, viz. the Indian Independence Act, 1947 and not from an act exhibiting the spirit of self-determination for the Indians. On the other hand, the Constituent Assembly had no doubt in its collective mind that the said Constitution was being framed by virtue of the exercise of the constituent power vested in the nation. It is this latter thought that seems to be reflected in the wordings of the Preamble.

There has always existed an underlying current of tension between the constituent power of the people who collectively enjoy the status of sovereignty and the checks and balances that the Constitution, which in itself is a creation achieved through the exercise of the said power, seeks to impose on the said power. The notion of '*We, the People*' having created the Constitution in the exercise of constituent power is pretty familiar in Constitutions like the Indian and the American ones, the idea being that the Constitutional Convention or the Constituent Assembly Debates were the concrete, operational form of the sovereignty of the people, through which device the people as a whole adopted the Constitution. It is this popular acceptance that forms the rationale behind the superiority of the Constitution to the laws enacted by legislatures. The Constituent Assembly had been created in India solely for the purpose of creating a touchstone to guide a nation that was on the verge of experiencing independence after having spent two centuries under the foreign yoke. It is this very single-minded aspect that endowed the said political body with a special status, that of the people's representative, the custodians of an infant legal edifice. The existence of the said Assembly, together with the manner in which the Preamble has been framed seems to reflect an ardent desire on the part of the nation to bestow unto themselves this so-called constituent power as a legal concept, based on which, the Constitution, the living law of the land, has been created. Therein lies the most significant difference between constituent power and legislative power – the latter seems to obtain its legitimacy, at least as far as the national Parliament is concerned, from an instrument, viz. the Constitution, the creation of which in turn can be looked upon as a direct ramification of the normative declaration of the popular sovereignty that is the hallmark of the former. The rationality of constituent power cannot be expressed more succinctly than the words of Dietrich Conrad –

“The very essence of the concept is that an exercise of the constituent power does not depend for its validity either on its legality or illegality in terms of the pre-existing order, but entirely on the positive character as an act of self-determination, i.e. a decision which can in a real sense be attributed to the authorship of the citizenry as a whole.”<sup>21</sup>

It is not far from truth to think of a spontaneous national decision inspired by a crowd of simultaneous, individual wills as a utopian concept that is rather too impractical to be achieved in reality. However, when one thinks of customary laws and traditions long in vogue, one has to admit that they represent a consensual procedure that forms a close approximation of the aforesaid concept. Similarly, when it comes to framing the Constitution of a nation, it has always been thought wise to leave the job to a body of representatives formed under a special mandate that in turn receives the popular support. When one looks at the constituent power, it is perceived as a normative concept more than anything else. Keeping that fact in mind, it has to be pointed out that whether a particular decision is in actuality receiving overwhelming support on a national scale, has nothing whatsoever to do with the said power. Rather, one has to be able to attribute the said decision to the society as a whole through the use of logic and rationality. Thus an absence of social freedoms like that of public debates, assemblies, free speech, free and fair elections etc. will undoubtedly spell the death for the legal concept that is constituent power. Such freedoms are necessary to preserve the normative nexus if nothing else. As long as they exist, the vagueness of the concept of constituent power cannot be used as a weapon to bypass the constitutional safeguards which are meant to validate the amendment of the Constitution. At the other end of the spectrum, one has to keep in mind the enormous possibilities of misuse that the amendatory power can be utilized for and the fact that a true appreciation of the principles underlying the constituent power can act as a check to such misuse.

Indeed, even if one for a while agrees to the theoretical concept of the Indian Constitution being a creature that came to be born by virtue of the exercise of the inherent constituent power possessed by the citizens of an independent nation, still certain questions keep floating in the background as a sort of logical corollary to such assumption. For example, what happened to the said constituent power once the Constitution has been framed? Did the citizens of India or their representatives spend such power in its entirety while engaged in such creation, or is the power still vested, albeit in a latent form, in the people themselves? If the latter is true, then what stops the people or at least the aforementioned representatives, from exercising that power and replacing the existing Constitution with a completely new one, characterized by a new set of normative values and principles? As Justice Mathew had said in the case of *Kesavananda Bharati*<sup>22</sup>, the

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<sup>21</sup> DIETRICH CONRAD, CONSTITUENT POWER, AMENDMENT AND BASIC STRUCTURE OF THE CONSTITUTION: A CRITICAL RECONSIDERATION 94 (1970).

<sup>22</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

possible effects of such a power will be nothing but chaotic and catastrophic in nature and perhaps that's why the Constitution has refrained from expressly providing such wide lassitude to the people at large. On the other hand, one would like to indicate that the very creation of the Constitution was justified on the ground of disallowing the previous generation from binding its successors irrevocably by its own legal traditions. Keeping that in mind, can it really be asserted that by limiting its own scope, or rather future exercise if one may so, to providing for mere amendments to the existing Constitution, the all-embracing constituent power has merely succeeded in relegating itself to the status of amendatory power? One would be wise to refrain from making such assertions, if for nothing else then in view of the differences between the notion of constituent power and amending power vested in a legislature. The Doctrine of Separation of Powers had been developed precisely for the purpose of not allowing the merger of constituent and legislative powers, among other things. If that be so, then there is no way that an ordinary legislative assembly, even if directly elected by the nation's population, can assume the mantle of the wielder of constituent power. Thus, in the light of the aforementioned arguments, one would like to reach the conclusion that it would be nothing short of an erroneous and careless action if the power conferred to the Indian Parliament under A. 368 of the Indian Constitution is equated with the 'original' constituent power through the exercise of which, the said Constitution had once been created. The latter power is a class in its own, not a reincarnation of national sovereignty as had been suggested in the *Election Case*<sup>23</sup>, but tempered by the doctrine of implied limitation, a sort of 'governmental constituent power', if one is permitted to say so.<sup>24</sup> The Constitution is thus akin to a Kelsenian *Grundnorm*<sup>25</sup> and any power conferred by it cannot go beyond the point where it begins to question the validity of the very instrument which has led to its creation, far less replacing the said instrument with a creature of its own. If constituent power is at all exercised in its originality, it would not be similar to a change of the existing Constitution from any point of view whatsoever, but can rather be equated to a total restructurization of the instrument from which emanates

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<sup>23</sup> *Indira Gandhi v Raj Narain*, (1975) Supp (1) SCC 1.

<sup>24</sup> CONRAD, *supra* note 21 at 104 .

<sup>25</sup> In Kelsen's view, the validity of a legal norm is conditioned by two things, viz. the fact of their having been posited by a more general and therefore higher norm and the effectiveness of the legal system to which the norms belong. Kelsen aimed to reconstruct the law as a closed, coherent and dynamic system of hierarchically ordered binding norms. This led him to transcend the positive law system and appeal to a sort of extra-legal, non-positive norm, called the Grundnorm or the basic norm that is conceptually presupposed in legal argumentation and is in itself posited as the ultimate justification of the legal system in its entirety. Therein lies the similarity with the constitution, for it is from the latter that the laws of the land derive their validity and thus if the legitimacy of the legal system is to be justified, the positive-law constitution has to be equated with the concept of Grundnorm, the validity and binding force of which is taken for granted. For further details, *see generally* Hans Kelsen, *Reine Rechtslehre. Mit Einem Anhang: Das Problem Der Gerechtigkeit*, translated by Max Knight under the title *PURE THEORY OF LAW*, 1967. Also *see* Uta Bindreiter, *Why Grundnorm? A Treatise On The Implications Of Kelsen's Doctrine*, 3 (2003).

the so-called 'law of the land'. Thus while the greater part of the scholastic community adheres to the belief that the constituent power of the people poses a serious threat to the integrity of constitutional forms, very few among them would venture to deny that it has had a role in shaping Indian constitutionalism.

## V. THE BASIC STRUCTURE DOCTRINE: AN INHERENT LIMIT TO CONSTITUTIONAL AMENDMENT

During the early years of independent India's constitutional history, the Supreme Court has been known to have treaded with extreme caution when beset with the critical question of the Parliament's power to rewrite the Constitution. The rejection that the judiciary offered regularly to the idea of the plenary power of Parliament to amend the Constitution being subject to substantive restrictions seemed little more than a well-rehearsed response than a reasoned argument on its part. But in the *Golak Nath Case*<sup>26</sup>, the Court finally appeared to shed off its mechanistic baggage and drastically restricted the scope of Parliament's amending power, the rendition being indicative of a paradigm shift in judicial stance from a positivist pronouncer towards a growing obsession with naturalist principles. That the Court reposed unflinching faith in these principles was clearly visible in the momentous verdict in *Kesavananda Bharati*<sup>27</sup> that introduced the concept of a 'basic structure' to the Indian constitutional jurisprudence in an attempt to balance the rival claims of conflicting schools of thought. Henceforth, the amending power could not be exercised in such a manner as to destroy or emasculate the basic or essential features of the Constitution, including the sovereign, democratic and secular character of the polity, rule of law, independence of the judiciary, fundamental rights of citizens etc. As Justice Chandrachud had exquisitely laid down, "*Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore, you cannot destroy its identity*".<sup>28</sup>

That the process of amendment cannot be put to use to obliterate the constitutional spirit is no longer contested as vigorously in the Indian academia. Practical experiences of the diabolic ramifications of absolute sovereign power being invested in the Parliament have convinced all and sundry of the efficacy of the idea of inherent limitations on the amending power. What scholars still doubt though is the utility of the 'Basic Structure Doctrine' given its anti democratic underpinnings.<sup>29</sup> Determination of the constituents of the immutable 'basic structure', they contend, depends solely upon judicial discretion. This argument

<sup>26</sup> *Golak Nath v. State of Punjab*, (1967) 2 SCR 762.

<sup>27</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

<sup>28</sup> *Id.*

<sup>29</sup> Raju Ramchandaran, for example, believes that the basic structure doctrine stands in the way of constitutional reform. See Raju Ramchandaran, *Supreme Court and the Basic Structure Doctrine* in *Supreme But Not Infallible – Essays In Honour Of The Supreme Court Of India*, 128-129 (B.N. Kirpal et. al. eds., 2000).

does not seem to be devoid of genuine merit. An overambitious judiciary can be as devastating as an overenthusiastic Parliament that is but a step away from autocracy. It is imperative to save the 'people's Constitution' from being transformed into the 'judges' Constitution'. In fact, protecting the Constitution from all its creatures is the urgent need of the hour. The judges ought to exercise restraint, for they too are bound by the 'basic structure' of the Constitution.

## VI. CONCLUSION

Notwithstanding the numerous short comings of the 'Basic Structure Doctrine', it still continues to remain the most important implied check on arbitrary exercise of power. It is a shining reflection of the constitutional commitment to growth and orderly progress more so because robbing the Constitution of its most essential features would undoubtedly unleash a reign of repression giving rise to tempestuous waves obliterating the core foundational values of Indian civilization. In the light of the aforementioned doctrine, one may find it permissible to use the amending power to make reasonable changes so as to fulfil the pledge of the enlightened luminaries representing 'the people' in constituent bodies. However, to use such mechanism to abrogate or destroy the basic structure or framework of the Constitution itself is an attempt nothing short of condemnable. Indeed, one may even look upon the same as a massive fraud on 'the people' who have given 'to themselves this Constitution'. We would like to conclude by expressing the conviction that such attempts should thus be foiled by any means possible and the judiciary, being the final arbiter over and interpreter of all constitutional amendments, ought to play the pivotal role in such efforts to preserve the sanctity of the constitutional framework.