GOPALAN, GOLAKNATH, & RAJ NARAIN – CONUNDRUM OF JUDICIAL REVIEW VIS-A-VIS THE APPLICATION OF BASIC STRUCTURE DOCTRINE TO ORDINARY LAWS

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The suprema lex of the Indian nation-State bestows the power of judicial review upon the courts to keep in check the powers of various organs of the State by providing for a separation of powers, and checks and balances-based governance system. The scope of judicial review has been a contentious issue ever since the Indian Constitution, 1950 ('the Constitution') came into effect and has been the subject matter of many a landmark judgement. Arguably, the most important judicial development in India has been the basic structure doctrine evolved by the Supreme Court in Kesavananda Bharati v. Union of India. Developed to check the amending powers of the Parliament, the doctrine has since evolved into an all-encompassing variant of judicial review being used to check a vast array of State action. This paper intends to discuss the nature and location of the basic structure doctrine in the Constitution and inquire whether it resides within the constitutional provisions while expanding the significance and development of the basic structure doctrine. The paper, while accepting the doctrine's significance to check constitutional amendments, identifies the aspects of the expanding scope of judicial review and argues against its application to ordinary law on various grounds. Incorporating and analysing scholarly discourse and judicial pronouncements, the paper suggests alternate and legitimate ways to achieve goals that are sought to be attained through the application of the basic structure doctrine.

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I. INTRODUCTION

Judicial review is very fundamentally the power of a court to check the legitimacy of any acts of the executive, or the legislature and declare unconstitutional, and hence unenforceable, any law, executive action,[1] among others, that is found to be at odds with the Indian Constitution, 1950 ('the Constitution') or other laws of a higher order.[2] Chief Justice Marshall of the United States ('USA') Supreme Court in the landmark judgement of *Marbury* v. *Madison*,[3] ('Marbury') observing that the USA Constitution was the paramount law of the land stated, "it is for the court to say what the law is" based on the judiciary having the final say on matter of the Constitution. This ultimately leading to the maxim, "Parliament makes the law but the bench declares the law".[4] The concept of judicial review as propounded by Justice John Marshall becomes all the more important when seen in light of the colonial legacy of the country. In the United Kingdoms ('the UK'), the concept of judicial review for a long time was signified, as expressed by Sir Francis Bacon as, "Judges ought to remember that their office is … to interpret law, and not to make law".[5] In the absence of a written constitution, the UK judiciary has had a rather limited scope of judicial review, giving it the power to declare a law as incompatible with human rights but not to strike it down.[6]

The Constitution vests with the Parliament the power to make law. This power, however, is not absolute in nature. The judiciary is correspondingly vested with the power to assess said legislation and declare void or *ultra vires* any such law which goes against the provisions of the Constitution. This power is considered to flow from Article 13 read with Article 245 and the concept of separation of powers,[7] which is engrained in the Constitution.[8] The Parliament is further vested with the powers to amend the Constitution, commonly referred to as the amending or constituent power of the Parliament. The applicability of judicial review to the constitutional amendments gave rise to a long tussle and a string of judgements from the *Shri Sankari Prasad Deo* v. *Union of India and State of Bihar*,[9] ('Shankari Prasad') to the *I. R. Coelho* v. *State of Tamil Nadu*.[10]

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[1] SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA, 43-69 (Oxford University Press, 2009).
[2] S. P. Sathe, *Judicial Power: Scope and Legitimacy*, Vol. 40, INDIAN JOURNAL OF PUBLIC ADMINISTRATION, 3 (1994).
[3] 1803 5 U.S. 137, S.C.O.T.U.S.
[4] Indira Gandhi v. Raj Narain, 1975 AIR 1590 SC, ¶278 (per Mathew J.).
[5] Hon'ble Mr Justice A.M. Ahmadi, The Chief Justice of India, delivered while inaugurating the workshop organised by the Institute of Advanced Legal Studies ('IALS'), Pune, (December 16, 1995).
[6] *See generally* Thomas Bonham v. College of Physicians, Court of Common Pleas 8 Co. Rep. 107 (1610) (Lord Coke gave his celebrated dictum "the common law will control acts of parliament, and sometimes adjudge them to be utterly void".); *See also* T. F. T. Plucknett, *Bonham's Case and Judicial Review*, Vol. 40, HARVARD LAW REVIEW, 30 (1926).
[7] S. P. Gupta v. Union of India, AIR 1982 SC 149; *See generally* J. Orth & T. Smith, *Judicial Review*, Vol. 80, FOREIGN AFFAIRS, 3 (2001) (explores the necessity of an inherent notion of judicial review in a written Constitution to prevent the possibility of the havoc that may be caused by other organs of the State).
[8] The Constitution of India, 1950, Arts. 13, 245; *See also* Sanjoy Narayan Editor in Chief Hindustan v. Hon. High Court of Allahabad, (2011) 13 SCC 155.
[9] 1951 AIR 458.
[10] AIR 2007 SC 861.

One of such cases was the landmark decision of the court in *Kesavananda Bharati* v. *State of Kerala*[11] ('Kesavananda Bharati'). In this case, a bench of thirteen judges bought forth the basic structure doctrine. The said doctrine was formulated by Khanna J. based on the foundations laid down by Mudholkar J. in the *Sajjan Singh* v. *State of Rajasthan*[12] ('Sajjan Singh') by reading into the concept of implied limitations.[13] The doctrine essentially allowed the Parliament to amend any part of the Constitution subject to what was termed as the basic structure or the basic features of the Constitution. The doctrine seeming almost prophetic in nature, was applied by the Supreme Court in *Indira Gandhi* v. *Raj Narain*[14] ('Raj Narain'). The case became a shining beacon after which the basic structure doctrine has been used extensively by the constitutional courts of this country, gaining both appreciations,[15] and criticisms[16] from scholars.[17]

It was in the *A. K. Gopalan* v. *State of Madras*,[18] ('Gopalan') case in which the term 'basic structure' was first advocated for by M. K. Nambiar in his arguments. The case also played a major role in the development of doctrine of judicial review in the Indian legal landscape as judicial review was first recognised as a distinct part of the Constitution in this verdict. Later, an eleven-judge bench in *I. C. Golaknath* v. *Union of India*,[19] ('Golaknath'), which though overturned in the Kesavananda Bharati judgement, missed a similar outcome by a razor-thin majority of 6:5. Herein, Justice Hidayatullah sided with the set of judges who opined that constitutional amendment are not 'law' under Article 13 of the Constitution, and thus, Part III of the Constitution could be amended by the Parliament without judicial review. Finally, the doctrine of basic structure, perhaps the most intriguing aspect of the power of judicial review which has been propounded by the judiciary, was invoked and relied upon in the Raj Narain case to check the powers of the Parliament. The three cases act as landmarks in the evolution of judicial review and basic structure doctrine as a facet of the same. The basic structure doctrine, though has been invoked by the Supreme Court on multiple instances since, provides no clarity as to its nature, scope, location, and even its legitimacy, with various debates persisting amongst scholars and jurists regarding the same.

What is basic structure doctrine, what is its scope and nature, are a few of the questions that this paper aims to address. An aspect which has also been overlooked by various scholars is the scope of the basic structure doctrine and the inclusion of ordinary legislation within it, and as such, this paper aims to address the same. This paper, while agreeing and differing from various opinions, argues that the application of basic structure doctrine to ordinary laws is beyond the pale of not only the constitutional provisions and mandate of the judiciary but is also defacing the work of the individuals who contributed to its development.

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[11] AIR 1973 SC 1461.
[12] AIR 1965 SC 845.
[13] *Id*., (per Mudholkar J. and Hidayatullah J.).
[14] 1975 AIR SC 1590 ('Raj Narain').
[15] Upendra Baxi, *The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment*, Vol. 1, SCC, 45 (1974); David Gwynn Morgan, *The Indian Essential Features Case*, Vol. 30(2), I. C. L. Q., (1981).
[16] Fagun Sahni & Naimish Tewari, *The Differential State of Indian Constitution – A Constitutional Anomaly*, Vol. 9, NLIU L. REV., 1 (2021).
[17] R. D. Garg, *Phantom of Basic Structure of the Constitution: A Critical Appraisal of Kesavananda Case*, Vol. 16, JOURNAL OF THE INDIAN LAW INSTITUTE, 16 (1974); *See also* A LAXMIKANTH, BASIC STRUCTURE AND CONSTITUIONAL AMENDMENTS: LIMITATIONS AND JUSTICIABILTY (Deep & Deep Publications, 2002).
[18] AIR 1950 SC 27.
[19] AIR 1967 SC 1643.

As is often the case with various landmark verdicts, the series of judgements that developed and expanded the role of judiciary, and elucidated the concept of judicial review through the test of basic structure doctrine, have rather complicated ratios to discern. As such, various aspects of the judgements have not come to the fore to the extent they should have. This has led to an irregular application and further development of the doctrine, thus leaving various facets murky and unclear.

In Part II of the paper, the growth and development of judicial review and the basic structure doctrine have been discussed following which various theories regarding the nature, scope, and location of the doctrine have been analysed in Part III of the paper. Addressing the inception and the growth of the doctrine, it is argued that the basic structure doctrine must be limited in scope to only constitutional amendments and must not be used to test statutory or ordinary laws. Part IV of the paper explores at length, the application of basic structure doctrine to ordinary law, provides counter arguments, as well as puts forth suggestions to mitigate the conundrums that might arise as a consequence of the same. Part V offers concluding remarks.

II. HISTORICAL BACKDROP AND DEVELOPMENT OF JUDICAL REVIEW AND THE BASIC STRUCTURE DOCTRINE

In continuation of the discussion in the previous part of the paper, this part explores the development of judicial review in India during the pre-constitutional era including the debates regarding its inclusion and its nature during the Constituent Assembly proceedings as well as the development post the enforcement of the Constitution. In the Indian legal landscape, judicial review has gone through various stages of development with the Supreme Court taking a pro-legislature stance to an almost adversarial one.[20] This part of the paper has divided the development of judicial review in India into three stages. Part II(A) delves into the pre-constitutional development and the reasons behind the inclusion of judicial review in the Constitution as well as the factors leading to its distinct nature. Parts II(B) and II(C) subsequently address the phases of development of judicial review in India by means of judicial pronouncements and amendments to the Constitution brought forth by the Parliament.

A. THE PRE-CONSTITUTIONAL STATUS AND THE CONSTITUENT ASSEMBLY DEBATES

Under the Government of India Act, 1935, the absence of a Bill of Rights limited the scope of judicial review to solely the review of ordinary law.[21] The Constituent Assembly however felt differently and was of the view that judicial review was an essential feature for protection of the fundamental rights, terming it the "arm of social revolution" and the "extension of the Rights".[22] However, the inconsistency and a difference of opinion concerning the enforceability of socio-economic rights and the needs of the nation did persist. Jawahar Lal

[20] B. L. SHANKAR & VALERIAN RODRIGUES, THE INDIAN PARLIAMENT: A DEMOCRACY AT WORK, 246-291 (Oxford University Press, 2011); Walekar Dashrath, *Changing Equation between Indian Parliament and Judiciary*, Vol. 71, INDIAN JOURNAL OF POLITICAL SCIENCE, 1 (2010).

[21] Samirendra Nath Ray, *The Crisis of Judicial Review in India*, Vol. 29, THE INDIAN JOURNAL OF POLITICAL SCIENCE, 1 (1968).

[22] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION - CORNERSTONE OF A NATION, 164 (1966).

Nehru's speech in the Constituent Assembly that the courts may not stand in the path of social reforms and the Constitution is in itself a creature of the Parliament also showcased the Assembly's distrust.[23] This distrust came from observing the American experience and as such the Parliament was given the power of the final say.[24] This resulted in the famous "due process" clause being the first to be removed from the draft Constitution and replaced by "procedure established by law".[25] Due process of law, unlike the procedure established by law, looks into not just if proper procedure has been followed by the legislature while enacting it but also examines whether the law is just, fair, and non-arbitrary. The due-process clause gives a wider range of power to the judiciary and if the procedure provided by law is frivolous, oppressive, or unreasonable, then it is liable to be struck down under the same.[26]

The members had before them the Constitutions of USA, Ireland, Japan, amongst various other countries, and as such saw eye to eye on the fact that the scope of the power of judicial review needed to be clearer and more direct than that in the USA, where the doctrine was more inferred than conferred. This ultimately led to Articles 13 and 32 being added to the Constitution.[27] Article 13 was inserted to settle the issue that persisted in the USA from the case of Marbury as to whether there could be judicial review of legislations. Article 13 provides that the State shall not make a law in violation of fundamental rights and if such a law is made, the courts may declare it to be void. The phrase 'making law' connects us directly to Article 245 of the Constitution which deals with the power of the State to make law.[28]

The concept of judicial review, however, had a long way to go. Amongst the first cases in which judicial review was addressed and buttressed as a distinct part of the Constitution was the case of *A. K. Gopalan* v. *State of Madras*.[29] In this case, the court, while stating that the

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[23] CONSTITUENT ASSEMBLY DEBATES, January 3, 1949, Speech by Professor K. T. Shah, Mr. Naziruddin Ahmad (1195-1195).

[24] The U.S. Supreme Court began reading in substantive due process rights in the realm of liberty to contract and economic regulation. In an approximately thirty-year period, the USA Supreme Court struck down around 200 economic regulations, dealing with the subjects of labour, price regulation, minimum wages and business entry, among others; *See* STONE, CONSTITUTIONAL LAW, 724 (4th ed., 2001); *See also* Manupatra, '*Due Process' v. ' Procedure Established by Law': Framing and Working the Constitution*, available at https://docs.manupatra.in/newsline/articles/Upload/04244C3D-E95A-4B0B-882F-6E6202ED3E73.3-b__constitution.pdf (Last visited January 02, 2024).

[25] CONSTITUENT ASSEMBLY DEBATES, September 15, 1949, Speech by Alladi Krishnaswamy Ayyar (1501); *See also* CONSTITUENT ASSEMBLY DEBATES, Speech by Alladi Krishnaswamy Ayyar, Constituent Assembly Debates, Vol. II (209).

[26] *See generally* Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, Vol. 28, BERKLEY JOURNAL OF INTERNATIONAL LAW, 223 (2010).

[27] Constitution of India, *Draft Constitution of Republic of India*, February 21, 1948, available at https://www.constitutionofindia.net/committee-report/draft-constitution-of-india-1948/ (Last visited July 23, 2023) (Articles 8 and 25 of the Draft Constitution.)

[28] *Id*.

[29] A. K. Gopalan v. State of Madras, AIR 1950 SC 27 (This aspect of A. K. Gopalan was later overturned in the case of Maneka Gandhi v. Union of India, AIR 1978 SC 597); *See also*, Emperor v. Burah, ILR, Calcutta, 63 (1877), ¶31 (The first Indian case in which the Calcutta High Court and the Privy Council derived the powers of judicial review for Indian courts, subject to certain limitation "There the Chief Justice points out that the powers of the Legislature are in America (as they are in India) defined and limited by a written constitution, 'but,' he proceeds to say, to what purpose is that limitation, if those limits may at any time be passed? The distinction between a Government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if Acts prohibited and Acts allowed are of equal obligation....").

due process clause is unknown to our Constitution. Elucidating the principle of judicial review-based on Justice Marshall's opinion in Marbury, the court laid the groundwork for further growth of the principle. This may be evidenced by Chief Justice Kania's majority verdict, which stated,

> "The inclusion of Article 13 (1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment, to the extent it transgresses the limits, invalid".[30]

B. THE UNLIMITED AMENDING PHASE (1951-67)

The most intriguing aspect of judicial review begins with Article 368 of the Constitution which states that if any amendment, change, or repeal is made by the Parliament using its powers, the Constitution shall stand amended.[31] Very early in its history, the Parliament intended to implement various land reform programs. Various challenges to the State's legislative reforms were made before different High Courts across the country.[32]

In order to quicken the process of agrarian reforms, the Parliament passed the Constitution (First Amendment) Act,[33] in the year 1951, inserting Articles 31A and 31B in the Constitution.[34] Article 31A provided that any law pertaining to land acquisition may not be challenged if it is made in the pursuit of agrarian reforms.[35] On the other hand, Article 31B went a step beyond Article 31A and stated that if any law, be it passed by the State or the Central legislature, is put into the Ninth Schedule, it becomes free from the test of fundamental rights. It further provided that even if a provision of a legislature is struck down by a High Court or the Supreme Court and is then put in the Ninth Schedule, such provision will resuscitate itself.[36]

This amendment was challenged in Shankari Prasad in 1951,[37] raising *inter alia*, a question as to whether Article 13 would include within itself a constitutional law. A five-judge bench, led by Patanjali Shastri J. unanimously opined that Article 13(2) only extends to ordinary law and does not include constitutional law within its ambit.[38] Therefore, judicial review could not be exercised over constitutional amendments, and hence, Article 31B was upheld.[39]

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[30] Navajyoti Samanta & Sumitava Basu, *Test of Basic Structure: An Analysis*, Vol. 1, NUJS L. REV. (2008) (The paper attempts to find relationship between natural law and the basic structure doctrine); *See also* A. K. Gopalan v. State of Madras, AIR 1950 SC 27; Vibhuti Singh Shekhawat, *Judicial Review in India: Maxims and Limitations*, Vol. 55, INDIAN JOURNAL OF POLITICAL SCIENCE, 2 (1994).

[31] The Constitution of India, 1950, Art. 368.

[32] Shri Sankari Prasad Deo v. Union of India and State of Bihar, 1951 AIR 458 (The High Court at Patna held that the Act passed in Bihar was unconstitutional while the High Courts at Allahabad and Nagpur upheld the validity of the corresponding legislation in Uttar Pradesh and Madhya Pradesh, respectively.)

[33] The Constitution (First Amendment) Act, 1951, §4, §5.

[34] The Constitution of India, Arts. 31A, 31B.

[35] *Id*., Art. 31A.

[36] *Id*., Art. 31B.

[37] Shri Sankari Prasad Deo v. Union of India and State of Bihar, 1951 AIR 458.

[38] *Id*., ¶¶1-5.

[39] *Id*., ¶¶17-18.

A few years later in 1964, the Constitution (Seventeenth Amendment) Act[40] was passed which added a few more laws to the Ninth Schedule.[41] The same was again challenged before the Supreme Court in the case of Sajjan Singh. Once again, a five-judge bench unanimously stated that a constitutional amendment not being law, cannot be subject to judicial review under Article 13. However, for the first time, alarm bells were rung by Mudholkar J. and Hidayatullah J. Both judges questioned the limit of amending power of the Parliament. Mudholkar J. in his opinion pondered whether there is a 'basic structure' to the Constitution which can be touched or not. He expressed reluctance in accepting that the phrase 'law' as per Article 13 did not include within its ambit constitutional amendments. His fundamental contention was that every Constitution has certain 'basic features' that could not be changed.[42] Hidayatullah J. also stated that the question whether 'law' under Article 13 includes constitutional law or not needs to be put before a bench of a higher strength.[43]

The incepting years of the Indian judiciary thus saw a cautionary and circumspect exercise of powers. This may be evidenced by the pro-legislature verdicts pronounced by the courts in the initial years as elucidated in the aforementioned parts. The same, however, were the periods of peace before the turmoil that was to arise in form of a tussle between the Parliament and the judiciary.

C. 1967 AND LATER: THE LIMITED AMENDING POWER PHASE.

A larger bench of eleven judges did ultimately come to decide upon the same question as Sajjan Singh and Sankari Prasad in the landmark case of *I. C. Golaknath* v. *Union of India*.[44] In a bench led by Subba Rao CJ., five out of the eleven judges held that the power to amend does not flow from Article 368 as the marginal note of the said provision reads "procedure for amendment". It was further stated that the power to amend, not being located anywhere must fall under the residuary powers. Therefore, unless there is anything contrary in the Constitution, the residuary power certainly takes in the power to amend the Constitution.[45] The other five judges opined that Article 368 is enshrined in a chapter entirely to itself, and the same would not have been done unless it dealt with the entirety of powers and procedure to amend the Constitution.[46] Hidayatullah J., however, held that the power in question is *sui generis* in nature is not found under any particular provision of the Constitution. He sided with Subba Rao CJ.'s opinion and agreed that Article 13 would be applicable to constitutional laws.[47] Therefore, by a 6:5 majority, it was held that fundamental rights are unalienable and as such even a constitutional amendment cannot touch them.[48]

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[40] The Constitution (Seventeenth Amendment) Act, 1964 §3; *See also*, S. L. Agarwal, *Constitution Seventeenth Amendment Act, 1964: Its Validity*, Vol. 7, JOURNAL OF THE INDIAN LAW INSTITUTE, 3 (1965) (delves into the question of Parliamentary legislation *vis-a-vis* fundamental rights).
[41] The Constitution of India, 1950, Schedule IX.
[42] Sajjan Singh v. State of Rajasthan, 1964 SCC OnLine SC 25, ¶¶55-58, ¶64.
[43] *Id*., ¶¶46-47.
[44] I. C. Golaknath v. State of Punjab, 1967 AIR 1643.
[45] *Id*., ¶26, ¶¶53-55.
[46] *Id*., ¶¶101-102, ¶113.
[47] *Id*., ¶189.
[48] Anushree Somnath Tadge & Pranit Tanaji Bhagat, *The Doctrine of Basic Structure: Origin and Legitimisation*, Vol. 17, SUPREMO AMICUS, 61 (2020).

Consequently, the Parliament acted swiftly and bought the Constitutional (Twenty-fourth) Amendment Act, 1971. The said Act *firstly*, amended Article 368 and provided that the power to amend ensues from it, and *secondly*, amended Article 13 which now stated that it applies solely to ordinary law and not constitutional law. Thus, it dismantled both pillars on which the Golaknath verdict stood.[49] Thereafter, the Parliament enacted the Constitutional (Twenty-Fifth) Amendment Act, 1971, that added Article 31C,[50] to the Constitution. The said provision prioritised the Directive Principles of State Policy ('DPSP') over fundamental rights and held that any law made in the pursuance of the principles of DPSP shall not be liable to be struck down if it is in violation of Articles 14 and 19 of the Constitution.[51] The Constitutional (Twenty-Sixth) Amendment Act, 1971, was introduced to abolish the privy purses paid to the former rulers of the princely states.[52] Furthermore, the Kerala Land Reforms Act, 1963, enacted by the Kerala state legislature was put into the Ninth Schedule vide the Constitution (Twenty-ninth Amendment) Act, 1972.[53]

The aforesaid four amendments were the subject matter of deliberation before the thirteen-judge bench in Kesavananda Bharati.[54] The decision was rendered with a 6:6 split with Khanna J. writing a separate opinion. Khanna J. sided with the group of judges who opined that there are certain principles which even the Parliament cannot alter or alienate from the Constitution by means of its amending power.[55] These principles were embodied by Khanna J. as the basic structure.[56] Different judges spoke of different principles which they believed comprise the basic structure.[57] Khanna J. further explained, concurring with the majority, that there are some features of the Constitution that are so sacrosanct that even the Parliament cannot alter, and as such the

[49] The Constitution (Twenty Fourth) Amendment Act, 1971.

[50] NDTV Profit, *Rohinton Nariman on 'Guardian Angel of Fundamental Rights'*, YOUTUBE, December 15, 2018, available at https://www.youtube.com/watch?v=2ImP3E86OxY&list=PLt2IOZt3NQkcTyKrIstV7bOT6eMzHLPmc&index=5&t=2127s&ab_channel=BQPrime (Last visited on July 23, 2023) (based on the opinion of B. N. Rau, the constitutional advisor of the Constituent Assembly. He believed DPSP must have precedence over fundamental rights).

[51] The Constitution of India, 1950, Arts. 14, 19 (Article 14 provides for the right to equality and Article 19 provides the six fundamental rights to freedom).

[52] *See generally* Maharaja Madhav Rao Scindia v. Union of India, 58 AIR 1971 SC 530; Neal A. Roberts, *The Supreme Court in a Developing Society: Progressive or Reactionary Force? A Study of the Privy Purse Case in India*, Vol. 20, THE AMERICAN JOURNAL OF COMPARATIVE LAW, 1 (1972).

[53] The Kerala Land Reforms Act, 1963.

[54] His Holiness Shri Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461.

[55] *Id.* (per Khanna J.).

[56] *Id*., ¶¶1426, 1433, 1434.

[57] Justice Sikri opined that supremacy of the Constitution, republican and democratic form of government, secular character of the Constitution, separation of powers between the legislature, executive and the judiciary, and the federal character of the Constitution were all a part of the basic structure of the Constitution. Justice Shelat and Grover's opinion laid down the mandate to build a welfare State contained in the DPSP and the unity and integrity of the nation to be basic features of the Constitution. Justice Reddy also laid down that elements of the basic features were to be found in the Preamble of the Constitution and the provisions such as sovereign, democratic, and republic nature, parliamentary democracy, and the division of powers into the three organs of State. The opinion authored by Justice Hegde and Mukherjee further provided for a more succinct list of the basic features of the Constitution, including sovereignty of India, democratic character of the polity, unity of the country, essential features of the individual freedoms secured to the citizens, and the mandate to build a welfare State.

constituent power of the Parliament had certain 'implied limitations'.[58] Furthermore, in order to devise the said basic features, one had to look no further than the Preamble and the ideals listed in the Preamble constitute the basic features.[59] These act as an implied limitation on the constituent powers of the Parliament.[60]

III. THE NATURE OF BASIC STRUCTURE DOCTRINE

The Constitution is said to be a living document.[61] At the time of drafting, unlike the Constitution of Ireland, the Constituent Assembly did not put a clock on the time for amending powers of the Parliament.[62] The amending provision, Article 368, however, was included to allow for a flexible Constitution while providing that the crucial aspects of the constitutional scheme needed a ratification by the States prior to amendment. The legislative powers of the Parliament on the other hand were made subject to the provisions of the Constitution in order to promote the sanctity and supremacy of the Constitution while preserving the powers of the Parliament.[63] The cases discussed above though concluded the tussle between the judiciary and the Parliament by formulating the basic structure doctrine, did not expound the nature and the constitutional location of the same, which are discussed in this part.[64]

There are three intriguing trains of thought regarding the nature of the basic structure doctrine. The first is the grounded in Mathew J.'s verdict in the Raj Narain case and second being the one laid down in Krishna Iyer J.'s opinion in *Maharao Sahib Shri Bhim Singhji* v. *Union of India*[65] ('Bhim Singhji'). Mathew J. felt that the basic structure must find its place in some provision of the Constitution and is not an abstract feature or doctrine as that of the supremacy of the law.[66] Iyer J., on the other hand, opined that when one talks of the great

[58] Virendra Kumar, *Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance [From Kesavananda Bharati to I.R. Coelho]*, Vol. 49, JOURNAL OF INDIAN LAW INSTITUTE, 3 (2007).
[59] His Holiness Shri Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461, ¶¶1471, 1473 (per Khanna J.).
[60] P. Sharan, *Constitution of India and Judicial Review*, Vol. 39, INDIAN JOURNAL OF POLITICAL SCIENCE, 4 (1978).
[61] Shivangi Gangwar & Aishwarya Pagedar, *Examining the Living Metaphor in the Indian Constitution*, Vol. 13, JINDAL GLOBAL LAW REVIEW (2002).
[62] Royal Irish Academy, *Introduction to the Origins of the Irish Constitution*, March 16, 2023, available at https://www.ria.ie/sites/default/files/introduction-to-the-origins-of-the-irish-constitution.pdf (Last visited on July 23, 2023) (The original Irish Constitution of 1922 provided that for the first eight years after the enactment of the Constitution, the Parliament (or 'Oireachtas' as it was called) had the power to pass any amendment it sees fit by a simple majority. Post the eight years, however, every such amendment was to go to a referendum to the people); *See also* Brian Farell, *The Drafting of the Irish Free State Constitution*, Vol. 6, IRISH JURIST, 2 (1971); Tom Hickey, *Revisiting Ryan v. Lenon to Make the Case Against Judicial Supremacy*, Vol. 53, IRISH JURIST (2015); Gary Jeffrey Jacobsohn, *Constitutional Identity*, Vol. 68, THE REVIEW OF POLITICS, 3 (2006).
[63] The Constitution of India, 1950, Art. 245 ("Extent of laws made by Parliament and by the Legislatures of States (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India…" emphasis added).
[64] Human Rights Initiative, *The Basic Structure of Indian Constitution*, available at https://www.humanrightsinitiative.org/publications/const/the_basic_structure_of_the_indian_constitution.pdf (Last visited on July 23, 2023).
[65] AIR 1981 SC 234.
[66] Indira Gandhi v. Raj Narain, 1975 AIR 1590 SC (per Mathew J.).

egalitarian principle, one does not refer to Article 14, but to the broader principle, and it is this broader principle that is a part of the basic structure.[67]

Furthermore, Nariman J. opines that the nature of basic structure can be found out using the Preamble and Article 368.[68] At the fore it must be noted that the Preamble, despite being the first part of the Constitution was formally drafted and accepted at the end of the debates by the Constituent Assembly.[69] It therefore encapsulates the principles that the framers believed were intrinsic and inalienable to the Constitution. Based on the Preamble, various features can be culled out which are basic in nature: sovereignty, democratic form of governance (based on the universal adult franchise), secularism, republic nature, secular, socialist, social economic and political justice, liberty, equality, fraternity, amongst others.[70]

Further, proviso to Article 368 enlists the provisions for which, in order to amend, the Parliament requires the consent from the State concerned. The provision points to the following features being a part of the basic structure of the Constitution: separation of powers[71], independence of the judiciary[72], and federalism[73].[74] The question therefore still arises that are all the features grounded in the Constitution or are they derived by the judiciary? Nariman opines that all these features are present in the Constitution.[75] This is based on the interpretation of Marshall J. in *McCulloch* v. *Maryland*,[76] wherein he states, "We must not forget that this is the Constitution, the very fundamental document we are deciphering and interpreting, and therefore, the general rules and norms that apply to ordinary law cannot apply to Constitutional Law".

Bearing the same in mind, the two visions of Mathew J. and Iyer J. may be reconciled on the premise that all the basic features are based in the Constitution. Further, though they may not be present in one article and might require some interpretation and as such, the basic features emanate from a provision or a set of provisions of the Constitution. There are, however, some basic features which cannot be culled out from the specific provisions, and are so

[67] Maharao Sahib Shri Bhim Singhji v. Union of India, AIR 1981 SC 234 (per Iyer J.).
[68] Justice Nariman Official Channel, *Doctrine of Basic Structure under Indian Constitution: Madras High Court Bar Association at Madurai*, April 12, 2022, available at https://www.youtube.com/watch?v=cvUf9ZeEe8Y&ab_channel=JusticeNarimanOfficialChannel (Last visited on July 23, 2023).
[69] His Holiness Shri Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461, ¶513; *See also* V. Venkata Rao, *The Preamble*, Vol. 12, THE INDIAN JOURNAL OF POLITICAL SCIENCE, 2 (1951).
[70] The Constitution of India, 1950, Preamble.
[71] *Id*., Art. 386 (Articles 54, 55, 73, 162, 241 if altered need state ratification. They speak of the executive and legislative powers of the Government).
[72] *Id.* (if any article pertaining to the Judiciary is to be altered, consent of the States is necessary).
[73] *Id.* (legislative lists if are to be altered, State ratification is required).
[74] Article 368 provides that if there is any change to Articles 54, 55, 73, 162, 241 Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, any of the legislative lists, or the representation of States in the Parliament, ratification from half of the States is required. Articles 54 and 55 speak of the manner of election of the President. Articles 73 and 162 provide for the extent of the executive power of the Centre and States respectively. Article 241 vests the authority with the Parliament to create High Courts for Union Territories. Further, Chapter IV of Part V and Chapter V of Part VI provide for the Union and State judiciary, respectively, while Chapter I of Part XI provide for legislative relations between the Union and the States. The lists in Schedule VII provide for subject matters on which the Union and State can legislate upon. Therefore, independence of judiciary and separation of powers can be culled out as basic features from the same.
[75] *Supra* note 68.
[76] McCulloch v. Maryland, 17 U.S. 316 S.C. (1819).

fundamental that they do not require any particular provision. One such example may be that of 'supremacy of the Constitution', which is taken from the *grundnorm* theory.

On the flip side of the coin comes the argument that the doctrine having no constitutional basis as per the provisions or the intent of the drafters.[77] Further, it is argued that it was developed by the judiciary, for the judiciary, to confer upon itself the powers to check the overzealousness of the Parliament to amend the Constitution.[78] This in itself has drawn a lot of criticism from various scholars on the validity and legitimacy of the doctrine as it applies a bar on the constituent powers of the Parliament which has not been provided expressly in any provision of the Constitution. The author has not gone into the question of legitimacy of the doctrine as the driving factor for its inception was the incessant amendment of the Constitution by the Parliament which was destroying the ethos of the document and the applicability of the doctrine was limited solely to constitutional law. This allowed the judiciary to read into the amending provision and conceptualise the doctrine of basic structure. The doctrine was thus brought into existence by the judiciary in extenuating circumstances to protect the sanctity of the Constitution and was invoked solely to check constitutional amendments, thus being limited in scope. Therefore, the legitimacy of the origins of the doctrine have not been ventured into in this paper, accepting the defence of necessity to conceptualise the doctrine. However, its further expanding scope, specifically *vis-a-vis* ordinary law have been analysed and argued against in this paper.

The basic structure doctrine has evolved as a form of judicial review distinct from that enshrined under Articles 13, 32, 226, or 245 of the Constitution.[79] Criticised often as an excessive use of judicial review, the doctrine has evolved from a simple check on the amending powers of the Parliament to a full-fledged form of constitutional review.[80] Sudhir Krishnaswamy, also taking a similar view has further argued that the doctrine has been applied to various forms of State actions in different ways and on that premise argues as to its distinct nature.[81] Such State actions include constitutional amendments,[82] powers of proclamation of emergency powers both regional and national,[83] ordinary executive powers, and executive action by high constitutional authorities,[84] amongst other instances.

At the time of its inception, basic structure doctrine was a need of the hour. Legislative overreach and the attempt to destroy the sacred nature of the Constitution by the Parliament was checked using the same. However, since then, the usage of the doctrine to other

[77] H. M. SEERVAI, THE CONSTITUTION OF INDIA- A CRITICAL SUMMARY, 1103 (1983).
[78] Sathe, *supra* note 2.
[79] The Constitution of India, 1950, Arts. 13, 32, 226, 245.
[80] S. P. Sathe, *Judicial Review in India: Limits and Policy*, Vol. 35, OHIO ST. L. J., 870 (1974).
[81] KRISHNASWAMY, *supra* note 1, 1-42.
[82] His Holiness Shri Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461; *See also* Minerva Mills v. Union of India, ¶¶1842-1843 (per Bhagwati J.).
[83] *See* S. R. Bommai v. Union of India, 1994 AIR 1918 (In the Bommai verdict, the proclamation of emergency in various States was challenged and the Supreme court stated that secularism, which is a part of the basic structure, provides a basis to distinguish between legitimate and illegitimate proclamations of emergency).
[84] Distinction between ordinary executive power and exercise of executive power by high constitutional authorities relies on the different phrasing of constitutional provisions authorising these powers; *See also* KRISHNASWAMY, *supra* note 1, 88-10; State of Rajasthan v. Union of India, AIR 1977 SC 1361; S. R. Bommai v. Union of India, AIR 1994 SC 1918 (per Verma J.); B. R. Kapur v. State of Tamil Nadu, 2001(7) SCC 231(per Bharucha J.).

forms of governmental activities begs the question in relation to its scope, and the exclusion of ordinary law from its application, as argued in the next part.

IV. THE APPLICABILITY OF BASIC STRUCTURE DOCTRINE TO ORDINARY LAW

The Parliament is sovereign in the UK. India, differing from their political system follows the principles of separation of powers[85] and checks and balances.[86] Judicial review therefore is unarguably an intrinsic part of the Indian legal system. Thus, the legislature and the executive alike are held to be accountable to the judiciary. Different forms of judicial review exist for various types of exercise of powers by the wings of the government. The grounds for such review are derived from the Constitution and developed by the judiciary as the socio-legal wheel turns.

There has been a cacophony of voices in the previous decades regarding the expanding scope of the courts power of judicial review.[87] By arming itself with broad powers of review qua various remedies apart from those conferred by the Constitution and the Parliament, the courts now hold the power to test proclamation of emergency, executive policy framing issues, legislative action and inaction, in addition to reviewing competence and subject matter issues. The paper in this part highlights some of the major arguments regarding the same and counters them in the following sub-parts.

A. THE PROBLEM: INSTANCES OF STRIKING DOWN OF ORDINARY LAW USING BASIC STRUCTURE DOCTRINE

Amongst the most commonplace arguments stated by supporters of the basic structure review is that since it does not flow from any particular provision of the Constitution, the Parliament cannot amend the Constitution to curb it.[88] This power has time and again been used by the courts to protect the sanctity of the *grundnorm* of our republic. However, the indiscriminate usage of the same to ordinary law takes the doctrine from the settled concept of separation of powers to the domain of judicial activism and perhaps overreach thereby, taking the doctrine beyond the pale of the powers and mandate of the judiciary.

Kelsen gave the theory that a legal system comprise various norms placed in a hierarchal manner.[89] Constitution is considered a *grundnorm* based on which all other laws are made and have to abide by.[90] Those arguing to make a case for the basic structure doctrine and its

[85] His Holiness Shri Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461 (per Shelat J.).
[86] Sanjoy Narayan Editor in Chief Hindustan v. Hon. High Court of Allahabad, (2011) 13 SCC 155.
[87] *See generally* MARK ELLIOT, THE CONSTITUTIONAL FOUNDATIONS OF JUDICIAL REVIEW, 165-196 (2001); Peter Bayne, *The Court, the Parliament and the Government- Reflections on the scope of Judicial Review*, Vol. 20, FEDERAL LAW REVIEW (1991); Sathe, *supra* note 2.
[88] KRISHNASWAMY, *supra* note 1, 1-42.
[89] J. O. Rachuonyo, *Kelsen's Grundnorm in Modern Constitution-Making: The Kenya Case*, Vol. 20, LAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA, 4 (1987).
[90] J. W. Harris, *When and Why does the Grundnorm Change?*, Vol. 29, CAMBRIDGE LAW JOURNAL (1971); T. C. Hopton, *Grundnorm and Constitution: The Legitimacy of Politics*, Vol. 24, MCGILL LAW JOURNAL (1978); Rakesh Kumar, *Structural Analysis of the Indian Legal System through the Normative Theory*, Vol. 41, JOURNAL OF THE INDIAN LAW INSTITUTE (1999).

application to ordinary law argue from a Kelsenian standpoint and propound that constitutional law is a legal norm placed at a higher level and is of a more fundamental nature than ordinary law.[91] The argument thus states that what the Parliament cannot do in its constituent capacity must not be allowed to do using its legislative powers either.[92]

Counter-arguments against the aforementioned propositions have been discussed in the following parts along with other peripheral arguments accompanied with the authors opinions' countering the same. The string of judgements that provided for the inception and development of the basic structure review were the need of the hour. The judiciary used its extraordinary powers to conserve the sanctity of the Constitution by bringing forth the basic structure doctrine. However, the same cannot be used to defile the very document it was supposed to protect. It has been demonstrated in the aforementioned parts of this paper that the Constituent Assembly gave primacy to social reform and believed that though a powerful and independent judiciary is necessary, it must not come in the way of such reforms. The power tussle between the Parliament and the judiciary perhaps was not envisioned by those learned men and women. However, the doctrine must not be stretched beyond its intended application, and must be limited solely to check the constituent powers of the Parliament else it may amount to judicial overreach.

It has to be conceded nonetheless that the it is the 'means' and the process that is being argued against in this paper and not the 'ends'. The effects aimed to be achieved and the actual results of the usage of the basic structure review have been remarkable. However, these opinions are personal in nature and as such cannot be the sole rationale for the continuance of extra-constitutional application of the judiciary's powers.[93] The goals that were achieved using the basic structure review may have been a positive effect of the society, but the means employed by the judiciary were beyond the powers bestowed upon it by the Constitution and as such must be checked.[94]

The expanding scope of judicial review has also, at time proven to be harmful as well. The doctrine of 'essential religious practices' developed by the courts to gauge the constitutional protection of religious faith under the articles for 'right to religion' has been heavily criticised on the grounds that it reduces the right to religion to the right to 'essential religious practices' with the courts denying to strike down State action if the practice being obstructed is not proved to be essential. The essentiality itself is deduced on the basis of the views of the religion's scripture and the views of the popular religious leaders, thus further diluting the sanctity of one's personal religious practices and views.[95]

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[91] S. P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS (2002); *See* Kuldip Nayar v. Union of India, (2006) SCC 1, 67 (Sabharwal, CJ.).

[92] KELSEN, THE FUNCTION OF THE CONSTITUTION, 111 (1986).

[93] *See also* SATHE, *supra* note 91 ("A socio-political study of judicial review, tracing the evolution of the Supreme Court of India from a passive, positivist court into an activist articulating counter majoritarian checks on democracy").

[94] *See also* A. SHOURIE, COURTS AND THEIR JUDGMENTS: PROMISES, PREREQUISITES, CONSEQUENCES, 399-421, (2001).

[95] Indian Young Lawyers Association v. The State of Kerala, 2017 10 SCC 689 (Justice Chandrachud's judgement in the recent Sabrimala verdict providing for the 'exclusionary' test is a step in the right direction as an attempt to expand the Constitutional protection to faith to the status that the Constitution provides for); *See generally* SCO Observer, *Judgement in Plain English*, September 28, 2018, available at https://www.scobserver.in/reports/sabarimala-temple-entry-indian-young-lawyers-association-kerala-judgment-in-plain-english/ (Last visited on July 23, 2023).

B. ARGUMENTS AGAINST THE ISSUE.

In the aforementioned parts as the inception of the basic structure review has been discussed, attempt has been made to shine a light on the arguments that support the application of basic structure review on ordinary legislation. The argument to utilise the basic structure review as a yardstick to test ordinary legislation has been going on since the very nascent stages of the doctrine. Apart from the Raj Narain case wherein the application of the basic structure review to ordinary law was rejected by the judged by a 3:1 majority, there are a plethora of instances where the courts have explicitly rejected the application of basic structure review on ordinary law.

The Golaknath verdict,[96] which considered constitutional law as law under Article 13 of the Constitution, was expressly overturned by the Kesavananda decision[97] on the very grounds that it was based on the British model of Parliamentary sovereignty rather than the 'supremacy of law' precept followed by India. It is argued that it is on similar grounds in the Raj Narain case that the majority opined that there is a hierarchy of laws, and the same test that is applicable on a higher law *vis-à-vis* constitutional law cannot be applicable on ordinary law. This acts as a further test on the legislative powers of the Parliament which has not been provided for in the Constitution. Constitutional amendments, according to Schmitt, are unlike any other governmental duty and should be treated as such. He argues that, the ability to alter the Constitution is distinct from the right to amend and pass statutes, as constitutional amendment power, unlike statute amendment power, is never exercised without restrictions.[98] The difference between amending and legislative powers are in fact visible clearly in the oath of the President as well, thus highlighting the varying tests applicable on the two.[99] Article 60 of the Constitution provides for the oath of affirmation to be taken by the President of India upon assuming office. The same reads,

> "I, A/B., do swear … defend the Constitution and the law and that I will devote myself to the service and well-being of the people of India" (emphasis supplied).[100]

Using the terms Constitution and law separately denotes that there is a distinction between the two powers as even the framers of the Constitution while drafting this particular provision. Therefore, if the amending and the legislative powers of the Parliament are separate and distinct, then it follows that the tests applicable on both on them must also be of different level, proportional to their hierarchical nature.

Further, the arguments based on Kelsen's school of thought have been expressly negated by Justice Chandrachud in the Raj Narain case and the view has been upheld by 3:1 majority,[101] with the rationale being that constitutional and ordinary law being two different levels of law cannot be held answerable to the same test. Justice Ray has further argued that the validity

[96] I. C. Golaknath v. State of Punjab, 1967 AIR 1643.
[97] His Holiness Shri Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461.
[98] CARL SCHMITT, CONSTITUTIONAL THEORY, 150 (2008) (he contended that no branch's jurisdiction is limitless because they are constrained by constitutional law).
[99] The Constitution of India, 1950, Art. 60 ("distinctly mentioning Constitution and the Law denotes the intent of the framers regarding the difference between the two levels of law).
[100] *Id*.
[101] Indira Gandhi v. Union of India, 1975 AIR 1590 SC (the fifth justice, Justice Khanna did not express any views on the matter).

of constitutional law is inherent while that of ordinary law is based on 'higher legal order'.[102] He justifies his stand by relying upon the statement that the Constitution generates its own validity. Furthermore, constitutional judicial review can be used to strike down an ordinary law made in the furtherance of the legislative powers under the Constitution if it violates any provision of the Constitution.[103] Basic structure being devoid of any explicit provision of the Constitution cannot be used to strike down an ordinary law. The same, in the author's opinion is against the tenet of constitutional supremacy and separation of powers.[104]

Going back to the moment of inception of the doctrine, one of the arguments behind the evolution of basic structure doctrine is that even plenary powers of the Parliament must be subject to the broader constitutional scheme and fundamental structure of the Constitution. The author argues that similarly, parliamentary sovereignty and the limitation of judicial review to respect the separation of powers is a part of the same fundamental structure of the Constitution, and the application of basic structure review on ordinary law goes against the expressly provided for provisions in the Constitution.

Further, the argument behind the inception of the doctrine was the concept of implied limitation. The learned judges believed that there are some aspects of the Constitution that cannot and must not be destroyed, and they act as implied limitation on Article 368 of the Constitution.[105] Similarly, it stands to reason that the powers of judicial review too, being a part of the Constitution, is subject to certain limitations, both express and implied, and the application of basic structure doctrine to ordinary law goes against both of them.[106] The courts, in pursuit of justice cannot forget the law laid down by itself. Further, the judiciary has also declared judicial review to be a basic feature of the Constitution. This thereby creates a paradox wherein as the ability to amend gets restricted, the power of review becomes boundless.[107] It again leads us to the question that whether judicial review, being a power granted by the Constitution, must therefore be similarly restricted if the amending power is intra-constitutional and subject to limitations?[108]

The basic features based on which various State action are being tested are further a non-exhaustive list and can be added to at any point by the judiciary without any checks on the same. Employment of such extraordinary and somewhat arbitrary power when resorted to in order to keep a check on the overarching doom of frequent and unjust constitutional amendments may

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[102] Ramesh D. Garg, *Phantom of Basic Structure of the Constitution: A Critical Appraisal of the Kesavananda Case*, Vol. 16, JOURNAL OF THE INDIAN LAW INSTITUTE, 2 (1974); *See also* P. K. Tripathi, *Kesavananda Bharati v. State of Kerala: Who Wins?*, Vol. 1, SCC JOURNAL, 3 (1974) ("the distinction between law and Constitution lay in the criterion of validity, i.e. whereas an ordinary law depended on a higher law for establishing its own validity, a provision of the Constitution did not depend on another law and, instead, generated its own validity.")

[103] THOMAS OLECHOWSKI, RECONSIDERING CONSTITUTIONAL FORMATION || DECISIVE CONSTITUTIONAL NORMATIVITY, 353-62 (2018).

[104] *See* Sayan Mukherjee, *The Unconventional Dimensions of the Basic Structure Doctrine: An Insight*, Vol. 1, NIRMA U. L. J., 45 (2011).

[105] RAJEEV DHAVAN, THE SUPREME COURT OF INDIA AND PARLIAMENTARY SOVEREIGNTY, 157-192 (1976).

[106] Nafiz Ahmed, *The Intrinsically Uncertain Doctrine of Basic Structure*, Vol. 14, WASH. U. JURISPRUDENCE REV., 307 (2022).

[107] *See generally* Bhanu Pratap Mehta, *The Inner Conflict of Constitutionalism: Judicial Review and the 'Basic Structure'* in INDIA'S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES (Zoya Hasan, E. Sridharan, et al. 2002).

[108] Upendra Baxi, *Constitutional Changes: An Analysis of the Swaran Singh Committee Report*, Vol. 2, SCC JOURNAL, 17 (1976).

be advocated for. However, when the same test is applied to the ordinary legislative powers of the Parliament, it hampers the concepts of representative democracy.[109] In addition, it has also been laid down that the rule of law includes that "decisions should be made by the application of known principles and rules, and, in general, such decisions should be predictable and the citizen should know where he is".[110]

C. THE SOLUTION: WHAT TO DO?

It is not contested that the Constitution has an evolutionary outline to it. However, a core tenet of the Indian constitutional framework is that the task of governance was specifically reserved for its representative institutions. The judiciary was tasked to only assist the Parliament from within its proper bounds arising from its constitutional mandate. Once it starts infusing constitutional text with its own preferred value systems rather than discerning the prevailing ones, the dysfunction begins. Almost all of it escapes critique or draws support from the "moral-judicial doctrines". Most of this ensues from the procedural overreach, yielding some desirable moral-social outcomes. Such concepts are teleological, and do well in supplying courts with rather pliable framework for discretionary outcomes. Yash Sinha argues, "This nascent digression fully shapes up when the infusion reaches the stage of modifying the jurisdiction and the ambit of the application of the powers of the courts".[111] In doing so, the judiciary has developed considerable impermissible powers which pertinently include an unacceptable enlargement of jurisdiction and the manufacture of writ-variants. From a constitutional perspective, it has become dysfunctional.[112]

There are a multitude of examples used to substantiate the claim of inclusion of ordinary law within the ambit of basic structure review. A few of them have been mentioned and demonstrate how the same conundrum may be resolved without resorting to basic structure review on the basis of the alternative tools present with the judiciary. In the aforementioned parts, the argument proposed by Justice Nariman in a lecture delivered by him has been mentioned wherein he stated that the features which comprise the basic structure may be deciphered from the Preamble and Article 368.[113] However, there are various such features which cannot be as easily found in the constitutional provisions. Though if all such features are grounded in the provisions themselves, then the normal constitutional review must suffice as a check on the legislative powers of the Parliament. Further, in the author's opinion, various basic features have been laid down by the judiciary which are not clearly or explicitly present in the provisions of the Constitution. Such features though vital, can be invoked out by the judiciary as it seems fit. However, testing the legislative powers on features that may be devised and stated at any point, using a power that has been devised outside of the bare-text of the Constitution, appears as an excessive use of judicial activism.

While deciding upon the features that comprise basic features of the Constitution, the Preamble is considered the indicative part from which the features are considered to flow. It is

[109] Maharao Sahib Shri Bhim Singhji v. Union of India, AIR 1981 SC 234 (per Chandrachud J.).
[110] S. G. Jaisinghani v. Union of India, 1967 AIR 1427; *See also* Indira Gandhi v. Raj Narain, 1975 AIR 1590 SC, ¶338.
[111] Yash Sinha, *Constitutional Dysfunctional*, Vol. 14, NUJS L. REV., 4 (2021).
[112] *Id*.
[113] *Supra* note 68.

not a coincidence that most of the features considered intrinsic to the Constitution are the same as the ideals enshrined in the Preamble. Therefore, one solution that may be used as an alternative to the application of basic structure doctrine to ordinary law is to make the Preamble enforceable as a test for ordinary law. The argument here is not against having a form of check on the legislative powers of the Parliament but rather making it less ambiguous by formulating the ideals enshrined in the Preamble as the grounds on the basis of which an ordinary law can be declared void. This will remove the criticisms of the basic structure doctrine and also prevent any chances of judicial overreach by making it non-arbitrary and confined to some part of the Constitution, i.e. the Preamble.

A much-cited example used to emphasise of the expanded scope of judicial review is one which raises the question that: if the Parliament were to hypothetically enact a law tomorrow that the India were to again become the dominion of the Great Britain then apart from striking it down on the basis of it being violative of the basic structure, what recourse would the judiciary or our country have? The answer to this lies in the above-proposed solution of making Preamble enforceable. If such a law were then to be passed by the legislature, it would be liable to struck down by the courts on grounds that it goes again the concept of sovereignty.

Apart from the landmark Raj Narain case, the Supreme Court has, in benches of various strengths deemed it unacceptable to apply basic structure review to ordinary law.[114] The courts themselves, in various landmark verdicts have expressly argued against the application of basic structure review of ordinary legislation. The same position was reiterated in the case of *V. C. Shukla* v. *Delhi Administration*,[115] and *Minerva Mills II* v. *Union of India*.[116] The same ratio was buttressed further in the landmark judgements of *Ashoka Kumar Thakur* v. *Union of India*,[117] and *Union of India* v. *Madras Bar Association*.[118] In the landmark verdict of *State of Karnataka* v. *Union of India*,[119] Beg J. while delivering the verdict for the majority, relying upon the Raj Narain case, went on to hold that ordinary law may not be challenged on the grounds of it being violative of basic structure.[120]

However, in *Dr. M. Ismail Faruqui* v. *Union of India*, better known as the Ram Junmubhumi case,[121] wherein a statute which abated suits and other legal proceedings against the disputed site was challenged, the legislation was struck down on the grounds that it went against the basic feature of 'rule of law'. It is a matter of no contention that the impugned legislation which

[114] Law and Other Things, *Judicial Overreach and Basic Structure-I*, August 24, 2020, available at https://lawandotherthings.com/judicial-overreach-and-basic-structure-i/ (Last visited on July 23, 2023).
[115] (1980) 2 SCC 665.
[116] (1986) 4 SCC 222; *See also* Raju Ramachandran, *Supreme Court and Basic Structure Doctrine* in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA, 107-133 (B.N. Kirpal, Ashok K. Desai et al, 7th ed., 2000).
[117] (2008) 6 SCC 1.
[118] (2010) 11 SCC 1.
[119] AIR 1978 SC 68.
[120] *Id*., ¶249 ("Mr. Sinha also contended that an ordinary law cannot go against the basic scheme or the fundamental back-bone of the Centre-State relationship as enshrined in the Constitution. He put his argument in this respect in a very ingenious way because he felt difficulty in placing it in a direct manner by saying that an ordinary law cannot violate the basic structure of the Constitution. In the case of Smt. Indira Nehru Gandhi v. Shri Raj Narain, such an argument expressly rejected by this Court.").
[121] AIR 1995 SC 605.

singled out a particular dispute and prohibited any legal action in the matter without any alternate dispute mechanism was unfair and against the right to equality. However, the same legislation could have been invalidated on the grounds of it being violative of the right to equality and secularism alone by means of making the Preamble enforceable. The same goal could also have been achieved by striking down the legislation on grounds of it being in contravention of Article 14, the right to equality, as it singled out a particular dispute for the removal of judicial remedies.[122]

Similarly, in *Madras Bar Assn.* v. *Union of India*,[123] the National Tax Tribunal Act, 2005, transferred the appellate jurisdiction vested in High Courts to the National Tax Tribunal to adjudicate upon questions of law. The same was challenged and held *ultra vires* the Constitution on grounds of the same being in contravention of the basic features of the Constitution, namely, judicial review, separation of powers, rule of law, amongst others. However, the impugned act could also have been struck down on the grounds of it attempting to transgress the independence of the judiciary, rule of law, checks and balances, and separation of powers which may be inferred from the Preamble as well as the proviso to Article 368 as discussed previously.[124] In the landmark ruling of *Supreme Court Advocates-on-Record Assn.* v. *Union of India*[125] ('NJAC'), the National Judicial Appointments Commission Act, 2014, was again struck down as being violative of the basic structure of the Constitution, namely the independence of judiciary and separation of powers. A similar outcome could also have been achieved by the alternative suggested in the paper.

Later however, in the case of *Kuldip Nayyar* v. *Union of India*, ('Kuldip Nayyar') while expressly denying a challenge made to a law made by the Parliament within its legislative competence, it was held that,

> "The doctrine of "basic feature" in the context of the Constitution does not apply to ordinary legislation which has only a dual-criteria to meet, namely:
>
> (i) it should relate to a matter within its competence;
>
> (ii) it should not be void under Article 13 as being an unreasonable restriction on a fundamental right or as being repugnant to an express constitutional prohibition."[126]

Further, in the Bhim Singhji case, it was stated succinctly,

> "But to permit the Bharati ghost to haunt the corridors of the court brandishing fatal writs for every feature of inequality is judicial paralysation of parliamentary function. Nor can the constitutional fascination for the basic structure doctrine be made a Trojan horse to penetrate the entire legislative camp fighting for a new social order and to overpower the battle for abolition of basic poverty by the 'basic structure' missile."[127]

[122] Raju Ramachandran, *Supreme Court and Basic Structure Doctrine* in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 107-33 (B.N. Kirpal, Ashok K. Desai et al, 7th ed., 2000).
[123] (2014) 10 SCC 1.
[124] The National Tax Tribunal Act, 2005.
[125] (2016) 5 SCC 1.
[126] Kuldip Nayar v. Union of India, (2006) 7 SCC 1, ¶¶96, 106, 107.
[127] Maharao Sahib Shri Bhim Singhji v. Union of India, AIR 1981 SC 234, ¶20 (per Chandrachud J.).

The bench in the Kuldip Nayyar based its reasoning on the majority opinion in the Raj Narain case. A split verdict regarding the same was given in the NJAC judgement[128] with one judge siding towards the application of basic structure doctrine on ordinary law and another against it, while the rest did not present their opinions.[129] The three-judge majority verdict of the Raj Narain case, thus stands absolutely since none of the judgements that go against it are pronounced by a bench of equal of higher size.[130] None of the learned judges who have opined in favour of the expanded scope of judicial review have attempted to distinguish from the view in the Raj Narain case, thus making those verdicts *per incuriam* and liable to be ignored.[131]

V. CONCLUSION

The basic structure doctrine is undoubtedly a result of the most brilliant legal and judicial minds working together.[132] It goes to the very heart of Parliamentary sovereignty, demarcating the powers between the Parliament and the judiciary. This doctrine has served the nation and the Constitution exceptionally in the past few decades.[133] Devised, however, to preserve the inviolability of the *lex suprema* of the State, the doctrine has been utilised to invalidate a plethora of State actions over the years, thus attracting intense criticism. The extension of the powers to ordinary law specifically goes to the other side of the border demarcating the boundary between the courts and the institutions of representative democracy.[134]

The courts need to declare in clear and unambiguous terms that the inclusion of ordinary law within the scope of basic structure doctrine is beyond the intended mandate of the Constitution as well as that of the jurists who helped formulate it. The view of the Constituent Assembly has long been considered as indicative of the intent of the Constitution and the same must not be ignored by the judiciary when adjudicating upon the limits of its own powers. The instances of application of the doctrine to ordinary law must be struck down or differed from as being ignorant of the judgements of benches of higher strength as well as constitutional provisions. Alternative provisions and mechanisms must be utilised in the future if the said aim is to be achieved.[135]

The bench thus needs to eschew all scholarly opinions and judgements contrary to the position of this paper as *per incuriam* or *per ignorentia.*[136] Cognisance must also be taken of

[128] Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1.
[129] *Id.* ("only Justice J.S. Khehar expressed his opinions in favour of application of Basic Structure Doctrine to ordinary legislation (¶381), while Justice Madan B. Lokur disagreed with the same ¶857). Justice Kurian Joseph, Justice Nariman, or Justice Chelameswar did not express any opinion on this point").
[130] Indira Gandhi v. Union of India, 1975 AIR 1590 SC (Chief Justice Ray, Justice Mathew, and Justice Chandrachud together comprise the majority in question).
[131] SCC Online, *Does Basic Structure Doctrine Applies to Ordinary Legislation*, June 7, 2021, available at https://www.scconline.com/blog/post/2021/06/07/basic-structure-doctrine/ (Last visited on July 23, 2023).
[132] Prashant Saurabh & Ankita Rani, *Doctrine of Basic Structure and the Spirit of Indian Constitution: An Analysis*, Vol. 5, INT'L J.L. MGMT. & HUMAN., 644 (2022).
[133] RAJEEV DHAVAN, THE BASIC STRUCTURE DOCTRINE-A FOOTNOTE COMMENT (1978).
[134] Anandini Saha, *Basic Structure Doctrine: Limited to Only Constitutional Amendments*, Vol. 3, INT'L J.L. MGMT. & HUMAN., 1649 (2020).
[135] Pathik Gandhi, *Basic Structure and Ordinary Laws*, Vol. 3, INDIAN J. CONST. L., 4 (2010).
[136] Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694 ("Now we deem it imperative to examine the issue of per incuriam raised by the learned counsel for the parties. In Young v. Bristol Aeroplane Company Limited

the fact that the expanded scope of basic structure review is argued to be beyond any constitutional checks on the legislative powers of the Parliament, and against the concepts of separation of powers, checks and balances, limitation of judicial review, implied limitations, hierarchy of laws, all of which are recognised and accepted parts of the Indian legal system.[137] This paper thus argues that the doctrine of basic structure, though is a necessary tool in the arsenal of the judiciary, must be used wisely and only in cases which warrant it. The doctrine must be applied only in cases involving constitutional amendments and not towards ordinary law as the same would transgress the powers demarcated by the Constitution. Furthermore, ways to clarify the nature and extent of the basic structure doctrine have been discussed in the paper through illustrations from multiple landmark judgements.

If there are no checks on the amending powers of the Parliament, it will prove extremely detrimental for the Indian populace. However, in doing so, the courts need to uphold the sanctity of the Constitution that they have been tasked to uphold. As such, it is not being argued that the application of basic structure doctrine to constitutional amendment must be curbed. However, the expansion of the basic structure doctrine to include ordinary law within the scope of its application seems at odds with the legendary stalwarts to whom the same may be attributed: Justice H. R. Khanna, Justice Mudholkar, Dieter Conrad,[138] and Nanabhoy Ardheshir Palkhivala.[139]

(1994) All ER 293 the House of Lords observed that 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority. The same has been accepted, approved and adopted by this court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law.") (Young v. Bristol Aeroplane Co. Ltd., 1944 KB 718, ¶729, "A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow"); *See* Mondaq, *The Doctrine of Per Incuriam*, August 5, 2016, available at https://www.mondaq.com/india/civil-law/516732/the-doctrine-of-per-incuriam (Last visited on July 23, 2023).

[137] *See generally* Justice K. K. Mathew, First Sapru Memorial Lecture delivered on the occasion of Tej Bahadur Sapru Centenary: Democracy and Judicial Review (March 26, 1976).

[138] A. G. Noorani, *Sanctity of the Constitution: Dieter Conrad—The man behind the 'basic structure' doctrine* in CONSTITUTIONAL QUESTIONS AND CITIZENS RIGHTS, 11-16 (2006).

[139] Soli Sorabjee, Senior Advocate and former Solicitor General of India, 'Palkhivala and The Constitution of India' delivered at the first Palkhivala Memorial Lecture (February 22, 2003).