
THE JURISPRUDENTIAL EVOLUTION: THE BASIC STRUCTURE DOCTRINE TO ORDINARY LEGISLATION

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ABSTRACT

The most unique constitutional innovation by the Indian judiciary has been the basic structure doctrine that has been developed to protect the constitutional identity against debilitating parliamentary amendments. However, the evolving nature of legislation methodology, in which in certain instances legislation of ordinary quality is used to bring about structural reform, poses an urgent enquiry: is the doctrine rightly applicable to ordinary legislation, and how then, once more, should the courts in practice help to make this happen without compromising the separation of powers? In this essay, I give a descriptive analysis of how this dilemma has been approached in the Indian courts, between the orthodox, which (confines the doctrine to constitutional amendments), and the pragmatic turn, which (appreciates that certain statutes may endanger the most fundamental constitutional attributes). The essay claims that Indian courts have been selectively and even tacitly scrutinizing Indian statutes against structural norms. It suggests a range of criteria when such review is justified focusing on systemic effects, institutional maintenance, and remedial discipline. What is obtained is a calibrated model that complies with the legislative policy-making and does not permit the weakening of the Constitution through statutory subterfuge. It is this model that is more conducive to make Indian constitutionalism deal with current methods of constitutional avoidance without disturbing democratic authority.¹

I. Introduction: Constitutional Identity and Governance by Legislation.

The Indian Constitution is a legal framework as well as a political project, which entails detailed textual prescriptions as well as a normative adherence to a democratic, rights-based, federal order. The fundamental principle of the doctrine of the basic structure is that the guaranty of constitutional identity by the judiciary is necessary since the ultimate authority of textual supremacy was insufficient to safeguard the internal values of the Constitution against the temptation to indulge in the excesses of the majority.² However, the Constitution is not carried on in empty space: day-governance is moderated, in the first instance, by common acts, by laws that are comparatively easy to enact, by legislative processes instead of super majoritarian amendments.³

This poses one of the major jurisprudential puzzles. Whether constitutional subversion may be carried on through orthodox statutes, by covert means of weakening the independence of the judiciary, by distorting elections, or through an excessive concentration of power not in proportion to the federal share, does the basic structure doctrine not apply to amendments, or does it apply, in a narrow though actual sense, to ordinary legislation? The orthodox school of thought opposes such extension in order to prevent judicial overreaching; the new pragmatic school of thought implies that structural review could be suitable in exceptional cases wherein statutes are successful in executing the responsibilities of unconstitutional amendments.⁴ This essay attempts a descriptive search into these stands and traces the lines of an extraordinary, principled examination of when structural revision of legislations are justified.

II. Ordinary Laws of the Constitutional Order: Nature, Process, and Role.

The main tools through which Parliament and the State Legislatures exercise their constitutional power to make law in areas distributed by the Seventh Schedule are ordinary laws. Articles 245-246 give them validity, and constitutional constraints, basic rights, federal competency, and other explicit means circumscribe them, all characteristic of dynamic representative democracy.⁵ The ordinary legislative process is not entrenched: any bill can either begin in either house (except some classes), pass by simple majority after debate and committee examination, and become a law when assented to by the president.⁶

The comparative ease of the process is a democratic virtue, which offers timely legislative response. However, the ease with which it has been made, together with legislative ingenuity,

can lead to the creation of statutes that act as constitutional avoidance mechanisms, formally respecting the text, but little more (e.g., by depriving the judiciary of jurisdiction or protections against institutional instability).⁷ This lack of form and substance is not accidental, but an indication of high-order lawmaking that knows how to take advantage of the gap between constitutional text and constitutional structure.

Constitutional amendments, on the contrary, are works of constituent power. They need majority requirements and in some aspects of federalism, state approval. A constitutional amendment explicitly modifies the constitutional text and thus it is vulnerable to basic structure review. Whether the ordinary statutes, which makes no changes on the text, can nevertheless be made to fall into the trap of structural review where their impact on constitutional practice is functionally identical to the impermissible amendment is the question.⁸ As the scholars have noted, the boundary between constituent and legislative power is not always clear in practice, sometimes statutes are used to readjust constitutional practice in a way which textualism cannot.⁹

III. The Basic Structure Doctrine: Conceptual Developments and Conceptual Commitments.

The doctrine of the basic structure was a result of the landmark case of *Kesavananda Bharati v. State of Kerala*.¹⁰ The doctrine has been constantly reiterated in its classical forms: the judiciary (judicial review), separation of powers (federalism), democracy, secularism, the rule of law,¹¹ and the doctrine of eternity found in Germany have had analogous variants in India, despite the fact that India had a wholesomely judge-made doctrine.¹²

The fundamental framework accepts as a structural fact that the identity of a constitution is not simply a matter of the aggregation of words but a matter of structural relations, institutional balances and normative commitments that the words reflect.¹³ It so suppresses constituent power as may be otherwise abused to produce legal continuity and normative rupture such as a government can abolish the Federal principle by procedure or strip fundamental rights by nominalism of text. The doctrine of basic structure ensures that this situation does not occur by ensuring review is founded upon constitutional essence rather than words.

To that effect, it places on the restraint of the constituent power, which might be otherwise abused by securing the continuity of the law with the help of a constitutional text, and by

interrupting the nominalism of the meaning through the textual means such as wiping out the Federal principle by constitutional procedure, or cancelling the very existence of fundamental rights by the textual methodology of nominalism. The doctrine of the basic structure aids in avoiding such situations by basing review on constitutional essence as opposed to words.

The cases of *Minerva Mills* and *Waman Rao* that have been decided after the ruling of the case of *Keesavananda* put forward a solidified application of the doctrine to the amendment clause and clarified that the traditional grounds of review (e.g., fundamental rights and legislative competence) applied to ordinary laws.¹⁴ This orthodoxy was such that it appointed a basic structure review to amendments; a textual review to statutes. But this same division, as we will see, has come to be strained with the constitutional practice.

IV. The Orthodoxy: Licensed Structural Review to Amendments.

This posture is classical in the case of *Indira Nehru Gandhi v. The Court*, in adjudicating in *Raj Narain*, where it struck down a provision of the constitution amendment that dealt with election controversy, cautioned that it would be problematic to apply the basic structure review to the routine statutes, one that will not be limited to textual limitations and a doctrine that will not be of democratic quality.¹⁵ Justice Chandrachud (then so) described the constitutional amendments together with statutes as living in two separate spheres: the former must be governed by basic structure, the latter by express constitutional constraint.

The argument was rather convincing. The Democratic theory is that unelected judges must respect elected legislatures about policymaking issues; rejecting statutes on the basis of structural misalignment might seem to cross this line and replace judicial by legislative discretion. Moreover, where the notion of basic structure is an open-ended category, its extension to all statutes would have the effect of gridlocking the administration of the country since law-makers can never be sure that their legislation would be struck down by a reference to some undocumented constitutional norm.¹⁶

In *Kuldip Nayar v. Union of India* this position was restated. The Court not only unanimously stated that ordinary legislation was not justiciable on basic structure grounds, but also explained the rationale.¹⁷ The first is that democracy is based on the clarity of the separation between judicial review and the legislative policymaking to prevent the substitution of elected judgment by the unelected guardians. Second, there should be no repurposing of a doctrine that is meant

to check the constituent power to police each statute in an open-ended structural framework.¹⁸ Its fundamental form is a constitutional restraint against amendments; regular statutes are to go through the competency and fundamental rights tests, but not a structural consideration.

V. The Pragmatic Turn: Institutional Protection and Functionalism.

Nevertheless, the constitutional adjudication is not stagnant despite orthodoxy. Over the past thirty years, the courts have been confronted with statutes which do not in any explicit way contravene the textual provisions but the implications on the constitutional institutions are immense. Tribunalization, among other reforms that were changing judicial role, in particular, has brought concerns as to whether there are some statutory redesigns threatening judicial independence to a degree that should lead to structural question.¹⁹

In *Madras Bar Association v. Union of India* (National Tax Tribunal), the Supreme Court was dealing with a legislative plan that transferred adjudicative powers to a tribunal in a manner that undermined the protection of judicial independence and incompetence. The functional emphases revealed by the Court analysis were that where a statutory framework submerges the fundamental functions of the judiciary or replaces executive dominated institutions with constitutionally essential courts, the statute may be structurally suspicious even when it is technically feasible to resolve them by reference to the Articles in question violated.²⁰

This is a slight yet profound deviation to classical orthodoxy. Instead of making a decision to structural review of statutes, Justice Khehar implied that the form of relief (bringing in reference to particular Articles vs. mentioning of basic structure) is not significant in comparison with the substance of the constitutional injury. Where institutional survival is at risk under statutes, structural reasoning will be one of the tools that will be applicable, although certain violations may also be formulated through the textual medium.²¹

The Supreme Court Advocates-on-Record Association decision (NJAC) is usually interpreted as a case about a judicial appointment amendment, however, it also implied significant dicta: the Court is concerned with form (appealing to specific provisions) but makes it clear that content (constitutional structure) is decisive when statutes threaten institutional arrangements.²² Such practicalism will enable the Court to adopt the orthodoxy letter, but to conduct structural scrutiny via other doctrinal portals.

VI. Why Textualism by Itself Can Be Insufficient.

The use of explicit textual infractions as the only means of overruling statutes puts the risk of missing complex legislative strategies that realize the barred purposes in the lawful manner. In either case, the constitutional text has been preserved (nominally) by a statute that limits the former status of judicial review by means of jurisdiction-stripping clauses; in the former maintaining federal words has been modified by centralizing effective control through administrative levers; in the former maintaining the electoral process has been deformed by the erosion of genuine competition by rules.²³

Take a hypothetical law, whose mere text grants respect to judicial independence, but in reality all judicial salaries to executive withholding, all the contempt powers of the courts, or all the appellate powers of executive tribunals. A textualist approach may find it hard to strike down such legislation unless it expressly infringes an enumerated right or competence rule. However, the content is clear: the independence of the judiciary, a requirement in the constitution, has been emptied. It is the basic structure doctrine that is specifically tuned to deal with such situations--where form conceals constitutional subversion.

This problematic incompleteness of textual literalism is pointed out by Tarun Khaitan and Madhav Khosla: the basic structure doctrine cannot be narrowed to amendments, when legislatures use ordinary statutes to achieve the same goal.²⁴ Khosla also notes the conceptual importance of the distinction between constituent and legislative power is not necessarily determinative in practice; it is a statute that has structural ramifications which deserves structural examination, regardless of formal classification.

The structural lens allows the courts to evaluate how the statutes interpret the architecture of the Constitution, as opposed to its language. That would not involve an indiscriminate increase in judicial authority; it would require a rigorous inquiry as to whether the impact of the statute is to disembowel institutions that the Constitution assumes. The question is not speculative, idealistic; it is based on the observable effects on the institutional functioning and constitutional values.²⁵

VII. Comparative Views: Germany and South Africa.

The experience of constitutions in comparison supports the thesis that the statutes, as well as

amendments, can pose a danger to the identity of a constitution. The German Federal Constitutional Court makes use of very powerful structural doctrines grounded on the eternity clause of the Basic Law;²⁶ although the eternity clause formally addresses the amendments, the broad jurisprudence of the Court includes structural scrutiny of legislative plans to guarantee their sensitivity to the constitutional order. This reasoning by the Court is simple to follow: since an amendment could not destroy the federal system, neither could ordinary legislation accomplish the same thing by the back door.

The South African Constitutional Court that lacks an eternity clause has also enforced statutes using structural principles, which are participative democracy, institutional independence and rule of law commitments, where textual hooks may not be enough.²⁷ A law that, either singly, would not breach a particular right, may nonetheless compromise the constitutional project by eroding institutional means of democratic self-governance or judicial independence.

These parallel teachings are not literally applicable to India but help to realize a general truth that constitutional identity may be put in danger by legislation of ordinary law, and that constitutional courts tend to react by combining structural analysis with traditional textual scrutiny.²⁸ It is this integration, not categorical move of doctrine, that Indian courts seem to be constructing in practice. The comparative model also indicates that such extension of structural review to exceptional statutes need not result in judicial overreach; well-behaved courts in Germany and South Africa have been able to strike down objectionable statutes, without disturbing space in which legitimate legislative policymaking can occur.

VIII. Separation of Powers and Case of Doctrinal Restraint.

Any form of structural review of the common law should not infringe the separation of powers. Courts have neither constitutional authority nor institutional capacity to tune the choice of policies; thus, when it is challenged that courts are not justified in overturning democratically made legislative decisions, it is sometimes appropriate to rely on the institutional logic of deference to the legislature.²⁹ When courts replace the electorally determined choice with policy decisions, the counter-majoritarian challenge is intensified;³⁰

Caution must therefore entail moderation. Structural review must be used with exception and should be invoked when (i) a statute endangers some identified basic feature, (ii) the threat is systemic rather than incidental and (iii) remedial action is informal (such as rights

infringement, incompetency in law-making, etc.).³¹ The judicial office is that of protector of constitutional identity, not protector of all legislative judgments.

Further, the communication between the courts and legislatures is essential. When there is a narrow use and clear rationale of structural review by courts, it is possible to educate the legislatures on the constitutional limits and change their habits. An overreaching or partisan action, in its turn, would probably cause a reaction in the legislature and compromise of judicial autonomy. A moderated strategy therefore is a constitutional safeguard as well as institutional courtesy.

IX. Structural Review of Statutes Thresholds.

An Indian precedent analysis by description, read together with comparative practice, and scholarly interpretation, justifies the following thresholds of a basic structure review in contrast with an ordinary legislation:

1). Identifiable Structural Feature

It is necessary to demonstrate that the statute undermines a known structural attribute - judicial independence, separation of powers, federalism, democracy, or the rule of law - and not simply has an undesirable policy effect.³² By way of example, any law that attempts to weaken the judiciary to check lawmaking or legislative or executive conduct is a threat to judicial independence, a quality that is based on Articles 32, 226, and similar provisions and upon the constitutional composition as a whole. The analysis should be factual and evidence based and not speculative.

2) Systemic Impact

The impact of the statute should be systematic poisonous. It must change institutional balance or incapacitate constitutional organs to play their mandate roles. At the same time, courts should not confuse policy objections with constitutional impairments: the latter can be left to legislatures, whereas the former can be left to constitutional courts.³³ However, a law which when combined with similar laws, or in its combination, materially limits judicial role or independence, enters the threshold. The question is not whether the statute is being used to undermine the constitutional institution in its form, not just to reform its marginal workings.

3) incompetence of Conventional Grounds.

Courts must also look beyond examining right-to-rule tools as remedy to the constitutional injury, i.e. the federal competence rules, equality and due process doctrine, before turning to structural review as a final tool of constitution avoidance.³⁴ This strategy observes the precedence of constitutional instruments: apply all the concrete tools before the general structural provisions. Courts should use structural doctrine only when the conventional analysis fails to offer sufficient protection to constitutional identity. This chain of command makes sure that judicial intervention does not get too large and that legislation is not struck down on a more broad basis than is warranted.

X. Remedial Modesty: Techniques That Bows To Legislative Primacy.

Remedial prudence is essential when a court determines that a statute violates the constitutional structure. Severability lets offending provisions be struck out and the rest remain valid; prospective invalidity allows time to rectify the scheme by giving legislators room to make the structures correct; and strong constitutional avoidance is permissive of narrow construal that correct the scheme to structural promises.³⁵ These tools have been useful in important constitutional matters in Indian courts, modifying the remedy to the type of structural breach.³⁶

As an illustration, where tribunal jurisdiction is concerned, instead of striking down a whole statute courts have interpreted protective measures on judicial independence or strictly construed jurisdictional grants to prevent incompatibility in structure. This is a surgical solution which honors the design of the legislature and preserves the constitutional architecture. On the same note, courts may determine that a provision is unconstitutional, though it may give the government some grace period to come up with a similar provision that meets the requirement and they will have the legislative role in coming up with the solution. This kind of humility in remedial design creates a judicial-legislative collaboration and minimizes the impression of judicial supremacy.

XI. A Descriptive Analysis: What the Courts Have in Reality Done.

Considering the Indian case law, a keen observation will indicate that the judiciary has followed the prescriptive *modus operandi* as opposed to declaring a doctrinal revolution. The outcome, in situations of tribunal and judicial design, has often been the application of the Court to

outcomes based on particular Articles (e.g., 14, 21, 32, 226-227) along with the application of language and logic of structural characteristics such as judicial independence and separation of powers.³⁷

This approach has virtues. It respects the orthodoxy upon which the doctrine of basic structure is directed to amendments, but acknowledges in fact that the same logic of structure frequently prevails in the interpretation of statutes. It will not engage in empty rhetoric that could lead to disruption of separation of powers because it will enable the Court to safeguard constitutional identity in cases where statutes are seen to pose a threat to fundamental institutions. This kind of incrementalism is typical of judicial statesmanship in a constitutional democracy. By signaling through courts to pursue structural protection without necessarily disregarding the orthodoxy, courts do not cause a lot of disruption and consider constitutional purposes.

In addition, in this incremental method there is flexibility and correction. In case the Court subsequently finds that structural scrutiny of statutes has exceeded its bounds, it will be able to draw demarcations without necessarily overturning a sweeping declaration. On the other hand, should there be a need in the future to address problems more directly based on structural reasoning, the Court has the opportunity to proceed with the doctrine in a methodical manner, supported by the precedent. The incrementalism therefore offers discretion and flexibility.

XII. Addressing Objections

There are three major objections that should be mentioned. First, critics state that it is conceptually confusing to apply structural review to statutes: the doctrine regulates constituent power, not legislative power. But the neatness of conception must give way to the necessity of the constitution where laws practically perform the duties of the prohibited amendments. It is not to forego categories but to allow exceptional examination where form swamps substantive injury.³⁸ The purpose of the Constitution cannot be defeated by a prudent connotation between amendment and statute. In the case of constitutional destruction, the form should be subject to substance.

Secondly, there is the vagueness objection, which argues that the basic features are undefined. Although the doctrine does not provide a closed list, the Court has numerous times noted features that it considers as being foundational, including: democracy, federalism, judicial independence.³⁹ The Kesavananda majority formulated that the fundamental framework

encompasses the democracy and judicial review; later cases have developed on the federalism, secularism, and the rule of law. This emerging jurisprudence offers manuals, not necessarily a comprehensive code. It is a cry to execute, but not to foreclose categorically. Structural analysis may be pegged by the Court on its own precedent, thereby lowering the chances of arbitrary extension.

Third, the democratic objection threatens judicial usurpation. The response is in terms of thresholds and remedial modesty: limiting structural review to systemic danger, relying on severability and limited decision-making, and basing the analysis on constitutional text.⁴⁰ Furthermore, legislatures having knowledge of that the statutory assaults on constitutional structures of substantial severity will be invalidated have a reason to restrain themselves and resort to constitutional prudence. A judicial review under proper calibration can also increase democratic legitimacy by making sure that the legislatures operate within constitutional limits.

XIII. The Path Forward: An Excellent, Principle-based Model.

The Indian Supreme Court does not have to issue a grand doctrinal extension to acknowledge the descriptive fact that some of the statutes should be subject to structural scrutiny. It may proceed the course of action: dispose of cases under certain conditions and proudly admit that structures are informative of such interpretations. In exceptional cases, where it is needed, the Court may indicate that the content of constitutional injury, rather than its form, is controlling judicial interpretation, and that statutes that function as mechanisms of constitutional evasion will be struck down on structural grounds.⁴¹

At the same time, the Court is able to establish thresholds and remedial practices thus guiding legislatures. On their part, Parliament and State Legislatures need to internalize structural constraints in the drafting, especially those that touch on the judiciary, federal distribution of powers and even electoral fairness.⁴² Consultations between the Court and parliamentary committees might be held on the regular basis as well, which would ease the understanding and avoid unnecessary conflicts.

Moreover, the Court can also provide advisory opinions or guidance papers on the scope of what the legislature can do structurally sensitive areas. This proactive interaction would allow the legislatures to look ahead of constitutional issues and make wise legislations.

Endnotes:

1. INDIA CONST. arts. 245–249; *State of W. Bengal v. Comm. for Prot. of Democratic Rights*, (2010) 3 SCC 571 (India).
2. *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, ¶¶ 292, 487, 1426 (India).
3. INDIA CONST. arts. 107–111.
4. Tarun Khaitan, *The Basic Structure Doctrine and Its Future*, in *COMPARATIVE CONSTITUTIONAL THEORY* 385, 387–90 (Gary J. Jacobsohn & Miguel Schor eds., 2018).
5. INDIA CONST. arts. 245–246.
6. K.M. MUNSHI, *INDIAN CONSTITUTIONAL DOCUMENTS, VOL. II*, 234–67 (1967).
7. Madhav Khosla, *Constitutional Amendment*, in *THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION* 234, 245–48 (Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta eds., 2016).
8. CARL SCHMITT, *CONSTITUTIONAL THEORY* 125–56 (Jeffrey Seitzer trans., Duke Univ. Press 2008) (1928).
9. JOEL I. COLÓN-RÍOS, *WEAK CONSTITUTIONALISM: DEMOCRATIC LEGITIMACY AND THE QUESTION OF CONSTITUENT POWER* 89–112 (2012).
10. *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 (India).
11. *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625 (India); *Waman Rao v. Union of India*, (1981) 2 SCC 362 (India).
12. DIETER GRIMM, *CONSTITUTIONALISM: PAST, PRESENT, AND FUTURE* 178–201 (2016).
13. YANIV ROZNAI, *UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS* 134–67 (2017).
14. Khosla, *supra* note 7, at 247.
15. *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp. SCC 1, ¶¶ 134–37 (India).
16. *Id.* ¶ 136.

17. *Kuldip Nayar v. Union of India*, (2006) 7 SCC 1, ¶ 107 (India).
18. *Id.*
19. *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261 (India).
20. *Madras Bar Ass'n v. Union of India*, (2014) 10 SCC 1, ¶ 109 (India).
21. *Id.*
22. *Supreme Court Advocates-on-Record Ass'n v. Union of India*, (2016) 5 SCC 1, ¶ 381 (India).
23. RICHARD ALBERT, *CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS* 234–56 (2019).
24. *Khaitan*, *supra* note 4, at 398–402.
25. *Khosla*, *supra* note 7, at 249–51.
26. *Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court]* July 18, 1970, 30 BVerfGE 1 (Ger.).
27. *Doctors for Life Int'l v. Speaker of the Nat'l Assembly* 2006 (6) SA 416 (CC) (S. Afr.).
28. *GRIMM*, *supra* note 12, at 178–201.
29. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (2d ed. 1986).
30. *Id.* at 16–23.
31. *R.M.D. Chamarbaugwalla v. Union of India*, 1957 SCC OnLine SC 11, ¶¶ 21–22 (India).
32. *L. Chandra Kumar*, (1997) 3 SCC 261 (India); *Madras Bar Ass'n*, (2014) 10 SCC 1 (India).
33. ALBERT, *supra* note 23, at 240–48.
34. *State of Karnataka v. Union of India*, (1977) 4 SCC 608 (India).
35. *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India); *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).

36. Madras Bar Ass'n, (2014) 10 SCC 1 (India).
37. Supreme Court Advocates-on-Record Ass'n, (2016) 5 SCC 1 (India).
38. State of Karnataka v. Union of India, (1977) 4 SCC 608 (India).
39. Indira Nehru Gandhi, 1975 Supp. SCC 1 (India).
40. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 145–62 (1991).
41. Khosla, *supra* note 7, at 249–51.
42. Khaitan, *supra* note 4, at 390–93.