
Ritwik Deswal & Himanshi Girdhar, *Reviewing Judicial Amendments in India: Evolving a 'Basic' Structuralist-Pragmatist Approach for Creation and Review of Constitutional Standards and Its Application to the Essential Religious Practice Test*, 11(2) NLUJ L. REV. 110 (2025)

**REVIEWING JUDICIAL AMENDMENTS IN INDIA: EVOLVING A
'BASIC' STRUCTURALIST-PRAGMATIST APPROACH FOR CREATION
AND REVIEW OF CONSTITUTIONAL STANDARDS AND ITS
APPLICATION TO THE ESSENTIAL RELIGIOUS PRACTICE TEST**

~Ritwik Deswal & Himanshi Girdhar*

Judicial Review has resulted in a plethora of landmark cases on constitutional interpretation since the inception of the Supreme Court. These judgments have both expanded and contracted the meaning of the Constitution's provisions. At times, they have read in restrictions, such as basic structure review for parliamentary amendments under Article 368, absent from the bare text. The evolution of many similar standards and principles to be used in reference to other provisions emanates and are sanctioned by decisions of our constitutional courts. With due course of time, they tend to act as 'functional' amendments to the Constitution. Therefore, this paper argues in favor of an amalgamative approach which merges central tenets of structuralism and pragmatism to create judicial amendments. The approach shall provide a burden to be discharged by the

* Ritwik Deswal is a legal researcher at the Punjab and Haryana High Court. He holds an LL.M (Criminal Laws) from NLSIU and a law degree from Panjab University, Chandigarh & Himanshi Girdhar: Himanshi Girdhar is a practicing advocate in New Delhi. She holds a law degree from Panjab University, Chandigarh

Court whilst making functional changes, by ensuring their compliance with the basic structure and pragmatic concerns. Further, to ensure parity with the Parliament, previous judicial amendments may be subject to a basic structure review, with eased procedural requirements. This paper also applies this approach to the Essential Religious Practice Test, a functional amendment to Article(s) 25 and 26, to illustrate its usage.

Keywords: Judicial Amendment, Basic Structure, Pragmatism, Review, Religious Rights

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I.

INTRODUCTION

The mechanism of Judicial Review is mentioned expressly under Article 13¹ and Article 32² as well as under other relevant provisions³ of the Constitution. It empowers the Constitutional Courts in India to invalidate any exercise of power or action of any organ of the State if it infringes upon Part III of the Constitution⁴ providing for Fundamental Rights. The courts exercise this power through various modes of judicial review. The concept of Judicial Precedent is one such mode which is favored above the rest by the Supreme Court in India, as well as in other constitutional democracies such as the United States. Indian courts also follow the principle of '*Stare Decisis*' which entails that when a larger bench decides a constitutional issue, it shall prevail unless and until an even larger bench decides the issue differently.

Indian Constitutional Courts, especially the Supreme Court, have been described as 'positive legislators', wherein they not only check administrative overreach through constitutional provisions but legislate through interpretation as well.⁵ The Supreme Court evolves tests, principles, standards, and rules which facilitate decisions for future disputes where a similar question of law has arisen. These principles also help in the

¹ INDIA CONST., 1950, art 13.

² *Id.*, art 32.

³ *Id.*, art(s) 131-136, 143, 226, 227, 245, 246, 251, 254 & 372.

⁴ *Id.*, part III.

⁵ Surya Deva, *Constitutional Courts as "Positive Legislators": The Indian Experience*, SSRN, (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1620224, quoted in Allan R. Brewer-Carias, *Constitutional Courts as 'Positive Legislators' in Comparative Law*, Cambridge Univ. Press, 2011.

determination of the constitutionality of administrative and legislative actions including statutes. The test of reasonable classification,⁶ the test of arbitrariness to determine interpretation of equal treatment under Article 14⁷ and the test of proportionality used in determining the scope of the prohibition of deprivation of life and personal liberty under Article 21⁸ are some leading examples of judicial standards. Such principles of constitutional interpretation tend to act as what we term through the course of this article to be ‘*functional amendments*’ to the Constitution as they determine how a provision shall be used on a case-by-case basis to decide questions of law and fact.

Judicial precedents as modes of judicial review have been criticized, as erroneous decisions of previous benches are continuously relied upon by courts for long periods of time. Furthermore, such precedents may also be affected by the prevailing conditions at the time and the judicial bias of the Judge or Bench, leading to arbitrariness. In circumstances where the bare text of the provision, the ethos of the Constitution, or the intent of the framers is not duly considered, any defective principle evolved in such precedents may continue to influence the decisions of future cases. Judicial precedents are also the sanctioning authority of ‘functional amendments’ with the latter continuing to be in force until the former is declared ‘*per incuriam*’.⁹ We argue that the Essential Religious Practice Test (“**ERP**”),

⁶ Ram Krishna Dalmia v Justice S.R. Tendolkar AIR 1958 SC 538.

⁷ INDIA CONST., 1950, art 14; Maneka Gandhi v. Union of India, (1978) 1 SCC 248 (India).

⁸ INDIA CONST., 1950, art 21; Justice K.S. Puttaswamy (Retd.) & Anr. v Union of India & Ors. (2017) 10 SCC 1.

⁹ John Hanna, *The Role of Precedent in Judicial Decision*, 2 VILL. L. REV. 367 (1957)

used to determine the extent of religious rights under Article(s) 25¹⁰ and 26,¹¹ is one such leading example of an erroneous judicial amendment. The oft-lambasted principle continues to persist more than 60 years since its conception and has been used in landmark cases such as the *Sabarimala*¹² verdict and recently, in the *Hijab*¹³ case by the Karnataka High Court. The principle, yet to be overturned, has diluted the concept of secularism as a part of the Constitution's basic structure and provides an unrivalled theological mantle to the Supreme Court, an organ of the State.

In **Part I** of the article, we provide for a comparative understanding of 'judicial amendments' in the Indian context and define their nature. We also seek to repurpose the Basic Structure Doctrine to control such amendments to the Constitution. Furthermore, we argue for adopting a 'structuralist-pragmatist' approach to be used in judicial review wherein a substantial question of constitutional law is at stake. In **Part II**, we apply our standard on ERP and provide a 'parameters' test which shall be in consonance with the basic structure. Finally, we shall conclude that this approach shall redefine the scope of judicial review and provide a better framework for constitutional interpretation. In the inevitable eventuality that they are not in consonance with the basic structure, the Supreme Court may use the same to dilute such principles.

¹⁰ INDIA CONST., 1950, art 25.

¹¹ INDIA CONST., 1950, art 26.

¹² Indian Young Lawyers Association & Ors. V. The State of Kerala & Ors. (2019) 11 SCC 1.

¹³ Resham, through Next Friend Mubarak v State of Karnataka, represented by the Principal Secretary Department of Primary and Secondary Education & Ors. 2022 SCC OnLine Kar 315.

II. PART I: JUDICIAL AMENDMENTS IN INDIA: REINING IN THROUGH SELF-REVIEW

A. PROBLEMS IN PRECEDENT: A FALLIBLE SANCTION

Judicial precedents have been held to be very reliable sources of constitutional interpretation. This reliance stems from two main points in favor: (a) their predictability and consistency; and (b) their tendency to prevent mistakes. The argument is simple: if a precedent exists on a substantial question of constitutional law, that question shall remain settled and the precedent shall apply uniformly when and if the same question arises again. Precedent also acts as the sanctioning authority for using any principle or standard evolved from it in future cases with a similar factual situation.

While reliance on precedent may be based on reasonable assumptions of predictability and prevention of judicial mistakes, these assumptions are not infallible. *First*, with regard to predictability and consistency; the Indian Supreme Court does not always adhere strictly to precedents. Through almost its entire existence, the Court has tended to pick and choose between precedents or overrule precedents entirely. *Second*, the manner in which they are overruled does not follow the convention of the, so called 'larger bench reference,' wherein only a court of greater strength may overrule a previous judgment. Further, at times the Court may choose to ignore a precedent entirely whilst pronouncing a judgment overruling it.

i. Inconsistency and Unpredictability

A leading example of such ignorance may be found in the advent of Public Interest Litigation (“**PIL**”), through cases decided against the precedent set by the eleven-judge bench in *R.C. Cooper v. Union of India* (“**Cooper**”).¹⁴ The judgment had categorically decided the issue of *locus standi* under Article 32 of the Constitution and reaffirmed that relief against infringement of any right may only be sought by the person whose right has been infringed. The only possible exceptions were carved out for habeas corpus petitions or guarantees of Article(s) 17,¹⁵ 23,¹⁶ and 24.¹⁷ In a stark ignorance of *Cooper*, in *Abdulbhai*¹⁸, the progenitor case of PIL in India, a single-judge bench of Justice Iyer chose to give a liberal expansion to the *locus standi* rule and inculcated socio-economic considerations of a weaker group into it. This expansion was concretized in *S.P. Gupta*,¹⁹ (a seven-judge bench) and later in *Bandhua Mukti Morcha*,²⁰ and finally the idea that any ‘public spirited person’ can approach the court for infringement of others’ rights, was incorporated into constitutional jurisprudence via Article 32. In later judgments, it was held that even private cases may be treated as public interest cases²¹.

¹⁴ *R.C. Cooper v. Union of India* AIR 1970 SC 564.

¹⁵ INDIA CONST., 1950, art 17.

¹⁶ *Id.*, art 23.

¹⁷ *Id.*, art 24.

¹⁸ *Mumbai Kamgar Sabha v M/s Abdulbhai Faizullabhai & Ors.* 1976 (3) SCC 832.

¹⁹ *S.P. Gupta v Union of India* 1982 AIR 149.

²⁰ *Bandhua Mukti Morcha v Union of India & Ors.* (1997) 10 SCC 549.

²¹ *Shivajirao Nilangekar Patil v Mahesh Madhav Gosavi* AIR 1987 SC 294; *Indian Banks’ Association v D.C. Service* AIR 2004 SC 2615.

ii. Prolonging Mistakes

The idea that precedent prevents mistakes by judges has been found to be erroneous on numerous occasions. While precedent can serve as a check on judicial arbitrariness, those based on weak or flawed reasoning may nevertheless persist and be applied for years. In the Indian context, several precedents interpreting the Constitution have done so by incorporating standards or principles which are antithetical to the provision itself or substantially curtail the right it grants. Such standards continue until they are declared *per incuriam* which may either take decades or may never be done. To understand this, let us look at Article 19 ('Fundamental Freedoms'), which *inter alia* provides for freedom of speech and expression. A relevant illustration may be the incorporation of the *Hicklin test*²² in Article 19(2)²³ to interpret 'decency and morality' as an exception to freedom of speech. The test, in essence, provided a very low bar to restrict freedom of speech, wherein every expression which might have the capability to deprave or corrupt young or feeble minds shall be deemed to be impermissible. Although, later overruled and replaced with the *Roth test*,²⁴ this interpretation still continued for around 50 years. Similarly, 'commercial speech', i.e., advertisements were not held to be a part of Article 19²⁵ and thus not entitled to any protections envisaged under it.²⁶ Only after 35 years, in *Tata Press*,²⁷ was the position rectified and commercial

²² Ranjit D. Udeshi v State of Maharashtra (1965) 1 S.C.R. 65.

²³ INDIA CONST., 1950, art 19(2).

²⁴ Aveek Sarkar v State of West Bengal (2014) 4 SCC 257.

²⁵ INDIA CONST., 1950, art 19.

²⁶ Hamdard Dawakhana v Union of India AIR 1960 SC 554.

²⁷ Tata Press Ltd. v Mahanagar Telephone Nigam Ltd. & Ors. AIR 1995 SC 2438.

speech held to be a part of Article 19. Furthermore, another questionable interpretation of Article 19(1)(g),²⁸ which entails one's freedom to choose one's vocation, continues to exist in the construction of *res extra commercium* (things outside commerce, some commercial activities are not part of private rights.) to exclude activities such as gambling from the purview of trade activities.²⁹ Lastly, the restriction of 'emergency' read into Article 21, continued till being overruled in *Puttaswamy*,³⁰ remained a grave 'mistake' sanctioned by precedent.

The aim of this sub-section is not to conduct an empirical study on instances where the Supreme Court rejected larger bench references or established erroneous standards based on shaky reasoning. We only seek to illustrate that precedent at times leads to unpredictability and inconsistency and at others, prolongs mistakes through its sanction. This leads us to the conclusion that precedent, the primary sanctioning authority behind 'judicial amendments' is weak and fallible, prone to erroneous reasoning and yet continues to be in effect, unless and until it is declared *per incuriam*, which is not always the case. An argument can also be made that a precedent is a more undemocratic sanction for constitutional amendment than the established procedure under Article 368³¹, which takes into account the will of the people at both the Centre and State levels and is undoubtedly harder to achieve than a judicial decision on a procedural level.

²⁸ INDIA CONST., 1950, art 19(1)(g).

²⁹ *State of Bombay v R.M.D. Chamarbaugwala* AIR 1957 SC 699.

³⁰ *Justice K.S. Puttaswamy (Retd.) & Anr. v Union of India & Ors.* (2017) 10 SCC 1.

³¹ INDIA CONST., 1950, art 368.

This leads us into the next question: what does a precedent sanction when it comes to substantial constitutional interpretation.

B. JUDICIAL AMENDMENTS: CHANGING FUNCTIONALITY OF CONSTITUTIONAL PROVISIONS

Judicial amendments to the Constitution are not a novel concept. They have been discussed thoroughly in Western jurisprudence particularly in those of Canada and the United States.³² A judicial amendment may simply be defined as a decision “*which effectively adds to, removes from or modifies the Constitution*”.³³ Such amendments become necessary when the Constitutional text is sparse and there is a need for interpretation to expand or change its meaning. However, not every constitutional interpretation may be considered a judicial amendment. Professor Emmett MacFarlane provides a very high bar to decide when a constitutional interpretation crosses the threshold of being an amendment.³⁴ An interpretation may be considered an amendment if: (a) it deviates from constitutional text; (b) deviates from the framer’s intent; and (c) is opposed to or ignores the prevalent political conditions at the time. In Berger’s reply,³⁵ she leaves room for challenging this high threshold to other scholars. In the Indian context, we believe that such a high bar to categorize a judicial amendment is not made out.

³² Akhil Reed Amar, *America’s Unwritten Constitution: The Precedents and Principles We Live By*, (Basic Books 2012).

³³ Emmett Macfarlane, *Judicial Amendment of the Constitution*, 19 INT’L J. CONST. L., 1894, (2021).

³⁴ *Id.*

³⁵ Kate Glover Berger, *Judicial Amendment and Our Constitutional Lives: A Reply to Emmett Macfarlane*, 19 INT’L J. CONST. L., 1925, (2021).

i. Differentiating in Definition

First, with the advent of judicial activism and structuralist reasoning in Indian constitutional jurisprudence, an interpretation may be considered an amendment even if the deviation is consistent with the purpose of the provision. To illustrate, we must consider, the doctrine of reasonable classification read into Article 14 ('Right to Equality').³⁶ This doctrine postulates that a reasonable classification may be made out based on intelligible differentia and must have a rational nexus to the object sought to be achieved by the statute. If it fulfills this test, such a classification becomes permissible.³⁷ While, we can observe a clear deviation from the text of Article 14, which merely commands equality before the law, this interpretation of the Constitution can still be considered consistent with the aim of the provision. It seeks to eliminate arbitrariness in the State's action when it comes to preserving equality. The Supreme Court has also held that the doctrine of reasonable classification provides a practical dimension³⁸ to the concept of equality envisaged in Article 14.

Second, with respect to the genesis of the Indian Constitution, the voluminous Constituent Assembly Debates cannot always accurately predict accurately whether a particular interpretation will be in consonance with the framers' intent. The sheer number of diverse opinions in the assembly can be construed to support or reject any interpretation on this basis. Further, the framers themselves believed that the Indian Constitution

³⁶ Ram Krishna Dalmia v Justice S.R. Tendolkar AIR 1958 SC 538.

³⁷ State of W.B. v. Anwar Ali Sarkar AIR 1952 SC 75; E.P. Royappa v. State of T.N. AIR 1974 SC 555; Ajay Hasia v. Khalid Mujib Sehravardi AIR 1981 SC 487.

³⁸ L.I.C. of India & Anr. v Consumer Education and Research Centre & Ors. 1995 SCC (5) 482.

is a living document which may need to be altered or changed as and when required by the Indian people.³⁹ We can illustrate this through Article 21 ('Right to Life'), which has had numerous dimensions added to it *viz.*, right to privacy,⁴⁰ right to free legal aid,⁴¹ right to speedy trial,⁴² etc. Therefore, this factor will not always be useful in identifying an interpretation as an amendment.

Third, prevalent political conditions and opinions are *prima facie* inapplicable for identifying judicial amendment in India. In discussing the *Quebec Succession Reference*⁴³, Professor MacFarlane points out that reading an obligation to negotiate in the Canadian Constitution defied everyone's expectations as to what the Constitution contains. While that may be so, this factor is relatively difficult to ascertain with regard to a developing democracy such as India. Professor MacFarlane in discussing *Kesavananda Bharati*,⁴⁴ elaborates that the basic structure doctrine being of foreign import defied the expectations of the 'relevant' political community.⁴⁵ Further, he states that political actors showed their dissent through attempts to pass amendments to nullify the effect of this doctrine. At this juncture, it

³⁹ Rishika Singh, *This Quote Means: 'Constitution is not a Mere Lawyers' Document... its Spirit is always the Spirit of Age*, INDIAN EXPRESS, (Nov. 27, 2023), <https://indianexpress.com/article/explained/this-quote-means-ambedkar-constitution-day-living-document-9043254/>.

⁴⁰ M.P. Sharma & Ors. v Satish Chandra, District Magistrate, Delhi & Ors. 1954 SCR 1077; Kharak Singh v State of Uttar Pradesh AIR 1963 SC 1295; Justice K.S. Puttaswamy (Retd.) & Anr. v Union of India & Ors. (2017) 10 SCC 1.

⁴¹ Madhav Hayawadanrao Hoskot v State of Maharashtra AIR 1978 SCC 154.

⁴² Hussainara Khatoon & Ors. v Home Secretary, State of Bihar 1979 SCR (3) 532.

⁴³ Macfarlane, *supra* note 33.

⁴⁴ His Holiness Kesavananda Bharati Sripadagalvaru v State of Kerala & Anr. (1973) 4 SCC 225.

⁴⁵ Dietrich Conrad, *Implicit Limitations on the Amending Power*, (Lecture delivered at the Faculty of Law, Banaras Hindu Univ., Varanasi, Feb. 1965.

becomes pertinent to point out exactly what ‘political community’ means in this context. While defining his factors, Professor MacFarlane understands political community to mean both the general public and political representatives empowered to amend the Constitution.

With regard to the general public, it may be contended that at the outset, it is near impossible to identify where their stance lies with regard to a constitutional interpretation and what does and does not form part of the Constitution. But most importantly, it is reasonable to assume that any interpretation which reaffirms their rights and protects them from the State’s overreach shall be viewed favorably by the populace. An idea which postulates that the Parliament may not amend the Constitution if such amendment violates easily understood principles such as democracy, rule of law, secularism, separation of powers and supremacy of the Constitution, shall in all probability find support. With regard to political actors, it is pertinent to understand that prevailing conditions of the time may influence their opinions and further it is reasonable to assume that they will view any interpretation which significantly curtails their powers negatively. In relation to *Kesavananda Bharati*, the broader political context was marred by the State continuing to infringe on the rights of the citizens through statutes and amendments which reaffirmed their unfettered right to amend the Constitution and exclusion of judicial review of this process. This eventually culminated in the Emergency in 1975. Therefore, mere opposition by representatives may not be a yardstick to determine the existence of a judicial amendment.

ii. Understanding ‘Judicial Amendment’ in India

At this stage, we seek to define ‘judicial amendment’, which adheres to the needs of Indian constitutional jurisprudence and provide a framework for further discussion. In the first place, any amendment can only be referred to as such if it is a binding authority on subsequent constitutional interpretation. Professor Richard Albert refers to this as “*functionally binding quality*” of a judicial pronouncement as opposed to the formally binding authority of an amendment promulgated under Article 368.⁴⁶ As discussed above at Section II.A.(ii), this authority flows from precedent declared through the operation of judicial review which lays down this interpretation and continues indefinitely until declared *per incuriam* by the Court itself.

A judicial amendment can further be expressed as the evolution of new principles and standards through decisions of the Apex Court.⁴⁷ An oft-cited example of such a principle may be found in the *Oakes* test,⁴⁸ a Canadian equivalent of the test of proportionality, which seeks to check whether a government action impinges on rights guaranteed by their Constitution. Professor MacFarlane rejects the effects of the application of this test as a judicial amendment. We find merit in this argument as each and every change which arises from the application from such tests cannot be treated as an amendment. However, we still maintain that a substantial

⁴⁶ Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 38(2) DUBL. UNIV. L.J., 387, (2015).

⁴⁷ Andree Lajoie & Henry Quillinan, *Emerging Constitutional Norms: Continuous Judicial Amendment of the Constitution-The Proportionality Test as a Moving Target*, 55(1) LAW & CONTEMP. PROBS., 285, (1992).

⁴⁸ *R. v Oakes* [1986] 1 SCR. 103.

change to the components of the tests or standards will constitute a change in the functionality of the test and therefore of the provision which it seeks to interpret. In the same vein, the test of reasonable classification under Article 14 and the test of reasonableness under Article 19 can also be referred to as judicial amendments. Moreover, judicial amendment may also take the form of adding or subtracting facets from a constitutional provision. Such modifications essentially change how the provision shall be construed and the elements that it constitutes. Article 21, as discussed above at Section II.B.1, is one such provision wherein entire new rights form part of it through judicial decisions and therefore also become justiciable under Article 32.

iii. Finding Meaning in Functionality

From this emerges a core tenet of our definition of judicial amendment-functionality. This tenet flows primarily from two concepts: (a) judicial review; and (b) the American realist school of jurisprudence. *First*, the Court derives its authority to settle questions of constitutional law from judicial review. It evolves standards and principles of constitutional interpretation through this exercise. A Constitution is essentially devoid of any meaning unless the Court exercises its provisions in practice.⁴⁹ In choosing between two interpretations⁵⁰ or evolving a new interpretation, a Court functionally makes or amends constitutional law. Therefore, judicial review provides an arena wherein constitutional amendment takes place.

⁴⁹ BERNARD SCHWARTZ, *CONSTITUTIONAL LAW: A TEXTBOOK*, (Macmillan, 2nd ed., 1972).

⁵⁰ WILLIAM O. DOUGLAS, *FROM MARSHALL TO MUKHERJEA – STUDIES IN AMERICAN AND INDIAN CONSTITUTIONAL LAW*, (Eastern Law House, 1956); M.P. JAIN, *INDIAN CONSTITUTIONAL LAW*, (Lexis Nexis, 8th ed., 1962).

Second, this tenet emerges from realist or more adequately functional school of law which propounds that law is what the judges say it is. As defined by Justice Holmes,⁵¹ law essentially means the actions of the Court in deciding legal issues rather than the bare text or orbiting theories analyzing it. Therefore, functionality of a constitutional provision means how the provision is construed or applied by the Courts when they are faced with factual situations invoking the same. In a practical sense, however the Courts apply a provision or a right, relates to its functionality. The elements that the Courts decides to form a part of the right or provision, also forms a part of its function.

Finally, we argue in favor of a broader definition of judicial amendment as it relates to Indian constitutional jurisprudence. A judicial amendment may be described as a change in the functionality of a constitutional provision by addition, subtraction or modification through rules, standards and principles or as otherwise deemed fit by the Court. A judicial amendment derives its authority from the precedent in which it is laid down directly and from the operation of judicial review which led to the said precedent indirectly. Such amendment continues to stay in force unless otherwise overruled, specifically changing the functionality of the said provision or through gradual shifting to another functional perspective.

iv. Identifying the Issues

Agreeing with Professor MacFarlane, we do not seek to provide a normative evaluation of judicial amendments. However, we contend that in a developing democracy such as India, it is important that the judiciary takes

⁵¹ Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV., 457, (1897).

on an active but not an unrestrained role in modifying the Constitution. At this stage, it is pertinent to mention that the main criticism of judicial amendment stems from primarily from two issues: (a) the extent of constitutional change enacted by the Courts; and (b) the inherently undemocratic nature of this change emanating from the Court rather than representatives of the people. Further, an auxiliary criticism stems from the Courts' lack of relevant expertise or information to decide such matters. Scholars have argued for self-restraint when exercising their powers of interpreting the Constitution. Professor Dale Gibson proposed a Constitutional Advisory Commission,⁵² which shall conduct research on constitutional questions when there is a possibility of a decision taking the shape of an amendment. After concluding its research, it shall provide the Courts with its recommendations. The recommendations themselves shall not be binding upon the Court, with only 'due consideration' being a prerequisite before it rejects them.

While we find merit in such a Commission, we disagree that it would adequately solve issues (a) and (b); as only increased expertise may be considered as a benefit of it. We believe that an adequate institution within Indian jurisprudence already exists to categorically solve these problems, democratize judicial review and the amendment process and pave way for actual enforcement.

⁵² Dale Gibson, *Founding Fathers-in-law: Judicial Amendment of the Canadian Constitution*, 55(1) LAW & CONTEMP. PROBS., 261, (1992).

C. GIVING A NEW PURPOSE TO THE BASIC STRUCTURE DOCTRINE

The basic structure doctrine has been arguably the most seminal and creative judicial interpretation evolved by the Indian Supreme Court. As laid down in *Kesavananda*, the amending power of the Parliament is subject to a basic structure review by the Court. Simply put, it introduced implied limits on the amending power under Article 368 insofar as any constitutional amendment shall not abrogate the basic structure of the Constitution.⁵³ Basic structure, by design, was not given a concrete definition but was intended to signify certain overarching principles derived from a structural interpretation of the Constitution by the Court on a case-by-case basis. The underlying principles centered around three considerations: (a) regulating State action from abrogating basic structure through amendment; (b) preserving democracy by ensuring that no two-thirds majority of the Parliament which is not representative of a large national consensus may change the text as to contravene fundamental features; and (c) to provide for a more flexible approach than *Golaknath*,⁵⁴ wherein amendment is permissible subject to review based on basic structure. In this sub-section, we argue for repurposing basic structure with respect to considerations (a) and (b).

Professor Sudhir Krishnaswamy⁵⁵ hails the doctrine and the consequent review it permits, as a sounder constitutional method to assess amendments and overreach by the State's actions. He broadly supports the

⁵³ Smt. Indira Nehru Gandhi v Shri Raj Narain & Anr. 1975 AIR 865; Minerva Mills Ltd. & Ors. v Union of India & Ors. AIR 1980 SC 1789.

⁵⁴ I.C. Golaknath & Ors. v State of Punjab & Anr. 1967 AIR 1643.

⁵⁵ SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE, (Oxford University Press 2011).

structuralist approach in construing basic structure wherein emphasis is not laid on a single provision or a set of provisions. Rather, the doctrine evolves through principles embodied by the Constitution. This also saves the doctrine from being diluted as reliance on provisions may prompt the Parliament to amend the same to curtail the scope of judicial review. Moreover, such a doctrine differentiates between judicial review of ordinary action of the State and process of constitutional amendment. The basic structure review is not merely a modified version of the review envisaged under Article 13 but a separate and an independent form of review. This establishes a clear purpose for basic structure review: to check constitutional changes through an implied limitation. Professor Krishnaswamy further states that this implied limitation may or may not apply with equal intensity to other modes of constitutional amendment.

v. Double Standards and Abstract Application

At this stage, we seek to make a case that basic structure should function as an implied limitation on judicial amendments. The central thesis behind this assertion stems from the purpose of the creation of basic structure as put forth in (a). The doctrine has, since its conception, checked variety of legislative and executive actions which sought to abrogate the fundamental features through judicial pronouncements. Through this doctrine, the Court checks substantial overreaches by organs of the State. However, the State as defined by the Constitution and as an accepted notion across democracies includes the legislature, the executive and the judiciary itself. As already established in Section II.A.2, the judiciary is as much capable of promulgating change to the Constitution as the

Parliament. In consonance with Professor MacFarlane and other scholars, we also contend that the Judiciary enacts constitutional change more frequently and with less procedural difficulties than the Parliament. To illustrate, Professor Krishnaswamy identifies three ways in which a constitutional amendment may be checked:⁵⁶ (a) rights review under Article 13; (b) basic structure review; and (c) review of compliance with the procedure laid down in Article 368. Only if an amendment passes one or all of these reviews, is it validly enacted by the Parliament. While our Constitution is not as hard to amend as the Canadian Constitution, a comparison may be drawn wherein empirically the judiciary has been shown to functionally amend the text significantly more than the Parliament. In sharp contrast, a similar standard is not applicable to judicial amendments as a precedent which changes the Constitution is dependent primarily on the reasoning adopted by particular judges at particular points in time. Furthermore, a constitutional amendment even if it does not fail any of the reviews, may be deleted with a change in Government or through pressure applied by national consensus opposing the same. A judicial amendment, however, stays in operation until the precedent is not declared *per incuriam*.

This points to an inherent disparity which may be solved by uniformly applying the basic structure doctrine to judicial pronouncements as well. Hence, we propose to adopt the doctrine as guiding principles for any decision which has the tendency to functionally change the provisions. We recognize that an abstract concept such as the Basic Structure cannot

⁵⁶ *Id.* at 70-130.

be condensed into a definite set of commandments which the Court may refer to while making its decisions. Even if it could, it is a highly futile exercise to be undertaken by the Court to read through the entire Constitution and exhaustively list fundamental features. It also substantially limits their scope of review as a government may claim exclusion from scrutiny if their enactment falls outside of the list. However, to combat this, we find merit in Professor Krishnaswamy's defense of the doctrine's mercurial nature.⁵⁷ The case-by-case nature of identifying fundamental features provides more discretion to the Court and enables it to consider a variety of sources such as the bare text, perspectives from a historical, sociological, philosophical or constitutional morality standpoint and framers' intent through Constituent Assembly Debates. They are inherently abstract values much in the same vein as those expressed in the Preamble. Furthermore, landmark judgments of nearly 50 years of basic structure jurisprudence also act as a source of such fundamental values.

vi. For Equal Treatment of Equals

To incorporate these values in judicial decision-making likely to affect the Constitution, we argue that the Court after recognizing the functional effect its pronouncement may have on the text, shall mandatorily subject itself to a self-review, identifying whether the change will be in consonance with the basic structure. This shall take the shape of an additional burden to be discharged by the bench in its reasoning for the change. Only when such a burden is discharged by the Court, will the pronouncement and subsequent functional change take place. At the very

⁵⁷ *Id.* at 164-229.

outset, these values shall guide the change which may be in the form of principles, standards or tests devised by the Court. These standards or tests should *prima facie* be in consonance with the basic structure. Thereafter, once such a conception has been made, it shall be the burden of the majority opinion to show that these standards do not violate the fundamental features. Thus, it provides two dimensions for the application of basic structure, i.e., as an advisory set of rules and as a directive to be fulfilled by the Court in its ratio. This, as shall be shown further, will constitute the ‘structuralist’ portion of our approach.

In considering the protection of essential democracy and national consensus involved in constitutional amendment, we find merit in Professor Gibson’s assertion. In reference to the Canadian Supreme Court, he states that no group of judges however well versed with the law can possibly see the full ramifications of the change enacted by them. Further, he postulates that they do not possess the adequate experience to enact such a change. There exists an argument against the judiciary possessing such a power as opposed to it resting firmly with the constituent authority elected by the people. However, we must make it clear that we are not against the judiciary possessing the power to functionally change the Constitution. Rather, we find that in systems such as Canada and India, where amendment by the Parliament is tough to realize, the judiciary should play an active role in changing the Constitution in accordance with the needs of society. This ideal is representative of the living constitutionalism envisaged by Ambedkar. But it is important to note that such a power should not be unrestrained so as to create a disparity between two institutions essentially doing the same function. On this point, we favor the

‘equal treatment of equals’ principle propounded by the Court as a part of Article 14. The Court should be subject to the same modicum of limitations as it creates on the Parliament’s power to amend. Our approach, as shall be realized towards the end of Part I, fulfills this democratization of amending limitations.

In concluding this sub-section, we understand this to be a ‘self-restraint’ approach as opposed to another organ reviewing judicial amendment. The aim behind this stems from the belief that India should preserve and nurture the strong form of judicial review it has cultivated through the years. In consonance with Professor Gibson’s suggestion of self-restraint, we believe that any other form of review mechanism would compromise the independence of our Judiciary. As Professor Swati Jhaveri explains that a dialogic form of judicial review entails a situation where review takes form of an exchange between the Parliament and the Judiciary with the Parliament having the final word.⁵⁸ Applying this weak form of judicial review in the case of judicial amendment, review would lead to a situation wherein the Parliament may have the final say in deciding the *vires* of the amendment. This would ultimately curtail the Court’s position as one of active engagement⁵⁹ and lead to an unnecessary deference to other organs of the State.

⁵⁸ Swati Jhaveri, *Interrogating Dialogic Theories of Judicial Review*, 17 INT’L. J. CONST. L., 811, (2019).

⁵⁹ Sujit Choudry, Madhav Khosla & Pratap Bhanu Mehta, *Locating Indian Constitutionalism*, in *The Oxford Handbook of the Indian Constitution* 3 (Sujit Choudry, Madhav Khosla & Pratap Bhanu Mehta eds., Oxford University Press 2016); Devesh Kapur & Pratap Bhanu Mehta, *Introduction in Public Institutions in India: Performance and Design*, (Devesh Kapur and Pratap Bhanu Mehta eds., Oxford University Press 2005).

D. ‘STRUCTURALIST-PRAGMATIST’: THE OTHER PRONG

At the outset of this sub-section, we would like to clarify that the usage of the terms ‘structuralist’ and ‘pragmatist’ is not intended to eclipse judicial precedent as a mode of judicial review or replace it with structuralism or pragmatism. Rather, the usage connotes the adoption of the core tenets of these modes in creating our approach. To illustrate, in the previous section, we defined the ‘structuralist’ part of our approach. In doing so, we identified central principles of modern structuralism and applied them to check judicial amendment while deciding a case. In his definitive work⁶⁰, Professor Akhil Reed Amar understands structuralism as one in which overarching doctrines identified from parsing the text aid in interpretation. As a textualist, he cites *Marbury*⁶¹ to illustrate that the doctrine of judicial review emanated from the US Constitution’s history, structure and text. Parallely, our argument for a basic structure self-review originates in the doctrine being based on history and structure as the *Kesavananda* opinions illustrate, particularly those of Justice Sikri and Justice Khanna. Hence, our approach focuses on using structuralist principles in guiding and sanctioning judicial amendment.

The other element of our approach focuses on adopting central tenets of pragmatism as a mode of judicial review. The auxiliary concern of the Court not possessing requisite experience and resources to adequately change the Constitution in contrast to pragmatic deliberations in the Parliament is undisputed. An amendment under Article 368 is introduced

⁶⁰ Akhil Reed Amar, *The Supreme Court, 1999 Term – Foreword: The Document and the Doctrine*, 114(1) HARV. L. REV., 23, (2000).

⁶¹ *Marbury v. Madison* 5 U.S. 137, 138 (1803)

in the lower house through a bill to that effect and passed after due debates on the same. Such discussions provide an opportunity to put forth pragmatic concerns that might result from the amendment. A similar procedure is carried out in the upper house and thereafter assent of the President is sought. While an argument may be made that the majority in the Parliament may pass the amendment without addressing these concerns, resources are expended to outline such difficulties. The same cannot be said with regard to judicial amendments as whether a pragmatic approach is adopted in evaluating their decision rests solely with the judges.

i. 'Paneling' Pragmatism

Professor Doori Song defines pragmatism as a mode of constitutional interpretation, rooted in empirical analysis and centered around future considerations which seek to solve cases based on social needs.⁶² Pragmatism deviates from rigid procedures established by precedent and offers more flexibility in decision-making.⁶³ In addition, the mode argues that a sounder decision is attained if the judge is well versed with empirical studies on the subject he or she is deciding. It also allows the Courts to be more activist in nature and resolve growing needs of society. With regards to pragmatism in constitutional interpretation, Professor Song identifies few core strengths which include: (a) allows judges to address factual realities of constitutional interpretation; (b) allows judges to decide on social issues not expressly provided in the text; and (c) provides a more

⁶² Dr. Doori Song, *Judicial Pragmatism: Strengths and Weaknesses in Common Law Adjudication, Legislative Interpretation, and Constitutional Interpretation*, 52 U. ILL. CHI. J. MARSHALL L. REV., 369, (2019).

⁶³ Richard A. Posner, *The Federal Judiciary: Strengths and Weaknesses* (Harvard University Press 2017).

rational basis to balance needs of the State with needs of the individual with a future looking analysis. We identify these as the core tenets in guiding functional change.

To inculcate these values, we need to create a pathway similar to the Commission proposed by Professor Gibson. However, instead of making it a permanent advisory body, we argue it should be a needs-based body taking the shape of expert panels. The panels shall constitute of experts on the specific question or area of law, which is relevant to any functional change to the text. Hypothetically, if the question revolves around adding commercial speech in Article 19, the panel should ideally consist of experts in comparative constitutional and corporate law to evaluate this proposition. Not every case of functional change would require a panel to alleviate pragmatic concerns. If the bench is itself an expert on the central issues, it can be considered an adequate authority to decide on future considerations which might emanate from the change. Therefore, we propose that the appointment of such panels is left to the discretion of the bench. Borrowing from Professor Gibson's suggestion, these panels equipped with adequate resources for research shall submit their findings in the form of a report outlining the concerns identified by them. This report shall ultimately be of an advisory nature. Lastly, such panels will not exist *ad infinitum*; only till the constitutional question is solved.

Our main idea behind proposing such panels is that they are not an unprecedented exercise. The Supreme Court appoints panels regularly to seek expert opinions on factual situations outside of their core competency such as the recently appointed six-member panel headed by former SC

Judge AM Sapre to assess regulatory questions emanating from the Adani crash.⁶⁴ Our proposal only seeks to extend this practice to seek specific, concentrated opinions when a functional amendment is a possibility. In conclusion, we believe that such an exercise would be a proper analog to the deliberation exercise undertaken by the Parliament while amending the text.

**E. BASIC STRUCTURE REVIEW OF PAST JUDICIAL AMENDMENTS:
A LEGITIMATE CASE FOR RELAXING LARGER BENCH
REFERENCE**

We limit the scope of this sub-section to an argument in favour for relaxing of the Larger Bench Reference (“LBR”) rule to the specific case of overruling or in other words striking down of judicial amendments. We are not concerned with a broader critique of the LBR⁶⁵. The central thesis is to provide an assertive dimension to our approach and remedy existing judicial amendments in an efficient manner.

Our proposition is thus: when a basic structure challenge to a judicial amendment comes before the Supreme Court, a bench of a defined strength shall hear and decide the matter irrespective of the strength of the amendment’s sanctioning precedent. We are inclined to follow procedure set by the U.S. Supreme Court where the bench which decides

⁶⁴ *Meet the Members of SC Appointed Panel on Adani Share Crash*, THE TIMES OF INDIA, March 2, 2023, <https://timesofindia.indiatimes.com/india/meet-the-members-of-sc-appointed-panel-on-adani-share-crash/articleshow/98362490.cms>.

⁶⁵ Shrutanjaya Bhardwaj & Ayush Baheti, *Precedent, Stare Decisis and the Larger Bench Rule: Judicial Indiscipline at the Indian Supreme Court*, 6 INDIAN L. REV., 58, (2022).

constitutional issues has been fixed at nine.⁶⁶ The relaxation shall facilitate a situation wherein an impugned precedent facing basic structure review does not continue to subsist for decades. It provides for revocation of a judicial amendment on a similar footing to how an amendment might be struck down or revoked by the Parliament. This would also give a retrospective operation to our approach and enable the Court to reassess its amendments.

At this stage, we do not seek to define the number of judges required to achieve this purpose. It may be set at five as per the provisions of a constitutional bench in Article 145(3)⁶⁷ or at nine as per the benches set by U.S. or Canadian Supreme Court. Finally, we feel that the extension of this review to the Court's previous amendments is justified considering its application to ordinary laws,⁶⁸ for if it can apply to a lower law, it must be applied to a higher one as well.

F. ADDRESSING POTENTIAL PITFALLS

Before concluding this part and moving on to its application, we feel it is important to address the potential criticisms and drawbacks in our model. The primary criticism may stem from the comparatively low threshold that we have kept in identifying judicial amendments in the Indian context. It may be reasonably inferred that by our standard almost every

⁶⁶ Judiciary Act of 1869, ch. 22, 16 Stat. 44 (USA).

⁶⁷ INDIA CONST., 1950, art 145(3).

⁶⁸ *Madras Bar Association v Union of India* (2014) 10 SCC 1; *Supreme Court Advocates-on-Record Association & Anr. v Union of India* (2016) 5 SCC 1.

constitutional interpretation may be considered an amendment. This inference may also have been the reasoning behind the high threshold of the Macfarlane model. While we have explained that the Macfarlane model will run into a host of issues if applied *pari materia*, it may be expected of us to create a similarly high qualification.

However, we feel that in the Indian context, our argument of functionality being the core factor in deciding when a mere interpretative technique becomes an amendment is valid. A constitutional interpretation can only be expected to cross the functional threshold if it becomes the primary way for a provision to be interpreted. If the interpretation is such that it will significantly change how a provision is applied it may be called a judicial amendment. A way to look at this, is to see the frequency of the interpretation's usage either *post facto* or in the Court's ratio. While giving an interpretation, if the Court in its judgment, creates an interpretation which it anticipates may be used frequently by the Court in its review process and will significantly change how the text is interpreted, that may be considered a judicial amendment.

To illustrate, in one dispute, the Supreme Court increases the ambit of right to life to include the right to a healthy environment,⁶⁹ while, in another, it evolves a four-pronged test of proportionality to be applied to legislative and executive State action.⁷⁰ The former merely makes another dimension of the right to health justiciable, while the latter can be reasonably expected to be used frequently to significantly change how the text in relation to the facts before it is to be interpreted. It is clear that the

⁶⁹ *Subhash Kumar v State of Bihar* 1991 SCR (1) 5.

⁷⁰ *Justice K.S. Puttaswamy (Retd.) & Anr. v Union of India & Ors.* (2017) 10 SCC 1.

latter crosses the functionality threshold and therefore becomes an amendment, while the former remains a mere interpretation. The identification of when a judicial interpretation may hit the critical mass necessary to become an amendment, may be left to the Courts which must employ the help of the expert panels in doing so.

As a corollary to this, a question may arise whether each and every judicial standard or test will be considered an amendment to the Constitution. We answer in the negative. The differentiation must be done based on the degree of the functionally binding nature of the test. In simpler terms, a test may be considered an amendment if it is of a definite nature with strict rules regarding its application and which must all be complied with for it to be applied in future decisions. To illustrate, the test of reasonableness under Article 19 postulates that it has to be applied to an impugned law as no abstract standard or general pattern can be laid down.⁷¹ This essentially leaves a lot of room for discretion for the judges and can be merely described as a technique for interpretation. On the other hand, the test of reasonable classification under Article 14 clearly sets out two conditions to be fulfilled by an impugned statute: (a) classification based on intelligible differentia; and (b) rational nexus to the object sought to be achieved. In each and every subsequent case when a law is challenged as violative of the right to equality, this test must be fulfilled by the law. This test eliminates ambiguity regarding its application and usage. Therefore, the former test will not be considered an amendment while the latter will be.

⁷¹ State of Madras v V.G. Row 1952 SCR 597.

Another significant criticism may be, that even with these limitations placed on judicial amendments, it still remains a fairly undemocratic process. At the onset, we accept this criticism at face-value. We cannot argue for fully democratizing this process or place another organ as a check on the Supreme Court, especially in the Indian context. We have partly explained our reasoning in the previous sections. However, we feel that our aim is mainly to make the process of creation and review of judicial amendments analogous to the Parliament's process.

In India, subject to judicial review, a two-thirds majority has the uncontested power to amend the Constitution. Further, because of the delimitation freeze⁷² of seat allocation amongst states since 1971, representation to the Parliament is such that not every citizen can claim to have an equal voice. The freeze effectively prioritized representation of less populous but more developed southern states above the over populated less developed northern states. Furthermore, the electoral history of India points towards situations wherein two-thirds majority can easily rest with one bloc for extended periods of time⁷³. Therefore, even in the Parliament, we cannot claim a fully democratic amendment process. At best, we can hope to make the result constitutionally sound.

Lastly, a pragmatic concern may be the acceptability of our approach by the Supreme Court. We feel that the approach can be intuitively used by the Court to combat confusion created by the shortcomings of existing precedents and their applicability through the

⁷² INDIA CONST., 1950, art 82.

⁷³ Dinesh Chandra Srivastava, *Effect of Numerical Strength of Majority Ruling Party on Legislative Output in India*, 74 INDIAN J. POL. SCI., 621, (2013).

years. Furthermore, as per recent trends, it may also help the Court in avoiding disapproval with regard to the seemingly autocratic nature of its constitutional interpretation. For citizens, the Constitution is what the Court says it is far more than what their representatives say it is. The Court does not even need to conform to strict rules of procedure and limitations that the Parliament does. In adopting this approach, the Court will become a more transparent body and create greater trust with the citizens above and beyond constitutional provisions. The aim of any Constitutional Court is to make rights of citizens holistically justiciable through its interpretation. The approach will achieve this and make the process acceptable to the entire populace.

III. PART II: APPLYING APPROACH TO THE ERP TEST:

PROVIDING A SOLUTIONS BASED MODEL

G. AMENDING ARTICLE 25 AND 26: A PRECEDENTIAL HISTORY OF ERP

Article 25 and 26 of the Indian Constitution provide for freedoms to practice religion and the management of religious affairs respectively. While the former provides for exceptions on the grounds of public order, health, morality and other provisions of Part III, the latter also exempts on similar grounds but does not subject itself to the other provisions of Part III.⁷⁴ These articles do not restrict the State from making any law on any 'secular' activity associated with religion or from seeking social reform in religious institutions and practices. It is on this proviso to these Articles

⁷⁴ Dr. Subramanian Swamy v State of Tamil Nadu AIR 2015 SC 460.

that the Indian Supreme Court had to evolve the ERP test to review legislations made by the State and to determine what constitutes religious practice. The test, continuing to this date, became a contentious and controversial functional amendment for these articles.

The amendment derived its sanction from landmark cases on religious rights adjudication of the Court. The first being *Shirur Mutt*,⁷⁵ which proposed that the Supreme Court can become a theological authority to determine essentialness of a religious practice by reading the texts and doctrines of that religion. The judgment did provide for an expansive definition of religion and affirmed that religious denominations can decide without any outside interference what is essential to their religion, unless it expressly ran contrary to the exceptions provided.⁷⁶ However, this judgment cannot be said to functionally change the provisions as it only highlighted the difference between secular and religious practice. The so-called textual turn,⁷⁷ happened in three landmark cases, first among which is *Devaru*⁷⁸, in which the Court relied on scriptures and held that it is for the Court to decide what is essential to a religion and not the denomination, an ignorance of the precedent set in *Shirur Mutt*. The elements of this modified test could be seen in *Mohd. Quareshi*,⁷⁹ in which the Court used similar standards to uphold the anti-cow slaughter law. The second case was *Durgab*

⁷⁵ Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt 1954 SCR 1005.

⁷⁶ RONOJOY SEN, LEGALIZING RELIGION: THE INDIAN SUPREME COURT AND SECULARISM, (No. 30, East-West Ctr. Washington, 2007).

⁷⁷ RONOJOY SEN, ARTICLES OF FAITH: RELIGION, SECULARISM, AND THE INDIAN SUPREME COURT, (Oxford University Press 2010).

⁷⁸ Sri Venkataramana Devaru & Ors. v State of Mysore & Ors. 1958 SCR 895.

⁷⁹ Mohd. Hanif Quareshi & Ors. v State of Bihar & Ors. 1959 SCR 629.

Committee,⁸⁰ wherein the Court began to apply reason to religious practices and sifted ‘superstition’ from religion. Further, in *Govindlalji*,⁸¹ Justice Gajendragadkar strongly reaffirmed the Court’s adjudicating authority in deciding religious practices, if there were opposing views emanating from the community. The third case was *Syed Saifuddin*,⁸² wherein excommunication was held to be a religious practice, yet the dissenting opinion of Chief Justice Sinha elaborated that it shall still be subject to public welfare.

These judgments culminated in a functional change to Articles 25 and 26, providing a three-pronged test for religious rights adjudication not found in either the bare text or framers’ intent in Constituent Assembly Debates. A practice shall only be granted constitutional protection against legislative action, if it can be proved religious, essential to faith and finally not contrary to any public interest notions that supersede it. The amendment conferring unprecedented ecclesiastical jurisdiction to the Court has been consistently reaffirmed.⁸³

H. AN UNCONSTITUTIONAL AMENDMENT?

The problems with this judicial amendment are numerous. The first and foremost being the apparent assumption of a theological authority by the Constitutional Courts, in contravention to the basic structure principle of ‘secularism’. Though the model of ameliorative secularism has been used as a justification by the Courts, the degree of interference cannot be so

⁸⁰ Durgah Committee, Ajmer & Anr. v Syed Hussain Ali & Ors. (1962) 1 SCR 383.

⁸¹ Tilkayat Shri Govindlalji ... v The State of Rajasthan & Ors. 1963 AIR 1638.

⁸² Sardar Syedna Taher Saifuddin Saheb v State of Bombay AIR 1962 SC 853.

⁸³ Adi Saiva Sivachariyargal Nala Sangam & Ors. v Govt. of Tamil Nadu AIR 2016 SC 209.

easily juxtaposed with social reform. In assuming this authority, the Courts began to rely on texts and scriptures, which poses a unique problem in India,⁸⁴ as multiple texts exist within the same denomination. The Courts' tendency to rely on majority versions, especially in the context of Hinduism, has diluted the 'essentialness' of a practice. Furthermore, the essentialness of a practice creates a novel exception not provided for in the text itself, wherein the only question that emanates from a bare perusal is whether a practice is religious or secular. The general term 'secular activity' being preceded by specific terms such as 'economic, political and financial' in Article 25 lends credence to this.⁸⁵ Another issue relates to shifting the burden from the State to the individual or the community, wherein they have to prove to the satisfaction of the Court that their practice is essential and does not contradict public interest and is therefore deserving of protection.

In a pragmatic sense, Courts' adjudication also does not take into account the net social benefit which may or may not be reached by rationalizing a religious practice. *Sabarimala* remains a fit example wherein constitutional morality allowed a few women clandestine entry following the decision at the cost of substantial interference by the Court in the matters of the religious community, which responded with protests. The case and the substantial questions emanating are yet to be decided by a nine-

⁸⁴ B.N. KIRPAL ET AL., SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA, (Oxford University Press 2000).

⁸⁵ Ashwani Kumar Singh, *India's Troubling Jurisprudence to Control and Regulate Private and Religious Sphere*, IACL- IADC BLOG, (Dec. 6, 2023), <https://blog-iacl-aidc.org/2021-posts/2021/9/30/indias-troubling-jurisprudence-to-control-and-regulate-private-and-religious-sphere>.

judge bench after multiple review petitions. A similar situation has also arisen with the recent 'Hijab'⁸⁶ dispute pending before the Supreme Court. The case also illustrates another problem of subjectivity, wherein, on reading the same passage from the Quran, the Kerala High Court found hijab an essential obligation⁸⁷, whereas the Bombay High Court held it to be non-essential⁸⁸. It reflects how difficult it is to determine what constitutes the essentialness of a religion, even from a single supreme text. With reference to Part I, this creates an ironic situation, wherein the Court leaves the determination of the essential features of the Constitution, a supreme text, to be determined on a case-by-case basis, subject to 'living constitutionalism' and impossible to definitively enumerate. Yet, essential features of a religion can be easily identified from even countless scriptures and texts dating back centuries to definitively facilitate rights adjudication.

I. STRIKING DOWN THROUGH SECULARISM: BASIC STRUCTURE REVIEW AND THE 'PARAMETERS' TEST

Secularism has been recognized as a basic feature of the Constitution and enumerated as such in the very first case of *Kesavananda* and in subsequent cases.⁸⁹ In *Bommai*, secularism has been defined as the equal treatment of all religions by the State. From the point of view of the state, belief, faith and religion of a person and the acts done in pursuance of their religion are immaterial. All citizens are entitled to equal treatment

⁸⁶ *Aishat Shifa v The State of Karnataka & Ors.* 2022 SCC OnLine SC 1394.

⁸⁷ *Fathema Hussain Sayed v Bharat Education Society* 2002 SCC OnLine Bom 713.

⁸⁸ *Amnah Bint Basheer & Anr. v Central Board of Secondary Education & Anr.* 2016 SCC Online Ker 41117.

⁸⁹ *S. R. Bommai v Union of India* 1994 SCC (3) 1; *Dr. M. Ismail Faruqui v Union of India* AIR 1995 SC 605 A.

by the State. Professor Jain⁹⁰ describes it as a positive model of secularism and the essence of constitutional provisions is to prevent India from becoming a Theocratic State. The Supreme Court has itself gone so far as to say that any Government which pursues unsecular policies and actions contrary to the Constitution should be subject to Article 356:⁹¹ State Emergency.⁹²

This conception of secularism and the Court's insistence from preventing the State from assuming theological and unsecular character runs distinctly contrary to the ERP test which allows for an extensive theological mandate. The amendment, while consistently running contrary to the 'golden thread' of secularism woven into the Constitution, also runs into a host of problems as enumerated in the aforementioned sections. The precedential sanction for this amendment has been continuing since *Shirur Mutt* and needless to say has done considerable damage to this basic feature as per extensive evidence analyzed herein and by constitutional scholars at large. Therefore, this judicial amendment of Article(s) 25 and 26 should be struck down as being violative of the basic structure.

We believe our two-pronged approach shall result in a much more efficient test. From a structuralist standpoint emerges, what we dub as the 'parameters' test. To achieve sound religious rights adjudication, firstly the Court must revert to the position before the 'textual turn'. The question shall again become the difference between what is 'essentially religious' and what is not. Furthermore, autonomy to decide essential practices shall again

⁹⁰ Jain, *supra* note 50, at 1384.

⁹¹ India Const., 1950, art 356.

⁹² State of Tamil Nadu v Ahobila Matam AIR 1987 SC 245.

be divested to religious denominations. To determine the question of religiosity of a practice, the Court must use certain enumerated, yet not exhaustive parameters. Such parameters can be presumed to include: (a) the duration since the practice has continued; (b) the social/cultural importance of a practice to the individual/community; (c) status of emanation of this belief: either religious or spiritual or any other; or (d) sincerity with which a practice is being followed. The list is not exhaustive and may change from case to case. However, none of the parameters shall allow for a theological mandate to check religiosity and its sincerity through texts or scriptures. In the same vein as the Sincerity of Belief test,⁹³ the parameters shall only check religiosity on an individual level and not *in rem*. The two-step application of the test shall be: (a) assertion of belief by individual/community;⁹⁴ and (b) checking religiosity through secular parameters

From a pragmatic standpoint, while evaluating the social reform as an exception under Article 25(2)(b),⁹⁵ we argue for reading in doctrine of proportionality to balance the importance of religious practice against the proposed social reform by the State or Judiciary. If the reform and its effects as contemplated by the Court in its wisdom outweigh the religious practice and any significance it may carry for the individual and community, it shall uphold the legislation or bar the practice as it deems fit. The proportional evaluation shall consider the fundamental rights of religious

⁹³ Elizabeth Platt & Kara Loewentheil, *In Defense of the Sincerity Test* in Kevin Vallier & Michael Weber eds., *Religious Exemptions* (Oxford University Press 2018).

⁹⁴ Faizan Mustafa and Jagteshwar Singh Sohi, *Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy*, *BYU L. REV.*, 915, (2018).

⁹⁵ INDIA CONST., 1950, art 25(2)(b).

freedom from a pragmatic lens and hypothecate any possible consequences that may emanate from their restriction.

Our test leaves the exceptions of public order, health and morality undisturbed. However, in agreeing with Justice Indu Malhotra, we believe that constitutional morality should only be used to eradicate substantial social evils which the Court may decide after considering the societal impact of a practice.

The primary aim of this section was to apply our approach in reading down the ERP test and to create a constitutionally sound judicial amendment. However, we believe that our test is only one of the possible alternatives which emerge from application of our approach.

IV. CONCLUSION

'Judicial Amendments' as a concept has been subject to considerable scrutiny in Western jurisprudence. Perhaps, this was the guiding force behind the high bar provided by Professor MacFarlane wherein only a few judicial interpretations may meet the criterion. While we have found merit in such and similar assessments, we still stand behind functional judicial amendments in developing democracy such as India to foster easier constitutional reform and protect citizens from substantial overreach by the State. The amendments have undeniably emanated through an active and robust system of constitutionally-sanctioned judicial review. This has been evidently shown through *Kesavananda* and beyond, particularly with respect to Fundamental Rights, the most direct relation the Constitution has with citizens.

However, we still understand the need to subject judicial amendments to the same standard that the Judiciary applies on Parliament's power under Article 368. As a democracy, we must not allow for unparalleled power to amend the Constitution to the Supreme Court. Therefore, we must ask for certain checks and balances as well as guiding principles which the Court may use to restrain itself from overreaching its bounds. We believe our approach, a mix of central tenets of structuralism and pragmatism, forms a suitable direction which the Court may take to guide formation of new amendments to strike down previous unconstitutional ones. In doing so, rather than definitively curtailing or expanding judicial review, we sought to redefine it.

Lastly, in our application of our approach to the ERP test, we sought to showcase the effect our model may have on constitutional interpretation and future exercise of judicial review. We firmly believe that it remains an exceptional erroneous judicial change which has perpetuated for almost the entire existence of the Constitution. In applying our model, we evolved a possible alternative amendment which can emerge and be constitutionally sound. Finally, we humbly hope that the nine-judge review bench or the Hijab case reference may become opportunities for the Court to inculcate our model in its constitutional jurisprudence.