

**MOVING FROM THE BASIC STRUCTURE TOWARDS A
PERMANENT STRUCTURE: FROM POSITIVE LAW TO
NATURAL LAW**

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This paper deals with potential lacunae of the basic structure theory as it promises to provide long-term protection to the most innately cherished values of the Indian Constitution, especially in the face of a determined executive and legislature. The paper illustrates instances like those surrounding Hitler wherein the limited amending power and the emergency provisions were used to create a new dystopian constitution. The issue of whether the limited amending power can be used to grant oneself absolute power has been investigated. The attempt has been to examine and propose potential legal means to preempt a future demagogue from destroying the cardinal values of the Constitution. The paper highlights the potential legal challenges and fallouts that could emerge from an attempt to bypass the limitations imposed by the basic structure doctrine, especially by calling for a new constituent assembly. It starts by providing an overview of the idea, origin and judicial development of the basic structure doctrine, as well as by analysing the context and the cases from which the doctrine emerged. The next section of the paper deals with analysing the jurisprudential ideas forwarded by jurists like Conrad, Maurice Haurio, and Schmitt. These jurists in essence laid down the edifice of modern understanding of constituent and constituted power. Further, they have made immense contributions to the understanding of the nature and extent of the constituent power and by borrowing from their ideas the authors have attempted to propose a new alternative legal framework. The new legal framework that has been proposed is based on a novel hierarchical understanding of certain cardinal rights, constituent powers and the constituted powers. The highest echelon of the proposed framework has been envisaged as the unchanging idea of a 'permanent structure' based on the natural law philosophy. This limits the usage of the otherwise unfettered

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MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

constituent power. The permanent structure is followed, hierarchically, by the constituent power that is expressed and exercised by the people. Constituent power, as a reservoir, continues to exist across different constitutions and epochs. Lastly, constituent power exists in the form of the parliament and the basic structure doctrine which deal only with one 'particular' constitution. The paper in the concluding section engages with jurisprudential issues related to natural and positive legal theories while proposing a framework to ensure the continued existence of certain fundamental values.

TABLE OF CONTENTS

Introduction	2
Constituent Assembly, Indian Constitutional Conflict and the Construct of Basic Structure Doctrine	9
Philosophical Edifice of the Basic Structure Doctrine towards Permanent Structure	19
An Overview of the Journey towards Natural Law	28
Positive Law and the Threat of Momentary Human (Political) Passion	30
Conclusion: Towards a Permanent Solution	33

INTRODUCTION

From the works of the much celebrated twentieth-century Austrian jurist Hans J. Kelsen, the Constitution of a nation can be viewed as the reflection removed of its *Grundnorm* i.e. the basic norm. This basic norm can crudely be understood as the harmonious amalgamation of the fundamental principles laying down the legal edifice, the polity of a nation and, resultantly, its governance. The Constitution of a state, in essence, lays down the political structure and delineates the limits and contours for the legitimate exercise of authority by the organs of the State i.e. it, *inter alia*, demarcates the role and functions of the legislature, executive and judiciary. For a jurisprudential gaze and in *the lumen* of the significant body of literature produced by Kelsen, the Constitution may also be conceptualised as being synonymous with the highest echelon of norms from which, directly or indirectly, all norms derive their validity. Though it might also be argued that apart from the *grundnorm*, there is an independent spirit and an underlying structure of the *grundnorm* which,

though distinct from it, exists alongside it. This spirit, which exists alongside the *grundnorm* may be called the basic structure⁴ or in other words, the basic personality⁵ of the Constitution. In regard to the Constitution, one is reminded of the quote by Caroline Fredrickson, “the Constitution exists to protect rights, not to undermine them.”⁶ Supplementing Fredrickson’s opinion, it may be stated that within the Constitution, there exists a basic structure doctrine which quite zealously shields and protects the Constitution which is both the reservoir and protector of our rights.

The Judiciary, sentinel on the *qui vive* carries the perpetual obligation to the people of India to protect their Constitutional values from being miscarried due to the overzealousness of the legislature.⁷ The discharge of this aforementioned duty of the Supreme Court provides a prolific basis for judicial innovation and herein lays the context and impetus for the evolution and subsequent development of the basic structure doctrine. However, the evolution of the basic structure was a particularly controversial exercise.⁸ This is, though, often true for any seismic change in the internal separation of power of a state. The doctrine, in essence, augmented the strength of the judiciary with regards to the legislature.

When we refer to the expression, “basic structure” for a document as fundamental as the Constitution, we are essentially attempting to delineate our thinking towards a modicum of entrenched and deep-rooted provisions which cannot be detached from the Constitution, without altering the very essence of the document. In gravamen, one might venture to state that the basic structure is the sum total of the heart and the soul of the Constitution.

⁴ Justice H. R. Khanna introduced the expression ‘*basic structure*’ in *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225. Further, he propounded that certain basic features cannot be removed by the legislature.

⁵ *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225, JJ. Hegde and Mukherjee used the expression “The personality of the Constitution” rather than basic structure.

⁶ Deepika, *The Constitution of India Basic Structure Doctrine*, 5(6) INT’L. J. L. MGMT. & HUMAN. 721, 723 (2022).

⁷ In *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225, ¶614 as per JJ. Shela and Grover., the consequence is not that the Judiciary is supreme but that the Constitution is supreme.

⁸ Ramaswamy R. Iyer, *Some Constitutional Dilemmas*, 41(21) EPW, 2064, 2065 (2006).

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

One can draw an analogy with the text *Animal Farm* by George Orwell wherein the author, in the quest to satirise the socialist system, writes “*All animals are equal, but some animals are more equal than others*”. The author essentially highlighted the fact that social stratification is the norm. The idea Orwell wanted to propound was that certain institutions, ideas and people are, for lack of a better term, ‘*privileged*’. Likewise, certain parts of the Constitution are more fundamental than others.⁹ Though creating legal inequality among humans must necessarily be frowned upon, yet, the same cannot hold true for all constitutional values and principles as certain values are more ephemeral than others, and some parts of the constitution ought to be more basic than others. Certain principles are part of Constitutional law even if not expressly stated,¹⁰ such as federal structure, separation of powers, popular sovereignty. As the result of judicial pronouncements, majority of the articles of the constitution could be amended by the Parliament as per the procedure entailed in Article 368 but certain other ‘*privileged*’ Articles are beyond the preview of any constituent adventures by the Parliament. The proposition can be better understood in the words of former Chief Justice Sikri:

*“One of the inferences that can be drawn is that the Constitution makers never contemplated, or imagined that Article 52 will be altered and there shall not be a President of India.”*¹¹

The genesis, growth and the subsequent valiant protection of the idea of basic structure in mature democracies, either by constituent or judicial means, was undertaken as a consequence of certain distasteful political lessons and experiences that the global community had gained. In a platitude of cases, across global constitutional history, more often than not, either the provisions related to the amendment of the Constitution or the provision related to the emergency were misused and abused to create a new dictatorial Constitutions with no semblance to their respective predecessor, Nazi Germany being a notorious example of the

⁹ *Id.* at 2065.

¹⁰ *M. Nagaraj & Ors. v. Union of India & Ors.*, (2008) 8 SCC 212.

¹¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

same.¹² Dr. B.R. Ambedkar also noted that during the interwar period from 1918 to 1939, certain European countries like Italy and Germany with working parliamentary democracies succumbed to the rise of extremist right-wing ideologies. These changes represented alterations to the constitutions, whereby the old democratic constitutions were replaced with a one-party legal order. The old constitutions were legally undermined by the usage of emergency or amendment-related provisions provided in the old constitutions themselves. Such events call for the need for constitutional checks and limitations on the power within the Constitution to alter the Constitution. This trend reflects a malevolent practice, undertaken by Machiavellian politicians standing on the shoulders of the ideologues of extremist ideologies to gain absolute power. Such extralegal political revolutions and their legal offsprings could be termed as Constitutional *maleficence*. The foresight of the framers of any mature constitutional system ought to, at the very least, have internal checks and balances like the basic structure doctrine to prevent such constitutional maleficence.

If the Constitution could readily be altered and freely restructured without any effective limitation, then such a text would be worth less than the paper it is written upon. This would be especially true in the face of a violent and exclusionist political force when no limits on the constitutional amendment are provided or a legitimate political force with unconstitutional aspiration achieves the Constitutional prerequisites for effecting amendments. The basic structure doctrine ostensibly ensures the aspirations of J.S. Mill when he remarked “*not to lay their liberties at the feet of even a great man, or to trust him with powers which enable him to subvert their institutions*”. In India, the fervent supporters of the doctrine of basic structure include, among others, luminaries such as Fali S. Nariman, Soli Sorabjee and former Chief Justice of India Aziz Mushabber Ahmadi.¹³

¹² In India’s immediate neighborhood, martial law powers were used to subvert their Constitution thrice, *First*, in Pakistan by Iskandar Mirza in 1958, second in Bangladesh, by General Zia-ul-Haq in 1977 and latest by General Pervez Musharraf in 1999. The judiciary legalised these coups by evolving the ‘doctrine of necessity’. In Europe, the rise of dictators like Benito Mussolini, Antonio Salazar of Portugal, and Francisco Franco in Spain also reflects subversion of Constitutional structures in their respective countries.

¹³ Iyer, *supra* note 8, at 2066.

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

The issue which has long plagued the judicial minds is whether the amending power could be used in a way to amend the Constitution to accord, upon the amender, unlimited power. Can the 'created' venture use its limited powers to destroy its creator and accord upon itself the status of a new omnipotent power, or can the whole Constitution be repealed and Mughal and British rule re-introduced?¹⁴ Theologically, the story of uprising the angel Lucifer against God is quite well known hence an Abrahamic analogy *vis-à-vis* our legal concern may be drawn in the paradigm of the revolt by the angel Lucifer against its creator, the God.¹⁵

The main challenge was to legally deny any extremist political party, playing on the momentary passion of the masses and having gathered the necessary majority, from exercising its legitimate legislative and constituent force, to undertake a substantial revision of the Constitution. The basic structure could be seen as a means of delineating the contours of the amending power. Without the doctrine of basic structure, democracy could be potentially used as a means to strangle democracy itself and the limited amending power of the Constitution could be used to draft a novel and more violent Constitution, as it may be if so, required by amendments.

Adolf Hitler, Fuhrer of Nazi Germany, was a dictator¹⁶, but the issue of interest for us is the question of whether he got his power through illegal means? The answer must be negative. It must be conceded that he was a democratically elected leader. Hitler fought elections,¹⁷ engaged with voters, debated his opponents, appealed for votes and participated in the legitimate political mobilisation. He made his electorate trust his political philosophy and eventually went on to win a free, fair and unbiased election. However, subsequently, he used the emergency power provided by the Weimar Constitution to gather absolute power.

¹⁴ A.G. Noorani, *Behind the 'basic structure' doctrine*, FRONTLINE (May 18, 2019).

¹⁵ Bible Isaiah 14:12-14 states that Lucifer said in reference to the aim of his rebellion against God that "I will be like the Most High".

¹⁶ Ian Kershaw, *Working Towards the Führer: Reflections on the Nature of the Hitler Dictatorship*, 2(2) CONTEMP. EUR. HIST. 103, 105 (1993).

¹⁷ *Id.* at 104.

Adolf Hitler pushed the Weimar Constitution to its limits¹⁸. So what if the Indian citizenry, in a moment of despair democratically elected a man who claims to be a prophet, a panacea, or elect a political party that denies the right of life and liberty or due process of law or human rights? The possibilities are limitless. What stops such jurisprudential agony and Constitutional violence? The swift retort, by a student of Constitutional law, would the existence and application of the doctrine of basic structure.

The Indian Supreme Court, when it realised that even the Indian leaders could go beyond the democratic tradition, to implement their vision of what they feel is right, crafted the doctrine of basic structure. It was the climate of constant Parliamentary aggression that provided the impetus and field for the judicial mind to develop the doctrine of the basic structure of the Constitution. The Forty Second Constitutional Amendment Act also called the mini-Constitution was passed during the emergency when most of the opposition Parliamentarians and leaders were lodged in various prisons, and the print and the electronic media were censored. Furthermore, for a short quantum of duration, the Constitutional position of the Directive Principles of State Policy and fundamental rights were reversed wherein, the latter became subservient to the former. Without going into the details, it can be safely stated that in both cases basic structure doctrine saved the day for India.

In light of the aforementioned, it might seem that all is fine but a complete victory over the forces of Constitutional violence and illegitimate disruption has not been won. One can only venture as far as to state that the battle to protect the basic constitutional spirit might have been won but the larger war to achieve a more permanent solution continues. The basic structure doctrine is only a partial and temporary solution. It merely remedies the symptom that is the abuse of amending power but does not address the underlying malady.

What would happen if a government is elected on a mandate which is in opposition to the basic structure and such a government is repeatedly hindered by the Courts to undertake a complete revision of the Constitution? The party leading the government may simply call for a

¹⁸ Dorsey D. Jones and S. L. Meltzer, *Hitler and Hitlerism*, 8(4) SOC. SCI. 412, 414 (1933).

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

new constituent assembly and create a constitution suited to its whims. The challenge or protection, depending on perspective, created by the basic structure doctrine can simply be overcome by convening a new constituent assembly. As the basic structure is only binding over the Parliament created by the present Constitution, the new hypothetical constituent assembly and the new Constitution inevitably emerging from it, will not be under the onus to pass the test of any Constitutional muster. The comfort and protection offered by the doctrine of basic structure will fall short in such a case. The experience of most of the countries reflects that formulation of multiple Constitutions is the norm and not the exception. France and Germany both have witnessed multiple Constitutions come and go, some violently and others after well-argued discussions. Who knows when *Durvasa Rishi*¹⁹ might appear for our much-cherished Constitution?

Legal regression is not unheard of. The French National Constituent Assembly of 1789 passed the Declaration of the Rights of the Man and of the Citizen of 1789 wherein Article 1 declared that “*all men are born and remain free and equal in rights*”.²⁰ Despite the pompous declarations, subsequent French Empires and Republics, based on different Constitutions, in the succeeding years pursued a highly racist policy.²¹ The recently attempted insurrection in the USA, to deter the peaceful transfer of power, again establishes that the ideas embodied in stable democracies and their mature Constitutions are fragile creations that need constant and ardent protection.

CONSTITUENT ASSEMBLY, INDIAN CONSTITUTIONAL CONFLICT AND THE CONSTRUCT OF BASIC STRUCTURE DOCTRINE

¹⁹ The appearance of *Durbhava Rishi* usually foretells a disaster by word of mouth - curse.

²⁰ Declaration of the Rights of Man and of the Citizen of 1789, art. 1.

²¹ The nature of colonial practices followed by the French in Africa, Indo-China etc. during the age of colonialism *prima facie* refused to recognise basic rights of men, even though the idea of inherent rights of humans was recognised during the 1789 French Declaration.

In India, there is a separation of functions and not power.²² Under the Constitutional arrangement, the Supreme Court is the protector of the Constitution. Nevertheless, the Indian Constitution is silent on the issue of basic structure, *per se*. The evolutionary journey of the doctrine can be seen across the span of a multitude of, closely contested, cases fought in the Supreme Court during the early decades of the republic. Amusingly, the source of the nasty conflict between the government, led by Congress, espousing socialist principles, and the Supreme Court was about the implementation of the much-needed land reforms. These seemingly necessary laws and welfare measures, that would have provided succour to the laity in distress, in form of necessary land redistribution had its conflict with the fundamental right to property guaranteed under Article 19(1)(f) of Part III of the Constitution of which the Supreme Court was the guardian by the virtue of Article 13 among others. This conflict over land reform provided the context for the development of this doctrine.²³

Later, the steady Parliamentary aggression upon the Constitution and Constitutional values, during the era of Prime Minister Indira Gandhi in addition to the aforementioned context, provided an edifice for the slow but steady growth of the basic structure doctrine. The *cause célèbre* cases of, among other, *Kesavanada Bharati v. State of Kerala*²⁴, *Indira Nehru Gandhi v. Raj Narain*²⁵ and *Minerva Mills Ltd. and Others v. Union of India*²⁶ provided the landmark judgments wherein, the principle of basic structure was overtime introduced, debated, refined, established, and eventually entrenched by a whole generation of the Judges of the Supreme Court of India.

As noted earlier, the basic structure doctrine was the judicial solution for the predicament of curtailing the power of the Parliament to ensure that

²² Walekar Dasharath, *Changing Equation Between Indian Parliament & Judiciary*, 71(1) INDIAN J. POL. SCI. 163-167 (2010).

²³ SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE*, 112 (Oxford University Press, 1st ed., 2010).

²⁴ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

²⁵ *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299.

²⁶ *Minerva Mills Ltd. and Others v. Union of India*, (1986) 4 SCC 222.

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

the Constitution is not turned over its head and certain values that are fundamental to human governance like democratic government, parliamentary structure, federalism, right of life and liberty, fundamental freedoms and right of equality remain intact irrespective of the Parliamentary majority or popular demands.

The Constitution of India is a reflection and culmination of the values espoused during the freedom struggle.²⁷ One weakness of the Constituent Assembly that has to be acknowledged is the fact that the members of the constituent assembly were partially, indirectly elected by the members of the provincial legislative assemblies who were themselves elected on a very limited and exclusive franchise and rest were partially nominated by despotic princes of the princely states whose interests were essentially feudal in nature.

The opinions of the members of the Constituent Assembly, on a large arena of Constitutional concern, were reflected in the Constituent Assembly debates, which are nothing short of legal poetry. A few have even argued that to keep the Constitution supreme in the country, India made the biggest written Constitution in the world.²⁸

Though the Constituent Assembly, never entertained the idea of an unalterable basic structure that renders certain parts of the ensuing Constitution beyond the pale of Parliamentary amendment. Such an issue was surprisingly never the cynosure of any debate. The Union Constitution Committee was rather preoccupied with internal squabbles over the fine details of the process of Constitutional amendment²⁹ for instance, should the amendment process be allowed via simple majority or two-thirds majority and should the states have any involvement in the

²⁷ India lost great freedom fighters and leaders like Abdul Gaffar Khan, Dr. Khan Sahib, Mian Iftkaruddin, among others due to partition hence they were not the member of constituent assembly of India and M.K. Gandhi was not a member of the constituent assembly.

²⁸ Fali S. Nariman, *Constitution under Threat*, THE TRIBUNE, Aug. 15, 2007.

²⁹ Ivan, *Basic Structure Doctrine Was Never Basal to the Constituent Assembly*, SCC ONLINE (May 6, 2020), <https://www.sconline.com/blog/post/2020/05/06/basic-structure-doctrine-was-never-basal-to-the-constituent-assembly/>.

procedure to amend the Constitution? Hence it is accurate to state that in India the doctrine of basic structure is the child of judicial interpretation or that it emerged out of the judicial mind. No article in the Indian Constitution substantively limits the amending power of the Parliament, though procedural limitations like the requirement of a two-thirds majority and in certain cases, consent of half of the states exists under Article 368.

Nonetheless, after the formulation of the Constitution, it was soon realised that the end of creating a modern Constitutionally governed nation based on values of rule of law and human dignity came at odds with the socialist socio-economic programs in general and land reforms in particular.³⁰ The *Zamindars* as a Marxian class, whose interests were protected by the fundamental rights, had largely remained loyal supporters to the British regime and they were the principal mode of exploitation of the laity.³¹ As for *zamindars*, their status and power was guaranteed and perpetuated by the erstwhile colonial government.³²

Coming back to the judicial arena, the Bihar Land Reform Act 1950³³ was declared unconstitutional by the Patna High Court in the case of *Kameshvar Prasad v. State of Bihar*.³⁴ Different interpretations were made by some other High Courts.³⁵ High Courts, in line with the Supreme Court, derived their power to declare the law of Parliament as unconstitutional from Article 13 of the Constitution, which prevented the Parliament from drafting any law that abridged the rights conferred under Part III of the Constitution.

To bypass the challenge, the Parliament passed the first Constitutional Amendment Act, 1951 wherein Article 31A and Article 31B were introduced. Article 31B was the genesis of the Ninth Schedule of the

³⁰ *Id.* at 7.

³¹ CHITTA PANDA, *THE DECLINE OF THE BENGAL ZAMINDARS: MIDNAPORE, 1870-1920* 15 (Oxford University Press India, 1997).

³² *Id.* at 17.

³³ Bihar Land Reform Act, 1950, No. 30, Acts of Parliament, 1950 (India).

³⁴ *Kameshvar Prasad Singh v. State of Bihar*, AIR 1962 SC 1166.

³⁵ The Patna High Court held that the Act passed in Bihar was unconstitutional while the High Courts at Allahabad and Nagpur upheld the validity of the corresponding legislations in Uttar Pradesh and Madhya Pradesh respectively.

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

Constitution which was to be a reservoir schedule for the laws that were beyond the preview of being declared unconditional by the Courts using their power, of judicial review, under Article 13. The land reform acts of various state legislatures were inserted in the Ninth Schedule and the agrarian revolution envisaged was successfully achieved. However, the spectre of subverting the Constitutional Morality by adding laws in the Ninth Schedule remained.

The issue of land reforms went to the Supreme Court and in the *locus classicus*, of *Shankari Prasad Singh Deo v. Union of India*³⁶ the Court held that the power to amend the Constitution, including the fundamental rights, is conferred to the Parliament under Article 368, and the expression 'law' as mentioned under Article 13(2) does not include an amendment of the Constitution. Therefore, the Court made a distinction between Parliament's law-making power, that is, the legislative power³⁷ and Parliament's power to amend the Constitution i.e. Constituent power. In short, the Parliament was given absolute power to change the Constitution. The position of the Court implied that if the Parliament wanted to remove Article 21 or the whole of Part III, it was free and within its competency to do so. It is odd to think that the constitutional interpretation by the Supreme Court would have prohibited the Parliament from using its legislative power to alter Part III while it would have allowed the same Parliament to alter Part III using its constituent power. Nonetheless, the Courts had conceded that Parliament had the power to undertake a total revision of the Constitution.

This landmark judgment and its reasoning was followed in the case matter of *Sajjan Singh v. State of Rajasthan*³⁸. The Supreme Court concurred with the earlier position and reaffirmed the decision of *Shankari Prasad*. However, the first seed for the future development of the basic structure doctrine was sown in this judgment by the dissenting opinions of J. Hidayatullah and J. Mudholkar. These judges, for the first time, raised doubts on the unfettered, unbridled authority of the Parliament to amend

³⁶ *Shankari Prasad Singh Deo v. Union of India*, AIR 1951 SC 458.

³⁷ Provided under the Seventh Schedule as per List 1 and List 3 across various entries.

³⁸ *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845.

the Constitution. In particular, it was J. Mudholkar who first envisaged the idea of limited amending powers of the Parliament. J. Mudholkar observed that the Constitutional amendment should be excluded from the definition of law under Article 13 and he also gave an argument that every Constitution has certain basic principles which could not be changed.³⁹ Justice Hidayatullah observed;

*“Fundamental rights cannot be amended by Constitutional Amendment as they are basic necessity for humans and Parliamentary cannot play with them”*⁴⁰

He further observed:

“The Constitution gives so many assurances in Part-III that it would be difficult to think that they were the plaything of a special majority. To hold this would mean prima facie that the most solemn parts of our Constitution stand on the same footing as any other part and even on the less firm ground than one on which the articles mentioned in the proviso stand.”

Further, J Mudholkar concurred with the opinion of the Chief Justice Gajendragadkar and questioned:

“It is also a matter for consideration whether making a change in the basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of Article 368?”

The view of J. Hidayatullah seems to be closer to the *ratio decidendi* of the *Golaknath* judgment, which made fundamental rights sacrosanct, whereas the remarks of J Mudholkar i.e. “Every Constitution has some basic elements which cannot be amended”⁴¹ are close to the principle of basic structure and *ratio* of *Kesavananda Bharati* judgment. Still, the Court

³⁹ Prashant Saurabh & Ankita Rani, *Doctrine of Basic Structure and the Spirit of Indian Constitution: An Analysis*, 5 INT’L J.L. MGMT. & HUMAN. 644, 645 (2022).

⁴⁰ Deepika, *supra* note 6, at 730.

⁴¹ *Id.* at 731.

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

through its majority opinion again emphasized the absolute amending power of the Parliament. The vocal judicial minority seems to have appreciated the potential ramifications of allowing unhindered constituent power, a concern which is the central theme of the paper.

The issue of amending power of the Parliament was again made subject to judicial scrutiny by the Supreme Court during the era of Chief Justice Subba Rao in the watershed *I.C. Golaknath* case.⁴² Unlike the five-judge bench in the cases of *Sajjan Singh* and *Shankari Prasad*, Chief Justice Subba Rao constituted a bench of eleven judges, wherein by a majority of six to five the Supreme Court held that the fundamental rights were sacrosanct and thereby outside the purview of the amending/constituent power of the Constitution. In the case, the judge did consider the doubts expressed by J. Hidaytullah and J. Mudholkar.⁴³

The Court made certain intriguing observations. *First*, Article 368 was not a source of power in itself but merely provided a procedure. The Court opined that the power of amendment was not rooted in Article 368, where it was commonly believed to reside. *Second*, the Court held that the power to amend was derived from Article 248 read with Entry 97 of the Seventh Schedule. The said entry contains the residuary power of the Parliament to make law, and it must be remembered that the expression law is expressly part of Article 13. This new, *sui generis*, view was taken to ensure that any amendment made by the Parliament comes under the scope of Article 13 and thereby fundamental rights remain forever preserved. Further, the Court applied the Doctrine of Prospective Overruling⁴⁴ wherein the amendments prior to the judgment were saved. This again reflects the aim of the Court which was to simultaneously preserve the land reforms but also to deny the Parliament the power to conduct any such drastic reforms of Part-III. The Court in a sense dissolved the earlier distinction between the legislative and the constituent power as Article 248 deals with the 'Residuary power of legislation'. Thereby an amendment was interpreted as an action under

⁴² *I. C. Golaknath v. State of Punjab*, AIR 1967 SC 1643.

⁴³ Deepika, *supra* note 6, at 733.

⁴⁴ Saurabh & Rani, *supra* note 39, at 645.

the residuary legislative power. However, the security provided was not as large as accorded by the doctrine of basic structure and this interpretation would not have allowed for the removal of the right to property from Article 19 an aspect which the doctrine of basic structure allowed.

The complex position, taken by the court, showed the immense desire of the Judges to preserve the vigour and vitality of the fundamental right from the excess that could potentially be committed by the Parliament. In essence by catapulting the fundamental rights to the status of a sacrosanct entity future organic growth of Part III of the Constitution was effectively barred. The Parliament's constituent powers with regards to Part III were left sterile and the only possibility of alteration was by virtue of novel interpretations offered by the Courts. Therefore, the Court had effectively established a permanent monopoly over any further progress of Part III of the Constitution. Most importantly the view that Parliament had absolute amending power was set aside. Therefore, the new judicial interpretation allowed for the Parliament to amend the whole of the Constitution except Part III. Vital aspects of the Constitution like universal adult franchise, separation of powers, and federal structure were still subject to absolute revision by the parliament.

The position on the contentious issue again changed and the doctrine of the basic structure of the Constitution was propounded by the Supreme Court in the case of *Kesavananda Bharati v. State of Kerala and another*⁴⁵ wherein thirteen judges bench sat for over sixty days and produced a cluster of opinion running into more than thousand pages.⁴⁶

The influence of the research work of foreign authors is *ex facie* evident in the judgment, in particular, there is the immense influence of the work by German scholar, Dietrich Conrad.⁴⁷ Conrad believed that the amending power enjoyed by the Parliament was limited. Though this view was *ex facie* accepted by J. Khanna it was simultaneously rejected by Justice Chandrachud in his separate opinion. The cardinal argument made in favour of the implied limitations on Constitutional amendment was

⁴⁵ *Supra* note 8.

⁴⁶ Deepika, *supra* note 6, at 735.

⁴⁷ A.G. Noorani, *Behind the 'basic structure' doctrine*, FRONTLINE (Apr. 28, 2001).

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

the word “amendment” itself. The contention was that the connotation of expression amendment in Article 368 of the Indian Constitution did not include the right to repeal, create or destroy the Constitution.

One could draw an analogy between the powers that the Parliament enjoyed under Article 368 as was originally bestowed by the constituent assembly and the powers bestowed on the demon Bhasmasur by Lord Shiva. The first act of demon *Bhasmasur*, after attaining the boon⁴⁸ from Lord Shiva was to attempt to lay his hands on Lord Shiva himself. The issue in both cases is can any institution which drives its power from a source, use its power, in such a manner as, to destroy the source itself.

This was refuted in particular by Chief Justice Sikri, who wrote:

“If this is so [unlimited amending power], a political party with a two-third majority [as required by Article 368] in Parliament for a few years could so amend the Constitution as to debar any other party from functioning, establish totalitarianism and enslave the people.”

The concerns of the authors are almost identical to those of Justice Sikri, the difference is that the Hon’ble Judge was primarily concerned about the threat to this Constitution from the Parliament, whereas the authors not only share his concern but are also worried about the threat from subsequent constituent assemblies to the future Constitutions. Basic structure can protect this constitution but cannot extend its limitations upon a future constituent assembly.

The basic structure doctrine, in effect but by a different jurisprudential means, achieved the same end that Chief Justice Subba Rao intended to achieve, i.e., the protection of vital parts of the Constitution from the destructive whims of a majoritarian Parliament. Though, the end of both the judgments was the same the *modus operandi* used was distinct. *Golaknath* protected only Part III of the Constitution whereas

⁴⁸ The boon gave the demon the power to convert anything into ash upon which he laid his hands.

Kesavananda's judgment protects the undefined basic structure which also covers large parts of Part III. The *Golaknath* judgment was premised on the expressed protection offered by Article 13 whereas *Kesavananda* saw the genesis of a new judicial innovation. Further, unlike *IC Golaknath's* judgment in *Kesavananda*, the majority did not consider Constitutional amendments as part of the expression law. This in effect set aside the complex view of the *Golaknath* judgment wherein Constitutional amendment acts were seen as law by virtue of Article 248 read with Entry 97 of the Seventh Schedule. It would not be inappropriate to state that in *Kesavananda* judgment *in toto* reverted to the old position of *Shankri Prasad* but with the caveat of the basic structure doctrine. Hence, the distinction between the constituent powers and the legislative powers was revived but the constituent power was made a perpetual slave to the basic structure doctrine.

The spirit of the basic structure doctrine could be very succinctly and aptly put forth by the theme song of the majority decision in *Kesavananda Bharati*:

*“Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But the Constitution is a precious heritage; therefore, you cannot destroy its identity”*⁴⁹

The doctrine of basic structure was only accepted by a very narrow majority of seven to six.⁵⁰ Though a thin majority was achieved these judges in the majority provided no unified reason as the Judges took very distinct positions. One could say the opinion of the majority was an amalgamation of several distinct and at times dissimilar reasoning. For illustration one of the majority judges in *Kesavananda Bharati*, Justice Palekar asserted that the Parliament has an indefinite power to amend.⁵¹ Nevertheless the majority, in brevity, reasoned that Article 368 of the Indian Constitution did not enable Parliament to alter the basic structure of the Constitution.

⁴⁹ KERSHAW, *supra* note 16.

⁵⁰ The narrow majority of seven judges were (namely, JJ. Sikri C. J. Hegde and Mukherjea; JJ. Shelat and Grover; J. Jaganmohan Reddy; and J. Khanna).

⁵¹ Iyer, *supra* note 8.

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

As for the minority⁵² J. Ray observed that “there is no limitation on the amending power of the Parliament”.⁵³ Further, J. Beg, quoted ancient Hindu scriptures to highlight the necessity of change and warned against provisions that lead to an obsolete, rigid and ancient Constitution.⁵⁴ The views of the minority judges would have only encouraged and precipitated constitutional rewriting. The Parliament would have quickly acted upon the judgment in an alternate scenario, wherein the minority view was accepted by the majority, to forever prevent any attempt at judicial examination and curtailment of the Parliament's constituent power.

Despite the vocal opposition the doctrine of basic structure was reaffirmed in the case of *Minerva Mill*. Eventually, by the *I.R. Coelho* judgment, the original confrontation between Parliament and the judiciary regarding the ninth schedule was brought under judicial review.⁵⁵ With the pleasure of hindsight, it might be said that the tension between the Indian Parliament and the judiciary was natural and to some extent desirable.⁵⁶ Today, it can be stated, with absolute certainty, that the Supreme Court is supreme in deciding whether the laws enacted and the amendments made by Parliament are within the ambit of the Constitution.⁵⁷ Further, the position that the amending power, under

⁵² The six judges in the minority were JJ. A.N. Ray, Chandrachud, Beg, Mathew, Dwivedi, & Palekar.

⁵³ Deepika, *supra* note 6, at 736.

⁵⁴ Iyer, *supra* note 8, at 908-909; Per J. Beg citing ancient Indian text The translation of which follows “the fundamental laws of kali age are different from all previous ages; the laws of kali age are different from all previous ages” conform to the distinctive character of that age (yuga roopa nusaara tah).

⁵⁵ H. K. Dua, *9th Schedule Route Plugged*, THE TRIBUNE, (Jan. 15 2010), <https://www.tribuneindia.com/2007/20070115/edit.htm>.

⁵⁶ K.G. Balkrishnan : *Basic Structure Doctrine : An Overview*, 50 J. IND. L. INSTI. 461, 463 (2008).

⁵⁷ S. L. SIKRI, *INDIAN GOVERNMENT AND POLITICS* (Kalyani Publisher Ludhiana, 2012) 206.

Article 368, is subject to implied and inherent limitations is widely accepted.⁵⁸

PHILOSOPHICAL EDIFICE OF THE BASIC STRUCTURE DOCTRINE TOWARDS PERMANENT STRUCTURE

France and Germany unlike England saw many revolutions and violent alterations of power structure. The process of Constitutional development in these countries was not as smooth and organic as in England. Therefore, these underlying circumstances may give one idea of why such views developed in the judicial soil of these nations.

Carl Schmitt was a prominent jurist from Germany who specialized in Constitutional Law; his contributions will be analyzed in this section. On the other side of the river, Rhine was an equally brilliant French jurist by the name of Maurice Hauriou. It was Hauriou who did extensive work in the area of constitutional law and developed the idea of implied constitutional limits on constitutional amendments. He was of the view that there were certain facets which were entrenched in the spirit of every Constitution. The literature developed by both these jurists justifies the limitation on the power of the Parliament to amend the Constitution, yet the approaches and the reasons provided for the curtailment of power were distinct and independent.

Schmitt's views, as to certain entrenched aspects of the Constitution, were based on mystical concepts and the belief in the limited ability of the legislature to exercise constituent power.⁵⁹ On the other hand, Hauriou opined that constituent power was only enjoyed by the constituent assembly. Further, Hauriou was also an ardent believer in the concept that certain essential values were within the ambit of natural law and therefore beyond the amending power. One may even feel that Hauriou was following the old tradition of French legal philosophers like Abbé Emmanuel and Joseph Sieyès.

A. CARL SCHMITT'S VIEW: ULTIMACY OF CONSTITUENT POWER

⁵⁸ MAHENDRA PAL SINGH, V. N. SHUKLA'S CONSTITUTION OF INDIA 1088 (Eastern Book Company, 1st ed, 2017).

⁵⁹ J. Colon Rios, *Five Conceptions of Constituent Power* 130 MCGILL L.J. 306, 329 (2014).

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

The German jurist Carl Schmitt was undoubtedly the most renowned theorist on implied Constitutional amendment.⁶⁰ He formulated his theory on the subject of Constitutional law in his *magnum opus*, *Verfassungslehre*. This text was first published in the year 1928 when the Weimar Republic was witnessing significant troubles in establishing a firm political order. The views of Carl Schmitt were formulated within the expanses and framework of the German Constitution of 1919.⁶¹ This Constitution was established after the end of the Great War. The most intriguing aspect of the Weimar Constitution was the fact that it did not contain any material limitations on the power of Constitutional amendment, whatsoever.⁶² In this regard, Article 76 of the Constitution was of great importance as it contained the procedural limits regarding the amendments.

The Constitution can be amended by legislation. However, a decision of the Reichstag regarding the amendment of the Constitution only takes effect when two-thirds of those present consent.

The views of Schmitt were formulated upon the belief that the constituent power, and nothing else, was the basis for all powers. Schmitt went on to further argue that the constituent power was in itself a legal entity beyond the preview of the Constitution and existed concurrently with a Constitution.⁶³ This belief in the constituent power that exists outside and alongside the Constitution was the most important aspect of his ideas.

The theory, forwarded by him, believed that the will of this almighty constituent power solely was the edifice for both the continued existence and the legitimacy of any Constitution. Yet, the author did not venture as

⁶⁰ Lars Vinx, Carl Schmitt, in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., Fall 2019 Edition), <https://plato.stanford.edu/archives/fall2019/entries/schmitt/>.

⁶¹ Charles Calvert Bayley et al., Germany, ENCYCLOPEDIA BRITANNICA, (Jan. 7, 2025), <https://www.britannica.com/place/Germany>.

⁶² CARL SCHMITT, CONSTITUTIONAL THEORY 26 (Jeffrey Seitzer, Duke University Press, 1st ed., 2008).

⁶³ Monika Polzin, *The basic-structure doctrine and its German and French origins: a tale of migration, integration, invention and forgetting*, 5 INDIAN L. REV. 45, 53 (2021).

far as to pinpoint the nature of this constituent power but did indicate that it could either be the monarchy or the people. This constituent power had the sole authority and prerogative to decide on the manner, nature and structure of the Constitution.

Further, Schmitt went on to distinguish between two components of a constitution, these were firstly, the indispensable norms of a Constitutional document and secondly the other provisions.⁶⁴ The indispensable norms shaped the essential part of the Constitution, and on the other hand, were the other provisions which, no doubt were important, did not carry the status of a Constitutional norm.

This distinction highlights the fact that the whole of the Constitution in itself is not part of the basic structure rather only certain essential aspects like federal structure, separation of power, rule of law, Parliamentary form of government etc. are its part as pointed out by Chief Justice Sikri in the *Kesavananda Bharati* judgment.

In light of the aforementioned, it is safe to assume that the amending power provision in any Constitution does not empower the legislative body to alter those norms that, in the material sense, make the essence of the Constitution. These fundamental facets of the Constitution which contain the very essence of the document could only be amended by the constituent power. Such an action was beyond the capacity and preview of the legislative body; rather such acts could only be performed by the constituent power, whatever its nature may be. Schmitt further argued that about the Weimar Constitution, this constituent power was the people. Hence, as per his theory, the Constitutional laws were undoubtedly subject to change by the supreme legislative body, but upon the prerequisite that the fundamental nature and essence of the Constitution as a whole are not denuded of vigour and vitality. This aim could only be achieved by the constituent power that existed concurrently but separately from the legislative power.

Schmitt also adopted a position wherein he expressly refrained from any precise and exhaustive list of the components of the Weimar Constitution that were beyond amendment. Though Schmitt gave a

⁶⁴ *Id.* at 56.

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

theory with an overarching superstructure he remained elusively silent on the issue of how the people, i.e. by what procedure people can act as the constituent power.⁶⁵ One may note that Article 1 of the Weimar constitution noted that political authority emanates from the people.⁶⁶

Schmitt's ideas could be seen as a product of the ideas developed by isolating the concepts propounded by Emmanuel Joseph Sieyès⁶⁷ during the French Revolution. Sieyès, like many of his contemporaries, was deeply rooted in the belief in natural law school. The idea of a politico-legal entity that existed outside i.e. over and above the Constitution was, therefore it seems, taken from natural philosophy.

Schmitt further, gave the idea of a 'mythical will of the people' such that was beyond the control of the Parliament. One of the negative aspects that can be noted with Schmitt is his strong opposition to any form of judicial oversight.⁶⁸ For him, the onus of acting as the guardian of the Weimar Constitution was with the executive branch, i.e. the President of the Reich. The inevitable and the seriously negative fallouts, of his views, were evident within a decade of Schmitt publishing his text.

Despite the challenges and limitations, the theory propounded by Schmitt is still significant, at least, in continental legal thought in general and German Constitutional thought in particular. Furthermore, the noted positivist jurist Hans J. Kelsen opined that a facet of the Constitution was beyond the amending power if an express provision to that effect was present.⁶⁹ The said article must have the consequence of declaring that either the whole of the Constitution or certain of its parts are unchanging. Such a provision is present under the current German Constitution. It is pertinent to mention that the much debated eternity

⁶⁵ *Id.* at 58.

⁶⁶ Weimar Constitution of 1919, art. 1.

⁶⁷ He was a clergyman who was the chief theorist of the French Revolution, his pamphlet 'What is the Third Estate?' became the political manifesto of the revolution.

⁶⁸ Polzin, *supra* note 63, at 53.

⁶⁹ *Id.* at 55.

clause⁷⁰ German Basic Law *ex facie* contains Constitutional limits on any amendment. This provision in the present German Constitution is the living evidence of the huge impact that the then literary contributions and theoretical works had on the Constitution makers.

Schmitt's work also introduced the idea of constitutional identity. As per the distinction propounded by Schmitt, there is a difference between constituent power and the constituted power. Such a distinction is also evident under the current German Basic Law. Within the paradigm of his theory, it is not inappropriate to state that only the constituted powers are bound by Article 79. On the other hand, the constituent power within Germany i.e. 'the people', unlike the parliament which represents the constituted power, has a continued right across generations and epochs to amend the facets of the eternity clause. In other words, the eternity clause recognises that certain legal principles are beyond the capacity of the constituted power i.e. the parliament to alter. The aspects of the eternity clause for instance are the rights provided from Article 1 to Article 20 of the German Constitution and the federal structure, among others. However, these rights and principles may be altered in future by the people who represent the constituent power.

This view of the said arrangement is reaffirmed by the landmark Lisbon judgment.⁷¹ In the said judgment the German Constitutional Court found a direct relation between the ideas of Constitutional identity as contained under Article 79, and the different sources of Constitutional change i.e. the constituent power and the constituted powers. Whereas one is limited the other is unlimited. The German Constitutional Court held:

“From the perspective of the principle of democracy, the violation of the Constitutional identity codified in Article 79.3 of the Basic Law is an encroachment upon the constituent power of the people. In this respect, the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the Constitution. No Constitutional body has been granted the power to amend the Constitutional principles which are essential pursuant to

⁷⁰ Article 79(3), Basic Law of the Federal Republic of Germany, 1949 (Germany).

⁷¹ BVerfGE 123, 267 – Lisbon Decision (Lissabon-Urteil).

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

Article 79.3 of the Basic Law. The Federal Constitutional Court monitors this.”

B. MAURICE HAURIUO AND THE CONCEPT OF CONSTITUTIONAL LEGITIMACY

The French jurist Maurice Hauriou was, if not the most significant, one of the leading Constitutional experts in the French legal fraternity of the twentieth century. He was an academician and worked as a professor of constitutional law, jurisprudence and administrative law at the esteemed University of Toulouse.⁷² Significantly, his views were being independently developed contemporaneously to Schmitt in Germany. The major point of departure from Schmitt’s view was that Hauriou made a patent rejection of the mystical ideas, and focused on the structure and rule of law as the basis for Constitutional amendment. He wanted to preserve the democratic ideas in his nation and emphasized the limited amending power of the Constitution, with the legislature.

The advantage of his work over his German contemporary was the fact that his work was more grounded and unlike the German jurist his emphasis on the mystical element was bare minimum. Hauriou opined that amendment should be introduced by a method that should be distinguished from simple legislative power. His analysis of the distinction between the ordinary legislative powers from the amending power was more nuanced as the jurist also proposed a distinction between minor and total revision of a Constitution. Hauriou laid great emphasis upon the fact that the labour for the enactment of a new Constitution can only be undertaken by a body which was specifically elected for that end.⁷³ Hence, the idea of total rejection or alteration of the Constitution in his view was beyond the power of even the supreme legislative body.

Hauriou was of the opinion that there exist certain vital values and features that are so cardinal that they supersede the legitimacy of the

⁷² Polzin, *supra* note 63, at 57.

⁷³ *Id.* at 58.

written Constitution itself. Hauriou, further, went as far as to say that the fact of the presence of principles was not essential for them to be respected e.g. the fundamental rights and the republican principle.⁷⁴ Such an attempt to delineate the basic structure of the Constitution was also attempted by the judges in the case of *Keshvananda Bharati* and the subsequent cases related to basic structure doctrine but almost all judges gave their distinct opinions as to the essential aspects of the Constitution.

Hauriou's views were also consonant with the current Indian practice with regard to the power of the judge to exercise judicial oversight upon the Constitutional amendments. Hauriou, unlike Schmitt, argued in favour of judicial oversight and directly supported the prerogative of the Constitutional courts to declare Parliamentary amendments, if need be, unconstitutional.

To put it succinctly Hauriou accepted the view that Parliament only enjoys limited amending power and the power to venture to under a complete revision was only enjoyed by a constituent assembly. The most interesting and tempting aspect of his views is the faith that he accorded in certain higher principles which are superior to the powers of a constituent assembly to alter e.g. democracy and republican form of government. In the end, it should also be pointed out that the French jurist belonging to the sociological school Duguit was in a certain sense closer to Hauriou. This fact can be established by the views taken by him. He believed, like Hauriou, that certain features are beyond even the constituent power to alter. For instance, he saw the French Declaration of Human Rights of 1789 as over and above any Constituent Assembly.

C. DIETRICH CONRAD'S WORK

Now we shift our focus on Conrad's literature which, unlike the other aforementioned jurist, had an immediate impact on the Indian Constitutional jurisprudence.⁷⁵ Nevertheless, his works reflect the great influence and impact of ideas that were earlier propounded by the aforementioned authors. Conrad's views focused on the implied limits on

⁷⁴ *Id.* at 58.

⁷⁵ SCHMITT, *supra* note 62 at 16.

MOVING FROM THE BASIC STRUCTURE TOWARDS A
PERMANENT STRUCTURE: FROM POSITIVE LAW TO
NATURAL LAW

the amending power of the Parliament of India.⁷⁶ He opined that certain articles were entrenched within the essence of the Indian Constitution. Conrad gave a much-celebrated lecture on “Implied Limitations of the Amending Power” in 1965 at the Law Faculty of Law of the Banaras Hindu University.⁷⁷ During this lecture, he propounded his views on the limited amending power of the Indian Parliament. He saw the power contained under Article 368 not as absolute, unfettered and overarching rather subject to the idea of inbuilt limitations.⁷⁸ His ideas were in opposition to the judgment of *Shankari Prasad* and *Sajjan Singh*.

After the landmark case of *I.C. Golaknath*, Conrad wrote a famous paper wherein he referred to the German Weimar Constitution, its Article 76 which contained a formal limit on the Constitutional amendment, and he also focused on Schmitt’s works.

He fought for the position of a limited amending power due to the ever-present danger of a legal revolution or a legal coup. In the same breath, Conrad also emphasized that the doctrine of implied limitations should be done only as the last resort when every other means fails to prevent a Constitutional revision. This doctrine should be used to prevent the amendment whose unconstitutional nature is apparent on the face i.e., *ex facie*.

Therefore, to summarise his views, it can be safely construed that the power of Parliament to make Constitutional amendments is subservient to certain entrenched provisions. It is needless to state that amendment cannot go so far as to conduct a total revision of the Constitution. The identity of the Constitution must be preserved.

The views of Carl Schmitt are inherently susceptible to abuse as by stressing on the mythical will of the people and viewing people, without

⁷⁶ Satya Prateek, *Today’s Promise, Tomorrow’s Constitution: Basic Structure, Constitutional Transformations and the Future of Political Progress in India* 1 NUJS L. REV. 34 (2016). 417, 444 (2008).

⁷⁷ *Id.* at 445.

⁷⁸ *Id.* at 446.

subject to any limitation, as the source of the constituent power he has opened the door for a demagogue to ride on the momentary passion of the masses to undermine the Constitution or deny certain inalienable rights like human rights, due process. One cannot dispute the fact that under modern conceptions of popular sovereignty, the people are the source of the constituent power but that power must be subject to certain higher norms and values. After all, almost all of the modern revolutions Islamic, Marxist, fascist, conservative were undertaken in the name of the people, recent examples include Bangladesh and Syria. However, the distinction made by Carl Schmitt as to the indispensable norm of the Constitution and other dispensable provisions is an important contribution and harmonious with the idea of the basic structure. Further, the idea that constituent power exists concurrently and is separate from the Constitution also seems acceptable as people being the source of constituent power never perpetually delegated this power to anyone and this constituent power can be called upon at any moment to formulate a new constitution.

As for Maurice Hauriou, his ideas are much more significant in many ways. Firstly, he divides constituent power into minor and major aspects. In this regard, the minor power may be legitimately exercised by the parliament but major constituent power can only be exercised by a body specifically elected for that end. Secondly, Hauriou also emphasized that certain principles ought to be read into a constitution even if they are not explicitly provided. The idea in simple terms means that certain features are so cardinal that they supersede the legitimacy of the written constitution itself. This reflects the very idea that this paper attempts to convey that certain values have to exist over and above the constitution and the constituent power.

Hence after scrutinizing the views of the aforementioned authors, a mechanism may be forwarded wherein, like ideas of Maurice Hauriou, certain values and principles are supreme and at the highest echelons of the hierarchy. These values ought to be considered part of the constitution even if they have not been explicitly provided. For example Indian Constitution under Article 21 only provided 'procedure established by law' but the Courts read the article as 'due process of law'. In the same light, certain rights ought to be read within a future

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

constitution even if they are not explicitly provided. Beneath these supreme rights, and principles there exists the constituent power with people as its source. This constituent power can only be exercised by the constituent assembly specifically elected for that purpose. Even after the creation of the constitution, the constituent power would continue to exist alongside the newly created constitution like the idea that Schmitt had forwarded. The constituent assembly would then create the constitution within which there would be certain entrenched indispensable provisions and certain other dispensable provisions. This idea will allow for the basic structure doctrine to exist while a particular constitution is in force. Lastly, as Schmitt suggested, there would exist the minor constituent power that may be exercised by parliament subject to judicial oversight.

To illustrate the position let us assume the idea that ‘a kitchen is a room devoted to preparation of food’ as the fundamental principle or value. Below this overriding value is the constituent power exercised by the people which exists concurrently with the constitution as Schmitt pointed out, represented by the will of the owner of the house. Then the Constitution would be the particular kitchen of that house and lastly, the maid representing the Parliament. The maid as Parliament is someone who works within the kitchen and is bound by its physical structure. This kitchen/constitution may be slightly altered by the housemaid/parliament by exercising her right of minor constituent powers of the parliament. The maid as the Parliament could alter i.e. amendment and change the kitchen only till the point that it remains a kitchen it should in no case become a living room or a library. The kitchen may only be significantly altered by the owner of the house exercising his constituent power yet the principle that the kitchen is a place to prepare food cannot be altered even by the owner as the concept is over and above him. With the change in social circumstance and coming of distinct milieu, new refurbishment may be conducted in the structure of the kitchen, tiles may be changed, the paint replaced, new utensils may be introduced but the essence of the kitchen as a room dedicated to the preparation of food cannot be altered.

AN OVERVIEW OF THE JOURNEY TOWARDS NATURAL LAW

As per the school of Natural Law the principles of law are based on certain basic ideas and concepts, the source of which is not in any worldly authority.⁷⁹ The more rational strands of this school focus, *inter alia*, on rationality and morality as the basis of this authority.⁸⁰ By and large; there is the belief that they are a product of reason.⁸¹ Further, it is not a man-made law like Positivism. It is merely discovered by him. It is an ideal law since it consists of the highest principles of morality towards which humanity is striving.⁸² Grotius himself stated as a hypothesis that natural law is so immutable that “*even God . . . cannot cause that two times two should not make four*”⁸³ The traditional view of natural law is that it is a body of immutable rules superior to positive law.⁸⁴

As per Dias and Hughes, “*Natural law is a law which derives its validity from its inherent values, differentiated from the law promulgated by the State or its agencies*”. Principles are believed to be unalterable, eternal and beyond the capacity of humans to alter. The school was famous in the ancient era. Aristotle defined natural law as reason unaffected by desires. Cicero remarked that “*true law or natural law is the right reason in agreement with nature*”. Jurist like John Rawls, Stammler, Hall, Morris, among others, have future developed the doctrines⁸⁵ to bring this school in harmony with the modern mind.⁸⁶ Natural law could offer help with two contemporary problems namely, the abuse of power and the abuse of liberty.⁸⁷

⁷⁹ B. N. MANI TRIPATHI, JURISPRUDENCE THE LEGAL THEORY 97 (Allahabad Law Agency, 2021).

⁸⁰ Nathan Isaacs, *The Schools of Jurisprudence. Their Places in History and Their Present Alignment* 31(3) HARV. L. REV. 373, 386 (1918).

⁸¹ *Id.* at 389.

⁸² A. G. Chloros, *What is Natural Law?*, 21(6) MOD. L. REV. 609, 609 (1958).

⁸³ *Id.* at 609.

⁸⁴ *Id.* at 609.

⁸⁵ N. KRISHNA KUMAR, JURISPRUDENCE AND COMPARATIVE LAW 17 (Central Law Publications, 1st ed., 2019).

⁸⁶ RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 54 (London and New York: Cambridge University Press, 2nd ed., 1979).

⁸⁷ DIAS, JURISPRUDENCE, 470 (LexisNexis, 1st ed., 2014).

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

One of the major criticisms of the now hegemonic positive law is the fact that most positivity excluded natural law and morality from the ambit of the law. Positivism was a reaction against Natural Law. Legal positivism makes the law barren and soulless. We need a permanent structure based on natural law. As Aristotle said, “*natural law emanated from human consciousness and not from the human mind*”. As noted in the prior sections, certain rights ought to supersede even the constituent power and as Maurice Haurio contented, these rights and values ought to flow even if the future constitution is silent on them. The larger issue remains what would be the source of these “highest rights”. They cannot flow from the mystical will of the people or even the constituent power as these would be subject to alteration. Hence, the solution seems to be that these rights should flow from natural law philosophy. The highest rights should be viewed as the reflection of innate human morality and consciousness. In the end, one must remember that there is renewed interest in natural law, but scepticism is too widespread to permit its general acceptance.⁸⁸

POSITIVE LAW AND THE THREAT OF MOMENTARY HUMAN (POLITICAL) PASSION

It can be safely stated that the development of political and legal institutions in any society depends on the established view about the innate human nature. In other terms, what is the conception, which is in vogue, in a society as to human character in the state of nature? Are humans seen as inherently evil or good? The social gaze on this issue formulates the base upon which the superstructure of the society is chiselled. The tone of the paper may wrongly induce one to believe that authors ascribe to the Hobbesian view about human nature.

English philosopher Thomas Hobbes had a conception wherein all humans, if left to themselves without a social contract, i.e., in the state of nature, were seen as evil, nasty and brutish. Hobbes accordingly believed that the state of nature was one of perpetual war of all against all. To his defence it must be remembered that Thomas Hobbes was writing during

⁸⁸ Robert A. Pascal, *Natural Law and Respect for Law*, 15(3) AM. J. COMP. L. 500, 505 (1966).

the course of the brutal English Civil War wherein, the parliamentarian led by Oliver Cromwell established a Commonwealth after defeating the Royalist forces. The authors surely do not ascribe to this view but, in the same breath, it is pressed, unlike Rousseau, that one should not too readily conceive of a state of nature wherein humans act as noble savages.

The greatest threat, it seems, is the susceptibility of the masses to believe in irrational things and violent myths created by Weberian charismatic leaders or demagogic politicians. Thereby it is contended that masses, though morally good, have a latent and ubiquitous potential of being used as instruments to commit inhumane actions. Noam Chomsky, a noted social scientist, also coined the term ‘manufactured consent’.⁸⁹ Further, one should not forget that post-truth is the contemporary buzzword.⁹⁰ What guarantee is there, save for the basic structure doctrine, that manufactured electoral dictatorships created by a misinformed economy won’t formulate a dystopian future? More often than not, humans do realise their mistake but that is after acting for long as the means of evil, as was the case with the German masses in Nazi Germany, Italians during the Fascist regime, Russians during the era of Joseph Stalin and Chinese during the epoch of Mao Zedong, etc.

So, the contention is that humans are innately good but could commit errors at times. The issue is that of legally, permanently, and effectively protecting values like human rights, due process, rule of law, golden triangle from any harmful exigencies of the uncertain future. Herein, natural law philosophy seems to provide an answer. At the onset, it must be made clear that the legal principles being moulded in the iron frame of natural law philosophy must only be the most innate and cardinal principle that is *sine qua non* for the assurance of human life, liberty and dignity. They may include, *inter alia*, the right to life, due process of law and equality before law.

⁸⁹ See in general EDWARD S. HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA (New York: Pantheon Books, 1st ed., 1988).

⁹⁰ See in general KALPOKAS, A POLITICAL THEORY OF POST-TRUTH (Palgrave Macmillan, 1st ed., 2018).

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

It must also be noted that the forced introduction of any secondary, transient or *ex facie* political aspects, into an unchanging mould of natural law, e.g. a socialist society, Islamic republic, monarchy etc will most certainly lead us to a Constitutional quagmire and it will do more evil than good.

The idea is to have a small core of unchanging principles based on natural law surrounded by the huge covering and overlay of positive law that can deal with the diverse challenges and legal needs of the future society. It is needless to state that this vast ocean of positive laws would be within the Parliamentary, or the constituent assembly's competency to amend or create. Hence, in the framework forwarded in the paper only the highest rights would be sourced from natural law philosophy and all the lower sections of the hierarchy including the constituent power would be an exercise of the positive law.

The aforementioned view can even accommodate the formulation of a new basic structure for a new Constitution. India tomorrow can frame a Constitution that provides for a unitary government or mandates a presidential system but all such provisions of a new Constitution would be subject to the continued acceptance of the values provided under natural law. Therefore, basic structures and Constitutions which are derived from the constituent power may come and go but the permanent structure in the form of the highest rights derived from natural law philosophy will continue to endure.

The issue that might arise is whether we can bind the future constituent assembly. Let us again go back to German Basic Law. Article 146 of the German Constitution provides “[*Basic Law*] shall cease to apply on the day on which a Constitution freely adopted by the German people takes effect”. In effect, the eternity clause which is more or less the German basic structure could be bypassed by calling for a new constituent assembly but even this assembly shall be subject to the free will of the German people. Therefore, at least conceptually the present German basic law confines the power of a future constituent assembly by making it subservient to the free will of the people.

For Germans, at least, it seems we have hypothetically again reached square one. It seems that unlike the German jurist and philosopher Gustav Radbruch, German Constitutional makers have not learned the full lesson. The whole issue was what if the people tomorrow freely elect another Hitler to make a new Constitution and how to assure the presence of some innate principles even in the new Constitution. Nevertheless, one can say the German idea of the eternity clause read with Article 146 is superior to the Indian basic structure as it provides for an additional caveat, in the form of the provision, that the future Constitution must be freely adopted by the people. Therefore, there is an implicit acceptance that even today's basic law can bind tomorrow's constituent assembly. If the judiciary formulates the doctrine of highest rights in the form of a permanent structure, it can preempt and prevent the mistakes of any future constituent assembly and secure an enduring victory.

The idea being forwarded is that the current German Constitution binds that future constituent assembly as it provides that the future constitution ought to be freely adopted by the German people. Therefore, in a rudimentary sense, one may argue that principles of "*free adoption by German people of the future Constitution*" are part of the 'highest rights' a facet of a potential permanent structure.

If the doctrine is formulated and established today, then even two hundred years in the future, members of a new constituent assembly will not enjoy the prerogative to draft a new Constitution wherein the state could exercise its authority to arbitrarily take away life. The future Courts, *pro tanto*, will not allow any deviation and the new Constitution shall be in consonance and harmony with the most innate natural law principles. Therefore, the new constituent assembly may draft any document, and insert any provision but all exercise of constituent power will be subject to the permanent structure. The core values i.e. *creme de la creme* must be kept sacrosanct across the saga of time. This would be similar to the noble intent of J. Subba Rao in the *I.C. Golaknath* case wherein he lifted part three to a sacrosanct status.

CONCLUSION: TOWARDS A PERMANENT SOLUTION

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

It must be noted that the basic structure doctrine is essentially counter-majoritarian in nature, that is, even if a political party wins all the seats to the Lok Sabha till *ad infinitum*, it will remain sterile *vis-à-vis* effecting any change in the Constitution that is against the basic structure. Even if every Indian electorate votes for the removal of the right to equality from the Constitution the Supreme Court will not allow the same. The idea is that the Constitution is supreme and it may at times conflict with the concept of popular sovereignty.

The Indian Constitution was adopted, enacted and given to ourselves by the constituent assembly that was acting on behalf of “We, the people”⁹¹. One might be tempted to ask who these people were. This is a contentious matter. One might even suggest that these people are a work of constituent fiction. The challenge which this paper attempts to address is how to prevent the appropriation of the expression “We, the people” by some other bunch of people who might exploit the ephemeral passion of the people during times of crisis or revolutionary changes.

The present position is that the Constitution is a conscious creation of the founding fathers and the basic structure is a judicial innovation that is based on a document created by an exercise of positive law-making. We have the right to life because Article 21 of the Constitution says so and the article was consciously created, it was an exercise of positive law. What would happen if the new Constitution has no right to life, and no corresponding article for Art 21 of the present Constitution?

In the case of *ADM Jabalpur v. Shivkant Shukla*,⁹² the dissenting opinion of Justice Khanna seems to be based on natural law:

“Article 21 cannot be considered to be the sole repository of the right to life and personal liberty. The right not to be deprived of one’s life or liberty without the authority of law was not the creation of the Constitution. Such a right existed even before the Constitution came

⁹¹ Expression used at the initiation of preamble of Indian Constitution.

⁹² A.D.M. Jabalpur v. Shivkant Shukla AIR 1976 SC 1207. The judgment is also called the dark day of Indian Judiciary.

CALJ 9(1)

*into force. Even in the absence of Article 21, the state has got no power to deprive a person of his life or personal liberty without the authority of law*⁹³

It is again most firmly pressed that any legal protection that can be consciously created by positive law can also be consciously taken away by another exercise of positive law. Herein, lays the biggest weakness of the basic structure doctrine it stands on the Constitution which stands on positive law. One can take away the basic structure by removing the Constitution upon which it stands. Therefore, a permanent solution lies in the acceptance of the views of Maurice Haurio that certain aspects as part of unchanging natural law which will forever remain over and above the human consciousness or human power of creation. We must create a situation wherein you do not enjoy the right to life because the Constitution says so but because you are a human being and this eternal position can only be accommodated by the principles of natural law. If the idea of the highest rights within a permanent structure is accepted the right of life will have to be read into every hypothetical new Constitution by the Courts even if such a right is not expressly provided. Even if it is conceded that Parliament is the constituted power and we the people embody the constituent power both, along with a new constituent assembly must forever remain subject to the permanent structure containing the highest rights.

Schmitt's contribution is noteworthy in regard to his distinction between the constituent power and the constituted power. Expanding upon an aforementioned illustration if the former is Lord Shiva then the latter is Bhasmasur, but we also need a protector when Lord Shiva i.e. the constituent power itself starts destroying the innate values. It is widely accepted that the Parliament is provided only with limited constituent power. In this regard, the works of both Hauriou and Schmitt are important which saw a distinction between the articles of the Constitution wherein some are viewed as more basic parts of the Constitution and others are seen as ordinary provisions. We argue for a further division of the former wherein some parts will remain basic only to the extent of this Constitution and some will be read as the permanent

⁹³ It must be noted that the case was overruled recently in the case of Justice K. S. Puttaswamy (Retd.) & anr. v. Union Of India And Ors (2019) 1 SCC 1.

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

parts of any Constitution. Therefore, there are three forms of power: *first*, the mundane legislative power, *second*, the necessary constituent power to undertake revision subject to the basic structure and lastly the highest form of constituent power to undertake a major or complete revision of the Constitution including the authority to alter the basic structure. We would argue that both the first and second powers are firmly within the competency of the current Indian Parliament and the *third* one, the most fundamental, may be exercised only by a new constituent assembly specifically convened to undertake a revision as was argued by Hauriou. Though it has been proposed in this research paper that even the third power should be subject to a few rights and principles read in terms of natural law that would inevitably entail the formulation of a permanent structure.

Our view is that even the basic structure doctrine has elements that potentially may need change over time like, as aforementioned, a transition from federal to unitary structure or shift from the Parliamentary system to a presidential system. These changes which seem distant or unlikely today will quite certainly become necessary as our country will inevitably undergo metamorphosis over time. The next Constitution may have its own unique basic structure tailored to its own needs and the spirit of the age, *zeitgeist*⁹⁴ as J. Beg had, so many years ago, pointed out. Therefore, we cannot bind our future generation completely within the basic structure of today. Nevertheless, certain principles have to be carried forward.

What about the elements of the basic structure that are, in the sense of Hauriou, even more innate than the other aspects, for example, the golden triangle, due process, human rights surely a new constituent assembly cannot be allowed to review the same. It is argued that a new judicial innovation will better cater to our concerns, a new doctrine of permanent structure which should not be contingent upon the stability of ever-changing positive law.

⁹⁴ German expression used for defining spirit or mood of a particular period of history as shown by the ideas and beliefs of the time.

It must be remembered that Europe produced giants like Voltaire, Hegel, Kant, Schopenhauer, Rousseau, and Montesquieu. Nevertheless, even after centuries of exposure to their work and over one hundred and forty years after the great French Declaration of 1789, the ideas of scientific racism, colonialism, and fascism were popular across Europe. Hitler made his people believe that there was an evil alliance between the international capitalist Jewry and Marxist Bolshevism to destroy Germans.⁹⁵ One can only be baffled by the patent hollowness of the argument especially in light of the Cold War yet they were openly accepted by the well-read German masses. We must learn from history. The argument being forwarded is beautifully summed up by a quote from Friedrich Nietzsche:

*“In individuals, insanity is rare; but in groups, parties, nations and epochs, it is the rule”*⁹⁶

We need to ardently protect the principles of human rights, democracy, the constituent rights of the golden triangle, and due process of law for any future malady of madness. The protection of some fundamental values from the recurrent insanity is the very *raison d’être* for this paper. As these fundamental principles ensure that there exists a government of law and not men, it must also be pointed out that these principles historically have been the exception and not the rule. These cardinal principles rest at the very kernel of our republic and they need to be constantly guarded. What we need is a jurisprudential *sentinel on the qui vive*.⁹⁷ A legal concept, rooted in natural law school, consisting of the most fundamental principle that will bind all the future, *bona fide* or *mala fide*, attempts to make new Constitutions. It seems to be our best bet. To conclude one might consider the much-celebrated novel ‘Dune’ by Frank Herbert. The author has visualised technologically a much evolved society, ten thousand years in the future, based on the medieval principles of governance. The novels, *in toto*, caution the reader from putting their

⁹⁵ The Editors of Encyclopaedia Britannica, *Nazism*, ENCYCLOPAEDIA BRITANNICA (Jan. 7, 2025) <https://www.britannica.com/event/Nazism>.

⁹⁶ FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* (Dover Publications, 1st ed., 1998).

⁹⁷ The expression “Qui Vive” was first introduced into the Constitutional parlance by Justice Patanjali Sastri, in the famous case of VG Row in 1952.

MOVING FROM THE BASIC STRUCTURE TOWARDS A PERMANENT STRUCTURE: FROM POSITIVE LAW TO NATURAL LAW

faith, future and security in a messianic figure or a charismatic leader just like the idea of J.S. Mill. In this light, the authors cannot prevent but argue for the need for the continued perpetuation of certain innate rights and principles till such a time dawns upon us. The authors of this paper with the fear of repetition want that till the long foreseeable future certain principles, like the ones highlighted across the paper, should stand on the indestructible edifice of permanent structure that is provided by natural law.

These principles must be believed to be like the god's uncreated, omnipresent and eternal, always protecting the most basic of human rights from any future political association or ideology to the contrary. Let all our legal innovation remain within the realm of positive law that gives the fluidity to change over time. However, simultaneously we must accept to read the most cherished values in a school of jurisprudence that has been long overlooked and ignored. Let us move over, above and beyond the basic structure towards a permanent structure. So, that the basis of the Indian Constitutional system becomes strong enough to counter any shock that time has reserved for us. This is not a call for the abandonment of the basic structure but just a call for a new doctrine of a permanent structure to exist over and most importantly beyond it. The doctrine has immense utilitarian value to it and as Kant stated for natural law "natural law is the result of human wisdom acting upon human experience for the benefit of the public." Just like Grotius saw natural law as being made of a mould that cannot be changed even by god almighty, on par should be the strength of the permanent structure i.e. beyond the reach of mortal men. At present, the constituted power is subject to the basic structure doctrine but now even the constituent power should be subjected to the natural law.

Few notions have elicited more controversy in the history of juridical thought of the early modern period than that of natural law.⁹⁸ However, the idea in a novel understanding may be accepted.

⁹⁸ Alfred Dufour, *Natural Law and Natural Rights*, 54(2) J. MODERNHIS. 292, 292 (1982).

CALJ 9(1)

Dr. Ambedkar once remarked that “*equality may be a fiction but nonetheless one must accept it as a governing principle*”. In a similar context, many arguments forwarded along with the paradigm developed in the paper might be pure fiction but nonetheless, they must be accepted as the governing principle to preempt possible dystopian futures. To conclude the noted Greek historian Herodotus stated that “*The Greeks though free were not absolutely free; they had a master called law*” in the same way constituent power as represented by the people and the idea of popular sovereignty is also independent and free but not absolutely free as constituent power ought to have a master in form of certain unalterable principles like human rights and due process.