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THE BASIC STRUCTURE DOCTRINE AS A THIN LINE OF DISTINCTION BETWEEN CONSTITUTIONAL AMENDMENT & CONSTITUTIONAL DISMEMBERMENT: AN ANALYSIS

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ABSTRACT

The Constitution serves as the fundamental legal framework of a nation, embodying its historical, social, and cultural identity. While constitutional amendment is a necessary mechanism to adapt to evolving societal, political, and economic changes, it must be exercised within defined limits to prevent the erosion of foundational principles. The distinction between "constitutional amendment" and "constitutional dismemberment" is essential to understanding the boundaries of amending power. Amendments function within the existing framework, whereas dismemberments fundamentally alter the Constitution's identity, structure, or core principles, potentially compromising its legitimacy. This research article examines the necessity of amendments in a constitution and the significance of placing limitations on amending power. It explores the role of judicial review in safeguarding constitutional integrity, particularly through the lens of the Constitution of India's "basic structure doctrine," which acts as a check against excessive legislative alterations. The research article also delves into the jurisprudential evolution of constitutional amendments, tracing discussions from the Constituent Assembly to contemporary judicial pronouncements. A comparative analysis of global constitutional frameworks provides insights into how different jurisdictions have navigated the balance between amendment and dismemberment. Ultimately, this research article argues that while flexibility in constitutional amendments is crucial for progress, an

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unchecked power to amend risks transforming the very essence of the Constitution. The judicially established boundaries, particularly in India, act as a safeguard against constitutional dismemberment, ensuring that amendments serve as instruments of evolution rather than tools of dismantling core democratic principles. The research article underscores the necessity of maintaining this fine balance to uphold constitutional legitimacy, stability, and the rule of law.

Keywords: *constitutional amendment, constitutional dismemberment, judicial review, basic structure doctrine, amending power, constitutional identity*

1. INTRODUCTION

In a Constitutional democracy, the Constitution is regarded as the supreme law. It is the *grundnorm* from which all other legal frameworks within the nation derive their legitimacy. This sacrosanctity of the Constitution for the legal system of any nation necessitates that it be a fine balance of rigidity and flexibility. The rigidity is important to ensure that the spirit and ethos of the Constitution are not diluted or abrogated in the future through unfettered amendments, while flexibility is necessary to allow future change to be incorporated into the constitutional framework so that it can remain updated to address the changing problems of society.

Thus, constitutional amendments are vital tools for adapting a nation's foundational laws to evolving social, political, and economic circumstances. However, the power to amend the Constitution is not without its boundaries. The distinction between amendment and dismemberment is crucial to understanding the limits of amending power. While amendments aim to adjust or update specific provisions within the framework of a constitution, dismemberments refer to fundamental changes that alter the identity, structure, or core principles of the Constitution itself. This distinction raises critical questions about the extent to which a constitution can be modified without undermining its integrity or legitimacy. An unchecked power of amendment may lead to gradual but irreversible transformations, effectively dismantling the core tenets upon which the Constitution was founded. This concern necessitates a structured approach to constitutional amendments, ensuring they serve as instruments of progress rather than as mechanisms for eroding fundamental principles. Judicial oversight and constitutional safeguards play a pivotal role in maintaining this delicate balance, preventing amendments from transgressing into dismemberment.

Against this backdrop, the present paper shall examine the necessity and limits of constitutional amendment to understand the fine line between constitutional amendment and dismemberment, with a focus on comparative analysis of global constitutional law to understand how different jurisdictions have addressed this issue. The first part is a brief introduction. The second examines the necessity of amendment in modern constitutions and the third part analyses the significance of placing limitations on the power of amendment by drawing a distinction between constituent power and amending power. The fourth part explores the concept of constitutional dismemberment. The fifth part explores the development of the jurisprudence on constitutional amendment with a historical analysis from the discussions of the Constituent Assembly to the present. The sixth part summarises the arguments provided to conclude the topic with suggestions.

2. THE MODERN CONSTITUTION AND THE NEED FOR AMENDMENT

The term "nation" represents a "*collective psycho-cultural recognition*", while the word *"State"* refers to a political entity within defined boundaries.[1] Modern constitutional jurisprudence emphasises on democratic participation in the process of making of the constitution, ensuring that it is a reflection of the unique needs of that particular nation, with the universal founding values that the nation wishes to uphold in the future being embedded within the constitutional framework of that nation.[2] Thomas Paine, in the aftermath of the creation of the American Constitution, had famously noted in this regard -*"A Constitution is the property of a Nation and not those who exercise the Government."*[3] The values contained within any constitution are shaped by the nation's history and collective will. This is well-represented in existing literature, with Jurgen Habermas, through his concept of *"Verfassungspatriotismus",* or shared patriotism,[4] arguing that shared traditions influence the constitutional values, while jurists J. Felix Frankfurter, who called a written constitution *"a stream of history"*[5] and J. H.R. Khanna, who asserted that *"framing of a constitution calls for the highest statecraft"*[6] emphasise on the importance of an underlying shared historical context that influences the framing of a Constitution.

1 Mostafa Rejai & Cynthia Enloe, *Nation-States and State-Nations*, 13 Int'l Stud. Q. 143 (1969).

2 Sharon Weintal, *The Challenge of Reconciling Constitutional Eternity Clauses with Popular Sovereignty: Toward Three-Track Democracy in Israel as a Universal and Holistic Constitutional System and Theory*, 44 Isr. L. Rev. 448 (2011).

3 Thomas Paine, Rights of Man 49 (J.S. Jordan 1792).

4 Gábor Halmai, *Transitional Constitutional Unamendability,* 21 Eur. J.L. Reform 261 (2019).

5 Hernan Belz, *History, Theory, and the Constitution*, 11 Const. Comment. 49 (1994).

6 H.R. Khanna, The Making of India's Constitution 1(E. Book Co. 2008).

Yet, what does the word 'Constitution' mean? In the narrowest translation of the term, it refers to the fundamental principles or rules that govern all legislations, the executive authorities and the people themselves; however, in a broader sense, the Constitution, addition to the aforementioned tenets, also embodies abstract concepts such the *"rule of law"* and *"separation of powers"* and also creates *"constitutional conventions"* that are adhered to and followed by everyone bound by the Constitution.[7] It can either be written, where it contains precise textual references for guiding the nuanced legal relationships between the State and the people, as well as the legal relationships between the different organs of the State, or it can be unwritten, where constitutional conventions ensure adherence to longstanding constitutional principles. The Constitution of a nation serves two purposes – firstly, it functions as a blueprint upon which all governmental action can be based; and secondly, it is a reflection of the most sacred principles of the country[8] This dual role makes the Constitution the most sacred legal treatise within the country, a treatise from which every legislative, executive, and judicial action derives its legitimacy.

The Constitution of a country serves as its *grundnorm,* or 'basic norm'. The 'basic norm' can be defined as – *"Coercive acts ought to be performed under the conditions and in the manner which the historically first constitution, and the norms created according to it, prescribe"*[9] and under the *Kelsenian* understanding of norms, functions as the primary node from which all the other norms trace their validity. Thus, the Constitution is the source from which all other laws derive their legitimacy and this makes it the most sacrosanct legal treatise within the legal system of any country.

However, the next question that arises is – from where does the Constitution derive its legitimacy and can a constitution that is no longer considered legitimate continue to function as the *grundnorm?* To answer the first part, the source of legitimacy for every Constitution is rooted in the concept of *'popular sovereignty',* which holds that in a liberal democracy, including constitutional authority, derives from the people. Popular consent is essential for the continued legitimacy of the Constitution[10] since the supremacy of the Constitution, grounded in the will of the people, elevates it to the status of *grundnorm*. This also answers the second part, and implies that any constitution that fails to meet the aspirations of the

7 James Tully, *The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy,* 65 Mod. L. Rev. 205 (2002).

8 Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 Harv. L. Rev. 433 (1983).

9 Dhananjai Shivakumar, *The Pure Theory as Ideal Type: Defending Kelsen on the Basis of Weberian Methodology*, 105 Yale L.J. 1387 (1996).

10 Maru Bazezew, *Constitutionalism*, 3 Mizan L. Rev. 358 (2009).

people and ideals will lack legitimacy and ultimately become redundant. A.V. Dicey also echoes this sentiment and argues that a constitutional framework that is totally rigid and not prone to change, by restricting gradual change that is naturally ushered into in society, may become an obstacle to necessary reforms, potentially leading to revolution under adverse conditions[11] and losing the people's collective acquiescence that grants the Constitution its legitimacy.

Amendments can be brought forth in two distinct ways, according to the procedure undertaken - either through the formal mechanism *(de jure)* or the informal mechanism *(de facto)*. The *de jure* form refers to the amendments implemented by the process within the constitution itself, and it can be divided into three forms – the referendum method the constituent assembly method, and the legislative method. The first method is an expression of the model of popular sovereignty discussed above, and it signifies a procedure where any proposed amendment must be ratified by the people of the nation through a referendum. The Constitution of Switzerland, 1999 under Art. 138-142 highlights Both a partial and complete rewrite of the Constitution be approved by a referendum with requisite majority, while at the same time allowing the people to demand an amendment of the constitution through the process of *"Volksinitiative"* following which the government must take an initiative *"Bundesversammlung"* for introducing the amendment demanded.[12] The constituent assembly method is a derivation of this first form, where a constituent assembly is created and conferred with the powers to determine the will of the people, and thus, this assembly is given the responsibility to enact changes to the constitution. The Constitution of Costa Rica, 1949 is an example, since under Art. 196, it has been mandated that a general amendment that is desirous of bringing forth transformative changes to the Constitution must be done through a constituent assembly. Finally, the legislative assembly method allows the democratically elected legislative assembly to decide the viability of amendments to the constitution, often with a procedure similar to which new legislations are enacted or existing legislations are amended, with the addition of an extra requisite of securing supermajorities in the assembly floor to secure the amendments.

The informal mechanisms for amending a constitution can be divided into two forms – judicial interpretation and constitutional conventions. Judicial interpretations influence the manner in which any statutory framework is interpreted over time, with the existing mechanisms being given new meaning by the judiciary to accommodate the changing needs

11 A.V. Dicey, The Law Of The Constitution 70 (Oup 2013).

12 Yaniv Roznai, *The Theory and Practice of Supra-Constitutional Limits on Constitutional Amendments*, 62 Int'l & Comp. L.Q. 557 (2013).

of times. The orthodox position of judicial interpretation, characterised by J. Blackstone's words – "*the duty of the Court is not to pronounce a new law but to maintain it and expound the old one"*[13] echoes that judges have the profound duty of giving novel interpretations to existing law for expanding its meaning and scope. This implies that despite the static nature of the phrasing of a legal body, it is an interpretation by the judiciary that bestows upon it a hint of dynamism. Yet, the responsibility for constitutional interpretation, unlike regular statute, is immense since if the judiciary's interpretation of the statutory framework is unable to reflect the intention of the legislature, then the statute can be amended to align it with the vision that the legislature initially had, however, in the event of a constitutional interpretation, if the same is flawed and does not reflect the ideals of the intent of the constituent assembly, then the only mechanism for changing the interpretation would be through the comparatively more complex procedure of constitutional amendment, whose substantive and procedural nuances may differ from jurisdiction to jurisdiction. Thus, addressing the unintended consequences of judicial interpretations that informally alter the Constitution in ways inconsistent with its spirit is, among other reasons, a justification for providing a formal mechanism of constitutional amendment. Indeed, as J. Holmes observed in *Missouri v. Holland*[14], it is the interpretation by judges that bestows upon the American Constitution the status of a *"living constitution"* since the cumbersome and rigid nature of amendment in the American context is such that in the absence of judicial creativity, the Constitution could probably only be amended through a revolution.[15]

Constitutional conventions, a term coined by A.V. Dicey,[16] refers to norms that generally transcend the written character of the constitutional framework and become unwritten rules that are concretized as usages after being in function for a long period of time. Conventions lead to informal amendments in two ways – firstly, constitutional conventions can sometimes override the formal provisions contained within the textual matrix of the constitution, where the law formally remains but is no longer practiced in reality. For instance, Section 56 of the Canadian Constitution of 1867 required the Governor-General to send copies of Canadian legislation to the British government, yet, despite its formal presence, this practice has been discontinued in practice since 1942, and has today transcended to the status of a convention. Secondly, conventions may evolve over time as practices fill the gaps that are present in the written law. A prime example is India's *"collegium system"* where although the Constitution of India, under Art. 124, merely stipulates that the President shall be

13 Allan Beever, *The Declaratory Theory of Law*, 33 Oxford J. Legal Stud. 421 (2013).

14 Missouri v. Holland, 252 U.S. 416 (1920).

15 William L. Marbury, *The Limitations upon the Amending Power*, 33 Harv. L. Rev. 223 (1919).

16 A.V. Dicey, Introduction to the Study of the Law of the Constitution 34 (Macmillan 1915).

responsible for the appointment of judges, the provision is silent vis-à-vis the details as to the number of judges and the procedure to be followed, to address which the collegium has been evolved, and any recommendations advanced by the Chief Justice without adhering to the requisite norms and requirements that was decided in the *Re: Appointment and Transfer of Judges*[17] is not binding.[18]

3. WHY LIMIT THE POWER TO AMEND? - AN ANALYSIS

Constitutions around the world are primarily categorised as either written or unwritten, with this demarcation being the simplest way of differentiating between constitutional frameworks. However, British jurist James Bryce has critiqued this as a superficial distinction, and instead, he had argued that constitutions should be classified based on the relationship between the Constitution and ordinary legislation within a country's legal system. As well as the authority required to amend them. Bryce's classification focuses on whether a constitution is rigid or flexible. Rigid constitutions, according to Bryce, can only be amended by a specially designated superior authority, distinct from the process used for ordinary laws. In contrast, flexible constitutions can be amended through the ordinary legislative process, meaning no special authority or procedure is required to alter them.[19] This distinction, Bryce suggested, offers a deeper and more practical understanding of constitutional systems, as it highlights the degree of difficulty involved in amending the constitution compared to ordinary laws, with Bryce stating – *"it takes a good deal of knowledge, skill and experience to work a flexible constitution safely"*[20] thus signifying that flexible constitutions are more desirable.

3.1 Limiting Amending Power: The Necessity

Any written constitution necessitates that there be a formal provision that allows for the modification of the constitution to ensure that the document is able to remain in consonance with the changes being brought forth by social change. Yet, this does not mean that the provisions of the constitution for amendment be used for reforming the constitutional structure altogether. Thus, the foremost reason why there are restrictions placed on the power to amend is because the power of amendment *prima facie* does not correlate to the

17 In Re: Appointment and Transfer of Judges, AIR 1999 SC 01.

18 Manish Tewari & Rekha Saxena, The Supreme Court of India: The Rise of Judicial Power and the Protection of Federalism, Courts in Federal Countries: Federalists or Unitarists, 215 (University of Toronto Press 2017).

19 James Bryce, Studies in History and Jurisprudence 130 (Oup 1901).

20 *Id.* at 153.

power to enact a new constitutional scheme. An amendment's purpose is merely to improve upon the existing structure and make minor, or even substantially major changes, but nothing that erodes the foundation.

Gordon Woods, the American historian, has elucidated that the creation or alteration of a constitution can only be possible through a *"convention of delegates"* who have been specifically selected for this express purpose of constitutional formation or change. This is further elaborated by Walter Murphy, the American political scientist, who defined an amendment as – *"an amendment corrects errors of commission or omission, modifies the system without fundamentally changing its nature that is an amendment operates within the theoretical parameters of the existing Constitution."*[21] Constituent power, thus, inherently, stands on a higher pedestal than ordinary power, and it is constituent power, rather than the ordinary legislative power, that must be used for effecting amendment within the Constitution.

The difference between constituent and ordinary legislative power also expands to the demarcation where certain constitutional provisions are deemed to be more important than others, for being a part of the constitutional spirit and ethos. This implies that change with regard to certain constitutional provisions can be implemented by exercising ordinary legislative power, yet, as far as these sacrosanct and inviolable provisions are concerned, constituent power must be exercised to bring forth a change in their structure and scope.

3.2 Methods of Limiting the Power of Amendment

Limitations placed on the power of amendment can be broadly categorized as explicit and implicit. The former refers to limitations that are clearly demarcated within the constitutional scheme, and these are vigorous and precise in their scope. The latter, on the other hand, are not rooted within the Constitution itself, and instead, are extraneous to the Constitution. These implicit limitations trace themselves from the writings of the Carl Schmitt, a German origin jurist who developed the notion of *"Verfassunghslehre"* and which stated that constituent power, necessary for bringing in a complete overhaul of the constitution, was different from and stood on a higher pedestal when compared to ordinary legislative power that could be exercised for introducing amendments. By drawing parallels with the Weimar Constitution, which did not place any explicit limitations on the power of amendment, Schmitt argued that the fundamental principles of a constitution could only be altered through amendment by exercising constituent power, and in the absence of the same, there was an implied limitation on the ordinary legislative power of the legislature to

21 L.M. Singhvi, Constitution of India 3898 (Thomson Reuters 2013).

amend the Constitution beyond a certain limit.[22]

Instead of relying upon this rudimentary characterisation, rooted in the source of the limitation, a more comprehensive demarcation of limitations based on the nature and scope of the same will be discussed here.

First, *"supra-national limitations"* that derive their authority from a source beyond the Constitution, traceable either from underlying principles of international law or from the larger tenets of human rights considerations. For example, the *"Constitution of Switzerland, 1999"*[23] prohibits partial revisions if they are a violation of *jus cogens* international law principles; similarly, it was held *Planas v. Comelec*[24] by the Philippine Apex Court in 1973 that amendments to the Constitution cannot violate the *jus cogens* principles; and finally, the *"Constitution of Bosnia & Herzegovina, 1995"* states that the principles confined within the *"European Convention for the Protection of Human Rights"* (ECHR) must have predominance over any other domestic law including constitutional amendments,[25] and thus amendments cannot violate the principles of the ECHR, thereby limiting the kind of amendments that can be introduced.

Second, *"autonomous limitations"* that are rooted within the Constitution itself, and function as 'eternity clauses' leading to a hierarchical demarcation between different constitutional provisions, with some being unamendable, whereas others can be amended. For example, the *"Italian Constitution, 1947"* prohibits an amendment that can change its republican nature;[26] the "German Basic Law, 1949" forbids amendments from Articles 1 to 20;[27] and, the *"Russian Constitution, 1993"* places the 1st, 2nd & 9th chapters beyond the scope of amendment.[28] These examples highlight that Some of the Constitutional provisions are considered so sacrosanct that they are beyond amendment, where a change to these provisions necessitates the exercise of constituent power.

Third, *"cultural influences"* can also become an implicit source of limiting amendments, since culturally, a nation's collective ethos may regard the Constitution as so sacrosanct that it cannot be changed. The *"Constitution of Japan, 1947"* provides an interesting example, since despite having a fairly flexible procedural mandate for amendments, necessitating

22 Carl Schmitt, Constitutional Theory, 78 (Duke University Press 2008).
23 SWZ. Const. art. 194.
24 Planas v. Comelec, 49 SCRA 105 (1973).
25 Roznai, *supra* note 12, at 590.
26 ITL. Const. art. 139.
27 GER. Const. art. 79.
28 RUS. Const. art. 134.

two-thirds majority in the legislature followed by a referendum from the people, it has not been amended even once during its existence.[29]

Fourth, the principle of *"judicial review,"* conceptualized in *Marbury v. Madison*[30] in the formative years of the 19th century continues to function as an implied limitation on the power to amend. There are two aspects for which the power of judicial review is exercised by the Courts – firstly, to ascertain whether the procedural requisites for introducing an amendment have been followed or not; and secondly, whether substantive requisites, such as the presence of eternity clauses that prohibit amendment, have been adhered to. However, unlimited power of judicial review for adjudicating on the legality of an amendment risks turning a democracy into 'juristocracy' since the final decision-making power for deciding the legitimacy of an amendment is vested not in the democratically elected legislature but rather in the unelected judiciary. The *"Constitution of Honduras, 1982"* limits the number of terms for which the president can get elected, and mandates it as an eternity clause under Art. 237. When an amendment to the same was attempted by the incumbent president in 2009, it was deemed unconstitutional by the Honduran Apex Court on account of the entrenched nature of the provision, yet, merely six years later, the same Apex Court validated the amendment and reduced the status of the provision from an entrenched eternity clause to something that was subject to amendment.[31] This radical shift in the position of the judiciary highlights that giving the judiciary to act as the final arbiter without any limitations on the extent to which the judiciary can exercise its discretion risks the dilution of

4. AMENDMENT V. DISMEMBERMENT: TREADING THE FINE LINE OF DIFFERENCE

The term *"constitutional dismemberment"* was coined by Prof. Richard Albert, and it poses the question - *"when is a constitutional amendment an amendment in name alone?"*[32] An amendment is inherently of two forms – firstly, when a change is introduced in the existing constitutional framework, leading to changes in the existing structure, and secondly, when through an amendment, the entire structure of the constitutional frame is changed

29 Satoshi Yokodaido, *Constitutional Stability in Japan Not Due to Popular Approval*, 20 GERMAN L.J. 263 (2019).

30 Marbury v. Madison, 5 U.S. 137 (1803).

31 David Landau et al., *From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras,* 8 GLOBAL CONSTITUTIONALISM 52 (2019).

32 RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 1 (OUP, 2019).

completely. While the former qualifies as an *"amendment"* in the traditional sense, the latter is amendment merely in name and constitutional revision in reality. Prof. Albert opines that *"constitutional dismemberment"* lies somewhere between these two positions, and is characterized by a scenario where a novel framework is created within the constitutional fold through amendments without resorting to formally breaking the existing constitutional structure. Thus, according to Prof. Albert, dismemberment relies on constitutional alteration to unmake the current structure, introducing transformative changes that are incompatible with the original framework. Thus, while *"dismemberment"* does not produce an entirely new constitution, it nevertheless alters foundational principles, resulting in a significant shift that challenges the continuity of the existing constitutional order.[33]

Prof. Albert provides three distinct ways to identify *"dismemberment"* from the amendment. The first is, a change that undermines the entrenched structural elements of the original constitution, leading to a deviation from the document's initial framework; the second is, a change that is in conflict with the normative constitutional vision or the core principles the constitution is designed to uphold, thus causing a derogation of the first principles; and the third is, a alteration that goes against what the public and pertinent actors understood at the time the amendment was adopted. It's interesting to note that dismemberment frequently results from a formal constitutional modification driven by politically active parties. The power to radically transform the constitution while adhering to the formal procedure of amendment grants legitimacy to the dismemberment, as it follows the constitution's own principles for modification. This adherence also shields such amendments from being outrightly overturned through judicial or constitutional review since the requisite procedural formalities for applying the amendment have been adhered with. Prof. Albert refers to this phenomenon as the *"rule of mutuality",*[34] where formal compliance with amendment procedures legitimizes even radically transformative changes that can result in dismemberment rather than an amendment.

An example of *"dismemberment"* can be seen in the transformation of the Portuguese Constitution of 1976. Initially inspired from ideas of Marxism-Leninism, the Constitution declared democracy as means of transition to socialism and emphasized agrarian reform and socialisation of production. The Portuguese author, Prof. António Costa Pinto noted that, among liberal democracies of the third wave, the Constitution of Portugal was the

33 Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT'L L. 1 (2018).
34 *Id.* at 57.

most left-leaning.[35] Two major constitutional amendments, however, of 1982 and 1989, marked a significant shift, replacing the "Revolutionary Council" with a constitutional court and removing the Marxist underpinnings in the language. Prof. Albert termed this the *"demarxification"* of the Portuguese legal system,[36] for it is reflecting a fundamental change from the Constitution's original Marxist identity to a more neutral and democratic framework where the tinge of Marxism has been significantly eroded, if not completely deleted.

Interestingly, Prof. Albert's notion of *"constitutional dismemberment"* also has parallels in academic literature. A comparison can be drawn between Prof. Albert's theory of dismemberment and the theory of *"constitutional moments,"*[37] According to Professor Bruce Ackerman, there are critical junctures in a country's constitutional history where political actors or judicial activism alter the preexisting frameworks., resulting in a fundamental shift in the constitutional spirit and the societal ethos. These *"moments"* are different from formal amendments since they are generally ushered in through informal means.[38] Ackerman, in this context, identifies three landmark *"moments"* in America's constitutional history to signify transformative changes that were not enacted by adhering to the requisites under Article V of the American Constitution: the amendments that were introduced in the aftermath of the civil war, the New Deal signed by President Roosevelt, and the legal revolution that was ushered in with *Brown v. Board of Education at Topeka*[39] that culminated with the *"Civil Rights Act, of 1964."*[40] Similarly, Prof. Gary Jacobsohn has introduced the concept of *"constitutional revolution"* referring to the creation of a new constitutional paradigm after the illegal overthrow of the previous one.[41] These transformations, ranging from *"dismemberment"* to *"constitutional moments"* to *"constitutional revolution",* each alter the constitution's identity so significantly that the legitimacy of the changes can be justifiably questioned as to whether they justify the use of the term 'amendment' or not.

These theorizations highlight that there is a delicate distinction between constitutional amendments and other forms of transformative change, such as *"dismemberment,"*

35 António Costa Pinto, *Constitution-Making and the Democratization of Portugal: An Enduring Legacy*, 34 Portuguese Stud. 35 (2018).

36 Albert, *supra* note 32, at 09.

37 Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 Const. Comment 115 (1994).

38 Walter D. Burnham, *Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman's We the People*, 108 Yale L.J. 2237 (1999).

39 Brown v. Board of Education at Topeka, 347 US 483 (1954).

40 Daniel T. Young, *How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling to Evaluate Bruce Ackerman's Theory of Constitutional Change*, 122 Yale L.J. 1996 (2013).

41 Gary J. Jacobsohn & Yaniv Roznai, Constitutional Revolution, 23 (Yale Univ. Press 2020).

"constitutional moments", and *"constitutional revolutions."* While an amendment traditionally introduces changes within the existing framework, more radical transformations alter the very core principles or structure of a constitution, yet may still adhere to either the formal or informal procedures for amendment for bringing in these changes. As Prof. Albert's theory of dismemberment suggests, these changes, while not formally breaking the constitutional order, fundamentally reshape it, challenging its continuity. Similarly, concepts like Ackerman's and Jacobsohn's theory highlight the possibilities where societal shifts occur without formal amendments, often raising questions about the legitimacy of such changes. Ultimately, these forms of transformation blur the line between amendment and complete constitutional overhaul.

5. THE INDIAN POSITION: FROM ABSOLUTE POWER TO IMPLIED LIMITATION

The Indian Constitution's position on the scope and power of constitutional amendment has undergone a journey of radical change. The initial position adopted by the Constituent Assembly echoed a position of flexibility wherein they allowed the Parliament to exercise unfettered power of amendment, however, within three decades, the judiciary relied upon the doctrine of implied limitations to formulate the *"basic structure doctrine"* and place inherent limitations on the power of amendment exercisable by the legislature. While this implied limitation has been controversial, it has also been adopted by different jurisdictions across the globe. Against this backdrop, this part shall attempt to undertake a detailed analysis of the implications of this *doctrine* vis-à-vis constitutional amendment, and whether it has been effective in being a tool against constitutional dismemberment.

5.1. The Constituent Assembly's Position on Amendment

Aristotle believed that the key to constitutional stability lies in fostering a constitutional spirit among citizens, as even the best laws lack value without moral alignment from the people, and instilling this national spirit into a constitution and ensuring it reflects the aspirations of the nation is typically the task of a collective body – framers of the constitution.[42] These framers, representing diverse aims and opinions within society, engage in negotiation and flexibility to shape the nation's highest legal framework.

The Constitution of India was drafted by a Constituent Assembly. These forefathers placed a lot of emphasis on flexibility to allow for future growth and adaptation, albeit it is notable

42 Ernest Barker, The Politics of Aristotle 233 (Oup 1962).

that not everyone was on the same page vis-à-vis the permissible scope of constitutional change. During the initial stages of discussion, perhaps the most vehement supporter of constitutional flexibility was Pandit. Jawaharlal Nehru, who during the "Constituent Assembly Debates" (CAD)in response to the draft Constitution presented by Dr. Ambedkar, had remarked that a rigid and unchangeable Constitution would eventually stifle the progress of the very people it was designed to govern. He argued that if the Constitution was made rigid and static, without any scope for future amendment and change, then it *"becomes empty, and if it falls behind those aims, it drags the people down."*[43] Prof. R.C. Ranga[44] and S.V Krishnamurthy[45] also echoed similar sentiments.

Draft Article 304 (Article 368 today) contained the procedure for amendment and it mirrored the present iteration of Article 368 where two distinct procedures for amendment are provided according to which provision of the Constitution needs to be amended. This framework was met with two different perspectives from the members of the Assembly. Members such as P.S. Deshmukh[46] and Acharya Jugal Kishore,[47] both advocated increased flexibility than what was possible under the provisions of Draft Article 304 and they argued that once the Constitution is legally enacted can the problems and difficulties with its provisions be properly understood, necessitating change to address wherever problems arise. Babu Ramanarayan Singh[48] also accepted this argument, but opined that a plebiscite was a more desirable alternative than referring the proposed amendment to the provincial legislatures. The idea of directly relying on the opinions of the was also echoed by Brajeshwar Prasad who believed that the proposed method was too rigid and a referendum should be used to ensure the democratic ethos of any amendment is maintained.[49]

The other end of the spectrum was represented by members such as Naziruddin Ahmed & R.K. Sidhwa who advocated for greater rigidity in the constitutional framework and believed that it is necessary to limit the scope of change within the constitution. However, the members who were in favour of greater rigidity were comparatively fewer in number than the members in favour of greater constitutional rigidity. H.V. Kamath, at this point, provided an interesting opinion. He stated that the notion of constitutional rigidity was rooted in the premise that the Constituent Assembly which was tasked with formulating

43 Lok Sabha Secretariat, 7 Constituent Assembly Debates, 318 (2014).
44 *Id.* at 352.
45 *Id.* at 384.
46 Lok Sabha Secretariat, 9 Constituent Assembly Debates, 1647 (2014).
47 *Id.* at 1657.
48 *Id.* at 1660.
49 *Id.* at 1652.

the Constitution stood on a higher pedestal than the legislature that would be responsible for introducing amendments in the future, yet, this was a false premise because, unlike the democratically elected Parliament, the Constituent Assembly was not elected democratically. Kamath substantiated his argument by drawing parallels with the British system where the Parliament, which had been elected democratically, was supreme and could introduce any amendment to their unwritten Constitution except for prohibiting any future iteration of the Parliament from introducing amendments. He finally argued that a constitution that refuses to cater to the needs of changing times and changes within society will inevitably become a hindrance to the country's progress on account of the inflexibility, thus leading to what he deemed *"revolution in place of evolution."*[50]

The conflicting positions were placated by Dr. Ambedkar who stated that the Indian position under Draft Article 304 was influenced by various foreign treatises – the Irish Constitution, 1937, which demanded a referendum to legitimize any proposed amendment;[51] the Swiss Constitution, 1874, which required the fulfillment of two preconditions for an amendment to become lawful – first, a majority of the provincial units of the Swiss federation (called cantons) must accept the amendment, and second, a majority of the people must approve of the proposed amendment through a referendum;[52] and the Australian Constitution, 1901 which stated that any amendment to the Constitution must be passed by the parliament and subsequently ratified by a majority of the population through a referendum.[53] Dr. Ambedkar also quoted Thomas Jefferson, where Jefferson had opined that absolute constitutional permanence leads to a scenario where future generations are burdened by the actions of the past generations, leading to the imposition of the will of the dead upon the living.[54] Citing these issues, Dr. Ambedkar justified the contents of Draft Article 304 and highlighted that the position adopted within the provision represented a balanced outlook.[55]

5.2 Post Constitutional Developments: From Unfettered Authority to Implicit Limitations

The Constitution of India, under Article 368, initially granted unfettered power of amendment to the Parliament, provided that the procedural nuances of Article 368 were

50 *Id.* at 1655.

51 IRL. Const. art. 47.

52 SWZ. Const. art. 118-123.

53 AUS. Const. art. 128.

54 Thomas Jefferson, The Papers of Thomas Jefferson: Retirement Series, 260 (Princeton University Press 2018).

55 Lok Sabha Secretariat, 11 Constituent Assembly Debates 978 (2014).

adhered to. In the aftermath of independence, and rooted within the socialistic aspirations of the government, the State introduced rampant constitutional reforms, primarily aimed at securing land rights and diluting property rights and also for securing affirmative action reservations. The primary question that was raised at this point was whether constitutional amendments effected under Art. 368 were *"ordinary law"* and thus subject to the restrictions of Art. 13(2) that prevented any laws from infringing on Part III of the Constitution. The Parliament contended that amendments introduced under Art. 368 stood on a different pedestal than ordinary laws, and thus, were not subject to the limitations of Art. 13(2). They further argued that since no limitations were given under Art. 368 vis-à-vis the power of amendment, the scope and ambit of amendment within the Art. 368 was unfettered. The judiciary also echoed similar sentiments in the cases of *Shankari Prasad v. State of Bihar*[56] and *Sajjan Singh v. State of Rajasthan*.[57] Interestingly though, in the latter, J. Hidyatullah's dissent, which was influenced by the jurisprudence developed by the Apex Court of Pakistan in *Fazlul Quader Chowdhry v. Muhammad Abdul Haque*[58] laid the foundation of "basic structure" when he asserted – "*intention of the constituent assembly to give permanency to the basic features of the constitution"*[59] and considered if an amendment of these inviolate features would amount to a reconstruction of the Constitution itself. The jurisprudential position changed two years later when in *I.C. Golaknath v. State of Punjab*[60] an eleven-judge bench proclaimed that the contents of Art. 368 merely delineated the procedure of amendment, with the power of amendment traceable from Art. 248 discussed the residuary powers.

The *status quo* of Parliament's power to effect amendments changed once again, and perhaps for the final time, in *Kesavananda Bharati v. State of Kerala*[61] where by a narrow majority of 7:6, the majority held that the Constitution contained a plethora of basic features or a concrete basic structure that could not be abrogated by amendment. There were two distinct concepts given in this judgment – 'basic structure' that was used by J. Khanna to describe that Art. 368 could not be used to touch "*the foundation or alter the basic institutional pattern of the constitution"* whereas the other majority authors discussed about 'basic features' that describe certain fundamental features that are considered as basic for the Constitution. Interestingly, Prof. Dietrich Conrad, who headed the Department of Law

56 Shankari Prasad v. State of Bihar, AIR 1951 SC 458.

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

58 Fazlul Quader Chowdhry v. Muhammad Abdul Haque PLD 1963 SC 486.

59 *supra* note, at 57.

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

61 Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

at the University of Heidelberg played a key role in enumerating the doctrine of implied limitations. His work was influenced by his compatriot Cal Schmitt, and based on the realities of the Weimar Constitution, which had also influenced Art. 79(3) of the "German Basic Law. 1949",[62] stated that there were implied limitations on the power of amendment, and thus, for reconstructing any of the basic features of the Constitution, mere amending power was unqualified, and rather, constituent power was needed.[63] These observations that were captured in a speech that Conrad delivered at Banaras Hindu University were noted by M.K. Nambiar and presented in his arguments in the *Golaknath judgement,*[64] and subsequently referred to in the *Kesavananda judgement*.

The doctrine's expansion has happened over time and during this period it has also been incorporated into different constitutional schemes across the world. Notably, the doctrine has been incorporated in *Belize,* in *Bowen v. Attorney General*[65] where the Belizean Supreme Court had proclaimed that the relevant constitutional provision merely depicts the procedure of amendment and as far as the substantive nature of the amendment is concerned, it must conform, like any other law, to the constitutional basic structure. This was subsequently reiterated in *British Caribbean Bank Ltd. v. Attorney General of Belize"*[66] and the constitutional basic structure was reiterated. Similarly, in Kenya, the Kenyan High Court deemed the *"Constitution (Amendment Bill), 2020"* as unconstitutional by citing the basic structure doctrine. In Columbia as well, the *"constitutional-replacement"* doctrine, derived from the Indian basic structure, has evolved as a significant tool for placing restrictions on the power of amendment.[67]

6. CONCLUSION

The creation of a constitution represents a crucial moment in history of any nation, reflecting its social, historical, and cultural identity. A constitution embodies the aspirations of its people and serves as the legal foundation or *grundnorm*. The power of amendment ensures that constitutions evolve with time, allowing future generations to address changing social

62 Helmut Goerlich, *Concept of Special Protection for Certain Elements and Principles of the Constitution Against Amendments and Article 79(3), Basic Law of Germany,* 1 NUJS LAW REV. 401 (2008).

63 Dietrich Conrad, *Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration,* 6 DEL. LAW. REV. 01 (1977-78).

64 Setu Gupta, *Vicissitudes and Limitations of the Doctrine of Basic Structure,* ILI LAW. REV. (WIN.) 111 (2016).

65 Belize, in Bowen v. Attorney General, Claim No. 445 of 2008 (Belizean Supreme Court)

66 British Caribbean Bank Ltd. v. Attorney General of Belize, Claim No. 597 of 2011.

67 Corte Constitucional [C.C.], Sentencia C-551/03, julio 9, 2003 (Colom.).

dynamics and incorporate past experiences into the constitutional framework. However, unlimited power of amendment risks undermining the Constitution's core principles, leading to constitutional dismemberment. Limitations, notwithstanding their nature, either derived from heteronomous sources or from intrinsic constitutional principles that have an entrenched character, ultimately act as vital protections against constitutional dismemberment. The institution of judicial review also operates as an adjudicator against unconstitutional constitutional amendments, thus protecting vital foundational values.

The Indian Constitution, although envisaged as flexible with an unfettered power of amendment, functions within the judicial limits set by the *"basic structure doctrine."* The doctrine operates as a check on the amending power of the Parliament, preventing any alteration that would effectively rewrite the Constitution's identity or compromise its core values. While allowing for necessary adjustments to address evolving societal needs, the doctrine ensures that amendments do not transgress into the realm of dismemberment, where the Constitution's fundamental principles would be at risk. In this way, the doctrine maintains the delicate balance between constitutional flexibility and rigidity, preventing political actors from overreaching their authority and protecting the democratic and philosophical integrity of the Constitution. Setting judicial limits, thus serves as a vital barrier against dismemberment, becoming the fine line that divides amendment from constitutional revision through dismemberment.