

DETERMINING THE CONSTITUTIONALITY OF CONSTITUTIONAL AMENDMENTS IN INDIA, PAKISTAN AND BANGLADESH: A COMPARATIVE ANALYSIS

*Aratrika Choudhuri & Shivani Kabra**

Unconstitutional constitutional amendments present an intractable conundrum in constitutional law theory and praxis, not the least because of the literal paradox in the term itself. The age-old tussle between the Parliament and the Judiciary, in delineating the scope of their powers, has had inevitable spill-over effects on determining how far a constitution can be altered and negated. We argue that a conflation of the variegated categories of constituent powers has led to the evolution of misplaced critiques of implied restrictions on the Legislature’s constitution-amending powers, which characterise doctrines such as the Basic Structure Doctrine to be ‘counter-majoritarian’ checks on democracy and effective political change. In order to understand and engage with these criticisms more fully, we embark upon a comparative constitutional inquiry into the developments of the Basic Structure Doctrine in India, Bangladesh and Pakistan. In an effort to seek clarity as to the scope and limitations of these doctrines, we engage with the oft-reiterated criticisms levelled against this doctrine, not simply by evolving a cogent epistemology on constitutional amendments, but rather with a focus on the actual evolution of the doctrine by the courts themselves. Such comprehensive engagement helps to dispel much of the objections and convoluted interpretations of the long-winded jurisprudence in this sphere, and serves to bring out the versatility of the doctrine in different jurisdictions with different socio-political contexts. We also critically examine the development of the Salient Features Doctrine in Pakistan, to determine how far it can be distinguished from the Basic Structure Doctrine, and how far it overcomes the objections to constitutional borrowing and legal transplantation from foreign jurisdictions. We seek to answer questions, both old as well as emerging, that accompany the operation of these doctrines, and to delve into the implications that these answers hold for Constitution-making and Constitution-amending powers.

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* 4th and 3rd year B.A./LL.B. (Hons.) students at the W.B. National University of Juridical Sciences, Kolkata.

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I. INTRODUCTION

Many new constitutional regimes have imported constitutional norms from abroad, which has influenced both constitution-making – encompassing constitutional revision and amendment – and constitutional interpretation.¹ Traditionally, the task of drawing out patterns of convergence and common trends among the constitutional orders of different countries, which resides predominantly in the realm of public law, has proved more difficult than observing similar trends in subfields of private law, as for instance in commercial law across industrialised nations.² In no small measure, this is owing to the difficulty in evaluating the different facets of the questions involved in comparative constitutional law, and assessing whether it is possible or desirable to undertake such comparative analysis in the first place. For instance, there still exists debate as to whether a parliamentary democracy can indeed be compared to a presidential one, whether it is possible to account for differences in ideology and national identity in such comparisons, whether the state of indigenous people’s rights should be compared in an ethnically pluralistic state and its more ethnically homogenous counterparts, etc.³ Cognisant of these debates, we undertake a comparative constitutional inquiry in India, Bangladesh and Pakistan with respect to the adoption and rejection of constitutional borrowing and transplantation of constitutional norms, doctrines, structures, practices and institutions, in the specific context of the Basic Structure Doctrine. The analysis proffered thus seeks to demonstrate that such comparative constitutional inquiry raises important questions and offers useful insights, and helps in

¹See THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 5 (Michel Rosenfield & András Sajóeds, 2012); COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA 12 (Sunil Khilnani ed., 2013).

²*Id.*; See generally COMPARATIVE CONSTITUTIONAL LAW (Tom Ginsburg & Rosalind Dixon eds, 2011).

³*Id.*

understanding the roots as well as future directions of constitutional jurisprudence in a more productive manner.

The Basic Structure Doctrine ('BSD') has evolved and been applied across multitudinous contexts and in light of variegated judicial traditions in different countries, to emerge as a truly global doctrine.⁴ This paper seeks to analyse the operation and implications of the BSD, both in theory and praxis, and specifically in the context of three countries-India, Pakistan and Bangladesh. This assessment helps to accurately identify the relevant judicial positions on whether implicit limitations on constitutional amendments exist in these countries. As noted by Yaniv Roznai, the lack of comparative constitutional analysis of the developments in hitherto ignored contexts – i.e. besides India or Germany, which are the traditional instances used for analysing constitutionality of restrictions on amendment powers – has led to a troubling stagnancy, and even mischaracterisation of the debate.⁵ Hence, it becomes imperative to account for the neglected practices, training and insights of these nations, in order to broaden the horizons of the discourse, and to enrich theoretical and pragmatic understandings of the limits of amending powers.

Therefore, this paper undertakes a more detailed approach, and analyses the operation of the BSD in the aforementioned three countries to further augment the debate in the Indian subcontinent. Instead of limiting the scope of comparative constitutional analysis in this paper to only finding commonalities across constitutional orders, or to explaining the modalities which each constitutional system adopts for conforming to its distinct needs, goals and aspirations,⁶ we posit that a broader framework of comparative constitutional analysis can simultaneously highlight the distinguishing traits that are often overlooked, as well as evince common patterns in constitutional issues and solutions framed in different polities.⁷ By undertaking detailed analysis of the development of case jurisprudence regarding the operation of the doctrine in the aforementioned three countries, this paper thus seeks to go beyond existing scholarly literature on the theoretical frameworks on primary and secondary constituent powers,⁸ and traverse the realm of actual interaction and operation of these frameworks located in particular socio-political contexts.

While the Indian regime does not entrench any formal 'eternity clause' in the constitution – that is, expressly grant supra-constitutional status to any law or provision in the constitution – the political exigencies and constitutional crises immediately following Indira Gandhi's constitution-amending efforts in order to subvert judicial review ('JR'), occasioned the Supreme Court to innovate and apply the BSD in *Kesavananda Bharati v. Union of India* ('Kesavananda Bharati').⁹ This doctrine, delineating the limited nature of constitution-amending powers and supremacy of core tenets of constitutional identity, has been continually upheld and reiterated in subsequent judicial verdicts, both in India, as well as

⁴Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* (2014) available at http://etheses.lse.ac.uk/915/1/Roznai_Unconstitutional-constitutional-amendments.pdf (Last visited on August 6, 2017) (Thesis submitted to the London School of Economics and Political Science).

⁵*Id.*, 241.

⁶See MARK TUSHNET, *ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW* 15 (2014).

⁷*Id.*

⁸These concepts will be discussed in detail in Part II of the paper. For a primer to the available literature, see *infra* notes 9, 10 and 12.

⁹*KesavanandaBharati v. Union of India*, (1973) 4 SCC 225.

directly in Bangladesh.¹⁰ Since the BSD derives from the entrenchment of implied judicial authority in the constitutional scheme, it does not find a precise definition, although a list of elements such as the rule of law, JR, Separation of Powers ('SOP'), etc. has been provided in these two countries.¹¹ Pakistan however presents a more complex scenario, as is evinced from the changing stance of the Supreme Court on the limits and scope of its authority to interfere with the exercise of constitutional powers; and from the unique treatment of the BSD; which has led to evolution of a new doctrine called the 'Salient Features Doctrine' ('SFD').¹² While its Supreme Court has explicitly rejected the BSD, doubts remain as to how far the content and operation of the SFD can in fact be distinguished from that of the BSD – owing in no small measure due to the many volte-faces of the Supreme Court of Pakistan on its position with respect to examination of validity of constitutional amendments.¹³ Thus, even though the express limits on the amending power– enshrined as Salient Features and as are abstracted from the Objectives Resolution 1949, or otherwise – have generally been accepted in the last decade in Pakistan, the contention that the Supreme Court should not interfere with examining validity of constitutional amendments at all, still holds weight.¹⁴

This paper delves into extensive case analysis, tracing the evolution of philosophy regarding BSD and SFD, analysing the Courts' comparative observations in the three countries on the limits of JR and whether such functions are better assigned to the Parliament itself, so as to clearly define the parameters of discussion of BSD and SFD. Thus, the narrower scope of this paper is to cut through the thicket of obscurity of ideological differences between BSD and SFD, and to attempt to present a clear account of the similarities and differences between the same. Such analysis covers new ground and offers insights for future studies on the BSD, since the SFD is a curious intermediate creature on the spectrum between express and implied eternity clauses in the constitutional text.

While earlier studies have traversed the preliminary ground of the individual operation of the BSD in India, Pakistan and Bangladesh,¹⁵ this paper seeks to identify commonalities and differences in such operation in a comparative framework. Thus, in a broader context, this paper will also attempt to posit and answer new issues, such as - *first*, the comparative judicial positions on the definition and limits of the "Constitution-amending powers" ('CAP') - whether it includes the right to destroy, even if it is characterised not merely as a mundane legislative power, but as a higher-ranked category of a constituent power - and identifying how 'foundational structuralism'¹⁶ and 'delegated power'¹⁷ arguments have influenced the eventual position on 'BSD' in these three countries; *second*,

¹⁰For a primer to the discussion on the BSD as operating in Bangladesh, see A.G. Noorani, *Behind the 'Basic Structure' Doctrine*, 18(9) FRONTLINE 4 (2001); Muhammad Hakim & Ahmed Haque, *Governmental Change and Constitutional Amendments in Bangladesh*, 2(2) SOUTH ASIAN SURVEY 5 (1995); Gabor Halmay, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?*, 19(2) CONSTELLATIONS 182-203 (2012); AbulHuq, *Constitution-Making in Bangladesh*, 46(1) PACIFIC AFFAIRS 59-76 (1973).

¹¹*Supra* notes 9 and 10.

¹²For a primer to the discussion on the Salient Features Doctrine ('SFD') as operating in Pakistan, see YanivRoznai, *Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea*, 61 THE AMERICAN J. OF COMP. LAW 657-719 (2013); Nasir Islam, *Democracy and Governance in Pakistan's Fragmented Society*, 24(12) INT. J. OF PUB. ADMIN. 1335-1355 (2006).

¹³*Id.*

¹⁴*Id.*

¹⁵*Supra* notes 9, 10 and 12.

¹⁶Discussed in detail in Part II.

¹⁷*Id.*

how the Courts have demarcated the scope of their authority to review the constitutionality of exercise of CAP – traditionally viewed as judicial overreach in cases where this authority impinges upon the legislature’s ostensibly unfettered CAP – and have evolved parameters and tests for conducting such JR; *third*, whether the silence of the Constitution on such authority vests the Court with such authority, or detracts from it; and *fourth*, how courts have distinguished between JR of the constitutionality of an ordinary statute as compared to such review of an amendment, and what these differences portend for their positions on BSD.

Fifth, broader questions on the scope of the judiciary’s role in these three countries shall be assessed- whether it is limited to mere protection against ordinary and mundane statutes that detract from the constitutional mandate, or also against amendments committing similar transgressions; and whether such determination involves redrawing the boundaries between the Parliament and the Judiciary in their functions to protect the constitution and democracy; and *sixth*, following from the previous question, it shall be attempted to examine the approach adopted by the Courts to determine whether the constitutionality of constitutional amendments is a judicial or political question, in light of distinctive constitutional philosophies of the individual polity.

Seventh, the comparative judicial positions on the entrenchment of a hierarchy of constitutional values and norms, as enshrined by the BSD, and the differences between primary and secondary constituent powers shall be examined. *Eighth*, we shall evaluate how the courts have sought or abandoned connections between amending the Basic Structure and amending the constitutional identity as a whole, especially where such amendment leading to replacement of the earlier constitution. *Ninth*, where the BSD stands accepted, we examine what limits can be imposed on the judicial interpretation of the BSD. *Tenth*, we assess the standards which are adopted for determining the constitutionality of such an amendment which itself denies the court’s authority to examine the constitutionality of the amendment – as in *Minerva Mills v. Union of India*.¹⁸

Eleventh, we trace the comparative judicial positions on whether the existence of express ‘eternity clauses’ (i.e. unamenable constitutional provisions) negates the existence of implied eternity clauses; and the intermediate position of the SFD on this spectrum. *Twelfth*, we evaluate whether the SFD as enunciated in Pakistan helps in ameliorating the criticism that the BSD effectively ensconces a supra-constitution within the constitution. *Thirteenth*, we locate the comparative judicial stances on whether the BSD should be expressly defined or function as an indicative list, and explore the practical implications of the same on determining constitutionality of the impugned amendments and statutes. *Fourteenth*, following from the previous question, we analyse whether differences exist between the SFD, and a BSD that is explicitly defined and includes an exhaustive list.

Fifteenth, we seek to present broader insights on the modalities by which earlier constitutions can be replaced in countries, where the BSD is accepted. This involves positing and attempting to answer questions such as how a reliable metric for measuring the will of the people to promulgate a new constitution, instead of merely amending the previous constitution, can be established; and whether any limitations would exist on such powers, similar to the BSD.

¹⁸*Minerva Mills v. Union of India*, (1980) 3 SCC 625.

In Part II of the paper, the normative and epistemological foundations of the basic structure doctrine are analysed, along with an attempt at clear exposition of the differences between primary and secondary constituent power, which lie at its core. The clarification of epistemological contours is especially significant for accurately identifying the differences in meaning and implications of express eternity clauses, the BSD and SFD, so as to cohere the extant case law and jurisprudence in appropriate categories, and to impart clarity to the convoluted evolution and operation of the BSD.

In Part III of the paper, we provide a brief overview of the socio-political context and other circumstances that led to the germination and adoption of the BSD in India and Bangladesh, and the adoption of SFD in Pakistan. Primarily, we explore the contemporary constitutional climate and the series of cases on basic structure doctrine are discussed, so as to orient the debates over the BSD after an appropriate examination of constitutional and jurisprudential history. The analysis is undertaken with an objective to offer the socio-political context of the Constitutional amendments, so as to render the case law exegesis undertaken in Part IV more holistic. References are also made to the notable constitutional provisions that relate to the amendment process and implied limitations thereon.

Part IV of the paper engages in depth with the questions presented above, by identifying core contested common themes across the questions, and analysing each theme in light of case law, observations of dissenting judges and other critical analyses. The positions of each country- India, Pakistan, and Bangladesh- with respect to each theme- for instance, the standards for JR of an amendment- are scrutinised and evaluated. Such comparative analysis not only serves to impart clarity to the often misunderstood respective judicial positions on BSD in each country, but more importantly, to gain insight into the nature of the oft-vaguely defined BSD. The insights from the comparative analysis are further expounded upon and streamlined in Part V, which help in answering the fifteen broad questions presented above. Such analysis adds value to the theoretical discourse that is often vexed with preconceived notions of the supra-constitutionality of BSD; and assists in identifying the constitutional and jurisprudential peculiarities that have led these three countries, with largely similar constitutional heritage, to adopt such widely differing variations of the BSD. Part VI offers an overview of the broad conclusions reached in the paper.

II. EXAMINING CONSTITUTIONALITY OF CONSTITUTIONAL AMENDMENTS: THEORETICAL FRAMEWORK AND EPISTEMOLOGICAL-NORMATIVE CONSIDERATIONS

This part engages with the theoretical rationales underpinning the idea of limitations on amendment powers. We seek to evolve a normative framework that explains the general theory of unamendability of certain provisions of the constitution (whether express or implied); and the nature and scope of CAP. We also attempt to explain how JR of amendments ties in with the substantive limits on amendment powers, whilst engaging with the criticisms of the normative bases of the BSD. A wide ranging enquiry into the value of Western constitutional philosophy frameworks, towards the understanding of the BSD, is not contemplated within the scope of this paper; because such exploration would require a broader and different analytical configuration. However, fundamental conceptions of primary and derivative constituent powers, constitutional identity, etc. derive in a large way from

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constitutional analyses all over the world, and we particularly draw from these to build our theoretical framework that explains the underpinnings of the BSD and SFD.

A. *COMPARATIVE CONSTITUTIONALISM, CONSTITUTIONAL BORROWING AND LEGAL TRANSPLANTATION- A CONTEXTUAL ANALYSIS*

Constitutional borrowing and legal transplantation are neither novel nor newly conceived notions.¹⁹ Constitutional borrowing usually occurs in polities where drafters are tasked with the formidable endeavour of framing new constitutions.²⁰ Since such polities generally possess limited domestic experience in such an endeavour, they solicit succour from other nations with a wealth of historical knowledge of constitutional theory, practices, adjudication and training.²¹ The experiences and traditions of these States with regard to their constitutional systems help the newer polities in assessing and selecting the features that are most appropriate for emulation and best suited to their unique domestic contexts.²² However, with the proliferation in such borrowing, the main issue that arises is the appropriateness of such borrowing, particularly when related to the activity of the courts.²³ Some scholars such as P.K. Tripathi argue that the practice of citing foreign sources is an invitation to judicial opportunism, as it can be wielded to suit the cognitive biases of historical association.²⁴ Other scholars have advocated that the overemphasis on perceptions of differences between similar constitutional systems may be artificial and harmful in practice.²⁵

As will be evident in the comparative analysis from part IV onwards, the increasingly voluble debate over the judicial application of foreign sources in constitutional adjudication, has found its way in the ways the courts in the three jurisdictions have distinguished between themselves, with respect to their positions on the Constitution-amending process. The proclivity of constitutional borrowing has been repeatedly denounced in Pakistan,²⁶ thus rendering the question of how permeable constitutional borders should be, as particularly relevant and evocative in this discussion.

Regardless of the final positions of the Supreme Courts in the three countries, the fact remains that the unique enunciation of the BSD in India, has permeated the jurisprudential configuration of its neighbouring countries significantly.²⁷ The problems imbricate in cross-national constitutional appropriation become especially marked when the relevant political and cultural differences are duly accounted for in depth, and not glossed over as comparative constitutional analyses are usually wont to do.²⁸ Thus, contrary to

¹⁹See Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108(4) MICH. L. REV. 459-522 (2010).

²⁰*Id.*

²¹*Id.*

²²See Lee Epstein & Jack Knight, *Constitutional borrowing and non-borrowing*, 1(2) INT. J. OF CONST. LAW 196-223 (2003).

²³*Id.*

²⁴P.K. Tripathi, *Foreign Precedents and Constitutional Law*, 57 COLUM. L. REV. 319-346 (1957); Epstein, *supra* note 22; Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1(2) INT. J. OF CONST. LAW 244-268 (2003).

²⁵ Tebbe, *supra* note 19; Sam F. Halabi, *Constitutional Borrowing as Jurisprudential and Political Doctrine in Shri D.K. Basu v. State of West Bengal*, 3(1) NOTRE DAME J. OF INT. & COMP. LAW (2013); Vlad Perju, *Constitutional Transplants, Borrowing, and Migrations* in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1304-1327 (Michel Rosenfield & András Sajó eds., 2012).

²⁶Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1(2) INT. J. OF CONST. LAW 244-268 (2003).

²⁷SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE* 10 (2009).

²⁸*Id.*

expectations, it appears that geographical contiguity offers no guarantee of the wisdom or advisability of constitutional borrowing²⁹— the fundamental concerns and unique socio-political history of each polity, as are implicated in decisions about the use of foreign sources in constitutional adjudication, must be examined carefully.³⁰

In Indian jurisprudence, concerns about the character of the polity receive constitutional articulation in the doctrinal language of the BSD.³¹ Invoking this designation, the Supreme Court of India has delineated certain constitutional features, which are of such fundamental significance, that any constitutional amendment threatening their existence must be necessarily struck down.³² In several landmark judgments, it has sought to justify upholding the BSD by reiterating the obligation of courts in well-functioning democracies to preserve the essence of constitutional identity.³³ In this context, the pertinent question is that if a particular element of the BSD is recognised as fundamental to a polity's constitutional identity— such as secularism in India — should the courts in nations where this element is differently constituted —for example, Pakistan — pursue its indigenous orientation towards this attribute instead? ³⁴ It can also be argued that, to the extent the immutability of a constitutional identity is attenuated by external influences, the courts can seek to reaffirm and establish the autochthonous constitutional identity by adapting foreign principles to local contexts.³⁵ These tensions have fraught and vexed debates on the wisdom of legal transplantation and constitutional borrowing in recent times,³⁶ and we remain cognisant of the same in our analyses of the BSD and the SFD.

In this context, any discussion on comparative constitutional inquiry would also require a review of objections to the notion of constitutional borrowing, the foremost of which have been articulated by Richard Posner. His argument primarily propounds that strategic judicial invocation of imported constitutional materials may prove unreliable, in light of the presumed inability of judges to make the necessary functional translations between different cultures.³⁷ These are not limited to semantics of language, but also extend to vast differences in theoretical and normative discourses owing to the diversity in social, cultural, political contexts in which constitutions are framed and interpreted, and in which courts function. He argues that the principle of *stare decisis* can mask flawed judicial selectivity in cherry-picking home-grown precedents, to achieve the judge's predetermined desired result.³⁸ Moreover, a lack of familiarity with the cultural context within which those precedents are developed, renders it impossible to attain the outcome sought by the uninformed judge.³⁹

While this objection to legal transplantation is indeed significant, it is also true that constitutional borrowing is often one of the most useful ways in which judges can engage in an interactive and dialogical attempt to resolve contentious issues, by drawing from the

²⁹*Id.*

³⁰*Id.*

³¹*Supra* note 9.

³²*Id.*

³³*See* Part IV of the paper for a detailed discussion of case law.

³⁴ Osiatynski, *supra* note 26.

³⁵*Id.*

³⁶*See* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 217 (2004).

³⁷ Richard Posner, *The Supreme Court: Foreword*, 119(31) HARVARD LAW REVIEW 86 (2005).

³⁸*Id.*

³⁹*Id.*

experiences of other countries.⁴⁰ Undoubtedly, such constitutional borrowing may stem from the judges' opportunistic and unreflective selectivity of foreign constitutional materials, as it may equally develop from their self-reflexive proclivities.⁴¹ However, the cultural concerns associated with the former may be ameliorated to a large extent, by a conscious attempt to bridge asymmetries and gaps in knowledge, continuous dialogue and reciprocal interaction between polities, and a keen cognisance of the individuality of constitutional identity of each polity.⁴² While this also places a higher charge upon the courts to uphold these standards and to review the complexities involved carefully, it is also important to remember that in an era of increased global trafficking of ideas and global 'judicialisation' of politics,⁴³ engaging in comparative constitutional inquiry helps broaden the horizons of public law and enriches public discourse in a radically new manner.

Therefore, in this paper, we eschew the reductive position that the practice of constitutional borrowing, like other judicial practices, can be readily reduced to any single motivation.⁴⁴ We locate ourselves in a position that constitutional borrowing and legal transplantation can indeed be useful, if one remains continually vigilant of the inherent limitations therein, as have been delineated above. For these purposes, we believe that a comparative constitutional inquiry must be comprehensive – to avoid the pitfalls of ignoring and accounting for differences in polities; objective – to enable fair assessment and evaluation of similarities and differences; and reasoned – to justify the aims of such analysis. A sound inquiry so conducted would avoid many of the difficulties imbricate in constitutional borrowing and legal transplantation.

B. CONSTITUTIONS, CONSTITUTIONAL AMENDMENTS AND POPULAR SOVEREIGNTY

Significant limitations operate on constitutional texts are, whether owing to the semantics and limitations of language; the goals and objectives enshrined in the text; or the derivation of fundamental universal principles from treaties, *jus cogens* norms, and evolving understanding of human rights; etc.⁴⁵ Most of these limitations are applicable in jurisdictions possessing a written and rigid constitutional frameworks; although they may also be applicable in unwritten constitutional contexts, where certain documents like the *Magna Carta* attain constitutional status – as in the case of the Constitution of the United Kingdom (U.K.).⁴⁶

Amendment procedures enshrined in the constitutional text help in ushering formal CAA, which denote formal changes in the constitutional text.⁴⁷ This is contrasted with alterations of the meaning and implications of the constitutional text through judicial interpretations or socio-political transformation.⁴⁸ Customarily, such amendment process is

⁴⁰See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE LAW JOURNAL (1999).

⁴¹*Id.*

⁴²*Id.*

⁴³HIRSCHL, *supra* note 36.

⁴⁴See Vlad Perju, *Constitutional Transplants, Borrowing and Migrations*, in OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1304-1327 (M. Rosenfeld and A. Sajo, ed.2012), for a critique of such a stance.

⁴⁵Roznai, *supra* note 4, 100.

⁴⁶R. George Wright, *Could a Constitutional Amendment Be Unconstitutional?* 22 LOY.U. CHI. L.J. 741 (1990).

⁴⁷Mads Andenas, *Introduction* in THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS xii (Mads Andenas, 2000).

⁴⁸*Id.*

more demanding and time-consuming than ordinary law-making,⁴⁹ so as to eschew the risks ushered in by extreme constitutional flexibility such as instability, uncertainty and subversion of the supremacy of the constitution in favour of short-term vested interests of intermittent political regimes.⁵⁰ The amendment process may entail participation by bodies other than the parliament, for instance ratification by states or by referendum; and it may also encompass different procedures for different subject matters in the constitution.⁵¹ As will be demonstrated by the discussion below, the peculiar constitutional amendment processes of each country reveal important facets of their constitutional and political cultures.

Conventionally, viewed from a layman's perspective, the idea of a constitutional amendment being unconstitutional appears to be an incoherent contradiction in itself.⁵² If the power to constitute a constitution is supreme, as a logical corollary, this should entail similar presuppositions about the omnipotence of powers of amending such constitution, and would render the notion of substantive limitations on amendment powers entirely inconceivable.⁵³ As long as the procedural requirements of such amendment process are satisfied, the amendment would then be considered legitimate, irrespective of its substance.⁵⁴

Further, in constitutional democracies, since "We, the people" are considered as the architects of the constitution;⁵⁵ it is argued that they can similarly change the constitution as well.⁵⁶ Thus, popular sovereignty is traditionally taken to justify the epistemology of unfettered amendment powers.⁵⁷ However, the fallacy underlying this extension is to conflate the "existence" of popular sovereignty on one hand, and its "accessibility" through the constitutional text, on the other. By positing popular sovereignty as existing in a supra-constitutional realm, above the constitutional text, no limitations can then exist on its power, whether procedural or substantive; for the procedural limitations are then entirely superfluous in face of the omnipotence of popular sovereignty.⁵⁸ In conceiving "the people" as existing outside and independently of the constitutional text, it thus becomes possible to justify the negation of the constitution, including abrogation of its amending provisions.⁵⁹

In order to resolve this seemingly intractable conundrum, and for the amending provisions to be meaningful and to actually bind "the people" under the extant constitutional regime, it becomes imperative to re-imagine and construe the amending provisions as not referring to the unconstitutional 'outside' (popular sovereignty), but as

⁴⁹ It is usually a more drawn out and detailed decision-making process, requiring more involvement in terms of a qualified majority in parliament.

⁵⁰ Andenas, *supra* note 47.

⁵¹ *Id.*

⁵² See WILLIAM F. HARRIS II, *THE INTERPRETABLE CONSTITUTION* 69 (1993) (describing the idea of an unconstitutional constitutional amendment as an intractable conundrum and a befuddling paradox); *THE AMERICAN PROSPECT*, 1995, at 20, 24 (which literally interprets that a constitutional amendment that has been enacted properly cannot be unconstitutional); J. L. Mackie, *Evil and Omnipotence*, *MIND*, Vol. 64, No. 254. (April, 1955), pp. 200-212, available at <http://www.ditext.com/mackie/evil.html> (Last visited on August 21, 2017).

⁵³ *Id.*

⁵⁴ Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 *ISR. L. REV.* 321 (2011).

⁵⁵ See *The Constitution of India, 1950, The Preamble*.

⁵⁶ Roznai, *supra* note 4, 105.

⁵⁷ *Id.*

⁵⁸ T.R. ANDHYARUJINA, *THE KESAVANANDA BHARATI CASE – THE UNTOLD STORY OF STRUGGLE FOR SUPREMACY BY SUPREME COURT AND PARLIAMENT* 100 (2012).

⁵⁹ *Id.*

referring to the constitutional ‘inside’.⁶⁰ This ‘inside’ is the BSD or the essence of the constitution, upon which the edifice of the constitutional scheme rests.⁶¹ Thus, the constitution can be envisaged in the form of a structure, with a core foundation that constitutes its essence and comprising pillars which lend support to its provisions that are interrelated in diverse ways.⁶² This connotes the notion of “foundational structuralism”, i.e., if the foundation of this structure is destroyed, the pillars can no longer stand. In the same way, even after complying with constitutionally prescribed procedural requirements, if a constitutional amendment violates the constitutional essence, controverts unamendable constitutional provisions or replaces the existing constitutional scheme by ushering in a new one and thereby substantively changing the constitutional identity, it can still be deemed unconstitutional.⁶³ Therefore, the logic of “foundational structuralism” is an important normative conception that can help in solving the paradox of unconstitutional CAA.⁶⁴

C. CONSTITUENT POWER VERSUS CONSTITUTED POWER: CONCEPTUALISATION OF AMENDMENT POWERS

The scope of CAP, and the restrictions placed on the same fundamentally determine the purview and contours of exercise of CAP.⁶⁵ Here, it is important to distinguish between ‘constituent’ and ‘constituted’ powers. Constituent power directly corresponds to the concept of popular sovereignty discussed above – it is the extraordinary supra-constitutional power that is necessary to consolidate the constitutional apparatus of a nation, which is unrestricted by extant constitutional schemes or limitations.⁶⁶ Constituted power, on the other hand, is an ordinary and limited power which is created and engendered by the constitution, and which operates in consonance with the terms and scope delineated using positive law.⁶⁷ Thus, while constituent power can be clearly disaggregated from the constitutional apparatus as whole, and can be found to exist independently of the constitutional text, constituted power derives completely from the particular constitutional order.⁶⁸ In this way, constituted powers derive their limited competence from the constitution, and owe their existence to constituent powers, which are superior to them owing to the lack of limits on their operation.⁶⁹

This exercise in differentiating the two categories helps in conceptualising limitations on the CAP. When viewed from the lens of constituent power, the CAP can be envisioned as wholly unfettered, free from any restrictions concomitant with the constitutional text, framework and rules.⁷⁰ It can be argued that since CAP introduce more detailed and complex procedures relating to ratification, involve a variegated set of

⁶⁰Roznai, *supra* note 4, 120.

⁶¹*Id.*

⁶²*Id.*

⁶³*Id.*

⁶⁴*Id.*

⁶⁵Barak, *supra* note 54, 330.

⁶⁶Roznai, *supra* note 4, 10.

⁶⁷ Markus Peterberg, *Constituent Power Beyond the State: An Emerging Debate in International Political theory*, 42(1) MILLENNIUM JOURNAL OF INTERNATIONAL STUDIES 224-238 (2013).

⁶⁸Kumarjit Banerjee & Bulbul Khaitan, *Resolving the “Paradox of Constituent Power and Constitutional Form” From A Schmittian Account of Sovereignty: Its Relevance to The Understanding of “Constituent Power” and “Amending Power”*, 1 NUJS L. REV. 547 (2008).

⁶⁹Richard Albert, *The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada*, 41 QUEEN'S L.J. 143 (2015).

⁷⁰*Id.*

stakeholders and State organs, amend norms created by the constituent power and thus establish new values, and thus locate the final locus of political sovereignty, they ensconce the supremacy of the constituent power over ordinary constituted power.⁷¹ However, if the subordinate constituted power conception is used to understand the nature of the amendment power, then it is clear that the CAP can be envisaged as similarly subservient to the constitutional text, much akin to legislative, judicial, or executive powers.⁷² Thus, CAP present a seemingly intractable conundrum owing to their dual-faceted nature, possessing characteristics of both constituted and constituent powers, and represent an intermediate position on this spectrum.

The functions of amending clauses to the constitution are well-documented – they uphold the inviolability of the constitution in the face of buffeting winds of socio-political transformation; limit the purview of functioning of political and constitutional actors by ensconcing specific procedures for modifying the constitutional text; place a constitutional check on the courts by outlining procedural conditions for the exercise of CAP; and seek to integrate the fundamental constitutional values with the overall constitutional scheme.⁷³ However, they also play a more proactive role by authorising majoritarian institutions constituted by political actors (such as the Parliament) to alter the constitutional text, as required by the exigencies of the contemporary era, so long as the conditions are complied with.⁷⁴ The amendment rules entrench a hierarchy of constitutional values – reflecting a well-functioning democracy's understanding of its constitutional identity; fulfil a pre-commitment function – rendering it more onerous for political agents to rapidly modify the established preferences engendered by the original generation that initiated popular sovereignty; and foster good governance and democratic practices – providing sufficient notice, certainty and predictability to political actors and “the people” as to who can alter the constitutional identity.⁷⁵ Depending upon the distinctive challenges faced by an individual polity, and the stage of development of polity in which it locates itself, from founding to consolidation of modern democracy, these amendment rules are necessarily diverse across multifarious socio-political contexts.⁷⁶

Thus, it is possible to argue that amendment powers represent a grey area between the antinomies of constituted and constituent powers.⁷⁷ Their categorisation becomes easier upon distinguishing between original (primary) and derived (secondary) constituent powers.

D. PRIMARY CONSTITUENT POWERS VERSUS SECONDARY CONSTITUENT POWERS: THE RATIONALE OF DELEGATED POWERS

Upon encapsulating amendment power as a special power – which is inferior to the unfettered constituent power, but more superior to the ordinary constituted and limited

⁷¹*Id.*

⁷²*Id.*

⁷³Roznai, *supra* note 4, 125.

⁷⁴ANDREW ARATO, POST SOVEREIGN CONSTITUTION MAKING: LEARNING AND LEGITIMACY (2016).

⁷⁵Chantal Mouffe, *Carl Schmitt and the Paradox of Liberal Democracy*, 10 CALJ & JURISPRUDENCE 2 (1997).

⁷⁶RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995).

⁷⁷Roznai, *supra* note 4, 150.

legislative powers – it is possible to distinguish between the two categories of primary and derivative constituent powers.⁷⁸ While the first category of power is exercised in circumstances necessitating establishment of a new political order, secondary constituent power is exercised under conditions established by the constitution. While the CAP certainly afford the space to change and revise the constitution, they do not vest the authority to abrogate and destroy the constitution itself – a matter left to the realm of original constituent powers belonging to ‘the people’.⁷⁹ This differentiation helps in understanding that there exist degrees of constituent powers, and not all of them therefore can tie in with popular sovereignty.

Delegation proffers the legal framework to explain the rationale for such distinction.⁸⁰ The amendment power can be envisioned as a delegated derivative constituent power, which is delegated from the original power reposed in popular sovereignty, and is made accessible through the constitution.⁸¹ The analogy of delegation and trust explicates this theorisation of amendment powers. The conditionality of the trustee’s (or even the donee’s) right to possess the corpus of the trust, on its fiduciary obligation to ensure conformity with the stipulations concomitant with the vesting and enjoyment of the trust, can be likened to the amendment authority’s right to possess and exercise CAP, subject to its obligation to comply with the substantive and procedural conditions imposed on the vesting and exercise of such power.⁸² Owing to the very nature and scope of trust, the exercise of the fiduciary CAP necessarily entails limits and restrictions.⁸³ Thus, we envisage the people’s constituent power to be superior to the CAP, not only because of chronological precedence, but because of its superior nature.⁸⁴ Just as an ordinary legislation conflicting with constitutional provisions is struck down, so also an amendment, being constituted by derivative constituent power, is inferior and would be struck down where it controverts a constitutional provision ordained by the primary constituent power.⁸⁵

Going further, in the case of ‘unamendable amendments’, as was observed in *Minerva Mills Ltd. v. Union of India* (‘Minerva Mills’)– i.e., when unamendable provisions are expressed in the form of eternity clauses – a new complication is created, since here the amendment itself stipulates that it may not be subject to amendments.⁸⁶ The delegated powers framework can help solve this conundrum. Given that CAP derive from the higher original constituent power, while they may be subsequently amended by the secondary power itself, they cannot transcend the limitations set the limited scope of authority and competence of secondary constituent power.⁸⁷ Thus, implied limitations restrict the establishment of unamendability of amendments, given the existence of the higher authority of original constituent power, which has full power to do so.

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹GARY J. JACOBSON, CONSTITUTIONAL IDENTITY (2010).

⁸²*Id.*

⁸³*Id.*

⁸⁴ Vincent J. Samar, *Can A Constitutional Amendment Be Unconstitutional?*, 33 OKLA. CITY U. L. REV. 667 (2008).

⁸⁵ Manoj Mate, *State Constitutions and The Basic Structure Doctrine*, 45 COLUM. HUM. RTS. L. REV. 441 (2013).

⁸⁶*Minerva Mills v. Union of India*, (1980) 3 SCC 625.

⁸⁷*Id.*

The distinction between constituent and constituted powers, and in turn, primary and secondary constituent powers, helps in understanding the meaning nature and scope of amendment powers. This helps in delineating the limitations on such CAP, through the evolution of doctrines such as the BSD and SFD, which also help in outlining the role of courts while examining the constitutionality of amendments in this context. Further, this framework explains how the spectrum of express eternity clauses, the BSD and the SFD can coexist, as discussed below.

It must be noted that modern constitutional democracies require conceptualisations that can retain their roots,⁸⁸ whilst simultaneously facilitating constitutional responsiveness to rapid political, social and economic transformations.⁸⁹ It is important to understand that express eternity clauses in the form of unamendable provisions, even when entrenched in the constitutional text, only limit the secondary constituent power i.e. CAP⁹⁰ - they never limit the people's sovereignty, that reigns supreme.⁹¹ This is because it is possible to still alter the constitution containing such express eternity clauses,⁹² through judicial interpretation⁹³ and extra-constitutional forces such as revolution.⁹⁴ These represent the inviolable core that facilitates and maintains the requisite constitutional intransigence at critical constitutional upheavals.

E. ANALYSING IMPLIED LIMITATIONS ON AMENDMENT POWERS

1. The Logic of Foundational Structuralism – Deconstructing the Imagery of the Constitutional Essence

One of the key insights gleaned from the taxonomy of delegated powers is the fundamental postulate that the CAP cannot be wielded to dismantle the constitutional order itself.⁹⁵ The very constitution of the delegated CAP is for ensuring self-preservation of the constitution.⁹⁶ Were it to destroy the constitution, it would subvert its own purpose, its *raison d'être*, and would amount to a blatant breach of trust, since it would amount to usurpation of primary constituent power which was not delegated by “the people” in the first place.⁹⁷

Going one step further, it is then possible to assert that since the CAP cannot destroy the constitution, it similarly cannot controvert the core foundation and essence on which the structure of the constitutional scheme is constructed – the basic principles and key constitutional edicts.⁹⁸ These form the substantive constitutional core, without which the pillars of the provisions, and the configuration of interrelation and interlocking between these provisions, cannot stand.⁹⁹ This idea imputes the conception of the constitution as a living, organic whole, which is built on basic fundamental principles and norms that embody the spirit pervading throughout its provisions.¹⁰⁰ This essentially denotes the argument of

⁸⁸Roznai, *supra* note 4, 150.

⁸⁹*Id.*

⁹⁰ Jos F. Ingham, *Unconstitutional Amendments*, 33 DICK. L. REV. 161 (1928).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵CARL SCHMITT, *LEGALITY AND LEGITIMACY* (2004).

⁹⁶*Id.*

⁹⁷*Id.*

⁹⁸SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA* (2009).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

“foundational structuralism”, which posits that constitutions are not merely formal documents charting the aspirations of the people, but that they reflect substantive social, philosophical and political principles which constitute the very ethos and quintessence of the constitution.¹⁰¹ Thus, if the very crux of the constitution were to be annihilated, then the pillars can no longer stand, and the entire structure of the constitution crumbles to dust, even if stray inferior constitutional procedural rules persist in terms of limited legal validity.¹⁰² When the CAP modifies and alters the foundational credos that form the lifeblood of the constitution, it no longer conforms to the original purpose for which it was created and delegated in the first place. Thus, in consonance with its nature as a delegated derivative constituted power, the CAP can neither countermand the constitution, nor can it obliterate the primordial norms and principles at the heart of the constitution.¹⁰³ For this purpose therefore, it is clear that if these key basic principles indeed need to be altered, then such alteration can be occasioned only using the means of primary constituent power.

2. The Configuration of Constitutional Values and its relationship with Constitutional Identity

The logic of foundational structuralism is built on an understanding of two elements – constitutional identity and configuration of constitutional values.¹⁰⁴ The meta-narrative imbricate in visualising the constitution as an interconnected whole, exposes the fallacy implicit in the fragmented cherry-picking of ostensibly autonomous constitutional provisions, envisioned as disaggregated and detached from each other.¹⁰⁵ Rather, the logic discussed above enables in abstracting the key fundamental principles intrinsic to the constitutional text and provisions, which interrelate and consolidate the order and edifice of the constitution as a harmonious whole.¹⁰⁶ The conception of the constitution as an organic, living whole thus brings within its fold two postulates:¹⁰⁷ the interconnectedness of its core values with its provisions, and the transmutation of its expositive meaning through adjudicative training, practices and experiences, in consonance with the transformations in the external societal milieu.¹⁰⁸ The CAP is a more formal and explicit provision that is entrenched in the constitution itself, as a safety valve for allowing such necessary and vital transformations in the constitutional text.¹⁰⁹ Thus, while it is evident that the second postulate renders the CAP crucial for facilitation of the evolution of the constitutional order in tune with the changing times and societal needs; the first postulate involving the metaphor of the constitution as a living whole, entails that the fundamental constitutional core cannot be abrogated, if the entire constitutional order is to be prevented from collapse.¹¹⁰

Even in terms of political philosophy, these essential basic tenets reflect the social fabric, political identity and the shared values nurtured by the citizens of the polity, and are ensconced in the constitutional text to bolster legitimacy and stability of the constitutional

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Casey Westover, *Structural Interpretation and the New Federalism: Finding the Proper Balance Between State Sovereignty and Federal Supremacy*, 88(4) MARQUETTE L. REV. 698 (2005).

¹⁰⁵ See GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE* (1999).

¹⁰⁶ DONALD P. KOMMERS & ORS., *AMERICAN CONSTITUTIONAL LAW: GOVERNMENTAL POWERS AND DEMOCRACY* (2nd ed., 1992).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

and political order of the State itself.¹¹¹ Therefore, a change in these core values, which necessitates a change in the constitution, requires an invocation of the primary constituent power by the citizens of the State itself. The secondary and delegated nature of the CAP therefore ipso facto implies that it cannot abrogate the founding values of the constitution, without heralding a simultaneous disintegration of the constitutional order as a whole – devoid of its identity and essence, nothing coherent remains of the constitution itself.¹¹²

3. Support from the Textualist Interpretation

As will be evinced from the case analysis for BSD and SFD, scholars and courts have placed great reliance on the literal meaning of the term ‘amendment’ to indicate that amendments cannot lead to repeal or abrogation of the constitution altogether. The etymological implication may be traced to the Latin verb “*emendere*” that connotes “to correct fault” or “to rectify”.¹¹³ By no stretch of imagination, therefore, can it be argued that the word amendment could be extended to wholesale negation and reconstruction of the constitution altogether. Thus, even a literal, textual and originalist interpretation demonstrates that the contours of the constitutional scheme and its essential norms constrain the purview of functioning of CAP.¹¹⁴ As has been recognised in recent cases in India, amendments may lead to dramatic and widespread changes in the constitution. Thus, theoretically, even all the Constitution’s provisions can be altered – but the substantive spirit or the core nucleus of the Constitution cannot be changed. Therefore the quantum of provisions altered is not the yardstick for measuring the constitutionality of an amendment – it is the content of the provisions that is altered, which forms the benchmark.

It can be therefore inferred that, the BSD is not simply a supra-constitution conjured by the judiciary out of thin air so as to ensconce its supremacy. Rather the BSD is an inexorable adjunct of the blueprint of CAP, and exists in harmony with the fundamental notion of a polity possessing the necessary executive, legislative, judicial, and constitutional checks and balances. It is necessarily borne by the political and philosophical traditions that underlie the foundations of modern constitutional polities across the world.

F. ENGAGING WITH CRITICISMS OF IMPLIED LIMITATIONS ON AMENDING POWERS

The question that arises, upon the acceptance of the BSD as a natural corollary of the content of CAP, is this: does this equate to permanence and unshakeable entrenchment of the Constitution for all future generations? Does it imply that the constitution can never be amended? By accepting the notion of a primary constituent power, we explicitly recognise that people have the power to constitute a constitution. Thus, in case of eventualities where the fundamental values of a polity change, or with the inevitable passage of time, must the people resign themselves to an unamendable immutable Constitution for eternity? Engaging with this question becomes imperative in light of the frequent criticisms directed towards the

¹¹¹ Vicki C. Jackson, *Constitutions as "Living Trees"? Comparative Constitutional Law and Interpretive Metaphors*, 75 *FORDHAM L. REV.* 921-960 (2006).

¹¹²*Id.*

¹¹³*Id.*

¹¹⁴*Id.*

BSD, that it entrenches an unamendable constitution, by rendering it impermeable to changes in the will and aspirations of the people who constituted it in the first place.

The apprehension stems from a conflation of the primary constituent power with secondary constituent power. As analysed above, no extant constitutional constraints operate on the primary constituent power, whether included in the constitutional scheme, provisions, eternity clauses or its current core of fundamental values.¹¹⁵ It is entirely separate from the delegated secondary nature of the constituent power imbricate in the CAP, which is restricted by unamendable provisions of the constitution, whether express or implied.¹¹⁶ The process flows like this- once the exercise of primary constituent power promulgates a new constitution, the secondary constituent power and constituted power operate, and usual limitations of unamendability apply.¹¹⁷ The primary constituent power recedes to the background, but it is never vanquished. Thus, the primary constituent power can change the basic structure, for it is the superior power, the conferring power and the people's sovereignty that legitimises the entire Constitutional framework.¹¹⁸ However, owing to the theory of the basic structure and consequent restrictions upon amendability, such change cannot be effectuated through the extant ordinary constitution-amending procedures, but through a radically different constituent procedure that operates on a higher conceptual plane.¹¹⁹ Where the changing needs of the society necessitate that 'the people' – in whom final sovereignty and the zenith of constitutional authority is reposed – act to transmute the basic values underlying the extant constitutional scheme, such alteration and even espousal of a new constitutional order requires that they exercise their primary constituent power.¹²⁰ This clearly denotes that the legitimacy and validity of a constitution, which is traced back to its fundamental values, can also change, and therefore, none of these edicts are immutable in such a manner that they can never be abrogated – rather their alteration and repudiation requires a wider power epitomised by the primary constituent power – the only limitation being that they cannot be so destroyed or modified through an exercise of mere secondary delegated constituent powers.¹²¹ In extraordinary political or constitutional crises therefore, an inherent safety valve continues to exist in the form of primary constituent power to secure requisite constitutional change.¹²²

This understanding of the interrelationship between popular sovereignty and exercise of primary constituent powers also enables to refute the 'dead hand' objection, which argues that the BSD renders the constitutional order stale and unresponsive to socio-political developments in the polity.¹²³ It is argued that by ensconcing the core of the constitution as unamendable, the BSD restricts and trammels the power of the future generations to transcend the values embodied therein, thus fostering stagnancy and dissatisfaction with the ostensibly artificial restrictions on the people's desires and wishes.¹²⁴ This criticism emerges from a gross misconception of the nature and limits of the BSD, and

¹¹⁵*Id.*

¹¹⁶Roznai, *supra* note 4, 150.

¹¹⁷*Id.*

¹¹⁸*Id.*

¹¹⁹*Id.*

¹²⁰*Id.*

¹²¹*Id.*

¹²²*Id.*; (The self-attribution and self-reflexive identification projects a mythical collective, a larger body comprised of the present generation linked with future generations, through a recognition of the consent of the real people. It forms the normative basis for identification of the overriding authority of popular sovereignty over all constituent powers).

¹²³Barak, *supra* note 54, 110.

¹²⁴*Id.*

from a conflation of the two categories of constituent powers. As stated before, the BSD is limited to only curbing unconstitutional exercises of the derivative constitution-amending power – by definition, it cannot be extended to primary constituent power, which is supreme and overrides all extant constitutional regimes.¹²⁵ As would be evident from the analyses undertaken in the Parts III and IV of the paper below, the concept of the BSD was formulated as an inherent response to the untrammelled and arbitrary exercises of the constitution-amending powers, which spring from the current constitution. Where, however, the primary constituent power is clearly imbued with the overriding sovereignty over all extant constitutional regimes, it would be clearly inaccurate and a fallacious characterisation of the BSD to claim that it unduly restricts the will of the people. Rather, the BSD is in fact a facilitator of the will of the people insofar as it enables the current constitutional order to cherish and protect its values, and provides a safety valve for passing amendments that are in line with the constitution. It does not seek to unduly limit the powers of the constitution-amending body, but as the socio-political histories of the jurisdictions where the BSD has evolved evince, it has emerged as the sole defense against autocratic and whimsical exercises of constitution-amending powers that seek to upturn the constitutional order via undemocratic means.¹²⁶

Further, it also helps to respond effectively to the ‘revolutionary means’ objection, at least to an extent. It is often argued that unamendability, by entrenching certain principles as immutable, blocks the possibility for drastic change through peaceful means and CAA, and thus, paradoxically increases the probability of revolutions.¹²⁷ This is because the people of the polity might find the BSD as an excessive check that blocks all attempts to amend the constitution, thus leaving them no choice but to resort to extra-constitutional means, such as rebellion, in order to facilitate wide-ranging changes in the constitutional order.¹²⁸

This argument can be responded to on the following counts. Essentially, the BSD has been conceptualised as a guardian of the founding values of the current polity, in the context of a modern constitutional democracy, where stability and supremacy of the constitution ensure protection of the constitutional edicts considered fundamental by the citizens themselves. Where the people’s will changes, the constitution that arises from, and is constituted by such will also changes – this series of changes operates on a plane completely distinct from and above the operation of the BSD.¹²⁹ The BSD acts as the last defence and the indispensable reminder of the lifeblood of the constitution, thus providing the people of the polity a chance to assess the current values and to arrive at a consensual decision whether these indeed need to be wholly amended.¹³⁰ Thus, by providing a constitutionally entrenched mechanism for enacting changes in the constitutional order, the BSD bolsters the legitimacy of the properly enacted constitutional amendments, and reduces chances of rebellion, through expression of will of the polity.¹³¹ It can then be understood that the BSD is a natural, inherent and necessary check, rather than a supra-constitutional imposition impeding free exercise of primary sovereignty vested in the people.¹³² By understanding the distinction between primary and derivative constituent powers, and identifying the applicability of the BSD only to the latter, the unwarranted criticisms against the BSD can thus be defeated.

¹²⁵*Id.*

¹²⁶*Id.*

¹²⁷*Id.*

¹²⁸HANNAH ARENDT, ON REVOLUTION 200 (2006).

¹²⁹*Id.*

¹³⁰*Id.*

¹³¹*Id.*

¹³²*Id.*

G. IS THE PRIMARY CONSTITUENT POWER UNFETTERED? UNDERSTANDING THE MUTABILITY OF THE BASIC STRUCTURE OF THE CONSTITUTION

The ambit of amendment powers consists of possibilities ranging from express eternity clauses, SFD, implied limits, BSD to referendum enshrined through the provisions of the constitution itself. These configurations and permutations are especially significant because they present different corresponding variations of primary and secondary constituent powers. It is therefore essential to evolve a holistic spectrum within which it is possible to capture all these possibilities, as well as future mutations of such combinations, so as to resolve the tension between constitutionalism and democracy imbricate in determining the constitutionality of CAA. By understanding the precise nature and limitations of each category, the conceptual and practical distinctions can then be carved out, and conflation of typologies can be avoided.

As stated earlier, the primary constituent power, which has the power to promulgate and replace constitutions, is not fettered by any restriction imposed by unamendable provisions, whether express or implied. It is reposed in an authority higher than the secondary and delegated constituent power represented by the CAP, which is vested in political actors including the legislature.¹³³ Thus, no limitation imposed by the extant constitutional order, whether imposed by express eternity clauses or by substantive principles enshrined in the basic structure and core of the existing constitution, can impede the untrammelled exercise of the constituent power vested in popular sovereignty. The only limitations that this supra-constitutional power can admit of are directly related to the possible theoretical and political constraints related to the exercise of the will of the people of a polity. In this regard, it is apposite to refer to two contrasting conceptions of this category of constituent power – while the ‘immanent’ conception has a limited view of the popular sovereign, by equating it to the temporary political majority; the ‘transcendent’ conception undertakes an approach in consonance with the meta-narrative of popular sovereignty, by attempting to interconnect the numerous generations and to cohere the legacies of constitutional orders in a polity under certain core fundamental edicts.¹³⁴ The transcendent conception of primary constituent power thus offers the people an opportunity to understand the essential supra-constitutional identity of the polity they inhabit, and to collectively participate in upholding and cherishing these common ideals, as well as altering them when the need so arises.¹³⁵

An important instance of the transcendent conception can be found in the German constitution, i.e. the Basic Law for the Federal Republic of Germany (1949), where it has been attempted to recognise and formally entrench the primary constituent power in the constitution. Article 146 of the Basic Law states that “[t]his Basic Law will lose its validity on the effective date of a constitution that has been chosen by the German people in a free decision.” Article 146 thus simultaneously recognises the authority of the popular sovereignty inherent in the will of the German citizens; whilst also recognising the mutability of the Basic Law promulgated by the people, through the exercise of such will. This constitutional cognisance of the people’s constituent power however does not imply that popular sovereignty would end, if the Basic Law were to be abrogated. Rather, a lack of

¹³³*Id.*

¹³⁴*Id.*

¹³⁵ *Id.*; See Engineering CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA (Xenophon Contiades ed., 2013).

stipulations or restrictions on the exercise of the primary constituent power clearly highlights its supra-constitutional character.¹³⁶ While this Article alludes to the referendum process for exercise of the people's constituent power, this does not mean that such power cannot be exercised through other extra-constitutional means – the Article only offers an in-built constitutional mode among the variety of options available. The constitutional fortification of the referendum process does offer some advantages, insofar as it can prevent political tumult in times of political or constitutional crises, by streamlining the exercise of the people's constituent power through a relatively peaceful and cooperative means, as compared to alternatives such as revolution.¹³⁷ The referendum system, when properly implemented, can foster inclusive deliberations in relatively fixed timeframes, to effectuate desired constitutional change. However, this method is reserved for the extraordinary constitutional 'moments' of crises, rather than usual CAA executed through the exercise of secondary constituent powers represented by CAP, which are generally fettered by additional stringent constitutional checks, as represented by the BSD. This does not imply that the exercise of the people's constituent power is simpler – the referendum system can be in fact much longer, time-consuming and lead to less effective or legitimate constitutional change.¹³⁸ Rather, it is argued that even a constitutional recognition of the supra-constitutional power, represented by the people's constituent power, cannot fetter its exercise.

Another related point that emerges from this analysis is that it is a mischaracterisation of the BSD to argue that the basic structure or any of its features are forever entrenched, unamendable and permanent, such that stagnancy in a constitutional order persists owing to the immutability of the BSD ensconced through unpopular means or judicial adventurism. These oft-reiterated denunciations of the BSD are easily refuted by understanding that the primary nature of constituent power reposed in popular sovereignty can change the BSD any time it wishes.¹³⁹

H. JUSTIFYING JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS

Once the intrinsic nature of the BSD to the constitutional order is understood, it is easier to justify the exercise of JR of CAP. Not only does such judicial scrutiny enable continual vigilance with respect to the procedural limits prescribed expressly by the constitution on CAP, it also helps in preservation of the implied core values embodied imbricate in the constitution, necessary for upholding the constitution as a whole.¹⁴⁰ The concepts of limited government and constitutional supremacy, which underlie modern constitutional democracies, lead to the necessary corollary that the guardian of the constitution, i.e. the courts, must ensure that the legislature employs its CAP in conformity with the constitutional text, scheme and ideals.¹⁴¹

¹³⁶*Id.*

¹³⁷*Id.*

¹³⁸*Id.* See Toddi Steelman & William Ascher, *Public involvement methods in natural resource policy making: Advantages, disadvantages and trade-offs*, 30 POLICY SCIENCES 71-90 (1997) (discussing the disadvantages of the referendum system in detail).

¹³⁹*Id.* See, e.g. Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18(2) J. OF DEMOCRACY 22 (2007); Madhav Khosla, *Addressing Judicial Activism in the Supreme Court: Towards an Evolved Debate*, 32(55) HASTINGS INT'L & COMP. L. REV. 25 (2009) (discussing these criticisms directed towards the basic structure doctrine).

¹⁴⁰Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 3692 (2002).

¹⁴¹SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA* (2009).

Thus, not only can JR enforce the legitimacy of procedural limits on CAP, such as the minimum voting requirements, but also bolster the eternity clauses and BSD, by underscoring the idea that amendment powers are secondary and delegated to the amending authority by the constitution itself, and must therefore be exercised strictly within these limits.¹⁴² Thus, akin to how JR is accepted and affirmed in cases of *ultra vires* where an ordinary statute violates a constitutional provision, similarly a constitutional amendment that violates the eternity clause or the BSD necessitates judicial scrutiny. As is evinced right from *Marbury v. Madison*¹⁴³ – where Chief Justice Marshall recognised JR as an essential judicial duty – the sanctification of JR of CAA has been entrenched in constitutional jurisprudence in several countries. It finds support from a conglomeration of ideas, ethics and principles that form the lifeblood of modern constitutional orders – constitutional supremacy, rule of law and constitution, limited government and SOP.¹⁴⁴ To take this a step further, it can be argued that by upholding the constitution and by preserving and jealously safeguarding the secondary delegated CAP, the exercise of JR also recognises the supra-constitutionality and superiority of the will of the people embodied by popular sovereignty, which is unfettered by extant constitutional limits, and which can exercise primary untrammelled constituent power to reshape or dismantle the constitutional order as and when necessary.

The foregoing discussion on the essential contrast between the primary and derivative constituent powers, and the necessity of JR to sustain this distinction, also helps in understanding the fallacies in oft-reiterated criticisms directed towards the BSD. As stated earlier, a major criticism of the BSD is that it enables “unpopular”, unelected, autonomous judges to strike down CAA heralded by legitimate elected political actors, such as people’s representatives in the legislature.¹⁴⁵ This has been the primary charge upon which Pakistan’s Supreme Court persistently refused to review the validity of CAA, by characterising them as political questions more appropriately suited to the Parliament’s mandate. However, recently, the SC of Pakistan has started accepting a more liberal view in favour of JR, as will be analysed below. The mutability of the BSD upon exercise of the people’s foremost constituent power, the necessity of JR for upholding constitutional supremacy and SOP, the power of the courts to strike down unconstitutional laws and amendments which transgress constitutional limits, as discussed above, all lead to the inevitable conclusion that JR is an inherent concomitant accompanying the epistemology of CAP in a constitutional polity. Therefore, it can be clearly seen that JR is not an unwarranted external intrusive force in the venture of enforcing constitutional legitimacy of CAP, but a necessary requisite for recognising and upholding the constitutionality of properly enacted amendments and for striking down unconstitutional ones.

Furthermore, it is important to understand that the theory of the BSD requires courts to interfere only when there is a breakdown of political process and a negation of constitutional identity.¹⁴⁶ JR seeks to prevent the tyranny of a transient majority. The unique historical experience of the three countries analysed below – India, Pakistan and Bangladesh – demonstrates that the parliament’s mandate has often been subverted by flagrant abuses of executive power and by usurpation of democracy in favour of autocratic rule. Thus, the entrenchment of JR is essential so as to facilitate constitutional democracy, not to obstruct it. In weak democracies with an untrammelled executive which can effectively deploy CAP for

¹⁴²*Id.*

¹⁴³*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-178 (1803).

¹⁴⁴JOHAN STEYN, *DEMOCRACY THROUGH LAW* 131 (2004).

¹⁴⁵ William R. Bishin, *JR in Democratic Theory*, 50 S. CAL. L. REV. 1099 (1977-1978).

¹⁴⁶*Id.*

patently unconstitutional purposes, JR becomes even more urgently imperative.¹⁴⁷ In such constitutional polities, JR then becomes the only check against complete annihilation of constitutional identity and shared political values by totalitarian autocratic forces, and the necessary institutional safeguard for ensuring the very existence of constitutional democracy in the first place.¹⁴⁸

III. CONSTITUTIONAL AND POLITICAL HISTORIES: A BRIEF TOUR D'HORIZON

This part seeks to offer a brief overview of the constitutional climate in the three countries and the socio-political and historical developments that led to CAA in the respective jurisdictions. The analysis is undertaken with an objective to offer the socio-political context of the CAA, so as to render the case law exegesis undertaken in Part IV more holistic. References are also made to the notable constitutional provisions that relate to the amendment process and implied limitations thereon.

INDIA

India, a constitutional multiparty republic governed under a parliamentary system,¹⁴⁹ is often termed as federal in structure and unitary in spirit,¹⁵⁰ owing to the balance between devolution and decentralisation of powers on one hand, and centralising tendencies in a single integrated judiciary, powerful Union Government, on the other.¹⁵¹ The highest judicial forum is the Supreme Court, which is at the apex of a hierarchy also populated by High Courts and other lower courts that are subordinate to Supreme Court.¹⁵² Its autochthonous Constitution, adopted on January 26, 1950 after independence, secured its transmutation from a dominion under the British Crown, to a sovereign democratic republic.¹⁵³ As it stands today, the Preamble enshrines certain common tenets that form the lifeblood of many modern constitutional democracies – democracy, justice, fraternity, etc..¹⁵⁴

While Article 13 of the Constitution proclaims that all laws that controvert Fundamental Rights ('FRs') are invalid, the Twenty-Fourth Constitutional Amendment Act ('CAA') in 1971 inserted Article 13(4) so as to formally exclude CAA made under Article 368 from the purview of Article 13.¹⁵⁵ Articles 14 to 32 secure the FRs to equality and life; freedoms of religion, speech, expression, profession, movement, assembly and association; *et al.* Currently, after the Seventh, Twenty-Fourth and Forty-Second Amendments, the relevant portion of Part XX, i.e. Article 368, reads as follows (reproduced verbatim in order to enable smooth analysis in Part IV of this Paper):

*“368. Power of Parliament to amend the Constitution and procedure
therefore-*

¹⁴⁷*Id.*

¹⁴⁸*Id.*

¹⁴⁹M.R. JOIS, LEGAL AND CONSTITUTIONAL HISTORY OF INDIA 10 (1984).

¹⁵⁰*Id.*

¹⁵¹JOHN KEAY, INDIA: A HISTORY 20 (2001).

¹⁵²*Id.*

¹⁵³*Id.*

¹⁵⁴The Constitution of India, 1950, The Preamble.

¹⁵⁵Uday Mehta, *Indian Constitutionalism: Crisis, Unity and History* in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 50 (Sujit Choudhry et al. ed., 2016).

- (1) *Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article...*
- (2) *Nothing in article 13 shall apply to any amendment made under this article.*
- (3) *No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of §55 of the Constitution (Forty-second Amendment) Act, 1976 shall be called in question in any court on any ground.*
- (4) *For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article."*

For the purpose of this paper, a short summary will suffice at this juncture. Significant CAA such as the First, Fourth, Seventeenth, aimed at realisation of Nehruvian socialist policies, secured constitutional validity of zamindari abolition laws and land abolition laws; introduced the curious device of the Ninth Schedule, which sought to oust JR of laws contrary to the constitutionally guaranteed FRs, and inserted bills on restrictions of property rights in this Schedule.¹⁵⁶ The Twenty-Fifth and Twenty-Ninth CAA sought to legitimise land acquisitions by placing them in the Ninth Schedule, to eliminate any legal compulsion for the government to grant adequate compensation for such acquisitions, and to empower the Parliament as well as the State Legislatures to promulgate any law requisite for enforcing the Directive Principles of State Policy, without fear of challenge on grounds of the enumerated FRs;¹⁵⁷ the Twenty-Sixth CAA scrapped the system of 'privy purses', wherein payments were made to the erstwhile rulers of princely States; and the Twenty-Ninth CAA brought the land reforms amendment acts passed by the Kerala State Legislature in the early 1970s within the ambit of the Ninth constitutional Schedule.¹⁵⁸ Further, significant CAA have been discussed in the context of the case analyses provided below.

The only instance of nationwide emergency in India was in the late 1970s, when Prime Minister Indira Gandhi effectuated the declaration of this emergency via an official proclamation issued by the contemporary President Fakhruddin Ali Ahmed under Article 352(1) of the Constitution, under the pretext of the prevailing "internal disturbance".¹⁵⁹ The amendment provided for curtailment of FRs, imposed fundamental duties and rendered India a "Socialist Secular" Republic.¹⁶⁰ During this period, the widespread violations of FRs, suspension of elections and proliferation in attempts to trammel the scope of JR by hastily enacting rampant CAA, spurred the courts to introduce and apply the concept of the BSD in Indian constitutional jurisprudence.

BANGLADESH

The polity of Bangladesh – officially known as The People's Republic of Bangladesh – is a multiparty, representative democracy, with a single unitary central government and a unicameral legislature, termed as the Jatiyo Sangsad.¹⁶¹ The parliamentary government of Bangladesh was established in 1991, with elections being regularly conducted

¹⁵⁶ Mehta, *supra* note 154.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ JOHN KEAY, *INDIA: A HISTORY* 35 (2001).

¹⁶⁰ *Id.*

¹⁶¹ The Constitution of Bangladesh, 1972, Art. 65. The Jatiyo Sangsad consists of three hundred members, with the majority of seats allocated to representatives who are directly elected from demarcated territorial constituencies, and also including reserved seats for women.

thereafter, barring the year of 2007 when a nationwide emergency was proclaimed by the military-backed caretaker government.¹⁶² The Supreme Court of Bangladesh consists of two branches – the High Court Division (HCD) and the Appellate Division (AD).¹⁶³

The Partition of pre-independent India left Bangladesh as a part of the polity of Pakistan.¹⁶⁴ After securing independence post the Bangladesh Liberation War in 1971, Bangladesh was established as a parliamentary republic.¹⁶⁵ A presidential government operated for fifteen years up till 1990, owing to the military coup by Khandaker Mushtaq Ahmed in 1975, followed by successive takeovers by Lieutenant General Zia-ur-Rahman and General Hussain Muhammad Ershad in 1977 and 1982.¹⁶⁶ In 1991, Bangladesh reverted to parliamentary democracy, led by the first female Prime Minister Khaleda Zia.¹⁶⁷ On January 11, 2007, the Bangladesh military effectuated a state of emergency, by supporting an ostensibly impartial caretaker government.¹⁶⁸ General elections are now being held since 2008.¹⁶⁹

The Constitution of Bangladesh, promulgated in 1972, establishes the republic as a democratic polity, and upholds the doctrine of constitutional supremacy.¹⁷⁰ Part III of the Constitution safeguards FRs of the citizens, inter alia guaranteeing equality before law;¹⁷¹ protection against discrimination on basis of sex, caste, religion, etc.;¹⁷² equal opportunity in public employment;¹⁷³ freedom of thought, conscience and speech,¹⁷⁴ and of religion.¹⁷⁵ Article 7 of the Constitution explicitly enshrines the doctrine of popular sovereignty by ordaining that all powers vest with the people, and that the exercise of such powers by the specified constitutional organs must be effectuated as per the demarcated constitutional limits only. Article 142 of the Constitution enshrines the CAP of its Parliament in a manner akin to the mechanism manifest in the Indian Constitution, by inter alia providing that a minimum of a two-third majority of Parliament is necessary for passing the constitutional amendment bill, coupled with the formal requirement of seeking Presidential assent thereafter, who has seven days to do so, otherwise his assent is deemed; and further stating that any derogation or violation of these procedures would render the constitutional amendment void. Interestingly, the Fifteenth CAA, 2011, has inserted a new provision, i.e. Article 7B, in the Constitution, which explicitly imparts unamendability to the preamble of the Constitution, the provisions of Parts I and II, FRs enshrined in Part III, as well as the “the provisions of articles relating to the basic structures of the Constitution”.¹⁷⁶ This eternity clause thus forbids unconstitutional intrusions into the FRs and the BSD, by way of amendment, alteration, abrogation, etc.

¹⁶² Adeeba Khan, *The politics of constitutional amendments in Bangladesh: the case of the non-political caretaker government*, 9 INT. REV. OF L. 5 (2015).

¹⁶³ WILLIAM VAN SCHENDEL, A HISTORY OF BANGLADESH 20 (2009)

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ MAHMUDUL ISLAM, CONSTITUTIONAL LAW OF BANGLADESH 18 (2nd ed., 2012).

¹⁷¹ The Constitution of Bangladesh, 1972, Art.27.

¹⁷² *Id.*, Art. 28.

¹⁷³ *Id.*, Art. 29.

¹⁷⁴ *Id.*, Art. 39.

¹⁷⁵ *Id.*, Art. 41.

¹⁷⁶ *Id.*, Art. 7B. See Jubaer Ahmed, *Article 7B and the Constitutional Stalemate*, THE DAILY STAR (March 14, 2017), available at <http://www.thedailystar.net/law-our-rights/article-7b-and-constitutional-stalemate-1375540> (Last visited on August 20, 2017).

A survey of the sixteen CAA enacted in Bangladesh so far, in the context of this paper, reveals the most noteworthy amendments in terms of their socio-political histories and adjudicative legacies connected to the development of the BSD in Bangladesh. The nascent Constitution enacted on December 16, 1972 witnessed the first large-scale upheaval just two years later, when the ascension of Sheikh Mujibur Rahman to presidency heralded an epoch of constitutional volatility involving the enactment of the Fourth CAA.¹⁷⁷ This amendment abrogated the parliamentary form of government and sought to replace it with a presidential government, trammelled the scope of Parliament's powers, and artificially constrained judicial independence and the courts' power to review unconstitutional transgressions of FRs.¹⁷⁸ After Sheikh Mujib's assassination, Ziaur Rehman emerged as the new President in 1975 and promulgated the Fifth CAA, which was the harbinger of consolidation of totalitarian rule in Bangladesh for over fifteen ensuing years.¹⁷⁹ In particular, the Fifth CAA legitimised the actions occasioned under the authority of martial law; deleted secularism from the text of the Constitution;¹⁸⁰ and amended Article 142 to insert a new sub-clause IA, which introduced the referendum process for enactment of CAA in relation to specified provisions.¹⁸¹ Similarly, the Seventh CAA – contrived by President Hussain Muhammad Ershad to impart legitimacy and legal validity to his administration – rendered all proclamations and regulations issued by the Martial Law Administrator between 1982 and 1986 valid.¹⁸²

The Eighth CAA *inter alia* explicitly entrenched the concept of a State religion – in this case being Islam – and effectuated apparent decentralisation of the upper judiciary by establishing six HCD permanent benches outside Bangladesh's capital, Dhaka.¹⁸³ One of the landmark amendments to the Constitution of Bangladesh, the Twelfth CAA restored parliamentary government upon the cessation of autocratic rule in 1991;¹⁸⁴ and instituted decentralised governance in local representative bodies across the nation.¹⁸⁵ Five years later, the Thirteenth CAA constituted a "Non-Party Caretaker Government" ('NCG'), an interim government established for facilitation of smooth legislative elections.¹⁸⁶ Ostensibly, the amendment was aimed at securing peaceful national elections in a country pervaded by frequent political strife and conflict.¹⁸⁷ However, the Fourteenth CAA enacted in 2004¹⁸⁸ led to mobilisation of public discourse against the caretaker government system, chiefly owing to the allegations of misuse of CAP to entrench the position of the Chief Justice of Bangladesh's SC, who was simultaneously acting as the contemporary head of the NCG as well, by elevating the retirement age limit for the judges of the SC.¹⁸⁹ The Thirteen CAA was struck down by the Supreme Court in 2011, on account of its unconstitutional transgression of the BSD of Bangladesh's Constitution – in particular, the fundamental element of constitutional

¹⁷⁷ Khan, *supra* note 162.

¹⁷⁸ *Id.*

¹⁷⁹ Talukder Maniruzzaman, *Bangladesh in 1975: The Fall of the Mujib Regime and its Aftermath*, 16(2) A SURVEY OF ASIA IN 1975: PART II 119-129 (1976).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Khan, *supra* note 162.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

democracy, which does not contemplate within its purview an unelected, “unpopular” NCG.¹⁹⁰ Nevertheless, the Court also held that in the interest of sustaining political and constitutional stability and perpetuity, the NCG would continue for a period of two more parliamentary election cycles.¹⁹¹ Finally, the Fifteenth CAA, 2011 amended the Constitution to restore secularism, freedom of religion, and democracy as the basic tenets of State and constitutional policies.¹⁹² This Amendment repealed the Thirteen CAA and scrapped the system of Caretaker Government, in a concerted effort to prevent the undermining of constitutional democracy through extra-constitutional means, although it ignored the Court’s directive to retain the NCG for two years.¹⁹³ The latest amendment – the Sixteenth CAA – was passed on September 17, 2014, which allows Parliament, by a two-thirds majority, to remove judges on grounds of inefficiency and misconduct.¹⁹⁴

PAKISTAN

Founded in 1947 in the name of Islam, Pakistan is a federal parliamentary republic.¹⁹⁵ The passing of the Objectives Resolution of 1949 predated any attempt at formulating a constitution.¹⁹⁶ The Objectives Resolution, engendered by the Constituent Assembly of Pakistan and embodying popular sovereignty, was intended to formally recognise the aspirations of the constitutional “founding generation”.¹⁹⁷ During its adoption, it was not proclaimed to be an operative part of the Constitution, nor was it attached with any supra-constitutional status, and was in fact, not incorporated into the Constitution at all.¹⁹⁸ Its transmutation to a substantive constitutional provision was occasioned through necessary constitutional orders and amendments, such as Article 2A of the Constitution and the Eighth CAA.¹⁹⁹

While an interim Constitution was passed in 1956, it came to be abrogated in 1958 after a political takeover manoeuvred by the army.²⁰⁰ The 1956 Constitution had established a unicameral Parliament, i.e., a National Assembly with a single house, consisting of 300 members; 150 members from each East and West Pakistan; effectuated that no law would be passed contrary to the teachings of the Quran and Sunnah; established the judicial supremacy of the SC; delineated FRs, etc.²⁰¹ This Constitution envisaged the President to be a ceremonial head of the state; however, Iskander Mirza, who had assumed presidency, acted contrary to the constitutional mandate, and subverted the Constitution in 1958 through his coup, a move later regularised by General Ayub Khan.²⁰²

The second Constitution, promulgated in 1962 under the sway of General Ayub Khan, introduced two significant changes– it removed the Prime Minister’s office, replacing it with the supremacy of the president’s executive powers and the office of the Prime

¹⁹⁰Abdul Mannan Khan v. Bangladesh, 64 DLR (AD) 169.

¹⁹¹*Id.*

¹⁹²Adeeba Khan, *supra* note 161.

¹⁹³*Id.*

¹⁹⁴*Id.*

¹⁹⁵IAN TALBOT, PAKISTAN: A MODERN HISTORY 6-50 (2009).

¹⁹⁶*Id.*

¹⁹⁷*Id.*

¹⁹⁸*Id.*

¹⁹⁹*Id.*

²⁰⁰*Id.*

²⁰¹*Id.*

²⁰²*Id.*

Minister.²⁰³ It also institutionalised military rule by formally providing that thereafter, the President or Defense Minister of Pakistan must necessarily hold a rank above that of a military lieutenant-general.²⁰⁴ The 1962 constitution was repudiated in 1972, after the military takeover by the next President Yahya Khan, who through yet through another coup, refused to hand over the power to the Parliament that was democratically elected for the first time in 1970.²⁰⁵ President Yahya did not undertake the task of formulation and adoption of a Constitution, except for issuing an extrajudicial order in 1970.²⁰⁶ In 1970, President Yahya issued an order that spelled out a list of basic tenets of the newly propounded constitution, and which outlined the organization and configuration of the state and national legislatures.²⁰⁷ However, owing to internal electoral and political conflict, and threat of secession of the current polity known as Bangladesh, as well as the imminent war with India, no National Assembly session was called.²⁰⁸

After the secession of Bangladesh, democratic rule and national reconstruction were resumed in Pakistan under Zulfikar Ali Bhutto's presidential regime.²⁰⁹ The constitutional convention seeking to draft and ratify a Constitution that would revise the 1956 articles suitably, was called for in 1972.²¹⁰ The Constitution ultimately established the bicameral form of the legislature;²¹¹ parliamentary government; and affirmed that the elected National Assembly was envisaged as genuinely representing the will of the people.²¹² The redefining of borders led Pakistan to be defined as a Federation of Four Provinces;²¹³ the above-enumerated FRs were reiterated, and new civil, political and religious rights were ensconced. Thus, the Constitution currently operative since 1973, was the first in Pakistan to be promulgated and enacted by directly elected representatives of the body politic of Pakistan. Unlike the 1962 Constitution, it established the parliamentary form of democracy, concomitantly reposed the zenith of executive power with the Prime Minister, and relegated the President to a nominal status. The State religion of Islam was formally proclaimed; bodies such as the Council of Islamic Ideology and National Finance Commission were instituted; the injunctions of Islam were ensconced as supreme edicts governing all laws; and judicial independence was secured.²¹⁴ The judiciary devolved into a superior judiciary consisting of the Supreme Court at the apex, under which the Federal Shariat Court and High Courts would function; and ensconced the Federally Administered Tribal Areas.²¹⁵

However, after yet another coup in 1977, leading up to the assumption of presidency by General Ziaul Haq, the Constitution continued to remain in abeyance until it was "restored" in 1985.²¹⁶ The Eighth CAA bolstered the President's authority and endowed

²⁰³*Id.*

²⁰⁴HAMID KHAN, CONSTITUTIONAL AND POLITICAL HISTORY OF PAKISTAN 52 (2nd ed., 2001).

²⁰⁵*Id.*

²⁰⁶*Id.*

²⁰⁷*Id.*

²⁰⁸*Id.*

²⁰⁹*Id.*

²¹⁰*Id.*

²¹¹*Id.*

²¹²*Id.*

²¹³*Id.*

²¹⁴*Id.*

²¹⁵*Id.*

²¹⁶*Id.*

his office with the power to suspend and disband the Prime Minister's government.²¹⁷ As enshrined in the new sub-clause 2(b) inserted into Article 58 of the Constitution, these powers of the President included the right to disband the National Assembly, if in his or her opinion, the governance of Pakistan is not carried out in conformity with constitutional limits, and therefore "an appeal to the electorate is necessary" for such dismissal.²¹⁸ The Seventeenth CAA in 2004 followed this trend; however the Eighteenth CAA in 2010 reversed this trend and substantially curbed presidential authority, restoring the polity to a parliamentary republic.²¹⁹

The material part of Articles 238 and 239 in Part XI of the Constitution of 1973, which provide for amendment powers in relation to the constitution, read as follows:

"238. Amendment of Constitution- Subject to this Part, the Constitution may be amended by Act of Majlis-e-Shoora (Parliament).

239. Constitution, amendment Bill-

...(5) No amendment of the Constitution shall be called in question in any court on any ground whatsoever.

(6) For the removal of doubt, it is hereby declared that there is no limitation whatever on the power of the Majlis-e-Shoora (Parliament) to amend any of the provisions of the Constitution."

Further, with respect to the SFD, Article 2A is especially important since it enshrines and effectuates the Objectives Resolution as a substantive and material constitutional provision. The nine directives enshrined in the Objectives Resolution *inter alia* entrench popular sovereignty of the body politic of Pakistan; effectuate exercise of secondary and delegated constituent power through specified constitutional organs; reiterate common modern constitutional values reaffirmed by Islam such as liberty, social justice, democracy and equality; mandate preservation of the edicts in the Quran and the Sunnah in the daily lives of the Muslims; provide for freedom of minorities to profess and observe their independent religions; enshrine the federal nature of the polity of Pakistan; assert common FRs of equality of opportunity and before the law, freedom of association and speech, etc.; reiterate the vision of social justice by explicitly providing that upliftment of underprivileged classes of the society must be continually strived for; safeguard judicial independence; and defend the cohesiveness, unity and integrity of Pakistan's borders.²²⁰ These principles, which constitute the core of the SFD, are now being used as a means for limiting Parliament's powers to amend the Constitution in Pakistan, and their interpretation will be duly explored below.

One important aspect that has vexed the constitutional jurisprudence of Pakistan must be mentioned here. The doctrine of State necessity has been long used as a veil

²¹⁷ LAWRENCE ZIRING, *PAKISTAN IN THE TWENTIETH CENTURY: A POLITICAL HISTORY* 115-135 (1997).

²¹⁸ *Id.*

²¹⁹ *Id.* Military coups were undertaken by General Pervez Musharaff in the interim, from 1991 to 2008.

²²⁰ See Government of Pakistan, *The Constituent Assembly of Pakistan Debates: Official Report of the Fifth Session of the Constituent Assembly of Pakistan* 101-102 (1949).

for usurpation of authority in Pakistan, during the aforementioned military coups, and still continues to be a bone of contention, in the public discourse regarding SOP.²²¹ The doctrine confers legitimacy and legal validity on otherwise illegal acts, conditional on their bona fide nature and occasioning contingent on necessity, if such acts are necessary to preserve and perpetuate the constitutional order and to safeguard it from harm.²²² Thus, this doctrine essentially utilises the maxim “necessity knows no law”, to not only usurp authority, but also to make ex post facto validations of such usurpation, by passing CAA that ratify and validate the acts done under such illegal or mala fide authority. Under the garb of civil and State necessity, military generals right from Zia-ul-Haq to Pervez Musharaff, had often conducted military takeovers, made emergency proclamations, and then sought to shelter themselves from legal consequences by passing a constitutional amendment. The Eighteenth constitutional amendment, passed in 2010, inserted Article 6 in the Constitution so as to prevent such autocratic unconstitutional intrusions, by expressly mandating that any person, who attempts to, conspires to or actually repudiates, subverts or abrogates the Constitution through the employment of force or other such unconstitutional methods would be held “guilty of high treason”.²²³ Consequently, the Supreme Court has grown more willing to strike down these takeovers in recent years, an aspect that will be analysed in more detail below.

IV. ENUNCIATION OF LIMITATIONS ON CONSTITUTION-AMENDING POWERS BY THE COURTS: A COMPARATIVE CONSTITUTIONAL EXEGESIS

Through an in-depth analysis of the relevant judgments, verdicts and opinions offered by the apex judiciary in the three countries studied in this paper, we seek to cut through the ideological thicket that surrounds the enigma of the BSD. Thus, we attempt to demonstrate that the development of the jurisprudence on the BSD clearly shows that criticisms levied on it – such as attainment of “supra-constitutional” status, and utilisation for aggrandisement of judicial hegemony – are unjustified.

A. DEFINITIONS, SCOPE AND LIMITS OF CONSTITUTION-AMENDING POWERS

Under this theme, we examine the definitions and limits of the amending powers of the Constitution, as enunciated by the apex courts of the aforementioned three countries. We seek to conduct such analysis to answer the following key questions under this theme:

- What are the definitions and limits of powers to amend the Constitution?
- What are the types of readings and interpretations employed by the courts while determining the constitutionality of the amendments– foundational-structuralist, constitutional identity, hierarchy of constitutional values, delegated power, *et al*? The analysis of the answers to this question shall continue throughout all themes.
- What is the nature of the CAP – legislative or constituent?
- If the CAP can be termed as a constituent power, does it include the right to destroy? Does it include the right to replace the entire constitution?

²²¹Mark Stavsky, *The Doctrine of State Necessity in Pakistan*, 16 CORNELL INT’L L.J. 341 (1983).

²²²*Id.*

²²³*Id.*

India

In Indian constitutional jurisprudence, one of the foremost attempts by the Supreme Court at contextualising the distinction between constituent and constituted powers can be traced to *Sankari Prasad v. Union of India* ('Sankari Prasad').²²⁴ In its unanimous verdict, the SC upheld the constitutionality of the First CAA, repudiating the argument that it had transgressed the mandate of Article 13(2), by abridging the FRs through insertion of the provisions of Articles 31A, 31B, and the Ninth Schedule in the constitutional text.²²⁵ Justice Patanjali Shastri, whilst delivering the verdict on behalf of the Court, reaffirmed the supremacy of parliamentary sovereignty as propounded by A.V. Dicey,²²⁶ observing herein although a quotidian implication of the term "law" as found in Article 13 includes its constitutional version and the FRs under Part III are immunised from interference by laws enacted by the legislature, such immunity could not be extended to intrusions by CAA promulgated by exercise of constituent power.²²⁷ Given the absence of any proviso in Article 368 indicating that the "perfectly general" CAP of the legislature should be curtailed, the Court used the doctrine of harmonious construction to infer that with respect to Article 13, the term "law" could not include CAA.²²⁸ The Court's reasoning evinces a rudimentary understanding of the scheme of legislative powers, and does not go into the distinction between constituted and constituent powers, or primary and derivative delegated powers at all. The verdict however lay down the foundation for the epistemological discourse surrounding the nature of CAP in Indian case law jurisprudence.

The conglomeration of CAA aimed at facilitating the patently Nehruvian vision of social justice – instances being the Fourth and Seventeenth CAA, in addition to the First CAA mentioned above – which immunised further forty-four acts inserted in the Ninth Schedule from a challenge on the basis of FRs (including Articles 14, 19 and 31), would continue to be the fulcrum of the debate surrounding CAA in India. Thus, in *Sajjan Singh v. State of Rajasthan*²²⁹ ('Sajjan Singh'), the erstwhile Chief Justice P.B. Gajendragadkar²³⁰ reiterated the stance in *Sankari Prasad* that the term 'constitutional amendment' unequivocally connotes amendment of the entire gamut of constitutional provisions, without an exception and untrammelled by FRs.²³¹ A common feature of the jurisprudence developed so far was the idea that the literal and lexical meaning of this expression – i.e. to 'correct' or 'reform' – should be transcended, and the Court therefore held that the ambit of the word 'amend' must be widened to include any form of change of constitutional provisions, including modification, derogation and even exclusion, i.e. imbuing them with inapplicability to the specific provisions ushered in by the amendment.²³²

²²⁴ *Sankari Prasad v. Union of India*, 1952 SCR 89.

²²⁵ *Id.*

²²⁶ *Id.* Notably, A.V. Dicey also theorised that constitutional law connotes the law-making by the sovereign constitutional State organs such as the legislature, rather than ordinary and regular statutes promulgated in the course of exercise of mundane legislative power.

²²⁷ *Id.*, 90.

²²⁸ *Id.*

²²⁹ *Sajjan Singh v. State of Rajasthan*, 1965 SCR (1) 933.

²³⁰ *Id.* On behalf of Justices Wanchoo and RaghubarDayal.

²³¹ *Id.*, 933, 938.

²³² *Id.*

The justification for such expansion of the ordinary and literal meaning of CAA – which portended significant practical implications insofar as including or excluding the amendments from being tested on the touchstone of FRs – was that constraints on CAP through the FRs by virtue of Article 13(2) would have been explicitly mentioned in the amending clause itself. The lack of express constitutional delineation of such a limitation by the Constituent Assembly was argued to evince that it was never intended to impute such restrictions on CAP.²³³ Furthermore, Chief Justice Gajendragadkar argued that if the Constituent Assembly took the precaution of excluding the applicability of the amending clause to the CAA mentioned in Articles 4(2)²³⁴ and 169(3)²³⁵ of the Constitution, it would follow that they would have outlined a similar restriction with regard to the FRs guaranteed by Part III – in its absence, no such limitation could be inferred.²³⁶

This strand of interpretation, involving judicial aggrandisement of the ordinary meaning of CAA, goes against the essence of the textualist argument supporting the BSD, as enunciated above. Further, both arguments proffered by the Court in support of such interpretation exhibit obfuscation and conflation of the nature of constituent and constituted powers – as explained above, the constitution-amending clause is not merely a formal provision, rather Parliament derives its CAP from such entrenchment. By according an *a priori* status to Parliament's CAP, the Court failed to recognise the supremacy and superiority of the constitution over the CAP in the first place. Moreover, the conceptual framework imbricate in delegated constituent powers appears to be completely missing from the Court's reasoning. As critics have suggested, this formalistic approach towards preserving the sanctity of the legislative domain, which was powerfully represented by the sovereignty of the CAP, is emblematic of the judicial anxiety in the early Indian constitutional epoch to defer to legislative wisdom in its exercise of traditional constituent and legislative powers.²³⁷

However, Sajjan Singh remains popular and relevant for current BSD studies even today, not for its majority verdict, but more for the powerful articulations of separate opinions by Justices Mohammad Hidayatullah and J.R. Mudholkar, which laid the seeds for the evolution of the BSD in India. Justice Hidayatullah, for instance, drew attention to the terminology of Article 13(3)(a), which evidently accords an expansive and inclusive implication to the word "law" and which does not explicitly exclude CAA from its purview.²³⁸ Further, he posited an important counterargument to Chief Justice Gajendragadkar's contention that FRs could not have been immutable given that they themselves outline restrictions, for instance, the restriction on Article 19(1)(a) by Article 19(6). Justice Hidayatullah cast doubt on this reasoning, stating that there is a clear distinction between restricting the FRs by resort to clauses 2 to 6 of Article 19, and removing or debilitating them by an amendment altogether.²³⁹ Thus, the genesis of the epistemological debate in the echelons of the apex court, regarding the functions and nature of constitution-amending clauses, stemmed from Sajjan Singh itself. Disagreement arose between the judges

²³³ *Id.*

²³⁴ *Id.* It provides that no law made by virtue of Article 4(1) of the Constitution shall be deemed to be an amendment of the Constitution for the purposes of Article 368.

²³⁵ *Id.* It provides that no law in respect of the amendment of the existing legislative apparatus by the abolition or creation of Legislative Councils in State shall be deemed to be an amendment of the Constitution for the purposes of Article 368.

²³⁶ *Id.*

²³⁷ *Id.* See, e.g., S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS 100-150 (2nd ed., 2003).

²³⁸ *Id.* The Constitution of India, Art. 13(3)(a).

²³⁹ *Id.* 37

as to the implications of Article 368 – whether it gave the substantive power to amend, or whether it simply ensconced the procedural mechanism for amending constitutional provisions.²⁴⁰ In stark contrast to the majority, therefore, Justice Hidayatullah was not inclined to adopt the viewpoint that the power to make CAA under Article 368 could wholly exonerate such amendments from the purview of the FRs altogether, which were usually intended to be inviolable and non-derogable for all purposes.²⁴¹ His reasoning evidently reflects a deeper understanding of the derivative nature of CAP, and although the conceptual progression towards the formulation of the BSD was not complete, it is evocative of a more nuanced examination of the realm of legislative powers, which were hitherto considered unimpeachable.

Justice Mudholkar also disagreed with the strand of reasoning adopted by the majority decision in *Sajjan Singh*. He favoured Justice Hidayatullah's reading of the word 'law' under Article 13, agreeing that CAA must fall within its purview. He argued that Article 368 nowhere suggests that Parliament occupies a different status, for instance, that of a constituent body, whilst promulgating CAA²⁴² – and even if this state of affairs was to be presumed, the power to amend could be appropriately categorised only as an attendant and supplementary legislative power, thus bringing it within the ambit of Article 13(2).²⁴³ While this justification afforded by Justice Mudholkar is suspect in light of the ontology of CAP elaborated in Part II of this paper – the secondary delegated constituent power is ontologically different from regular statutory and legislative powers of Parliament – his attempt at broaching a subversion of all-pervading parliamentary supremacy in enacting CAA, is indeed laudable. Moreover, his effort towards developing an interpretation that identifies a hierarchy of values in the Constitution was markedly significant for founding later judicial opinions in support of implied restrictions on CAP. Justice Mudholkar highlighted the structural incongruity and logical incoherence that would arise in the scheme of the Constitution, if the FRs enshrined in Part III were more casually amendable as compared to the relatively less vital constitutional matters mentioned in the proviso to Art. 368.²⁴⁴ The noteworthy aspect of this observation is that Justice Mudholkar had accurately identified the tension and strain in the constitutional scheme, order and morality, upon undertaking an artificial interpretation of CAA as proposed by the majority opinion in this case. Instead of characterising the identification of definitive constitutional attributes as a strictly political exercise, the jurisprudence began to evolve towards a more mature understanding of how the forces of the constitutional text, scheme and interpretation play an equally significant role in delimiting the purview of amendment powers.

The next relevant decision in the case of *I.C. Golaknath v. State of Punjab* ('*Golaknath*'),²⁴⁵ wherein the constitutionality of the immediately aforementioned set of Amendment Acts was challenged yet again, marks a curious departure from the previous approach adopted towards amendment powers, as outlined above. In the majority verdict

²⁴⁰ *Id.* See Virendra Kumar, *Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance [From Kesavananda Bharati to I.R. Coelho]*, 49(3) J. OF THE IND. L. INST. 375 (2007).

²⁴¹ *Id.*

²⁴² *Id.*, 963.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *I.C. Golaknath v. State of Punjab*, 1967 SCR (2) 762.

delivered by the contemporary Chief Justice Subbarao on behalf of his fellow judges,²⁴⁶ we find a keen emphasis on the ‘hierarchy of constitutional values’ argument to foreground the import of the constitutional scheme and transcendental character of FRs that would inherently and naturally restrict Parliament’s CAP. The Court plainly endorsed the view that Article 368 did not contain the substantive CAP, but merely represented a formal procedural mechanism for enacting such amendments. Intriguingly, however, the CAP was traced to Articles 245, 246 and 248, which outline the territorial and subject-matter scope of Parliament’s legislative and law-making powers respectively, in addition to ensconcing its residuary lawmaking competence.²⁴⁷ The rather tenuous logical leap made was that since the residuary power to promulgate laws that vests with Parliament is subservient to other constitutional provisions such as Article 13, the power to amend – which can be traced to this residuary lawmaking power – is also constrained by the provisions of the FRs-testing provision.

By obliterating the distinction between ordinary legislative and constitution-amending processes, the Court successfully brought CAA within the sweep of Article 13, and consequently subjected them to being tested on the touchstone of FRs. The stance of the Court in this case has been severely criticised in numerous verdicts thereafter, and the tracing of CAP to the aforementioned trinity of constitutional provisions has been abandoned for reasons discussed below in detail. At this stage, however, it is important to note that the pendulum had swung to the extreme opposite in the spectrum of demystifying the ontology of CAP. Where the Sankari Prasad and Sajjan Singh decisions elevated CAP to the status of a supra-constitutional power like the primary people’s constituent power, the Golaknath verdict veered towards the converse position, by effectively equating the two powers. This conflation and inconsistency in reasoning clearly evinces that the lack of a proper theoretical framework for outlining the scheme of CAP led to highly flawed and volatile articulations of jurisprudence in this field, so far.

Conscious of the gaps in the reasoning of the majority verdict in this decision, Justice Hidayatullah reiterated his views first pronounced in Sajjan Singh, in his separate opinion in Golaknath as well. Explicitly endorsing the view that no *a priori* view can be taken of the omnipotence of Article 368,²⁴⁸ he lucidly stated that harmonious interpretation of the constitution-amending clause and the FRs-touchstone provision, is required in case of a conflict between these provisions.²⁴⁹ It is a testament to the clarity of his logic that he however refused to trace the CAP to the aforementioned trinity of provisions; instead stressing the distinctiveness of such powers, which are subject to the FRs, but nevertheless constitute a class entirely separate from ordinary statute-promulgating powers.²⁵⁰ The significance of these observations for BSD studies even today is that even if these articulations of the ontology of limitations on CAP do not perfectly correspond to more modern and detailed discourses such as those analysed in Part II of the paper, it is patently clear that the logic and reasoning implicit in the ontology was proffered even before the origins of the BSD in Indian constitutional jurisprudence.

²⁴⁶*Id.*, on behalf of Justices Shah, Sikri, Shelat and Vaidialingam

²⁴⁷*Id.*, 781-790.

²⁴⁸*Id.*, 855-858.

²⁴⁹*Id.*

²⁵⁰*Id.*

It is also important to note the substance of the arguments put forward by the dissenting judges in *Golaknath*,²⁵¹ for even after fifty years of development of BSD case jurisprudence, these arguments are reiterated *ad nauseam* to resist the logic of the BSD. Akin to the majority reasoning in *Sankari Prasad and Sajjan Singh*, the dissenting judges in *Golaknath* argued that CAP, particularly in relation to a written constitution such as the Indian Constitution, are an “adjunct of sovereignty” representing superior exercise of constituent powers, which are wholly above mundane statute-promulgation and therefore cannot admit of any limitations.²⁵² They correctly stated that the nature and intent of the constitution-amending clause was wholly different from the ordinary statute-formulation process, although the degree of distinction was overstated. In fact, Justice Wanchoo particularly emphasised that simply because there were procedural similarities in both processes, this should not overshadow the structural and substantive distinction between CAA, which are taken to be a part of constitutional law, as opposed to plain regular statutes.²⁵³ Evidently, the essential nature of CAA falls below the rank envisaged by these judges, i.e. below fundamental exercise of popular sovereignty; however the appreciable aspect, when compared to the majority verdict, is that at least the primary distinction between constitutional and legislative powers was restated by these judges. Nevertheless, owing to the approach adopted towards ensconcing of supremacy of CAP, it was held that no constitutional provision, including Article 13(2) which operates in the field of ‘ordinary law’, could impinge upon the sanctity of Article 368 operating in the field of constitutional amendment. The remarkable facet of this argument is that it appears that by relegating FRs to the status of ordinary law, CAA are accorded a status higher than the constitutional provisions itself. While it is constitutionally cogent to argue that ordinary statutes cannot impinge upon CAA, the extension of such deference to constitutional provisions, particularly the significant ones such as FRs, is highly debatable. We have attempted to chart out these lacunae in reasoning to not only study the evolution of BSD case law, but also to map the variegated judicial anchoring of radically opposing stances on the limitations of CAP. We can therefore trace the quantum leap in the jurisprudence on the BSD by locating it in the appropriate frameworks evolved in the normative analysis above, for understanding the heterogeneity of contemporary approaches towards the nature and scope of CAP.

In *Kesavananda Bharati* – the magnum opus of the Indian judiciary as regards the explicit formulation and innovation of the BSD – the constitutionality of another set of Amendment Acts, which had rendered the land reforms legislations such as the Kerala Land Reforms Act, 1963 immune from judicial scrutiny, was challenged.²⁵⁴ The Twenty-Fourth CAA, for instance, immunised all amendments promulgated under the constitution-amending clause of the Indian constitution from a challenge on basis of FRs by virtue of Article 13.²⁵⁵ Further, to overcome the *Golaknath* majority reasoning – that owing to the marked procedural similarities in enacting both CAA and ordinary laws, they are substantially similar and should therefore be both subject to the FRs-touchstone provision – Article 368(2) was amended to render the formality of the President’s assent less significant in the mechanics of passing CAA. This mandatory requirement imposed upon the President to accord his assent in case of CAA was intended to be in contradistinction with ordinary legislative enactments, which are left to the judgment of the President, who can at least deny assent to them once.²⁵⁶ The

²⁵¹*Id.* This camp included Justices Wanchoo, Bhargava, Mitter, Bachawat, Ramaswami.

²⁵²*Id.*, 930.

²⁵³*Id.*, 829.

²⁵⁴*Id.*, ¶2-17.

²⁵⁵*Id.*

²⁵⁶*Id.*, ¶46.

contents of the Twenty-Fifth, Twenty-Sixth and Twenty-Ninth CAA have already been discussed above in Part IIIA of the paper.

A historic bench of thirteen judges was set up in *Kesavananda Bharati*, which overruled the eleven judge bench decision in *Golak Nath*, and propounded a pioneering formulation of the BSD.²⁵⁷ A majority of seven judges, including Chief Justice S.M. Sikri, Justices Hegde and Khanna, delivered against the State;²⁵⁸ whilst six judges in dissent, including Justices Ray, Chandrachud, Mathew and Beg, decided in favour of the State.²⁵⁹ As a closer reading of the decision evinces, Justice H.R. Khanna had in fact developed an intermediate position, which now forms the *locus classicus* for the BSD.²⁶⁰ It is important to note that despite a degree of consensus being reached on either side, it camouflaged a great deal of individual dissensions and variations, and distinct lines of thinking and articulations. These variations are important not only from the perspective of theorisation of limitations placed on CAP in India, but also for rational critiques of the evolution and very notion of the BSD itself. The summary statement of the humongous decision spanning over seven hundred pages, which only nine judges agreed to sign, stated that *Kesavananda Bharati* overruled the *Golaknath* verdict; that the constitution-amending clause i.e. Article 368 cannot be wielded to amend the BSD of the Constitution; and upheld some parts of the aforementioned set of amendments as constitutional.²⁶¹

The majority camp in *Kesavananda* overruled *Golak Nath* on the basis that Article 368 effectively ensconced the CAP in their opinion, without there being any concomitant necessity to refer to Parliament's residuary lawmaking competence.²⁶² They observed that this Article was clearly envisaged to relate to the exercise of constituent power, and hence promulgation of CAA could not be couched under the scheme of regular lawmaking powers of Parliament.²⁶³ Further, the general sentiment expressed was that it would be difficult to believe that the Constituent Assembly had failed to foresee or deliberate upon the provisions relating to CAA, such that the substantive CAP would be required to be necessarily traced back to the residuary powers enshrined in the Constitution. Thus, they definitively charted the ontology of CAP within the realm of Article 368, rooting it in the intrinsic Indian constitutional epistemology.

As stated above, Justice Khanna's opinion serves as the canonical pronouncement of the key edicts of the BSD. It becomes imperative to undertake a holistic critical reading of his opinion, which has been subsequently obfuscated by a variety of interpretations, often leading to misplaced criticism of the conception and implications of the BSD. While his discussion on the tenets of the BSD will be analysed in detail in Part III.C.1 of this paper, it is of immense value to also study his views on the meaning and nature of CAA, which served as the fulcrum for the development of the doctrine.

²⁵⁷ *Kesavananda Bharati v. Union of India*, (1973) 4 SCC 225.

²⁵⁸ *Id.* See Upendra Baxi, *The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment*, 1 SCC J. 45 (1974); N.A. Palkhivala, *FRs Case: Comment*, 4 SCC J. 57 (1973).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* In particular, the Twenty-Fourth and Twenty-Ninth constitutional amendments were entirely upheld as valid; the Twenty-Sixth constitutional amendment was referred to the Constitution bench for determination of its validity; and besides the part of the Twenty-Fifth constitutional amendment that ousted JR of the laws mentioned thereunder, the rest of the Amendment Act was upheld as legally and constitutionally valid.

²⁶² *Id.*

²⁶³ *Id.* Baxi, *supra* note 258.

As per Justice Khanna, Article 368 indubitably contains both the procedural mechanism for enacting CAA, as well as the self-executing substantive CAP, as evinced from the express language of the provision indicating the incontrovertibility of the change to the constitutional text once the amendment bill is successfully enacted.²⁶⁴ Furthermore, he adopted a foundational structuralism argument to argue that looking at the constitutional scheme, it was clear that the demarcation of an entirely separate Part in the Constitution i.e. Part XX, devoted to entrenching the constitution-amending clause, clearly indicates the substantive and distinctive ontology of CAP. Thus, Justice Khanna was concerned with questions of constitutional identity and epistemology right from the beginning of his reasoning, thus enabling a logically as well as constitutionally sound construction of the taxonomy of CAP. From his opinion, it is clear that he subscribed to Hans Kelsen's conception of the Constitution as the *grundnorm* – which denotes the cardinal norm or rule underscoring the roots of a legal order – so as to drive home the distinction between ordinary and constitutional law.²⁶⁵ He observed that statutes, which are often temporary and tentative expedients, must be contrasted with the Constitution, which is “the fundamental and basic law” of the land. In light of the definition of Article 13(3)(a), it was evident that Article 13(2) referred to ordinary legislation, and not CAA effectuated under Article 368. Thus, he reasoned that the clear and unambiguous words of the constitution-amending clause clearly convey that immediately upon the satisfaction of the requisites enlisted by the provision, the Constitution would stand irrevocably amended; there is no imputation of any restriction by Part III of the Constitution. He repudiated the argument that the Constituent Assembly must have inadvertently omitted to incorporate such a limitation, citing the withdrawal of the amendment proposed by Dr. P.S. Deshmukh on September 17, 1949, which sought to entrench the unamendability of FRs.²⁶⁶ The withdrawal of this proposed amendment, he argued, clearly suggests that the founding fathers did not envisage the FRs as limiting forces which would constrain CAP.

Furthermore, his refusal to trace the CAP to the aforementioned trinity of Articles 245, 246, 248, stemmed from a more conceptual interpretation as opposed to an outright summary dismissal as the other judges in the majority camp were wont to do. He argued that if this trinity were to be hypothetically considered as the source of the CAP, it would be realistically difficult to usher in CAA, as these provisions are themselves expressly constrained by other constitutional provisions – as is patent from their straightforward language – such that the amendments would be frequently incompatible with the unamended version of the constitutional provision.²⁶⁷ He astutely observed that Article 368 would thus be effectively rendered futile and ineffectual, owing to the substantial constraints arising from the bare language of the provisions themselves, even without delving into the question of implicit limitations on CAP.²⁶⁸ This demonstrates that Justice Khanna was concerned with evolving an ontology that was in keeping not only with the political expediency attached to the case, but more significantly, with the logic and intent of the scheme and structure of the constitutional text and provisions, thus lending an appreciably harmonious bent to the very roots of the notion of the BSD in Indian constitutional jurisprudence.

²⁶⁴ *Id.*, ¶1412.

²⁶⁵ *Id.*, See Joseph Raz, *Kelsen's Theory of the Basic Norm*, 27(1) THE AMERICAN J. OF JURIS. 46-63 (1982).

²⁶⁶ *Id.*, Constituent ASSEMBLY DEBATES, September 17, 1949 *speech by DR. P.S. DESHMUKH*, 37, available at <http://parliamentofindia.nic.in/ls/debates/vol9p37c.htm> (Last visited on February 3, 2017).

²⁶⁷ *Id.*, ¶1410.

²⁶⁸ *Id.*, ¶1403.

In keeping with this congruous and balanced reading of CAP, Justice Khanna also sought to explicate the lexical implications of the term ‘amendment’, through the lens of the wider constitutional scheme. Thus, he asserted that this term evidently connotes the continued existence and endurance of the old Constitution without obliteration of its basic, fundamental and essential identity, notwithstanding the changes heralded to the provisions.²⁶⁹ In legal parlance, it need not always imply improvement or reform – amendment could also signify merely a change of alteration.²⁷⁰ However, what he emphasised upon as the core of the definition was that a constitutional amendment, by its very nature, cannot destroy, annihilate and abrogate the constitution in such a way that its very core and spirit would be wholly extirpated; the lexical connotation signifies the preservation of the original Constitution – albeit accompanied by the changes ushered in by the amendment – such that the BSD is upheld, i.e. the core lifeblood and nucleus of the Constitution survives and perpetuates throughout all alterations. While this elucidation of the BSD shall be explored in detail later, it is important to note that Justice Khanna firmly believed that amendment cannot contemplate total repeal, destruction or subversion.²⁷¹ He was demonstrably clear in his assertion that no amendment could introduce a completely distinctive, new, alternative constitution – by its very definition, it would imply the unimpeachable retention and protracted continuity of the fundamentals of the extant constitution, accompanied by the measured changes engendered by the amendment.

It is equally important to note, nevertheless, that such lexical interpretation did not detract from or subvert the wholly plenipotentiary nature of the CAP, which unequivocally include the competence to alter and modify a plethora of constitutional provisions, including the FRs.²⁷² However, while doing so, the focus should be on the logic of the constitutional amendment itself, by which it would be impossible to repudiate the elemental constitutional framework and promulgate a radically new version that entirely supersedes the extant constitutional scheme.²⁷³ Thus, whilst even permitting arrogation of powers by Parliament via CAA, he powerfully underscored the centrality and incontrovertibility of the BSD in the ontology and epistemology of the constitutional configuration and CAP.²⁷⁴ His adoption of semantic hermeneutics for lending conceptual clarity to the discourse surrounding the meaning of CAP was thus pervasively informed by an articulate, rational and systematic approach towards construing the thrust and gist of CAP.

A few important observations from the rest of the majority judges may be noted for the purpose of the analysis conducted in this paper. Intriguingly, Chief Justice Sikri argued that the constitution-amending clause nestles such an extraordinary and distinctive power that even the constitutional organ harbouring and exercising this power, i.e. Parliament, could not delegate or consign this competence to another legislative body, e.g. state legislatures, or even relegate this power such that it would be hierarchically of the same rank as mundane statute enactment powers.²⁷⁵ A similar sentiment was expounded upon and reiterated by Justices Hegde and Mukherjea.²⁷⁶ It is crucial to note at this juncture that such an interpretation did not imply that the CAP was thereby supra-constitutional in character;

²⁶⁹*Id.*, ¶1489.

²⁷⁰*Id.*

²⁷¹*Id.*, ¶¶1480, 1486.

²⁷²*Id.*

²⁷³*Id.*, ¶1481.

²⁷⁴*Id.*, ¶1540.

²⁷⁵*Id.*, ¶506.

²⁷⁶*Id.*, ¶773.

rather this stream of exegesis was intended to belabour the distinction between the superior status of CAP as opposed to the more quotidian nature of ordinary lawmaking competence.

Notably, Justices Shelat and Grover explicitly affirmed that one of the linchpins of the theoretical framework underlying the Indian Constitution is that popular sovereignty is reposed with the people, i.e. the denizens, and that the Constituent Assembly had exercised this power for promulgation of the Constitution on their behalf.²⁷⁷ This observation forms a momentous and admirably succinct statement of the supra-constitutionality of the people's constituent powers and the delegated powers framework explored in Part II of this paper. Additionally, they incisively adduced the sources for lexical and semantic interpretation of the term 'CAA' in the Indian constitutional configuration, referring to the original purpose of the constitution-framers as abstracted from the archival backdrop, for instance, the Constituent Assembly deliberations, the Preamble and configuration and organisation of the Constitutional provisions, and the quintessential precepts constituting the character, complexion and primary attributes of the Constitution.²⁷⁸

Going further, Justice Jaganmohan Reddy posited an interesting point as to why amendments cannot be read as 'law' under Article 13(2). He argued that if this interpretation were to be accepted, then technically even the Constitution itself would similarly constitute a 'law' in light of the specific usage and context of the term in the aforementioned provision.²⁷⁹ However, he pointed to the semantics of the constitutional arrangements, highlighting that since the Constitution-framers had perspicuously differentiated between the terms 'Constitution' and 'law' throughout the text, it was demonstrably evident that the former represented a concept fundamentally distinct from the pedestrian legislation envisioned under the latter.²⁸⁰ We thus find a variety of theoretical and epistemological justifications and meta-narratives utilised for articulating a cogent ontology of CAP in the set of judges on the same side, in the same case. These multitudinous enunciations are important not only from a purely theoretical standpoint, but also for a pragmatic, holistic and comprehensive understanding and defence of the notion of the BSD.

It is crucial to restate here that while the majority verdict in *Kesavananda Bharati* conceded that the Constitution as a whole could not be annihilated by virtue of the general conception of 'amendment' – which does not permit destruction – it did concede that the constitution-amending clause is effectively untrammelled in the Indian Constitution, constrained by no other force except the BSD. While this may lend itself to the conclusion that Parliament can repeal the entire Constitution under Article 368 without impunity,²⁸¹ this conclusion was outright rejected in the *locus classicus* by Justice Khanna himself; and besides, it is salient to note that the evolution of the BSD jurisprudence demonstrates in effect, the BSD has so ensconced certain provisions of the constitution in recent cases, such as the golden triangle described later, that repealing the entire constitution would be practically ineffectual, owing to violation of the BSD.

²⁷⁷*Id.*

²⁷⁸*Id.*

²⁷⁹*Id.*, ¶1128.

²⁸⁰*Id.*, ¶1129.

²⁸¹Satya Prateek, *Today's Promise, Tomorrow's Constitution: 'Basic Structure', Constitutional Transformations And The Future Of Political Progress In India*, 1 NUJS L. REV. 417 (2008).

The significance of *Kesavananda Bharati* has been reaffirmed continually in later cases, especially since it formed the starting point for articulating progressively more sophisticated discursive understandings of the BSD in Indian constitutional jurisprudence. Thus, in *Indira Gandhi v. Raj Narain* ('Raj Narain'),²⁸² the SC found opportunity to review the BSD in substantial depth. The appellant had filed an appeal against the verdict of the Allahabad HC which had invalidated her election on the ground of electoral malpractice. Pending appeal, the Thirty-Ninth CAA was promulgated to render the HC verdict ineffectual, by ousting the SC's authority to review petitions regarding inter alia elections of the Prime Minister,²⁸³ and by replacing such JR with the constitution of a parliamentary committee that would be competent to resolve such election disputes. In addition to amending Article 71 and inserting Article 329A in the Constitution, the Thirty-Ninth CAA entailed affixing certain enactments such as the Representation of Peoples Act, 1974 to the Ninth Schedule, in order to buttress the ouster of the Court's jurisdiction to review the amendment.²⁸⁴

The appeal was upheld by the SC, but the grounds for the decisions of the individual judges were vastly different. The differences in the approaches was engendered by the fact that while a majority of the judges – including Justices Ray, Mathew, Chandrachud – asserted that the BSD could not be extended to ordinary legislations, Justice Beg asserted otherwise, and Justice Khanna remained silent on this aspect.²⁸⁵ However, the potential of the BSD to restrict the CAP was vociferously defended by a majority of judges – Justices Khanna, Chandrachud and Mathew – who declared that the provision in the Thirty-Ninth constitutional amendment which ousted JR of the SC to adjudicate upon the constitutional validity of aforementioned elections, was unconstitutional.²⁸⁶ On the other hand, Chief Justice Ray held otherwise, stating that this provision was an exercise of constituent power, which is above the Constitution itself, and therefore does not preclude exercise of judicial power by Parliament through law.²⁸⁷ His dissent is a classical articulation of the supra-constitutional status accorded to CAP as can be found in the *Sankari Prasad* and *Sajjan Singh* verdicts as well. However, since this decision rested primarily on an analysis of the SOP doctrine and the BSD, it will be discussed in more detail under Parts IVB and IVC of this paper.

The debate surrounding the limits of CAP becomes even more complicated and complex in cases where the Constitution is itself amended to forbid the Court from reviewing the constitutionality of the amendments. Such unusual exercise of the CAP elevates it from a delegated power to a rank and status equivalent to the supra-constitutional people's constituent power. In such cases, questions arise as to whether such amendments can also be reviewed by the Court, and be subject to the BSD. These issues arose in relation to the Forty-Second CAA, which inserted clauses 4 and 5 Article 368 in order to respectively oust JR of CAA enacted under this provision, and to expressly restate and affirm that the Parliament's CAP is completely unfettered.

²⁸² *Indira Nehru Gandhi v. Raj Narain*, (1975) SCC 2 159.

²⁸³ *Id.*

²⁸⁴ *Id.*, Manoj Mate, *Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*, 12 SAN DIEGO INT'L L.J. 180 (2010).

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

Thus, in *Minerva Mills Ltd. v. Union of India* ('Minerva Mills'),²⁸⁸ the SC first examined the constitutionality of this provision, in light of the test of the BSD as articulated in *Kesavanada Bharati*. The Court, by a majority of four judges, including erstwhile Chief Justice Chandrachud, held that such an amendment which transgressed the strictly demarcated limits of the CAP was wholly unconstitutional and void.²⁸⁹ It observed that the provisions introduced by the amendment denigrate from the philosophy underpinning the configuration and character of the Indian Constitution, which never envisaged an untamed and unchecked exercise of CAP by Parliament, without admitting of any restriction whatsoever. Drawing from the logic of the majority verdict in *Kesavandanda Bharati*, the Court held in the instant case that the constituent power endowed by this amendment is of such extraordinary and intemperate nature, that it grants the immoderate competence to even repeal, repudiate and abrogate the Constitution as a whole, an eventuality that finds no place in the intrinsic ontology of CAP. Furthermore, the Court significantly asserted that not only does such a provision unacceptably transgress defined limits of the CAP itself, but it also negates the very foundation of democracy which revolves around the conception of a limited government, so as to establish a thoroughly obverse constitutional order and polity.²⁹⁰ Reiterating the logic of the lexical interpretation asserted in *Kesavandana Bharati* by Justice Khanna, et al, the majority verdict in the instant case held that the CAP can never contemplate or include within its scope, the power to obliterate the very identity and complexion of the Constitution itself. Linking it to the concepts of democracy and ideals of socio-economic and political justice, equality and liberty pervading the Indian Constitution, the court held that such unlimited CAP would not only torpedo these aspirations and core tenets underlying the foundational framework and configuration of the Constitution, but also worryingly be validated as ostensibly perfectly democratic exercise of constituent powers.²⁹¹ The disingenuous circular logic imbricate in such an amendment thus defeats the very purpose and intent of CAP, intended to facilitate democracy and to continually preserve and uphold key constitutional values through necessary changes.

Thus, we find that the evolution of the BSD clearly demonstrated an increasing judicial proclivity for distinguishing between primary and secondary constituent powers, and for engaging in JR over CAA. The courts have mostly repeated and reiterated these enunciations of the basic ontology of the CAP analysed above, over the years, throughout the development of BSD case jurisprudence, and hence we conclude this discussion at the present juncture without delving into more recent articulations. Nevertheless, the exegesis presented above covers and addresses in substantial depth, the entire gamut of judicial perspectives and articulations targeted at addressing the questions examined under this theme; and the analysis conducted below will continue to discuss these issues concomitantly with other themes.

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²⁸⁸*Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625.

²⁸⁹*Id.*

²⁹⁰*Id.*, 240.

²⁹¹*Id.*

The historical ontology of CAP in the context of Bangladesh can be charted by tracing back to the decision in *Anwar Hossain Chowdhury v. Bangladesh* ('Eighth Amendment case'),²⁹² which is also later explored in more detail under Part IV.C of this paper. In this case, Justice B. H. Chowdhury referred to Article 7(2) of the Constitution of Bangladesh, 1972 – which entrenches the principle of constitutional supremacy and so declares any law inconsistent with the Constitution to be void – for extending this principle to CAA violating the constitutional mandate as well. While he impliedly distinguished between primary and secondary constituent powers, and cogently identified that the constitution-promulgation and amendment powers correspond to them respectively,²⁹³ the conflation of CAA with regular statute-formulation causes a perplexing obfuscation of the ontology. Nevertheless, he lucidly explicated that the *vires* of the amendment would correspond to its conformity with the prescribed Constitutional restrictions, as he significantly noted that the Constitution itself forms the barometer for testing the constitutionality of the exercise of CAP.²⁹⁴

Interestingly, his analysis helps in comparing the variations in the epistemologies of CAP in the context of the Constitutions of India and Bangladesh. His categorical emphasis on the distinction between the operating spheres of Articles 7 and 26 of the Bangladesh Constitution, which declare a law void in case they controvert the Constitution and FRs respectively, present an important contradistinction to the FRs-touchstone provision of the Indian Constitution, which corresponds only to the latter case. The jurisdiction and scope of Article 7, therefore, was interpreted to be far wider by Justice B.H. Chowdhury, wherein any law incompatible with the Constitution, including CAA, would automatically stand null and invalid. The justification would have been completely accurate and in consonance with the intent of Article 7 so far, but his tracing back the justification to Article 142 – the constitution-amending clause – stating that the fact that CAA can be enacted by legislation i.e. bills, also evinces the wide ambit of the term 'law', is slightly more debatable. By extension, this would imply that if any constitutional provision were to be violated by the amendment, it would be automatically declared void, leading to the pragmatic and realistic implementation and operation issues discussed by Justice Khanna above.

Moreover, he cautioned that the CAP must not be conflated with the constitution-promulgation power.²⁹⁵ He endorsed the etymological connotation of the term 'amendment', implying it to mean such alteration in the original constitutional text as is necessary for corrective purposes or for better facilitating its stated goals and ideals.²⁹⁶ Thus, borrowing Hart's and Kelsen's philosophies, he found that the Constitution is the rule of recognition which forms the yardstick for examining the bona fides of all CAA.²⁹⁷ He explicitly clarified that a constitutional amendment cannot by itself constitute such a litmus test, for it must conform to constitutionally entrenched methodologies.²⁹⁸ Thus, the possibility of repealing or wholly abrogating the entirety of the Constitution was vociferously rejected. Although Justice Chowdhury hinted at the ontological distinction between CAP and

²⁹² *Anwar Hossain Chowdhury v. Government of the People's Republic of Bangladesh*, 41 DLR(AD) (1989) 165.

²⁹³ *Id.*

²⁹⁴ *Id.*, ¶190-200.

²⁹⁵ *Id.*, ¶215-220.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

mundane statute-making,²⁹⁹ nevertheless he repeatedly emphasised that the outer boundary limit of CAP is underscored by the confines of the constitutional framework itself. Thus, Justice Chowdhury attempted to use the unique context of the polity's constitution to evolve a reasoning suited to the character of its intrinsic morality and configuration.

This line of reasoning was echoed by Justice Shababuddin Ahmed, who adduced to the discursive constitutional parameters as both the progenitors of validity and delimitation of scope for amendments.³⁰⁰ An all-encompassing change that transmutes the cardinal disposition and fibre of the Constitution would defeat the purpose and intent of the expression.³⁰¹ He restated the derivative secondary delegated nature of CAP, which are not automatically inoculated from being tested for their substance simply because they are a species of constituent powers.³⁰²

The key takeaways from this analysis are the interpretive differences in perspectives and insights owing to the constitutional entrenchment of the well-know doctrine of constitutional supremacy over all laws, a core tenet equally operating in modern constitutional democracies. The justifications afforded for limiting CAP are substantially bolstered upon formulating such express constitutional provisions that delimit the legislature's scope of competence and powers. We will continue this analysis of the evolution of the ontology of CAP in the analyses presented below, since they are irrevocably tied in with the themes discussed later.

Pakistan

The apex judiciary in Pakistan developed the taxonomy of constituent powers in its constitutional jurisprudence, at the nascent stage itself. Thus, in *Fazlul Quader Chowdhry v. Muhammad Abdul Haque* ('Fazlul Quader Chowdhry'),³⁰³ the Supreme Court of Pakistan clearly distinguished between ordinary law-making and CAA, stating that a difference between the two has been maintained throughout the Constitution itself. Justice Kaikus, in particular, asserted that even from the perspective of quotidian linguistic discourse, a reference to the term 'law' commonly implies an allusion to routine lawmaking, not promulgations of CAA; on the other hand, a reference to the Constitution would colloquially and ordinarily connote a reference to its text and provisions only.³⁰⁴ This articulation stands in stark contrast to the approach adopted by the Bangladeshi SC, as analysed above.

A notable explication of the rudiments of the BSD and corresponding configuration of CAP can be found in *R.S. Jhamandas v. Chief Land Commissioner* ('Jhamandas'),³⁰⁵ where the Court directed attention to the concept of a "constitutional conscience". It noted that the Pakistani Constitution, which is an integrated organic whole

²⁹⁹ *Id.*

³⁰⁰ *Id.*, ¶415-418.

³⁰¹ *Id.*, ¶374.

³⁰² *Id.*

³⁰³ *Fazlul Quader Chowdhry v. Muhammad Abdul Haque*, PLD 1963 SC 486.

³⁰⁴ *Id.*

³⁰⁵ *R.S. Jhamandas v. Chief Land Commissioner*, PLD 1966 SC 229.

and attuned to social, political and constitutional changes, possesses a distinct morality and conscience, which could not be abrogated by any law inconsistent with it. Thus, any such law which does not operate within the constitutionally outlined limits would be considered as impugning the very “constitutional conscience” of Pakistan. We find an inversion of the discursive logic examined in Part II of this paper with respect to tracing the BSD from the scheme of CAP in this verdict, as instead, it is the constitutional conscience that is found to be the mainspring of the justification for ensconcing the doctrine of constitutional supremacy over amendments. Nonetheless, the dominant similar feature of both the theoretical and juridical models is the rooting of the logic of limitations of CAP in the constitutional design itself.

Notably, in *Mahmood Khan Achakzai v. Federation of Pakistan*,³⁰⁶ Justice Saleem Akhtar affirmed that the Constitutional provisions could not be prorogued or debarred by any external force, barring those inherent in its own text and composition. He stated that any notion of repudiation or obliteration of the Constitution is alien to the very spirit of Pakistan’s Constitution.³⁰⁷ Thus, despite being acutely aware of the unique jurisprudential history of the polity (as discussed in Part III.C and discussed more in detail in Part IV.D of this paper), and of the historical abundance of legal sanctions granted by Pakistan’s SC to derogations from its Constitution, he powerfully proffered that such legalisation would make no difference to the *ab initio* unconstitutionality of these denigrations.³⁰⁸ He highlighted the consequentialist intent of granting such sanctions and approvals for the purpose of eschewing political volatility and imbalances in constitutional governance, for preserving the stability of constitutional order and administration, and for affording the executive the requisite space and freedom to gradually conform to constitutional tenets on its own accord.³⁰⁹ Such judicial benevolence however did not imply that conceptually, theoretically and epistemologically, the CAP of the Chief Executive were or would continue to remain untrammelled. Thus, the judicial anxiety of arrogation of powers by the constitutional organ originally envisaged to exercise its powers within set limits, very much vexed the constitutional jurisprudence of Pakistan right from the beginning. In particular, we have analysed Justice Akhtar’s observations to counterpoint common characterisations of Pakistani constitutional jurisprudence as uniformly and unilaterally deferential to the wishes of the executive. His opinion is a momentous and prodigious instance of clear articulation of the occupation of the Pakistani SC with more pressing interests besides purely preserving constitutional sanctity, in light of the polity’s distinctive socio-political history, as well as the Court’s simultaneous agitation at the resulting imbalance in the powers and operating domains of the constitutional organs.

A targeted analysis of the distinctions between constituent and CAP is found in *Wukala Mahaz Dastoor v. Federation of Pakistan*,³¹⁰ where Chief Justice Ajmal Mian and Justice Saeed uz Zaman Siddiqui referred to Article 8 of the Pakistani Constitution, which, akin to Indian Constitution, declares any law contravening the FRs to be void.³¹¹ Similar to the articulations in Sajjan Singh through Kesavananda verdicts in India, they distinguished between ordinary legislative power and CAA in the instant case, holding that the

³⁰⁶Mahmood Khan Achakzai v. Federation of Pakistan, PLD 1997 SC 426.

³⁰⁷*Id.*

³⁰⁸*Id.*

³⁰⁹*Id.*

³¹⁰Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan, PLD 1998 SC 1263.

³¹¹*Id.*, 1386.

aforementioned constitutional provision could not be used to test the latter.³¹² They iterated the subservience of the ordinary laws promulgated on exercise of the legislature’s normal legislative power – which can be tested on the touchstone of this provision imputing limitations – to the CAP – which admits of no such fetters.³¹³ In stark contrast to Justice Chowdhury’s reasoning in the Eighth Amendment verdict in Bangladesh’s constitutional jurisprudence, the Court in this case found that merely because the procedural mechanism for promulgating CAA and regular statutes both employ the technical term “Act”, this would not imply that the constitution-amending clauses in the Pakistani Constitution, i.e. Articles 238, 239, would be similarly contingent on the diminutive limits operating on the latter.³¹⁴ Immediately upon its enactment in conformity with constitutionally prescribed procedures and receipt of Presidential assent, the amendment would intrinsically embed itself in the Constitution.³¹⁵ Referring to the interpretive canon that no constitutional provision enjoys superior status unless otherwise so specified by the Constitution itself, the Court found that such amendments and provisions ushered in by the amendments would be exempt from the purview of the FR-touchstone provision.³¹⁶ This proposition is now well-settled in Pakistan’s constitutional law jurisprudence; although *Wukala Mahaz’s* rigid eschewal of any form of implied limitation on amendment has been mediated in the latest cases on the Eighteenth and Twenty-First Amendments, which will be discussed in detail below.

DEMARCATION OF DOMAINS OF THE LEGISLATURE AND THE JUDICIARY- WHO DETERMINES WHETHER AN AMENDMENT IS CONSTITUTIONAL?

Under this theme, we will explore the following questions-

- Does the SOP doctrine hold true as per the respective constitution of each polity, especially with reference to the demarcation of distinctive domains of the Legislature and the Judiciary?
- If so, how does the Constitution envisage such separation while determining constitutionality of amendments?
- Is determining such constitutionality a political or judicial question, in light of the constitutional histories and philosophies of each polity analysed above in Part III?
- Is the role of Courts limited to protecting against statutes violating the Constitution, or does it extend to such violations engendered by constitutional amendments?
- Does silence of the Constitution vest courts with the authority to determine constitutionality of amendments?

1. India

The variations and multiplicity in the approaches adopted towards the nature of CAP throughout the years, correspondingly influenced the stance of the SC towards the application of the doctrine of SOP. Thus, in *Sankari Prasad*, it was explicitly asserted by the

³¹² *Id.*, 1387.

³¹³ *Id.*, 1388.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

SC that the CAP exclusively vest with Parliament, such that amendments otherwise violating the constitutional mandate and provisions would be rendered valid.³¹⁷ In keeping with its pro-Parliament approach, the Court observed that though the impugned Articles 31A and 31B, inserted by the aforementioned set of CAA,³¹⁸ covered subjects traditionally and wholly falling within the realm of state legislative competence, the object of these Articles was to render certain laws immune from interference by the FR-touchstone provision, i.e Article 13, and the FRs themselves. Thus the impugned Articles were essentially CAA, and Parliament had the power to enact them, regardless of whether the class of laws protected by the Articles themselves contravened the Constitution.

Echoing these observations in *Sajjan Singh*, the majority judgment delivered by Chief Justice Gajendragadkar repudiated the operation of the maxim '*delegatus non potest delegare*' in Indian constitutional law.³¹⁹ He rejected the application of the delegated powers framework to the Indian constitutional context, observing that the CAP in India could not rest upon such theoretical doctrines which vest sovereignty in the people, and which consider statutes to be merely the delegate of the people.³²⁰ The Parliament's power to amend, it was held, solely depends upon whether the said power is included in Article 368.³²¹ The reasoning adduced for such linkage was that it would then effectively oust any political considerations of or deliberations on the reasonableness, utility or appropriateness of the impugned amendments, as these would be rendered wholly extraneous to the explicit and unambiguous mandate of the unfettered power contained in the constitution-amending clause.³²²

However, Justice Mudholkar countered in his separate opinion in this case that though it was well established that the delegated powers framework as found in the British Parliamentary setting was inapplicable to the Indian Parliamentary context, it is equally true that unlike the British Parliament, the Indian Parliament can operate solely, only and strictly function within the fetters limits imposed by the written Indian constitution.³²³ These limits, by logical extension, would then also operate when the Parliament amends the Constitution itself. Thus, he opined that where the amendment is disputed on the basis of lack of any amendment actually made, or that it breaches the frontiers envisaged by the Constitution, it is the competence as well as the solemn responsibility of the Court to review the vires of the amendment. Such JR competence which applies ordinarily to regular statutes, therefore, is equally applicable to CAA as well.³²⁴ We thus find that in the Indian context, the emphasis placed upon the constitutional context was as important as the discursive and epistemological horizons of the ontology of CAP, for tracing the limitations placed on the same.

Coming to the *Golaknath* verdict, Chief Justice Subbarao categorically rejected the contention of political characterisation of CAA and consequent attempt at rationalising the ouster of JR through such imbuing of a political persona.³²⁵ He acknowledged that political motives may play a significant role in promulgating amendments, however when the court exercises JR and curbs the CAP in case of contravention or

³¹⁷*Sankari Prasad v. Union of India*, 1952 SCR 89.

³¹⁸*Id.* See Parts III.A and IV.A.I of the paper for the list of the amendments referred.

³¹⁹*Sajjan Singh v. State of Rajasthan*, 1965 SCR (1) 933.

³²⁰*Id.*

³²¹*Id.*

³²²*Id.*

³²³*Id.*

³²⁴*Id.*

³²⁵*I.C. Golaknath & Ors. v. State of Punjab*, 1967 SCR (2) 762.

transgression, such limitation does not equate to repudiation of the power itself.³²⁶ Such exercise of judicial powers does not lead to overextension of the Court's jurisdiction to reviewing political matters as well. Rather, this should be understood ontologically as a purely constitutional requisite necessary for preserving the integrity of the constitutional framework, which cannot be abrogated by the amendment powers.³²⁷

Intriguingly, in *Kesavananda Bharati*, Justice Khanna observed that unless verbally expressed or necessarily implied, the abstract notion of a "spirit" of the Constitution, discovered by judicial interposition, could not limit the omnipotence of the CAP.³²⁸ He believed that any assumption of authority beyond this would lead to an aggrandisement of powers by the judiciary, which would then become a super-legislature indulging in subjective calculations of the wisdom of legislation.³²⁹ This observation becomes particularly significant for two reasons: *firstly*, despite eschewing a clear definition of the BSD, Justice Khanna offers a cogent clue to its contents through this statement; and *secondly*, this patently evinces that the judges in *Kesavananda Bharati* were wholly conscious of possible criticisms of entrenchment of judicial hegemony and subversion of the SOP doctrine, and therefore sought to engage with and refute these, by outlining reasoned and constitutionally coherent defences in this very verdict itself. Thus, a detailed reading of the case opinions offers unique insight into the intent and purposes for which BSD was originally propounded, and enables holistic and expedient rebuttals of the common criticisms levied upon the BSD even today.

Significantly, Justice Khanna outlined that the scope of CAA admits of ousting of JR of extant laws, or immunising such review of future legislations pertaining to enumerated subjects.³³⁰ In such cases, the courts still retain power to examine whether the statute or law has been promulgated corresponding to the enlisted theme, sphere or subject; and therefore such amendments are contemplated within the ambit of the constitution-amending clause. He opined that what is however not permitted, and what amounts to a transgression of constitutionally demarcated limits of CAP, is an amendment ousting JR of the laws as well as immunisation of such review of existence of actual linkage between the statutes and their proclaimed concerns. Not only is the JR of the laws excluded in such cases, but also the JR of whether these statutes indeed relate to these subjects in the first place, is also ousted.³³¹ Such CAA would clearly be violative of the ontology of CAP.

Even in the latter prohibited cases of untrammelled *carte blanche* accorded to the legislatures, however, Justice Khanna cautioned JR nevertheless cannot broach policy decisions on the wisdom of the legislation, and should leave room for trial and error.³³² The competence of the courts in this scenario is to only adjudge, discern and proclaim whether the constitutional amendment and the provisions it ushers, are compatible with constitutional provisions and limits.³³³ Thus, right from *Kesavananda Bharati*, it is quite evident that BSD was envisaged as a necessary means for promotion of democracy, instead of an arbitrary counter-majoritarian check to legitimate political authority asserted through proper CAA.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Kesavananda Bharati v. Union of India*, (1973) 4 SCC 225, ¶1491

³²⁹ *Id.*, ¶1495; *Ferguson v. Skrupa*, (1963) 372 U.S. 726

³³⁰ *Id.*, ¶1581-1585

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*

Justices Shelat and Grover expounded upon why it is apposite for the judiciary to possess the power to review CAA, irrespective of the inevitable interlinking with political, economic and social questions.³³⁴ They argued that as was the case in *Kesavananda Bharati*, where the contentions revolve not only in the usual binary of the State versus citizen, but involve issues directly affecting a broader gamut of entities including the Central and state governments and their contestations vis-à-vis citizens, then it becomes imperative for the only appropriate constitutionally sanctioned authority to intervene and adjudicate upon these questions, i.e. the courts, to exercise their powers of review.³³⁵ They asserted that such checks and balances effectuating a judicious demarcation of the respective domains of the constitutional organs emerge from the federal features imbricate in the Indian Constitutional configuration itself.³³⁶ Since the Indian judiciary is constitutionally sanctioned with the power, role, function, competence and duty to interpret and safeguard the Constitution, it follows that any issue involving examination of consistency of a statute or law with the constitutional text and provisions, similarly falls under the realm of constitutional interpretation, and therefore within the domain of the judiciary.

In contrast to this constitutionally cogent interpretation of judicial domains, Justice Ray adopted a patently conservative approach in the *Raj Narain* case. Thus, he clearly found that the nature of the constituent power is legislative, not judicial.³³⁷ He adopted a rather tenuous line of reasoning to rationalise the Thirty-Ninth CAA which overthrew JR of election disputes. He began his analysis from a standpoint that there is a clear conceptual and theoretical difference between the customary and habitual adjudicative divination undertaken by the courts, and the idiosyncratic Parliamentary competence to decide upon instances of elections whose legal validity has been questioned,³³⁸ although, the CAP cannot however outright proclaim a person to be elected.³³⁹ Drawing from Keslen's theoretical framework, he adduced that judicial verdicts comprise simultaneous and concomitant application of two categories of powers – lawmaking and its application.³⁴⁰ This involves interpretation and application of the higher norm such as a law or statute, as well as the lower derivative standard operative upon the individual parties involved in the dispute.³⁴¹

Thus, he evolved a rather artificial interpretation that where the constitutional amendment retroactively deprives a judgment of its effect and consequences, as in the present case, such amendment could not be considered as a transgression on judicial competence, since it was well within the scope of Parliament's authority to divest the very existence of the general norm, which formed the basis for the concerned judgment, in the first place.³⁴² Thus, Justice Ray attempted to evolve a rather stilted construction of the ontology of SOP, in order to justify his conclusion that clause 4 of the Article 329A, which ousted JR of election disputes, was an exercise of declaratory judgment and not law, and therefore well within the Parliament's ambit of powers.³⁴³

³³⁴*Id.*, ¶614-615

³³⁵*Id.*

³³⁶*Id.*

³³⁷*Indira Nehru Gandhi v. Raj Narain*, (1975) SCC 2 159, ¶408.

³³⁸*Id.*, ¶411.

³³⁹*Id.*, ¶408.

³⁴⁰*Id.*, ¶411-412.

³⁴¹*Id.*

³⁴²*Id.*, ¶412.

³⁴³*Id.*

Justice Khanna afforded a lucid counterpoint to this convoluted line of interpretation articulated by Justice Ray in the Raj Narain decision. Justice Khanna observed that usually and customarily, any proclamation rendering a judgment delivered by a court or tribunal to be ineffectual is usually a role contemplated within the province of the judiciary and not the legislature.³⁴⁴ Whilst admitting that the Constitution of India does not rigidly adhere to the doctrine of SOP in a manner akin to the American Constitution, he nevertheless expostulated that the Indian constitutional scheme substantially distinguishes between and delimits the respective spheres of operation and restrictions on functioning of these two State organs. He asserted that while Parliament possesses the competence to retroactively alter the law or statute underscoring a judicial verdict, it does not have the competence to outright render the judgment itself wholly ineffectual and to deprive the adjudicative decision of its imperative.³⁴⁵ Thus, Justice Khanna viewed the actual intent and effect of the amendment to determine its constitutionality in the instant case, rather than inventing circuitous routes to subvert JR, which enabled him to reinforce the competence of both the Parliament and the courts.

Justice Mathew also supported Justice Khanna's observations in this case. He affirmed and accepted the postulate of Parliament's unequivocal competence to promulgate CAA, and acknowledged that usually in the context of written and strict constitutions such as the Indian Constitution, the difference between constitutional and regular laws lies in their respective exclusion from and inclusion within the scope of challenge based on the barometer of the constitutional configuration.³⁴⁶ However, he contended that it cannot be denied that both categories indubitably are ultimately species under the same genus of law, and therefore any constitutional law or amendment contravening the constitutional mandate cannot be immunised from its effect or from being challenged. He dismissed Justice Ray's discursive understanding of Kelsen's theory, noting that this theoretical framework never contemplated a conflation of the legislative and judicial functions.³⁴⁷

More recently, the SC has proactively reiterated numerous times that the SOP doctrine now forms an integral feature of the BSD in Indian constitutional jurisprudence. Thus, in *I.R. Coelho v. State of Tamil Nadu* ('Coelho'),³⁴⁸ the Court observed that there are vast differences between parliamentary and constitutional sovereignty, which operate in UK and India respectively. The fact of promulgation of our Constitution not by Parliament, but by the Constituent Assembly, clearly signifies the constituent competence of the latter to draft, frame and execute the constitution. Thus, a written constitution as operating in India always admits of constitutionally specified demarcations and limitations of the competence of the constitutional organs, as opposed to more flexible nature of CAP of such organs operating in States with unwritten constitutions such as the U.K.³⁴⁹

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³⁴⁴*Id.*, ¶463.

³⁴⁵*Id.*, ¶463.

³⁴⁶*Id.*, ¶508.

³⁴⁷*Id.*, ¶510.

³⁴⁸*I.R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1.

³⁴⁹*Id.* (although the scenario is progressing towards firmer entrenchment of demarcation of domains in the recent U.K. context as well)

In the Eighth Amendment case, Justice M.H. Rahman reaffirmed the doctrine of constitutional supremacy as well as the legacy of judicial independence, postulating that the resolution of constitutional questions can fall only within the realm of courts.³⁵⁰ He referred to the classical statement of the judicial province in *Marbury v. Madison*,³⁵¹ where the U.S. SC held that notwithstanding the lack of formal entrenchment of JR in the constitutional text, the judicial role and function intrinsically contemplates interpretation of statutes as well as the Constitution, and the unimpeachable obligation to strike down laws devoid of legal effect and validity. Drawing support from this line of interpretation, Justice Rahman asserted that an independent judiciary which can freely adhere to its constitutionally delimited scope of authority, is the best and only means for legitimate resolution of constitutional law disputes; and that the Parliament and the military must necessarily accept the judicial supremacy in this respect.³⁵²

His emphasis on the presumption of validity of a CAA must be noticed. He accepted the weighty presumption of constitutionality operating upon such amendments; and cautioned that the judiciary must exercise “utmost self-restraint” and “weigh the consequences for and against”, before invalidating an amendment, emphasising that the Court should hold back from striking down an amendment if it can be reconciled with the constitutional text.³⁵³ Therefore, he felt that the role of the Supreme Court should not interfere with policy prescriptions and actions undertaken by the two other organs of the State. But such interference would be justified and in fact warranted in case of violation of a constitutional provision or law that occasions the court’s power of review, which must nevertheless be subject to “great restraint”, and, further, paying anxious consideration to the ramifications ensuing from such a judgment.³⁵⁴

A trace of the views articulated in the Coelho decision in India can be found in the case of *Siddique Ahmed v. Bangladesh*³⁵⁵ as well. Here, the HCD held that polities endowed with written constitutions such as Bangladesh, India, the U.S.A., etc., constitutional pre-eminence and ascendancy lies with the constitutions themselves, rather than the legislature, as found in the U.K.³⁵⁶ Thus, the thesis of Parliamentary sovereignty which forms the normative bedrock of the Westminster model, finds no place in the written and delineated constitutional orders operating in the aforementioned set of polities including Bangladesh.³⁵⁷ It emphasised upon that the power to conduct JR, when seen through the lens of the Constitution, no longer remains solely a competence, but also transmutes to an onus and inviolable commitment placed upon the courts to uphold constitutional supremacy at alltimes and in all cases.³⁵⁸

It must be noted that the question of SOP remains a significantly contentious question in the public discourse of Bangladesh, particularly because of the changes wrought in the constitutional text owing to imposition of Martial law. Recent judgements of the Supreme Court, including the HCD and AD, have repeatedly affirmed the independence of

³⁵⁰ Anwar Hossain Chowdhury v. Government of the People’s Republic of Bangladesh, 41 DLR(AD) (1989) 165.

³⁵¹ *Id.*, *Marbury v. Madison*, (1803) Cranch 137.

³⁵² *Id.*

³⁵³ ¶442.

³⁵⁴ ¶527.

³⁵⁵ (2010) 39 CLC (HCD).

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*, ¶¶113-114.

the judiciary and its right to review CAA, in the recent years, with increasing vociferousness and emphasis. The particulars of these cases will be more appropriately examined under Part IV.C, wherein the discussion of SOP, in these cases, will also be examined.

Pakistan

As early as 1963, the Supreme Court held in *Fazlul Quader Chowdhry* that constitutional interpretation and preservation is an inherent and intrinsic *droit* of the judiciary, and is grounded upon real and pragmatic investigations into substantial contestations of the scope of operation of political and constitutional actors.³⁵⁹ The Court asserted that such obligation as well as franchise of the judiciary to review laws and amendments is not derived extraneously or from a supervening intrusive external force, but is rather a natural by-product of the constitutionally envisaged role of the courts in the first place.³⁶⁰ Therefore, the Court rejected the contention that the invocation of such power would necessarily entail concomitant invocation of a totally superficial and extrinsic entitlement, for such competence is wholly imbricate in the function and role of the courts.³⁶¹ Thus, the erstwhile Chief Justice Cornelius admirably elucidated the delegated powers framework to justify this proposition, stating that whereby the legislative organ derives its power from the superior dominion of the Constitution, any statute formulated by it must necessarily conform to the constitutional configuration owing to its derivative and secondary nature.³⁶² In the event the latter appears to contradict the former, it would be rendered wholly void owing to its delegated quintessence. The power to decide upon such issues of contestations of the two categories of laws being vested in the judiciary, the acts of the issuing or promulgating authority would be subject to its jurisdiction, irrespective of the rank of such an entity, unless otherwise barred.³⁶³

Further, Justice Hamood-ur-Rahman stated that it is the bedrock of every modern constitutional order that the role of interpreting and deciding upon the meaning of the constitution must vest with a constitutionally entrenched body, and this is an exercise that is best performed by the impartial, neutral arbiter embodied by the Judiciary. He further propounded that the Courts have uniformly held that while the presumption of constitutionality operates heavily with respect to amendments, an important exception is where the amendment wholly and irrevocably removes the review powers of the judiciary.³⁶⁴

The question of the respective domains and provinces of the Legislature and Judiciary were similarly explored in detail in *State v. Zia-ur-Rehman* ('Zia-ur-Rehman').³⁶⁵ Justice Hamood-ur-Rahman observed that in the traditional discursive trichotomy of powers between the three State organs, the predominant role of the constitution is to delimit and delineate the contours of powers and roles of every organ of the State.³⁶⁶ He

³⁵⁹ *Fazlul Quader Chowdhry & others v. Muhammad Abdul Haque*, PLD 1963 SC 486.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.*, 539.

³⁶⁵ *State v. Zia-ur-Rehman*, PLD 1973 SC 49.

³⁶⁶ *Id.*, 66.

emphasised that whilst exercising its functions of interpretation and review, the courts do not seek to arrogate any unconstitutional sovereignty or dominion over the other two aforementioned State bodies. Rather, in executing such functions, the judiciary upholds the very intent and purpose for which it was created in the first place – upholding constitutional supremacy and protecting constitutional sovereignty.³⁶⁷ Thus, in cases where it strikes down promulgations of rules, laws, orders or amendments as unconstitutional, this competence emerges not from a higher rank or supremacy of the judiciary over other State organs, but from the constitutionally accorded role and scope of the courts to adjudicate upon such questions.³⁶⁸ Thus, it is clear that the SC of Pakistan clearly upheld the sanctity of judicial independence and review in this decision.

The Court's observations that while the Judiciary possesses the power to examine the legislative instruments made under the Constitution, it would not have such power with regard to the promulgation of a new Constitution altogether, were admirably evocative of the scheme of CAP outlined in Part II of this paper. Thus, the Court held that when a formal written Constitution, for instance, the interim Constitution of 1972 of Pakistan, had been enacted and adopted by a body so possessing the competence to frame and promulgate it, and where it has been widely and integrally accepted by the citizens of the polity as the effective constitution, the courts would have no role or function of examining the validity of its contents.³⁶⁹ Drawing from the logic of this ontology, the Court then stated that it however possesses the power to examine the *vires* of a *law* challenged as incompatible with this Constitution.³⁷⁰

Thus, the Court clearly drew a distinction between the adoption of a new Constitution – a question that the judiciary cannot examine, since it relates to the exercise of popular sovereignty – and a law made under the ambit of the new Constitution – which connotes exercise of derived constituent powers, and which thereby admits of JR. However, as will be analysed below, in later cases, the limitation regarding non-justiciability of adoption of a new Constitution, i.e., that the Court cannot declare the provisions of the original Constitution void, was misread and misunderstood to extend to the judiciary's power to examine the constitutionality of laws and amendments, such that the interpretation emerged that the Zia-ur-Rehman decision had laid down the proposition that the Court cannot declare even the amendments and laws which contravene the original Constitution, as void. This inaccurate reading of the ratio of the verdict proved spectacularly disastrous for the constitutional jurisprudence in Pakistan, as will be examined below, for now the Courts now began to adopt the stance that the Judiciary can only interpret laws, but cannot strike them down – a gross obfuscation of the basic taxonomy of CAP. It also reaffirms the need for critical studies of the constitutional jurisprudence in this context, as has been undertaken in this paper, which are indispensable for revealing and accurately tracing the source of distinct constitutional readings and interpretations that are often misattributed to other sources, such as external political proclivities of the judges.

³⁶⁷*Id.*

³⁶⁸*Id.*

³⁶⁹*Id.*,70.

³⁷⁰ *Id.*

Thus, only a year later, in *Federation of Pakistan v. Saeed Ahmed Khan* ('Saeed Ahmed Khan'),³⁷¹ the SC held that notwithstanding the straightforward and unambiguous inferences of the judicial realm and examination powers arising from the constitutional scheme, the overriding precedential value of the Zia-ur-Rehman decision tied the hands of the Court such that it could not strike down patently autocratic and subversive expulsions of its integral function of JR, as ensconced through rampant and unbridled promulgations of Martial regulations. The astoundingly paradoxical result of such vexed interpretation was that the Court held that it could only interpret and enforce such laws, as per settled interpretive canons. The obliteration of the very meaning and purpose of the establishment and functioning of the judiciary was thus subverted simply owing to an inaccurate reading of a precedent, that became firmly entrenched in Pakistan's constitutional jurisprudence for a considerable span of time.³⁷²

The basic ontology of CAP was reiterated in *Dewan Textile Mills Ltd. v. Pakistan*,³⁷³ where the Sindh High Court dilated upon the contention that the legislature did not possess the requisite competence or even the political ratification to promulgate amendments abrogating the essential character and epistemology of the Constitution. Furthermore, the contention arose that in the absence of such mandate and competence, the complete and total disbandment of the legislature, and solicitation of the citizen's perspectives through a referendum or any other such democratic means, can be the only solution for ensuring validity and constitutional efficacy of the concerned amendments.³⁷⁴

However, the Court completely rejected this contention. It stated that where the Constitution has been drafted, framed, deliberated upon and created by the citizens through the exercise of their popular sovereignty, and endowed the specified constitutional organ, i.e. Parliament with the CAP, it would be wholly fallacious and inapposite to suggest an abrupt resumption of the derivative CAP by the people, which have already been delegated.³⁷⁵ Where the citizens of the polity have accepted the sovereignty of constitutional supremacy, and explicitly delegated the CAP to the legislature, thereby removing themselves from any unmediated and alacritous execution of the CAP and procedures, it would be extraordinarily arduous to prove that a re-arrogation of CAP could be attested to the will of the people.³⁷⁶ The unique socio-political history and jurisprudential evolution of Pakistan, and the nature of its polity, clearly indicate that direct democratic means such as referendum were eschewed in favour of representative democracy; and furthermore, the Constitution itself did not contemplate of such methodologies, as compared to the formal embedding of such means in the constitutions of polities such as Australia, Switzerland, etc.³⁷⁷ The constitutionally incoherent result that would emerge if such a process were to be allowed is that two entities would then simultaneously and incompatibly execute the derivative CAP – the body represented by popular sovereignty on one hand, and the constitutionally delineated amending body on the other.³⁷⁸

³⁷¹Federation of Pakistan v. Saeed Ahmed Khan, PLD 1974 SC 151.

³⁷²*Id.*,166.

³⁷³Dewan Textile Mills Ltd. v. Pakistan and others, PLD 1976 Kar. 1368.

³⁷⁴*Id.*

³⁷⁵*Id.*

³⁷⁶*Id.*

³⁷⁷*Id.*

³⁷⁸*Id.*

Thus, the delegated powers framework was deployed to justify that such delegation of CAP could not be effectuated at the same time by the delegating authority represented by popular sovereignty, and the delegated authority encapsulated in the constitution-amending organ. To bolster its conclusions, the Court also that the adjudication of the legislature's political mandate was a political question, a sphere barred from JR in the scheme of the constitutional arrangements of the polity.³⁷⁹ While this verdict accurately delimited the judicial domain, the approach adopted also demonstrates the practical difficulty of recommencing the exercise of popular sovereignty, once a written constitution containing a clear amending clause has already been adopted in the polity.

In *Pakistan Lawyers Forum v. Federation of Pakistan* ('Pakistan Lawyers Forum'),³⁸⁰ the Supreme Court restated the importance of deferring to the constitutionally delimited competence of the Parliament, which forms an unimpeachable expression of the will of popular sovereignty. Consequently, the Court stated that the presumption of a statute's constitutionality would operate heavily in its favour. The Court held that it was not within its envisaged province to delve into political questions reserved for the consideration of elected representatives in the legislature, nor could it formulate subjective yardsticks as to the will of the people for examining the *vires* of a statute or an amendment.³⁸¹ The sole province of the Court being adjudicating upon the constitutional validity of these enactments, it would have no competence in interfering with the legislature's determinations and prescriptions of the wishes of the citizens.³⁸²

The Supreme Court explicitly recognized, for the first time, in *Sindh High Court Bar Association v. Federation of Pakistan* ('Sindh HCBA'),³⁸³ that amendments undertaken by authorities not envisaged by the Constitution, were to be struck down as violative of the constitutional epistemology and therefore wholly void. The impugned Seventeenth Amendment to the Constitution, which was purportedly passed under the constitutional aegis, was rejected by the SC as 'eyewash', stating that the onerous task of constitutional amendment assigned to Parliament could not be subverted in such a manner.³⁸⁴ The Court held that such abeyance of the Constitution and amendments by the military executive "by the stroke of his pen", via a patently unconstitutional course, amounted to unacceptable destruction of the entirety of the Constitution, and therefore could never be validated.³⁸⁵

Moreover, the Court went a step further and asserted that the amendments would remain equally bereft of sanctity, even if they are approved by the Parliament subsequently and a consequent deeming effect of competence is attached to their

³⁷⁹*Id.*

³⁸⁰*Pakistan Lawyers Forum v. Federation of Pakistan*, PLD 2005 SC 719.

³⁸¹*Id.*, 774-775.

³⁸²*Id.*

³⁸³*Sindh High Court Bar Association v. Federation of Pakistan*, PLD 2009 SC 879.

³⁸⁴*Id.*

³⁸⁵*Id.*

promulgation.³⁸⁶ This was because they were devoid of legal effect right from the inception, since they were effectuated by an authority not possessing the constitutional mandate to undertake such a function. The Court also pointed out that the constitution-amending powers had been reposed in this body solely, through the one and only means of the constitution-amending clause. Article 238 coupled with Article 239 clearly impart the Constitution with the requisite “inner strength” to oppose its breaches by such military takeovers.³⁸⁷ The SC vigorously affirmed that no constitutional abrogation could be permitted under the pretence that the Constitution had, in fact, become unworkable, futile or ineffectual, when the real reason for the promulgation of such amendments was that the people holding the ultimate authority, for instance, military dictators, did not want to follow the Constitution.³⁸⁸

Further, the Court referred to Article 6, discussed in Part III.C of this paper, under the discussion on the State necessity doctrine. The Court observed that Article 6 has in fact created an impressive constitutional buffer against the whims of tyranny.³⁸⁹ It argued that if such whims were allowed to be exercised without any check, that too by the deployment of illegal recourses such as use of force, then the intent of formulating and enforcing Article 6 would be rendered wholly futile.³⁹⁰ Thus, we find that the Court emphasised the integrated character of the Constitution envisaged to represent the will of the polity as a whole.³⁹¹ Therefore, any suspension or repudiation of its provisions, not contemplated in its own scheme, was held to be downright illegal and ineffectual. The entrenchment of the aforementioned provision was intended to signify that it would not be within the judicial province to respect such unconstitutional execution of powers, but conversely, it remains the solemn and sole duty of the courts to take cognisance of such transgressions and unabashedly strike them down.³⁹² Therefore, the Court rejected the doctrine of British parliamentary sovereignty, emphasising the all-encompassing supremacy of the constitutionally delineated parameters of competence.

Furthermore, coming to the question of applicability of the State necessity thesis and of the maxim *salus populi est suprema lex*, as enunciated in *Begum Nusrat Bhutto v. Chief of Army Staff*,³⁹³ the Court wholly repudiated the possibility of such application where the arrogation of constitutional powers is undertaken in a patently undemocratic manner incompatible with the constitutional epistemology, through adoption of routes including but not limited to martial orders, CAA, declarations of state of emergency, etc. The Court also examined the historical evolution of constitutional jurisprudence through the cases discussed in Part IV.D of this paper, to argue that it has always been a cardinal tenet of the constitutional order of Pakistan, that courts retain the independence, competence, power and prerogative to conduct JR. This proposition has now been accepted as settled law in the latest SFD decision, explored in detail in Part IV.D of this paper.

³⁸⁶*Id.*

³⁸⁷*Id.*

³⁸⁸*Id.*

³⁸⁹ *Id.*

³⁹⁰*Id.*

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³*Id.* *Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan*, PLD 1977 SC 657.

THE BASIC STRUCTURE DOCTRINE: MEANING, RATIONALE AND LIMITS

Under this theme, we examine the following issues:

- How has the BSD been defined? How have its contours and limits been delineated?
- What is the rationale for the BSD?
- How do courts limit themselves from an overgenerous construction of the BSD, so as to avoid exercising judicial hegemony?
- Should a list of basic features be provided? If so, what features does this list include? Is it an indicative or expressly defined list?
- What are the tests for identifying these features?
- Do any other implicit/explicit limitations exist on constitutional amendments after the promulgation of the BSD?
- Where an amendment itself forbids the court to examine, review and adjudicate upon the vires of amendments, how does the court review such an amendment?
- Does the BSD extend to ordinary legislations?
- Does the BSD extend to executive action?
- Are the criticisms that the BSD has attained a supra-constitutional status true in light of the most recent developments in the doctrine?

1. India

The genesis of the BSD in India can be traced back to Justice Mudholkar's separate opinion in *Sajjan Singh*, wherein he asserted that the Constituent Assembly's decision, to eschew the British model of Parliamentary sovereignty, and instead, to enact an expressly delineated and detailed Constitution; to ordain the Preamble with the integrity of a succinct synopsis of the constitutional complexion; to ensconce the inviolability of the FRs; to effectuate SOP between the three constitutional organs, whilst also incorporating checks and balances and mutual accountability to facilitate harmonious implementation of the constitutional values and ideals; to execute a distributive scheme of demarcated domains of federal or central and state legislatures and executive governments with concomitant powers and limitations; and to repose the responsibility and competence to act as the steward and guardian of the Constitution; etc. all signified the intent of the Constitution-framers to impart stability, durability and continuity to the essential attributes of the Constitutional epistemology.³⁹⁴ In rewriting these basic features, therefore, the question then arises as to

³⁹⁴*Sajjan Singh v. State of Rajasthan*, 1965 SCR (1) 933.

whether it is a matter of mere amendment or of rewriting and replacing the Constitution itself, which would correspondingly also indicate whether or not it falls within the purview of Article 368.³⁹⁵

While Justice Khanna's exposition of the BSD, as stated earlier, forms the *locus classicus* pertaining to the doctrine, he acknowledged in his verdict that the most efficacious safeguards against abuse of amending power by the Parliament are wide and vigorous public discourse and the bona fide intentions and exercise of powers by the elected representatives functioning in the legislature.³⁹⁶ However, to incorporate further necessary safeguards, he envisaged that the Constitution can be so amended only insofar as it retains the elemental attributing constituting its bedrock and quintessence.³⁹⁷ The test laid down by him for determining what would amount to the minimum requirement for such retention was the continued survival and endurance of the extant Constitution, albeit accompanied by the concomitant alterations; if however, the core constitutional character represented by the BSD were to be annihilated, then the fact that some other provisions of the extant Constitution continue to exist, would be wholly relevant for adjudging the survival of the entirety of the Constitution.³⁹⁸

Justice Khanna quoted and approved observations in numerous works of constitutional scholars, for instance Professor Dietrich Conrad, which in essence state that notwithstanding the bare language and text of the amending clause indicating a wholly unfettered CAP, this competence could never be so exercised to demolish the portals buttressing the constitutional edifice.³⁹⁹ The basic structure is the very foundation, the "medicatrix" of the system.⁴⁰⁰ The amendment of any Constitution implies its remoulding and adaptation for the purposes of its organic evolution and perpetuation, but not at the cost of destruction of its essential components which implies death of the Constitution itself.

Interestingly, while Justice Khanna admitted of the operation of the BSD to curb the CAP, he was sceptical of reading in any implied restrictions ostensibly flowing in from the constitutional provisions, into such constraints.⁴⁰¹ The two facets of the ontology of the implicit limitations thesis are *firstly*, that such restrictions flow from an express and implicit reading of the constitutional text and provisions; and *secondly*, that akin to the theoretical discourse surrounding the jurisprudential, political and philosophical supremacy of natural rights of all human beings, these implied limitations can be abstracted definitively from the set of higher norms, values, ideals and goals, which are elemental to the existence and perpetuity of any modern constitutional democracy, and which constitute the cornerstone and crux of the constitutional epistemology.⁴⁰² Thus, these implied limitations are so predominant, fundamental and cardinal, that no constitutional amendment could effectuate or lead to their destruction or subversion.

³⁹⁵*Id.*

³⁹⁶*Kesavananda Bharati v. Union of India*, (1973) 4 SCC 225, ¶1599.

³⁹⁷*Id.*, ¶1480.

³⁹⁸*Id.*, ¶1484.

³⁹⁹*Id.*

⁴⁰⁰*Id.*, ¶1485.

⁴⁰¹*Id.*

⁴⁰²*Id.*

Justice Khanna repudiated the first facet, observing that the principle of interpretation of statutes, which imputes a limitation flowing from an apparently inexorable implicit interpretation of the explicit wordings of the Constitution, could not be applied to the clear and unambiguous words of Article 368.⁴⁰³ He could not discern any such implied restrictions on CAP in the face of the bare language of the amending clause, or any other relevant articles. He also rejected the applicability of the second facet, reiterating his earlier observations that given that the Constituent Assembly had exhaustively debated the minutiae of diverse constitutional matters, promulgating one of the lengthiest constitutions of the world, it would indeed be difficult to conceive the reason for the gap in the constitutional text to impute any such stated explicit limitations in the constitutional text in the first place.⁴⁰⁴ As evinced from the Constituent Assembly proceedings, considerable deliberations were made on the amendment process, and yet there is a clear absence of limitations, express or implied, in Article 368.⁴⁰⁵ Taking into account the intricately meticulous and painstakingly elaborate constitutional configuration in the Indian context, Justice Khanna failed to find any cogent reason for accepting this theory, which he believed should be best left to the realm of doctrinaire approaches and political theorists.⁴⁰⁶ Such invocation would entail vague speculation and venturing into the territory of abstract metaphysical dialectics, instead of realizing the Constitution's purpose as a veritable, fruitful and potent instrument for effectuating the accomplishment of the stated constitutional aims and goals.⁴⁰⁷ Justice Khanna similarly refused to read in the concept of natural rights in the BSD, arguing that this theoretical notion cannot detract from the unimpeachable imperative of the delineated and exhaustive constitutional text, so as to trammel the operative scope and force of the rights enshrined therein. More importantly, they certainly cannot be considered superior or supreme, as compared to express legal enactments of the State, irrespective of their status in the moral hierarchy.⁴⁰⁸

Furthermore, it is critical to note at this juncture that he wholly jettisoned the culling out of a distinction between the nucleus or crux of a FR, and its fringe elements. Thus, he rejected the contention of the petitioners that even if it is accepted that the Parliament can amend a FR whilst conforming to the constitution-amending clause, it did not possess the competence or mandate to truncate or diminish the quintessence of that FR.⁴⁰⁹ In his opinion, such an artificial attempt at outlining the contradistinction of the lifeblood and kernel of the FR as opposed to its more marginal aspects is a futile exercise, and has no place in the schema of judicial examination of CAA.⁴¹⁰ This was because of the lack of any objective yardstick to conclusively demarcate such domains of the FR, which would furthermore lead to unpredictability and vacillation in a matter as significant as CAA.⁴¹¹ He also highlighted the conceptual incongruity that would emerge from such a reading, wherein a FR is subject to the aegis of CAA, but its core which forms its intrinsic, inseparable crux, is nonetheless protected from any alterations through such a mechanism.⁴¹²

⁴⁰³*Id.*

⁴⁰⁴*Id.*

⁴⁰⁵*Id.*

⁴⁰⁶*Id.*, ¶1500.

⁴⁰⁷*Id.*

⁴⁰⁸*Id.*, ¶1509-1515.

⁴⁰⁹*Id.*, ¶1517.

⁴¹⁰*Id.*

⁴¹¹*Id.*

⁴¹²*Id.*

Justice Khanna also asserted that since the Preamble is certainly a part of the Constitution, it is also amendable, and therefore its contents cannot connote any implicit restrictions, otherwise than those admitted of through the BSD.⁴¹³ This is because according to principles of construction, while the Preamble can be deployed for interpretive purposes for resolving cases of textual ambiguity, choosing between multiplicity of interpretations, and for shedding light on any obfuscated construal of a constitutional provision, it cannot legitimately engender any implied competence or expansion of the scope of a provision where the language is clear, direct and intelligible.⁴¹⁴ The intent and purpose of the Preamble being to only explicate the constitutional configuration and epistemology, it cannot by itself generate and fabricate new powers.⁴¹⁵ Thus, he refused to read in any implied limitations possibly imposed even by the Preamble, which he considered to be a part of the Constitution itself.

A clue as to what he envisaged BSD to constitute or exclude, in reality, may be gained insofar as he refused to consider the erstwhile FR to property as constituting an attribute of the BSD, by reasoning that while the BSD delineates the sweep of the constitutional boundaries and horizons, the concerned FR is a concern revolving on individual ingredients.⁴¹⁶ Given the changing nature of property rights, which were often subordinated to social good, he stated that such right could not be considered to be a part of the BSD.⁴¹⁷ However, he also simultaneously observed that insofar as Article 31C, for instance, ousted JR on bases of the golden triangle of FRs (discussed below) even if the enactment did not correspond to the specified statutory aims, it would violate the BSD.⁴¹⁸ Therefore, a critical reading of Justice Khanna's opinion evinces that according to him, the thrust of the BSD appears to be on the spirit and lifeblood pervading the constitutional provisions, rather than their literal formal contents themselves.

A closer critical examination of the opinions of the rest of the judges in the majority camp reflects a more relaxed reading of the BSD. Justice Khanna's staunch refusal to delineate what the BSD would actually constitute, or to read in the theory of implied limitations, natural rights, or the Preamble into the BSD, was mediated to a great extent by these judges. It is important to scrutinise the difference in approaches in some detail, not simply for semantic purposes, but because, here, we find that despite the common understanding that Justice Khanna's opinion serves as the focal point with respect to the BSD, the willingness of the other six judges to articulate the essential features of the BSD has greatly influenced its development. Consequently, the contribution of these six judges towards the shaping and implementation of the doctrine cannot be ignored.

Chief Justice Sikri stated that a plain reading of the tenets enshrined in the Preamble and the unimpeachable character attached to these core precepts including liberty, justice, inviolability of the ideal of equality, etc., the inexorable inference that arises is that the lexical hermeneutics of the term "amendment" does not envisage unbridled alterations which abrogate the constitutional identity altogether.⁴¹⁹ He explicitly asserted, in

⁴¹³*Id.*, ¶1526-1527.

⁴¹⁴*Id.*

⁴¹⁵*Id.*

⁴¹⁶*Id.*, ¶1539.

⁴¹⁷*Id.*

⁴¹⁸*Id.*, ¶1591.

⁴¹⁹*Id.*, ¶306.

contradistinction to Justice Khanna, that FRs could not be amended out of existence.⁴²⁰ Further, he postulated that the primary attributes of all modern constitutional democracies, such as those found in the DPSPs, would continue to be intrinsically connected to the development and health of a polity centred on socio-economic upliftment of its citizens; would thus constitute “inalienables” of the constitutional identity.⁴²¹ He was anxious to emphasise that the formal and substantive CAP must therefore, by the very semantic meaning, operate within the general horizons delimited by the constitutional epistemology, as can be abstracted from the DPSPs and the Preamble.⁴²² Extending this line of reasoning to FRs, he stated that while the total destruction of FRs could never be permitted, measured and tenable diminutions of FRs may be permissible, where the interest of the polity so demands.⁴²³

Chief Justice Sikri then provided a detailed list of five essential attributes comprising the BSD — demarcation of spheres stemming from SOP of the State organs; secularism; constitutional supremacy; democratic and self-governing nature of the polity; and distribution of powers envisaged, with allocation of functions and powers among the federal and state governments.⁴²⁴ He stated that this structure is founded on the core integrity, dignity and liberty of the individual citizen of the Indian polity.⁴²⁵ He asserted that these key attributes stem not only from parts and provisions of the Constitutional text, but also from its integrated epistemology and configuration as a whole.⁴²⁶ This pronouncement of essential features is a marked departure from Justice Khanna’s dogged reluctance to provide even an indicative list of values enshrined in the BSD.

Justices Shelat and Grover echoed Chief Justice Sikri’s conclusions in broad strokes, stating that the Preamble, Parts III and IV would form cardinal attributes of the BSD.⁴²⁷ They delineated an illustrative list of attributes of the BSD, adding features such as an individual’s dignity and national integrity and integration to Chief Justice Sikri’s list.⁴²⁸ Similarly, Justices Hegde, Reddy and Mukherjea traced some more additional indicative features of the BSD, as abstracted from the Preamble, common ideals of all welfare States, etc. – national sovereignty; the core lifeblood and kernel of the FRs; etc.⁴²⁹ Thus, these judges found that Article 31C, which enabled total annihilation and destruction of the FRs to property, equality and fundamental freedoms enshrined in Art. 19, and sought to irreconcilably delegate the especial CAP vested solely with Parliament to state legislatures, was wholly void.⁴³⁰

All of these judges, who were in favour of the BSD, explicitly endorsed the approach that implied limitations exist on amendment. At first glance, this may seem at odds with Justice Khanna’s stance, which favoured no restrictions on CAA except those imposed by the BSD, not even implied limitations. However, their espousal of the term ‘implied

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.*, ¶311.

⁴²⁴ *Id.*, ¶316.

⁴²⁵ *Id.*, ¶317.

⁴²⁶ *Id.*, ¶318.

⁴²⁷ *Id.*, ¶563-564.

⁴²⁸ *Id.*

⁴²⁹ *Id.*, ¶700, 705, 1159.

⁴³⁰ *Id.*, ¶646.

limitations’— perhaps to counter contentions that the BSD was too vague — was ultimately oriented towards finding restrictions based on the BSD itself, rather than an extrinsic articulation of the two facet-theory outlined above. In any case, it appears that Justice Khanna’s conscious eschewal of any restrictions other than the BSD was mediated right from *Kesavananda Bharati* itself.

It is instructive to briefly explicate the arguments proffered by the judges in dissent, against the BSD, since these form the bases of the criticisms continued to be levied against the BSD even today. Justice Ray refused to admit of the existence of the BSD, when the framers of the Constitution did not embody such distinction expressly in its text.⁴³¹ He argued that an amendment could make fundamental changes to the Constitution, and that there cannot be any limitations on the CAP so long as the altered provisions do not detract from JR and independence.⁴³² Justice Mathew concluded that no constraints whatsoever operate on the CAP, for it is the province of legislative wisdom to take away even the basic elements in special circumstances, owing to its character as representative of the will of the polity, and thus courts cannot interfere with this supreme power at all.⁴³³ Justice Beg admitted that the only restriction was imposed by Article 368 — once the procedural provisions were complied with, no question arose of restricting the power to amend further.⁴³⁴ Justice Dwivedi emphasised upon the rigidity of the procedure prescribed in the Constitution — he thus correlated unamendability to rigidity of procedure. This interpretation led to his assertion that given the more rigid procedures prescribed for amendment of the provisions in the proviso to Article 368, they were more essential than even the FRs, but could still be amended by the clear mandate of Article 368 itself.⁴³⁵ Justice Chandrachud followed the literal interpretative approach, stating that in the face of the express wording of the constitution-amending clause and clear delimitation of its scope, it would be difficult to impute inherent limitations into the amending power.⁴³⁶

At this juncture, it would be apposite to refer to criticisms levelled that *Kesavananda Bharati* effectively reinstated the *Golak Nath* position⁴³⁷ insofar as FRs were once again enshrined by the BSD as unamendable. However, this is not an entirely accurate reading, for *Kesavananda Bharati* itself recognised that certain FRs may not be a part of BSD, e.g., the right to property. Thus, only the FRs forming a part of the BSD could be considered unamendable.

Furthermore, pertaining to the Twenty-Ninth CAA which sought to immunise certain state land reform laws from JR by insertion into the Ninth Constitutional Schedule, it is crucial to note that while the six judges in dissent — including Justices Ray and Palekar — upheld its constitutional validity unconditionally, since they did not subscribe to the BSD; and ostensibly, the other six judges in the majority camp — including Chief Justice Sikri, Justices Grover and Reddy — conditionally its conditionally, subject to its conformity with the BSD. Most significantly, however, Justice Khanna himself who is arguably the foremost progenitor of the BSD, sided with the six judges in dissent.⁴³⁸ Thus, on a final analysis, while

⁴³¹*Id.*, ¶789.

⁴³²*Id.*, ¶961.

⁴³³*Id.*, ¶1714-1715.

⁴³⁴*Id.*, ¶¶908, 913, 1836-1837.

⁴³⁵*Id.*, ¶1930-1931.

⁴³⁶*Id.*, ¶2013, 2089.

⁴³⁷*Id.*

⁴³⁸*Id.*, ¶1599.

the validity of the 29th Amendment Act was indeed upheld, by no means could the holding be termed unanimous. This insight is significant because, as will emerge from the discussion below, the later obfuscation on the important conceptual and pragmatic point as to whether the BSD could be extended to review the constitutionality of ordinary legislation, would stem from diverse readings of the holding in *Kesavananda Bharati* itself.

For instance, in the *Raj Narain* decision, while Justice Ray asserted that the Twenty-Ninth constitutional amendment had been concordantly upheld in *Kesavananda Bharati* — this is indeed a highly dubious reading⁴³⁹ — Justice Mathew expressed his doubts whether even the six judges in the majority camp in *Kesavananda Bharati* had affirmed the conditional validity of this enactment subject to the BSD.⁴⁴⁰

In the *Raj Narain* decision, Justice Ray refused to uphold the BSD with respect to ordinary legislations, stating that the limiting of the plenary legislation-making powers of the Parliament under Articles 245 and 246, by the test of the BSD, would equate to an impermissible breach of the constitutional scheme and patent arrogation of legislative competence.⁴⁴¹ He was apprehensive that if the BSD is extended to ordinary statutes, this would denigrate from constitutionally specified lawmaking powers of the Central and state legislatures, thus pilfering their competence to frame and promulgate policies through statutes, thus encroaching on the constitutional scheme of SOP.⁴⁴² Justice Mathew agreed with him in this respect, stating that ordinary laws cannot be tested by vague conceptions of democracy and justice as envisaged in the BSD.⁴⁴³ He found that the 'doctrine of the spirit' of the Constitution, such as the BSD, may lead to unwarranted domino effects insofar as transgressions of constitutional limits of CAP is concerned; and proffered that subjective formulations of such spirit or meaning of terms such as national integrity and constitutional democracy cannot equip the judiciary with the competence to commit such transgressions. Where the Constitution does not mention any such curtailment of the broad sweep of lawmaking powers of Parliament, the courts are not endowed with the requisite competence and scope to denigrate from such power by evolving abstract ideals envisaged by the BSD.⁴⁴⁴

Justice Mathew said that the *Kesavananda Bharati* majority verdict offered no support for the contention of extension of the BSD to regular statutes.⁴⁴⁵ He showed that there was considerable disagreement among the judges constituting the majority in *Kesavananda Bharati* itself, with respect to this point.⁴⁴⁶ For instance, while Justice Sikri said that the BSD could not be extended to ordinary legislations unless they violated FRs within the BSD; Justices Shelat, Mukherjea, etc. found that the issue of conformity of the legislations inserted in the Ninth constitutional Schedule via the CAA, with the tenets of the BSD, should be reviewed and adjudged when the legal validity and effect or vires of those specific enactments arise within the aegis of judicial consideration. Only Justice Khanna in the majority camp had unreservedly proclaimed the impugned constitutional amendment to be legally valid in that decision.⁴⁴⁷

⁴³⁹*Indira Nehru Gandhi v. Raj Narain*, (1975) SCC 2 159. See *I.R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1.

⁴⁴⁰*Id.*, 529.

⁴⁴¹*Id.*, 436.

⁴⁴²*Id.*, 437.

⁴⁴³*Id.*, 525-528.

⁴⁴⁴*Id.*, 528.

⁴⁴⁵*Id.*, 530.

⁴⁴⁶*Id.*

⁴⁴⁷*Id.*, 529-530.

Thus, Justice Mathew said that the election laws amendments would automatically become a part of the constitutional scheme merely because of their insertion in the aforementioned constitutional Schedule via an amendment.⁴⁴⁸ A challenge to their legal validity on the basis of FRs may still be theoretically permissible to a very limited extent, but certainly not on the touchstone of the BSD.⁴⁴⁹ Justice Mathew criticised that given the uncertainty and vacillation imbricate in the supra-constitutional conception of the BSD, which is envisaged to operate over and above the constitutional provisions underscoring the BSD itself,⁴⁵⁰ the doctrine cannot form a sound, cogent or reliable basis for testing the *vires* of an ordinary and regular statute. We thus find an implied critique of the BSD by Justice Mathew, and a proclivity to restore the Golak Nath position, insofar as the BSD would be conceptually limited to include only FRs at the most.

Justice Beg also adopted the approach that since the impugned ordinary legislation had been already immunised from a challenge on the basis of FRs via the amendment mechanism outlined below, such immunisation could not be retracted by subjecting it through the “backdoor” of the BSD.⁴⁵¹ Justice Chandrachud also found that ordinary laws could not be subject to the BSD, interestingly affirming that the BSD is not a part of the FRs or a constitutional provision, but that it forms execution of constituent power in keeping with the conspectus of the Constitution.⁴⁵² He rejected the contention that it would be paradoxical to apply the BSD to the higher norm of the CAA and to not apply the BSD to ordinary laws which are at a lower level, for he argued that they operate in two completely different fields, and are hence justifiably restricted by different limitations.⁴⁵³

As analysed above, Justice Ray incorrectly stated in Raj Narain that the validity of the impugned amendment had been wholly concordantly affirmed in Kesavananda Bharati.⁴⁵⁴ It was affirmed by only seven judges, as discussed above. He observed that Kesavananda Bharati had delinked Article 31B, which protects constitutionally scheduled enactments from deprivation of legal binding force on account of violation of FRs; from Art. 31A, which saved laws for acquisition of estates from being declared void on grounds of inconsistency with FRs. Article 31B, therefore, was a ‘constitutional’ device, unlike Article 31A, and gave a clear mandate and complete protection to the scheduled acts from a FRs challenge. Therefore, Justice Ray opined that since the impugned amendment had been held to be not subject to the BSD or the FRs in Kesavananda Bharati itself, the ordinary legislations could also not be subject to the BSD.⁴⁵⁵

Significantly, Justice Khanna, who was highly reluctant to specify any basic feature in Kesavananda Bharati, himself asserted one key tenet of the BSD in Raj Narain – democratic nature of the Indian constitutional polity.⁴⁵⁶ This evinces his willingness to clarify the contours of the BSD, and to subvert the arguments he had posited in favour of retaining vagueness of the BSD, keeping in mind the requirements of practical exigencies and considerable critique levied on the very notion and abstract nature of the BSD in the first

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*, 530.

⁴⁵⁰ *Id.*, 529.

⁴⁵¹ *Id.*, 575.

⁴⁵² *Id.*, 670.

⁴⁵³ *Id.*, 670.

⁴⁵⁴ *Id.*, 442.

⁴⁵⁵ *Id.*, 443.

⁴⁵⁶ *Id.*, 469.

place.⁴⁵⁷ He found that democracy being an essential feature, it requires free and fair elections as a necessary corollary, and therefore clause (4) of Article 329A (discussed above) controverts this basic feature.⁴⁵⁸ He found that the divestment of the Court's review powers over election disputes was not concomitantly accompanied by a simultaneous endowment of an appropriate adjudicative authority with such power in its stead.⁴⁵⁹ Therefore, such complete exclusion and ouster of review of election disputes by any adjudicative or even a quasi-judicial authority – despite the occurrence of substantial and grave irregularities vitiating the election – and unequivocally affirming the validity of such election, would render all the constitutional and statutory provisions proscribing unconstitutional and unfair practices during elections, effectively and entirely ineffectual and nugatory.⁴⁶⁰ He found such a proposition to clearly controvert the key characteristics of elections envisaged under the constitutional scheme in India – freedom and fairness – which themselves are included in the BSD. Further, he asserted that it makes no difference if the amendment relates only to one case, i.e., Indira Gandhi's election, or to many cases — so long as it violates the BSD, the amendment cannot attain validity merely by virtue of being related to one case.⁴⁶¹ This underscores the centrality of the BSD and its pervading application irrespective of numerical strength of the alleged violations of the Constitutional schema.

Ostensibly, Justice Khanna sidestepped the question of applicability of the BSD to ordinary legislations, stating that given his finding that the impugned Election Laws Amendment Act, 1975 did not impinge upon the principle of fair and free elections, and was therefore constitutional, there was no need to deal with the question of its conformity with the BSD.⁴⁶² However, a closer reading clearly reveals that if not expressly, Justice Khanna had indeed relied upon the BSD impliedly, for to find that the 1975 Act did not contravene this principle, which is itself a part of the BSD, does admit the applicability of the BSD to ordinary legislations at least indirectly.

Further, in the Raj Narain decision, Justice Mathew was reluctant to read in Articles 14, 15, 16, 17, 25, etc., which enshrine the principle of equality, as a part of the BSD.⁴⁶³ This position has changed materially in current BSD jurisprudence in India, as will be discussed below. However, it must be noted that he also expressed his doubts that if *Kesavananda Bharati* were to be read as holding that Art. 14 does not form a part of the BSD, then it would be difficult to find any other provision in the Constitution that would enshrine the principle of equality as a cardinal tenet of the rule of law, itself held as constituting a part of the BSD.⁴⁶⁴

Justice Chandrachud found the following elements of the BSD, in addition to the ones mentioned above — equal status accorded as well as opportunity; FR of inter alia profession and practice of religion, and government of laws, not of men. He rejected the contention that the Preamble forms a part of the BSD, for he believed that the metaphysical and vague terms in the Preamble, which more accurately can be stated to reflect hopes and aspirations, cannot be couched as coercive legal touchstones for testing the constitutionality

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*, 474.

⁴⁶² *Id.*, 491.

⁴⁶³ *Id.*, 523.

⁴⁶⁴ *Id.*, 525.

of amendments to the text of the Constitution.⁴⁶⁵ He further found that JR does not constitute an element of the BSD.⁴⁶⁶ He however declared clause (4) of Article 329A to be wholly violative of the FR to equality, an element of the BSD he considered to be one of the most intrinsic, momentous and indispensable.⁴⁶⁷

From preceding discussion, it emerges that while we observe considerable disagreement between the judges as to what constitutes the BSD, which would contribute to its obfuscation in later cases, the majority view upheld the concept of the BSD. However, the lack of clarity as to the contents of the BSD continues to haunt BSD jurisprudence even today, as is evinced from the latest NJAC judgment (discussed below), despite the Nagaraj and Coelho decisions developing substantive tests for the BSD. Questions such as firstly, what can be considered as an essential feature — i.e. FRs as a whole, or each individual FR, or the essence of each FR; and secondly, whether the BSD can extend to ordinary legislation, are still not conclusively settled and have been subject to lengthy contestations over the years. The ilk of critical studies as conducted in this paper therefore become crucial to enabling the presentation of a clear picture of the evolution of the jurisprudence, and predicting the future directions of such development, as well as outlining practicable and grounded suggestions for better enunciations and reforms.

Coming to the majority verdict in *Minerva Mills* – delivered by the erstwhile Chief Justice Chandrachud – the position was directly adopted that trammelled CAP inherently forms a vital element of the BSD, and therefore such restrictions operative on the ontological scope of such competence also cannot be obliterated. Since the constitution-amending clause itself vests a delimited CAP, it would not be open for the trustee of the delegated and derivative CAP to transgress the limited nature of the power entrusted, and to unilaterally remove the significant limitations operating upon the same. Thus, the Court held that by virtue of Art. 368, the legislature cannot so augment its CAP such that it would be endowed with the entitlement to repudiate and annihilate the entirety of the Constitution, or even its essential attributes constituting the BSD.⁴⁶⁸ This approach evinces a self-reinforcing effect of the BSD with respect to Parliament's CAP.

Thus, the Court struck down the aforementioned impugned clauses (4) and (5) of Art.368 as violative of the constitutional mandate and void *ab initio*, for they not only abrogated the epistemological restrictions on CAP discussed above, but also obliterated the constitutional character and essence through total deprivation of the FR to approach the Court through Article 32.⁴⁶⁹ Such simultaneous conferment of a right upon the Parliament to impinge upon the BSD, along with complete negation of JR to examine the impingement, were held to be clear transgressions of these articulated limitations.⁴⁷⁰ It pointed to the dangerous implications of accepting the constitutionality of an amendment that completely ousts judicial examination of all such amendments, which would lead to a scenario that even mundane statutes promulgated under the aegis of the amendment would be rendered exempt from the scope of the Court's review, in spite of the clear violation of the BSD by the amendments. This would render the FRs-touchstone provision i.e. Art. 13 completely

⁴⁶⁵*Id.*, 660.

⁴⁶⁶*Id.*, 661.

⁴⁶⁷*Id.*, 665.

⁴⁶⁸*Minerva Mills v. Union of India*, (1980) 3 SCC 625.

⁴⁶⁹*Id.*, 241.

⁴⁷⁰*Id.*, 242.

fruitless and nugatory, as then regular statutes could eschew JR by the sanction of their promulgation under the aegis of CAA, which themselves are closed to judicial scrutiny.⁴⁷¹

Justice Bhagwati, who concurred on this issue, also adduced to the interpretive incongruity stemming from the impugned amendment, in the configuration of the constitution-amending clause itself. By ousting judicial scrutiny of amendments on all bases and premises, an amendment that contravenes the basic procedural mechanism ensconced in Art. 368(2), is thereby effectively rendered valid.⁴⁷² Where the Constitution had clearly delineated the compulsory and mandatory procedural requirements specified in Article 368(2), these could not be negated through such an amendment, and hence he held it to be unconstitutional.

Further, he stated that these clauses are also invalid because they violate two essential features of the BSD – the legislature’s trammelled constitution- amending competence, and competence of courts to scrutinise unconstitutional transgressions of constitutionally delimited authority.⁴⁷³ He clearly elucidated the rationale for the former attribute, holding that owing to constitutional supremacy and the derivative and secondary nature of powers vested with the legislature which is a constitutional organ, it can possess no competence other than as envisaged under the constitutional epistemology.⁴⁷⁴ Thus, given the lack of any intrinsic constitution-amending competence, it can enjoy and exercise only the delegated derivative power. Thus, a constitutional amendment abrogating the inherent restrictions of this power would render the legislature a supra-constitutional body, existing over and above the Constitution which engendered it in the first place, and would enable it to destroy and modify the BSD and entirety of the Constitution according to its whims, without any reference to the constitutionally delimited competence and sphere of CAP.⁴⁷⁵ Therefore, he reasoned, such limitations on CAP form a cardinal attribute of the BSD.⁴⁷⁶ Explicitly affirming JR to be a part of the BSD, he held that any amendment usurping such competence to scrutinise would amount to subversion of the Constitution, for it would render the federal scheme of allocation and division of powers of the Central and state governments, as well as the operation of the FRs utterly fatuous and pointless.⁴⁷⁷

The majority verdict in this decision further found that anything that upsets the stability of the equilibrium maintained in the harmonious operation of the FRs and the DPSPs, is violative of the BSD.⁴⁷⁸ This was examined with reference to the contention that the Forty-Second constitutional amendment, by immunising any law effectuating the DPSPs from JR, had effectively accorded precedence to these Principles over the FRs ensconced in Part III. The Court found that while the DPSPs have been increasingly construed harmoniously with FRs in recent years, the balance between the two categories cannot be so destroyed as to enable realisation of the DPSPs, through complete obliteration of the basic freedoms encapsulated in the FRs.⁴⁷⁹

⁴⁷¹*Id.*, 242.

⁴⁷² *Id.*

⁴⁷³*Id.*, 284, 285.

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶*Id.*, 285, 286.

⁴⁷⁷ *Id.*

⁴⁷⁸*Id.*, 256.

⁴⁷⁹*Id.*, 253, 256.

Justice Bhagwati, however, disagreed on this point, holding that suffusing the DPSPs with such superiority over FRs did not violate the key tenets of the BSD.⁴⁸⁰ He found that such upturning of the usual epistemological ontology of constitutional provisions would be justified in cases of the expediency of public interest and where the curtailment of the FR is reasonable and measured; and that if a law were truly effectuated for facilitating realisation of a DPSP, it would definitely not abrogate or abridge any FR.⁴⁸¹ Further, he interpreted DPSPs and FRs to possess equivalent and the same hierarchical rank and status, and found no cogent justification as to why, in cases of a clash between the two categories, the FRs should always irrevocably trump DPSPs, simply because of non-justiciability of DPSPs as opposed to justiciability of FRs. Thus, he did not consider the amended Article 31C to be violative of the BSD.⁴⁸²

We will now examine which of the multiple interpretations of the ontology of the BSD and its application in numerous spheres, have come to be entrenched over the years. For instance, the decision in *State of Karnataka v. Union of India*⁴⁸³ evinces a fitting illustration of such jurisprudential entrenchment. The verdict in this case has often been misread as holding that the BSD cannot be extended to ordinary legislations.⁴⁸⁴ Here, the erstwhile Chief Justice Beg stated that the ontology of the BSD must be traced to the explicit wording of the constitutional provisions and scheme, for the BSD cannot exist and operate in a vacuum. It must be rooted in the semantics and epistemology of the constitutional provisions themselves, which serve as the foundation and pillars of the BSD.⁴⁸⁵ He observed that in the usual sense, the BSD operates on the higher plane of limiting the constitution-amending powers, as it emanates directly from the constitutional core itself; however where these edicts are so fundamental to the Constitution that they must necessarily underlie the mundane statutes that govern the everyday lives of citizens as well, the contours of the BSD should not be artificially restricted.⁴⁸⁶ Thus, a minute reading of the decision in this case clearly reveals a counterpoint to the obfuscation and unnecessary vexing of jurisprudence with regard to this issue.

In *WamanRao v. Union of India* ('WamanRao'),⁴⁸⁷ where the Supreme Court reviewed its decisions in *Minerva Mills* and *Dattatraya Govind Mahajan v. State of Maharashtra* ('Dattatraya Mahajan'),⁴⁸⁸ it significantly observed that not every instance of temporary withdrawal and suspension of FRs, as for instance which occurs in a constitutional emergency, would automatically impinge upon the BSD.⁴⁸⁹ The applicable test in such cases is the centrality of the FR and its significance in the context of the BSD. withdrawn is quintessential to the BSD of the Constitution.⁴⁹⁰ Further, this case upheld and approved of Kesavananda Bharati's prospective overruling enunciation,⁴⁹¹ and reiterated that only those

⁴⁸⁰*Id.*, 342.

⁴⁸¹*Id.*

⁴⁸²*Id.*, 329, 330.

⁴⁸³*State of Karnataka v. Union of India*, (1977) 4 SCC 608.

⁴⁸⁴*Supra* note 9.

⁴⁸⁵*State of Karnataka v. Union of India*, (1977) 4 SCC 608, ¶111-125.

⁴⁸⁶*Id.*, ¶125.

⁴⁸⁷*WamanRao v. Union of India*, (1980) 3 SCC 587.

⁴⁸⁸*Id.*, *DattatrayaGovindMahajan v. State of Maharashtra*, [1977] 2 SCR 790.

⁴⁸⁹*Id.*, 18.

⁴⁹⁰*Id.*

⁴⁹¹*Id.*

CAA enacted post April 1973 would be liable to challenge on grounds of abridgment of the BSD.⁴⁹²

Moreover, the Court discussed the rationale for incorporating the “problem provisions” of Article 31B and the Ninth Schedule in detail. Article 31, when harmoniously construed along with the Ninth Schedule, entrenches the immunisation of the laws enlisted therein from a challenge on the ground of encroachment of FRs.⁴⁹³ In this context, the Court repeatedly emphasised that such immunisation powers executed through the means of the aforementioned constitutional schedule, can only be exercised by the legislature; and owing to the constitutional entrenchment of this schedule itself, any further amendments to the same would be trammelled by usual limitations imputed on CAP, i.e. via the BSD.⁴⁹⁴ Thus, at least at the inception of the BSD jurisprudence, we observe a marked proclivity to employ the BSD only in circumstances of utmost necessity, and significant judicial restraint in order to eschew transgression of the constitutionally demarcated legislative domain. The BSD was developed and formulated as a counter-majoritarian check of the last resort, rather than being envisaged as a tool for ensconcing judicial hegemony. The unique set of socio-political circumstances and constitutional crisis had compelled the judiciary to assert its constitutionally sanctified powers of scrutiny and examination, and for safeguarding constitutional supremacy itself.

In *S.P. Gupta v. Union of India*,⁴⁹⁵ although the issues involved did not pertain directly to the constitutionality of an amendment, the Court reiterated that judicial independence and the concomitant faculty and prerogative of judicial scrutiny are cardinal tenets of the BSD.⁴⁹⁶ The decision in *S.P. Sampath Kumar v. Union of India* (‘Sampath Kumar’)⁴⁹⁷ reaffirmed this proposition. In particular, Justice Bhagwati stated that where the Forty-Second CAA excluded the HC’s authority under Art. 226, 227, etc., devoid of the establishment of an appropriately efficacious surrogate adjudicative institution, it clearly violated the BSD – only the presence of an equally effective alternative authority, endowed with the faculty of judicial scrutiny, with a prerogative to enforce constitutional limitations and to maintain the rule of law, would ensure that the BSD was not flouted. Since the Administrative Tribunals Act, 1985, made in pursuance of Article 323A did not adequately and fully provide such an adequate alternative mechanism, the Court ordered necessary changes to be made in the Act within a specified period to save it from invalidation by virtue of the operation of the BSD.⁴⁹⁸

These findings in *Sampath Kumar*, were echoed in *P. Sambamurthy v. State of Andhra Pradesh* (‘Sambamurthy’),⁴⁹⁹ where the Court unanimously held that the provision heralded by the Thirty-Second CAA — which provided that the final order of the Administrative Tribunal, set up by Article 371D(3), could be modified or annulled by the

⁴⁹²*Id.*, 10, 46.

⁴⁹³*Id.*, 36-37.

⁴⁹⁴*Id.*, 37-38.

⁴⁹⁵*S.P. Gupta v. Union of India*, 1981 Supp (1) SCC 87.

⁴⁹⁶ This case was however criticised for not adequately protecting the independence of the judiciary, especially in matters such as appointment and transfer of judges, and was later overruled in *Supreme Court Advocates-on-Record Association v. Union of India* (‘The Second Judges’ Case’), (1993) 4 SCC 409.

⁴⁹⁷*S.P. Sampath Kumar v. Union of India*, (1987) 1 SCC 124.

⁴⁹⁸*Id.*, 441-444.

⁴⁹⁹ *P. Sambamurthy v. State of Andhra Pradesh*, (1987) 1 SCC 362.

state Government – was held to be afoul of the BSD.⁵⁰⁰ This was because the state Government would then have the option, in case it receives an unfavourable verdict from the Administrative Tribunal in a servicedispute, to nullify this decision, which clearly negates rule of law, an essential feature of the Constitution.⁵⁰¹ The State Government could defy the law with complete impunity, thus impinging upon the BSD; consequently, the provision was declared unconstitutional.⁵⁰²

As is evinced above, JR had been consistently upheld to be a part of the BSD, right from *Kesavananda Bharati* to *Sambamurthy*. However, in *KihotoHallohanv.Zachillhu and Ors.*,⁵⁰³ the Court—while recognizing democracy, equal purview of the law, etc. as essential features of the Constitution — left this issue open. It was finally settled in a later decision,⁵⁰⁴ which will be discussed in greater detail below.

As evinced from the summary statement signed by the nine judges in *Kesavananda Bharati*, the constitutional validity and legitimacy of the Twenty-Sixth CAA (discussed above in Parts II and IV.A.1 of the paper) was referred for final determination by a Constitution Bench. In *RaghunathraoGanpatraov. Union of India*,⁵⁰⁵ the petitioner, who was the successor to the Ruler of Mysore, challenged the constitutionality of this CAA, arguing that it damaged the BSD. The SC unanimously rejected this contention, stating that the removal of Articles 291 and 362 – which accorded constitutional cognisance to the contemporary princely rulers and princely purses – through this CAA, did not alter the constitutional epistemology or configuration of the BSD.⁵⁰⁶ Whilst upholding this CAA as constitutional, therefore, the Court asserted that the question of abridgement of constitutional identity is inextricably interconnected to the occasioning of alteration in the structure, ethos or contextual fibre of the Constitution.⁵⁰⁷

Interestingly, in *S.R. Bommai v. Union of India* (‘Bommaiv’),⁵⁰⁸ the SC applied the BSD even to executive action, thus widening its ambit of application. The issues involved pertained to dissolution of certain State Legislative Assemblies, and proclamation of Presidential Rule. The Court asserted that Article 356, which provided for such proclamation, must be construed in a way that would not controvert secularism, scheme of power-distribution amongst the central and state governments, and pluralist democracy, which are features of the BSD.⁵⁰⁹ Thus, the Court found that there existed a *de jure* vesting of power in the President, but the actual authority was reposed in the Council of Ministers, under Article 356; which has the latent capacity to emasculate these key tenets of the BSD, and hence it is imperative to conduct JR of the information which serve as the grounds for the President to form his satisfaction, more closely and circumspectly, within the acknowledged parameters such as allegations of illegality, irrationality and *mala fides*, et al.⁵¹⁰ The Court especially emphasised that where a state government’s policies and acts are directed against an element

⁵⁰⁰*Id.*, 890.

⁵⁰¹*Id.*, 889.

⁵⁰²*Id.*, 889-890.

⁵⁰³*KihotoHallohan v. Zachillhu*, 1992 SCR 1 686.

⁵⁰⁴*L. Chandra Kumar v. Union of India*, (1995) 1 SCC 400.

⁵⁰⁵*RaghunathraoGanpatrao v. Union of India*, 1994 Supp (1) SCC 191.

⁵⁰⁶*Id.*, 527.

⁵⁰⁷*Id.*

⁵⁰⁸*S.R. Bommai v. Union of India*, 1994 3 SCC 1.

⁵⁰⁹*Id.*

⁵¹⁰*Id.*, 742-748.

of the BSD such as secularism, this would justify imposition of Presidential rule.⁵¹¹ This is indeed a remarkable conclusion, given that not only does the Court extend the BSD to *itself* review the Constitution, but also to require the executive to act in accordance with the BSD. The transmutation of the BSD from a restriction operating primarily on CAP and justified within this specific ontology, to a limiting force acting in a broader framework of powers exercised by a larger set of political actors, certainly transcends the intent and logic of promulgation of the BSD, and is more susceptible to criticisms of entrenchment of judicial hegemony.

In *L. Chandra Kumar v. Union of India*,⁵¹² the SC held that Articles 323A as well as 323B were unconstitutional as they ousted the jurisdiction and powers of the SC and HC under Articles 32 and 226 respectively, which consisted of powers to scrutinise constitutional validity of laws, and especially the faculty reposed with HCs to supervise tribunals and courts within their demarcated jurisdiction. This decision reaffirmed ratio of the Sampath Kumar verdict, and settled the position that judicial scrutiny is a non-derogable element of the BSD. Thus the complete exclusion of the aforementioned powers of the SC and HCs, and instead vesting them in subordinate judiciary created under ordinary and regular statutes, is impermissible.⁵¹³ The ratio of this case that JR forms part of the BSD has been reiterated throughout in the later BSD jurisprudence.

For instance, in *Raja Ram Pal v. The Hon. Speaker, Lok Sabha*,⁵¹⁴ the Court observed that the SC's powers under Article 32 are so critical to the BSD that their repudiation or exclusion through any amendment or regular statute would obliterate the order and tenets founding the basic constitutional schema of the Indian polity.⁵¹⁵ It stressed that the finality of the authority vested in the courts to adjudicate upon and decide matters pertaining to constitutional violations and abrogation, forms, in itself, a cardinal tenet of the BSD.⁵¹⁶ This was reiterated in *Mahmadhusen Abdulrahim Kalota Shaikh v. Union of India*,⁵¹⁷ where the court found that because the impugned Prevention of Terrorism (Repeal) Act, 2004, had not removed JR under Article 226 or Article 136, it had not abridged the BSD.

Further, the Supreme Court affirmed in *P.V. Narasimha Rao v. State* ('Narasimha Rao')⁵¹⁸ that parliamentary democracy is central to the BSD. Thus, it found that placing a strained construction upon Article 105(2) so as to offer immunity and protection to Parliamentary members from criminal prosecution, in relation to commission of bribery pertaining to a speech or vote given in Parliament, would accord supra-constitutional and supra-legal status to them, thus denigrating from the equal operation and application of the purview of rule of law and parliamentary democracy, both of which are integral to the BSD. Thus, the Court found that such unbridled extension of the immunity to acts antecedent to the speech or vote given in Parliament, is clearly unconstitutional. The approach adopted in this case clearly shows that the ambit of the BSD is being increasingly extended, to test not only CAA, but also to interpret the text of the Constitution itself. While this is relatively less startling than the judicial arrogation evinced in the Narasimha Rao decision, such over-

⁵¹¹ *Id.*

⁵¹² *L. Chandra Kumar v. Union of India*, 1997 (2) SCR 1186.

⁵¹³ *Id.*, ¶80.

⁵¹⁴ *Raja Ram Pal v. The Hon. Speaker, Lok Sabha*, (2007) 3 SCC 184.

⁵¹⁵ *Id.*, ¶415.

⁵¹⁶ *Id.*, ¶415-424.

⁵¹⁷ *Mahmadhusen Abdulrahim Kalota Shaikh v. Union of India*, (2009) 2 SCC 47.

⁵¹⁸ *P.V. Narasimha Rao v. State*, (1998) 4 SCC 626.

expansive interpretation of the BSD's amplitude renders the doctrine exceedingly vulnerable to justified denouncements of the BSD, on account of its actual operation and implementation, if not its original conceptualisation.

In *IndraSawhney v. Union of India* ('IndraSawhney'),⁵¹⁹ we find another instance of overextension of the BSD to ordinary legislation, wherein a state law which failed to exclude the creamy layer from its purview was found to have contravened the equality mandate imbricate in Articles 14 and 16(1) of the BSD, which were considered as elements of the BSD.⁵²⁰ The court reasoned that where an amendment promulgated by Parliament cannot transgress strictly demarcated constitutional limits, it stands to reason that an ordinary statute enacted by a state legislature which operated on a lower constitutional plane, has the even more pressing mandate to eschew violation of the BSD.⁵²¹ In the taxonomy of CAP enunciated in Part II of this paper, it is critical to note that CAP are regarded as derivative of popular sovereignty and limited by the constitution enacted thereby. The ordinary lawmaking power of the legislature therefore needs to be placed in the appropriate categorisation in the hierarchy, so as to enable justification of extension or limitation of BSD to such power, instead of assuming *a priori* that it is subservient to any powers. The source of such power therefore becomes critical to the evaluation of its limits. What is especially striking about the development of jurisprudence in this case is that when the Court struck down the impugned Act as contravening the BSD, it allowed such a broad application of BSD to ordinary legislation as well, that even state laws could now be tested on the touchstone of the BSD.

However, the evolving approach of the SC from *WamanRao* to *IndraSawhney*, as to willingness of the SC to extend the BSD to ordinary laws, was departed from the five-judge bench in *KuldipNayar v. Union of India* ('*KuldipNayar*').⁵²² Here, the SC was tasked with reviewing the constitutionality of certain amendments which deleted the domicile requirement for election to the Rajya Sabha, and which introduced the open ballot system, alleged to have abrogated federalism and the essential characteristics of elections such as freedom and fairness, considered to be tenets of the BSD.⁵²³ However, despite taking notice of the SC's approach from *WamanRao* to *IndraSawhney*, the Court unanimously rejected the application of the BSD to determine the validity of an Act of Parliament.⁵²⁴ Instead, reiterating the stance taken by Justice Ray in *Raj Narain*, the Court stated that the ordinary legislation has to meet only two criteria – subject-matter competence and conformity with the FRs-testing provision, Article 13.⁵²⁵ Beyond these two aspects, the ordinary legislation cannot be tested on the BSD.⁵²⁶ While reaffirming that democracy, federalism, free elections, etc. are indeed part of the BSD, the court followed the approach adopted in '*Raj Narain*' and refused to extend the BSD to ordinary legislation. The scepticism expressed by the judges in this case as regards the unbridled expansion of the BSD beyond the ontology originally envisaged, points to the counter-movement within the uppermost echelons of the Indian judiciary itself, to limit the ambit of the BSD.

⁵¹⁹*IndraSawhney v. Union of India*, 2000 (1) SCC 168.

⁵²⁰*Id.*, 202.

⁵²¹*Id.*, 202.

⁵²²*KuldipNayar v. Union of India*, (2006) 7 SCC 1.

⁵²³ *Id.*

⁵²⁴ *Id.*

⁵²⁵ *Id.*

⁵²⁶ *Id.*

In *M. Nagaraj v. Union of India* ('Nagaraj'),⁵²⁷ the SC was faced with the critical endeavour of defending the BSD against increasingly justified criticisms, whilst simultaneously ensuring that its limits could be drawn in a way as to stay faithful to the constitutional limits. Thus, whilst unanimously upholding the validity of a set of impugned amendments – including the Seventy-Seventh and Eighty-Fifth CAAs – the Court propounded a two-pronged test to establish the parameters required to be fulfilled whilst conducting JR of CAA on the touchstone and basis of the BSD.⁵²⁸ The first prong, famously known as the 'width test', mandates that for a principle to be termed as a cardinal tenet of the BSD, it must first be proved that it is a component of the legal constitutional fabric and has legal validity to bind Parliament.⁵²⁹ If and only if this first prong is satisfied, the Court can then test the feature on the basis of the second prong – known as the 'identity test' – which mandates close scrutiny as to whether the feature is so cardinal, vital and essential to the constitutional character and fabric that it can trammel Parliament's CAP, i.e. whether it constitutes a component of the BSD.⁵³⁰ Thus, emphasis was laid on shifting the focus of the BSD from individual disaggregated provisions to the fundamental overarching tenets underpinning the fabric interconnecting the provisions, such as secularism, reasonableness, etc., which would enable differentiating the ordinary and mundane constitutional provisions from those that form its very essence.⁵³¹

Thus, the Court sought to clarify that the intent and aim of the BSD was not to limit Parliament's powers to amend a specific constitutional provision per se, but to limit such amendments that abrogate these aforementioned core edicts, which form the lifeblood of constitutional identity.⁵³² Elaborating further upon Justice Chandrachud's observations in *Raj Narain*, the Court held in the present instance that for determining the centrality of the relevant feature to the BSD, it is necessary to abstract the underlying tenets encompassing the constitutional complexion, from the epistemology, context, location and configuration of a constitutional provision, as for instance, the location of Article 14 in the "equality code"; the contextualisation of Article 19 in the "freedom code"; etc.⁵³³ Reiterating Justice Khanna's postulations in *Kesavananda Bharati* that no express limitations curtail the ambit of CAP in India, the Court confirmed that the BSD forms the sole and only benchmark for measuring the constitutionality of such amendments.⁵³⁴

Thus, in the *Nagaraj* decision, we find an attempt to evolve core standards guiding the exemplar of transformative constitutionalism embodied within the BSD, with a reference to the indigenous constitutional context, so as to defeat allegations of unthinking foreign normative constitutional transplantations as a pretext for arrogation of judicial hegemony. The width and identity tests are particularly remarkable for their lucid and succinct encapsulation of the substantive content of the BSD, without meandering into completely vague and obscure references to meta-theoretical constitutional narratives. The imputation of values certainly involves the exercise of judicial subjectivity to an appreciable extent, however the coupling of this two-pronged test with the explicit formulation of the placement code further enables to root the BSD in the distinctive normative epistemology of

⁵²⁷*M. Nagaraj v. Union of India*, 2006 8 SCC 212.

⁵²⁸*Id.*

⁵²⁹*Id.*, ¶¶25, 102.

⁵³⁰*Id.*

⁵³¹*Id.*

⁵³²*Id.*

⁵³³*Id.*, ¶¶35-36.

⁵³⁴*Id.*

the Indian Constitution. The striking and immediate interlinking of the BSD's tenets with the configuration and schemata of entrenched constitutional provisions therefore enables in delineating and defending a well-drawn organisational structure of the BSD hierarchy, whilst reposing the requisite freedom and space in the judicial sphere to interpret the BSD to oppose creative attempts at executive and legislative power-arrogation.

Following closely on the heels of the Nagaraj decision, a nine judge-bench in Coelho unanimously reaffirmed the WamanRao position, in clear contradistinction to the ratio of KuldipNayar.⁵³⁵ The entire debate surrounding the prospective overruling enunciation as settled in the WamanRao decision, was reopened for examining the impact on the Court's JR.

Engaging in an in-depth analysis with the BSD as propounded in Kesavananda Bharati, the Court found that the intractable conundrum between Justice Khanna's explication of the significance of the BSD on one hand, and his unreserved affirmation of the constitutional validity of the Twenty-Ninth CAA, can be resolved by interpreting that while Justice Khanna had indeed delineated the implications and ambit of the BSD accurately, the same could not be said about his views on the immunisation of legislations from challenge through the constitutional device explained above.⁵³⁶ Thus, in Coelho, the Court reasoned that instead of unquestioningly upholding the validity of this CAA, Justice Khanna should have sided with the camp in Kesavananda Bharati which had conditioned the validity of the CAA on the conformity of the legislations it included in the Ninth Constitutional Schedule with the BSD.⁵³⁷ Thus, the Court affirmed the holdings in the Raj Narain, Minerva Mills and WamanRao decisions, concerning prospective overruling of the aforementioned laws.

Next, the SC examined the extent of the immunity afforded by Article 31B. The Court unequivocally espoused the position that FRs are a part of BSD – indeed a long way to have traversed from the famed reluctance of Justice Khanna to articulate even one element of the BSD – and proffered that while the rights and freedoms created by Part III are subject to abridgement through amendments, such amendment would necessarily have to satisfy the BSD – thus clearly subjecting the laws protected under Article 31B to the BSD.⁵³⁸ The substantial trammelling of the actual operational scope of Article 31B through such a line of reasoning was duly acknowledged, but the Court stated that the constitutional limits of the BSD can never be transgressed through amendments.⁵³⁹

Asserting the WamanRao position that the original Constitution cannot be alienated or transmuted into its antithesis simply by its amendment, the Court noted that if Article 31B only provided restricted immunity to a defined set of legislations, with a rational interconnecting common ground for doing so, then the immunisation from FRs could have perhaps been justifiable.⁵⁴⁰ Nevertheless, given the unfettered and unrestrained abuse of this provision as evinced from the immunisation from several constitutional provisions even beyond FRs, it was clear that the character imbued to Article 31B had rapidly transformed from the lone exception to the pervasive norm, vulnerable to easy manipulation.⁵⁴¹ Further,

⁵³⁵ I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1.

⁵³⁶ *Id.*, 96.

⁵³⁷ *Id.*

⁵³⁸ *Id.*

⁵³⁹ *Id.*, 98.

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.*, 100.

the lack of any clear and tangible prescription or procedure to channel and regulate the exercise and execution of this extraordinary power, led to the dangerous result of total negation of requirement of all constitutional provisions to conform at least with the limits set by the Constitution itself, and enabled Parliament to seize supra-constitutional dominion.⁵⁴²

Intriguingly, furthermore, the Court highlighted that where features such as JR and principles such as equality, democracy form part of the BSD, as do the FRs embodying these values, then immunisation of the laws from JR on the pretext that FRs can never be a part of the BSD or that Article 31B explicitly ousts testing amendments on the yardstick of FRs, would be wholly unconstitutional.⁵⁴³ The Court appears to have subscribed to the idea that rather than weaving ivory tower formulations of the idealistic implications of the notions of freedom, equality, etc., it is much more constitutionally and logically cogent to refer to the constitutional text and provisions in the first place, which tangibly entrench these aspirations and edicts in constitutionally cognisable forms.

Enunciating the traces of more evolved tests of the BSD as laid down in the Coelho decision, here the Court examined the scenario of where a complete constitutional chapter is sought to be erased through an amendment.⁵⁴⁴ In such a case, the Court held that rather than the “essence of the right” test laid down in the Nagaraj decision, it would be more apposite to utilise the broader “rights” test – which entails that specific key constitutional provisions are so vital and central to the Constitution, that their negation or destruction would lead to the cessation of the existence of the constitutional order itself.⁵⁴⁵ One prime instance is the “Golden Triangle” of FRs – i.e. Art.21, 14 and 19 – which epitomises certain essential constitutional precepts and values.⁵⁴⁶ The abrogation of such rights through an amendment cannot stand the formidable test of the BSD.⁵⁴⁷ Reaffirming the sanctity of judicial scrutiny, the Court refused the immunity and protection afforded by Article 31B to operate in absolute and unbridled terms.⁵⁴⁸

The Court also emphasised upon the “impact test”, observing that in reviewing whether the impugned legislation inserted in the aforementioned Schedule impinges upon the BSD, the Court must inquire into the content of the law, the ilk of rights it seeks to introduce, the sphere of abridgement of other vital rights such as FRs, to arrive at a balanced assessment as to whether the law truly, substantively and effectively contravenes the core constitutional tenets.⁵⁴⁹ This would involve an inquiry into the impact of the impugned statute upon the FRs and other edicts constituting the BSD, and if found to abridge these, the SC must not hesitate to strike down the law as unconstitutional.⁵⁵⁰ Thus, the settled position appears to be that the BSD can be used to review the constitutionality of even ordinary legislations, at least when they are placed in the Ninth Schedule by virtue of Article 31B. However, hether such extension of judicial scrutiny would stand beyond the very specific constitutional device embodied by this provision, was not answered in this decision. Thus, Justice K.G. Balakrishnan was well within the scope of judicial deference to precedent when he made a

⁵⁴² *Id.*

⁵⁴³ *Id.*, 102.

⁵⁴⁴ *Id.*, 109-110.

⁵⁴⁵ *Id.*, 110.

⁵⁴⁶ *Id.*

⁵⁴⁷ *Id.*

⁵⁴⁸ *Id.*

⁵⁴⁹ *Id.*, 111.

⁵⁵⁰

stray observation in a later case – *AshokaKumar Thakur v. Union of India*⁵⁵¹ – to the effect that regular statutes cannot be tested on the grounds of the BSD.⁵⁵²

Indubitably, the tests pertaining to BSD elucidated in *Coelho* have been upheld in many recent cases. For instance, in a case pertaining to reviewing the sphere of abridgement of the JR power of High Courts,⁵⁵³ the Court affirmed that such JR can never be abrogated by a constitutional amendment, let alone an ordinary statute, masquerading under the pretext of according more importance to demarcation of separate operating domains of the Courts and the Legislature.⁵⁵⁴ The faculty of judicial scrutiny in fact is so vital to this doctrine that its curtailment through an amendment can only lead to the impermissible destruction of the BSD. Similarly, in another decision,⁵⁵⁵ the Court affirmed the Nagaraj position that ordinary legislations inserted into the aforementioned Schedule by virtue of Article 31B are open to JR on grounds of the BSD. Here the constitutionality of the impugned Thirty-Fourth CAA was upheld, and the Court dismissed the contention that the amendment had contravened any facet or even the core of Article 14.⁵⁵⁶ The Court cautioned that mere allegation of violation of FRs would not suffice; the petitioner must further show that the violation abrogates the basic features of the Constitution.⁵⁵⁷ Once both are established, the onus would then shift to the State to justify the infraction.⁵⁵⁸ Thus, the court asserted that violation of fundamental right may not always *ipso facto* necessarily violate the BSD; but it interestingly observed that usually, a law which violates the BSD invariably violates the FRs.⁵⁵⁹ Similarly, in *K.T. Plantation Ltd. and Anr. v. State of Karnataka*,⁵⁶⁰ while reiterating the *Coelho* position, it was significantly noted that upon applying the impact test, statutes protected under Articles 31A, 31B, etc. would be amenable to challenge under the Golden Triangle of FRs as a part of the basic BSD, rather than the FRs *simpliciter*.⁵⁶¹

This trend of judicial reasoning evinces the preoccupation of the Court in recent times to link the content of the BSD to the logic of the distinct constitutional epistemology imbricate in the Indian polity. While it may ostensibly appear to be an artificial distinction to use the BSD to strike down amendments, when they are really being tested on the FRs included in the BSD, thus appearing to restore the *Golknath* position; a clear distinction must be noted: the logic and intent of the BSD operates completely differently from the implications of Article 13 of the Constitution. As a part of the BSD, the FRs occupy a completely different ontological position and meaning, for they relate to the very lifeblood of the Constitution, as opposed to the separate and limited goals that they would individually seek to achieve. When cohered in a context of preservation of basic ideals and cardinal attributes of the Constitution, the BSD then transcends the FRs to also include concepts such as federalism, secularism, demarcation of separate domains of constitutional organs, etc. It forms the character of the polity and the fulcrum of the constitutional order itself.

⁵⁵¹ *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1.

⁵⁵² *Id.*, ¶116.

⁵⁵³ *State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal and Ors.*, (2010) 3 SCC 571.

⁵⁵⁴ *Id.*, 601-602.

⁵⁵⁵ *Glanrock Estate Private Ltd. v. State of Tamil Nadu*, (2010) 10 SCC 96.

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.*

⁵⁵⁸ *Id.*

⁵⁵⁹ *Id.*, ¶73.

⁵⁶⁰ *K.T. Plantation Ltd. and Anr. v. State of Karnataka*, (2011) 9 SCC 1.

⁵⁶¹ *Id.*, ¶209.

Coming to one of the most recent instances of deliberations on the BSD in Indian constitutional jurisprudence, the decision in *Supreme Court Advocates-on-Record Association and Another v. Union of India* ('NJAC judgment')⁵⁶² proved to be a potentially fitting opportunity to contextualise and reinforce the contemporary trends of BSD articulations. Here, the Court struck down the Ninety-Ninth CAA and its concomitant National Judicial Appointments Commission Act, 2014 – which sought to remove the old collegium system of judicial appointments, and replace it with a system ostensibly heralding more transparency by according the Executive a more active role – as unconstitutional.⁵⁶³ The majority verdict, consisting of the opinions of Justices Khehar, Lokur, Kurien Joseph and Goel, held that the proposed mechanism would have abridged features such as judicial independence, rule of law, etc., which are central to the BSD.⁵⁶⁴ Interestingly, furthermore, we find an extension of the BSD in this case to encompass not only judicial independence, but also in an attempt to render such independence meaningful, the entrenchment of judicial primacy in these appointment matters.⁵⁶⁵ However, the notes of dissension struck from Raj Narain onwards as to extension of application of the BSD to regular statutes continued to resound in this decision. While Justices Khehar and Goel agreed that a BSD challenge is available to an ordinary legislation,⁵⁶⁶ Justice Lokur wholly disagreed, reaffirming Justice Ray's observations in *Raj Narain*.⁵⁶⁷ Justices Kurian and Chelameswar thought it unnecessary to examine the issue in view of the conclusion arrived by the majority to strike down the amendment.⁵⁶⁸

In Justice Chelameswar's dissent, we find a radically different interpretation of the evolution of the BSD. He posited that whilst the BSD embodies the whole of the additive cardinal constitutional attributes, the term "basic features" symbolises the individual constituents of the BSD, although the latter need not always necessarily correspond to a single provision and can also emerge from a conjoint reading of a plethora of Articles.⁵⁶⁹ He then contended that the judicial primacy in appointment matters is in fact not so vital to judicial independence to constitute a part of the BSD, as compares to the need to divest the Executive of the unbridled power to interfere in legitimate judicial appointments.⁵⁷⁰ Since this doctrine of demarcation of separate domains was not abridged by the amendment – for the Executive's appointment proposal would open to rejection by the rest of the NJAC's members⁵⁷¹ – it could be reasoned that the amendment is constitutional. In fact, he went a step further to assert that the lack of imputation of such Executive's participation is a negation of this key tenet of the BSD.⁵⁷²

The majority verdict disagreed on many counts. Justice Khehar, for instance, tacitly endorsed the theory of implied limitations on CAP enunciated above, when he stated that unique constitutional epistemology embodied in provisions such as Article 141 require

⁵⁶²Supreme Court Advocates-on-Record Association and Another v. Union of India, (2016) 5 SCC 1.

⁵⁶³*Id.*

⁵⁶⁴*Id.*

⁵⁶⁵*Id.*

⁵⁶⁶*Id.*

⁵⁶⁷*Id.*

⁵⁶⁸*Id.*

⁵⁶⁹*Id.*, 539. In a passing reference (vide Footnote 591), Justice Lokur disagreed with Justice Chelameswar on this finding, by saying that lexicographically, 'basic structure' and 'basic feature' may have different implications, but in terms of constitutional ontology, they reside and operate in the same plane.

⁵⁷⁰*Id.*, 561.

⁵⁷¹*Id.*

⁵⁷²*Id.*, 568.

such a cogent and organic interpretation of the Constitution, that this would naturally entail a judicious consideration of the embedded “constitutional silences” underpinning its provisions.⁵⁷³ Taking this line of reasoning further, he asserted that it was clearly implied in the appointment provisions of the Constitution to accord judicial primacy in such matters.⁵⁷⁴ Thus, he stated that the fact that the two ‘eminent persons’ constituting the Executive prong could reject the proposal by the judicial members in the NJAC, clearly abrogated judicial independence, a core tenet of the BSD.⁵⁷⁵ These conclusions were echoed by Justice Goel,⁵⁷⁶ who echoed the impact test when he stated that it would be necessary to review not only the bare language of the impugned amendment, but also its actual effect on the BSD.⁵⁷⁷ Interestingly, furthermore, despite observing that the BSD cannot be extended to ordinary legislation,⁵⁷⁸ Justice Lokur said that once the Ninety-Ninth CAA is held to be unconstitutional, as it seriously compromises judicial independence, the NJAC Act borne and engendered by the CAA, could not be detached for continued distinct survival.⁵⁷⁹

Jurisprudentially, on reviewing the developments from the Nagaraj and Coelho decisions to the NJAC judgment, some further important observations can be made with regard to the contents of the BSD. The Court has repeatedly affirmed that abstract and foundational values must be rooted in the Constitution – they cannot be conjured at will, without any reference to the Constitution. While features such as secularism, democracy, which have been reiterated as basic features, can be found in the Preamble, it is apparent from the Nagaraj and Coelho decisions that the impingement of these features must be connected to the actual impact and substantive tangible effect of the amendment. Similarly, it is wholly possible to contend that a violation of FRs has resulted in a contravention of the BSD; however not simply as individual Articles, but as codes representing the very core of the Constitution.

The liberal interpretation accorded to FRs, such as in *Maneka Gandhi v. Union of India*,⁵⁸⁰ clearly denotes that an overview of the connected DPSPs, the entire Constitutional framework, principles of reasonableness and natural justice must accompany the generous and purposive construction of principles such as equality and judicial independence. The unarticulated rights implicit in enumerated guarantees⁵⁸¹ are so fundamental that they uphold the status of a controlled Constitution, and a guarantee against legislative and executive overreaches. This is best evinced from the complementary deployment of both the ‘essence of rights test’ and ‘rights test’, as per the ambit of the amendment—the former test undertakes a synoptic view of constitutional values, while the latter test lends itself to unearthing the direct impact and effect of the impugned amendment. Thus, for identifying the pillars of this scheme, structuralist arguments have been employed so as to attain a more holistic understanding of the basic features underlying constitutional values. The BSD thus fosters constitutionalism, i.e., stonewalling State excesses, through the most holistic view of restrictions imposed by Articles such as Articles 14, 19, 21, as well as the principles underlying them. This also represents a simultaneous concerted and conscious

⁵⁷³*Id.*, 347-348.

⁵⁷⁴*Id.*

⁵⁷⁵*Id.*, 357.

⁵⁷⁶*Id.*, 986-990.

⁵⁷⁷*Id.*, 1003.

⁵⁷⁸*Id.*, 828.

⁵⁷⁹*Id.*, 592. In any case, he affirmed that it violates Article 14 by fostering significant arbitrariness in judicial appointments.

⁵⁸⁰*Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

⁵⁸¹*I.R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1.

approach towards effectively delineating the parameters of the BSD, so as to guard it against criticisms of having attained a supra-constitutional status and as a pretext for aggrandizement of judicial hegemony.

Bangladesh

The origins of the BSD in Bangladeshi constitutional jurisprudence can be traced back to *Hamidul Huq Chowdhury v. Bangladesh* ('Fourth Amendment case'),⁵⁸² wherein the incorporation of emergency provisions and the Fourth CAA into the constitutional text, was challenged as impinging upon the BSD. It was argued that through such incorporation, the Constitution's parliamentary complexion had been completely altered, so as to be replaced by Presidential rule, under which the petitioner's shareholding in a newspaper printing and publishing company was arbitrarily divested.⁵⁸³ It was further contended that the safeguards as provided under Chapter III of the Constitution, i.e., the FRs, had been altered, changed, and abridged in a manner so as to broach the pale of CAP of Parliament, rendering such amendment void. Citing the verdicts in *Golaknath* and *Minerva Mills*, the petitioner asserted that if the Parliament or any State organ was so allowed to transgress its powers, the Constitution would be reduced to a nullity.

The HCD of the Supreme Court of Bangladesh acknowledged that the Constitution indeed operates as supremalexin Bangladesh, and reaffirmed the doctrine of constitutional supremacy enshrined in Article 7, further observing that the State organs' powers are ultimately derived from the Constitution.⁵⁸⁴ It recognised that the aforementioned amendment and incorporation had led to abnegation of the BSD, as they effectuated undue limitations on the enforcement of FRs, and secured law-making by Parliament that was inconsistent with FRs. The Court highlighted that further alterations and amendments such as the alteration of the Parliamentary democratic system to the Presidential system of government, had almost reduced the Constitution out of recognition.⁵⁸⁵ The Court endorsed the delegated powers argument by affirming that such amendments and legislative promulgations were impermissible because they could not transcend the boundaries of the derived CAP of Parliament, so as to render the BSD nugatory.⁵⁸⁶

Thus far, the Court expressed its agreement with the underlying philosophy of the BSD as expressed in *Golaknath* and *Minerva Mills*; however it refused the immediate application of the principles enunciated in those decisions, on two grounds – firstly, a difference in history of constitutional process in Bangladesh, owing to changes in the political system and the government in August, 1975; and secondly, the fact that a lapse of nearly six years interposed by extra-constitutional processes beginning from August 1975, had not been resisted by people, and had been recognised by several judicial authorities. Therefore, the Court held that the unconstitutionality of the impugned enactments on the ground of loss of competency of the Parliament in 1975, on account of the Fourth CAA and creation of immunity of laws during Proclamation of Emergency, though violative of FRs, could not be

⁵⁸²*HamidulHuqChowdhury v. Bangladesh*, (1981) 1 BLD 381.

⁵⁸³*Id.*

⁵⁸⁴*Id.*

⁵⁸⁵*Id.*

⁵⁸⁶*Id.*

entertained.⁵⁸⁷ It highlighted that several parts of the Fourth CAA had been incorporated and retained in several Proclamations made by the Chief Martial Law Administrator during the period from 1975 to 1979 when Martial Law was lifted.⁵⁸⁸ These proclamations incorporating, retaining or recognising several parts of Fourth CAA of 1975 were immunised from JR, and furthermore ratified by the Legislature through the Act I of 1979. Thus, the Court held that the impugned legislations could not be challenged. The Court also rejected the petitioner's contention that even if the amendment of the Constitution relating to Proclamation of Emergency in 1973 was not declared void, yet since the alleged violations of FRs had taken place before the contemporary Proclamation of Emergency in 1981, it should not affect the HCD's power to enforce FRs. The Court refused to undertake an activist stance and abided by the contemporary Article 141C of the Constitution, which provided for the suspension of enforcement of FRs during emergencies. They stated that a decision could not be given on this question in view of the Proclamation of Emergency in 1981.⁵⁸⁹

However, this approach rapidly changed with the onset of the autocratic rule and political upheaval under Martial law. In *Anwar Hossain Chowdhury v. Bangladesh*,⁵⁹⁰ the *locus classicus* for the BSD in Bangladesh, the Appellate Division (AD) of the Bangladeshi SC, examined the constitutionality of the Eighth CAA. The majority verdict delivered by Justices Badrul Haider Chowdhury, Shahabuddin Ahmed, and M.H. Rahman, upheld the BSD and for the first time, struck down the impugned amendment as unconstitutional. While the lone dissenting judge, Justice A.T.M. Afzal, refused to read in any curtailment of Parliament's CAP by virtue of the BSD,⁵⁹¹ the majority verdict of the Court acknowledged the undemocratic nature of implementing decentralization of the judiciary in the absence of consultation with any stakeholders, lawmakers and the public, and restored the plenary power of the HCD, affirming judicial independence to constitute an important element of the BSD.⁵⁹²

Justice Badrul Haider Chowdhury found that as stipulated by the contemporary Article 142, the Preamble could only be amended by referendum, and hence he argued that it constitutes a part of the Constitution.⁵⁹³ He observed that given the substantive aspirations, goals and aims recognised by the Preamble of Bangladesh's Constitution, such as democracy, FRs, freedom,⁵⁹⁴ the Court's role as the guardian of the constitutional order,⁵⁹⁵ etc., there are significant restrictions on untrammelled CAA – which can be executed only through a referendum – and that the Preamble is not simply a rhetorical flourish, but a source of substantive power.⁵⁹⁶ He affirmed that Bangladesh's Constitution is sovereign and detached from the colonial powers preceding its inception.⁵⁹⁷ Thus, it was sought to accord the Constitution its legitimacy through its autochthonous origin. He highlighted the doctrine of Constitutional supremacy, FRs of equality, right to life, right to access courts, etc. embodied in the very fabric of the constitutional text, through provisions such as Articles 8,

⁵⁸⁷*Id.*

⁵⁸⁸*Id.*

⁵⁸⁹*Id.*

⁵⁹⁰ *Anwar Hossain Chowdhury v. Government of the People's Republic of Bangladesh*, 41 DLR(AD) (1989) 165.

⁵⁹¹*Id.*,

⁵⁹²*Id.*, ¶5.

⁵⁹³ *Id.*, ¶52.

⁵⁹⁴*Id.*

⁵⁹⁵*Id.*

⁵⁹⁶*Id.*, ¶53.

⁵⁹⁷*Id.*

27, 44 etc.⁵⁹⁸ to assert that the entire constitutional scheme wholly forbids executive or legislative action that may impinge upon the BSD.⁵⁹⁹

He then analysed the changes wrought by the Eighth CAA, which amended Article 100 to establish permanent Benches at those sites at which ‘sessions’ of the HCD were operating,⁶⁰⁰ and all the roles and authority of the HCD were vested with these permanent Benches instead, which now had exclusive jurisdiction. Thus, these Benches operated in competitive spheres with the HCD. It disrupted the structural balance of the allocation of the judiciary in the Constitutional scheme, by impinging upon Article 114 which expressly forbids the setting up of courts of coordinate or competing jurisdiction. Thus, he asserted that the amended Article 100 clearly violated the constitutional mandates in Article 94 and 7(2), which delineate the constitutional ontology of Bangladesh’s judiciary and the constitutional supremacy doctrine respectively.⁶⁰¹ As mentioned above, Justice Badrul Haider Chowdhury was of the firm opinion that judicial independence is a part of the BSD.⁶⁰² He eschewed Justice Khanna’s reluctance to enumerate individual elements of the BSD, citing elements such as an autochthonous Constitution, ideals recognised in the Preamble such as constitutional supremacy, democratic process, SOP, Article 114 (the HCD’s power of superintendence), plenary judicial power (Articles 101, 102, 109 and 110), etc. as instances of core elements of the BSD.⁶⁰³ It was thus interpreted that the impugned CAA upturned the scheme laid down for constituting the judiciary laid down in Article 94, because it inserted a concept completely alien to the clear constitutional scheme, and in fact, completely antithetical to the express prohibition on such destruction of judicial independence.⁶⁰⁴ Such amendment disrupted the constitutional fabric because it established competitive courts to the HCD, which was constitutionally endowed with judicial supremacy and independence. Therefore, he held that such amendment clearly contravened the constitutional limits of CAP.

Whilst echoing these observations as to the unconstitutionality of the Eighth CAA, Justice Shababuddin Ahmed affirmed people’s sovereignty, democracy, demarcation of different operating spheres of the distinct State organs, as core tenets of the BSD.⁶⁰⁵ Notably, he rejected the contention that simply because the BSD does not provide a full catalogue of all basic features, and may be undefined and vague in certain respects, it should be rejected.⁶⁰⁶ Drawing an analogy from concepts such as negligence, reasonableness, natural justice, which are well understood but escape precise definition, he stated that the BSD need not be fully defined for its acceptance. Further, he submitted that the consequences of rejection of the BSD would indeed be “so grave and opposed to the objectives of the Constitution”, that the consequence of uncertainty of the BSD itself would be insignificant by comparison.⁶⁰⁷ Thus, he observed that by upturning the structural integrity of the HCD, the Eighth CAA had violated the BSD.⁶⁰⁸ We find a very clear defence of the BSD early on from the constitutional jurisprudence in Bangladesh, with the emphasis being on the indispensability of the BSD to preserving the integrity of the constitutional polity. From the

⁵⁹⁸ *Id.*

⁵⁹⁹ *Id.*

⁶⁰⁰ *Id.*, i.e. at Rangpur, Jessore, Barisal, Chittagong, Comilla and Sylhet.

⁶⁰¹ *Id.*, ¶54.

⁶⁰² *Id.*, ¶280-281

⁶⁰³ *Id.*, ¶292-293

⁶⁰⁴ *Id.*

⁶⁰⁵ *Id.*, ¶367-368.

⁶⁰⁶ *Id.*

⁶⁰⁷ *Id.*, ¶368.

⁶⁰⁸ *Id.*

perspective of comparative analysis, it is clear that both in India and Bangladesh, the willingness of courts to uphold the BSD has been directly related and proportional to the increase in threats to the constitutional order posited by unbridled arrogation of power by the Legislature and Executive, and vice versa.

In the Eighth Amendment decision, Justice M.H. Rahman however neatly sidestepped the question of determining the legitimacy of the BSD in Bangladeshi constitutional jurisprudence. Whilst noting the criticisms levied against the BSD that it had evolved in a largely reactionary manner to the unbridled proliferation in autocratic arrogations of power by the Executive,⁶⁰⁹ he nonetheless stated that since the only basic feature involved in this case i.e. Rule of Law is stated in the Preamble itself and therefore can be used to test the validity of the impugned CAA, the legitimacy of the BSD need not be tested.⁶¹⁰ However, he acknowledged that the Preamble acts as the cynosure of the BSD, i.e. it embodies the substantive content of the BSD through its explicit endorsement of the philosophy, ideals, objectives and aims of the Constitution of Bangladesh. Thus, from one of the earliest cases on BSD in the constitutional jurisprudence of Bangladesh, it is possible to infer a marked readiness to enumerate the content of the BSD, as opposed to the intentional vagueness imbued to the BSD by Justice Khanna in *Kesavananda Bharati*.

On the other hand, the dissenting judge, A.T.M. Afzal, opined that the BSD should be rejected on two counts- firstly, that it was unthinkable that the founding fathers of the Constitution had already determined all issues for future generations of the polity, without leaving any resort or means for change, and secondly, that if such substantive restriction was intended on the constitution-amending powers, it could be entrenched expressly in the Constitutional text itself.⁶¹¹ It is instructive for developing a healthy critique of the BSD, to understand the rationale for his views. He opined that the Article 142(1A) amply manifested that except the provisions mentioned therein, no other provision would be so fundamental that it would need a referendum for its amendment to be adopted in the Constitution.⁶¹² Approving of Justice Ray's views in *Kesavananda Bharati*, he found no basis for evolving an interpretation that required discerning the cardinal constitutional attributes embodied by the BSD, unless otherwise expressly indicated, for he asserted that once entrenched, all constitutional provisions should be considered vital.⁶¹³ He thus strongly felt that the BSD could detract from the clear intent and wishes of the Constitution-framers, and in fact remove the safety valve of CAP by unduly trammelling it in favour of extra-constitutional negotiations of the constitutional order through revolutions, etc. – a dangerous prospect for a civilised constitutional polity like Bangladesh.⁶¹⁴ His observation that no other safety valve for CAA is allowed to the citizens, as long as the Constitution exists, is a flawed but nonetheless interesting counterpoint to the constitutionality attributed to the BSD. This viewpoint posits the BSD as completely antithetical to constitutional democracy itself.⁶¹⁵ However, the consequences of the rejection of the doctrine are considered at all by him.

Nevertheless, he argued that in view of the organic evolution of the Constitutional text, corresponding to the changes in hopes and aspirations of the people, a

⁶⁰⁹*Id.*, ¶475-476.

⁶¹⁰*Id.*, ¶483.

⁶¹¹*Id.*, ¶1404.

⁶¹² *Id.*

⁶¹³ *Id.*

⁶¹⁴*Id.*, ¶575.

⁶¹⁵*Id.*

doctrinaire approach to the BSD would create a roadblock to further constitutional growth and development.⁶¹⁶ He demonstrated that the BSD itself is not immutable in the indigenous context, for instance, while the original Constitution started with ‘secularism’ as a cardinal constitutional tenet, it provided for a State religion of the Republic in the succeeding years. Thus, he did not believe that it would be wise or desirable to hinder the realization of people’s interests by erecting unnecessary obstacles to people’s amending power. He argued, then, that if in the future, should people choose to demand the restoration of the Parliamentary form of Government—the contemporary form being the Presidential form—there is no reason why the BSD should obstruct their choice from being reflected in the Constitution through the amending process.⁶¹⁷ The first contention can be refuted by understanding the mutability of the BSD owing to popular sovereignty, as discussed in detail in Part II of this paper. Coming to the second argument, it appears that his conceptualisation of the BSD as an unjustified barrier to legitimate exercise of CAP by Parliament completely sidesteps any cogent discussion on the very real and clear possibility of Parliamentary or Executive hegemony, similar to the judicial hegemony he so feared would be an inevitable outcome of the BSD.

In later decisions such as in *Secretary, Ministry of Finance v. Masdar Hossain*,⁶¹⁸ the AD has expressly affirmed judicial independence and the SOP doctrine as inalienable elements of the BSD.⁶¹⁹ Similarly, in *Khondker Delwar Hossain v. Bangladesh Italian Marble Works*⁶²⁰ (‘Fifth Amendment Case’), wherein the Supreme Court categorically reiterated that the scope of JR vested in it is similar to the ambit of JR in constitutional polities such as India, the U.S.A., etc., it upheld the BSD in no uncertain terms, reaffirming that the facilitation of the military rule owing to the Fifth CAA, subverted the BSD, and therefore, the Constitution itself. Such abeyance, suspension, abrogation and destruction of the Constitution, would not be permitted to any authority who is not competent to do so under the Constitution. It ensconced the sanctity of the BSD as articulated in the majority verdict of the Eighth Amendment case, striking down provisions that accorded untrammelled authority to the Martial Law Administrator, as it was of the opinion that no authority enjoined to act by the Constitution, could subvert it altogether.

Similarly, in *Siddique Ahmed v. Bangladesh*,⁶²¹ the HCD struck down the Seventh Amendment that ratified the martial law decree, and which prevented the decrees and orders issued between 1982 and 1986, from being subject to JR. The Court held that the power of JR is indeed an element of the BSD, as are the equal purview and protection of law and judicial independence.⁶²² Thus any abrogation of these features through CAA – such as the Seventh CAA, which had negated attributes such as rule of law, secularism, JR imbricate in the Constitution, under the guise of Martial Law – would be clearly unacceptable.⁶²³ The Court rejected the concept of Martial law, which had led to “usurpation of power”, autocratic rule, and destruction of the democratic fabric, as completely alien to the Constitution of Bangladesh.⁶²⁴

⁶¹⁶*Id.*

⁶¹⁷¶591.

⁶¹⁸*Secretary, Ministry of Finance v. Md. Masdar Hossain*, 20 BLD (AD) 104.

⁶¹⁹*Id.*, ¶57.

⁶²⁰*Khondker Delwar Hossain v. Bangladesh Italian Marble Works*, (2010) 62 DLR (AD) 298.

⁶²¹*Siddique Ahmed v. Bangladesh*, (2010) 39 CLC (HCD).

⁶²² *Id.*

⁶²³ *Id.*

⁶²⁴*Id.*, 134-136.

Recently, in *Abdul Mannan Khan v. Government of Bangladesh* ('Thirteenth Amendment Case'),⁶²⁵ the AD declared the Thirteenth CAA to be unconstitutional for having contravened the BSD. As discussed in Part III.B of this paper, through the establishment of the all-powerful, unrepresentative and undemocratic NCG, the Thirteenth CAA was clearly found to have abrogated cardinal constitutional tenets of the BSD such as democracy, SOP, etc.⁶²⁶ In fact, the Court's repeated emphasis on the complexion of parliamentary democracy embodied in the constitutional epistemology wholly evinces that rather than being an unconstitutional medium for entrenchment of judicial dominion, the BSD has been conceptualised to prevent tyranny of all constitutional organs.

Here, the Court read in the substantive limitations articulated by the BSD in the Preamble, thus upholding the aforementioned elements of democracy etc. as duly trammelling the Parliament's CAP.⁶²⁷ Further, the Court notably asserted that while the constitution-amending clause of Article 142 embodied the Parliament's substantive CAP, it did not accord the right to abridge or violate the BSD, as imputed from the very lexical implications of the term "amendment".⁶²⁸ This has now been ensconced in Article 7B of the Constitution through the mechanism of the Fifteenth CAA.

In the latest case on the BSD, the HCD has struck down the Sixteenth Amendment as unconstitutional.⁶²⁹ The amendment was assailed as a piece of "colourable legislation"⁶³⁰ and as violative of the twin principles of judicial independence and demarcation of different operating domains of the constitutional organs, which are guaranteed by a conspectus of constitutional provisions.⁶³¹ The Court held that by abolishing the Chief Justice-led Supreme Judicial Council system which was introduced in 1978 – that was imbued with the power of removal of the SC – and instead vesting the JatiyaSangsad with this power to remove SC judges on grounds of incapacity or misconduct, instead, would equate to vesting the latter with an untrammelled authority, contrary to the spirit underlying the basic structure of the Constitution of Bangladesh.

Jurisprudentially, therefore, we find a much less convoluted evolution of the BSD in Bangladesh as compared to India, largely owing to the relatively later development of the doctrine in Bangladesh due to its inception as a constitutional polity much later, which enabled the apex court in Bangladesh to draw from the then largely settled position as to the legitimacy of the BSD in India. This has been further reinforced by the clearer articulations in the constitutional text itself, of the doctrine of constitutional supremacy and sanctity of JR, as represented by Article 7 for instance. However, the liberal approach adopted towards the BSD by the Bangladeshi SC assumes even more importance when compared to Pakistan, where similar instances of autocratic rule and rampant amendments have led to very different jurisprudential developments in the context of limits on CAP.

⁶²⁵ *Abdul Mannan Khan v. Bangladesh*, 64 DLR (AD) 169.

⁶²⁶ *Id.*

⁶²⁷ *Id.*, 383.

⁶²⁸ *Id.*

⁶²⁹ Ashutosh Sarkar & Shakhawat Liton, *Bangladesh High Court scraps 16th amendment to Constitution*, THE DAILY STAR (May 6, 2016), available at <http://www.thedailystar.net/frontpage/hc-scraps-16th-amendment-1219480> (Last visited on August, 7, 2017).

⁶³⁰ BDNEWS24.COM, *High Court publishes verdict that declared 16th Amendment Unconstitutional* (August 11, 2016), available at <http://bdnews24.com/bangladesh/2016/08/11/high-court-publishes-verdict-that-declared-16th-amendment-unconstitutional> (Last visited on August, 7, 2017).

⁶³¹ The Constitution of Bangladesh, 1972, Art.7B, 94(4), 147(2).

Pakistan

There appears to be an overwhelming consensus among Pakistan's constitutional law scholars that the BSD has never been accepted in Pakistan, even in the origins of its jurisprudence.⁶³² While the SFD currently appears to be the doctrine in vogue, whether the BSD had been completely rejected in the early cases is a matter that still bears closer investigation. Since this aspect closely intertwines with the discussion on SFD, the two doctrines are examined in detail under the next sub-Part of this paper.

THE SALIENT FEATURES DOCTRINE: MEANING, RATIONALE AND LIMITS

Under this theme, we examine the following issues:

- How has the SFD been defined? How have its contours and limits been delineated?
- What is the rationale for the SFD?
- How do courts limit themselves from an overgenerous construction of the SFD, so as to avoid exercising judicial hegemony?
- How can the Salient features be identified? Is the Objectives Resolution 1949 an indicative or expressly defined list thereof?
- Do any other implicit/explicit limitations exist on constitutional amendments after the promulgation of the SFD?
- Where an amendment itself forbids the court to examine the constitutionality of amendments, how does the court review such an amendment?
- Does the SFD extend to ordinary legislations?
- Does the SFD extend to executive action?
- Does the SFD help defeat the criticisms that the BSD has attained a supra-constitutional status?
- Is the SFD truly an improvement over the BSD? What are the similarities and differences between the two doctrines?

1. Pakistan

The genesis of the BSD in the Indian context may in fact be most appropriately traced back to its mention in *Fazlul Quader Chowdhry* in Pakistan, which was referred to in *Sajjan Singh* by Justice Mudholkar. In *FazlulQuaderChowdhry*, the SC of Pakistan famously held that the Parliament's CAP could not repudiate essential tenets of the BSD. This would bar the arbitrary transmutation of the governmental form from Presidential to Parliamentary,⁶³³ and the introduction of the complexion of permanency to the seats of the elected representatives. Thus, the erstwhile Chief Justice Cornelius asserted that the

⁶³²*Supra* note 12.

⁶³³*FazlulQuaderChowdhry v. Muhammad Abdul Haque*, PLD 1963 SC 486.

amendment in question which had negated the cardinal constitutional tenet of demarcation of separate operating spheres of different constitutional organs, would be wholly void.⁶³⁴

It must be observed that in the Jhamandas decision, wherein the Court had explicitly recognised the existence of a “constitutional conscience”, it distinguished this notion from the “constitutional spirit”.⁶³⁵ While this may seem to be an academic distinction between two ostensibly abstract formulations, the Court nonetheless observed that while the term “spirit” implies an enabling and empowering force, the term “conscience” clearly denotes a curtailing and limiting force which acts as a check and balance.⁶³⁶ By affirming that an amendment contravening the “constitutional conscience” would therefore be completely void, the Court effortlessly linked the twin facets of the BSD as a substantive epitome of the cardinal constitutional tenets, and its more frequently known aspect as a restriction on Parliament’s CAP.

In Zia-ur-Rehman, Justice Hamoodur Rehman expressed his doubts as to how far the Objectives Resolution discussed above, could be appropriately termed as the pole-star to the Constitution of Pakistan, when compared to the Preamble of the Constitution of Bangladesh.⁶³⁷ He was wary of according equal or superior rank to any piece of text besides that of the Constitution itself, and of expanding the Court’s province to declare amendments unconstitutional solely on the basis of such a charter.⁶³⁸ He stated that irrespective of the portentous and august character of the Objectives Resolution, it could not trammel the constitutional scheme owing to its lack of incorporation in the bare Constitutional text in the first place.⁶³⁹ More importantly, he restated the argument that the judiciary being the creature of the Constitution itself, it could not possess or exercise such faculty and competence as to strike down any of its provisions as being violative of the Constitution itself.⁶⁴⁰ This line of reasoning is based on the same flawed equating of the source of CAA and constitutional provisions, and a conflation of the ontology of CAP, discussed throughout this Paper.

Further, Justice Rehman argued that even if the Objectives Resolution truly did encapsulate popular sovereignty as claimed, then the citizens of the polity must themselves address its contravention, rather than the courts.⁶⁴¹ Thus, the lack of constitutional entrenchment of this document impeded him from considering it seriously as a limitation on CAP.⁶⁴² He observed that if it were to be accepted in the nature of a Preamble, then it can only fulfil the limited lexical functions of a preamble as discussed above in this Paper, but cannot affect the unambiguous and clear constitutional mandate.⁶⁴³ He thus rejected any conception of the Objectives Resolutions as equivalent to an eternity clause, the BSD or any other cardinal constitutional tenet which could curtail Parliament’s CAP.⁶⁴⁴

⁶³⁴*Id.*

⁶³⁵R.S. Jhamandas v. Chief Land Commissioner, PLD 1966 SC 229.

⁶³⁶*Id.*

⁶³⁷State v. Zia-ur-Rehman, PLD 1973 SC 49.

⁶³⁸ *Id.*, 70-72.

⁶³⁹ *Id.*

⁶⁴⁰ *Id.*

⁶⁴¹ *Id.*

⁶⁴² *Id.*

⁶⁴³ *Id.*

⁶⁴⁴ *Id.*

As noted earlier,⁶⁴⁵ this case has often been used to reiterate the proposition that courts in Pakistan cannot review the substantive vires of a constitutional amendment, that it is a political question more appropriately to be decided by the people and their representatives, and that the Court had rejected the BSD in this case. A closer reading of the case however reveals—as correctly observed by Justice AzmatSaeed in the *Lahore Bar Association v. Federation of Pakistan* (discussed below)—that the question of restriction on Parliament’s CAP was never in issue in *Zia-ur-Rehman* in the first place. Predominantly, the decision revolved on the position occupied by the Objectives Resolution in the constitutional order of Pakistan; and it was in the context of assessing the validity of the Interim Constitution – i.e. promulgation of a new Constitution altogether, rather than a constitutional amendment – that the Court stated that the judiciary should not interfere with such policy decisions. The promulgation of a new Constitution, which relates to primary constituent power, operates on an entirely different realm as opposed to the constitutional amendment, which relates to secondary constituent power. By conflating the two, *Zia-ur-Rahman* has often been misread to state an inaccurate proposition and to cause further befuddlement in the context of Pakistan’s position on CAA. Thus, in Saeed Ahmad’s case, the SC referred to the observations in *Zia-ur-Rehman* pertaining to adoption of a new Constitution, and applied them directly to the issue of examining the constitutionality of amendments. The Court unequivocally rejected its powers of striking down an unconstitutional amendment, stating famously that its only function was to interpret the Constitution, not to whittle it down.

In *Islamic Republic of Pakistan v. Abdul Wali Khan* (‘Abdul Wali Khan’),⁶⁴⁶ the SC stated that following *Zia-ur-Rehman*, the court could not trammel the scope of Parliament’s CAP by referring to the Objectives Resolution; and that the conformity of these powers only with the constitutional procedure prescribed would be considered. Two points may be immediately noticed—declaring a constitutional provision to be invalid is a very different proposition from declaring an amendment to be invalid, as discussed above; further, in *Zia-ur-Rehman*, the Court had stated that though the Objectives Resolution cannot substantively curtail the Constitution, this would not imply that the courts would have correspondingly absolutely no discretion to review an amendment, which is different from the adoption of a new constitutional altogether.⁶⁴⁷

Thus in *Zia-ur-Rehman* itself, the Court had clearly accepted the possibility of constitutional restrictions and JR operating on CAP. The argument, here, therefore, is that while the Court cannot review the constitutionality of a constitutional provision itself, it can certainly review the validity of a constitutional measure such as an amendment. The question was limited to distinguishing between these two aspects and defining the limits of the judicial power with respect to each field. The Court never concerned itself with the question of limitations on CAA per se. Further, contrary to what Abdul Wali Khan observed, *Zia-ur-Rehman* never stated that the only restriction limiting the constitutionality of amendments is the entrenched procedural mechanism; rather, the Court had stated that while an amendment

⁶⁴⁵Part IV.B of this paper.

⁶⁴⁶*Islamic Republic of Pakistan v. Abdul Wali Khan*, PLD 1976 SC 57.

⁶⁴⁷*Id.*, 70-72.

could certainly be examined on these illustrative grounds, the validity of the Constitution itself could not be adjudged in such a manner.

Unfortunately, this distinction of pressing importance was completely ignored, and the SC went on to hold in *Abdul Wali Khan* – reaffirmed in later decisions⁶⁴⁸ – that since the judiciary cannot enter into questions of examining the constitutionality of a constitutional amendment, the question of examining the controversy surrounding the BSD, as articulated in *Kesavananda Bharati* by the Indian Supreme Court, became redundant. In any case, such an abstract concept or national aspiration could not restrict the passing of a Constitutional amendment validly promulgated by Parliament in conformity with constitutional limits.⁶⁴⁹ While upholding this position in *Fauji Foundation v. ShamimurRehman*,⁶⁵⁰ the Supreme Court examined the erstwhile BSD Indian jurisprudence and rejected the notion of BSD, asserting that no supra-constitutional touchstone could negate the validity of CAA. The Court emphasised that the BSD only remained a theoretical constitutional formulation, with no legal compulsion or force.⁶⁵¹

In the interim however, certain judgments began to recognize the intermediate position of the SFD. The earliest mention may be traced to *Miss AsmaJilani v. Government of the Punjab* ('Jilani'),⁶⁵² wherein the SC affirmed the Objectives Resolution to be the 'grundnorm' of the Constitution. While Justice Hamood-ur-Rahman rejected this reading of Jilani, later cases affirming SFD continue to interpret the case so as to hold that the Objectives Resolution forms an inalienable constitutional tenet, representing the polity's will, aspirations and goals. Following the rejection of this reading in *Zia-ur-Rehman*, however, the Supreme Court held in *Hakim Khan v. Government of Pakistan* ('Hakim Khan'),⁶⁵³ and *Mst. Kaniz Fatima v. Wali Muhammad*,⁶⁵⁴ that even Article 2A or the Objectives Resolution could not be used as yardsticks for testing the constitutionality of impugned provisions.

The reasons for the rejection of the SFD in *Hakim Khan* merit a closer look, especially because they persist in the debate regarding examining validity of CAA in Pakistan even today. In this case, despite the substantive incorporation of the Objectives Resolution within the constitutional text through the insertion of Article 2A, the Court refused to interpret it as a yardstick for limiting Parliament's CAP, mainly for consequentialist reasons.⁶⁵⁵ Upon considering the consequences that would stem from the operation of the Objectives Resolution as such a limiting force, the Court reasoned that most of the Articles of the Constitution would then become vulnerable and subject to challenge, leading to negation of the text as a whole.⁶⁵⁶ Thus, the Court found force in the contention that despite its

⁶⁴⁸*Federation of Pakistan v. United Sugar Mills Ltd.*, PLD 1977 SC 397; *BegumNusrat Bhutto v. Chief of Army Staff and Federation of Pakistan*, PLD 1977 SC 657.

⁶⁴⁹*Id.*

⁶⁵⁰*Fauji Foundation v. ShamimurRehman*, PLD 1983 SC 457.

⁶⁵¹*Id.*

⁶⁵²*Miss AsmaJilani v. Government of the Punjab*, PLD 1972 SC 139.

⁶⁵³*Hakim Khan v. Government of Pakistan*, PLD 1992 SC 595.

⁶⁵⁴*Mst. Kaniz Fatima v. Wali Muhammad &Anr.*, PLD 1993 SC 901.

⁶⁵⁵*Hakim Khan v. Government of Pakistan*, PLD 1992 SC 595.

⁶⁵⁶*Id.*

constitutional entrenchment, the Objectives Resolution should continue as a largely inspirational document, relegated to the background and possessing no binding force.⁶⁵⁷

The Court further emphasised that any conflict between the Objectives Resolution and the “original Constitution” should be resolved through an exercise of CAO.⁶⁵⁸ It also posited that owing to the hermeneutic multiplicity of interpretations that can be potentially attached to the largely abstract conceptions and values embodied by the Resolution, it could be wielded as a tool for aggrandising judicial hegemony, and could thus irrevocably encroach upon the stability, enduring permanence and certainty of the constitutional order.⁶⁵⁹ Therefore, any concern regarding the soundness of a constitutional provision is best examined by the legislature itself, which could deploy the amendment mechanism as a corrective instrument, if necessary.⁶⁶⁰ This line of reasoning yet again appears to have conflated the ontology of CAP.

Similarly, in *Mst. Kaniz Fatima v. Wali Muhammad* (‘Fatima’),⁶⁶¹ it was held that Article 2A could not be utilised for negating constitutional provisions. The approach adopted in both the Hakim and Fatima decisions was that the Objectives Resolution could only initially establish the foundation of the edifice of the promulgated constitutional order; once established, however, it would have no further role to play, especially in terms of restricting any alteration of the edifice through amendments.⁶⁶² This is indeed a highly curious and flawed conflation of the ontology of CAP and the foundational structuralist argument, as rationally, the “structure” analogy enunciated here does not consider the material fact that if the foundation of this edifice were to be destroyed, then the entire configuration would collapse. In fact, in *Lahore Bar Association*, Justice Khosa mentioned that it was “evident” that in both Hakim and Fatima, the SC had been faced with the prospect of accepting the BSD and the Objectives Resolution as twin dimensions of the same picture, which led it to reject all the yardsticks since the acceptance of one would inevitably tantamount to acceptance of other all closely interrelated concepts. In an effort to circumvent this eventuality, the SC eschewed all these conceptions.⁶⁶³

The tacit endorsement of the SFD in Jilani was explicitly espoused in *Mahmood Khan Achakzai v. Federation of Pakistan* (‘Achakzai’),⁶⁶⁴ wherein Chief Justice Sajjad Ali Shah identified “salient features” such as judicial independence, federal polity, etc. His judgment therefore marked a departure from the previous refusal of the SC to even read in the Objectives Resolution as an implied restriction on Parliament’s CAP.⁶⁶⁵ What is especially noteworthy about this decision is that despite the inferences made with regard to the SFD, the Court upheld the validity of the military takeover by General Pervez Musharaff, mainly on the now-discredited doctrine of State Necessity.

⁶⁵⁷*Id.*

⁶⁵⁸*Id.*

⁶⁵⁹*Id.*

⁶⁶⁰*Id.*

⁶⁶¹*Mst. Kaniz Fatima v. Wali Muhammad*, PLD 1993 SC 901.

⁶⁶²*Id.*

⁶⁶³*Id.*, 258.

⁶⁶⁴*Mahmood Khan Achakzai v. Federation of Pakistan*, PLD 1997 SC 426.

⁶⁶⁵*Id.*

In this verdict, while examining the vires of the Eighth CAA, the Chief Justice followed the stance adopted in *Kesavananda Bharati* and ruled that FRs could not be deployed as a barometer for testing and disannulling amendments, owing to the equality in operating force of all constitutional provisions.⁶⁶⁶ However, he went on to hold that the SFD tracing from the Preamble and the Objectives Resolution would certainly trammel Parliament's CAP.⁶⁶⁷ However, as noted above, while recognizing the importance of SFD, he also affirmed that the impugned Eighth CAA had been ratified by implication.

It must be noted that Chief Justice Sajjad Ali Shah's observations in *Achakzai* were made even after taking into account the considerable opposition to such recognition in earlier cases. While the effect of such recognition was diluted owing to the fact that he could not strike down the validity of the military takeover or the CAA undertaken therein, the explicit endorsement of SFD at least in the theoretical realm portended important consequences for a shift in the constitutional jurisprudence of Pakistan.

In *Achakzai*, Justice Saleem Akhtar, taking into account the developments in Indian BSD jurisprudence from *Kesavananda Bharati* to *Raghunathrao Ganpatrao*, reiterated the usual position that although this doctrine had been consistently rejected in Pakistan, certain elements such as will of the polity, popular sovereignty, constitutional morality, etc. must limit the operation of CAP.⁶⁶⁸ Echoing Prof. Conrad's arguments (discussed below), he explicitly asserted that the substantive CAP would be restricted by such elements, so that complete transmutation and negation of these cardinal attributes, such as derogation of democracy through amendments, would not be permitted.⁶⁶⁹

Most significantly, therefore, the Court noted that although what constitutes the BSD is relegated to the domain of academic theory in Pakistan's constitutional jurisprudence, the SFD as adequately reflected in the Objectives Resolution would act as a decisively limiting force on CAP. While vociferously rejecting any foreign legal transplantation with respect to the BSD, in light of its distinctive politico-constitutional history, the SC also simultaneously affirmed the importance of the SFD. This position was also reiterated in *Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan*,⁶⁷⁰ wherein the "salient features" such as Islamic polity, SOP, etc. were adduced. However the majority verdict refused to treat them as "basic features" to eschew any associations of the BSD with the SFD.

The decision in *Zafar Ali Shah v. Pervez Musharraf* ('Zafar Ali')⁶⁷¹ appeared to reiterate the *Achakzai* position, affirming the supervening force of the SFD. What the

⁶⁶⁶ *Id.*

⁶⁶⁷ *Id.*

⁶⁶⁸ *Id.*

⁶⁶⁹ *Id.*

⁶⁷⁰ *Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan*, PLD 1998 SC 1263.

⁶⁷¹ *Zafar Ali Shah v. Pervez Musharraf*, Chief Executive of Pakistan, PLD 2000 SC 869.

Court was reluctant to do in Achakzai – regarding taking the SFD further, so as to limit the Chief Executive’s CAP justified on the flimsy grounds of the contemporarily rejected State Necessity Doctrine – was sought to be done in Zafar Ali, where the Court now held that the limitations operating on Parliament’s CAP must extend to the Chief Executive’s CAP, which are exercised by a constitutional organ much smaller and narrower in scope and ambit than the legislature.⁶⁷² Thus, the Court reined in the unfettered CAP justified on the basis of the now outdated State necessity formulation. It affirmed concepts such as constitutional supremacy, and judicial independence, federal polity, rule of law, etc. as core elements of the SFD. Thus, JR was affirmed to possess the faculty and competence to limit the CAP of the Parliament as well as the Chief Executive.

In *Pakistan Lawyers Forum v. Federation of Pakistan*,⁶⁷³ the SC undertook a comprehensive review of the evolution of Pakistan’s constitutional jurisprudence with respect to the BSD and SFD. As a result, it could surmise that in the period of roughly thirty years before the Zafar Ali decision, it had been widely accepted that no restrictions would operate on Parliament’s CAP, whether the BSD or the SFD, and that the domain of deciding such constitutional questions reposed appropriately with Parliament, not the courts.⁶⁷⁴ Further in light of Zia-ur-Rehman, the demarcation of domains of these two State organs became even more entrenched, immunising amendments from the JR of the SC and High Courts.⁶⁷⁵

This tug of war and continuous conflict as well as threats of encroachment were decisively settled in favour of the judiciary in the Sindh HCBA decision.⁶⁷⁶ Here, the Court observed that in spite of the autocratic declarations of emergency and takeovers undertaken by the army being branded as supra-constitutional measures and therefore insulated from JR in the decisions of Zafar Ali, Nusrat Bhutto, etc., thus rendering them valid, such assumption of power could no longer be considered valid. Thus General Pervez Musharaff’s takeover of the Constitution by his 2007 Oath Order was considered a gross contravention of the constitutional mandate.⁶⁷⁷ The Court noted that its failure to bring the SFD into fruition in earlier cases need not detain its taking action in this case. By choosing to term such a takeover as “extra-constitutional” and thus imparting it validity, and rendering the constitutional scheme nugatory, the Court stated that it would not be right to deploy such substantial judicial and legal resources only to invent ostensibly innocuous but actually meaningless and dangerous phrases such as “supra-constitutional” and “extra-constitutional”,⁶⁷⁸ to circumvent legitimate exercise of JR over unconstitutional exercise of CAP. In the Court’s view, such terminology would hardly change the unconstitutional nature and character of the said actions, which not only *ex facie* lacked the backing of a statute or constitutional provision, but in fact violated and abrogated these outright. The Court therefore firmly asserted that such autocratic rule is not only completely antithetical to the constitutional order of Pakistan, but that the SC could not accord its cognisance or approval

⁶⁷²*Id.*

⁶⁷³*Pakistan Lawyers Forum v. Federation of Pakistan*, PLD 2005 SC 719.

⁶⁷⁴ *Id.*

⁶⁷⁵ *Id.*

⁶⁷⁶*Sindh High Court Bar Association v. Federation of Pakistan*, PLD 2009 SC 879.

⁶⁷⁷ *Id.*

⁶⁷⁸ *Id.*

of the same in light of its constitutionally delineated functions as well.⁶⁷⁹ Significantly, upon tracing the substantive CAP to Articles 238 and 239, the Court stated that even Parliament did not possess the faculty, competence or authority to transmute the SFD.⁶⁸⁰

Finally, in the most recent case, *Lahore Bar Association v. Federation of Pakistan* ('Lahore Bar Association'),⁶⁸¹ the SC reasserted the constitutional role, functions and duty of the courts to conduct JR on untrammelled exercise of Parliament's CAP. In the instance case, the Eighteenth and Twenty-First CAA – which, much like the NJAC Act, sought to promulgate a radically different method of judicial appointments, as well as to establish a specific set of martial courts for ostensibly providing a special anti-terror adjudicative mechanism – were challenged as contravening the constitutional limits. Whilst accepting this contention, the SC reaffirmed the sanctity of JR, thus resolving the SOP debate in Pakistan.

The majority opinion eschewed the BSD in favour of the SFD, charting the evolution of the latter from the Zia-ur-Rehman decision onwards, to highlight its wide acceptance in Pakistan as opposed to the BSD articulated in foreign jurisdictions.⁶⁸² Rationalising that the obscurity and opacity of the indeterminate horizons of the BSD were fundamentally antithetical to the fixed contours of the SFD, the verdict also noted that the historiography of the BSD in Pakistan evinces very remote traces of any justification for the same – a few occasional remarks made in the Achakzai, Mahaz and Zafar Ali decisions enumerating cardinal constitutional tenets such as parliamentary character of government, Islam as the State religion, federalism, etc. could equally fall within the realm of SFD as effortlessly.⁶⁸³

The majority verdict noted that the substantial variations in the inception, evolution and progression of the socio-economic, political, constitutional and adjudicative legacies of Pakistan and India, intrinsically required that any hasty and imprudent foreign transplantation of the BSD from the Indian constitutional jurisprudence into the Pakistan constitutional context must be eschewed.⁶⁸⁴ Furthermore, given the historical prominence of the dissension and criticism directed against the BSD in the Indian context itself, the Pakistani SC said that such borrowing should be even more vociferously resisted, especially where a cogent and adequate alternative of the SFD already exists in Pakistan.⁶⁸⁵ Interestingly, in reference to the correlation between autocratic rule and the need for limiting doctrines such as the BSD articulated above, the Court here noted that the Executive's proclivity to promulgate arbitrary and despotic CAA in the context of Pakistan has substantially abated, and that in clear contradistinction to the Indian scenario, the modern CAA passed in the last few years are in fact imbued with a distinctive flavour of bona fides both in conceptualisation and actual operation.⁶⁸⁶

⁶⁷⁹*Id.*

⁶⁸⁰*Id.*

⁶⁸¹*Lahore Bar Association v. Federation of Pakistan*, PLD 2015 SC 401.

⁶⁸² *Id.*

⁶⁸³ *Id.*

⁶⁸⁴ *Id.*

⁶⁸⁵ *Id.*

⁶⁸⁶ *Id.*, 535-536.

It may be argued, however, that this line of reasoning commits the same fallacy of associating spotless virtue with the CAA promulgated by the legislature – ignoring the historical recurrence of executive and legislative manipulation of the amendment mechanism in Pakistan to legitimise autocratic rule – which it was so anxious to detach from the judiciary, that is in fact the constitutionally delineated authority to safeguard constitutional values and ideals in the first place. Given the numerous instances of abuse of power by Military Generals who sought to legitimise their rule through ratification by the Parliament via CAA, as was recognized in Sindh HCBA decision, this line of argument seems especially oblivious and antiquated.

Justice Khawaja, on the other hand, fully subscribed to the lexicographic epistemology of amendments delineated in the Indian constitutional jurisprudence from *Kesavananda Bharati* onwards, arguing that the scope of CAP does not permit total negation and repudiation of the Constitution, and that JR of untrammelled CAP is both envisaged by and necessary for the preservation of the constitutional order and polity of Pakistan.⁶⁸⁷ However, he agreed with the majority verdict that the SFD remains the accepted limitation on CAP in Pakistan, as opposed to the BSD. He found that the SFD being perfectly clear in delineating the mandates that Parliament would need to follow while amending the Constitution, the concept of BSD – which is often criticised as a façade for wielding judicial hegemony – stands appropriately eschewed.

It must be noted that he referred to the explicit entrenchment of the features enumerated in the Preamble as constituting the SFD,⁶⁸⁸ as opposed to referring to the Objectives Resolution itself. While substantively there are not many major differences in the Objectives Resolution and the Preamble of the Pakistani Constitution, it must be noted that while the Preamble was a substantive part of the Constitution from the inception itself, the Objectives Resolution was incorporated later through the aforementioned amendment and provision. The acceptance of the Preamble as enshrining the SFD leaves it open to raise doubts regarding the contents of the SFD, and further as to whether the arguments regarding rejection of the latter as constituting SFD, have indeed been accepted by the Pakistani SC. In fact, Chief Justice Nasir-ul-Mulk explicitly denied the possibility of the Objectives Resolution being read into the SFD, owing to its adoption at a later temporal stage in history. Thus, we find that the criticism promulgated by the judges in this verdict, directed towards *Kesavananda Bharati* for failing to arrive at a common consensus on the meaning and implications of the BSD, can be equally levied against this verdict itself.

Further, as contended by Justice Osmany that the adoption of the SFD would not connote a concomitant and tacit approval of the BSD in Pakistan.⁶⁸⁹ He located the SFD in the Objectives Resolution, arguing that these entrenched, express and explicit edicts would provide clear and direct guidance as to the examination of substantive vires of the CAA whilst conducting JR, without any need for evolving suppositious metaphysical formulations of constitutional credos and dogmas.⁶⁹⁰ This argument was clearly intended to defeat the aspersions of the so-called extra-constitutional intrusions of the BSD, evocative of judicial hegemony. It remains open to debate, however, as to whether the Salient Features are indeed

⁶⁸⁷*Id.*, 491.

⁶⁸⁸*Id.*

⁶⁸⁹ *Id.*

⁶⁹⁰ *Id.*

as clear and incapable of judicial aggrandisement as proclaimed by the Court – both the Preamble and the Objectives Resolution relatively “abstract” values such as the FRs, justice, equality, judicial independence, rule of law, etc. These features are also markedly similar to the features that have come to be recognised as a part of the BSD, and the Preamble of the Indian Constitution. Therefore, in practice, it remains doubtful how far the SFD actually overcomes the faults it detects in the BSD.

Moreover, as noted above, even the definitional certainty of the SFD is derogated on account of the befuddlement in the selfsame verdict as to its constituents: whether it connotes the Preamble, as found by Justice Khawaja; or the Objectives Resolution, as noted by Justice Osmany; or whether it involves judicial interpretation of what the SFD means and entails, as posited by the rest of the judges. The last formulation in fact appears to be substantially similar to the BSD, by permitting the courts to evolve an original interpretation of the components of the SFD, thus casting serious doubt as to how far the SFD has in fact succeeded in distinguishing itself from the BSD to combat the same criticisms it has been so anxious to protect the Pakistani constitutional order from.

Even the SOP debate and conflation of ontology of CAP continued to rage in this verdict. Thus, while Justice Nisar found that the prefatory text of the Preamble clearly enshrined popular sovereignty in the Parliament, and not the courts; Justice Isa distinguished between the immanent and transcendent conceptions of popular sovereignty, arguing that the temporary body of elected representatives in Parliament did not equate to the will of the citizens and generations residing in the polity at any given point of time, and that the courts, being constitutionally delineated to uphold the Constitution, are the appropriate authorities for determining the limits of CAP. Such conflicts over interpretation thus seem to be transpiring in full force in Pakistan, as opposed to the more relatively settled contours of the BSD in recent Indian jurisprudence.

We find, therefore, that the evolution of the SFD has in fact failed to materially distinguish itself from the BSD; and that although ostensibly efforts have been made to moderate and balance the criticisms of BSD with the sanctity of JR through a promulgation of the SFD, the spectrum of CAP still remains substantially murky in Pakistan’s constitutional jurisprudence.

HOW CAN CONSTITUTIONS BE REPLACED? EVALUATING EXTRA-CONSTITUTIONAL MEANS CORRESPONDING TO PRIMARY CONSTITUENT POWER

Under this theme, we examine the following issues:

- Where the BSD and SFD are accepted, how can the people replace earlier constitutions?
- How can the will of the people be measured as to determining in such cases?

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- What are the extra-constitutional means that can be employed for such exercise of primary constituent power?
- Do any limitations exist on the exercise of such power?

It must be noted that not much case law discussion or otherwise, has been undertaken on these aspects in any of the countries studied in this paper, and therefore a fuller examination of these issues will be undertaken in Part V.⁶⁹¹

1. India

With admirable foresight, Justice Khanna's exposition of the BSD, which was the very first authoritative proclamation of the doctrine in Indian constitutional law, recognised the possibility of adoption of a new Constitution corresponding to the enjoyment of popular sovereignty by the people in a polity. He observed that in the Indian context, which lacks an entrenchment of popular sovereignty similar to the German constitutional mechanism explored above, the BSD ostensibly leads to the inference that constitutionally, no mechanism remains for the promulgation of an entirely dissimilar and novel constitutional regime.⁶⁹² However, he argued that this does not point to the existence of a lacuna in the BSD, or that the Constitution is too rigid and fails to be truly organic, for he believed that it is not necessary that such express constitutional entrenchment of primary constituent power is not a necessary condition for undertaking this exercise. Noting the inanimate nature of the will of the people, he opined that such will could articulate itself through an entirely extra-constitutional mechanism, without the requirement for sanctification by the extant constitutional epistemology. Thus, we find a clear endorsement of the modern ontology of CAP in Justice Khanna's verdict in *Kesavananda Bharati*.

What remained unexplored in his judgment, however, were the practicalities and technicalities of the method for actually enacting such a new constitutional order, based on an entirely variegated BSD. To be clear, any amendment abridging the BSD would be immediately struck down by the courts. Thus extra-constitutional means appears to be the only route for such promulgation, both ontologically and practically.

In the *Coelho* decision, the SC briefly expostulated upon the ontology of CAP, noting the plenipotentiary nature of popular sovereignty and the delegated character of CAP.⁶⁹³ Thus, it held that there is a distinction between formulating, creating and establishing an entirely new Constitution by a constituent body, which is only subject to the political constraints of popular will, on one hand; and CAP, which expressly stem and spring from the wellspring of the extant Constitution, concomitant with its prescribed and enforceable limits and restrictions.⁶⁹⁴ The Court lucidly explicated, in the vein of the *FazlulQaderChowdhury* decision, that constitutional constraints do not bind primary constituent power, for no extant constitutional yardstick would apply to or bind the same.⁶⁹⁵ The CAP, on the other hand, being a donee of the Constitution's devolved authority, must be strictly exercised in consonance with the curtailments delineated therein.

⁶⁹¹Roznai, *supra* note 4.

⁶⁹²*KesavanandaBharati v. Union of India*, (1973) 4 SCC 225, ¶1487

⁶⁹³*See also* H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA (4th ed., 2009).

⁶⁹⁴*Id.*

⁶⁹⁵*Id.*

Bangladesh

In the Eighth Amendment case, Justice Shababuddin Ahmed similarly noted that constitution-framing and constitution-promulgating powers vest solely with the will of the polity.⁶⁹⁶ The Parliament being a “child” of the Constitution, it could not exercise the power to negate the same, and promulgate a new Constitution altogether.

Pakistan

The discussion on adopting new constitutions was undertaken in depth at an early stage in Pakistan’s constitutional law jurisprudence, primarily owing to questions of legitimacy of the Interim Constitution of 1972, which had replaced the earlier 1956 Constitution. While upholding the validity of the recent Constitution, Justice Hamood-ur-Rahman made an important addendum in the Zia-ur-Rehman case.⁶⁹⁷ He innovatively articulated the political constraints operating on the exercise and endowment of primary constituent power, noting that even the constituent body promulgating the new Constitution – for example, the Constituent Assembly – did not possess unbridled and unlimited constitution-framing powers; these would be limited by the transcendent conception of popular sovereignty located in the political mandate of the will of the people, embodying their foremost goals, aims and desires.⁶⁹⁸ This may provide some insight into the limits that would be placed on adoption of new constitutions even in countries where the BSD has been accepted, capable of being construed as the broad contours within which the process must operate. He further asserted that such limitations on the power of this body being of a political nature, no constitutional organ, including the judiciary, could adjudge, uphold or limit the same.⁶⁹⁹ The safeguard is that if such a constituent body contravenes the aforementioned political decree, then the citizens of the polity themselves can remedy the situation – the courts, being the guardian of the extant constitutional regime, would have no authority to intrude in this sphere, as expected in accordance with the SOP doctrine.⁷⁰⁰ The replacement of earlier Constitutions was thus asserted as a political or policy decision, which the judiciary could not examine, given that it is itself subordinate to the extant constitutional regime, and can exercise its adjudicative functions, only with respect to matters contemplated within the scope of this regime.

V. LOCATING COMPARATIVE INSIGHTS AND INFERENCES

Through the insights derived from the case analysis undertaken in Part IV, we now attempt to answer the fifteen questions posited in Part I of this paper.

⁶⁹⁶ Anwar Hossain Chowdhury v. Government of the People’s Republic of Bangladesh, 41 DLR(AD) (1989) 165, ¶418.

⁶⁹⁷ State v. Zia-ur-Rahman, PLD 1973 SC 49, 76-77

⁶⁹⁸ *Id.*

⁶⁹⁹ *Id.*

⁷⁰⁰ *Id.*

The task tracing of the BSD back to Fazlul Qader Chowdhury in Pakistan is incomplete without an apposite reference to German Professor Dietrich Conrad's lecture in 1965 in the Banaras Hindu University, wherein, drawing from his German constitutional experience, he expressed his concerns regarding whether the CAP can operate so freely as to abrogate the extant constitutional order and establish completely antithetical values, such as through destroying the right to life, reintroducing monarchy, etc.⁷⁰¹ He emphasised that the discussion surrounding the limitations on CAP are not merely relegated to the academic realm, but have a direct and immediate relevance in light of the vagaries of imposition of autocratic rule in numerous countries.⁷⁰² Historical experience therefore demands a serious deliberation on these issues.

These apprehensions proved uncannily accurate in the context of all three countries. While in India, the abuses of power as mentioned by Prof. Conrad were not as drastic, they were exceedingly so in Bangladesh, which has intermittently been under long periods of autocratic rule, as also in Pakistan. While India and Bangladesh have been readily willing to uphold the BSD, Pakistan has been inclined to do so only in the last decade.

In India and Bangladesh, the development of the BSD clearly demonstrates that the courts have not been unwilling to interpret constitutional silences regarding the court's authority to perform JR of the CAA, as a negation of that authority. Rather, not only have they been proactive in interpreting such silence as affording them sufficient space to in fact examine the CAA on merits, but also to strike down such amendments on the basis of implied authority. The Pakistani SC opts to refrain from interpreting such silence as vesting of power, instead defining it as political question, as long as it satisfies the tests laid down by SFD. The trend of interpretation however seems to be changing and to be progressing towards a more nuanced view of the role of the courts. The Pakistani SC is now slowly adapting the SFD to strike down abuses of State necessity, at least insofar as they impinge upon expressly delineated touchstones enshrined in the Objectives Resolution, or otherwise.

The question of the standards of such JR is however inextricably intertwined with the question of authority of the court to perform such JR in the first place.⁷⁰³ This becomes especially prominent in cases where the amendment itself denies the court its authority to examine the constitutionality of the amendment, as in *Minerva Mills*. In rejecting such an amendment as unconstitutional, the court cannot base itself on its authority referred to earlier, which is clearly refuted by the amendment. Therefore, the court must then move towards evolving certain substantive standards which fall outside the realm of the procedural requirements of the amendment clause in the Constitution. These substantive standards then coalesce to form the fortifying edifice of the BSD, which is one more step towards entrenchment of implied judicial authority. Through the delegated powers framework, we arrive at a position where it is possible to observe the court's role as safeguarding the primary constituent power of the people to establish stable constitutional regimes. Through the analyses of the hierarchy of constitutional values, textualist arguments, etc. in favour of substantive limits, we see that even Indian courts have attempted to rationalise their efforts to safeguard democracy.⁷⁰⁴ The entrenchment of primary constituent power defeats arrogation

⁷⁰¹See A.G. Noorani, *Behind the 'basic structure' doctrine*, 18(9) FRONTLINE MAGAZINE(Delhi) April 28- May 11, 2001.

⁷⁰²*Id.*

⁷⁰³Barak, *supra* note 54, 340.

⁷⁰⁴Although excesses such as extending BSD to executive acts do occur – see Part IV.C of this paper.

and aggrandising expansion of secondary constituent power, thus promoting popular sovereignty.

This inference then leads to the question of deciding whether an amendment permits removal and replacement of the entire constitution. In the absence of such substantive standards as BSD, the procedural clause pertaining to CAA can be easily used to interpret such amendment as constitutional. The imposition of substantive requirements however necessitates that the BSD permeates through both the CAP as well as the entire constitution itself, thus rendering such constitution-abrogating amendments as completely unconstitutional. The only way to remove the BSD would then be to promulgate a new constitution altogether. This prospect has been hinted upon in the *KesavanandaBharati* case in India, and discussed in some more detail in Pakistan.⁷⁰⁵

The entrenchment of judicial authority also engenders fierce debate as to the boundaries of judicial legitimacy and judicial propriety—how far can judges who are not elected directly by the public, be said to be vested with authority to strike down CAA ushered in by elected representatives? How far can the judiciary justify its authority by creating judicial eternity clauses, mention of which cannot be found anywhere in the constitutional text?⁷⁰⁶ The absence of formal eternity clauses in the Constitution only intensifies the debate regarding the characterisation of the question as political or judicial. This characterisation becomes especially imperative in the spectrum of express eternity clauses, the BSD and the SFD. Our analysis shows that it is possible to locate these in different positions and contexts, not only due to their varying conceptions of constituent and constituted powers, but also because of the way the polities in which they operate envisage the role of courts.

The proponents of JR argue that review of the constitutionality of amendments is merely a natural extension of the power of the court to exercise JR of the constitutionality of a regular statute.⁷⁰⁷ Just as the JR in the latter is required to examine its procedural and substantive compliance with the constitution, so in the case of the former, the court is required to assess the express and implied content of the CAA and to uphold the constitution. While safeguarding the constitutional text and epistemology in such a manner, the court is only furthering democracy and popular sovereignty who promulgated the constitution.⁷⁰⁸ As posited in the jurisprudence of the BSD in Indian and Bangladesh, by fulfilling its classical role as the steward of the constitution, the court safeguards the basic principles on which the constitution's edifice is built. Therefore instead of being characterised as an external and artificial constraint, the JR of constitutionality of amendments should be seen as a natural by-product of the fundamental doctrine of SOP, and as crucial to a well-functioning modern democracy.

Since the BSD draws upon an interpretation of the constitution in its entirety including express and implied language, history, fundamental values and principles underlying the constitutional scheme etc., such basic values constitute the very essence of the constitution which cannot be abrogated through amendments, and therefore a change in the basic structure necessitates the establishment of a new constitution altogether. Instead of interpreting such a requirement as hindering the constitution-amending process, this difference between the amendment of an existing constitution and promulgation of a new

⁷⁰⁵Refer to Part IV.E of the paper.

⁷⁰⁶*Id.*

⁷⁰⁷*Id.*; Roznai, *supra* note 4, 56.

⁷⁰⁸*Id.*

constitution can be understood as essential for protecting and promoting democracy. This is because the difference between the two processes recognises the sovereignty of the power of the people, and its supra-constitutional authority to transcend constitutional texts and effectuate new constitutional orders.⁷⁰⁹

Pakistan however, despite sharing a largely similar chequered history as Bangladesh with regard to abuses of State necessity, has had a distinct formulation of the function and scope of JR exercised by the courts. Whether due to convoluted evolution of the jurisprudence, or misinterpretation of stray remarks in unrelated cases,⁷¹⁰ Pakistan's jurisprudence on the BSD completely veered on another direction, and refused its operation by characterising it as the symbol of judicial hegemony. The development of the SFD, and its obvious similarities in actual implementation with the BSD, therefore marks a more holistic development and nuanced reinterpretation of the constitutional role and functions of courts in light of the flagrant abuses of State necessity.

The intractable conundrum of maintaining a delicate balance between upholding and challenging the distribution in authoritarian states often defines the limits of judicial independence in these countries. The institutional bargains that they represent deeply influence not only politics, but also the degree of detachment that can be effectuated by the judiciary from considerations of politics while arriving at decisions. Thus, in India, the possibility of such detachment could be realised in *KeshavanandaBharati*, and could continue to be inextricably enmeshed with the developing constitutional jurisprudence. The check on tyranny could be effectuated with relative ease.

The scenario in Bangladesh presented some more difficulties. While the Courts have remained firm in sticking to their proclivity to strike down any abuses of legislative or executive power, the other two State organs have also sought to respond overtly by passing CAA in tune with contemporary political exigencies. However, as is evinced from the Eighth Amendment case onwards, the Supreme Court has been especially proactive in upholding and preserving the BSD equally adamantly, thus demonstrating the significance attached to the doctrine in a country with a different socio-political context, which may originally not have been as conducive to the development of the BSD. The fact that the SC persevered in defending the doctrine perhaps serves as the best illustration of the democratic nature of the BSD, even when compared to India.

As would be observed in the cases prior to *Zafar Ali Shah*, in Pakistan, the judiciary was compelled to inevitably seek to align their values and pronouncements with the exigencies of contemporary politics, even if this led to the undermining of judicial independence, in an attempt to preserve at least a semblance of future autonomy and legitimacy.⁷¹¹ Thus, for the entire period of twenty years between the 1950s and 1970s, under the pressure of autocratic rule, the pendulum of SC judgments swung firmly towards articulation of highly restricted JR powers, which were not in consonance with the founding values of the polity—a disjunction that deeply influences the jurisprudence pertaining to CAA in Pakistan even today. It is only in the last decade that the Courts have truly begun to challenge untrammelled executive authority and martial law, when emboldened by the recent CAA, such as the 18th amendment. The stature of the Courts has waxed and waned under autocracy, periods of transition and democracy, and thus the complexities of navigating

⁷⁰⁹See Part II of the paper.

⁷¹⁰See Part IV.D for a detailed discussion of these interpretations.

⁷¹¹PAULA NEWBERG, *JUDGING THE STATE: COURTS AND CONSTITUTIONAL POLITICS IN PAKISTAN* 1-8 (2002).

through such convoluted and contrarian positions becomes infinitely more complex. Concerns remain, therefore, even after the Lahore Bar Association case, as to the vulnerability of the SOP theory and JR in this jurisdiction. The SFD's constituents also remain unclear, thus further rendering the actual distinction between the BSD and the SFD unclear in practice. Definitional unanimity has not been achieved, as judges remain undecided as to whether the SC or the Objectives Resolution provides the yardstick for identifying the Salient Features.

As per the current position, in both India and Bangladesh, after *Kesavananda Bharati* and the Eighth Amendment case, the CAP has been clearly distinguished from ordinary legislative power, and it has been accepted that while FRs no longer restrict the former, the limitations imposed by the BSD would. While theoretically, some judges have recognized that the BSD offers the space for the negation of the entirety of the constitutional text, so long as the constitutional identity represented by the basic structure is retained, the entrenchment of the width and identity tests in *Nagaraj* and *Coelho* in India have effectuated the consolidation of a triad of equality, life and liberty codes, as enshrined in Articles 14, 19 and 21. The developments up to the latest NJAC case demonstrate that Justice Khanna's famous reluctance to enumerate any feature within the BSD, has been significantly mediated. The BSD now extends to restricting even executive action, although paradoxically, its operation in restricting ordinary legislation, especially in the field of election and administrative law, is much more restricted. The foundational structuralism and constitutional identity arguments find firm footing in both Indian and Bangladesh constitutional law jurisprudence, as courts have repeatedly struck down encroachment upon FRs and other basic features. The feature that has been the most assailed is the independence of judiciary and concomitant JR, and courts in both jurisdictions have grown progressively more willing to strike down any abrogation of the same, whether through CAA, or through martial law ratified by CAA.

This also signifies the expanding role of the judiciary in these two jurisdictions. It is no longer limited to mere protection against unconstitutional statutes, but also extends to protection against unconstitutional CAA that violate the BSD. The principle of SOP is now effectively ensconced in these countries, with the Courts jealously safeguarding against any amendments that threaten this principle, and thus derogate the all-encompassing purview of law. Where the amendment denies the court's authority to examine its constitutionality, as in the *Minerva Mills* decision, the Courts have correctly struck such amendments down as well, in exercise of their review over limited secondary constituent power. While the distinction has not been explicitly recognised, it would certainly serve to understand how the Courts arrived at such a position without overstepping their mandate, as has been criticised by scholars.

In India, the BSD traces from the core edicts underlying the notion of constitutionalism. With the development of the idea of an organic, living Constitution, the principle of constitutionalism evolved in conjunction to operate as a check on governmental powers, so as to prevent the destruction of the fundamental principles upon which it is based. Thus the principle proffers a model involving its inherent limiting and enabling mechanisms, replete with disparate independent centres of exercising power. It entrenches the legitimacy of the constitutional order itself, by permitting the courts to defend it against destruction by untrammelled and undemocratic exercise of Parliament's CAP. A legislative curtailment of FRs is perfectly permissible, at least in theory, so long as their ethos are preserved. Thus the justification for protecting the fabric of such rights and core tenets is not wholly on the

ground of occupying a higher hierarchical rank, but that they are also fundamental to the functioning of a just, tolerant and humane society. Therefore, the SC of India has ruled throughout the evolution of the BSD jurisprudence that Courts offer the best avenue for protecting FRs, given their independent nature, and their ability to formulate interpretations in consonance with the constitutional lifeblood.⁷¹² The rule of law and justice govern such interpretations in a controlled Constitution, thus restricting Parliamentary sovereignty where it threatens constitutional democracy. By effectively securing such a limited form of constitutionalism, the Courts not only ensure that their institutional roles are preserved, but also seek to further the aims that the Constitution itself sets out to achieve.

A criticism that is often levelled upon the BSD, as observed in the jurisprudence in Pakistan as well, that the doctrine is “undemocratic”, for it places limitations on the powers of the political majority (acting through the legislature).⁷¹³ The underlying presumption is that democracy necessarily equates the majority will. As a result, a violation of the latter implies violation of the former, and hence cannot be accepted, for such role undertaken by the Courts acts as an unwarranted impeding force on democracy.⁷¹⁴ However, the concept of the primary constituent power helps reveal the flawed nature of such an argument. This is because when courts review CAA vis-à-vis the BSD, they are not acting in the capacity of unwarranted counter-majoritarian institutions, but as facilitators of legitimate exercise of CAP. JR expresses the constitution’s democratic roots, i.e., it recognises and affirms popular sovereignty as the lifeblood of the polity. When judges enforce the BSD, they are upholding, not defeating, the true will of the people as expressed in primary constituent power, as opposed to its institutionalisation in secondary constituent power. This will of ‘the people’ as embodied by the enduring Constitution, may contradict the temporary whims of the representatives claiming to represent the current generation through arbitrary exercise of CAP. In such cases, as the ultimate constitutional defender, the Court must exercise its duty to strike down any impingement upon the primary constituent power, by the amending power.⁷¹⁵

This, however, does not mean that majority will cannot be represented by democratic institutions such as Parliament. But the crucial factor remains that the exercise of such majority will must be in pursuance of primary constituent power. In the final analysis therefore, it is the ‘people’ that are entrusted with the upholding of the BSD, a function that they relegate to courts when the primary constituent power recedes to the background during everyday political process. This argument was reiterated by N.A. Palkhivala, in his submissions before the SC in *Kesavananda Bharati*,⁷¹⁶ when he stated that the ultimate sovereignty of the people could not be vested in the Parliament, but must vest in the people themselves, as is evinced from the Preamble. Thus, the primary constituent power represents a form of social contract, which could not be abridged by anyone besides the people themselves. The concept of constitutional supremacy necessarily connotes that neither parliamentary sovereignty nor judicial supremacy can truly represent the will of the people. Therefore allegations that the BSD replaces the one with the other are misplaced and flawed.

⁷¹²See Part IV.C.1 of this paper.

⁷¹³RajuRamachandran, *SudhirKrishnaswamy: Democracy And Constitutionalism In India - A Study Of The Basic Structure Doctrine*, NALSAR INDIAN J. CONST. L. 213-221 (2012).

⁷¹⁴See S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J. L. & Pol’y 29 (2001).

⁷¹⁵See Aharon Barak, *JR of the Constitutionality of Legislation*, 3 MISHPATUMIMSHAL 403 (1996).

⁷¹⁶N.A. Palkhivala, *The FRs Case: Propositions submitted before the Supreme Court*, (1973) 4 SCC Jour 1.

Further, pertaining to the elements constituting the BSD, the SC of India has often reiterated the main guiding principles now form the modern yardsticks for identification of basic features. Echoing the foundational structuralist arguments, it has been laid down from the Raj Narain to NJAC decisions, that the constitutional location and context of the particular feature, the impact of its infringement, its centrality to preserving the constitutional ethos and character, its place in the constitutional epistemology, etc. are some of the key factors for evaluating whether it can be appositely termed as an element of the BSD. Further, coming to the increasing importance of the FRs as can be evinced from the width and identity tests laid down in Nagaraj and Coelho, it appears that the ‘hierarchy of constitutional values’ argument is also attached with increasing significance. As stated in Coelho, the centrality of FRs can be assessed upon duly heeding the transcendence of FRs from limited, broad checks against excesses by State authorities, to effective guarantees of liberties and human emancipation, and a means for securing justice, liberty and equality. This is not to imply that all FRs would be unamendable. Rather, it is to place the rights against the context of the entire scheme of the Constitution and to examine whether the ‘Constitutional identity’ would be abrogated if such rights were violated. We thus observe the interlinking of justifications for the BSD, portraying its versatility in diversity.

The growing proclivity of the Supreme Court of India to identify certain FRs as essential features can also be placed against the context of the frequent criticism that such basic features are merely fanciful principles carved out by the judiciary, ensconcing a supra-constitution that can be moulded at its will. Identifying principles such as equality and liberty, by tracing them as being imbricate in Articles 14, 19 and 21, the Supreme Court engages in two planes of deconstruction—firstly, it identifies the basic features, and secondly, it roots them in Constitutional provisions to indicate that these foundational provisions can be drawn from the Constitutional text itself. Where the rule or principle emerges from the provisions read collectively, the foundational character of such an edict is fully revealed. Thus, the assessment of the impact of the abridgement of the relevant feature upon the endurance or destruction of the BSD is crucial to evolving a reasoned justification for either accepting or rejecting it as a cardinal tenet of the BSD. At the same moment, it must be remembered that it must possess legal validity and constitutional operative force in the first place. Once this is satisfied – the competence question – then the BSD evaluations can be conducted to test the limits of Parliament’s CAP.⁷¹⁷

Thus, the current position in both India and Bangladesh is that the BSD includes the aggregate of the elements considered to constitute the very lifeblood, nucleus, kernel and crux of the Constitution, without which its continued existence becomes impossible. It includes, but is not limited to, basic features such as JR, judicial independence, FRs, democracy, equal purview of law, demarcation of different domains of the constitutional organs, etc.; and repudiation of any of the core elements usually connotes a concomitant destruction of the BSD. The BSD operates as substantive limitation upon Parliament’s CAP, i.e., CAA must adhere to the founding edicts embodied by the BSD, and must not controvert the substantive content of the constitution, in order to be constitutionally valid. Further, the Courts have consistently held that the task of adjudicating such content-based violations of the basic structure must be performed by the judiciary. It is this framework that enables a reasoned interpretation of the ontology of the BSD.

⁷¹⁷See Part IV.C.1 of this paper.

In Pakistan, the current position with regard to SFD represents a growing proclivity towards a commitment to imposition of limitations on amendment powers, however intermediate they may be on such a spectrum. While the previous persistent refusal to engage with the BSD means that such jurisprudence is primarily nascent, the SFD does correspond strongly to the foundational structuralist, hierarchy of constitutional values and textualist arguments presented above, if not more than the BSD, especially since the Objectives Resolution expressly delineates certain key principles, as opposed to the BSD, which was originally envisaged to be more vague (although it has emerged to be more defined in recent years). Even if as per the differing opinions in the recent Lahore Bar Association case, the SFD were to be taken to be interpreted by the Supreme Court, thus rendering it materially similar to the BSD, these arguments would continue to be upheld for justifying limitations on amendment powers. The silence of the Constitution on vesting authority to review constitutionality of amendments then becomes markedly less, and the domain of the Courts expands considerably. Further, where the SFD stands accepted, the question of denial of primary constituent power that Pakistan's Supreme Court has been particularly anxious about, no longer remains in issue, for it can be exercised by the people alone, through democratic mobilization. Neither the Parliament nor the Judiciary, which alternatively seek to expand and restrict the secondary constituent power, i.e., the amending power would be able to interfere with the same.

VI. CONCLUSION

Primary constituent power is the active, operative element common to modern democracies. It has been the mainspring of the constitution and organisation of the polity, rather than being an artificially imposed extra-constitutional check operating in the constitutional and political spheres. Thus, the realisation of such power through the concept of the BSD, or even the SFD (irrespective of the differences in their degree) represent a transcendence from a classic limited reading of the Constitution, to more socially relevant and inclusive interpretations that redefine notions of Constitutional democracy.

The evolution of jurisprudence with regard to BSD and SFD evince that a comparative constitutional inquiry can help dispel misplaced objections to both doctrines, with respect to their characterisation as counter-majoritarian checks to democracy. In fact, they represent a deep commitment to the Rule of law, justice, freedom, equality and the other foundational constitutional values that underlie the functioning of any modern polity today. Bangladesh provides an important instance of a country wherein similar to Pakistan, the socio-political context has not proved very conducive to the ensconcing of JR over the Parliament's CAP, and yet, the Supreme Court has consistency upheld from the Eighth Amendment case that the BSD is fundamental to the concept of constitutional supremacy. This affords an important and useful path for Pakistan to follow, if it is to persist in its nascent endeavour to strike down flagrant excesses of executive power, and manipulation of the legislature in order to ratify such acts.

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A comparative constitutional inquiry also reveals that while India has evolved the BSD, the operation and development of this doctrine in different countries with common socio-economic and cultural commonwealth origins has been markedly different. This demonstrates the immense value of such analysis for prospects of future constitution-making and constitution-amending spheres in these countries, as well as for other countries around the world that regularly engage with debates in relation to the contours of the domains of the distinct constitutional organs. The BSD and the SFD are manifestations of the larger debates on constitutionalism and constitutional frameworks themselves, and therefore remain eternally relevant for constitutional law theory and praxis.