

A Tussle between the Constitutional Amendability and the Basic Structure Doctrine: A Comparative Study of India, South Africa, and Germany

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Abstract

This research article investigates the tension between constitutional amendability and the judicial limits on the amendability of the Constitution, such as the Basic Structure Doctrine (BSD), through a comparative study of India, South Africa, and Germany. Most modern nations have their written constitutions that impose certain limitations on their governments. However, if the government can authoritatively amend the constitution, then the credibility and stability of constitutionalism may be endangered.

It situates amendment power within the classic distinction between constituent and amending power, tests whether formal amendment rules are adequate to protect a constitution's core identity, and assesses the democratic legitimacy of judicially enforced unamendability principles. India represents a robust, judge-made Basic Structure Doctrine (BSD) that constrains amending power of Parliament; Germany embodies explicit textual unamendability via the Basic Law's Ewigkeitsklausel (eternity clause) and a constitutional court that regulates it; South Africa sits between these poles, employing certification jurisprudence, justiciable procedural and structural limits, and rights-sensitive judicial review without an explicit eternity clause, such as Germany. The article argues that carefully cabined judicially enforced limits are normatively defensible where an amendment threatens to collapse the separation of powers or annihilate constitutional identity, which very commonly happens under conditions of dominant or majoritarian-party rule. Nevertheless, there should be sufficient caution against an excessive emphasis on the Basic Structure Doctrine (BSD) that stagnates constitutional politics and the evolving ethos of society.

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I. Introduction

Generally, the constitution of a nation is the set of rules of the law that regulates the government and society. Furthermore, it creates limitations on the exercise of the government's power. It also embodied some morality, ideology, and ethos within the written texture of the Constitution so that the society can be transformed as per the fixed ideology of the nation. For example, Gandian philosophy has taken a significant role in shaping the ethos of the Indian Constitution. However, there is some ongoing skepticism regarding the applicability of Gandhian theories to the constitution. In this context, I can recall the dialogue delivered by the former Prime Minister of India, Pt. Jawaharlal Nehru on 8th November, 1948, on the floor of the Constituent Assembly, "*There should be a certain flexibility. If you make anything rigid and permanent, you stop the nation's growth, of a living, vital, organic people...*"² He argued that although the constitution must be stable and permanent, it must have some adaptability so that it can cater to the hopes and aspirations of the upcoming generations.

Nevertheless, by the time society changes, the Constitution must also change as per the changing demands and ethos of the society. And we know society changes faster than law. Most of the modern Constitution is dynamic, not static. According to Carl V. Savigny society changes its value and ethos; therefore, law must keep changing. Further, the law must reflect the spirit of nation or *volgeist*. So, the change or amendment of the Constitution is required to cater the evolving spirit of the nation. Similar to the historical school, law grows together with the growth of society and becomes strong together with the strength of society. Furthermore, in the end, it dies if the nation loses its nationality.³

² B SHIVA RAO THE FRAMING OF INDIA'S CONSTITUTION A STUDY, 51-53 (Indian Institute of Public Administration, 1968)

³ Nadir, *Friedrich Carl Von Savigny's Thoughts on The Existence of Annual Sale and Purchase Customary Love Establishment*, 2(2), INTERNATIONAL JOURNAL OF LAW AND

Professor Wheare, a constitutional jurist, argues that the process of amending a constitution is crucial. A constitution that is too rigid may hinder necessary reforms, while one that is too flexible may be subject to frequent changes that undermine its stability and the prefixed ethos of the framers. Therefore, a balanced approach is essential to accommodate both continuity and adaptability.⁴

Further, Professor Wheare notes that federal constitutions are often characterized by their rigidity. This rigidity serves to prevent any single level of government from unilaterally altering the distribution of powers between the federal and state governments. Such a structure ensures that the foundational principles of federalism are preserved and not easily modified by transient political majorities.⁵ For the study, I have chosen three federal nations with similar government structures, allowing us to systematically discuss the factors that can be influenced in these countries. The constitutions of these three countries are homogenous in nature, as they follow federalism in one form or another. To be very specific, the Indian and South African constitutions are not federal in the true sense; rather, we can say they are quasi-federal. However, these two nations follow the essence of the federal government, consistently displaying a strong inclination towards the centre.

Only a small number of democracies have endured because they are typically controlled by a constitution, which is the supreme law that gives legitimacy to all other laws and day-to-day politics. The term "constitution" can widely and uniquely refer to the collection of core state concepts, governmental institutions and procedures, and citizens' fundamental rights in a higher law that cannot be altered unilaterally by a regular legislative act.⁶

SOCIETY 199-202 (2025), [accessed on Oct. 17 2025], https://www.researchgate.net/publication/394690288_Friedrich_Carl_Von_Savigny's_Thoughts_on_The_Existence_of_Annual_Sale_and_Purchase_Customary_Love_Establishment.

⁴ K.C. WHEARE, MODERN CONSTITUTION, 1-66, (Oxford University Press, London, New York, 5th edn.,1960).

⁵ *Ibid.*

⁶ Elliot Bulmer, *What is a Constitution? Principles and Concepts*, INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, STOCKHOLM, Sweden, 2017 (visited on

II. Significance of the Constitutional Unamendability

In most of the modern constitutions, the theory of unamendability has been imposed. The **theory of unamendability** revolves around the idea that in a constitutional framework, there are some **limits to constitutional amendments**, particularly when it comes to protecting fundamental features of a constitution. In this regards the constitutional jurists have classified the amending power of the legislator in two main parts *first*, is the primary constituent power i.e. constitution making power, which is basically enjoyed by the sovereign authority in order to create the new constitution. And the *second* part is the secondary constituent power i.e. Constitutional amending power.⁷ Once a constitution is framed and enforced, by application of this power, some modification or alteration can be made to the existing constitution. Generally, this second part of amending power has some limitation such as limitation to alter fundamental rights as basic principles of the constitution.⁸ The constituent power is the foundational, extralegal power to create or change a constitution, whereas constituted power or the power to amendment, is the ordinary legal power to amend the constitution this power itself derives from the constitution. Generally, a power derived from the constitution can not distort or destroy the constitution itself.

There should be certain unamendable provisions in the Constitution, and these are significant because they preserve the core ideologies of the nation and fundamental rights, as well as protection against democratic erosion. It ensures the stability of the constitutional order, safeguards minority rights, and maintains the core principles of the constitution by preventing majoritarian overreach; that is the reason such clauses are sometimes called “eternity clauses.”⁹

August 2, 2023), <https://www.idea.int/sites/default/files/publications/what-is-a-constitution-primer.pdf> .

⁷ Yaniv. Roznai, *Unconstitutional Constitutional Amendments*, 368 (Oxford University Press, 2017).

⁸ Y ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS—THE LIMITS OF AMENDMENT POWERS, 154, (Oxford University Press, 2017).

⁹Adam Chilton and Mila Versteeg, *Do Constitutional unamendability rules make a difference?* 127 PUBLIC CHOICE (2025).

There are certain reasons behind unamendability principles to be embodied within the constitution. **Firstly**, it preserves the core values of the nation that carries the ethos from generation to generation. Some specific values, such as democracy, the rule of law and human dignity, are often considered an ‘eternity clause’. **Secondly**, these unamendable clauses safeguard democratic norms from the whimsical attacks of totalitarian government. These unamendable clauses check the power of the government. **Thirdly**, it ensures stability of the legal order by making certain parts of the constitution permanent. **Fourthly**, it prevents temporary majoritarian governments from making drastic or irreversible changes that could destroy the constitutional principles in long-term and that may affect minority rights. **Fifthly**, these unamendable rules create a role for future amendment powers as trustees or guardians of the constitution. The reason behind that is the government may undermine the core principles of the Constitution may be introducing ‘abusive constitutionalism’ or abusive constitutional reforms.

This unamendability principle can be maintained by various methods. Political leaders frequently attempt to amend constitutions to eliminate limits on their authority. To help protect against such democratic erosion, constitutional drafters and jurists sometimes restrict constitutional amendments by: (1) specifying in the constitutional text that certain clauses or principles can never be changed that may be called as "Eternity Clauses"; (2) granting apex courts the power to review the procedural validity of amendment processes i.e. “Judicial review of Amendment”; or (3) developing judicial doctrines that prohibits amendments that change the nature of constitution such as unamendability doctrines like the ‘Basic structure Principle’. However, do unamendability rules genuinely correlate with variations in democratic levels among countries?

Henceforth, the author argues that ‘Eternity Clauses’ are likely to emerge in conditions more conducive to protecting democracy, while court-created doctrines will emerge in conditions when democracy is under threat. We also hypothesize that enforcement of this dogma through courts is difficult specially when would-be an autocratic government hold the political position.

III. Comparative Study on the Constitution of India, Germany, and South Africa

A. Indian Constitution with Judge-made Basic Structure Doctrine (BSD)

The framers of the Constitution did not intend to limit amending power of the Parliament, according to the debates in the Constituent Assembly. The Constituent Assembly was informed by Pandit Jawaharlal Nehru that "the Constitution must be as solid and permanent as it must also permit National growth." He maintained that "the newly elected House should have the freedom to make any changes it desires, as the new Parliament would represent all Indian adults."¹⁰

The Indian judiciary developed the idea of basic structure, which was not a feature or intrinsic part of the Indian Constitution. Implementing constitutional unamendability is the judiciary's main goal in order to protect the fundamental principles of the constitution. When the judges saw that it was exceedingly impossible to defend the spirit of the Constitution without it, and that it had become a dead text legislation, they introduced the BSD. BDS prevents the parliament from stepping into the treacherous realm of arbitrariness by misusing the Article 368 of the Constitution.

The requirement of these principles arose from concerns regarding Parliament's authority to modify the Constitution and perhaps compromise its integrity. The argument that amending power of Parliament was constrained by certain substantive limitations was initially presented in *Sankari Prasad Deo v. Union of India*.¹¹ In the year 1951, indicating a positivist judicial perception, the court determined that the power of Parliament to modify the Constitution was unrestricted and absolute. The identical question was reiniciated in the case of *Sajjan Singh v. State of Rajasthan*,¹², and the court re-affirmed the ruling of *Sankari Prasad case*. However, Mudholkar J. expressed specific objections in the former case. He pointed out that the founders of the Constitution must have

¹⁰ GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: THE CORNERSTONE OF A NATION*, 84 (Oxford University Press, New Delhi, 1972).

¹¹ *Sri Sankari Prasad Singh Deo v. Union of India*, 1951 SCC 966, (INDIA).

¹² *Sajjan Singh v. State of Rajasthan*, 1965 SCR (1) 933, (INDIA).

meant it to include certain essential and timeless features and that it could not have been devised as a tool for a majority to indulge their whims. This was the first time that the 'fundamental characteristics' of the Constitution were emphasised and the question of whether they could be removed was raised.¹³

The legal approach safeguarding the unrestricted modifying authority of Parliament was overturned by a 6:5 decisions in Golaknath case, which rendered Part III of the Constitution immune to parliamentary amendment.

The basic structural doctrine as it is now established was made possible by the judiciary's use of BSD to create transformative justice and to limit Parliament's ability to change the constitution. This led to a more thorough judicial evaluation. By enacting the Constitution (Twenty-fourth Amendment) Act, 1971, the Parliament sought to overturn this ruling by stating that Article 368 constitutional changes would not be subject to Article 13, the standard used to determine whether legislation are constitutional. The judicial scrutiny of Parliament's amending power was thus further protected.

A thirteen-judge bench of the Supreme Court was established in the case of *Kesavananda Bharati v. State of Kerala*¹⁴ to address and resolve the controversy regarding amending power of Parliament. The judgement overruled Golaknath by affirming that amending power of Parliament is comprehensive and encompasses all provisions of the Constitution; nevertheless, this power cannot be exercised in a manner that undermines or violates the 'fundamental structure of the Constitution'. Although the judiciary has sufficiently recognised the idea, it is vague and further elaborate elucidation is needed. It does not safeguard specific articles or constitutional provisions but establishes immunity for certain principles underlying the Constitution as it exists now. There is no definitive definition or comprehensive enumeration of the doctrine, nevertheless its intention and purpose is clear that to safeguard the constitution.

¹³ Arvind Datar, *Legal Notes by Arvind Datar: Seeds of Basic Structure first sown by Justice JR Mudholkar*, February 11, 2023, (visited on Nov. 12, 2025), <https://www.barandbench.com/columns/legal-notes-arvind-datar-seeds-basic-structure-first-sown-justice-jr-mudholkar>.

¹⁴ *Keshavananda Bharati v. State of Kerala*, AIR 1973 SC 1461, 1730, (INDIA).

It illustrates that specific elements of the Constitution are unalterable, immutable, and intrinsically linked to the essence of the Constitution, ensuring their perpetual existence as long as the Constitution endures.¹⁵ Throughout constitutional history of India, numerous judicial rulings have contributed additional characteristics and concepts to the definition of the Basic structure doctrine, aimed at safeguarding the original constitutional framework. The cases encompass *Indira Gandhi v. Raj Narain* ('Raj Narain')¹⁶, *Kihoto Hollohan v. Zachillhu*¹⁷ (about free and fair elections), *Minerva Mills v. Union of India*¹⁸ ('Minerva Mills') (addressing judicial review and the equilibrium between fundamental rights and directive principles of state policy), and *Waman Rao v. Union of India*¹⁹ (concerning the independence of the judiciary).

In the Raj Narain case in 1975, the judiciary applied and affirmed the fundamental structure theory for the first time since Kesavananda Bharati. The problem was that Smt. Indira Gandhi, who was India's prime minister at the time, was awaiting an appeal after being convicted guilty of electoral fraud by the Allahabad High Court. While the appeal was still pending, the Parliament hastily passed the Constitution (Thirty-ninth Amendment) Act, 1975, in an attempt to limit the Supreme Court's authority to decide cases involving the elections of the President, Vice President, Prime Minister, and Speaker of the Lok Sabha. The amendment was granted retroactive effect by the parliament. Concurrently, relevant laws were modified.²⁰ The constitutional amendment and the pertinent statutes were disputed together with the other concerns on the grounds that they were in violation of the fundamental structure concept. The bench consequently

¹⁵ Gautam Bhatia, "The Curious Case of Salient Features: Exploring the Current Relevance of the Basic Structure Doctrine in Pakistan" *INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY*, February 15, 2015, available at <https://indconlawphil.wordpress.com/?s=basic+structure+doctrine> (Last visited on November 12, 2025).

¹⁶ *Indira Gandhi v. Raj Narain*, AIR 1975 SC 865, (INDIA)

¹⁷ *Kihoto Hollohan v. Zachillhu*, 1992 SCR (1) 686, (INDIA)

¹⁸ *Minerva Mills v. Union of India*, AIR 1980 SC 1789, (INDIA).

¹⁹ *Waman Rao v. Union of India*, 1981 (2 SCC 362), (INDIA).

²⁰ Venkatesh Nayak, *The Basic Structure of the Indian Constitution*, 2016, (visited on November 12, 2025), <https://constitutionnet.org/vl/item/basic-structure-indian-constitution>.

concluded that the doctrine could be applied to the Parliament's constituent power rather than its legislative power, and the amendment was ruled unconstitutional for breaching the fundamental structure doctrine's key tenets of free and fair elections and the separation of powers.²¹

It is important to remember that legislative acts encompass more than just amending the constitution; they also include passing laws and policies. The Doctrine of Basic Structure serves as a protection against the amendment-making authority, not the legislature's law-making power, diluting the Constitution. However, even if the Constitution's wording doesn't alter, common laws can nonetheless affect its identity, contents, and ideas. Therefore, the framers have attempted to demonstrate why ordinary legislation should be subject to the fundamental structural theory. Therefore, shouldn't a doctrine be able to validate a lower standard, such as regular legislation, if it can support a higher norm, such as a constitutional amendment?²² Still the present day the Government stance on the Basic Structure Doctrine is not favorable. In the aftermath of the NJAC Judgement High-ranking Government officials, including the current vice-president and the Rajya Sabha Chairman, Sri Jagdeep Dhankar and Late Former Finance Minister Arun Jaitley publicly criticized the “Basic structure Doctrine”. Their argument centred on the idea that the doctrine is an abstract idea without a basis in the explicit text of the constitution and allows for Judicial overreach. Potentially undermining Parliamentary sovereignty and mandate of the people.

B. The Dichotomy of the Basic Structure and Legislative Overruling

As the judiciary has the basic structure doctrine, similarly the Parliament has the counter weapon that is the legislative overruling. The legislature can eliminate judicial obstacles by using the doctrine of legislative overruling. It is clear that the Constitution itself grants the parliament this authority through its constituent powers. The Supreme Court itself ruled in the case of *Madras Bar Association v. Union of India*²³ that a certain type of legislative overruling is acceptable and

²¹ Indira Gandhi v. Raj Narain, AIR 1975 SC 2299, (INDIA).

²² Pathik Gandhi, *Basic Structure and Ordinary Laws (Analysis of The Election Case & The Coelho Case)*” 4 INDIAN JOURNAL OF CONSTITUTIONAL LAW 47-70 (2010).

²³ Madras Bar Association v. Union of India, 2015 SCC OnLine SC 388.

established guidelines for its future application. Thus, this doctrine gets additional constitutional support.

Legislative overruling has significant effects on the government. On the one hand, it functions as a democratic instrument that enables elected members of Parliament to respond to popular grievances and modify court rulings that might not be consistent with the socio-political or socio-economic environment at the time. However, if this is applied excessively or arbitrarily, it runs the risk of weakening the rule of law and judicial independence. For example, based on the constitutional concept of gender equality, the Supreme Court decided in *Indian Young Lawyers Association v. State of Kerala*²⁴ that women of all ages might access the Sabarimala temple. The conflict between judicial interpretations of fundamental rights and legislative overruling was brought to light, however, when the Kerala government later passed legislation intended to preserve practices.²⁵

There must be some limitation on legislative overruling. It should be curtailed by clearly defining the limits within which such actions can be taken, ensuring that they do not infringe upon judicial independence or the core values of the Constitution, i.e., the basic structure of the Constitution. It should be used with the utmost care and caution and used only to rectify the judicial overreach.

Legislative overruling has occurred countless times throughout the Indian constitutional history. The legislature has used the constituent power of the Parliament under Article 368 as a tool to overturn the outcomes of court rulings, as demonstrated by the cases of *State of Madras v. Champakam Dorairajan*,²⁶

²⁴ AIR 2018 SC 4165.

²⁵ F. S. NARIMAN, GOD SAVE THE HON'BLE SUPREME COURT: A MEMOIR 15-20 (Hay House Publishers, 2020).

²⁶ *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226 (Here, the Communal Government Order of the Madras Government was declared void by the Madras High Court and upheld equality and non-discrimination. The First Amendment to the Constitution added Article 15(4) to invalidate the effects of the judgement and allowed the State to make special provisions for the advancement of socially and educationally backward classes, Scheduled Tribes and Scheduled Castes. Nariman,

Golaknath,²⁷ *Mohd. Ahmad Khan v. Shah Bano Begum*,²⁸ and most recently, *Prithvi Raj Chauhan v. Union of India* (ST/SC Amendment Act).²⁹ Nevertheless, the aforementioned philosophy has not been adequately applied in practice. The doctrine has been reduced to a tool for overturning decisions whenever possible, upholding a hierarchy within the organs, and allowing the Parliament to assert its dominance over the judiciary in the name of popular will, leaving behind the goal of preserving a harmonious system of checks and balances.

The judiciary is frequently accused of being 'activist,' which results in judicial overreach in the guise of judicial review. At different points in time, the judiciary has tried to enforce morals and values that are completely outside its purview. Examples of this include enforcing patriotism by requiring the National Anthem to be played in Indian movie theatres before to the start of the film,

We are currently in a maze of ambiguity brought about by the intersection of the fundamental structure and morality teachings of the constitution with legislative overruling. A larger bench of court should rule in support of the recent rulings, which call for the application of the basic structure doctrine to ordinary law, in order to resolve any disagreements on the applicability of the basic structure principle. Furthermore, the concepts and values safeguarded as the fundamental framework that direct the interpretation and operation of the Constitution should be the focus of judicial assessment of legislation rather than just its contents. In all sovereign governments, the fundamental structural theory is an essential component of constitutional supremacy and the rule of law. Additionally,

²⁷ *I. C. Golak Nath v. State of Punjab*, AIR 1967 SC 1643 (the Parliament passed the 24th Amendment in 1971 to repeal the effects of the Supreme Court judgement. This amendment gave the Parliament the power to amend any part of the Constitution, including the provisions relating to Fundamental Rights. The 24th Amendment was held valid in the case of *Kesavananda Bharti*).

²⁸ *Mohd. Ahmad Khan v. Shah Bano Begum*, AIR 1985 SC 945 (in 1986, the Parliament passed The Muslim Women (Protection of Rights on Divorce) Act, 1986, to nullify the effect of the judgement).

²⁹ *Prithvi Raj Chauhan v. Union of India*, AIR 2020 SC 1036 (In 2018, the Parliament introduced Section 18A to the ST/SC (Prevention of Atrocities Act), 1989, to overturn the safeguards that the Supreme Court introduced in the case of *Kashinath Mahajan v. State of Maharashtra*, AIR 2018 SC 1498. The former judgement questioned the validity of the act of the Parliament).

attention has been paid to the doctrine's evolution after 1973, emphasising how it frequently coincided with continuous political dilemmas that elevated the unwelcome conflict between the legislative and the judiciary to the forefront.

With an emphasis on the theoretical underpinnings of the notion of separation of powers and the practice of checks and balances, the battle between the legislative and the judiciary is examined. In order to fully comprehend the challenges facing the legislature in relation to the verdict in the Kesavananda Bharati case, comparisons between the operations of judicial review and legislative overruling are also made. This begs the question of whether India's judiciary has truly evolved into a separate legislative branch. Though they are disguising their unjustified involvement in the guise of review, the judiciary's job is to ensure that the administration is operating "lawfully," not to remark on its "efficacy."

C. Germany and its 'Eternity Clause'

There are a few reasons behind the *eternity clause* in the German constitution. The Germany has taken the lesson from the downfall of the Weimar Republic, and that lead to introduce the 'eternity clause'. The framers of the Basic Law held the prevailing view that they needed to safeguard the new German constitution from any self-destructive amendments.³⁰ Karl Loewenstein's analysis of the devastating effects of totalitarian mass movements on the fate of the European constitutional democracies after World War-I arguably played a major role in shaping that perception. The German Constitution is largely based upon the "eternity clause" of Article 79, which is immutable.³¹ According to this interpretation, the immutability of the principles laid down in this clause marked out a normative core that defined the constitutional identity of the polity. This doctrine holds that altering these principles would destroy the very identity of the Constitution.

The Weimar Constitution granted the president the authority to impose emergency orders and suspend civil liberties. This created an undemocratic

³⁰ Ulrich K. Preuss, *The Implications of Eternity Clauses: The German Experience*, 44(3) ISRAEL LAW REVIEW, 429-448 (2011).

³¹ Rivka Weill, *Secession and the Prevalence of both Militant Democracy and Eternity Clauses Worldwide*, 40 (2) CARDOZO LAW REVIEW, 905-990 (2019).

shortcut to governance by consolidating too much power in the hands of the president and circumventing the parliament.³²

The truth is that the downfall of the Weimar Republic is one of the major reasons resisting the Parliament from the abusive amendment by imposing restriction under Article 79, Section. The democratic status of the constitution was not to be destroyed or significantly altered by any of the amendment to the Weimar Constitution.³³ Previous constitutional amendments turn the political system into a dictatorship, leading to Hitler's takeover. Instead, the Nazi Party's anti-constitutional acts following Hitler's appointment as Reich Chancellor caused this situation, which occurred in accordance with the constitution's wording but clearly violated its spirit. This does not imply that the Weimar Constitution's downfall was unrelated to the amending rules. However, the constitution's standing as the ultimate law of the land was steadily undermined by the indirect result of the combination of regular legislation and constitutional amendment.

It reads as follows: "The Basic Law may be amended only by a law expressly modifying or supplementing its text." Thus, a law cannot have the status of a constitutional amendment, even if enacted with a two-thirds majority in both houses of parliament, unless the intended change to the constitution is expressly inserted into its text.

The Basic Law has undoubtedly prevented this consequence. The opening language of Article 79, Section 1, which attempts to avert the infamous Weimar Republic period noted above, emphasises the difference between regular legislation and constitutional revision. The constitution is not shielded from normative distortion of its constitutional substance by a two-thirds majority in both houses of parliament, even though this procedural precaution avoids the confusion between legislation and constitutional amendment and, of course, any type of tacit or "unconscious" constitutional amendment. Only Section 3 of Article 79 may stop this. Establishing a supra-constitutional criterion by which constitutional modifications must be evaluated is equivalent to establishing an

³² See, Article 48 of the Weimar Constitution, 1919.

³³ The Weimar Constitution had problems stemming from proportional representation, which led to weak, unstable coalition governments, and Article 48, which gave the President excessive emergency powers to rule by decree. These flaws made the democratic system seem ineffective, contributing to political instability.

unchangeable substantive normative core of the constitution. The "eternal clause" is the only supra-constitutional principle included in the German Constitution.³⁴

An amendment that does not meet this standard is unconstitutional, making it an "unconstitutional constitutional amendment." This can occur when both houses, with the required two-thirds majority, enact a law that expressly changes the constitutional text but violates the substantive "supra-constitutional" standard because the eternal clauses are "supra-constitutional."

In the case in point, the German Federal Constitutional Court made use of both arguments. It defended the "eternity clause" against potential encroachments by the constitution-amending legislative powers, which means that it defended the constituent power as embodied in the constitution. However, by indicating that only the directly declared will of the German people alone can override the barrier of the "eternity clause" of Article 79 section 3, it accepted that the actuation of its constituent power is a legitimate option. **To put it differently, the defense of the constituent power as embodied in the constitution, including the "eternity clause," annihilates the constituent power in its quality as the people's right to self-determination.**

*Under Article 146 of the Constitution has embodied that the basic law cannot be amended until that amendment, freshly adopted by the German people in a free decision, enters into force. This means that the entire constitution, including 79 (3) could theoretically be replaced by a new constitution following the process outlined in Article 146; however, this would require a more profound process and the will of the German People.*³⁵

Article 76 of the Weimar Constitution stipulated that constitutional amendments could be performed by legislation and that they required the presence of two-thirds of the members of the Reichstag (Diet)—the popularly elected house of parliament—and the approval of two-thirds of the members present. As a consequence, less than 50% of the members of the Reichstag could amend the

³⁴ Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88(2) AMERICAN POLITICAL SCIENCE REVIEW 355-357 (1994).

³⁵ Article 146., The Constitution of Germany, 1949.

constitution. The role of the Reichsrat (the body in which the German Lander or states were represented) in this regard was negligible.

It requires the defence of the constitution by rendering the pre-constitutional freedom of the people eternally tacit and inactive. Conversely, the defense of the constituent power in its quality as the people's right to self-determination threatens to under-mine the integrity of the constitution and open the door to uncertainty, arbitrary rule, and possibly chaos. *The German Constitutional Court's argument implies that the immutable elements of the constitution cannot be changed or abolished by the constituted powers, whereas this remains a pre-constitutional right of the constituent power.* This reasoning culminates in a constitutional dilemma.

D. South Africa: Combination of Flexibility and Procedural Justiciability

The Constitution is the supreme law of South Africa.³⁶ The Constitution of South Africa states, "*The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.*" The prime objective of the Constitution is to do what is **just, right, and fair**.³⁷ The entire constitution of South Africa can be classified by three major parts, namely the Preamble and Chapter 1, which are the foundation of the constitutional values, and Chapter 2, which contains the Bill of Rights.

The Constitution imposes a duty on the National Assembly (Parliament) to operate within a legally defined framework designed to prevent injustice, wrongdoing, and bias, while also offering mechanisms for the protection of rights. The principles of justice, right, and fairness are not unique to South Africa; they are foundational concepts that have shaped legal processes and constitution-making throughout legal history.

In South Africa, the procedural justiciability of a constitutional amendment is determined by the judiciary, which is empowered to review whether Parliament followed the correct and specific amendment procedures outlined in Section 74

³⁶ Sec 2 of the South African Constitution, 1996.

³⁷ Preamble of the Constitution of South Africa, 1996.

of the Constitution. This allows the court to act as the ultimate guardian of constitutional integrity and procedural fairness.

The prime characteristics of the constitution of South Africa are that 'transformative constitutionalism' that required amendments to cater to the advancement of social justice, the supremacy of the Bill of Rights, and the balance between parliamentary power and constitutional limits. A central theme is that the Constitution is not static. Amendments are viewed as instruments for both institutional stability and advancing socio-economic justice, reflecting the *country's commitment to transformative justice*.

South African post-apartheid constitutional system is a prime example of transformative constitutionalism, a term that has come to characterize both its normative goal of social change and its jurisprudential approach. The South African Constitution of 1996, which emerged from a sharply divided history characterized by racial segregation, legal authoritarianism, and structural exclusion, represents a fundamental rupture meant to rectify historical injustices via legal reform. Rapatsa (2014) asserts that transformational constitutionalism in South Africa is a socio-political endeavour that demands active engagement from the state and civil society and is not only a legal framework. Its goal is to promote equality, human dignity, and democratic participation.³⁸ The objectives of change and democratic inclusion are reflected in the very structure of South African constitutional amendments. In contrast to many other federations, where constitutional amendments typically aim to uphold inflexible federal structures or reinforce central power, the South African constitutional amendment process is more flexible and substantively based on advancing social justice and fairness. Roux (2009) points out that the courts are entrusted to interpret the Constitution "in its best light," upholding progressive political ideals while avoiding the traps of politicized decision-making. This strategy has assisted courts in preserving their legitimacy while also promoting social changes. The integrated participation of the legislative, executive, and judicial departments of government in accomplishing constitutional goals is a fundamental component

³⁸ Mashele Rapatsa, *South Africa's transformative Constitution: from civil and political rights doctrines to socio-economic rights promises*, 5(2) JURIDICAL TRIBUNE 208-219 (2015), <https://www.tribunajuridica.eu/arhiva/An5v2/14%20Rapatsa.pdf>

of transformative constitutionalism in South Africa.³⁹ According to Rapatsa *et al.* (2012), this paradigm promotes inclusive government and advocates for participatory constitutionalism, in which common people share accountability for bringing constitutional principles into real life. The amendment process, which involves intense parliamentary discussions and occasionally public participation, especially when public rights are at stake, reflects this notion. Scholars have expressed concern, nevertheless, that transformative constitutionalism is sometimes viewed primarily through the prism of civil rights, giving judges an excessive amount of authority to bring about socioeconomic changes. Klaaren (2023) criticizes this tendency and argues that aspects of directive constitutionalism, which give the legislature equal authority to effect change, might be included in South African constitutionalism.⁴⁰ The disparity jeopardizes the democratic accountability of elected entities entrusted with enacting reform while simultaneously raising the possibility of judicial overreach. The endurance of South Africa's revolutionary constitutional system has been put to the test once again by amendments pertaining to land rights and resource redistribution. Dugard (2021) demonstrates how the courts resolve disputes between more radical community-based transformation claims and conservative governmental policies in an analysis on mineral rights adjudication.⁴¹ The judiciary's over-enthusiastic willingness to consider more radical interpretations of fundamental rights highlights how it has come to view change as a dynamic and contentious process. Socioeconomic disparity endures despite the transformational goals of the constitutional framework, which

³⁹This paper was presented at the University of Stellenbosch conference on "Transformative Constitutionalism after Ten Years" held on 8 August 2008.

⁴⁰ Jonathan Klaaren, *A Comment from a South African Perspective on Directive and Transformative Constitutionalism in Comparative Constitutional Law*, 1, VERFASSUNG IN RECHT UND ÜBERSEE (WCL) 602-610, (2023), <https://wiredspace.wits.ac.za/server/api/core/bitstreams/f10dbe0f-33af-4332-87d4-e3e9e0809bf1/content>

⁴¹ Jackie Dugard, *Testing the transformative premise of the South African Constitutional Court: A comparison of High Courts, Supreme Court of Appeal and Constitutional Court socio-economic rights decisions*, 20(8) THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 1132-1160 (2016). <https://www.tandfonline.com/doi/citedby/10.1080/13642987.2016.1227324?scroll=top&needAccess=true>

frequently feeds criticism that the document lacks the political will or the necessary instruments for meaningful change. Despite its worldwide influence, Fowkes (2015) points out that the South African example illustrates a larger difficulty in converting constitutional ideas into tangible results in practice. Put another way, the South African constitution has influenced people all over the world through "transformative constitutionalism," yet it still has trouble making its goals a reality. This is because the Constitution is a very burdensome structure that is in some ways unworkable, especially when it comes to the issues of poverty and inequality. Closing the gap between legislative promises and the actual reality of marginalised populations must thus be a top priority for future amendment procedures and jurisprudence.⁴² In South Africa's rights-based constitution, judicial scrutiny has occasionally been observed, particularly to uphold socioeconomic rights and transformative constitutional philosophy. The judiciary had to strike a balance between the necessity of revolutionary reforms and the pragmatic constraints of government in situations such as the Grootboom (Housing Rights) case.⁴³ The South African judiciary, especially the Constitutional Court, was given wide authority to uphold justiciable rights and guarantee that the state is responsible for carrying out constitutional commitments, especially when the Constitution was ratified in 1996.

Particularly in areas where legislative supervision is inadequate or corrupted, the judiciary's actions have played a crucial role in both influencing the public's perception of rights and keeping the executive branch responsible. Given the fundamental flaws in the parliamentary institutions to regulate executive activity, courts have had to take on a stabilizing role in foreign policy and international responsibilities, as noted by Venter (2019).⁴⁴ Historic rulings on socioeconomic rights, such *Gundwana v. Steko Development*⁴⁵, further demonstrate the

⁴²James Fowkes, Transformative Constitutionalism and the Global South: The View from South Africa, SOCIAL SCIENCE RESEARCH NETWORK (SSRN), (visited on Nov. 8, 2025, 5:58 PM), <https://ssrn.com/abstract=2847579>

⁴³ Government of the Republic of South Africa and Others v. Grootboom and Others (CCT11/00) [2000] ZACC 19;

⁴⁴ F Venter, *Judicial Defence of Constitutionalism in the Assessment of South Africa's International Obligations*, 22(1) POTCHEFSTROOM ELECTRONIC LAW JOURNAL (PELJ) (2019). <https://doi.org/10.17159/1727-3781/2019/v22i0a6253>

⁴⁵ 2011 (3) SA 608 (CC)

judiciary's proactive involvement., In order to operationalize Section 26(3) of the Constitution, which safeguards housing rights, the Constitutional Court insisted on substantive judicial review prior to permitting the sale of mortgaged dwellings. In this instance, Walt & Brits (2012) shows the dedication of the judiciary to a complicated, rights-based decision-making process, especially in intricate financial situations. The Constitutional Court has adopted structural interdicts and supervisory jurisdiction in addition to deciding individual rights cases. This gives it the ability to monitor long-term adherence to its rulings, especially when it comes to the execution of socioeconomic initiatives. According to Christiansen (2011)⁴⁶, this body of law demonstrates the propensity of judicial activism to advance substantive justice by inventing procedural fairness.

However, even while the judiciary's revolutionary aim is praised, scholars like Dugard (2016)⁴⁷ warn that there may be a mismatch between institutional design and judicial impact because the Constitutional Courts' rulings are occasionally less revolutionary than those of subordinate courts. Furthermore, the increasing dependence on judicial involvement to carry out policies creates questions regarding democratic legitimacy and the counter-majoritarian challenge posed by the judiciary, which is frequently seen in India as well. Henrico (2023)⁴⁸ examines this issue and makes the case that in order to prevent interfering with political or legislative policies, courts must carefully strike a balance between constitutionalism and judicial restraint. The South African court, however, continues to enjoy high levels of legitimacy and public confidence in spite of these accusations, mostly because of its unwavering dedication to protecting the

⁴⁶ Eric C. Christiansen, *Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice*, SOCIAL SCIENCE RESEARCH NETWORK (SSRN), (visited on Nov. 8, 2025, 6:18 PM), <https://dx.doi.org/10.2139/ssrn.1890885>

⁴⁷Eric C. Christiansen, *Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice*, SOCIAL SCIENCE RESEARCH NETWORK (SSRN), (visited on Nov. 8, 2025), available at: <https://dx.doi.org/10.2139/ssrn.1890885>

⁴⁸ Radley Henrico, *Judicial Review In South Africa And India: Advancing Constitutionalism or Undue Activism?*, 43(4) NELSON MANDELA UNIVERSITY LAW JOURNAL (2022) <https://doi.org/10.17159/obiter.v43i4.15412>

socioeconomic rights, equality, and dignity of marginalized people. Judicial activism has played a crucial role in the development of South African democracy and the pursuit of constitutional justice because of the judiciary's exceptional capacity to interpret rights creatively and apply them with contextual sensitivity. The durability of federalism in India has been called into doubt as a result of the constitutional flexibility that has allowed successive administrations to frequently change the constitution in order to further centralizing objectives. Through principles like the Basic Structure, which imposes significant restrictions on amendment powers, the judiciary only partially mediates this tendency of centralization (Albert, 2009).⁴⁹ On the other hand, Canada has one of the most challenging amendment procedures in the world, with intricate, multi-tiered regulations including both provincial and federal approval. This has led to a situation known as "constructive unamendability," in which informal channels and judicial interpretation are the main means by which the constitution evolves (Albert, 2015).⁵⁰ The South African constitution strikes a balance between rigidity and flexibility, having been crafted by a transformational and rights-oriented purpose. Although the official amendment procedure is methodical and tiered, it is not so strict as to prevent important revisions. Instead of following a formalistic or procedural examination, the South African Constitutional Court takes a more active role in making sure that changes are in line with the revolutionary spirit of the Constitution (Kincaid & Tarr, 2005).⁵¹

IV. Conclusion

Noah Webster criticized any attempt to design an unalterable constitution in many essays that appeared in the *American Magazine* in 1787 and 1788. Aside from being "arrogant and impudent," this strategy would be pointless since "a paper declaration is a very feeble barrier against the force of national habits and inclinations. " Its goal is to "legislate for those over whom we have as little

⁴⁹ Richard Albert, *Nonconstitutional Amendments*, 22(1) CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 5-47 (2009). :10.1017/S0841820900004550

⁵⁰ Richard Albert, *The Difficulty of Constitutional Amendment in Canada*, 53(1) ALBERTA LAW REVIEW 85-114 (2015). <https://albertalawreview.com/index.php/ALR/article/view/281>

⁵¹ JOHN KINCAID AND G. ALAN TARR, CONSTITUTIONAL ORIGINS, STRUCTURE AND CHANGE IN FEDERAL COUNTRIES, 84 (McGill-Queen's University Press, 2005).

authority as we have over a nation in Asia."⁵² As a 'complex and potentially controversial constitutional instrument, unamendability should be applied with utmost care and reserved only for the basic principles of the democratic order,' it is true.⁵³

The notion that judges have the authority to decide whether constitutional amendments are constitutional is even more problematic than the unamendability mechanism itself. There are undoubtedly important theoretical, conceptual, and practical concerns with this approach. Because it deals with the position and function of the court in a democratic society as well as its relationships with other institutions of government, it has institutional relevance and significant consequences for the concepts of judicial discretion, independence, and accountability.⁵⁴

The majority of objections to judicial review of amendments seem to be rehashing the age-old debate about unamendability. However, such arguments 'tend to overlook the limited, essentially corrective and marginal function of judicial review, *if kept within its proper sphere and exercised with judicial discipline*.'⁵⁵

Many of the arguments against unamendability may be solved if judges display caution and self-control when reviewing amendments. It is significant to note that many of the criticisms of the notion of unamendability are adequately addressed by the theoretical distinction between the main and secondary constituent powers.

Thus, a constitution at the disposal of a constituted power carries with it certain risks. This situation may equate to a constituted power having the authority to assume constituent power. To be sure, the authority to revise the constitution

ⁱ Report on Constitutional Amendment, "Adopted by the Venice Commission at Its 81st Plenary Session" para. 213 (Venice, Dec. 11-12, 2009).

⁵³ *Ibid.*

⁵⁴ Teresa Stanton Collett, *Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments*, 41 LOY. U. CHI. L.J. 327 (2009) Available at SSRN: <https://ssrn.com/abstract=1444583>

⁵⁵ Aharon Barak, *Unconstitutional Constitutional Amendments*, *Gavriel Bach Book* 361 (D. Hahn, D. Cohen-Lekach and M. Bach eds., 2010).

does not include the authority to create an entirely new constitution. In practice, however, it will be difficult to distinguish between a 'major' or 'total' revision of the constitution and the replacement of an existing constitution with an entirely new one. In summary, the amending power presents a dilemma: while the constituent power must establish it to ensure the constitution's adaptability and longevity, this same amending power poses a risk to the constitution by lacking an inherent stop rule that could prevent its transformation from a protector of democratic freedom into a tool for authoritarian or totalitarian control.