"DEAD HAND" RULE OR CONSTITUTIONAL GUARDIAN: A COMPARATIVE ANALYSIS OF JUDICIALLY IMPOSED LIMITATIONS ON FORMAL CONSTITUTIONAL CHANGE IN INDIA, BANGLADESH & ISRAEL[1]

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"*The Constitution is the act of the people, and ought to remain entire…if we mean to destroy the whole, and establish a new Constitution, we remove the basis on which we mean to build*"

- Roger Sherman[2]

INTRODUCTION

The aforesaid phrase by Mr. Roger Sherman, one of the Founding Fathers of the United States, succinctly articulates the underlying idea of the Basic Structure doctrine. Every constitutional document embodies an aspiration of 'permanence' and encapsulates a set of principles and norms within itself, which guide the functioning of all organs of the State.[3] *For example*, the German concept of *ewigkeitsgarantie* or "eternal",[4] which affirms the permanent and supreme nature of the German Basic Law. However, no generation would like to be governed by an outdated Constitution, which fails to address its contemporary societal needs. Change, as the saying goes, is the only constant. Therefore, constitutions must be amended from time to time, in order to align them with changing political and societal moralities.

In that regard, constitutions are generally subject to two form of amendments or constitutional changes. *First,* the formal method of constitutional change is the amendment procedure expressly set out within the four corners of the Constitution. Accordingly, formal amendments to the Constitution can only be brought about by the 'constitutional authority' (*For Example, Parliament, President etc.*) whoever is expressly vested with such power under the Constitution.[5] On the other hand, informal constitutional changes are alterations that happen to the meaning of the constitutional text, which are brought about by the "*civil society, market, media, armed opposition insurgent groups and other nonstate actors*",[6] including the constitutional courts of the State. Such form of constitutional change occurs upon any alteration to the 'enforceable meaning' of a constitutional provision, however, the text of the provision remains unchanged.[7] This Chapter shall only focus on the former method of constitutional change i.e. the formal amendment procedure.

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[2]Annals of Congress, House of Representatives, 1st Congress, 1st Session (August 13, 1789), at 735, at http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=369.

[3] Schmitt, Carl, Constitutional Theory (Duke University Press, 2008); Ashok Tanwar v State of HP, AIR 2005 SC 614.

[4] Kokott, Juliane, '*From Reception and Transplantation to Convergence of Constitutional Models in the Age of Globalization – with Special Reference to the German Basic Law*', Constitutionalism, Universalism, and Democracy: A Comparative Analysis (Christian Strack ed., Nomos Verlagsgesell, 1999), 71.

[5] Article 368 of the Indian Constitution; Article 142 of the Constitution of Bangladesh.

[6] Baxi, Upendra. "Demosprudence versus jurisprudence: The Indian judicial experience in the context of comparative constitutional studies." Macquarie LJ 14 (2014): 3, p. 6.

[7] Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 38 DUBLIN U. L. J. 387, 388–89.

The Constitution is expected to guard the rights and liberties of all its subjects,[8] and therefore its protections must be shielded from the whims of political majorities. Otherwise, civil liberties could possibly be erased from the books overnight. For example, under the Indian Constitution, the Parliament is vested with the authority to amend the Constitution with a simple majority vote in each house of the parliament as long as there is a two-thirds quorum. Such amendment procedure when compared with other jurisdictions, lays down an immensely low threshold for formal amendment,[9] which also significantly raises the risk of governments treating the supreme document of the State like an ordinary statue.[10] Therefore, there is an imminent necessity to limit the parliament's amending power and preserve the superior position of "We the People".

Accordingly, in comparative law, we notice there exist two forms of limitations on the Parliament's amending power[11] – (1) express and (2) implied limitations, which can both be either substantive or procedural in nature**.** For example, Article 79(3) of the German Constitution, Article 139 of the Italian Constitution,[12] Article 97 of the Japanese Constitution,[13] Article 60(4) of the Brazilian Constitution,[14] and Article 7B of the Bangladeshi Constitution[15] enumerate substantive express limitations on the amending power. These are also known as "eternity clauses".

On the contrary, the Indian Constitution does not include an eternity clause. Indian constitutionalism had to rely on the Supreme Court to lay down a 'substantive *implied* limitation' on the power of the Parliament to make formal amendments,[16] in the form of the 'Basic Structure Doctrine' ("**BSD**"). In **Part I** of the Chapter, I shall discuss the birth and evolution of the BSD in India. For the sake of reader's convenience, I shall also draw out a timeline of events to better portray the gradual development and establishment of BSD. Briefly speaking, according to the

[8] By "Subjects" I mean both citizens and resident non-citizens.

[9] DONALD LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 170, (2006).

[10] ANDRÁS SAJÓ, LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM 39-40 (1999).

[11] Yaniv Roznai, Unconstitutional Constitutional Amendments: The Limits of Amendment Powers (Oxford University Press, 2017).

[12] It entrenches the republican form of government and prevents it from being a subject of constitutional amendment.

[13] ***See*** Art. 97 of the Japanese Constitution. ("The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolable.")

[14] Art. 60(4) of the Brazilian Constitution. ("No proposed constitutional amendment shall be considered that is aimed at abolishing the following: I. the federalist form of the National Government; II. direct, secret, universal and periodic suffrage; III. separation of powers; IV. individual rights and guarantees.")

[15] The Constitution (Fifteenth Amendment) Act 2011 (Act No XIV of 2011).

[16] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

aforesaid doctrine, any constitutional amendment that abridges or infringes upon any basic or essential feature of the Constitution shall be declared unconstitutional.

Herein, one might argue that the idea of a constitutional amendment, which forms a part of the Constitution, being declared unconstitutional is certainly *prima facie* counterintuitive. Therefore, in **Part II** of the Chapter, I shall delve into the theoretical underpinnings of the BSD, in order to properly appreciate the purpose and requirement of the BSD in context of modern politics. Moreover, the BSD is faced with several objections, many of them being quite meritorious and thus require incisive analysis, such as the debate between primary vs. secondary/derivative constituent power. I shall also evaluate whether judicially enforced limitations on Parliament's amending power create a "dead hand rule",[17] or whether it actually guards the substantive content of the Constitution.

The Indian BSD was gradually exported across the globe. In **Part III** of the Chapter, I will focus on the form taken by the BSD in Bangladesh, and consider the benefits and objections to that form. Finally, **Part IV** shall be dedicated to Israel. For my comparative analysis, I have specifically chosen India, Bangladesh and Israel, due to the peculiar diversities and dissimilarities in their constitutional frameworks. I shall attempt to understand the impact of BSD on their constitutional order, and highlight how the judicially created and enforced BSD has brought about powerful constitutional moments for each of them.

I. INDIA: BIRTH OF THE BASIC STRUCTURE DOCTRINE

The idea of a BSD took shape in India, during the troubling times of emergency and in the context of a tense political landscape. Let us begin by rewinding the clock a bit. Post-independence, several agrarian and land reform measures were deployed by the Indian Government, which soon came under the scrutiny of the Judiciary. These lands were being acquired by the State without providing any reasonable and just compensation, violating the landowners' fundamental right to property.[18] This was followed by a sequence of High Court decisions on the validity of these land reform laws and regulations and the mode of land acquisition prescribed therein. Such as the Patna High Court,[19] acting on the petition by Maharaja of Darbhanga, struck down the Bihar Land Reforms

[17] ***See*** Ely JH (1980) Democracy and distrust: a theory of judicial review, Harvard University Press, USA, p.11; Samaha AM (2008) Dead hand arguments and constitutional interpretation, Columbia Law Rev 108, p. 606; McConnell MW (1998) Textualism and the dead hand of the past, Geo Wash Law Rev 60, p. 1127–1128.

[18] MERILLAT, H. C. L., 'THE INDIAN CONSTITUTION: PROPERTY RIGHTS AND SOCIAL REFORM', OHIO ST. L.J. 21 (1960), 616.

[19] Kameshwar v. State of Bihar, AIR 1951 Pat 91.

Act, 1950 and the Calcutta High Court held certain provisions of the West Bengal Land Development and Planning Act, 1948 to be unconstitutional.[20] The immediate reaction from the Indian Government came in form of the Constitution (First Amendment) Act, 1951,[21] however, there is an entire context preceding it.

Following the recent developments, Dr. Ambedkar, the then Law Minister, was asked to draft an amendment to the Constitution. He advised that the question of "Compensation" should be put beyond judicial review, if the property is acquired by Presidential assent.[22] Meanwhile, the Advocate-General of Madras, V. K. Thiruvenkatachari sent a letter to the Law Secretary suggesting the addition of a new schedule to the Constitution, which shall enlist all the land reform acts in force[23]. These Acts would have the Presidential assent and could not be challenged in a court for violation of any Constitutional provision or even abridging any fundamental right.[24] The power of judicial review was purportedly being snatched away from the courts. It was in this context that the BSD episode begun.

The journey of the BSD makes for a gripping story. In order to properly understand the evolution of the doctrine, let us break down the narrative in 3 parts – Pre-1970 era, 1970s and Post-1970 era.

A. PRE-1970 ERA: LAYING THE FOUNDATIONS FOR BSD

The doctrine of "essential features" of the Constitution was first touched upon by two dissenting judges in *Sajjan Singh* -[25] Justice Hidayatullah and Justice Mudholkar. They highlighted the possible intention of the Constituent Assembly to grant permanence to the "basic features of the Constitution".[26] However, they did not go to the extent of laying down a legal doctrine for substantively limiting the amending power of the Parliament.

Justice Mudholkar, in his concurring opinion, initiated an interesting debate by highlighting the force and effects of the basic features of the Constitution vis-à-vis its other provisions:

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[20] Bela Banerjee v State of West Bengal, AIR 1952 Cal 554.

[21] THE CONSTITUTION (FIRST AMENDMENT) ACT, 1951.

[22] DATAR, ARVIND P. - "OUR CONSTITUTION AND ITS SELF-INFLICTED WOUNDS" [2007] INJLCONLAW 4; (2007) 1 INDIAN JOURNAL OF CONSTITUTIONAL LAW 92.

[23] Ibid.

[24] *Ram Kissen v Divisional Forest Officer* AIR 1965 SC 625; *Jeejeebhoy v Asstt. Collector,* AIR 1965 SC 1096. ("An Act included in the IX schedule could not be challenged under any fundamental right")

[25] Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.

[26] Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845 [61].

> "71. Before I part with this case, I wish to make it clear that what I have said in this judgment is not an expression of my final opinion but only an expression of certain doubts which have assailed me regarding a question of paramount importance to the citizens of our country : to know whether the **basic features of the Constitution under which we live and to which we owe allegiance are to endure for all time** - or at least for the foreseeable future **- or whether they are no more enduring than the implemental and subordinate provisions of the Constitution**." [**Emphasis added**]

The 'BSD-as-implied-limitation' argument, was first pressed in the case of *Golaknath v. State of Punjab*.[27] The advocates for petitioners, led by the distinguished Mr. Nambyar, attempted to make a consequentialist argument to effectively bring forth the need to limit Parliament's amending power, in the absence of express limitations. They argued that:

> "Parliament may do all kinds of things, which were never intended, under this unfettered power and may, for example, abolish elected legislatures, abolish the President or change the present form of Government into a Presidential type like the United States Constitution or do away with the federal structure altogether."[28] [**Emphasis added**]

However, the argument was rejected without any due consideration. For example, Justice K. N. Wanchoo, of his separate opinion, called the consequentialist rational underlying BSD an "argument of fear". He rejected the existence of any implied limitations to the amendment power and reasoned his stance by relying on the text of Article 368 of the Indian Constitution. He observed:

> "116. We have given careful consideration to the argument that certain basic features of our Constitution cannot be amended under Art. 368 and have come to the conclusion that no limitations can be and should be implied upon the power of amendment under Art. 368…Parliament would thus never be able to know what amendments it can make in the Constitution and what it cannot; for, till a complete catalogue of basic features of the Constitution is available…. The power to amend being a constituent power cannot in our opinion for these reasons be held subject to any implied limitations thereon on the ground that certain basic features of the

[27] Golaknath v. State of Punjab, AIR 1967 SC 1643.

[28] Golaknath v. State of Punjab, AIR 1967 SC 1643, (K.N. Wanchoo J.), ¶94, 137-139.

> Constitution cannot be amended….On the clear words of Art. 368 which provides for amendment of the Constitution which means any provision thereof, we cannot infer any implied limitations on the power of amendment of any provision of the Constitution, be it basic or otherwise. Our conclusion is that constituent power, like that contained in Art. 368, can only be subject to express limitations and not to any implied limitations so far as substance of the amendments are concerned." [**Emphasis added**]

B. 1970S: A NEW BEGINNING

Finally, the base set by the dissenting opinions in *Sajjan Singh* was shaped into BSD in its current form, by a 13-judge bench in *Kesavananda Bharati v. State of Kerala*.[29] *Kesavananda* continues to be the single most important judgement in Indian legal history. Eleven judges wrote separate opinions running into thousands of pages. However, precisely what is the ratio of *Kesavananda* continues to be a matter of intense debate among legal scholars.[30]

In any event, as interpreted by subsequent judgements, the BSD in *Kesavananda,* through a fine majority of 7:6, imposed a substantive implied limitation on the amending power of the Parliament. In other words, it was held that although the amending power under Article 368 can extend to all parts of the Constitution, the Parliament cannot "alter, abrogate, or destroy the Basic Structure of the Constitution". Interestingly, the Supreme Court could not reach a majority conclusion with regard to an exhaustive list of "basic or essential features" of the Indian Constitution. Therefore, the BSD has witnessed a slow yet incremental development via several Supreme Court precedents.[31]

As a side note, the Supreme Court in *Kesavananda* eventually accepted the arguments forwarded by Mr. Nambyar in *Golaknath.* Mr. Soli Sorabjee, while writing about Mr. Nambyar's contribution to Indian constitutional law, once said:

> "Nambyar's most significant contribution in the field of constitutional law and fundamental rights was his argument in the case of Golaknath…. The stand adopted by Nambyar and his arguments apart from reflecting his deep research, study and

[29] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

[30] Andhyarujina TR (2011) The Kesavananda Bharati case: the untold story of struggle for supremacy by supreme court and parliament, Universal Law Publishing, pp. 63–67; Seervai HM, (1996), CONSTITUTIONAL LAW OF INDIA, 4th edn. N.M. Tripathi, p.3114.

[31] Raghunathrao Ganpatrao v. Union of India, AIR 1993 SC 1267.

erudition are evidence of his farsightedness. It can be said that he had an almost prophetic vision of the Supreme Court judgment in 1973 in Kesavananda Bharati where the doctrine of implied limitation was accepted."[32] [**Emphasis added**]

C. POST-1970 ERA: STRATEGIC 'JUDICIAL AVOIDANCE' AND FINDING THE BASIC FEATURES

At the outset, we must acknowledge that the concept of an implied limitation suffers from inherent ambiguity. The lack of an indicative list of basic features or an objective formula to identify them, might gradually make the 'basic structure review' an ad-hoc adjudication process. As Rozanai had noted, the essential or basic features of the Constitution "*cannot be isolated with scientific accuracy*".[33] Over the years, the Supreme Court has held different components of the Indian Constitution to be foundational, and hence forming parts of the 'Basic Structure'. A non-exhaustive list of such components is as follows:

Component of Indian Constitution	**Decisions declaring the respective component to be a part of the "Basic Structure"**
Parliamentary Democracy[34]	Kihoto Hollohon, AIR 1993 SC 412
Harmony and balance between fundamental rights and directive principles[35]	Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625
Independence of Judiciary[36]	Supreme Court Advocates on Record Association v. Union of India, (1993) 4 SCC 441; S.P. Gupta v. Union of India, AIR 1982 SC 149

[32] Sorabjee, Soli J., 'From Gopalan to Golaknath, and Beyond: A Tribute to Mr. M K Nambyar' (2007) 1 Indian J. Const. L. 20.

[33] Yaniv Roznai, Unconstitutional Constitutional Amendments: The Limits of Amendment Powers (Oxford University Press, 2017), p. 196.

[34] Kihoto Hollohon, AIR 1993 SC 412.

[35] Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625.

[36] Supreme Court Advocates on Record Association v. Union of India, (1993) 4 SCC 441; S.P. Gupta v. Union of India, AIR 1982 SC 149., State of Bihar v. Bal Mukund Sah, (2000) 4 SCC 640.

Rule of law and judicial review[37]	L Chandra Kumar v. Union of India & Ors., (1997) 3 SCC 261; Waman Rao v. Union of India, (1981) 2 SCC 362; S.P. Sampath Kumar v. Union of India (1987) 1 SCC 124
Federalism[38]	S.R. Bommai v. Union of India, AIR 1994 SC 1918
Effective access to Justice[39]	Central Coal Fields Ltd. v. Jaiswal Coal co. 1980 Supp SCC 471
Secularism[40]	Valsamma Paul v. Cochin University, AIR 1996 SC 1011; S.R. Bommai v. Union of India, AIR 1994 SC 1918
Separation of Power[41]	State of Bihar v. Balmukund Sah, AIR 2000 SC 1296
Social and Economic justice[42]	Maharao Sahib Shri Bhim Singhji Ors. v. Union of India, AIR 1981 SC 234
Judicial Primacy in matters of Judicial appointments[43]	Supreme Court Advocates-on-Record Association v. Union of India, (2016) 4 SCC 1

I believe there is a certain degree of 'judicial strategy' involved in not putting out an exhaustive list of basic features of the Constitution. In comparative law, such strategical silence by a constitutional court is also termed as 'judicial avoidance', which is a calculated measure to ensure functional effectiveness of its judgements and preservation of institutional security.[44] In this context, it is

[37] L Chandra Kumar v. Union of India & Ors., (1997) 3 SCC 261; Waman Rao v. Union of India, (1981) 2 SCC 362; S.P. Sampath Kumar v. Union of India (1987) 1 SCC 124; P. Sambamurthy v. State of Andhra Pradesh (1987) SCC 362.

[38] S.R. Bommai v. Union of India, AIR 1994 SC 1918.

[39] Central Coal Fields Ltd. v. Jaiswal Coal co. 1980 Supp SCC 471.

[40] Valsamma Paul v. Cochin University, AIR 1996 SC 1011; S.R. Bommai v. Union of India, AIR 1994 SC 1918.

[41] State of Bihar v. Balmukund Sah, AIR 2000 SC 1296.

[42] Maharao Sahib Shri Bhim Singhji Ors. vs. Union of India (UOI) and Ors, AIR 1981 SC 234.

[43] Supreme Court Advocates-on-Record Association v. Union of India, (2016) 4 SCC 1.

[44] ***See*** Delaney, E.F., 2016, Analyzing avoidance: judicial strategy in comparative perspective. Duke LJ, 66, p.1. ***Also See*** Vincent Blasi, The Role of Strategic Reasoning in Constitutional Interpretation: In Defense of the Pathological

possible to argue that the 'judicial avoidance' ensures that the scope of the BSD is not limited by past judicial decisions and there could be a constant check on the Parliament's arbitrary exercise of amending power. Additionally, in the era of Transformative Constitutionalism, the "Basic Structure" of the Constitution cannot be subjected to stagnancy and must evolve with time.

Recently, the 'Basic Structure review' has been classified as a recognised category of jurisdiction of the Indian Supreme Court.[45] In certain cases, it has also been extended beyond the amendment process and has been used to review the legality of executive action. For example, in S.R. Bommai,[46] the Supreme Court used the doctrine to review the powers of the President to dissolve constitutionally elected state legislatures within the scope of Article 352.[47]

Currently, there exist two competing visions on identification of the components of BSD - one by Justice Mathews in *Indira Nehru Gandhi* decision,[48] and another by Justice V. R. Krishna Iyer in *Shri Bhim Singhji* decision.[49] According to Justice Mathews, the basic or foundational features of the Constitution must be grounded in a cluster of constitutional provisions, as they are not based on abstract extra-constitutional principles. His theory can be classified as a textualist vision of BSD. Whereas, according to Justice Krishna Iyer, the components of BSD cannot be grounded in any specific provision or part of the Constitution, as the Constitution is 'founded upon' certain overarching principles in our legal system. As Justice Rohinton Nariman once put it:

> "elements of Basic Structure are probably located where the Elephant is with six blind men, each one shall describe it from his point of view, but it requires some light and sight for us to ultimately see the Elephant".[50]

Perspective, 1986 DUKE L.J. 696, 697; Neal Kumar Katyal & Thomas P. Schmidt, Active Avoidance: The Modern Supreme Court and Legal Change, 128 HARV. L. REV. 2109, 2112 (2015).

[45] Krishnaswamy, Sudhir, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford University Press, 2010).

[46] S R Bommai v. Union of India, [1994] 3 SCC 1.

[47] Baxi, Upendra. "Demosprudence versus jurisprudence: The Indian judicial experience in the context of comparative constitutional studies." Macquarie LJ 14 (2014): 3, p. 15.

[48] Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299.

[49] Maharao Sahib Shri Bhim Singhji Ors. vs. Union of India (UOI) and Ors, AIR 1981 SC 234.

[50] ***See*** the Lecture by Justice Nariman at- https://www.youtube.com/watch?v=LUWeDjsV7u8.

II. UNDERSTANDING THE THEORATICAL BASIS OF BSD AND ADDRESSING THE OBJECTIONS AND CHALLENGES TO ITS APPLICATION

A. THEORIES CONCERNING THE SCOPE AND NATURE OF THE AMENDING POWER VIS-À-VIS CONSTITUENT POWER

In the aftermath of Supreme Court's judgement in *Golaknath v. State of Punjab,*[51] Parliament enacted the 24th Constitutional Amendment, which added the following clause to Article 368 of the Indian Constitution- "*Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution*…".[52] This specific addition raises two very pertinent questions about the scope and content of the amendment powers under Article 368:

1. Why did the Parliament feel the necessity to add the phrase "constituent power", and what were its motives while making that addition?
2. Did the aforesaid addition to Article 368 bestow any additional authority on the Parliament, that might not have existed prior to the 24th amendment?

Before delving into the aforesaid questions, one must ask what "constituent power" means. How is it distinct from Parliament's amending power? Briefly speaking, 'Constituent Power' is the highest form of sovereign authority, which is exercised to enact a Constitution, and consequently establish a constitutional order in the State.[53] It is exercised by a body whose power is plenary in nature, derived directly from the will of the "People",[54] and is not subject to any external limitations. *For example*, the Constituent Assembly of India during the drafting and adoption of the Constitution had exercised constituent power. It had the ultimate autonomy to determine the structure and contents of our Constitution in a manner it deemed fit. Thereafter, once a Constitution is put in place via exercise of constituent power, all State laws, ordinances,

[51] Golaknath v. State of Punjab, AIR 1967 SC 1643.

[52] Constitution (Twenty-Fourth Amendment) Act, 1971, s. 3.

[53] 'Shouldn't We Seek the People's Consent? On the Nexus between the Procedures of Adoption and Amendment of Israel's Constitution', 10 Mishpat U'Mimshal (2007), 449; Carl Joachim Friedrich, Constitutional Government and Politics, Nature and Development, 113 (Friedrich Press, 2007); Samuel Freeman, Constitutional Democracy and the Legitimacy of Judicial Review, 9 LAW AND PHILOSOPHY 327 (1990-1991); Suber, Peter, 'Amendment', Philosophy of Law: An Encyclopaedia I (Christopher B. Gray ed., Garland Pub. Co, 1999), 31.

[54] Upendra Baxi, 'A New Theory About Constituent Power?', Indian Journal of Constitutional & Administrative Law (2018), p.9.

proclamations, constitutional offices draw their authority and legitimacy from the Constitution.[55] Such power rests with only the "People" of the State.

Now let us understand the scope and contours of amending power of the Parliament and whether such power is equivalent to constituent power. To clarify, the amending power is the authority of any parliament to formally bring about changes in the Constitution, in accordance with the method prescribed in the Constitution. Therefore, the amending power is a subsidiary of the constituent power, the distinction is quite clear. As articulated by Professor Upendra Baxi - " *there are several ways to articulate this distinction (constituent v. constituted, original v. derived, exception v. normal, foundational v. quotidian, etc.).*"[56] The issue in *Kesavananda,* as discussed in **Part I** of the Chapter, was whether the amending power under Article 368 of the Indian Constitution is unlimited in content? In that context, I shall shed light upon two theories which justify the limited nature of amendment power:

(1) Derivative Theory

In *Dodge v. Woolsey,* the US Supreme Court held that the amendment power of the Parliament is a delegated power under the Constitution, through a prior exercise of "constituent power".[57] This decision is a good starting point for purposes of discussing the 'derivative theory' of the amendment power. The 'derivative theory' claims that the constitutional authority of the Parliament to amend the Constitution, being sourced from a specific provision of the Constitution, cannot be exercised to repeal or fundamentally change the Constitution (parent source), from which it derives its own authority. On this account, the constituent power, the power of constitution-making, differs from the amending power, the power to amend the constitution and make necessary changes, but not constitution-remaking. This distinction was well-explained by the Indian Supreme Court in *I.R. Coelho (Dead) by L.Rs. vs. State of Tamil Nadu,*[58] in which it held:

> "The distinction is drawn by the author between making of a Constitution by a Constituent Assembly which was not subject to restraints by any external authority as a plenary law-making power and a power to amend the Constitution, a derivative power -derived from the Constitution and subject to the limitations imposed by the Constitution." [**Emphasis added**]

[55] Srinivasan, N. "THE THEORY OF THE CONSTITUENT ASSEMBLY.", The Indian Journal of Political Science, vol. 1, no. 4, 1940, pp. 376–392

[56] Upendra Baxi, 'A New Theory About Constituent Power?', Indian Journal of Constitutional & Administrative Law (2018), p.9.

[57] Dodge v. Woolsey, 59 U.S. (18 How.) 331, 347-348 (1885).

[58] I.R. Coelho (Dead) by L.Rs. vs. State of Tamil Nadu and Ors., AIR 2007 SC 861, ¶29.

In this respect, it would be convenient to term the ultimate authority of "We the People" as 'primary constituent power' and the amending power of the Parliament as 'derivative constituent power'. And, the latter would always rank below the former within a constitutional framework.

While we indulge in this interesting debate, we must give due consideration to the book written by Yaniv Roznai,[59] which is a marvellous commentary on this subject. In this regard, Roznai inquired- if the amendment powers were to be considered equivalent to the constituent power, then why distinguish between the Constituent Assembly and the Parliament in the first place? In his opinion, as amendment power is derived from a certain constitutional provision, it is limited by the overarching identity and terms of the original Constitution.[60]

The work of Prof. Dietrich Conrad, a German legal scholar, was one of primary sources for the development of the BSD in India.[61] Mr. Nambyar, had used the manuscript of a lecture delivered by Prof. Conrad, while arguing in the case of *Golaknath.* According to Prof. Conrad, the power to amend the Constitution arises out of the original Constitution and - "*howsoever verbally unlimited its power*", it cannot destroy or repeal the foundational structure and essential components of the Constitution, as that would result in destruction of its parent authority from which it derives its own power.[62]

To conclude, the supra/extra-constitutional power of a body to enact a Constitution, free from any external restrictions and limitations, can be classified as "*Primary Constituent Power*". Such power is derived from a democratic process to establish a constitutional order in a State and otherwise only comes into play during "extraordinary constitutional moments".[63] Whereas, the amendment power of the Parliament being derived from the original Constitution, which "*We the People"* had

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[59] Yaniv Roznai, Unconstitutional Constitutional Amendments: The Limits of Amendment Powers (Oxford, Oxford University Press, 2017), pp.113-122.

[60] Yaniv Roznai, Unconstitutional Constitutional Amendments: The Limits of Amendment Powers (Oxford, Oxford University Press, 2017), p. 115; ***Also See***, Claude Klein, 'After the Mizrahi Bank Case— The Constituent Power as Seen by the Supreme Court' (1997) 28 Mishpatim 341, 356 [Heb.].

[61] Anil B. Divan, 'Some Personal Glimpses' in Maj Gen Nilendra Kumar (ed.), Nani Palkhivala: A Role Model (Universal Law Publishing 2009) 67, 70.

[62] Dietrich Conrad, 'Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration' (1977– 8) 6– 7 Delhi L. Rev. 17, p. 379; Noorani, A.G.- "Behind the Basic Structure" Doctrine- On India's debt to a German Jurist, Professor Dietrich Conrad", Frontline, Volume 18, Issue 09, (2001).

[63] ***See*** Prateek, Satya, 'Today's Promise, Tomorrow's Constitution: "Basic Structure", Constitutional Transformations and The Future of Political Progress in India', 1 NUJS L. Rev. (2008), 417. ('*The legitimacy of constituent power is premised on the indisputably higher nature of collective authority that is wielded when "people" as a whole engage themselves with political decision-making. This power is the power to constitute afresh, re-organise thoroughly and to reconsider the direction which constitutional form itself might take in future.*")

given to themselves, can be classified as a "*Derivative Constituent Power*", which is inherently limited in its content.[64]

(2) Inside and Outside Theory

Kemal Gözler advocates an "Inside and Outside" theory of the amendment power, which provides another equally compelling justification for the limited nature of the amendment power.[65]

The Theory has two components:

- **'Outside' Authority**: The constituent power to enact a Constitution, which is not limited by any mandate within the State's legal system, is called 'Outside' authority. This is because such power arises outside the State's existing legal framework and is supra-legal and supra-constitutional in nature. It operates in a "legal vacuum", both for establishment of the constitution or for repeal of the existing Constitution. This power rests with the "People", who collectively may exercise this power to establish or repeal a Constitution.
- **'Inside' Authority**: The power to affect the existing constitutional order, but which is limited by a pre-existing mandate (the original Constitution) within the State's framework, is called 'Inside' authority. This is because such power arises from within the State's existing constitutional framework and must therefore, work within the limits of the Original Constitution.[66]

To conclude, I shall answer the two questions raised in the first paragraph of this Part in following terms:

The 24th Amendment to the Indian Constitution was a deliberate and colourable attempt of the Parliament to transform their 'derivative constituent power" into an unrestrained constitution-remaking power. However, in light of the above discussion, the mere addition of the phrase "constituent power" could not have bestowed any additional, or unconstrained power on the Indian Parliament. This position also finds support in the Supreme Court's decision in *Minerva Mills Ltd. v. Union of India,* whereby the Parliament was held to be a trustee of the "derivative

[64] Sieyès, Emmanuel Joseph, 'What is the Third Estate?' [1789], Political Writings (Hackett Publishing Company, Inc, 2003), 136.

[65] Kemal Gözler, *Le pouvoir de révision constitutionnelle* (Thèse, Université Montesquieu– Bordeaux IV, 1995) 12– 32; Kemal Gözler, *Pouvoir constituant* (Ekin Press 1999) 10– 28.

[66] Kemal Gözler, *Le pouvoir de révision constitutionnelle* (Thèse, Université Montesquieu– Bordeaux IV, 1995) 12– 32; Kemal Gözler, *Pouvoir constituant* (Ekin Press 1999) 10– 28.

constituent power" on behalf of "We the people", and the Parliament cannot exercise that limited power to convert or transform it into an unrestrained authority.[67]

B. TEXTUAL CHALLENGE TO BSD

In this Part, I shall deal with the textual challenge to the BSD. Scholars have challenged the legality and grounding of the BSD arguing that the text of Article 368 does not provide for any substantive limitation. As argued by Kemal Gözler,[68] without the presence of any express limitation, the Courts cannot create substantive limitations by merely preferring one grammatical interpretation of the amendment clause over another.

However, I argue that the BSD does have a strong grounding in the text of Article 368, on the following bases:

(1) Interpretation of the term "Amendment": A Classic Polysemy

In 1787, the US Committee on Style of the Constitutional Convention, while deliberating the scope of the term "Amendment" opined that-

> "the term Amendment implied such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed."

Recently, Yaniv Roznai has argued that the literal meaning of the Latin expression "emendere" is to "correct faults".[69] On this basis, Murphy has rightly drawn a distinction between "amendments *to* the Constitution" and "change *of* the Constitution".[70] Accordingly, I believe that an "Amendment" is a qualified term and ought to have a limited and positive/curative effect on the Constitution. In any event, the "*change*" initiated by an amendment cannot be totally alien to the

[67] Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625, (Y.V. Chandrachud, CJ. - "In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.")

[68] Gözler K (2008) Judicial review of constitutional amendments—a comparative study, Ekin, Bursa, pp. 69–71.

[69] Yaniv Roznai, (2018), Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability, p. 48 in Ed. Richard Albert; B. E. Oder, AN UNAMENDABLE CONSTITUTION? UNAMENDABILITY IN CONSTITUTIONAL DEMOCRACIES, Springer (2018).

[70] Murphy WF (1987) Slaughter-house, civil rights, and limits on constitutional change. Am J Juris 32, p. 1, 12–13.

initial constitutional scheme of the State.[71] This position is also supported by several scholarly opinions[72] and judgements from India[73] and Bangladesh.[74]

For example, according to Thomas Cooley, there always exist certain implied limitations on the amendment power and an amendment in question "*cannot be revolutionary, [it] must be harmonious with the body of the instrument*".[75] Other renowned scholars, from different jurisdictions, have also opined that an amendment cannot be inconsistent with the very character and identity of the Constitution, and must be subject to certain implied limitations.[76]

Finally, **it is imperative** to note that there also exist Constitutions with "total revision" clauses, such as Austria (Art. 44), Spain (Art. 168) and Switzerland (Art. 139), which do not use the term "amendment". Such clauses can be used to fully revise the existing constitutional framework. Therefore, by **inverse rationale**, I believe that the jurisdictions or States which have intentionally preferred using the term "amendment", did not intend to allow for total revision of the Constitution.

(2) Interpretation of clauses 1, 2 and 5 of Article 368 of the Indian Constitution

Chief Justice Sikri, in *Kesavananda*,[77] argued that Article 368(2) states that the Constitution shall "*stand*" amended, while the language of the proviso reads- "if such amendment seeks to make any *change in*". This gives support to an interpretation favouring the BSD. The interpretation would have been different had the proviso used the expression "*change of*" or had omitted the word "*in*" and simply stated "*seeks to change*".

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[71] Levinson, Sanford, 'Introduction: Imperfection and Amendability', Responding to Imperfection: The Theory and Practice of Constitutional Amendment (Sanford Levinson ed., Princeton University Press, 1995), 3 [1995A]; Schwartzberg, Melissa, Democracy and Legal Change (Cambridge University Press, 2009).

[72] Marbury, William L. "The Limitations upon the Amending Power." Harvard Law Review, vol. 33, no. 2, 1919, pp. 223–235; Levinson, Sanford, 'Introduction: Imperfection and Amendability', Responding to Imperfection: The Theory and Practice of Constitutional Amendment (Sanford Levinson ed., Princeton University Press, 1995), 3 [1995A]; Schwartzberg, Melissa, Democracy and Legal Change (Cambridge University Press, 2009).

[73] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 (Khanna J., ¶1426-7).

[74] Anwar Hossain Chowdhury v. Bangladesh, 41 DLR 1989 App. Div. 165 (Justice B.H. Chowdhury, ¶196 and Justice Shahabuddin, ¶336, 417).

[75] Cooley, Thomas M., 'Power to Amend the Federal Constitution', 2 *Mich. L. J.* (1893), 109.

[76] Calhoun, John C., *A Disquisition on Government and a Discourse on the Constitution and Government of the United States* (A. S. Johnston, 1851); Jessup, Henry Wynans, *The Bill of Rights and its Destruction by Alleged Due Process of Law* (Chicago, 1927); Skinner, D. George, 'Intrinsic Limitations on the Power of Constitutional Amendment', 18 *Mich. L. Rev.* (1919-1920), 213.

[77] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 [Sikri CJ., ¶53].

Additionally, the BSD can also be grounded in the wording of clauses 1 and 5 of Article 368, which gives Parliament the "power…to amend by way of addition, variation or repeal the *'provisions'* of this Constitution" and does not grant an unlimited power to repeal the Constitution itself. In other words, only the "*provisions*" of the Constitution can be amended under Article 368 and the amending power does not extend to the effect of repealing the Constitution itself or its "basic structure".

III. BANGLADESH: BASIC TO ETERNITY

"*In this free trade of constitutional ideas, the Indian Supreme Court has come to play the role of an exporter.*"

\- Dietrich Conrad[78]

A. ADOPTION OF BSD BY THE SUPREME COURT OF BANGLADESH

The BSD migrated to Bangladesh in 1989, when the Appellate Division of Bangladeshi Supreme Court adopted the doctrine in *Anwar Hossain Chowdhury v. Bangladesh*,[79] by relying on the principles laid down in *Kesavananda*. There were a few interesting opinions in that judgement, where certain judges favoured the 'derivative theory' while others chose to rely on the 'inside-outside theory'.

Justice B. H. Chowdhury articulated the limited nature of amending power by relying on the 'Inside-Outside' theory (Refer to **Part II**). He had observed:

> "…the amending power is but a power given by the Constitution to Parliament, it is a higher power than any other given by the Constitution to Parliament, but nevertheless it is a power within and not outside the Constitution."[80] [**Emphasis added**]

However, Justice S. Ahmed favoured the 'derivative' theory in his reasoning. He observed that the plenary nature of constituent power is not identical to the amending power of the Parliament bestowed by the Constitution itself *i.e.* derivative power.[81] He further analysed which parts of the Constitution can be considered to be a "basic feature". Accordingly, he considered a list of

[78] Dietrich Conrad, 'Basic Structure of the Constitution and Constitutional Principles', in S.J. Sorabjee (ed.), Law and Justice: An Anthology (Delhi, Universal Law Publishing, 2003), 186.

[79] *Anwar Hossain Chowdhury v. Bangladesh*, (1989) BLD (Special) (AD) 1; 41 DLR 1989 App. Div. 165.

[80] Ibid, ¶195 (Chowdhury J.).

[81] Ibid, ¶381, (Shahabuddin J.).

constitutional aspects, such as sovereignty of the citizens, democratic nature of government, separation of powers, constitutional supremacy, judicial independence and fundamental rights.[82]

Henceforth, BSD gradually made a place for itself in Bangladeshi academia[83] and judicial decisions.[84] By applying the BSD, the Supreme Court of Bangladesh has thus far struck down 5 out of 16 constitutional amendments.[85] While striking down the 16th constitutional amendment, in *Government of Bangladesh v. Asaduzzaman Siddiqui,*[86] Chief Justice Surendra Kumar Sinha (writing for the 7-judge bench) and one concurring opinion, cited the *Kesavananda* decision 7 times and relied on 50+ Indian precedents. Accordingly, the BSD has been deeply entrenched into the constitutional jurisprudence of Bangladesh.[87]

B. CURIOUS CASE OF CO-EXISTENCE OF EXPRESS AND IMPLIED LIMITATIONS TO AMENDING POWER

Interestingly, the Bangladeshi Constitution incorporated an eternity clause in 2011, through the 15th constitutional amendment, which reads –

> "7B. Notwithstanding anything contained in article 142 of the Constitution, the preamble, all articles of Part I, all articles of Part II, subject to the provisions of Part IXA all articles of Part III, and the provisions of articles relating to the basic structures of the Constitution including article 150 of Part XI shall not be amendable by way of insertion, modification, substitution, repeal or by any other means." [**Emphasis added**]

Through Article 7B, the Constitution has placed the preamble, all the fundamental principles of state policy and fundamental rights beyond the purview of amendment powers. However,

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[82] Ibid, ¶416-417, (Shahabuddin J.).

[83] Ridwanul Hoque, 'The Judicialization of Politics in Bangladesh', Mark Tushnet and Madhav Khosla (eds), UNSTABLE CONSTITUTIONALISM— LAW AND POLITICS IN SOUTH ASIA (Cambridge University Press 2015) 261, 278–85; Md. Abdul Malek (2017) Vice and virtue of the Basic Structure Doctrine: a comparative analytic reconsideration of the Indian sub-continent's constitutional practices, Commonwealth Law Bulletin, 43:1, 48-74.

[84] Fazle Rabbi v. Election Commission, 44 DLR (1992) 14; Mashihur Rahman v. Bangladesh, 1997 BLD 55.

[85] ***See*** Bangladesh Italian Marble Works Ltd v. Bangladesh, (2006) 14 BLT (Special) (HCD) 1; Khondker Delwar Hossain v. Bangladesh Italian Marble Works Ltd., (2010) 62 DLR (HCD) 298; Siddique Ahmed v. Bangladesh (2011) 63 DLR (HCD) 84; Siddique Ahmed v. Government of Bangladesh and others, (2013) 65 DLR (AD) 8.

[86] CIVIL APPEAL NO.06 OF 2017, Date of Judgment: 3rd July, 2017.

[87] Ridwanul Hoque, Eternal Provisions in the Constitution of Bangladesh: A Constitution Once and for All? In: Albert R., Oder B. (eds) AN UNAMENDABLE CONSTITUTION? (2018), Ius Gentium: Comparative Perspectives on Law and Justice, vol 68, Springer.

fortunately, the Parliament did not close all doors for a judicial application of the BSD, by also including "*articles relating to the basic structures of the Constitution*" in Article 7B. In other words, the determination of which parts of the Constitution, other than the Parts expressly mentioned in Article 7B, forms a part of the 'Basic Structure' has been left open.

This is a peculiar case of both express and implied limitations co-existing in a constitutional system. At this juncture, a befitting analogy comes to my mind – the judgement of the International Court of Justice in *Nicaragua,*[88] wherein the ICJ had held that treaty-based law or codified norms do not subsume an existing customary (uncodified) legal norm and both can independently co-exist. Similarly, the BSD can be considered to be a pre-existing uncodified principle of law and Article 7B (the eternity clause) to be a mere codification and recognition of that uncodified principle. Accordingly, one does not subsume the other and both has its own application sphere. In the era of cross-fertilisation of jurisprudence, using of analogies from international legal adjudication should not be considered irrelevant. Therefore, in conclusion, there exists 2 kinds of limitations to the amending power of the Parliament of Bangladesh:

1. Express limitations under Article 7B; and
2. Implied limitations enforced by the Judiciary and equally backed by Article 7B last part.

IV. CURIOUS CASE OF ISRAEL: A WORK IN PROGRESS

A. BACKGROUND: PECULIAR NATURE OF ISRAELI CONSTITUTIONAL SYSTEM

The question of the applicability of the BSD in Israel is a thorny one. This is due to the absence of a consolidated written Constitution in Israel. Upon the adoption of the Israeli Declaration of Independence, the Constituent Assembly i.e. the People's Council of 1948, failed to adopt a Constitution and the Knesset (Israeli legislature) even today continues to legislate "Basic laws" on various subjects. These 'Basic Laws' are considered to be separate constitutional documents which govern their respective subject matters, such as Judiciary (1984), Human Dignity and Liberty (1992), Freedom of Occupation (1994). It is believed that once all possible basic laws have been enacted, they shall together constitute the Israeli Constitution.

[88] Military and Paramilitary Activities in and Against Nicaragua, Judgment, 1986 I.C.J. Rep. 14, 95.

Aharon Barak, former President of the Israeli Supreme Court, who was an ardent supporter of the BSD as enunciated in *Kesavananda*, considered the applicability of the doctrine in Israel in his extra-judicial writing. He observed[89]-

> "The constitutional project in Israel is a work in progress…. Even if one accepts the basic approach that there are restrictions on the establishment of a constitution in Israel or on the power to amend it, my opinion is that, as long as the project of enacting basic laws has not yet been completed, these restrictions operate in a narrower framework than is customary in comparative law" [**Emphasis added**]

Recently, this notion was adopted by the Israeli Supreme Court in *MK Yousef Jabareen v. Knesset*, whereby President Esther Hayut noted that[90] –

> "For now, and considering the unfinished stage in which the Israeli constitutional enterprise is at, and especially as there are no established procedures for enacting and amending basic laws, there is a great difficulty in adopting a comprehensive doctrine concerning unconstitutional constitutional amendments such as we find in comparative law." [**Emphasis added**]

B. IS THERE ANYTHING BASIC YET?

In Israeli academic circles, there is an ongoing debate concerning the possible application of the BSD on Knesset's power to amend existing basic laws or enact a new basic law which violates another existing basic law or the democratic values of Israel.[91]

In that regard, Yaniv Roznai, in a Symposium on BSD organised by Jindal Global Law School, had argued that the Knesset only exercises a limited secondary/derivative constituent power while amending existing basic laws as well as enacting new basic laws.[92] His argument is premised on the logic that the Knesset derives its authority from the Declaration of Independence, as the first legal norm of the Israeli constitutional system, and therefore it is a derived constituent power and is

[89] Aharon Barak, 'Unconstitutional Constitutional Amendments' (2011) 44(3) Israel Law Review 321.

[90] MK Yousef Jabareen v. Knesset, HCJ 10214/16 (27 May 2018), ¶25.

[91] Claude Klein, 'The Constituent Power in Israel' (1970) 2 Mishpatim 51 (Hebrew).

[92]Roznai Y., Kesavananda in Jerusalem? A report on Constitutional Unamendability in Israel, Symposium on "The Origins, Migration and Influence of the Basic Structure Doctrine" (Jindal Global Law School).

limited by the values embodied within the Declaration of Independence.[93] Recently, even Barak has subscribed to this position on the limited constituent power of Knesset.[94]

However, I would attempt to clearly articulate my humble disagreements with the aforesaid position. To elaborate, I would like to draw a comparison with the Indian Independence Act of 1947,[95] which created the Constituent Assembly of India via Section 8 of the Act. Following the logic of Roznai, the Constituent Assembly of India derived its constituent power from Section 8 of the Indian Independence Act, 1947 and its power must have been limited by the values embodied with the said Act or the Government of India Act, 1935, which was the applicable law in the interim as per Section 8(2) of the Indian Independence Act, till the time the Constitution was adopted. But we all know, that such was not the case. The Constituent Assembly operated as a sovereign body and was not subject to any substantive limitations. It was neither supported nor limited by the colonial law. It continued to exercise primary constituent power; till the time the Constitution was finally adopted by the "We the People" of India.[96]

Similarly, in the case of Israel, I believe the Knesset continues to exercise primary constituent power in the ongoing constitution making process and such power is unrestrained in its content. Till the time the Israeli Constitution is finally adopted by the "People", the Knesset must have the power to enact and amend basic laws as they deem fit, in pursuance of the State goals and objectives. Any limitation on their constituent power would curtail their authority to cure any existing defects and align the basic laws with existing political morality.

This position finds support from both the "Inside-Outside" and the "Derivative Theory", as was discussed in **Part II** of the Chapter. There is no pre-existing constitutional framework in Israel and therefore, there is no mandate governing the exercise of Knesset's power to enact or amend Basic laws. The power of the Knesset is operating in a legal vacuum and while establishing or amending Basic laws, they are exercising an unrestrained constitution making power.

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[93] Ariel Bendor, 'The Legal Status of the Basic Laws' in Aharon Barak and Chaim Berenson (eds.) Berenson Book (Vol 2., Nevo Publishing,2000), 119 (Hebrew); Nadav Dishon, 'Temporary Constitutional Amendments as a Means to Undermine the Democratic Order - Insights from the Israeli Experience' (2018) 51(3) Israel Law Review 389; Claude Klein, 'Is There a Need for an Amending Power Theory?' (1978) 13 Israel Law Review 203; Ariel Bendor, 'The Legal Status of the Basic Laws' in Aharon Barak and Chaim Berenson (Vol 2., Nevo Publishing,2000), 119.

[94] Aharon Barak, 'The Declaration of Independence and the Constituent Assembly' (2018) 11 Hukim – Journal on Legislation (Hebrew).

[95] ***See*** http://www.legislation.gov.uk/ukpga/1947/30/pdfs/ukpga_19470030_en.pdf.

[96] For a detailed discussion on the importance of the phrase "We the People", **See** Swaminathan, Shivprasad. "India's Benign Constitutional Revolution." The Hindu. The Hindu, November 3, 2016. https://www.thehindu.com/opinion/lead/India's-benign-constitutional-revolution/article12318419.ece.

At this juncture it is also important to convey that - while I do understand and acknowledge the fear of arbitrary exercise of constituent power by the Knesset, but it cannot be the sole reason to limit its power. Otherwise, every constituent assembly of a newly formed State shall also be subjected to a similar argument. In any event, the contents of the BSD differ in every State, depending upon the core identity and social values existing there, there cannot be a set international standard in this regard. BSD is not an international, but a purely domestic concept. For example, while 'Secularism' is a part of the basic structure of the Indian Constitution, it may not have a similar place in a country with a state religion.

Therefore, in absence of a consolidated constitution, it is impossible for any adjudicatory body to identify the basic features that may limit the power of the Knesset. However, once the Constitution of Israel is put in place, the Knesset's power henceforth shall become limited by the values set out in the Constitution.