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“POST-COLONIAL CONSTITUTIONALISM AND THE BASIC STRUCTURE DOCTRINE: A COMPARATIVE STUDY OF INDIA AND SOUTH AFRICA”

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Abstract

This paper conducts a comparative analysis of two seminal models of constitutional unamendability in the post-colonial world: India’s judicially crafted “Basic Structure Doctrine” and South Africa’s textually explicit constitutional supremacy. Its central research question explores how these distinct mechanisms represent analogous, yet contextually specific, responses to the threat of majoritarian authoritarianism and the erosion of transformative constitutional values. Employing a methodology of comparative constitutional analysis, the study juxtaposes the historical genesis, doctrinal development, and practical application of both systems. The key finding is that while both nations share a profound commitment to protecting foundational principles like democracy, dignity, and equality from legislative override, they diverge fundamentally in method. India’s Supreme Court developed an implicit, substantive limitation on parliamentary power through judicial innovation, creating a flexible but often contested doctrine. Conversely, South Africa’s Constitution pre-emptively established a supreme legal order with stringent procedural entrenchment, offering greater clarity but less judicial discretion. The paper concludes that both models are effective, though imperfect, guardians of transformative constitutionalism. Their comparative success hinges on their ability to balance democratic legitimacy with robust judicial protection, offering vital lessons for constitutional design in post-colonial societies navigating the tensions between majority rule and minority rights.

1. Introduction

How can a constitution, founded on the principle of democratic rule, legitimately restrict the power of a democratically elected parliament to amend it? This paradox lies at the heart of modern constitutionalism, particularly in nations grappling with the legacy of authoritarian pasts. For post-colonial states, this question is not merely theoretical but a pressing practical concern: how to create an enduring framework for an egalitarian society that cannot be dismantled by temporary legislative majorities seeking a return to old hierarchies.

This dilemma is central to the project of post-colonial constitutionalism—the concerted effort to break from a history of oppression and

discrimination by establishing a new legal order founded on justice, equality, and human dignity. This project inherently rejects the British tradition of absolute parliamentary sovereignty, a model often associated with colonial rule and instead embraces constitutional supremacy. Within this broad movement, the experiences of India and South Africa stand as powerful, yet distinct, experiments in safeguarding a transformative vision.

India, the world’s largest democracy, presents a fascinating case of judicial innovation. Through a series of landmark rulings, its Supreme Court articulated the “Basic Structure Doctrine,” a judicial principle that holds that while Parliament has the power to amend the

constitution, it cannot alter its fundamental, foundational architecture. In contrast, South Africa, born from the struggle against apartheid, chose a path of explicit textual entrenchment. Its 1996 Constitution establishes itself as the supreme law and, in its very text, rigorously entrenches its core principles, mandating special judicial procedures and supermajorities for their amendment, leaving little room for doubt about its supremacy over Parliament.

This paper argues that while both India and South Africa have developed robust mechanisms to protect their constitutions' core transformative values from majoritarian amendment, India's judicially crafted Basic Structure Doctrine and South Africa's textually explicit constitutional supremacy represent two distinct models of post-colonial constitutional guardianship, each deeply reflective of their unique historical and political experiences.

The analysis will proceed as follows. First, it will establish the theoretical framework of post-colonial and transformative constitutionalism. It will then provide the necessary historical context for both nations. The paper will subsequently dedicate a section each to a detailed examination of the genesis and application of India's Basic Structure Doctrine and South Africa's model of constitutional entrenchment. A comparative analysis will then highlight the key points of convergence and divergence between the two models, followed by a discussion of their respective criticisms. The paper will conclude by reflecting on the broader implications of these two approaches for the future of constitutional democracy in the post-colonial world.

2. Theoretical Framework: Post-Colonial Constitutionalism

To understand the constitutional choices of India and South Africa, it is essential to establish a theoretical framework grounded in their shared post-colonial condition. This condition is not merely a chronological marker but defines a particular constitutional project aimed at repudiating the past and constructing a new

future. This framework is built upon three interrelated concepts.

First, Post-Colonial Constitutionalism is characterized by its transformative ambition. Unlike classical liberalism, which often seeks to limit the state's role to protect pre-existing liberties, post-colonial constitutionalism envisions an active state responsible for reshaping society. Its primary aims are to redress profound historical injustices, dismantle entrenched hierarchies of race, caste, and class, establish substantive equality, and protect fundamental rights against all forms of power. Consequently, it is inherently sceptical of untrammelled state power, including the power of a democratically elected parliament, having learned from experience that majorities can be as oppressive as colonial rulers. The constitution, therefore, must act as a counterweight to this power, ensuring the state remains faithful to its transformative goals.

This leads directly to the second concept, Transformative Constitutionalism, a term most explicitly associated with the South African constitutional project but equally applicable to India's. Scholar Karl Klare defines it as "a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction". The constitution is not a neutral rulebook for governance but an instrumental and aspirational document. It is a vehicle for social, economic, and political change, mandating the state to move progressively towards realizing socio-economic rights and creating a more egalitarian society. This transformative mandate justifies a more engaged and initiative-taking role for the judiciary.

The third key conceptual shift is from Parliamentary Sovereignty to Constitutional Supremacy. Both India and South Africa inherited the British tradition of parliamentary sovereignty, a doctrine where the legislature is

the supreme legal authority and cannot be bound by any prior law or bind its successors². This model was integral to the colonial apparatus, allowing laws to be enacted without robust judicial oversight. In rejecting this model, both nations adopted constitutional supremacy. In this system, the constitution is the supreme law of the land. All organs of the state—the executive, the legislature, and the judiciary—are subordinate to it and must comply with its provisions. The judiciary, particularly a constitutional court, acts as the ultimate guardian of the constitution, wielding the power of judicial review to invalidate any law or state action that violates constitutional norms.

This theoretical foundation reveals the central dilemma of post-colonial constitutionalism: the need to create an enduring framework for transformation that cannot be easily undone by temporary legislative majorities.

3. Historical and Constitutional Context

The distinct models of constitutional guardianship developed by India and South Africa are not products of abstract theorizing but are deeply rooted in their specific historical struggles and the political contexts of their founding. Understanding this background is essential to appreciating the rationale behind their chosen paths.

India:

India's constitutional journey was forged in the twin fires of a prolonged freedom struggle and the sudden, violent trauma of Partition in 1947. This cataclysm created an imperative for a strong, unifying central government to hold a vast and diverse nation together. The framers of the Indian Constitution were deeply influenced by the Government of India Act of 1935, which provided a robust administrative framework that was retained. This resulted in a paradox: the new republic's legal and bureaucratic structures exhibited a significant continuity with the colonial state it sought to replace.

The ideological foundations of the Constitution,

as articulated in its Preamble, sought to transcend this colonial legacy by establishing India as a sovereign, socialist, secular, democratic republic committed to securing for its citizens Justice (social, economic, and political), Liberty, Equality, and Fraternity³. This transformative ambition was further elaborated through the Directive Principles of State Policy, which mandated the state to strive for a socialist pattern of society, ensuring economic democracy and redistributive justice. However, this transformative agenda quickly led to conflict. The early government's land reform laws, aimed at dismantling feudal zamindari systems, were challenged in court for violating the fundamental right to property. In cases like *State of Bihar v. Kameshwar Singh* (1952)⁴, the judiciary upheld the reforms, but this early tension between Parliament's power to enact social change and the judiciary's role in protecting fundamental rights set the stage for the epic constitutional battles over the amendment power that would culminate in the Basic Structure Doctrine.

South Africa:

South Africa's constitutional context is defined by the pervasive and brutal legacy of apartheid, a system of institutionalized racial discrimination and oppression. The profound need for a definitive break from this past made the adoption of a supreme constitution with entrenched values an existential necessity. Unlike India's "transfer of power," South Africa's transition was a "negotiated revolution"—a delicate and complex process of bargaining between the apartheid government and the liberation movement.

This process resulted in the Interim Constitution of 1993, which served as a critical "bridge" between the old and new orders. Its primary function was to ensure a peaceful transition by guaranteeing inclusive elections and establishing a Government of National Unity. Crucially, it created the Constitutional Court and mandated it to certify that the final Constitution, to be drafted by a democratically

elected assembly, complied with a set of 34 immutable Constitutional Principles⁵. This unique process ensured that the final constitution was the product of democratic will but was also bound by a pre-commitment to foundational values agreed upon during the negotiations.

The final Constitution of the Republic of South Africa, 1996 is thus a direct repudiation of apartheid. Its foundational values, explicitly enumerated in Section 1, are its very bedrock: human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism, non-sexism, supremacy of the constitution, and universal adult suffrage⁶. This explicit textual entrenchment reflects a collective determination that the core of the new, democratic South Africa must be placed permanently beyond the reach of any future majority that might seek to compromise it. The constitution is not just a legal document but the embodiment of the nation's moral conscience and its commitment to transformative change.

4. The Indian Model: The Basic Structure Doctrine

The Basic Structure Doctrine is a cornerstone of Indian constitutional law, a judicially created principle that limits the power of Parliament to amend the Constitution. Its evolution is a story of a protracted struggle between the judiciary and the legislature over the ultimate source of constitutional authority.

Origins and Evolution:

The doctrine emerged not from a single event but through a series of landmark cases that progressively defined the limits of parliamentary power:

- *Shankari Prasad Singh v. Union of India* (1951) & *Sajjan Singh v. State of Rajasthan* (1965): In these early cases, the Supreme Court adopted a position of deference to Parliament. It held that the term "law" in Article 13 (which invalidates laws that abridge fundamental rights) did not include a "constitutional amendment" passed under Article 368. This

established the initial principle that Parliament could amend any part of the Constitution, including the Fundamental Rights chapter.

- *Golak Nath v. State of Punjab* (1967)⁷: Marking a dramatic shift, an 11-judge bench reversed its earlier stance. By a narrow 6-5 majority, the Court held that Parliament could not amend, abridge, or abrogate any Fundamental Right. It declared that constitutional amendments were "laws" under Article 13 and were therefore subject to judicial review if they violated fundamental rights. This decision provoked a constitutional crisis, leading Parliament to attempt to overrule it through amendments.

- The Landmark: *Kesavan Anda Bharati v. State of Kerala* (1973)⁸: The culmination of this conflict was a hearing before the largest-ever bench of 13 judges. The court overruled *Golak Nath*, upholding Parliament's power to amend any part of the Constitution, including Fundamental Rights. However, by a thin and historic 7-6 majority, it introduced the Basic Structure Doctrine. The court held that while Parliament had the power to amend, this power was limited; it could not be used to alter or destroy the "basic structure" or "essential features" of the Constitution.

- Subsequent Applications and Reaffirmations: The doctrine was swiftly put to the test and firmly entrenched. In *Indira Gandhi Nehru v. Raj Narain* (1975)⁹, during the Emergency, the Court applied the doctrine to invalidate a constitutional amendment that sought to immunize the Prime Minister's election from judicial scrutiny, declaring democracy and the rule of law part of the basic structure. Later, in *Minerva Mills v. Union of India* (1980)¹⁰, the Court struck down amendments that attempted to exclude judicial review of constitutional amendments altogether, firmly establishing that judicial review and a balance between Fundamental Rights and Directive Principles were themselves part of the basic structure.

Content of the Basic Structure:

The doctrine is not defined by a closed list but is

evolutionary. Through various judgments, the Supreme Court has identified the following, among others, as essential features constituting the basic structure:

- Sovereignty and territorial integrity of India
- Secularism
- Democratic and republican form of government
- Federal character of the Constitution
- Separation of powers between the legislature, executive, and judiciary
- Rule of law
- Principle of free and fair elections
- Independence of the Judiciary
- Judicial review
- Dignity of the individual (mandating the protection of fundamental rights)
- The principle of equality Analysis:

The Basic Structure Doctrine is a powerful example of judicial innovation. Its great strength lies in its flexibility; as an unwritten, evolving principle, it can adapt to new threats to constitutional democracy that the framers may not have foreseen. It has proven to be a remarkably resilient bulwark against the concentration of power.

However, this is also the source of its greatest weakness: its ambiguity. The lack of a definitive list of what constitutes the "basic structure" creates legal uncertainty and grants the judiciary immense discretionary power. This has led to persistent and powerful charges of judicial overreach, with critics arguing that an unelected judiciary can veto the will of a democratically elected parliament based on a subjective and undefined standard, thereby undermining the very democratic principles it seeks to protect. The doctrine represents a continuous, dynamic, and often contentious dialogue between the judiciary and the other branches of government.

5. The South African Model: Explicit Constitutional Supremacy

In stark contrast to India's judicial innovation, South Africa's model for protecting its constitutional core is one of explicit textual entrenchment. The South African Constitution does not rely on an implicit doctrine discovered by courts; instead, it establishes itself as the supreme law and, within its own text, sets forth the precise and demanding procedures required to alter its foundational provisions.

Textual Entrenchment:

The 1996 Constitution creates a multi-tiered amendment regime that reflects the supreme importance of its different parts:

- Section 1 - The Foundational Core: This section contains the quintessential values upon which South Africa is founded: "Human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the constitution and the rule of law [and] universal adult suffrage". An amendment to Section 1 is the most difficult to achieve. It requires a supporting vote of 75% of the members of the National Assembly (the lower house) and the support of six out of the nine provinces in the National Council of Provinces (the upper house). This near-consensus requirement ensures that any change to the nation's most fundamental values must enjoy overwhelming multi-racial and multi-regional support, making it impossible for a single party or faction to enact such a change.
- Section 74 - Amending the Constitution: This section outlines a rigorous, procedurally complex process for amending all other parts of the constitution¹². It requires different levels of support depending on the nature of the amendment:
 - For most amendments, a bill must be passed by a two-thirds majority of the National Assembly (66%), and by at least six provinces in the NCOP.
 - Amendments affecting provincial

boundaries, powers, or functions require additional protections, also requiring a two-thirds majority in the NA but only the support of a simpler majority of provinces (at least six) in the NCOP. This structure ensures that the constitution cannot be amended by a simple legislative majority and that the interests of the provinces are protected, reinforcing the cooperative governance model.

The Role of the Constitutional Court:

The primary role of the Constitutional Court in the amendment process is procedural. Its mandate is to adjudicate whether the correct parliamentary procedure, as meticulously outlined in Sections 1 and 74, has been scrupulously followed. This is a more limited, though vital, role than that of the Indian Supreme Court; it acts as the umpire of the process rather than the substantive arbiter of the amendment's content.

However, a compelling legal argument exists that the Court could, in a future case, develop a substantive limitation doctrine. Scholars and jurists debate whether an amendment that successfully navigates the procedural hurdles of Section 74 but blatantly violates the spirit and values of Section 1 (e.g., an amendment that reintroduces racial segregation) could be struck down. The Court's power to ensure that all law and conduct are consistent with the Constitution suggests it might assert such an authority, potentially creating a South African analogue to the basic structure doctrine, albeit one deeply rooted in the text of Section 1.

South Africa's model is a masterclass in textual clarity and democratic legitimacy. The rules of the game are written down for all to see, providing immense predictability and leaving little room for charges of judicial overreach. The high thresholds for amendment ensure that changes enjoy broad-based support, grounding the constitution's supremacy in a democratic mandate.

The trade-off, compared to the Indian model, is a relative lack of judicial flexibility. The South African Parliament, if it can muster the required supermajorities, has a clearer and more certain path to amendment than its Indian counterpart, which is always subject to the unpredictable, judicially defined limitations of the basic structure. The South African model trusts in clear, pre-defined democratic processes, while the Indian model places its ultimate trust in judicial wisdom to protect the constitution from both simple and super majoritarian abuse.

6. Comparative Analysis: Convergence and Divergence

The Indian and South African approaches to constitutional unamendability represent two sophisticated yet distinct solutions to the same fundamental problem: protecting a transformative constitutional order from erosion. While they converge in their ultimate objective, they diverge profoundly in their methodology, source, and philosophical underpinnings. The following analysis synthesizes these points of comparison and contrast.

Analysis:

Aspect	India	South Africa
Source of Limitation	Judicial innovation (Kesavan Andra). The limitation is extrinsic to the text of Article 368 (the amendment article). It was discovered and imposed by the judiciary as a necessary implication of the constitutional framework.	Explicit textual provisions (Sections 1 & 74). The limitations are intrinsic, written directly into the constitutional text by the founders. The rules are self-imposed by the democratic constituent power.

Nature of Limitation	Implicit, substantive. The "basic structure" is an unwritten, evolving set of principles. The judiciary reviews the substance or content of an amendment to judge its compatibility with these abstract principles.	Explicit, primarily procedural (with substantive underpinnings). The focus is on the process of amendment. However, the stringent protection of the substantive values in Section 1 means that procedure serves a deeply substantive goal.
Role of Judiciary	Active, creative, and potentially counter-majoritarian. The judiciary has an initiative-taking role in defining the basic structure and striking down amendments. This is an ongoing, substantive guardianship that can override even a supermajority in Parliament.	Guardian of a pre-defined process; interpretive. The judiciary's primary role is to ensure procedural compliance. It acts as an umpire rather than a co-author. Its role is more limited and deferential to the clear textual rules.
Democratic Legitimacy	Often criticized as "undemocratic" judicial overreach. The doctrine is persistently challenged because unelected judges can invalidate the will of a democratically elected parliament based on a non-textual doctrine. Its legitimacy is derived from its moral authority and successful defines of democracy, not from popular consent.	High legitimacy, as the rules are set out in the constitution itself. The amendment rules were established by the democratically elected constitutional assembly. The high thresholds ensure broad support for any change, making the model democratically legitimate and politically difficult to assail.
Flexibility vs. Certainty	Flexible but uncertain. The doctrine's unwritten nature allows it to adapt to new threats (e.g., the rise of majoritarian authoritarianism). However, this creates legal uncertainty, as the scope of the basic structure is never finally defined.	Certain but less flexible. The rules are clear, predictable, and known to all actors. However, this creates rigidity; if a future supermajority wishes to amend a core value, the textual model provides fewer implicit judicial tools to block it compared to India's fluid doctrine.

Response to History	A reaction to the abuse of parliamentary power and emergency rule. The doctrine emerged as a corrective response to historical events—specifically, the experience of the Indira Gandhi government's authoritarianism during the 1975 Emergency. It is a reactive model.	A direct, pre-emptive rejection of parliamentary sovereignty to prevent any return to apartheid-like rule. The model was designed from the outset to prevent the abuse of power. It is an initiative-taking and pre-emptive architectural choice born from the explicit lessons of apartheid.
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7. Criticisms and Challenges

Despite their critical role in safeguarding constitutional democracy, both the Indian and South African models face significant theoretical and practical criticisms that reveal the inherent tensions in limiting amendment power.

For India: The Perils of Judicial Supremacy

The Indian Basic Structure Doctrine is perennially shadowed by the "counter-majoritarian difficulty"¹³. This central criticism questions the democratic legitimacy of an unelected judiciary invalidating constitutional amendments passed by a democratically elected parliament, and potentially even a supermajority. Critics argue that it constitutes a form of judicial overreach, where appointed judges effectively veto the will of the people's representatives based on a doctrine not found in the constitutional text. This creates a persistent tension between popular sovereignty and constitutional sovereignty, with the judiciary positioned as the ultimate arbiter.

A second major challenge is the vagueness and uncertainty inherent in the doctrine. Because there is no exhaustive, definitive list of what constitutes the "basic structure," its content remains fluid and subject to judicial interpretation in each new case. This creates a lack of predictability for lawmakers and citizens alike and grants the judiciary immense discretionary power. The scope of the doctrine is defined retrospectively, only after a challenge is brought, which can lead to charges of judicial

subjectivity and a lack of clear constraints on judicial authority itself.

For South Africa: The Limits of Textual Entrenchment

The South African model, for all its clarity, faces a more latent but equally profound challenge: the problem of a determined supermajority. The model is designed to prevent amendment by a simple majority, but its procedures are possible to meet. If a future political movement were to secure a 75% majority in the National Assembly and support from six provinces, it could, in theory, legally amend Section 1 and dismantle the very foundational values of the constitution. The model operates on the assumption that such a supermajority would reflect a genuine national consensus, but history shows that supermajorities can sometimes be achieved by illiberal or populist movements. The text itself provides no explicit substantive barrier once the procedural hurdle is cleared.

Consequently, a key criticism is that the model remains untested. It has not faced a serious, determined political campaign to amend its core provisions. Its resilience against a sophisticated and popular assault on the constitutional order is therefore unknown. This uncertainty leads to a crucial jurisprudential question: if such an attempt were made, would the Constitutional Court be forced to invent a substantive basic structure-like doctrine—rooted in the spirit of the Constitution and the 1993 Constitutional Principles—to block it? If it did, it would face the same criticisms of judicial overreach as the Indian model. If it did not, it could be complicit in the legal demise of the

constitutional order it is sworn to protect.

8. Conclusion

This paper has argued that India's Basic Structure Doctrine and South Africa's model of explicit textual entrenchment represent two distinct, yet equally profound, models of post-colonial constitutional guardianship. Each is a sophisticated legal innovation, meticulously designed to protect a transformative constitutional vision, but each emerges from a different source and employs a fundamentally different method to achieve this goal.

Synthesizing the findings, it is clear that both nations, having learned from the traumatic experiences of colonial and apartheid-era abuse of state power, decisively rejected the British tradition of absolute parliamentary sovereignty. Their shared objective was to prevent a return to authoritarianism by placing core constitutional values beyond the reach of ordinary majorities. However, their paths diverged dramatically. India, through a series of judicial battles, developed a judicial "safety valve"—an implicit, evolving substantive doctrine that grants the judiciary ultimate authority to define and protect the constitution's core. In contrast, South Africa, through a negotiated settlement, constructed a "fortress" of textual entrenchment—a precise, procedural mechanism that demands a near-consensus for altering its foundational provisions, grounding its legitimacy in pre-commitment rules established during a democratic founding moment.

Reflecting on the broader significance, these models offer crucial lessons for constitutional design globally, particularly for nations transitioning from conflict or authoritarian rule. The choice between them represents a classic constitutional dilemma: flexibility versus certainty, and judicial guardianship versus democratic pre-commitment. The South African model offers greater democratic legitimacy and predictability, making it potentially more stable and less contentious eventually. However, the Indian model offers superior flexibility and

resilience against novel threats, acting as a dynamic shield where rigid textual rules might fail. There is no definitive answer to which model is more sustainable; each nation must choose the tool best suited to its historical context and political culture. The ideal may lie in a hybrid approach that combines clear textual entrenchment of core values with a recognized judicial role as their ultimate interpreter.

This analysis opens several avenues for further research. A compelling comparative study could examine the application and adaptation of these doctrines in other Commonwealth jurisdictions, such as Bangladesh (which has adopted the basic structure doctrine) or Kenya (whose constitution contains robust entrenchment clauses). Another fruitful area would be to explore the potential for cross-fertilization of ideas between the Indian and South African judiciaries, particularly whether South African courts might, in a future case, develop a substantive jurisprudence based on Section 1, or whether Indian jurisprudence might increasingly look to textual interpretation to bolster the legitimacy of its basic structure review. The dialogue between these two giants of post-colonial constitutionalism continues to provide a rich narrative on the endless quest to perfect the balance between democratic will and constitutional integrity.

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