

Constitutional durability

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SOUTH Asian nations have had some difficulty in maintaining their post-Independence constitutions. Drafted in the euphoria of decolonization, these constitutions have been challenged by revolutions of the political right and left, communal politics and military coups. The Constitution of India 1950, albeit with around 100 constitutional amendments, is the only constitution to survive these onslaughts without a break in application. Bangladesh and Pakistan have endured several phases of constitutional suspension or repeal. The resolution of the ethnic conflict in Sri Lanka partially rests on a revision of the current constitution.

In all these jurisdictions, the courts have engaged with some version of a ‘basic structure doctrine’. The Indian Supreme Court has developed the doctrine into a novel and extensive doctrine of constitutional judicial review. The Pakistani and Bangladeshi Supreme Court have modestly embraced the doctrine in recent years to warn future coup plotters and to entrench a democratic order. The Sri Lankan courts have rejected the argument that the doctrine applies to their constitution.

The basic structure doctrine is often understood as the key judicial instrument that has allowed the Constitution of India 1950 to endure to its 60th anniversary. By contrast the reluctance of other South Asian courts to adopt the doctrine or its equivalent is offered as part of the explanation for the shorter shelf-life of these constitutions.

In this paper I explore whether the adoption of the basic structure doctrine in India is a constitutional design feature relevant to constitutional endurance and durability in India or merely an epiphenomenal indicator of the structural stability of Indian political society? Further, does the basic structure doctrine enhance the stability of the Indian Constitution or does it damage these prospects in the long term? These questions are motivated in part by a recent book by Ginsburg, Melton and Elkins titled *The Endurance of National Constitutions*. This essay begins with an overview of the arguments in the book followed by a brief account of the present status of the basic structure doctrine in India. I conclude with a brief evaluation of the role played by the basic structure doctrine in India’s constitutional endurance considered against the arguments in the book.

This book rests on an extensive empirical study of an original data set of every constitution written since 1789 which is available at the website of the Comparative Constitutions Project.

A review of this data set reveals that the life expectancy of constitutions is 19 years (p. 2). The book seeks to explain the extent to which constitutional survival may be explained by design factors as distinguished from environmental factors. Design factors are those relating to the content and drafting process of the constitution while environmental factors are the national and international circumstances that have an impact on the longevity of the constitution.

The design factors identified by the authors that have a significant bearing on the longevity of constitutions are striking in at least two respects. First, they partially run against the grain of common assumptions about effective constitutional drafting and second, they are exemplified by the Indian Constitution. The first factor that has a significant effect on constitutional longevity is specificity. The authors argue that the greater the level of detail and scope of the constitution, the more likely it is to survive. The Constitution of the United States 1787 which is celebrated for its brevity and emphasis on a few general principles is not a recipe for constitutions that endure. The Constitution of India 1950 with 395 Articles and 12 Schedules is among the longest constitutions in the world and is often subject to criticism on this count. However, it appears that this constitutional excess is a feature that contributes to its longevity.

The second design factor that the study identifies to be positively correlated with enduring constitutions is the degree of inclusion. Where constitutions are drafted and maintained by including a wide range of social and political actors, they endure. The drafting history of the Indian Constitution reveals a concerted attempt to accommodate the diversities of religion, caste, gender, region and language by ensuring diverse representation in the Constituent Assembly. Further, various constitutional devices such as recognition of official languages, asymmetrical federalism, minority rights and the right to practice, profess and propagate religion has allowed for the accommodation of various group interests at critical points in our constitutional development.

The degree of inclusivity and accommodation possible in a constitution rests in part on the political craft and the extent of legal and constitutional self-confidence in a society. The challenges in Jammu and Kashmir and the Naxal problems suggest that the existing asymmetric federal arrangements and intra-state autonomous zones in tribal areas are inadequate responses to these problems. Our ability to recognize inclusivity as a critical ingredient of our constitutional success and to respond creatively by crafting new strategies of constitutional inclusion will have a significant impact on the longevity of the constitution in the near future.

The third design factor that has a significant bearing on constitutional survival is its flexibility. Flexibility is the capacity of a constitution to respond to changes in the environment through formal and informal amendment. Where a constitution is formally amended there is a change in the constitutional text. Informal amendment occurs where a court interprets the constitution in a new manner or the popular understanding of the

constitutional text changes with time. The Indian Constitution provides for three modes of formal constitutional amendment: by ordinary legislation, by super-majoritarian approval in Parliament, and by super-majoritarian parliamentary approval and the assent of one-half of the states. The mode of amendment depends on the provision of the constitution sought to be amended.

While on the face of it, it appears that the Constitution of India 1950 is neither too flexible nor too rigid in practice; it has been amended almost 100 times in 60 years. The flexibility of the Indian Constitution has often been criticized as being the bane of our constitutional system. Academic and political commentators often lament the incapacity of the government and the political class to govern in accordance with the constitution as being the primary motive for the frequency of amendment.

In the light of the evidence and argument in this comparative study of all modern constitutions, the flexibility of constitutional change may well be an important reason for the survival of the Indian Constitution. The attachment to an unchanging constitution appears to be a romantic, but essentially unfounded, aspiration that no enduring constitution is likely to satisfy. Moreover, the Indian experience suggests that political struggles find expression in the formal constitution amending process more readily than in the informal modes through which a constitution may be changed. However, the extent of flexibility embraced by a constitution has to be balanced by a need to preserve its normative character as a higher law that restrains temporary parliamentary majorities.

The evolution and practice of the basic structure doctrine in India responds to this normative concern to preserve the sanctity of the constitution as a higher law. In this part of the essay I examine the development and use of the basic structure doctrine in India and its effect on the flexibility of the constitution. The basic structure doctrine was developed by the Indian Supreme Court in *Kesavananda v. State of Kerala* (AIR 1973 SC 1461) where the court held that the constitutional amending power was subject to implied limitations – basic features of the constitution. There is a significant body of literature on the evolution and history of the doctrine (G. Austin 2003, M.K. Bhandari 1993) and some recent efforts to evaluate and justify the doctrine (S. Sen 2008, S. Krishnaswamy 2009). In this essay I will not revisit or assess this literature, or comprehensively survey the cases, but instead examine some aspects of the doctrine which offers useful insights into the relationship between flexibility and constitutional survival.

The first feature of the doctrine of basic structure that has received inadequate attention in the academic literature is that the doctrine is no longer confined to the judicial review of constitutional amendments. Over the years, the court has extended its use of the doctrine to other forms of state action: emergency powers, ordinary legislative and executive action. This

extended use has transformed the doctrine into a novel form of constitutional judicial review which is distinct from judicial review for constitutional limits on fundamental rights, legislative and executive competence and other constitutional provisions.

In the South Asian context, not all threats to constitutional endurance have emerged through the process of constitutional amendment. As the basic structure doctrine guards against all kinds of extra-constitutional manoeuvring to overcome constitutional limits, it guards against formal and informal constitutional change. We now examine the extent to which the basic structure doctrine impairs the flexibility of the constitution.

The basic structure doctrine does not invoke higher law or natural law principles in constitutional adjudication. The court has decisively rejected the argument that basic features of the constitution are either natural rights (or natural law principles) or higher law principles embedded in our pre-constitutional common law inheritance (*Indira Gandhi v. Raj Narain* 1975 Supreme Court). The method of identifying basic features of the constitution relies on the constitutional provisions for support and is best understood as multi-provisional implication that pays attention to our constitutional history and normative political discourse.

This method of interpretation has been inconsistently applied in basic structure cases but there is little doubt that a careful analysis of precedent endorses this view as the applicable law in this field. By confining the application of the doctrine to the policing of basic features traceable to the Constitution of India 1950, the court is advancing a constitutional doctrine particular to the Indian Constitution. Hence, it does not develop a general constitutional theory about the applicability of basic structure review or the existence of basic features of a constitution in every jurisdiction.

The identification of basic features of the constitution as abstract constitutional norms has important effects on the flexibility it permits and the scope for constitutional amendment. Complex norms such as equality or secularism allow several conceptions to operate consistently with the claim that these norms are being respected. Hence, the court has allowed amendments inserting new affirmative action provisions which have broadened the scope of the equality guarantee to the private sector to be consistent with respect to the basic feature of equality (*Ashok Kumar Thakur* 2008).

Similarly, the court has tested and permitted state action in the acquisition of religious property in the Ayodhya dispute (*Ismail Faruqui* 1994) and the introduction of 'value-based' education (*Aruna Roy* 2002) in school education. By sustaining state action that alters contemporary understanding of a norm but is nevertheless a coherent version of that norm, the court has allowed for a significant degree of flexibility to remain in the constitution. The inherent flexibility in any model of judicial review that tests state action using basic features

of the constitution is confirmed when one looks at the standards of judicial scrutiny in these cases.

Basic structure review assesses whether state action ‘damages or destroys’ basic features of the constitution. The damage or destroy standard establishes a high level of constitutional injury before the court will intervene to strike down the state action. For example, where Parliament alters the domicile requirements for a candidate to the Rajya Sabha from domicile in the state the candidate seeks to represent to domicile in India, it arguably alters the character and composition of the Rajya Sabha (*Kuldip Nayar* 2006). When these modifications to the election rules were challenged on the grounds that Parliament had damaged the ‘federal’ character of the upper chamber of Parliament, the court did not agree with this challenge.

The best manner in which the court’s reasoning may be understood is that the federal character of the Rajya Sabha is maintained by two institutional devices: candidates domiciled in the state and an electoral college composed of members of the state assemblies. As the state action has only altered one of these institutional devices, i.e., the domicile of the candidates, the court concluded that ‘federalism’ was not damaged or destroyed. The less intrusive standard in basic structure review allows for minor infractions of the basic features of the constitution to be upheld and thereby ensures that the constitution remains flexible enough to permit a wide range of constitutional amendment.

Despite the argument above that the basic structure doctrine does not impose severe constraints on the flexibility of the constitution, there is no doubt that it imposes some constraints on constitutional change. The introduction of the basic structure doctrine has not prevented Parliament from enacting constitutional amendments: almost 67 amendments have been passed since the judgment. These amendments include minor as well as significant changes to the constitution such as the introduction of a third tier of government by the Constitution (73rd Amendment) Act, 1993 and the Constitution (74th Amendment) Act, 1993.

The constitutional change the doctrine has hindered is any attempt to comprehensively alter the constitutional framework. The Constitution (42nd Amendment) Act, 1976 and the constitution of a National Commission to Review the Working of the Constitution, 2002 are two attempts to alter constitutional fundamentals. While the former was largely reversed by the Constitution (44th Amendment) Act, 1978 with the change in political party in power at New Delhi, the latter was abandoned after the coalition government in power was forced to concede that the commission would operate within the confines of the basic structure doctrine.

The introduction of the basic structure doctrine institutionalizes a new design factor that constrains radical constitutional change in India. The courts have stressed that these new limits apply only to parliamentary amendment as the 'people' may alter the constitution in this comprehensive manner. This recognition of popular sovereignty has not been refined to qualify the political manner in which the 'people' may deliberate or act to radically alter the constitution in this manner. To the extent that this popular movement is not constrained by constitutional limits, it is an environmental and not design factor that affects constitutional survival.

On the 60th anniversary of the Constitution of India 1950, the overwhelming critical reaction to the constitution's survival is one of pleasant surprise. Most commentators complained that our drafters had bequeathed us a poorly designed constitution that was nested in a hostile political, legal and economic environment. The comparative constitutional study by Elkins and Ginsburg gives us good reason to revisit these complaints and recognize what design factors in our constitution may have contributed to its longevity.

The Indian Constitution measures positively against the three design factors identified by the study: specificity, inclusivity and flexibility. However, the Indian constitutional experience suggests that while flexibility in the ordinary course contributes to constitutional survival, young constitutions need to be protected from radical constitutional change. The basic structure doctrine has exerted some normative force on political actors and institutions in India, which has kept political imagination and expectations in check and thereby ensured constitutional survival. It is not the argument in this essay that the basic structure doctrine as developed by the Indian courts must be adopted by any other jurisdiction in an identical form. Rather, I would argue that the differences in constitutional text, history and politics make reckless adoption hazardous to constitutional survival.

In the Indian context the basic structure doctrine has developed in a sophisticated fashion and is able to distinguish between permissible and radical constitutional change. Thereby, it does not choke political energies that seek expression in the constitutional text. If this is the case, and the Supreme Court continues to develop the doctrine in this nuanced fashion, then the doctrine contributes significantly to our constitution's longevity. Further, the Indian constitutional arrangements with respect to constitutional change suggest a further iteration in the manner in which 'flexibility' is assessed in a comparative constitutional context as a design factor that promotes constitutional survival.

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