
A COMPARATIVE STUDY OF THE BASIC STRUCTURE DOCTRINE IN INDIA AND PAKISTAN: CONSTITUTIONALISM, JUDICIAL REVIEW AND THE LIMITS OF AMENDING POWER

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Article Received: 17 September 2026

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Article Revised: 07 October 2026

LL.M. (Constitutional Law)

Published on: 27 October 2026

DOI: <https://doi-doi.org/101555/ijrpa.1231>

ABSTRACT

Constitutional amendment is the space at the edge of democratic self-government and constitutional restraint. India and Pakistan have a common history in legal and constitutional traditions and both have specially entrenched amendment procedures and yet the courts in both nations have adopted sharply contrasting views on the substantive scope for the limitations of constituent power. Indian basic structure doctrine provides a power that is very wide on the part of Parliament but which cannot be used to delete the very identity of the Constitution. The Pakistani jurisprudence has identified its important features on the constitution like Federalism, Parliamentary Government and Independence of Judiciary and is of divided views on the extent to which these can be invoked to strike down constitutional amendments. The contrast has been accentuated by the 26th Amendment to the Constitution of Pakistan 2024 and 27th Amendment 2025 under which the constitutional adjudication was overhauled, a Federal Constitutional Court was introduced and the wording of Article 239(5) was enhanced to the exclusion of judicial challenges to constitutional amendments. Through doctrinal and comparative analysis of the constitutional texts and seminal cases as well as institutional materials from the current era, the Article argues that the main distinction is not an "activist/parliament" dichotomy. It is in the interplay between the constitutional wording, past institutional history, standards of review and the apparent difference between amendment and replacement of the constitution. The Article advocates the adoption of a structured identity based test, which involves the existence of a more textual foundation,

demonstrable structural relevance, and substantial impairment and also a reasoned remedial threshold before an amendment can be constitutionally destructive.

KEYWORDS: Basic Structure; Constitutional Amendment; Judicial Review; Constitutionalism; Comparative Public Law.

1. INTRODUCTION

Constitutions need to be highly stable yet also flexible enough to keep the pace with social, institutional and democratic adaptation. Thus, the amendment power serves two purposes: it guarantees the continuity of law and enables conscious constitutional change. This tension is manifested in unusually instructive ways in India and Pakistan. The Constitution of India provides for a constituent power of Parliament explicitly in Article 368¹ with certain special conditions. Articles 238 and 239² of the Constitution of the Islamic Republic of Pakistan also allow for a formal parliamentary setting where constitutional amendment can occur, and the current reading of Article 239 comprises an unusually strong bar to judicial challenges to constitutional amendments.

The question in dispute is whether the amendment process is available to a constitutionally established Parliament to change every aspect of the constitutional framework, even those components which render democratic government and judicial review possible. Indian law provides the answer in the form of the basic structure doctrine; according to it, an amendment can alter any provision of the Constitution, but it cannot impair or outrage the basic structure of the Constitution. In Pakistan, the language of salient features and essentials of the constitution has already become a part of the accepted terminology and a doctrine of constitutional essentials has been built, but there have been divergent views about if the language of salient features and essentials is descriptive and interpretive or if they impose restrictions on the power of amendment. It is therefore a question of the constitution not only in terms of its content, but also its authority.³

This Article does not discuss the two as separate and independent national narratives, but rather compares them doctrinally. It looks at how the text of the amending power was designed, the manner in which the judicial reasoning justified or did not justify substantive limits, as well as the institutional implications of amendment review. The emphasis is placed

¹ The Constitution of India, art. 368.

² The Constitution of the Islamic Republic of Pakistan, 1973, arts. 238, 239.

³ Matthew J. Nelson, "Indian Basic Structure Jurisprudence in the Islamic Republic of Pakistan: Reconfiguring the Constitutional Politics of Religion", 13 *Asian Journal of Comparative Law* 333 (2018).

on the constitutional developments in Pakistan, including the Twenty-Sixth Amendment of 2024⁴, which added constitutional benches to the constitution, and the Twenty-Seventh Amendment of 2025⁵, which created a Federal Constitutional Court, and changed the definition of constitutional adjudicatory process. The fundamental point is that constitutional amendment review must be based on a disciplined separation between constitutional amendment and constitutional destruction, with discernible textual and structural arguments, and not an ill-bounded judicial veto.

2. RESEARCH FRAMEWORK

The research framework focuses more specifically on the legal underpinning, functioning and institutional consequences of substantive amendment review. It brings together the research problem, the research questions and the research objectives in line with doctrinal method that can see the distinction between the text of the constitution, judicial interpretation and the normative evaluation.⁶

2.1 Statement of the Problem

There is no clear standard or uncontested principle that allows for an easy decision on how far a formally valid constitutional amendment goes beyond the mandate of an amending institution. In India, the Supreme Court has transformed the implied constitutional boundaries into a tangible 'basic structure doctrine,' which in part depends on the case and the level of intensity of the review. Pakistan's courts have often pointed towards salient constitutional characteristics and held different views on the ability of the court to declare an amendment as unconstitutional. The situation is further exacerbated by the restructuring in the constitutional adjudication in Pakistan in 2024 and 2025, which has made the existing text create a specialised constitutional court and has expressly barred judicial review of constitutional amendments of the country. The comparative question is thus doctrinal and institutional.⁷

2.2 Research Questions

1. How do Article 368 of the Constitution of India and Article 238 and 239 of the Constitution of the Islamic republic of Pakistan allow substantive judicial restraint on constitutional amendment?
2. What have been the ideas of the superior courts of India and Pakistan regarding the relationship between constituent power, constitutional identity and judicial review?

⁴ The Constitution (Twenty-Sixth Amendment) Act, 2024 (Act XXVI of 2024), s. 17.

⁵ The Constitution (Twenty-Seventh Amendment) Act, 2025 (Act XXXII of 2025).

⁶ Terry Hutchinson and Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research", 17 *Deakin Law Review* 83 (2012).

⁷ Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* 70 (Oxford University Press, New Delhi, 1st edn., 2009).

3. Why the basic structure doctrine in India has made it an enforceable limitation and salient-features jurisprudence in Pakistan has been textually and institutionally contested?
4. What are the implications of the two for democratic amendment, judicial independence, constitutional supremacy and the difference between amendment and constitutional replacement?

2.3 Research Objectives

1. To analyse the constitutional framework under which amendments can be made in the Indian and Pakistani constitution, and to identify the procedural and substantive implications.
2. To examine key judicial landmark cases that established the basic structure and salient-features reasoning in the two jurisdictions.
3. To evaluate differences and similarities between the two systems in terms of its doctrinal tests, institutional context, and historical context.
4. To evaluate if a more organized identity-based logic can meet constitutional preservation and the democratic need for legitimate constitutional change.

2.4 Research Methodology

The Article uses doctrinal, analytical and comparative legal approach in the research. Primary materials include the Constitution of India, the Constitution of the Islamic Republic of Pakistan, constitutional amendment Acts and parliamentary materials and reported decisions of the Supreme Court of India and Supreme Court of Pakistan. Current institutional developments in Pakistan are confirmed based on official sources, such as Parliament documents and Federal Constitutional Court (FCC) documents. Academic books, peer-reviewed journal Articles and institutional reports on constitutional amendment and unamendability are secondary materials. The comparison is functional and not merely descriptive: Each jurisdiction is examined under the same variables: sources of the amendment power, substantive limitation, standard of review, judicial remedy and institutional consequence. No interview, survey or other empirical field methods are claimed.⁸

⁸ Terry Hutchinson and Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research", 17 *Deakin Law Review* 83 (2012).

2.5 Research Hypothesis

The research goes forward on the assumption that substantive amendment review will be best justified if it is not a self-standing judicial power to choose between institutional arrangements but, instead, a narrowly reasoned doctrine of constitutional identity. It further speculates that perhaps the Indian doctrine was a bit more stabilized given that the judicially-drafted restrictions had made their way into the jurisprudence of Article 368 on numerous occasions, while the Pakistani salient-features jurisprudence was still inhibited by the stronger textual claims of parliamentary amendment authority and on-going institutional reshaping of constitutional adjudication.⁹

2.6 Scope of the Study

The focus of the study is India and Pakistan only between the time of the inception of their present constitutional regimes until September 2026. Key themes are amendment power, judicial review, constitutional identity, democratic structure, federalism and judicial independence. Basic structure cases are the focus of Indian analysis, while Pakistani analysis focuses on Article 238 and 239, salient features cases, Eighteenth and Twenty-First Amendment litigation, and Twenty-Sixth and Twenty-Seventh Amendments. Only other jurisdictions' comparative theory is introduced to shed light on amendment design and unamendability. The Article does not offer a detailed history of each constitutional change, nor does it assess common laws other than as they relate to amendment-review doctrine.¹⁰

3. LITERATURE REVIEW

The literature shows that there has been a more advanced theoretical discussion on unconstitutional constitutional amendments while a limited work has been conducted on integrating Pakistan's post-2024 institutional restructuring within the comparative perspective of India-Pakistan. The various sources are assessed to see their doctrinal contribution and their comparative utility and remaining unresolved limitations.¹¹

The book, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine*, by Sudhir Krishnaswamy offers a systematic argument for basic structure review as

⁹ Rosalind Dixon and David Landau, "Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment", 13 *International Journal of Constitutional Law* 606 (2015).

¹⁰ The Constitution of the Islamic Republic of Pakistan, 1973, arts. 175A, 175E, 239.

¹¹ Yaniv Roznai, "Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea", 61 *The American Journal of Comparative Law* 657 (2013).

a unique type of judicial review. It provides the basic Indian doctrinal background, however, before the amendment litigation or the recent restructuring in Pakistan.¹²

Granville Austin's book "The Indian Constitution: Cornerstone of a Nation" explores the synthesis of social transformation, rights and institutional government as the Constituent Assembly did. It deals with the history which gives substance to constitutional supremacy, and is thus earlier than the basic structure doctrine itself.¹³

The book, *Working a Democratic Constitution: A History of the Indian Experience*, by Granville Austin, is an account of the constitutional politics of post-1950 India and the role of the Supreme Court as an institution. It is useful in locating amendment cases in the history of politics, but unfortunately, even if one cared to, the historical terminus marries off the more recent applications of the basic structure.¹⁴

In book "Constitutional Amendments: Making, Breaking, Changing Constitutions", Richard Albert distinguishes between constitutional amendment and constitutional dismemberment, and provides a vocabulary for changes that disclaim rather than revise a constitutional order. The theory helps to make comparison but it is not an indicator of domestic judicial competence.¹⁵

In his book "Unconstitutional Constitutional Amendments: The Limits of Amendment Powers", Yaniv Roznai elaborates a comparative theory of limited amendment power, which is based on the derivative character of constituted authority. This is wide enough to allow implied limit analysis and highlights the need for text-specific limits for each jurisdiction.¹⁶

According to Matthew J. Nelson Article "Indian Basic Structure Jurisprudence in the Islamic Republic of Pakistan: Reconfiguring the Constitutional Politics of Religion", Indian basic structure reasoning has been introduced in to Pakistan, for instance the issue of judicial independence and religion-state relations. It is the closest direct comparison, but it predates the 2024 and 2025 amendments in Pakistan.¹⁷

¹² Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* 1 (Oxford University Press, New Delhi, 1st edn., 2009).

¹³ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* 255 (Oxford University Press, New Delhi, 2nd edn., 1999).

¹⁴ Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* 258 (Oxford University Press, New Delhi, 1st edn., 1999).

¹⁵ Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* 91 (Oxford University Press, New York, 1st edn., 2019).

¹⁶ Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* 103 (Oxford University Press, Oxford, 1st edn., 2017).

¹⁷ Matthew J. Nelson, "Indian Basic Structure Jurisprudence in the Islamic Republic of Pakistan: Reconfiguring the Constitutional Politics of Religion", 13 *Asian Journal of Comparative Law* 333 (2018).

In "Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea" Yaniv Roznai traces the transnational diffusion of substantive restraints on amendment, showing that unamendability is not exclusively Indian. Its comparative account does not solve the separate tension caused by the clear words of the Article 239 of Pakistan's Constitution.¹⁸

Rosalind Dixon and David Landau's "Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment" suggests that amendments review can be effective in preventing unconstitutional amendment in bad faith but need to be limited to ensure that constitutional amendment remains among the legitimate powers of democratic government. The calibrated approach is useful in finding the Indian review and the resistance of Pakistanis to judicial supremacy.¹⁹

Richard Albert's Article, "Amending Constitutional Amendment Rules", demonstrates that such amendment rules have substantive constitutional roles and that they, themselves, might need special protection. It has helped to light up the need to question the amendment architecture; it has not, however, provided an India-Pakistan-specific case test.²⁰

Tom Ginsburg and James Melton Article "Does the Constitutional Amendment Rule Matter at All? "Amendment Cultures and the Challenges of Measuring Amendment Difficulty" demonstrates empirically that amendment probability can not only be explained by formal amendment rules, but that amendment culture also plays a crucial role. This serves as a warning against the taking of raw amendment counts as a direct measure of constitutional rigidity.²¹

The Committee of Experts of the European Commission for Democracy through Law (Venice Commission) Report on Constitutional Amendment" discusses the design of amendment, constitutional stability and the role of courts. Its institutional view facilitates flexibility and coherence with preventions against opportunistic change, yet emphasizes the need for adaptation to the text & history of each jurisdiction.²²

¹⁸ Yaniv Roznai, "Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea", 61 *The American Journal of Comparative Law* 657 (2013).

¹⁹ Rosalind Dixon and David Landau, "Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment", 13 *International Journal of Constitutional Law* 606 (2015).

²⁰ Richard Albert, "Amending Constitutional Amendment Rules", 13 *International Journal of Constitutional Law* 655 (2015).

²¹ Tom Ginsburg and James Melton, "Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty", 13 *International Journal of Constitutional Law* 686 (2015).

²² European Commission for Democracy through Law (Venice Commission), "Report on Constitutional Amendment" (CDL-AD(2010)001, January, 2010).

The report “Constitutional Amendment Procedures” by the International Institute for Democracy and Electoral Assistance (International IDEA) presents an overview of the supermajority systems, supermajority entrenchment and other factors affecting the design of amendment procedures. It distinguishes between procedural fixation and substantive inalterability thus underscoring that numbers cannot provide an account of constitutional change.²³

3.1 Research Gap

While much work has been done on the Indian doctrine, and its spread to Pakistan has been traced, much of the direct comparative literature dates back to before the institutional change of 2024 and 2025. If the creation of a permanent Commission on Basic Structure was ever discussed in Pakistan or not is not the issue. It is the way such jurisprudence is supposed to be interpreted now given that Article 239(5) has been updated with new anti-review provisions and the constitutional power has been transferred to a Federal Constitutional Court. The second gap is method: a great deal of comparative writing takes a very high-level look at judicial supremacy vs. parliamentary sovereignty, without articulating an orderly asymptote between former and latter. This Article covers both those gaps.²⁴

4. LEGAL AND JUDICIAL ANALYSIS

The doctrinal analysis is chronological, but emphasizes change in legal reasoning, not a catalogue of decisions. The pivotal question in each jurisdiction is whether the amendment power is considered to be an original sovereign power or should it be understood as a constitutionally delegated competence with a legally delimited field of operation.²⁵

4.1 India: From Parliamentary Authority to Basic Structure

The doctrine of the Indians started from a wide sweeping parliamentary power. In *Sri Sankari Prasad Singh Deo v Union of India & State of Bihar*²⁶, the Supreme Court ruled that a constitutional amendment could be held to be not "law" under Article 13 (2) and thus could be subjected to amendment of the fundamental rights. The case of *I.C. Golak Nath v. State of Punjab*²⁷ took back a step and prospectively denied Parliament the power of amendment to abridge Fundamental rights. That this way was ultimately to be abandoned, however, left a

²³ International Institute for Democracy and Electoral Assistance, *"Constitutional Amendment Procedures"* (Constitution-Building Primer No. 10, 2nd edn., 2017).

²⁴ The Constitution (Twenty-Seventh Amendment) Act, 2025 (Act XXXII of 2025), s. 50.

²⁵ Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* 103 (Oxford University Press, Oxford, 1st edn., 2017).

²⁶ AIR 1951 SC 458.

²⁷ AIR 1967 SC 1643.

lingering issue — would it be enough for the formal agreement with Article 368 to be adhered to or would it be the case that an amendment changing the nature of rights which create the constitutional order would be a problem.

The turning point reconstruction was in *Kesavananda Bharati Sripadagalvaru v. State of Kerala*²⁸. The thirteen-judge bench rejected the possibility of a narrowly legislative interpretation and that of a general constituent power. Excluding the basic structure of the Constitution, every provision could be amended under Article 368, the Court ruled. The doctrine consequently sees Parliament's power as constituent but derivative – it comes by way of the Constitution which gives it and it cannot be used to remove the identity of the giver. The judgment intentionally left the list of basic features open for future courts to fill in the doctrine by application.

Application was clarified as well as risks of the doctrine. The Court struck down constitutional protection for a specific election controversy, linking free and fair elections, rule of law and judicial review to constitutional structure, in *Indira Nehru Gandhi v. Raj Narain*²⁹. The provisions contained in the Forty Second Amendment, aimed at curbing judicial review and making amendment power unlimited came under fire in *Minerva Mills Ltd. v. Union of India*³⁰. Through the limited amending power it was thus imbued in the basic structure itself and Parliament could not be allowed to transform a competence in a constitutionally granted field into a legally unlimited power.

Subsequent decisions took a more specific look at the Constitution. In *I.R. Coelho (Dead) by LRs v. State of Tamil Nadu*³¹, it was ruled that law enacted after 24 April 1973 in Ninth Schedule are not barred from the consideration of basic structure doctrine and can be open to it only if the laws have basic features. Not all of the rights violations were held to be structural violations. It rather questioned whether it affects the constitutional identity guaranteed by the doctrine, the constitutional device itself. That distinction is crucial if basic structure review is not to be used as an all-purpose challenge to amendments which judges consider to be unattractive from a substantive perspective.

This tension can be seen in institutional cases, as well as equality cases. *Supreme Court Advocates-on-Record Association v. Union of India*³² holds the Ninety Ninth Amendment framework (National Judicial Appointments Commission) as invalid due to failure to address

²⁸ (1973) 4 SCC 225.

²⁹ 1975 Supp SCC 1.

³⁰ (1980) 3 SCC 625.

³¹ (2007) 2 SCC 1.

³² (2016) 5 SCC 1.

the distinction between basic structure and the general rules of established and evolving nature of the Constitution. In comparison, *Janhit Abhiyan v. Union of India*³³ had carved out a 3:2 majority verdict in favor of the One Hundred and Third Amendment on Economically Weaker Sections reservation. Basic structure review does not bar substantial constitutional change, as the contrast shows. It is its role "to differentiate allowable reconfiguration from injury to features considered to be constitutive of the constitutional order.

4.2 Pakistan: Salient Features and Amendment Review

The amendment question is stated differently in Pakistan. Amendment can be made under Article 238 by law of Majlis-e-Shoora and Article 239 by supermajorities and (for alteration of provincial boundaries) consent of the provinces. Current clauses (5) and (6) are current deciding issues; clause (5) denies courts any jurisdiction for judging a constitutional amendment on any ground while clause (6) has stated that there is no limitation whatsoever on the power of Parliament in amendment. Thus the debate in Pakistan is not about constitutional silence, but about whether the judicially determined essentials are compatible with the express statements of unlimited amendment powers.³⁴

Early case law was reluctant to have an independent power to strike down constitutional provisions. In *The State v. Zia-ur-Rehman and others*³⁵, the Supreme Court laid stress on the fact that courts interpret the Constitution, not that they strike down constitutional provisions by citing an abstract higher norm. Later, the identification of more salient features such as federalism, parliamentary government and Islamic provisions in the Constitution overruled challenges to the Eighth Amendment by *Mahmood Khan Achakzai and others v. Federation of Pakistan and others*³⁶. Thus, foundational characteristics alone did not necessarily result in a rule of law for judicial invalidation in Indian style.

The confusion was further intensified in *Wukala Mahaz Barai Tahafaz Dastoor and others v. Federation of Pakistan and others*³⁷ with regard to the Fourteenth Amendment provisions and anti-defection laws. The Judiciary's reasoning was: 'Basic features', constitutional interpretation and preservation of the constitutional scheme, however the amendment did not meet its end. As the case makes clear, there is a difference in kind, but salient features can direct interpretation without functioning as a doctrine of substance unamendability.

³³ (2023) 5 SCC 1.

³⁴ The Constitution of the Islamic Republic of Pakistan, 1973, art. 239(5)-(6).

³⁵ PLD 1973 SC 49.

³⁶ PLD 1997 SC 426.

³⁷ PLD 1998 SC 1263.

Unresolved issue was whether that alteration would ever come within the ambit of the judicial power and if so what quantum of damage to the constitution would justify it.

The thrust of the 18th Amendment litigations was on the independence of the judiciary. The Supreme Court in *Nadeem Ahmad, Advocate v. Federation of Pakistan*³⁸ has considered petitions challenging the changes in the judicial appointments system, and sent certain portions of Article 175A back to Parliament for reconsideration. The subsequent Nineteenth Amendment demonstrated the way institutions can dialogue and not immediately strike down the law. By contrast, judicial independence was structurally significant in both countries, but unlike the Pakistani episode, the Indian doctrine allowed for direct invalidation instead of interpretive pressure and legislative reconsideration, in a text that was overwhelmingly oriented toward the authority of parliamentary amendment.

The most challenging face-off was seen during the case of *District Bar Association, Rawalpindi v. Federation of Pakistan*³⁹, where 17 judges were hearing the case challenging the Eighteenth and Twenty-First Amendments. Maintainability was accepted thirteen to four; the Eighteenth Amendment challenges were rejected fourteen to three and the Twenty-First Amendment challenges eleven to six. The opinions failed to generate a single Indian style formula. Some judges were willing to undertake substantive amendment review and others construed that Article 239 was not meant for such review or cautioned against judicial aggrandisement. Hence the judgment highlights the constitutional significance of salient features and a lack of stability of collective remedial rule.

4.3 Post-2024 Constitutional Restructuring

Those unsettled principles have been altered in their institutional setting by recent amendments. The introduction of constitutional benches was made in the Supreme Court by the Twenty-Sixth Amendment of 2024⁴⁰. The Federal Constitutional Court was then introduced in the Twenty-Seventh Amendment of 2025⁴¹, where many constitutional powers were devolved to the Federal Constitutional Court, and the earlier Article 191A was dropped. It also replaced Article 239(5) with the following wording: “Notwithstanding anything contained in the Constitution and any judgment of any Court, no Court shall have jurisdiction to call in question any amendment to the Constitution on any ground whatsoever.”⁴² In

³⁸ PLD 2010 SC 1165.

³⁹ PLD 2015 SC 401.

⁴⁰ The Constitution (Twenty-Sixth Amendment) Act, 2024 (Act XXVI of 2024), s. 17.

⁴¹ The Constitution (Twenty-Seventh Amendment) Act, 2025 (Act XXXII of 2025).

⁴² The Constitution (Twenty-Seventh Amendment) Act, 2025 (Act XXXII of 2025), s. 50.

November 2025, the Federal Constitutional Court officially began constitutional activities.⁴³ The implications on any future claim of salient features has yet to be settled by the courts as of the date of this document (September 2026).

5. COMPARATIVE ANALYSIS

To make a comparison one must not only consider what each court has said, but the question of why similar constitutional concerns result in different legal implications. The contrast is starkest when brought to the same analytical plane as related to textual design, judicial remedy, institutional history and amendment practice.⁴⁴

5.1 Textual Design and the Source of Limits

There being no express eternity clause in the Indian Constitution, limitation must be read into it from the source of constitutional supremacy and its structural and derived nature of Article 368 power. In Pakistan, there is a general power of amendment, an express ouster of jurisdiction and an express declaration of no limitation. That difference alters the role of a judge. A Pakistani court has to account for the space between the lines, as prescribed by an Indian court in the light of Article 368; how substantive review can survive a command in gross issued specifically to courts is a question that needs to be answered.⁴⁵

5.2 Basic Structure and Salient Features

Labels are alike; but they have different legal roles. The basic structure of the constitution is a yardstick which can be referred to for the purpose of striking down an amendment. While being utilized as constitutional descriptions, interpretative principles and as per some interpretations proposed limits, the collective outcomes have been less determinate in Pakistan's salient features. The comparison should then be limited to recognition of the principles that underlie the Constitution rather than to the remedial issue of whether a court can null an amendment if it is found to be unconstitutional. This is particularly relevant in light of the establishment of the Federal Constitutional Court and the reinforcement of Article 239(5).⁴⁶

⁴³ "About US", *available at*: <https://www.fccp.gov.pk/about-us> (last visited on September 29, 2026).

⁴⁴ Rosalind Dixon and David Landau, "Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment", 13 *International Journal of Constitutional Law* 606 (2015).

⁴⁵ Matthew J. Nelson, "Indian Basic Structure Jurisprudence in the Islamic Republic of Pakistan: Reconfiguring the Constitutional Politics of Religion", 13 *Asian Journal of Comparative Law* 333 (2018).

⁴⁶ Yaniv Roznai, "Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea", 61 *The American Journal of Comparative Law* 657 (2013).

5.3 Institutional History and Judicial Independence

The relationship between amendments and judicial independence is established in both systems, but in different ways. The doctrine of India has been nurtured by ongoing constitutional adjudication and repeated applications to the Supreme Court. Pakistan went through constitutional breaks, several changes in a design of judicial appointment and, most recently, the constitutional redistribution. Institutional legitimacy has been linked to these conditions, which in turn explain why it is an issue of amendment doctrine. They also reveal a common risk: in the event of amendments to their composition or jurisdiction, these may require some form of structural protection, but it is essential to have open principles to minimize concerns of any institutional self-interest.⁴⁷

5.4 Judicial Voting in the 2015 Amendment Litigation

The Supreme Court of Pakistan's official reports for Annual Reports of 2015 shows some significant voting split among the 17 judges of the Supreme Court during the amendment litigation, 13 judges to 4 in favor of maintainability, 14 judges to 3 for dismissing challenge upon the Eighteenth Amendment, and 11 judges to 6 for dismissing challenge upon the Twenty-First Amendment. These are figures as institutional data—Table 1 and Figure 1 do not constitute a score of doctrinal legitimacy. The shifting majorities illustrate the reason the opinion is not readily summarizable in terms of a single principle of basic structure review: when looking for an answer to a basic structure challenge, the members of the majority were not of one mind either on theory or remedy.⁴⁸

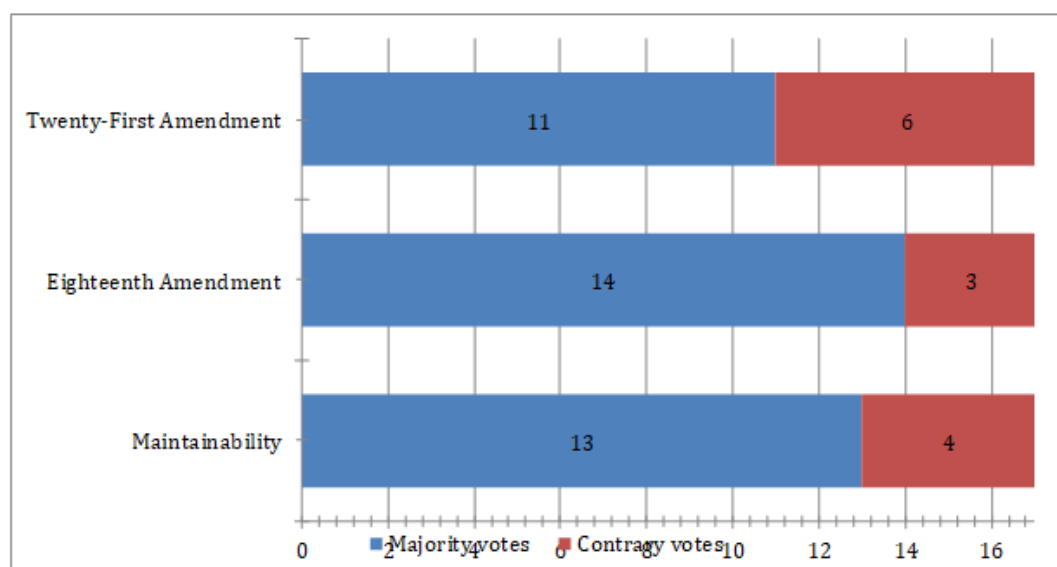
Table 1: Recorded voting splits in the 2015 constitutional amendment litigation.

Issue	Recorded majority outcome	Majority votes	Contrary votes
Maintainability of constitutional petitions	Maintainable	13	4
Eighteenth Amendment challenges	Dismissed	14	3
Twenty-First Amendment challenges	Dismissed	11	6

⁴⁷ Matthew J. Nelson, "Indian Basic Structure Jurisprudence in the Islamic Republic of Pakistan: Reconfiguring the Constitutional Politics of Religion", 13 *Asian Journal of Comparative Law* 333 (2018).

⁴⁸ Supreme Court of Pakistan, "Annual Report June 2015-May 2016" 66 (2016).

NUMBER OF RECORDED VOTES IN THE 2015 AMENDMENT LITIGATION



The data in figure 1 is for the voting split in the Eighteenth and Twenty-First Amendment cases litigated by the Supreme Court of Pakistan in 2015.

6. CRITICAL ANALYSIS AND ORIGINAL CONTRIBUTION

The comparative evidence does not advocate for either unlimited judicial guardianship or an assumption that a constitutional transformation always can be legitimated by formal supermajorities. The more relevant query is what type of legal test will maintain constitutional continuity without sending simple structure review into an indeterminate judicial veto.⁴⁹

6.1 Amendment, Dismemberment and Constitutional Identity

The best argument for substantive review will be one in which an amendment alters the conditions for the persistence of the Constitution as the same legal order. Albert's notion of constitutional dismemberment helps flesh out the line: some changes are dismemberment and some changes are revision. The Indians, however, teach that distinction by “damage or destruction”. Salient-features reasoning is found in Pakistan, where it identifies possible foundations but does not always provide a remedial threshold. Basic should thus be used to express not only significance but in terms of being fundamental, and these courts should clarify how the impugned modification renders a function indispensable to the constitutional order impossible.⁵⁰

⁴⁹ Rosalind Dixon and David Landau, "Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment", 13 *International Journal of Constitutional Law* 606 (2015).

⁵⁰ Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* 91 (Oxford University Press, New York, 1st edn., 2019).

6.2 Democratic Legitimacy and Judicial Self-Restraint

Majoritarian procedure provides democratic legitimacy, but cannot alone address whether an amending body can eliminate the body that gives it legitimacy. Because the judge oversees the exercise of the constituent power, the opposite risk of judicial amendment review exists. Dixon and Landau's narrow view is thus helpful: Review must preserve essential democratic features, but not constitutionalise judicial tastes. There are appointments and jurisdiction cases, where the concern is strongest, and courts have to differentiate between protection of judicial independence and of a certain institutional design.⁵¹

6.3 A Structured Comparative Test

A four-stage test will help clarify review without the need to presume similar remedial powers in India and Pakistan. In turn, the principle on which the claim is based should be firmly rooted in text, structure and established practice. Secondly, its constituting role has to be described. Third, the amendment must materially affect, destroy or replace that function—it cannot simply change policy. Fourthly, remedial authority is a separate matter and there are specific restrictions like Article 239. The line of demarcation between the sequence of recognition of constitutional identity and the line of judicial invalidation is not, as it were, an automatic one, but rather one that is clearly marked and which identifies the precise point on which the two systems diverge.⁵²

7. FINDINGS

The comparative doctrinal analysis produces the following specific findings.

1. Textual Asymmetry in Amendment Review: While the current Article 239 says all the things in plain language, India's substantive limit is judicially implied in the context of a broadly worded Article 368. Thus, the legitimacy query starts from constitutionally different material starting points.⁵³

2. Enforceability Distinguishes the Doctrines: Thus, Indian basic structure doctrine is a rule of invalidation and Pakistani salient features has not always been a rule of invalidation.

⁵¹ Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* 177 (Oxford University Press, Oxford, 1st edn., 2017).

⁵² Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* 70 (Oxford University Press, New Delhi, 1st edn., 2009).

⁵³ Matthew J. Nelson, "Indian Basic Structure Jurisprudence in the Islamic Republic of Pakistan: Reconfiguring the Constitutional Politics of Religion", 13 *Asian Journal of Comparative Law* 333 (2018).

Allowing the two expressions to be used interchangeably hides the main comparative difference.⁵⁴

3. Constitutional Identity Is Not a Closed List: In India, cases describe the basic features contextually and evaluate the structural impairment, instead of having a full codified catalogue. This flexibility allows for adaptation, but also results in an ongoing need for doctrinal boundaries and for good reasons.⁵⁵

4. Pakistani Precedent Remains Plural: The 17-member District Bar decision expressed deep dissatisfaction and disagreement with the challenged amendments as well as with the jurisdiction, even though it left them standing. Thus it is a better characterization to say that the case was a broken-down way of thinking about the Constitution rather than an adoption or rejection of the Indian doctrine.⁵⁶

5. Judicial Independence Is a Common Pressure Point: When the amendment involves increase or decrease in the number of judges or jurisdiction of the courts, both jurisdictions have cited arguments based on constitutional structure. These conflicts create an inevitable tension between safeguarding independent courts and preventing institutional self-preference.⁵⁷

6. Recent Pakistani Amendments Change the Institutional Question: Enhancement in constitutional adjudication was made through the reforms in the year 2024 and 2025, in which Article 239(5) got enhanced. A comparative literature before 2024 has thus an incomplete account of the constitutional allocation of amendment-related authority as it currently stands.⁵⁸

7. Amendment Counts Do Not Measure Rigidity Alone: This difference of 79 between 106 Indian amendments and 27 Pakistani ones is descriptively relevant but analytically incomplete. In order to draw conclusions about the flexibility of the constitution formal rules, political practice, package design and package amendment culture must also be taken into account.⁵⁹

⁵⁴ Yaniv Roznai, "Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea", 61 *The American Journal of Comparative Law* 657 (2013).

⁵⁵ Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* 131 (Oxford University Press, New Delhi, 1st edn., 2009).

⁵⁶ PLD 2015 SC 401.

⁵⁷ Matthew J. Nelson, "Indian Basic Structure Jurisprudence in the Islamic Republic of Pakistan: Reconfiguring the Constitutional Politics of Religion", 13 *Asian Journal of Comparative Law* 333 (2018).

⁵⁸ The Constitution (Twenty-Seventh Amendment) Act, 2025 (Act XXXII of 2025), s. 50.

⁵⁹ Tom Ginsburg and James Melton, "Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty", 13 *International Journal of Constitutional Law* 686 (2015).

8. CONCLUSION

This comparison shows that the basic structure debate is one relating to the legal nature of the constituted amendment power. India's response to that has been to read Article 368 as a grant of constituent power; so broad as to be unlimited as to altering every provision, but not so broad as to cross the limits of the Constitution's foundational identity. By the decision in successive cases, the Supreme Court has rendered the limitation judicially enforceable; and also indicated that there can be a substantial constitutional change which could pass muster with the basic structure test. The configuration is different in Pakistan. Salient constitutional attributes have been frequently identified by its courts but the status of its remedial measures has been disputed, with judicial independence, federalism and parliamentary government put forward as constitutionally significant. The Indian model has always been an odd challenge to the transplantation of Article 239, and the Twenty-Seventh Amendment⁶⁰ further complicates the transplantation with specific language that negates any possibility of a review, and a specially created Federal Constitutional Court. The qualified divergence thus answers the research questions instead of a binary opposition. Both systems recognise that constitutional government relies not only on the existence of certain clauses in the text, but they differ in the distribution of authority with regard to constitutional change. Actually, the strongest comparative argument is one that distinguishes the issue of constitutional identity from the judicial remedy. A disciplined test that necessitates textual underpinnings, constitutive meaning, significant impairment, and an independent remedial inquiry could resolve Indian doctrine and accurately depict the institutional outcome of Pakistani law. While the primacy of democratic amendment in constitutionalism is undeniable, there must also be some intelligible understanding of the moment whereby amendment stop becoming a mere change in the law and becomes a change of the constitutional form itself.⁶¹

9. SUGGESTIONS

The results indicate the following legal workable steps to be taken for better constitution amendment practice in terms of clarity and accountability.

1. Require Express Structural Justification: Parliaments that are considering amendments that impact courts, elections, federal relations or amendment rules should issue a reasoned statement which details the constitutional interests that are at stake. It would enhance the legislative process without delegating the power to amend to the judiciary.

⁶⁰ The Constitution (Twenty-Seventh Amendment) Act, 2025 (Act XXXII of 2025), s. 50.

⁶¹ Matthew J. Nelson, "Indian Basic Structure Jurisprudence in the Islamic Republic of Pakistan: Reconfiguring the Constitutional Politics of Religion", 13 *Asian Journal of Comparative Law* 333 (2018).

2. Differentiate Principle from Institutional Design: Courts should separate out a constitutional principle (such as the independence of the judiciary) from any system in place to ensure that it is carried out. If the constitutional role is adequately safeguarded then an amendment with only this change of institutions should not fail.
3. Adopt a Substantial-Impairment Threshold: The test of review of the basic structure of the Indian Constitution should remain unchanged and the ordinary inconsistent with some constitutional value should not be sufficient. A clearly stated substantial impairment threshold would lessen the risk of becoming blurred between amendment and rights review.
4. Separate Merits from Remedial Competence: In the context of constitutional adjudication in Pakistan, salient features should be distinctly identified from the question of adjudication of remedial jurisdiction under Article 239. This would ensure at least that disagreement was clear even if the constitutional text did not go so far as to strike down the law.
5. Give Reasons for Self-Referential Judicial Review: Similarly, if the amendments relate to changes in judicial appointments, tenure, composition or jurisdiction, courts should explicitly consider institutional self-interest. Enhanced reasons should address the question of whether the constitutional principle under discussion goes beyond just furthering the court's institutional preferences.
6. Preserve Accessible Amendment Records: Legislative powers of both jurisdictions must keep unified (and searchable, version controlled) databases of constitutional changes, bills, statements of objects and voting in the Parliament. Good records would benefit in doctrine studies and for public accountability.
7. Use Comparative Law as Persuasion, Not Transplantation: Before resorting to the foreign amendment doctrine, courts and scholars ought to be mindful of the textual and institutional context which could make the doctrine available. Only after considering Article 239 and the unique constitutional history of Pakistan should Indian precedents be turned to in analysing the situation in Pakistan.
8. Review Amendment Procedure Independently: Supermajorities and provincial ratification and constitutionally mandated voting stages are procedural matters, which should be examined separately from substantive concerns. Substantive disagreement should not be allowed to overlook the flaws in the constitutional framework of amending the constitution.
9. Develop Consistent Constitutional Identity Factors: Reasoned judgments under the basic structure doctrine in India should include each basic feature's textual location, historical continuity, institutional function and precedent. It would be helpful to have a regular pattern of conditions to make it more predictable without becoming a closed list.

10. Periodically Reassess Post-Amendment Institutional Effects: Legislatures should assess key structural changes following implementation. The results should help inform subsequent constitutional reform.

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