COMPARATIVE ANALYSIS OF KELSEN'S THEORY OF GRUNDNORM AND INDIA'S BASIC STRUCTURE DOCTRINE

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ABSTRACT

Grundnorm is a title that is granted to the highest form of the law of a country due to the fact that this title is also known as the basic or fundamental norm. Hence, any law to be made legitimate must have an underlying legal system. This essentially means that no law in the said system can be legislated whose essence is violative of the highest norm

The article begins by outlining legal theories that are essential to determining whether a contemporary legal system, such as India's, can be described without the presence of a supreme norm or authority. The theories are John Austin's command theory of law, as discussed under legal positivism, and Hans Kelsen's discussion on the term Grundnorm under the pure theory of law. These two theories are relevant for the question as they are the ones that deal with a legal system being governed by a supreme norm. However, with both the theories being contrasting in nature, only one can be compatible with the Indian legal system.

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The article further advances by elaborating the said concept by finally contending that the Articles envisaged under the Constitution of India should not be recognized as the Grundnorm of the country, instead, the Basic Structure, i.e., the doctrine identified as the crux and foundation of the Constitution should be acknowledged as the same.

I. NEED FOR A SUPREME NORM?

Initiating the examination of this question by scrutinizing Austin's theory who defined law as a command of the sovereign backed by a sanction, it is essential to break down this definition into its fundamentals for a better understanding of its relevance in the Indian legal system.

1. Austin and the Need for a Supreme Norm

Austin's Command Theory refers to commands as directives given by the political superior i.e., the Sovereign to the political inferiors. Any person or group of people who commands the obedience of the majority of a political society but does not himself command the obedience of others can be recognized as the sovereign. Lastly, any system of imperative law is enforced through sanction, which is a form of coercion. The state's sanction in the administration of justice is physical force.[1]

[1] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED, 60-72 (Lawbook Exchange Ltd., 2012).

By examining the command theory given by Austin, the authors find it evident that the theory lays strong emphasis not just on the State but also on the definition of law. It can be observed that the command theory of law accords the sovereign with the position of ultimate supremacy, implying that the sovereign's authority is absolute and unfettered, as the latter is not answerable to anyone, but the entire country is required to obey its orders. Moreover, as per the said theory, the sovereign's powers are indivisible, essentially meaning that only the sovereign has the authority to establish, execute and administer the laws.[2] Further, a sanction can be perceived as the evil force that is applied to an individual who refuses to accept the sovereign's commands, as Austin states a sanction to be a physical force used by the state to repress people who do not abide by the commands.[3]

These observations lead to the denouncement of the fact that Austin's theory paints a picture of a framework that is completely opposite to the constitutional structure that governs India. The above-mentioned definition implies that the sovereign is politically superior, which goes against the essence of democracy, as the latter grants civil and political rights to every citizen, regardless of them being the President or a regular wage worker.

[2] *Id.*
[3] *Id.*

Moreover, the command theory of law considers courts and judges to be mere delegates of the sovereign.[4] Hence, it can be ascertained that the said theory ignores other sources of law, such as precedents established by judges. The authors observed Austin's theory to be untenable when it comes to laws that do not have sanctions, such as preambles, defining clauses, repealing sections, and beneficial and welfare legislation. Another criticism that follows is that the said theory assumes that the people would obey every command directed by the sovereign without ever questioning it. This stance does not float well with the concept of democracy, as it grants the people the right to protest, criticize, and question any government policies that they deem to be unfit.

India, being a quasi-federal country does not have all the power concentrated in just one political sovereign. The power is decentralized and distributed between Union and the States, and after the 73rd Amendment, with the Panchayats and Municipalities. This is again contrary to Austin's theory.

Further, the element of the sovereign having indivisible power does not sit in conformity with the Rule of law and Separation of Power as it does not permit any authority to wield complete power. The Constitution of India clearly

[4] John Dewey, *Austin's Theory of Sovereignty*, 9(1) POLITICAL SCIENCE QUARTERLY, 31, 49 (1894).

defines the jurisdiction of three organs, i.e., the executive, the legislative, and the judiciary, and expects them to be implemented within their respective authorities without going beyond their limits.[5]

Even the validity of law is although presumed to be valid, if challenged, must pass the challenge of Judicial Review. And in case it falls foul of the Constitution, it can be declared invalid by the Court. However, it is pertinent to note that a glimpse of Austin's view was seen in India in the case of *A.K. Gopalan* v. *State of Madras,*[6] a case from the early 1950s, in which the petitioner was detained under the Preventive Detention Act, 1950. When the Act's constitutionality was questioned, the Supreme Court affirmed its legitimacy, stating that law is "lex" rather than "jus." As a result, even if the legislature's decision is unjust, it is considered the law of the land. This aligns with Austin's idea of law as "what is" rather than "what ought to be." The criminal justice system in India where breaking the law results in punishment is an example of Austin's theory in action.

In modern times, as the Constitution is viewed as a living body, evolving over time, Austin's theory would hold little to no relevance to the Indian legal system. Hans Kelsen,

[5] INDIAN CONST. Art. 50; Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1, 305-306, 519, 598-608.
[6] AIR 1950 SC 27.

on the other hand, does not consider law to be a sovereign command but believes that laws gain legitimacy from certain supreme norms. He rejected the concept of command because it adds a psychological element into what he considered to be a pure philosophy of law.[7]

II. INTRODUCING KELSEN'S GRUNDNORM

The term Grundnorm was first introduced by Kelsen, who, by applying his analysis on Pure Theory of Law, coined the said term, and further scrutinized it into being referred to as the source of positive law.[8] He found the essence of the legal order by excluding the ethical, political, and historical factors. In contradiction to the views of Austin who perceived law to be a command backed by sanction, Kelsen considered law to be pure, i.e., without any psychological factor affecting the theory of law.[9] Moreover, Kelsen further dismissed Austin's operation of sanctions by stating that the said operation is dependent on the operation of other rules of law, indicating the difference between a law and a sanction.[10]

[7] HANS KELSEN, PURE THEORY OF LAW 5 (Lawbook Exchange, 2009).
[8] UTA BINDREITER, WHY GRUNDNORM? A TREATISE ON THE IMPLICATIONS OF KELSEN'S DOCTRINE 58 (Springer, 2003).
[9] KELSEN, *supra* note 7.
[10] RWM DIAS, JURISPRUDENCE, 361 (Aditya Books Pvt. Ltd., 5th ed. 1994).

Based on the definition of the term norm, which means to have instituted a set of rules in order to regulate the behavior of the people, interpretation of positive law has been derived from the said norms to regulate human conduct in a definite way. A norm suggests what ought to be, and not what is or must be. As per Kelsen, 'ought 'does not refer to moral obligation, but simply to normative forms of legal propositions.[11] The legal philosopher periodically noticed that the formation of any legal norm was dependent on other legal norms, as the latter had the power to authorize and validate the former.[12] Kelsen claimed this peculiar trait to be of most significance.[13] Hence, for discerning the legitimacy of a legal norm, the process would always lead the tracer higher on the norm chain and would end with him finally reaching the peak, i.e., the highest norm on the chain. The tracer can recognize the highest norm if the said norm is standing valid solely on the presupposition that the people ought to behave in accordance with it, and not because it has been constructed under the authority of its superior valid norm. This presupposition of the highest norm is called the

[11] 57 HANS KELSEN, WHAT IS JUSTICE?, ESSAYS IN LEGAL AND MORAL PHILOSOPHY, 235-244 (Dordrecht Springer, 1973)
[12] ROGER COTTERRELL, THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY 104 (Lexis Nexis, 2nd ed. 2003).
[13] *Id.*

Grundnorm.[14] Kelsen's pure theory of law has a pyramidical hierarchy based on the Grundnorm as the foundational norm which got its meaning from the German language.[15] It is defined as the assumed ultimate rule by which the norms of any order are constituted and annulled, and their validity is received or lost. The Grundnorm determines the content and verifies additional norms that are derived from it. Although, the question regarding the origin from which it received its legitimacy was never answered by Kelsen, as he claimed the said question to be a meta-physical one. He further stated that the proposed theory was a work of fiction, rather than a hypothesis.

Moreover, the society accepted the concept of presupposition and Grundnorm to give validity to all the other norms, because without it, the country would have no order. Furthermore, any norm can be identified as the Grundnorm if it authorizes or validates the norms underneath it.[16]

As a law regulates its own production, the study of law of dynamics is a necessity. Thus, as per Kelsen, the existence of a Grundnorm will always be present in some form in

[14] HANS KELSEN, GENERAL THEORY OF LAW AND STATE 115 (Routledge, 1st ed. 2005).
[15] William Ebenstein, *The Pure Theory of Law: Demythologizing Legal Thought*, 59 CAL. L. REV. 617, 618 (1971).
[16] KELSEN, *supra* note 7.

every legal order.[17] It goes without saying, after due analysis of both the theories, that in a democratic country like India, application of Kelsen's pure theory of law remains much more relevant in comparison to that of Austin's command theory of law. It is utmost essential for any legal system to have a supreme norm or authority in order to be legitimate.

Accordingly, it is extremely essential to mention that the Indian community has embraced the concepts of presupposition and Grundnorm in order to give validity to all other norms because the country would be chaotic without them.

III. THE INDIAN CONSTITUTION SHOULD NOT BE CALLED THE GRUNDNORM

Through the medium of this section of the article, we shall argue as to why the Constitution of India should not be held as the Grundnorm of the Indian Legal System, as popularly suggested in *Keshavananda Bharti v. State of Kerala.*[18]

As it is essential for every land to have a Grundnorm in order to establish the validity of the rest of the norms, the question that arises is in respect to the Grundnorm of

[17] *Id.*
[18] (1973) 4 SCC 225, 833-846.

India. In most cases, the Constitution of the country is said to be the highest norm as all the other laws need to confer with the criterion mentioned in the said Constitution in order to be declared valid. However, the situation prevalent expresses a different picture.

1. Generally, even the established practice does not envisage the Constitution as the Grundnorm. The authority from which law derives legitimacy keeps on shifting between the two organs of the governments namely, the Judiciary and the Legislature.

When a judge, through his/her decision, creates a norm regarding a situation, it is authorized and validated by the norms governing the court's jurisdiction. Thus, the decision of the court becomes the Grundnorm, instead of the written word inside the Constitution. It essentially means that the judgements rendered by the Supreme Court while interpreting the various provisions of the Constitution and other laws become the law of the land. For example, the Indian Supreme Court in the *Keshavananda Bharati* judgement limited the powers of the Parliament to amend the Constitution although no such limitation was prescribed in the provision.[19]

[19] INDIA CONST. art. 368

Significantly, the Supreme Court in that very judgement also declared the Constitution as the highest norm, i.e., the Grundnorm.[20]

However, the situation reverses when the Legislature tries to overrule the judgement of the Court through the introduction of constitutional amendments as seen in the case of *Indira Gandhi* v. *Raj Narain*[21] wherein Indira Gandhi brought in a constitutional amendment to overrule the High Court judgement cancelling her election. Although the enactment of such constitutional amendment or a legislative enactment may be in line with the procedural norms which, prima facie, are in accordance with the Constitution. But in doing so, the entire scheme of what is the Grundnorm, i.e., the authority from which laws derive legitimacy, shifts from the Constitution to the Judiciary and then to the Legislature. It can, thus, at least be said that the situation becomes ambiguous.

This tussle between the two organs came out in the open during the Indira Gandhi era. The Supreme Court, in *IC Golaknath* v. *State of Punjab,*[22] modified the definition of law as under Article 13 to include constitutional amendments as well. This judgement severely reduced the power of the Parliament to amend the Constitution. In retaliation, the

[20] *Supra* note 18.
[21] (1976) 2 SCR 347.
[22] (1967) 2 SCR 762.

Parliament passed the Twenty Fourth Amendment Act, 1971[23] to nullify the court's decision by adding sub-clause (3) to Article 368 excluding the application of Article 13 on constitutional amendments. Now, this amendment itself was challenged before the Supreme Court in the *Keshavananda Bharati* case. Although the court upheld the validity of the 24th Amendment, it brought into picture the doctrine of inherent limitations: the Basic Structure Doctrine. The Parliament, again, responded by passing the Forty Second Amendment Act[24] thereby including sub-clauses (4) and (5) to Article 368 to invalidate the Supreme Court judgement. This was, lastly, rendered invalid by the *Minerva Mills* v. *Union of India*[25] and the matter in regard to the Parliament's power to amend the Constitution has been laid to rest, however, the tussle between the two organs continues to exist.

1. The premise that the Constitution of India can be widely accepted as the Grundnorm, as according to the plethora of cases,[26] is flawed due to the fact that the Constitution itself grants the ability to be amended.[27] Hence, if the provisions of the

[23] The Constitution (Twenty-fourth Amendment) Act, 1971, Sec. 3(d) (w.e.f. 05.11.1971).
[24] The Constitution (Forty Second Amendment) Act, 1976, Sec. 55 (w.e.f. 03.01.1977).
[25] (1980) 3 SCC 625.
[26] Indira Gandhi v. Raj Narain, (1976) 2 SCR 347; Government of Andhra Pradesh v. P. Laxmi Devi, (2008) AIR SC 1640, 1728.
[27] INDIAN CONST. art. 368.

> Constitution are substantially amended or repealed, its authority would cease to exist as it would no longer be in a position to confer validity to the laws that have been legislated in accordance with it, as the grundnorm can only be altered by a political revolution.[28] Therefore, it would be incorrect to recognize the Constitution as the grundnorm of the country.[29]

Interestingly, during the Review hearings of the *Kesavananda Bharati* case,[30] Justice Beg (as he then was) asked Nani Palkhivala, the lawyer from the Petitioner's side, that he doesn't understand what the basic structure doctrine is, according to him every article is basic? Palkhivala replied that if Justice Beg takes that view then he would be the happiest man in the world since the Constitution would remain as is.[31]

Moving to the topic at hand, there have been, and still are several laws in different Indian statutes that should be declared unconstitutional due to their lack of conformity with the Articles of the Indian Constitution. Some, like Section 377 of the IPC have been read down[32] to bring them in conformity with the Constitution, but others like

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[28] KELSEN, *supra* note 14.
[29] T. C. Hopton, *Grundnorm and Constitution*, 24 MCGILL L.J. 72 (1978).
[30] Keshavananda Bharti v. State of Kerala, (1973) 4 SCC 225.
[31] SOLI SORABJEE & ARVIND DATAR, NANI PALKHIVALA THE COURTROOM GENIUS, 143 (Lexis Nexis, 2012).
[32] Navtej Singh Johar v. Union of India, (2018) AIR SC 4321, 4371.

the second exception to Section 375 of the IPC which legalizes marital rape also violates the Constitution[33] but still continues to exist. Hence, as evident from above, there are laws that have and continue to prevail in contravention to the Indian Constitution and in that condition, the same cannot qualify as the Grundnorm of the country.

Interestingly, during the period after the promulgation of the Constitution and before the First Amendment, the provision of Sedition[34] was also on the verge of being declared unconstitutional[35] but the amendment recused it. Not just that, the first amendment also brought in the infamous Ninth Schedule which protected the Acts in it from Judicial review.[36] Essentially meaning that they could not be declared invalid even on the ground that it contravenes the Constitution.[37] Thus, it can be argued the vision of the Constitution though pompous, is not at all the reality. It is seen to be dismantled and amended to the convenience of the elected forces, even from the ones who drafted the Constitution.[38]

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[33] Anirudh Pratap Singh, *The Impunity of Marital Rape*, THE INDIAN EXPRESS (Dec. 20, 2020), https://indianexpress.com/article/opinion/columns/the-impunity-of-marital-rape/.
[34] Section 124A, Indian Penal Code, 1860
[35] Tara Singh Gopi Chand v. State, (1951) Cri LJ 449.
[36] TRIPURDAMAN SINGH, SIXTEEN STORMY DAYS: THE STORY OF THE FIRST AMENDMENT OF THE CONSTITUTION OF INDIA, 218 (Penguin Vintage Books 2020)
[37] I.R. Coelho v. State Of Tamil Nadu, (2007) AIR SC 861
[38] SINGH, *supra* note 36

Fortunately, the Supreme Court in *Waman Rao v Union of India*[39] saw no justification in continuing the 'blanket protection' on the laws included in the Ninth Schedule and held that "…The various constitutional amendments, by which additions were made to the Ninth Schedule on or after April 24, 1973, will be valid only if they do not damage or destroy the basic structure of the Constitution."[40]

IV. EQUATING KELSEN'S THEORY OF GRUNDNORM AND INDIA'S BASIC STRUCTURE DOCTRINE

The comparative analysis of Kelsen's theory of Grundnorm and India's Basic Structure Doctrine shows the intricacies of structure of both theories. It should be noted that the latter is the foundation of the Constitution, and it is on this foundation that the legitimacy of the Constitution's provisions as well as ordinary legislation are assessed. If a provision contradicts the Constitution's Basic Structure, the provision is deemed invalid. The notion was developed in the form of theory in the landmark *Keshavananda Bharti* case[41] wherein it was ruled that the essential elements of the Constitution, being the basic

[39] Waman Rao v. Union of India, (1981) 2 SCC 362, 397.
[40] *Id.*, at 397.
[41] Keshavananda Bharti v. State of Kerala, (1973) 4 SCC 225.

Structure, is un-amendable and embraces the essence of the Constitution.

Kelsen says that the Grundnorm has to be the highest norm that dictates all the norms that are constituted below it. Hence, by carefully interpreting the said statement, it can be deduced that the Grundnorm cannot be changed or altered, as the ultimate law, if changed, would lead to nullification of all the laws that it previously granted legitimacy to. By analyzing this interpretation on the touchstone of the Indian Constitution, it can be observed that the latter grants the Parliament the power to amend it as per Article 368, it, therefore, makes it possible for the subordinate laws to lose their validity.

It is pertinent to note that the Basic Structure Doctrine is an unamendable norm.[42] Herein unamendable means that the basic structure of the Constitution can be changed, but cannot be substantially altered or destroyed. In the *Minerva Mills judgement*,[43] Bhagwati J. stated that

> [T]he Constitution of India which is essentially a social rather than a political document, is founded on a social philosophy and as such has two main features: basic and circumstantial. The basic constituent remained constant, the

[42] Sajjan Singh v. State of Rajasthan, (1965) 1 SCR 933, 953-955 (Mudholkar J. Dissenting).
[43] Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625.

> circumstantial was subject to change. According to the learned Judges, the broad contours of the basic elements and the fundamental features of the Constitution are delineated in the preamble and the Parliament has no power to abrogate or emasculate those basic elements or fundamental features.[44]

Furthermore, Courts have now interpreted the said doctrine to be the final norm that any ordinary legislative enactments need to be in consonance with.[45]

Hence, from the Basic Structure's inherent nature and the cited case laws, it can be discerned that the people of India have accepted the said doctrine as a presupposition that they 'ought' to follow it in order to give meaning to all the other laws that have already been enacted or might be enacted in the future. Therefore, it is suggested that by being an unamendable norm that authorizes the alleged highest norm, it is the Basic Structure that is actually the highest law of the land, whose essence further lies in accordance with the definition of Kelsen's theory of Grundnorm.

[44] *Id.*, at 640.
[45] Madras Bar Association v. Union of India, (2015) SCC OnLine SC 388.

V. THE LEGITIMACY OF THE BASIC STRUCTURE DOCTRINE AS THE GRUNDNORM

The existence of the Basic Structure doctrine has been criticized by various critics,[46] calling its presence unreal, constitutionally illegitimate while some have gone so far as to call it a "*vehicle for judicial aggrandizement of power*".[47] However, relying on the case of *Ashok Kumar Thakur v Union of India,*[48] Senior Advocate Arvind Datar has written that negating the basic structure doctrine would create a scenario wherein it would not be difficult for populist figures to create a totalitarian regime.[49] "When judicial review is barred, democracy evaporates."[50]

By analyzing the judgement of *Manoj Narula v. Union of India,*[51] it is inferred that the existence of the said Structure is justified through the doctrine of Implied Limitations as the Constitution of India has been laid down in a written form, it is not a common occurrence to have everything expressly stated. That is why the doctrine of Implied Limitation is a necessity as it grants life to certain implied

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[46] THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE USA 46-47 (Little, Brown and Co., 3rd ed. 1891).
[47] District Bar Association v. Federation of Pakistan, (2015) PLD SC 401 (Pakistan).
[48] (2008) 6 SCC 1.
[49] SANJAY S. JAIN ET AL., THE BASIC STRUCTURE DOCTRINE - A 37-YEAR JOURNEY, IN BASIC STRUCTURE CONSTITUTIONALISM: REVISITING KESAVANANDA BHARATI 370 (1st ed. 2011).
[50] *Supra* note 48 at 668.
[51] (2014) SCC OnLine SC 640.

powers and conditions in a Constitution which cannot be avoided or amended as it is the foundation on which the said Constitution is built.

As it has been laid down in the *Keshavananda Bharti* case, the basic structure is the foundation of the Constitution of India which not only validates its provisions but also the amendments made. It argues that the Constitution, through its written and unwritten provisions, contains a 'solemn and dignified' structure that is fundamental to the Constitution.[52] Though the Parliament has drastic powers to amend the Constitution, it also has certain implied limitations. These implied limitations point out that even though the Constitution can be changed, its core, its essence, its basic structure must be retained.

Such foundations or values that the constitution exhibits have categorically been laid down to mean different things such as Secularism[53], Democracy[54], Federalism[55], etc. as per different benches of the Supreme Court. These values, also known as Constitutional Morality, acts as a response to the controversial debate between Critical morality and Conventional morality, wherein Critical morality is universally applicable, regardless of which society or time

[52] Sajjan Singh v. State of Rajasthan, (1965) 1 SCR 933, 953-955 (Mudholkar J. Dissenting).
[53] SR Bommai v. Union of India, (1994) AIR SC 1918, 2216.
[54] Indira Gandhi v. Raj Narain, (1976) 2 SCR 347.
[55] Keshavananda Bharti v. State of Kerala, (1973) 4 SCC 225.

period an individual life in,[56] however, following and accepting society's norms and thinking about those rules to distinguish good and evil is what conventional morality entails.[57]

VI. UNDERSTANDING CONSTITUTIONAL MORALITY AS THE BASIC STRUCTURE DOCTRINE

Moving back towards the discussion on Constitutional Morality, it can be argued that Constitutional Morality can be comprehended to mean the Basic Structure of the Constitution. This statement emerges from the argument that the values occupying both these doctrines such as rule of law, democracy, freedom of speech and expression, etc. are largely the same. Both of these doctrines talk about the crux of the Constitution, the morals of the Constitution, the essence of the Constitution.[58] Thus, it would be not incorrect to equate the said doctrines.

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[56] Arjun Singal, *Critical Morality & the Hivemind*, LAW SCHOOL POLICY REVIEW & KAUTILYA SOCIETY (Dec. 31, 2018), https://lawschoolpolicyreview.com/2018/12/31/critical-morality-the-hivemind/.

[57] *Id.*; Ronald Dworkin '*Social Rules and Legal Theory* ,81 YALE L.J. 855-890 (1972).

[58] AMBEDKAR,'SPEECH DELIVERED ON 25 NOVEMBER 1949', THE CONSTITUTION AND THE CONSTITUENT ASSEMBLY DEBATES 107-131, 171-183 (Lok Sabha Secretariat, Delhi, 1990).

This can be best exemplified by comparing the *Sabarimala* case *(Original*[59] *and Review*[60]*)* and the *SR Bommai* case.[61] Gogoi CJ. in the *Sabarimala review* case explained that that "'Constitutional Morality' is nothing but the values inculcated by the Constitution, which are contained in the Preamble read with various other parts, in particular, Parts III and IV thereof."[62] Chandrachud J. (in the *Sabarimala* case) further explained that the fundamental principles which emerge in the preamble along with basic postulates of Liberty, dignity, equality, etc. are infused with Constitutional Morality in its contents. "These are the means to secure Justice e in all its dimensions to the individual citizen."[63] In the SR Bommai case, Ramaswamy J. categorically laid down that "the preamble of the Constitution is an integral part of the Constitution. Democratic form of Government, federal structure, unity and integrity of the nation, secularism, socialism, social justice and judicial review are basic features of the Constitution."[64] On analyzing the above stated two judgements, it becomes clear that the values being

[59] Indian Young Lawyers Assn. (Sabarimala Temple-5J.) v. State of Kerala, (2019) 11 SCC 1.
[60] Kantaru Rajeevaru (Sabarimala Temple Review-5 J.) v. Indian Young Lawyers Assn., (2020) 2 SCC 1.
[61] S.R. Bommai v. Union of India, (1994) 3 SCC 1.
[62] Kantaru Rajeevaru (Sabarimala Temple Review-5 J.) v. Indian Young Lawyers Assn., (2020) 2 SCC 1, 28.
[63] Indian Young Lawyers Assn. (Sabarimala Temple-5J.) v. State of Kerala, (2019) 11 SCC 1, 157.
[64] S.R. Bommai v. Union of India, (1994) 3 SCC 1, 205.

occupied by both the doctrines are largely the same. Both the theories talk about the integral nature of the preamble, the values of Judicial Review, Social Justice, etc. can be said to be located within Part III and Part IV of the Constitution.

Though, it can be argued that the Basic Structure is said to be a Doctrine that limits the powers that the Parliament can exercise, whereas, constitutional morality is a principle that is directive in nature and both are independent of each other. However, it should be noted that constitutional morality being a directive does essentially indicate that it holds certain limitations over the powers of the Parliament as well as any principle that commands the government to follow a specific route, inherently restricts the same from going off of it. Hence, even though the two theories might seem different from afar, deeper observation of the same portrays that their essence remains synonymous.

The principle of constitutional morality has remained in the constitutional scheme of India since the 1950s, with due credits to Dr. Ambedkar. Unfortunately, it has largely remained dormant in practice. It states that it is essential for a person to follow and consider the norms of the Constitution as supreme and should further avoid acting in an inconsistent manner so as to violate such rules.[65] It

[65] Manoj Narula v. Union of India, (2014) SCC OnLine SC 640.

makes the evaluation of even non-constitutional structures including social practices (evils) 'through the prism of Constitutional Morality.'[66] This approach would render the concerns surrounding critical and conventional morality redundant as the validity of any given law could be established by testing its essence on the touchstone of the Constitution, which, as per the Indian context, is required to be in conformity with the Basic Structure.

Therefore, it is contended that the premise of calling the Basic Structure the Grundnorm of the country should, instead of being dismissed, rather be established to mitigate the adoption of unconstitutional practices such as critical or conventional morality for testing the constitutional legitimacy of laws.

VII. LIMITATIONS AND SOLUTIONS TO THE BASIC STRUCTURE DOCTRINE AS THE GRUNDNORM

It is pertinent to mention that the Supreme Court in the case of *Kuldip Nayar* v. *Union of India*[67] limited the scope of basic structure doctrine by disallowing any challenge to ordinary enactments on the basis of it violating the said doctrine. This essentially implies that although the basic structure doctrine can be invoked to nullify constitutional

[66] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, 145; Indian Young Lawyers Assn. (Sabarimala Temple-5J.) v. State of Kerala, (2019) 11 SCC 1, 242.
[67] (2006) 7 SCC 1.

amendments, but fails in case ordinary laws violate the basic structure. This has been a severe impediment in the establishment of the Basic Structure Doctrine as the Grundnorm. However, the Supreme Court has subtly altered its stand in the *Madras Bar Association* case[68] wherein the Court, though only through its obiter, accepted that ordinary enactments could be challenged on the ground of violating the Basic Structure doctrine.

Even in certain previous judgements, the Supreme Court had held ordinary laws or their provisions unconstitutional on the ground that they violated the basic structure. Notably in the *DC Wadhwa* case[69], the Supreme Court, while quoting *SP Gupta* judgement[70], the Supreme Court struck down the re-promulgation of ordinances in Bihar and stated that "The rule of law constitutes the core of our Constitution and it is the essence of the rule of law that the exercise of the power by the State whether it be the legislature or the executive or any other authority should be within the constitutional limitations."[71] In this particular case, the term 'constitutional limitations' can be understood to include the Basic Doctrine as well.

[68] Madras Bar Association v. Union of India, (2015) SCC OnLine SC 388, 189-190.
[69] D.C. Wadhwa v. State of Bihar, (1987) 1 SCC 378.
[70] S.P. Gupta v. Union of India, 1981 Supp SCC 87, 218.
[71] *Supra* note 69 at 383.

In the case of *L. Chandra Kumar* v. *Union of India*,[72] the Supreme Court declared invalid Section 28 of the Central Administrative Tribunals Act, 1985 which excluded the jurisdiction of high courts as under Article 226/227 against the decisions of the Central Administrative Tribunals on the ground that it violated the principle of Judicial review, which is a 'part of the inviolable basic structure of our Constitution.'[73] Lastly, the Supreme Court in the case of *Indra Sawhney* v. *Union of India*[74] declared the Kerela Law regarding the on reservation for the 'creamy layer' violated the doctrine of basic structure. The Court went so far as to state that the Kerela government's 'virtual defiance' to the earlier *Indira Sawhney* judgement[75] was a violation of the "concept of Separation of Powers which has also been held to be a basic feature of the Constitution."[76]

These aforesaid judgments open the grounds of challenge as against ordinary Acts to basic structure doctrine, but their value as a precedent cannot completely be accepted in the presence of the *Kuldip Nayar* judgment. Nevertheless, the principle of constitutional morality has been gaining much traction. It was cited by the Delhi High Court in the case of *Naz Foundation* v. *Government of NCT of*

[72] (1997) 3 SCC 261.
[73] *Id.,* at 311.
[74] Indra Sawhney (2) v. Union of India, (2000) 1 SCC 168.
[75] Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217.
[76] *Supra* note 75 at 208.

Delhi[77] to invalidate Section 377 of the IPC. This judgement was, at last, validated by the Supreme Court, while again quoting constitutional morality. These principles of Constitutional Morality have also been followed in a catena of Supreme Court judgements such as the *GNCTD* case[78] and the *Sabarimala* verdict [79]as well.

In the *GNCTD* case, the Supreme Court while ruling that the Lieutenant governor of Delhi exercised "complete control of all matters regarding National Capital Territory (NCT) of Delhi" stated that:

> The Court must take into consideration constitutional morality, which is a guiding spirit for all stakeholders in a democracy. … In discharging his constitutional role, the Lieutenant Governor has to be conscious of the fact that the Council of Ministers which tenders aid and advice is elected to serve the people and represents both the aspirations and responsibilities of democracy.[80]

In the *Sabarimala* case as well, Chandrachud J. said that that "It is the duty of the courts to ensure that what is protected (by the constitution) is in conformity with fundamental

[77] (2009) SCC OnLine Del 1762.
[78] State (NCT of Delhi) v. Union of India, (2018) 8 SCC 501.
[79] Indian Young Lawyers Assn.(Sabarimala Temple-5J.) v. State of Kerala, (2019) 11 SCC 1.
[80] *Supra* note 78, 740.

constitutional values and guarantees and accords with constitutional morality."[81]

Thus, if the equivalence between constitutional morality and Basic Structure is permitted, the grounds for challenging ordinary enactments shall become open to the Basic Structure Doctrine. This will further establish the credence of the Basic Structure as Kelsen's Grundnorm.

VIII. CONCLUSION

It is summarized that the Basic Structure should be identified as the Grundnorm of not just the Indian legal system but the entire country instead of the Constitution of India as the former validates the latter, making itself the highest norm of the country. It also transforms the age-old rivalry between critical and conventional morality unnecessary by establishing constitutional morality or the basic structure theory as an unrivalled norm. The argument equalizing constitutional morality and the Basic Structure doctrine will open up vast avenues for challenge in the upcoming Constitutional cases disputing the legitimacy of Electoral Bonds and Citizenship Amendment Act where Petitioners have argued the violation of the Basic Structure doctrine.

[81] Indian Young Lawyers Assn.(Sabarimala Temple-5J.) v. State of Kerala, (2019) 11 SCC 1, 188.

Lastly, the Basic Structure lies above the problems faced by the Constitution regarding its ability to be amended and the existence of laws that are not in compliance with the Constitution. As substantiated above, the authority of the Basic Structure is unfettered in being residuary of the values inherent of the Constitution and in granting legitimacy to the ordinary legislations as well as Constitutional amendments.