Grounding the Basic Structure in Legal Theory

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In this article, I would join the everlasting debate on theorizing the basic Structure doctrine of the Indian Constitution. Having demonstrated that it cannot be justified either in orthodox positivism of Austin or Kelsenite normativity, I would make a modest case of its grounding in modern *Avatara* of analytical jurisprudence, popularly known as Inclusive legal positivism.

Orthodox positivism and the Doctrine of Basic Structure

Austin defines law as a command of sovereign which imposes a duty of compliance coupled with a threat of sanction, in the event of breach of this duty.[1] In his own words, the existence of law is one thing, it's merit and demerit is quite another. A law which actually exists is law, even when we happen to dislike it or when it is in variance with the text by which we regulate our approbation or disapprobation[2]. This means that Austin refuses to apply a moral criterion for the existence of law. Once a rule of conduct is laid down by the sovereign, it becomes law irrespective of its demerits. Another feature of Austin's concept of sovereignty is that for him, sovereignty is indivisible and illimitable. Thus, a Constitution, on this analysis, is a system of positive morality and therefore, cannot bind the sovereign. To capture this idea in the context of the Constitution of India, we can examine 'the power to amend the Constitution conferred upon the parliament by Article 368,' which is textually unlimited. To further amplify this point, since the constitution does not expressly limit the power of the parliament in the literal sense, it is not open to the Courts to imply any limitations on the same for two obvious reasons -

(i) Doctrine of Separation of powers interdicts the courts from interfering with the powers of the parliament to amend the Constitution.

(ii) Judicial invocation of Doctrine of Basic structure by default tantamount to imposition of limitations retrospectively.

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1 See generally, the excerpts from Austin, the province of Jurisprudence determined, 1954, in Ed. M.D.A. Freeman "LLOYD'S INTRODUCTION TO JURISPRUDENCE. 1994, pp 252 et. seq. Sixth edition. Sweet and Maxwell Pub

2 G.W. Paton, "A TEXTBOOK OF JURISPRUDENCE" Oxford University Press 2017.

In Sankari Prasad & Sajjan Singh,[3] the Supreme Court drew a distinction between legislative and constituent powers, holding that the former being subject to fundamental rights by virtue of Article 13 and other provisions of Constitution (Articles 245-246), is amenable to judicial review; whereas the latter being an exercise of plenary constituent power cannot be equated with ordinary law-making power so as to bring them within the scope of judicial review.

Kelsen's Normativity and Basic Structure:

Unlike Austin, Kelsen described legal system as a hierarchy of norms, thereby bringing out the interrelationship between different norms of the same system,[4] In order to keep the theory of law pure, he rigorously argued for separation of his theory from other sources of sciences like sociology, economics, or metaphysics.

Kelsen considered legal science as a pyramid of norms with the grundnorm (basic norm) at the apex. The subordinate norms are controlled by norms superior to them in hierarchical order. The basic norm, which is otherwise called grundnorm is however independent of any other norm being at the apex. The process of one norm deriving it's power from the norm immediately superior to it until it reaches the grundnorm was termed by Kelsen as concretization of the legal system. Thus, a system of norms proceeds from downwards to upwards and finally it closes to the grundnorm at the top. The grundnorm is taken for granted as a norm-creating organ and the creation of it cannot be scientifically demonstrated and is not required to be validated by any other norm. For example, a statute or law is valid because it derives its authority from a norm *i.e.* the Constitution; as to the question from where does the constitution derives its validity there is no answer, as same is a grundnorm. In this view the basic norm is the result of social, economic, political and other conditions and is supposed to be valid by itself.

Kelsen's analysis raises an important question about the characterization of amending power under Article 368 as it originally stood, merely laid down the procedure to the amend the Constitution. According to Kelsen, the basic norm performs three functions. It lays down-

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3 *Sri Sankari Prasad Singh Deo v. Union of India* 1951 AIR 458, 1952 SCR 89; *Sajjan Singh v. State of Rajasthan* 1965 AIR 845, 1965 SCR (1) 933

4 See generally, Kelsen, The Pure Theory of Law and Analytical Jurisprudence, 55 HARV. L. REV. 44, 44(1941)

1) the norms describing where the legislative power resides.
2) the procedure to be followed while exercising the legislative power.
3) the limit subject to which a legislative power is to be exercised.

It is submitted that Article 368 as it originally stood performed dual functions-

1) Housing of the sovereign power to amend the Constitution and
2) The procedure to be followed while exercising the same.

Thus, it will be seen that the ultimate power to amend the Constitution is limited in its very nature because the power to amend the Constitution should be rule born and rule bound. Therefore, the constituent power to amend the constitution is subject to the procedure prescribed by the norms itself.[5] That is the reason why RAY J in his dissenting opinion, in Kesavananda Bharati, recognized that the power to amend the constitution is open to judicial review on procedural grounds, while totally rejecting the majority's theory of implied substantive limitations on the constituent power to amend the Constitution. Since the constituent power is limited only procedurally and not substantively in the terms of the text of the basic norm, the doctrine of basic structure cannot be defended on the analysis of Kelsen's theory of law. There is an additional reason why Kelsen's theory cannot be invoked to justify the doctrine of basic structure, *i.e.* amendment of the Constitution is at *par* with the Constitution itself. The validity of the law in Kelsen's theory of hierarchy of law depends on the application of higher laws to determine the validity of lower norms, for example, the validity of subordinate legislation can be tested by reference to the parent's statute while the validity of the parent's statute can be tested by the Constitution which is the basic norm. Since, in the exercise of constituent power the amendments are made to basic norm itself, such amended provisions become its integral parts and the validity of the one part of the basic norm cannot be tested by reference to other parts of the basic norm. Furthermore, the existence and validity of the norm does not depend on the content of the norm but has to be ascertained by content independent criterion of being created or authorized by an anterior superior norm. It is a plain fact that the existence of basic structure is knowable by reference

5 *Kihito Hollohan v. Zachillhu* 1992 Supp (2) SCC 651.

to the content of the Constitution and on some standard of significance or importance of that content. It is yet another ground for not justifying the basic structure by applying Kelsen's theory of law.

Last but not the least, although Kelsen was one of the ardent advocates for the creation of the Constitutional Court to repose in it the guardianship of the Constitution, in the same vein, he was categorical in his view in characterizing the same as merely the negative legislature.[6] Considering the problem of the legitimacy of the concentrated system of judicial review, in particular, he established the compatibility of the system with the principle of separation of powers. He opined that an organ of the State other than the Legislature could invalidate the statutes without invading its domain. For him to invalidate a statute would tantamount to creation of a general norm as the annulment of the statute and its adoption were according to him, two sides of the same coin.[7] In other words, he characterized the power of the Constitutional court to invalidate the Statute as integral to the Legislative power. However, he construed this power of Constitutional court as negative. Rather, he very famously asserted that Constitutional courts are negative legislatures. He distinguished this negative dimension of the legislative power of the Court by arguing that the positive legislative power of the legislature lies in 'Free creation of Norms'. The latter is not reflected in the former (Annulment of statutes), which is essentially jurisdictional function and can only be performed in the application of norms of the Constitution, and being absolutely determined by the Constitution itself.[8] Whereas the determination of the Basic structure of the constitution being a function based on examination of consequences and impact of an amendment on the original constitution, is more or less the function of an 'Activist Court', which may also be colourfully described as court as positive legislature.[9] The function of the Constitutional

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6 The views of Kelsen on this matter, directed at non-German-speaking readers, were expressed in his 1928 article "The Jurisdictional Guarantee of the Constitution" Hans Kelsen, La garantie juridictionnelle de la Constitution [The Jurisdictional Protection of the Constitution], 44 R.D.P. 197 (1928).,"

7 See generally Part One Allen Brewer ED "Constitutional Courts as positive Legislators: a comparatve Law study" Cambridge university press 2011. pp 10.

8 Ed and Translated by Lars vinx "The *Guardian* of the *Constitution*. Hans Kelsen and Carl Schmitt on the Limits of *Constitutional* Law." Cambridge University press 2015

9 See generally Surya Deva "constitutional Courts as positive legislators : Indian Experience" in Allen Brewer ed, "Constitutional Courts as positive Legislators: a comparative Law study" Cambridge university press 2011 PP 587-602. Professor U Baxi in his famous article "little done –Vast undone" has also opined that Supreme court shares constituent powers with parliament. SC itself has endorsed this view in I.R. Cohelo's 2007 case.

court while determining the basic structure requires it to not only identify certain values but also to commit the Constitution to such values as 'basic structure'.[10] Thus, to sum up, neither Austin nor Kelsen's theory can justify the doctrine of basic structure. The question then arises, 'Can modern positivist theory justify the doctrine of basic structure?'

Modern positivism and doctrine of Basic Structure

Modern Positivism has mainly two planks, *Inclusive positivism and Exclusive Positivism*. The latter does not recognize even the contingent connection between law and morality, whereas the former, though does not seek or advocate any connection between law and morality for existence of a legal system, it is however opposed to inclusion of morality as one of the criterion of validity by a legal system, *i.e.* it *per se* doesn't detract from contingent connection between law and morality. Joseph Raz is one of the leading proponents of Exclusive positivism,[11] whereas legendary legal icon HLA Hart,[12] is the main proponent of the Inclusive positivism, whereas, disciple of prof Hart, Prof Ronald Dworkin with his assumption of coexistence of law and morality as a foundation of legal system occupies an enviable position in the ever expanding horizon of Legal theory. He has propounded the famous school of thought, "the moral reading of the Constitution".[13]

Hartian rule of recognition and Basic Structure

Without reference to Hart's conception of law,[14] grounding of Basic structure in legal theory would be incomplete. Hart argues that a legal system is comprised of two types of rules & primary rules (*i.e.* duty imposing rules) & secondary rules (*i.e.* power conferring rules). The primitive communities comprise only of primary rules and suffered from three defects.

1. Uncertainty
2. Inefficiency

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10 *M. Nagraj and Others v. Union of India,* 2006 (8) SCC 212; *I.R. Cohelo (Dead) by LRS v. State of Tamil Nadu.* 2007 (2) SCC 1.

11 Andrei Marmor, "Exclusive Legal Positivism" in Ed. Jules L. Coleman, Kenneth Einar Himma, and Scott J. Shapiro "The Oxford Handbook of Jurisprudence and Philosophy of Law" Oxford University Press 2004.

12 "Concept of Law" HLA Hart (Author), Leslie Green (Author), Joseph Raz (Editor), Penelope A. Bulloch (Editor) Third edition, Oxford University Press 2014.

13 Ronald Dworkin, "Freedom's Law: The Moral Reading of the American Constitution," Harvard University Press 1997.

14 See generally Chapter 6, "Modern trends in analytical and normative jurisprudence' id at Pp 339-355, in Ed. M.D.A. Freeman "Llyod's introduction to Jurisprudence 1994.

3. Instability

However, these defects are cured by establishing three types of secondary rules[15].

1) Rule of change – conferring powers on legislature to change laws.

2) Rule of adjudication –empowering the courts to authoritatively determine the meaning of the rules.

3) Rule of recognition – establishing authoritative criteria of validity of the laws of legal system.[16]

Unlike Kelsen's basic norms, Hart's idea of rule of recognition is not based on any assumption; but the practice of the officials and the judges. The question to be asked is whether the judges and the officials treat particular rule of recognition as a common public standard of behavior from an internal point of view. In the context of the doctrine of basic structure, the question arises whether it constitutes an ultimate rule of recognition in a Hartian sense. It is trite knowledge that the Supreme Court has consistently treated basic structure as a criterion of validity not only of the constituent power of parliament to amend the constitution but also of the legislative and executive powers.[17] Additionally, the doctrine of basic structure is also perceived as a formative context in which the provisions of the constitution and statute are to be interpreted.[18]

However, in order to constitute rule of recognition, the basic structure must also be shown to be perceived by the officials as a common public standard of behavior from an internal point of view. It is submitted that after the 42nd amendment Act, there has been no serious challenge to features which are held by the court to be part of the basic structure of the Constitution either by the parliament while exercising constituent and legislative powers or by the government while exercising executive powers. Similarly, judges have also shown deference to the wisdom of parliament by not addressing the issue of merits of an amendment to the constitution.

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15 See generally Chapter 1 "Aspects of Law and Legal systems" in Ed. Jeffrey Brand's "Philosophy of Law: Introducing Jurisprudence" Bloomsbury London.

16 Eugenio Bulygin "On the Rule of Recognition (1976)" ed. Eugenio Bulygin, Carlos Bernal, Carla Huerta, Tecla Mazzarese, José Juan Moreso, Pablo E. Navarro, and Stanley L. Paulson "Essays in Legal Philosophy" 2015 Oxford university Press.

17 *Ismail Farooq v. Union of India* (1994) 6 SCC 360. (legislative power), *S.R Bommai v. Union of India* (1994) 3 SCC 1.(executive power))

18 *B.R. Kapoor v. State of Tamil Nadu* (2001) 7 SCC 231,

Furthermore, the parliament was put on notice about the limits on its constituent powers by the Supreme Court in Golaknath[19], Kesavananda Bharti[20] and recently in the NJAC case[21]. The Supreme court has however, showed great deference to the 101st Amendment of the Constitution resulting in fundamental changes in the economic Constitution of India and particularly in the fiscal relationship between center and the States.[22] It is therefore plausible to argue on the sociological plank that basic structure is an ultimate rule of recognition and has been accepted as a political practice shared by the judges and the officials together. The court observed on the strength of S.R. Bommai, "the power of judicial review is a constituent power that cannot be abrogated by judicial process of interpretation. It is a cardinal principle of our Constitution that no one can claim to be the sole judge of the power given under the Constitution. It is the duty of this court to uphold the Constitutional values and enforce constitutional limitations as the ultimate interpreter of the Constitution…"[23]

Inclusive Legal Positivism and Basic Structure

The notion of inclusive positivism is best captured in the following passages in an article by Professor Himma-"Knowing there can be legal systems without moral criteria of validity, however, does not tell us anything about whether there can be legal systems *with* moral criteria of validity. Inclusive positivists subscribe to the Incorporation Thesis, according to which there are conceptually possible legal systems in which the validity criteria include substantive moral norms. In such legal systems, whether a norm is legally valid depends, at least in part, on the logical relation of its content to the content of the relevant moral norms."[24]

According to him, the incorporation thesis is enmeshed with two constitutive elements, "sufficiency component and necessity component". Articulating the same, he observes, "According to the Sufficiency Component, there are conceptually possible legal systems in which, it is a sufficient condition for a norm to be legally valid that it reproduces the content of some moral principle. The Sufficiency Component

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19 *Golaknath v. State of Punjab* (1967 AIR 1643
20 *Kesavananda Bharati Sripadagalvaru and Others v. State of Kerala and Another* (1973) 4 SCC
21 *National Judicial Appointments Commission v. Union of India* (2016) 4 SCC 1
22 *See Union of India v. Mohit Mineral Pvt Ltd* AIR 2018 SC 5318
23 Id at Para 40, M Nagraj
24 Kenneth Himma "Inclusive Legal Positivism" Ed. Jules L. Coleman, Kenneth Einar Himma, and Scott J. Shapiro "The Oxford Handbook of Jurisprudence and Philosophy of Law" Oxford University Press 2004.

allows, then, that an unpromulgated norm might be legally valid in virtue of its moral content. According to the Necessity Component, there are conceptually possible legal systems in which it is a necessary condition for a norm to be legally valid that its content be consistent with some set of moral norms. Thus, the Necessity Component allows morality to serve as a constraint on promulgated law; it is not enough for a norm to be valid that its content stands in the appropriate logical relation to the content of some moral norms."[25]

A careful analysis of Constitution of India would demonstrate how sufficiency component is reflected in the background assumptions underlying it and how the necessity component echoes explicitly through provisions like Articles 19, 25 and 26.

In this connection, scholarship of Prof Jules Coleman is also worth attention. He attracts the attention of readers, by articulating two different ways in which connection between law and morality can coexist in a legal order. Firstly, he describes Moral Semantics thesis. "The moral semantics thesis is not the claim that the content of law is a moral directive. It is a claim about how the content of the law can be (accurately or truthfully) described. The moral semantics thesis is the view that the content of law can be truthfully redescribed as expressing a moral directive or authorization."[26] The proposition that law calls for moral semantics can be explained by the following example, 'Exercise of amending power by Parliament under Article 368 in violation of Basic structure is Unconstitutional', expresses the directive: 'Basic structure is not to be violated' is the content of the law. The moral semantics claim is that 'Basic structure is not to be violated' can be redescribed truthfully as 'Violation of Basic structure is morally wrong'.[27] Prof Coleman reiterates, claim of law is a claim about truthful descriptions or redescriptions of legal content; not a claim about the constitutive elements of legal content. Specifically, it holds that the content of law can truthfully be redescribed as a moral directive (or authorization, as the case may be).

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25 Ibid

26 Jules Coleman "Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence" Oxford Journal of Legal Studies, Volume 27, Issue 4, Winter 2007, Pages 581–608. Id at Pp. 592-93.

27 Prof Coleman draws insights from Donald Davidson, He famously claims that the same act admits of a number of true descriptions of it, under certain conditions. Thus violation of basic structure may be truthfully describe to give rise different consequences contextually.

Similarly, in articulation of descriptive jurisprudence[28] and why it is preferable over normative jurisprudence,[29] Prof Coleman offers a very incisive three steps analysis. Firstly, any theory of law must have the resources adequate to explain why being governed by law is necessarily and importantly, valuable or desirable (the adequacy condition);[30] Secondly, What we want in a theory of law is *not* the value that law exhibits, but factors that very different theories can point to that are both essential to law and help us to understand the value law has from the point of view of the relevant theory (the elasticity /flexibility condition)[31]; Thirdly, an explanation of why law is desirable must make reference to at least some of law's essential features. If it is true that law is desirable but we cannot make sense of this by reference to some list of its essential features, then that list is incomplete or we have an inadequate account of what law is (the salient feature condition).[32]

If we take a look at the journey of the basic structure of the Indian Constitution, it is not difficult to read all the three features of descriptive jurisprudence as well as the moral semantic thesis of Professor Coleman into it. In fact, the strength of the Basic structure doctrine is its resilience to fit in varying contexts. At any rate, inclusive legal positivism being a pantheon of a variety of themes, the variance about basic structure in judicial discourse is but natural. Moreover, an actual legal system is not supposed to be a barometer for the success or failure of a concept or doctrine, rather concept or doctrines are evolved by scholars in a particular frame and it is too much to expect from these scholars to capture the entire legal order within such frame. It is therefore, justified on the part of judges, while invoking theories, doctrines and standards to engage in fine tuning of the same with the actual legal order.

To the great extent the observations of Kuldip Singh J in *Supreme Court Advocates on Record Association v. U.O.I.*[33] embraces inclusive legal positivism in the aforementioned spirit, "that the court is the guardian of constitutional values." The doctrine of basic structure is an attempt to identify the constitutional values and

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28 Descriptive jurisprudence claims that law can be analyzed entirely in terms of its formal features. Ibid PP 598.
29 Normative jurisprudence denies this. It claims that any theory of law must make reference to material features of law or to the substantive value of living under law. Id at Pp 598 F N 38.
30 Id at PP 606, Jules Coleman "Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence" OXFORD JOURNAL OF LEGAL STUDIES, Volume 27, Issue 4, Winter 2007
31 Id at PP 606-607.
32 Id at PP 607.
33 (1993) 4 SCC 441.

evaluate its importance as a first step and then to find out whether a particular amendment has the consequence of destroying any of the essential elements of the basic features of the constitution." It is this appeal to constitutional values in the formation of basic structure which constitutes the basis for "*inclusive positivism"*[34] or *"incorporationism"*. When the court is engaged in the task of identification of the constitutional values, it follows approach adopted by inclusive positivism, for example Justice S.H. Kapadia observed in *M. Nagraj,*[35] that provisions in part III of the Constitution, incorporate certain fundamental values. Certain fundamental rights in part III represent foundational values but its scope and extent is to be ascertained by reading the provisions of Constitution, which is the supreme positive law of the land. As professor J. Stone observes, the analytical jurisprudence is interested in studying not the *de facto* interest, but the manner in which and the extent to which the *de facto* interest is secured by positive legal order.[36] Furthermore as an inclusive positivist rule of recognition, basic structure necessarily invokes principles and standards. Therefore, it is necessary to consider the manner in which a court constructs principles and standards, by reference to the provisions of the Constitution. According to the Court, "the recognition of a basic structure in the context of amendment provides an insight that there are, beyond the words of particular provisions, systematic principles underlying and connecting the provisions of the Constitution. These principles give coherence to the Constitution and make it an organic whole. These principles are part of the constitutional law even if they are not expressly stated in the form of rules. An instance is the principle of reasonableness which connects Arts 14, 19 and 21. Some of these principles may be so important and fundamental as to qualify as essential features, or part of the basic structure of the Constitution. That is to say, they are not open to amendment. However, it is only by linking provisions of the Constitution to such over-arching principles that one would be able to distinguish essential from less essential features of the constitution."[37]

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34 For the purposes of this paper inclusive positivism refers to the process of identifying the contents of rule of recognition by reference to moral or ethical standards. It is in this sense that basic structure, is content dependent criterion of validity.

35 *Nagraj and Others v. Union of India and Others* AIR 2007 SC 71;

36 See Julius Stone, "Legal systems, and lawyer's reasoning" Stanford University Press. (1964)

37 See Para 18, M Nagraj

A substance of the principle does not lie in a particular provision exclusively, rather it can be gathered only through a conjoint reading of multiple provisions. According to the Court, this process brings out coherence of values and principles. The concept of coherence in the contemplation of the Supreme Court is not a formal notion but a substantive one.

Finally, it may be observed that the court has confined the doctrine of basic structure only to those principles and standards, which are analogues to Constitutional axioms. Thus, the Supreme Court refused to accord principles of service jurisprudence, the status of fundamental Constitutional principle. The court categorically held, *"The concept of catch up rule and consequential seniority are judicially evolved concepts to control the extent of reservation. The source of these concepts is in service jurisprudence. These concepts cannot be elevated to the status of an axiom like secularism and constitutional sovereignty*".[38] Similarly, the court also held that an amendment of the constitution, which confers fictional immunity on the laws, could be hit by the doctrine of basic structure because there are no standards laid down in Article 31-B.[39] Thus it will be seen that the doctrine of basic structure is a rule of recognition constituted by reference to principles and standards which are grounded in the text of the constitution and the courts would indulge in their preservation against total destruction and exclusion in the exercise of constituent power by the parliament of India.

Whatever be the position one may take with regard to general and descriptive jurisprudence, it is a well-established convention that after the decision in Maneka Gandhi,[40] the criterion of validity of laws and amendment is to be founded in principles, standards and doctrines. As a result, it is plausible to argue that the rule of recognition practiced in India is founded on the idea of inclusive positivism, allowing its construction by reference to the contents.

Thus, after the decision of the Supreme court in Kesavananda Bharathi, moral criteria for identification of Rule of recognition have been incorporated as part of

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38 See Para 54, M Nagraj

39 See carefully drawn distinction between Rights and essence of Rights Tests in *I R Coelho v. State of Tamil Nadu* (2007) 2 SCC 1.

40 (1978) 1 SCC 248.

the Indian legal order, and therefore as a part of descriptive theory of law, this contingent connection between law and morality at the ultimate level, has to be acknowledged as a matter of fact.

Inclusive Positivism and theory of implied limitations

In the alternative, one may also venture to submit that the inclusive positivist approach can explain the theory of implied limitations adopted by the Supreme Court in Kesavananda Bharathi's case. Since there are no express substantive limitations imposed upon the power of the Parliament to amend the Constitution, it would only be justified on the theory of implied limitations *i.e.* implied from the express provisions of the Constitution. Implied limitation theory of interpretation operates upon the background assumption of shared expectations of values, principles, and standards; therefore, it is necessarily inclusive of positivist in its leanings in the process of interpretation of the Constitution. Since these shared expectations of values, principles and standards, being background assumptions, a presumption can be raised that the same are both expressly and impliedly endorsed by the political branches. Such an understanding lends credence to the fact that background assumptions are always part of the existential understanding of what the Constitution is. Therefore, any deliberate or conscious attempt made by the Parliament to bring in radical change or reform may be considered as striking at the very roots of the shared understanding of principles, standards and values as a part of existential understanding of the Constitution and one cannot blame the judiciary for interdicting Parliament to destroy these backgrounds, shared political and cultural assumptions in which the political branches have allegiance.