

PROPERTY RIGHTS AND THE BASIC STRUCTURE OF THE CONSTITUTION: THE CASE OF THE DRAFT CONSTITUTION EIGHTEENTH AMENDMENT BILL*

*by Martin van Staden***



1 Introduction

The land reform debate in South Africa has always been as contentious as it is controversial. Up to now, however, it has not reached the intensity of bringing about changes to South Africa's fundamental law. In February 2018, Parliament resolved in favour of adopting an amendment to the Constitution that would allow government to expropriate private property without being required to pay compensation.¹ This began a process that eventually culminated in the December 2019 publication of the draft Constitution Eighteenth Amendment Bill. This is the first time since the Constitution was enacted that an amendment has been introduced to change a provision in chapter 2, in this case section 25.

* This article is written from a legal-theoretical perspective and does not represent legal advice.

** LLB, LLM student (University of Pretoria), Head of Legal (Policy and Research) at the Free Market Foundation. ORCID 0000-0002-4612-5250. For more information visit www.martinvanstaden.com or contact martinvanstaden@fmfsa.org. The author extends his thanks to the PSLR peer reviewers and editorial team for their helpful insights and edits.

1 Constitution of the Republic of South Africa, 1996 (hereinafter 'the Constitution').

The basic structure doctrine is a judicial doctrine that features most prominently but not exclusively in the constitutional law of India.² The doctrine's essence is that constitutional amendments, despite complying with the formal requirements for amendment set out in the constitutional text, might still be struck down by a court because the amendment offends the constitution's foundational principles, its identity, character, or logic – its basic structure.³

In 2005, Devenish wrote that the basic structure doctrine has been implicitly recognised by the Constitutional Court as applicable in South Africa, but that 'the doctrine is waiting in the wings, since, should certain circumstances and a crisis situation arise, the Constitutional Court could invoke its application'.⁴ At the time of Devenish's writing, there was no pending amendment of the Bill of Rights, unlike today.

In this paper, I briefly summarise the amendment procedure set out in section 74 of the Constitution, and the process that has taken place between February 2018 and June 2020. Thereafter, I briefly discuss the basic structure doctrine and its potential application in South Africa. Finally, I consider whether the basic structure doctrine could be employed as a viable challenge to the draft Constitution Eighteenth Amendment Bill. The question that is inevitably considered: Has the crisis, that Devenish referred to, arrived?

2 The positive law and *status quo* of constitutional amendment

Section 74 of the Constitution concerns Bills that propose to amend the Constitution.⁵ Section 74(1) provides that section(s) 1 and/or 74 of the Constitution can be amended only by a majority vote of at least 75% of the members of the National Assembly. Section 74(2), which concerns amendments to the Bill of Rights, requires a two-thirds (66.3%) majority of the members of the National Assembly to vote in favour of the amendment; and section 74(3) requires the same for other provisions of the Constitution. Wherever the Constitution requires the cooperation of the National Council of Provinces in the adoption of a constitutional amendment, the support of at least six

2 Y Roznai 'Unconstitutional constitutional amendments: A study of the nature and limits of constitutional amendment powers' PhD thesis, London School of Economics 2014 54, 59 <https://core.ac.uk/download/pdf/46517697.pdf>.

3 Roznai (n 2) 54.

4 GE Devenish 'A jurisprudential assessment of the process of constitutional amendment and the basic structure doctrine in South African constitutional law' (2005) 68 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 252.

5 As opposed to secs 75, 76 and 77 which concern Bills which, if they receive presidential assent and are enacted into law, would create, amend or repeal ordinary Acts of Parliament.

provinces represented in the National Council of Provinces is required for that amendment to pass muster.⁶

At the time of writing, the Constitution has been amended seventeen times. None of these amendments have been to section 1, section 74, or to the Bill of Rights. In other words, the Constitution has thus far only been amended in terms of section 74(3).

3 Expropriation without compensation

3.1 Background

In February 2018, Parliament adopted a resolution that signalled the government's intention to pursue a policy of expropriation of private property without compensation that might require an amendment to section 25 of the Constitution.⁷ This was two months after South Africa's ruling party, the African National Congress, adopted expropriation without compensation as a policy pillar, at its December 2017 conference.⁸

Land reform has been a recurring item in public, and particularly jurisprudential, discourse since at least 1990 when Sachs, who would go on to be one of the first justices of the Constitutional Court, wrote:

In the past three decades, more than three million South Africans have been forcibly removed from their homes and farms, simply because they were black. Apartheid law then conferred legal title on owners whose main merit was that of having a white skin. ... Looked at from the perspective of human rights, who has the greater claim to land – the original owners and workers of the land, expelled by guns, torches, and bulldozers from the soil ... or the present owners, frequently absentee, whose rights are based on titles conferred in terms of the so-called Native Land Act and the Group Areas Act?⁹

Land reform is an emotive issue that deserves acknowledgment of its importance and continued relevance. Getting into the weeds of the land reform debate is, however, beyond the scope of this paper.

6 Amendments to sec 1 or the Bill of Rights, as contemplated in secs 74(1) and (2), always require the cooperation of the National Council of Provinces. In the case of sec 74(3) amendments, that is, to any provision outside of sec 1 or chap 2 of the Constitution, the support of the National Council of Provinces is only necessary 'if the amendment (i) relates to a matter that affects the Council; (ii) alters provincial boundaries, powers, functions or institutions; or (iii) amends a provision that deals specifically with a provincial matter'. Secs 74(4) to (9) concern ancillary affairs not relevant to this paper.

7 S Mokoena 'National Assembly debates motion on land expropriation' 28 February 2018 <https://www.parliament.gov.za/news/national-assembly-debates-motion-land-expropriation> (accessed 3 July 2020).

8 L Omarjee 'ANC reaches resolution on land reform' 20 December 2017 <https://www.news24.com/fin24/Economy/anc-reaches-resolution-on-land-reform-20171220> (accessed 3 July 2020).

9 A Sachs *Protecting human rights in a new South Africa* (1990) 10-11.

Suffice it to say that I regard the restitution of property, seized for political or ideological – invariably racial – purposes, as an imperative not only of law, but of justice. The February 2018 parliamentary resolution set in motion a process to determine whether an amendment to the Constitution is necessary to enable government’s new policy, and if so, what the content of the amendment should be.¹⁰ President Cyril Ramaphosa reaffirmed his party’s commitment to changing the Constitution on 31 July 2018.¹¹

On 15 November 2018, the constitutional review committee that was established in the February resolution recommended that Parliament make an amendment to section 25 of the Constitution to enable expropriation without compensation. The parliamentary *ad hoc* committee responsible for the amendment published its Draft Constitution Eighteenth Amendment Bill on 13 December 2019.¹²

3.2 Section 25 prior to amendment

The foundation of constitutional property rights in South Africa, section 25(1) of the Constitution, at the time of writing, provides that ‘no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property’. Section 25(2)(a) allows for expropriation of property if it is in terms of law of general application and is for a public purpose or in the public interest. Section 25(2)(b) requires any expropriation to be subject to compensation. Section 25(3), in turn, provides that the compensation must be ‘just and equitable, reflecting an equitable balance between the public interest and the interests of those affected’, and sets out, in an open list, various circumstances that must be factored in by a court when determining such amount.

Both sections 25(2)(b) and (3) refer to an ‘amount’ of compensation, which, it is submitted, eliminates the possibility that expropriation without compensation has already, up to now, been available to government in terms of section 25.¹³ Section 25(4) clarifies that the ‘public interest’ referred to above includes South Africa’s commitment to land reform, and that ‘property is not limited to land’.¹⁴

10 G Crouse ‘The NA’s resolution on EWC: A clause-by-clause analysis’ 2 March 2018 <https://www.politicsweb.co.za/comment/the-nas-resolution-on-ewc-a-clausebyclause-analysi> (accessed 9 July 2020).

11 C Ramaphosa ‘SA’s President Cyril Ramaphosa’s statement on expropriation of land without compensation, economic stimulus’ 31 July 2018 <https://www.cnbcafrica.com/insights/ramaphosa/2018/07/31/land-expropriation/> (accessed 3 July 2020).

12 Hereinafter ‘the Amendment Bill’ (available at: https://www.parliament.gov.za/storage/app/media/CommitteeNotices/2019/december/06-12-2019/Draft_advertised.pdf) (accessed: 20 July 2020).

13 R Hall ‘The land question: What is the answer?’ (2018) Public lecture, University of the Western Cape.

3.3 Draft Constitution Eighteenth Amendment Bill

Clause 1(a) of the 13 December version of the Amendment Bill adds the following underlined portion to section 25(2)(b) of the Constitution:

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court: Provided that in accordance with subsection (3A) a court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil.

In other words, the Amendment Bill introduces the notion of ‘nil compensation’ into section 25 of the Constitution as a ‘payable’ ‘amount’ in cases of expropriation. Clause 1(b) of the Amendment Bill only brings about changes to section 25(3) that ensure consistency with the above. Clause 1(c) adds a subsection 3A to section 25, which provides as follows:

(3A) National legislation must, subject to subsections (2) and (3), set out specific circumstances where a court may determine that the amount of compensation is nil.

In other words, the Amendment Bill empowers Parliament to decide, in ordinary legislation and by simple majority, those circumstances in which the courts may determine that ‘nil’ compensation is payable. Committee chair Mathole Motshekga has revealed that ‘the court’ referred to in this clause might be replaced by language vesting the same power instead in the executive.¹⁵ At the time of writing, this had not happened.

In summary, the Amendment Bill brings about a material change in the constitutional property rights dispensation. The notion that it merely makes explicit that which is already implicit – that is, the ostensible reality that ‘nil’ compensation expropriations have always been possible under section 25 – is disputed for the reason stated

14 Sec 25(8) provides that ‘no provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1)’. At the time of writing, a sec 36(1) justification of the Amendment Bill had not been made in the discourse or, obviously, in a judicial setting. It is submitted that sec 25(8) is irrelevant to this paper and only relevant, *ad hoc*, in cases of litigation. Secs 25(5) to (9) concern ancillary affairs not relevant to this paper.

15 P Saxby ‘EWC: There may be more to the parliamentary process than meets the eye’ 27 January 2020 <https://www.dailymaverick.co.za/opinionista/2020-01-27-ewc-there-may-be-more-to-the-parliamentary-process-than-meets-the-eye/> (accessed 9 July 2020). This does not rule out judicial review and adjudication on the administrative action aspects of an expropriation. It is, however, trite that there is a difference between the courts having the power to finally decide in a case whether ‘nil’ compensation is to be paid, and the power to review, usually for irrationality, the decision of an executive functionary.

above. However, even if this were the case, clause 1(c) of the Amendment Bill is novel by all accounts, in that it introduces parliamentary discretion into the determination of whether any compensation need be paid upon expropriation. The COVID-19 pandemic and government's resulting declaration of a state of national disaster (commonly referred to as the 'lockdown') has caused the parliamentary committee responsible for the Amendment Bill to lapse. As of June 2020, it has been reported that the committee will be reconstituted.¹⁶ For the purposes of this paper, it is assumed that the Amendment Bill's substance will remain unchanged.

4 The basic structure doctrine

4.1 Unconstitutional constitutional amendments

Roznai, who has written in-depth about the idea of 'unconstitutional constitutional amendments', explains that the notion of implicit limitations on a legislature's amendment power has various roots.¹⁷ In the United States, Calhoun opined that if an amendment 'is inconsistent with the character of the constitution and ends for which it was establishe[d], – or with the nature of the system', or 'radically change[d] the character of the constitution, or the nature of the system', then such a change would go beyond what is allowed by the amendment power bestowed on Congress.¹⁸ Cooley further contends that an amendment to a constitution 'cannot be revolutionary; [it] must be harmonious with the body of the instrument'.¹⁹ According to Machen, an 'amendment must be a real amendment, and not the substitution of a new constitution'. A new constitution can only be adopted 'by the same authority that adopted the present constitution'.²⁰

Skinner said that an amendment must be reconcilable with a constitution's scheme and purpose.²¹ Marbury submits that the power to amend a constitution does not extend to destroying that

16 J Gerber 'Ad hoc committee to amend Section 25 of the Constitution to be re-established' 11 June 2020 <https://www.news24.com/news24/southafrica/news/ad-hoc-committee-to-amend-section-25-of-the-constitution-to-be-re-established-20200611> (accessed 3 July 2020).

17 Roznai (n 2 above) 48-54.

18 JC Calhoun *A disquisition on government and a discourse on the constitution and government of the United States* (1851) 300-301. As quoted in Roznai (n 2 above) 49-50.

19 TM Cooley 'Power to amend the federal Constitution' (1893) 2 *Michigan Law Review* 109. As quoted in Roznai (n 2 above) 50.

20 AW Machen Jr 'Is the Fifteenth Amendment void?' (1909-1910) 23 *Harvard Law Rev* 170. As quoted in Roznai (n 2 above) 51.

21 DG Skinner 'Intrinsic limitations on the power of constitutional amendment' (1919-1920) 18 *Michigan Law Review* 223. As quoted in Roznai (n 2 above) 51.

constitution.²² The German scholar Schmitt posited that a constitution contains certain principles that embody that constitution's identity and are thus beyond amendment.²³ The Bavarian Constitutional Court has also held that:²⁴

There are fundamental constitutional principles, which are of so elementary a nature and so much the expression of a law that precedes the constitution, that the maker of the constitution himself is bound by them. Other constitutional norms ... can be void because they conflict with them.

Perhaps most relevantly, another German scholar who was well versed in Indian history and law, Dietrich Conrad, in a lecture in 1965 to the Law Faculty at Banaras Hindu University in India, opined that the legislature, 'howsoever verbally unlimited in its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority'.²⁵ Conrad also wrote, as quoted by Roznai, that 'there are, beyond the wording of particular provisions, systematic principles underlying and connecting the provisions of the Constitution ... [which] give coherence to the Constitution and make it an organic whole'.²⁶

There are therefore both scholarly and judicial endorsements of the notion that certain (purported) amendments to constitutions may be invalid if they conflict with those constitutions' existing characters. Judicially, this has been manifested most prominently in the basic structure doctrine, which will be discussed in the succeeding paragraphs with reference to the situations in India, Belize, and South Africa.

4.2 India and the basic structure doctrine

India is the main case study for the application of the basic structure doctrine, where it came about in a judicial setting. India's political context at the time was similar to South Africa's current context, in that land reform was high on the political agenda and gave rise to the events that led to the doctrine's development.

22 WL Marbury 'The limitations upon the amending power' (1919-1920) 33 *Harvard Law Review* 225. As quoted in Roznai (n 2 above) 51.

23 C Schmitt *Constitutional theory* (2008) 150-153. As quoted in Roznai (n 2 above) 52.

24 As quoted in Roznai (n 2 above) 53. Bavaria is a state (or *land*) of Germany. Sec 5 of the Constitution of the Free State of Bavaria, 1998, established this court as a sub-national constitutional court. Art 93(1)(4b) and 100(3) of the Basic Law for the Federal Republic of Germany, 1949, recognise the existence of these sub-national constitutional courts in the German states.

25 AG Noorani 'Behind the "basic structure" doctrine' 11 May 2001 <https://web.archive.org/web/20101220120644/http://www.hinduonnet.com:80/fline/fl1809/18090950.htm> (accessed 3 July 2020).

26 Roznai (n 2 above) 123.

After gaining independence from the United Kingdom in 1950, the government of Indian Prime Minister Indira Gandhi pursued a policy of land reform. This land reform agenda included amending the Indian Constitution in a way that interfered with property owners' constitutional right to property. However, what followed turned out to be less about property rights in the constitutional scheme, than about the proper powers of the legislature and the judiciary as a matter of constitutional theory.²⁷

In 1967, in *Golaknath v State of Punjab*, the Supreme Court of India held that the Indian Parliament's constitutional power to amend the constitution does not empower it to abridge the fundamental rights contained in the constitution.²⁸ This decision was based on the fact that the Indian Constitution explicitly prohibited Parliament from passing a 'law' infringing on those fundamental rights.

MK Nambyar, Counsel for the petitioner in *Golaknath*, had been exposed to Conrad's ideas of implied limitations on the amending power. With Conrad's permission, Nambyar presented the argument 'that implied limitations exist on the amendment power so that amendments cannot destroy the permanent character or 'basic structure' of the Constitution' before the Supreme Court. The Court did not give an opinion on the basic structure argument, other than to say that it carries 'considerable force', and limited its inquiry to the scope of the amendment power as it related to fundamental rights.²⁹

This case set in motion a process whereby the Indian government attempted to curtail the power of the Supreme Court to intervene in constitutional policy questions. The Prime Minister's party introduced the 24th Amendment, meant to empower Parliament to amend any provision of the Indian Constitution without the possibility of judicial review. In *Kesavananda Bharati v State of Kerala*, the Court overruled *Golaknath* but held that Parliament's amendment power 'does not include the power to alter the basic structure, or framework of the constitution so as to change its identity' – the basic structure doctrine was born into Indian constitutional law.³⁰ Thus, while the Indian Parliament can *amend* any provision of the Indian Constitution, including fundamental rights, the amendment power does not include the ability to change the constitutional identity or basic structure of that constitution. The Court did not, however, enumerate the features of the basic structure of India's constitution.³¹

27 Roznai (n 2 above) 54-55.

28 *I.C. Golaknath & Ors v State of Punjab & Anrs* 1967 AIR 1643 (ISC) para 163.

29 Roznai (n 2 above) 55.

30 *HH Kesavananda Bharati & Ors v State of Kerala & Anr* 1972 AIR 1461(ISC).

31 Roznai (n 2 above) 56.

Prime Minister Gandhi retaliated by appointing a new Chief Justice, who was part of the minority in *Kesavananda Bharati*.³² Two years later, in 1975, a high court invalidated Gandhi's 1971 re-election, prompting the Prime Minister to declare a state of emergency. The Court also found Gandhi guilty of electoral malpractice. Parliament then attempted to enact two constitutional amendments: The 38th Amendment, which provided that the President's decision to issue a proclamation of emergency, and any laws adopted during the period of the emergency, were exempt from judicial review; and the 39th Amendment, which attempted to change the laws under which Gandhi was convicted, and further prohibit the judiciary from intervening in any matter related to the election of the President, Vice President, Speaker of Parliament, or the Prime Minister.³³ When this matter reached the Supreme Court, in *Indira Nehru Gandhi v Raj Narain*,³⁴ the majority confirmed the basic structure doctrine in holding that 'the 39th Amendment violated three essential features of the constitutional system: fair democratic elections, equality, and separation of powers, and was therefore invalid'. At the same time, however, the Court validated Gandhi's election.³⁵

Parliament then tried to enact the 42nd Amendment which would put an end to any kind of judicial review of the exercise of parliamentary amendment powers. This was challenged in *Minerva Mills v Union of India* in 1980.³⁶ The Supreme Court held that the amendment 'removed all limitations on Parliament's amendment power, conferring upon it the power to destroy the Constitution's essential features or basic structure, [hence it] was beyond Parliament's amendment power and therefore void'. The Court explained.³⁷

If by constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire Constitution including its basic structure and even to put an end to it by totally changing its identity.

Roznai writes that after *Minerva Mills*, the basic structure doctrine was accepted in Indian jurisprudence.³⁸ The basic structure of the Indian Constitution now includes, among other things, liberal democracy, judicial review, freedom and dignity of the individual,

32 As above.

33 As above.

34 *Indira Nehru Gandhi v Raj Narain* 1975 AIR 2299 (ISC).

35 Roznai (n 2 above) 57.

36 *Minerva Mills v Union of India* 1980 AIR 1789 (ISC) (hereinafter '*Minerva Mills*').

37 *Minerva Mills* (n 36) 1824. As quoted in Roznai (n 2 above) 57.

38 Roznai (n 2 above) 57-58.

unity and integrity of the nation, free and fair elections, federalism, and secularism.³⁹

4.3 The case of Belize

Before turning to South Africa, it is worth briefly considering a case study of the basic structure doctrine in Belize, as discussed by Roznai and British constitutional scholar O'Brien. The facts of the Belize experience seem to coincide quite closely with the experience in South Africa, as both relate to the constitutional right to compensation upon expropriation. The 2008 Constitution (Sixth Amendment) Bill of Belize exempted 'petroleum minerals and accompanying substances' from the protection of property rights in the Constitution of Belize.⁴⁰ O'Brien explains, '[t]he purported effect of the legislation would thus have been to deny to the owners of any such interests in land the right to apply to the courts for compensation ...'. This amendment was challenged in the Supreme Court.⁴¹

Coneth CJ, in setting aside the amendment, reasoned that the Belizean Constitution's basic structure consisted of the rights guaranteed in its Bill of Rights as well as the beliefs and desires of Belizeans. The special majority required in the Belizean National Assembly by the constitution was nothing more than a procedural guideline and did not finally determine whether an amendment to the constitution is valid or not. According to O'Brien, writing of the judgment, 'any prospective amendment of the Constitution had to conform to the Constitution's *normative* requirements'. Were this not the case, parliamentary sovereignty would replace constitutional supremacy.⁴²

Conteh CJ outlined the basic structure of the Belizean Constitution as including, according to Roznai, the sovereignty and democracy of Belize,

the supremacy of the Constitution; the protection of fundamental rights and freedoms that are enumerated in the Constitution; the limited sovereignty of Parliament; the principle of separation of powers; and the rule of law.⁴³

Sometime later and after some related litigation in the meanwhile, the Belizean government enacted the Constitution (Eighth)

39 Roznai (n 2 above) 58.

40 This case is not entirely dissimilar from South Africa's own *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).

41 D O'Brien 'The basic structure doctrine and the courts of the Commonwealth Caribbean' 28 May 2013 <https://ukconstitutionallaw.org/2013/05/28/derek-obrien-the-basic-structure-doctrine-and-the-courts-of-the-commonwealth-caribbean/> (accessed 3 July 2020).

42 As above. O'Brien's emphasis.

43 *Barry M Bowen v Attorney General of Belize* 2008 BZ 445 (BSC) 2 para 119. As quoted in Roznai (n 2 above) 74-75.

Amendment Act, which attempted to re-entrench the supremacy of the procedural requirements for constitutional amendment. It provided, among other things, that the said section 69 of the Belizean Constitution was 'all-inclusive and exhaustive and there is no other limitation, whether substantive or procedural, on the power of the National Assembly to alter this Constitution'.⁴⁴ The Supreme Court, too, invalidated this constitutional amendment, as it conflicted with the constitution's basic structure. According to O'Brien:⁴⁵

Since the cumulative effect of the Eighth Amendment was to preclude the Court from determining whether the arbitrary deprivation of property by the Government was for a public purpose, the Eighth Amendment offended the principle of the separation of powers and the basic structure doctrine of the Constitution. To this extent the amendments to the Constitution were unlawful, null and void.

4.4 Does the doctrine apply in South Africa?

The basic structure doctrine appears to be sound legal theory on its own merit, without requiring statutory or case-law validation, as it speaks to the nature of constitutions and of constitutionalism. Indeed, 'the concept of a basic structure giving coherence and durability to a Constitution', observed Conrad, 'has a certain intrinsic force which would account for its appearance in various jurisdictions and under different circumstances'.⁴⁶

To put it in more technical terms, constitutions are *constituent* instruments, and legislatures are *constituted* entities. A constitution *constitutes*, and a legislature *is constituted*, by a constitution.⁴⁷ During the height of apartheid and before the Indian Supreme Court developed the basic structure doctrine, Centlivres CJ of the Appellate Division of the Supreme Court of South Africa remarked the following in *Minister of the Interior v Harris*, which spoke directly to the nature of Parliament's constituted power:⁴⁸

As ordinarily constituted, however, Parliament cannot expand its mandate by deleting the inhibition of its powers in relation to the Cape franchise. ... One must keep in mind that this inhibition is in restraint of power and not a regulation of method. *No legislative organ can perform an act of levitation and lift itself above its own powers by the bootstraps of method.* (my emphasis)

As a result, ordinary legislatures that are created by constitutions, like the Parliament of South Africa, have *constituted* powers bestowed upon them by that constitution, and not *constituent* power,

44 O'Brien (n 41 above).

45 As above.

46 Noorani (n 25 above).

47 *Golaknath* (n 28 above) para 163.

48 *Minister of the Interior & Another v Harris & Others* 1952 (4) SA 769 (A).

i.e., a power to create a new constitution – even by purporting to amend the existing one.⁴⁹ ‘The people’, or some special assembly of the people, usually have the constituent power to constitute a new constitution, as was the case with the Constitutional Assembly, in conjunction with the Constitutional Court, in South Africa.⁵⁰ The result of this is that despite any powers given to legislatures by their constitutions, legislatures may only ever exercise constituted powers and constituent powers to the limited extent that they are consistent with the constitutional framework within which the legislature itself was constituted, but never beyond. This is to say that legislatures may not enact new constitutions in the place of their already existing constitutions. The basic structure doctrine becomes relevant when legislatures *purport* to exercise their powers of constitutional amendment. If a legislature changes the basic structure – the logic, the character – of the constitution, it is in fact enacting a new constitution rather than amending the existing one, and thus exercising a constituent power that it does not possess. If the amendment does *not* change the basic structure of the constitution, the legislature would be properly exercising its constituted power of amendment – which in the case of South Africa, is granted to Parliament in terms of section 74 of the Constitution.

The basic structure doctrine, however, is not completely unknown in South African jurisprudence, as the Constitutional Court has made remarks about it at least thrice since the advent of constitutional democracy.⁵¹ The Constitution itself also lends some support to the idea that the doctrine might find application in South Africa. In this regard section 167(4)(d) provides that, ‘[o]nly the Constitutional Court may decide on the constitutionality of *any* amendment to the Constitution’.⁵² Unlike other provisions that are referential, like subsections (4)(c) or (4)(f),⁵³ section 167(4)(d)’s operation does not depend upon other provisions. Thus, it does not say that the Court may decide the constitutionality of amendments ‘*in terms of*’ section 74. Instead, ‘*any*’ amendment is open to constitutional scrutiny. The notion that the Court may not inquire into the constitutionality of an amendment that has been enacted in terms of

49 Roznai (n 2 above) 81-82.

50 Roznai (n 2 above) 83-84.

51 See *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC) para 204; *Premier of KwaZulu-Natal & Others v President of the Republic of South Africa & Others* 1996 (1) SA 769 (CC) para 47; and *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae)* (No 2) 2003 (1) SA 495 (CC) paras 15-17, as discussed below.

52 My emphasis.

53 Sec 167(4)(c) of the Constitution provides that the court may ‘decide applications envisaged in section 80 or 122’; and sec 167(4)(f) of the Constitution provides that the court may ‘certify a provincial constitution *in terms of* section 144’ (my emphases).

the requisite procedures in the Constitution does not at first glance find support in the Constitution itself. In *Executive Council of the Western Cape Legislature v President of the Republic*, Sachs J said:⁵⁴

There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the question has arisen in other countries as to whether there are certain features of the constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not change them. I doubt very much if Parliament could abolish itself, even if it followed all the framework principles mentioned above. Nor, to mention another extreme case, could it give itself eternal life – the constant renewal of its membership is fundamental to the whole democratic constitutional order. Similarly, it could neither declare a perpetual holiday, nor, to give a far less extreme example, could it in my view, shuffle off the basic legislative responsibilities entrusted to it by the Constitution.

In *Premier of KwaZulu-Natal v President of the Republic of South Africa*, Mahomed DP said:⁵⁵

There is a procedure which is prescribed for the amendment to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable. It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganizing the fundamental premises of the constitution, might not qualify as an ‘amendment’ at all.

Finally, in *United Democratic Movement v President of the Republic of South Africa*,⁵⁶ ‘the Constitutional Court assumed, for the sake of argument, the application of the basic structure doctrine, but then found that no basic feature was violated’.⁵⁷ In *S v Mhlungu*, Sachs J alluded to the idea that the Constitution does in fact have a basic structure, without referring to the basic structure doctrine *per se*. Sachs J explained:⁵⁸

The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the *basic design* of the Constitution and indicate its fundamental purposes. (my emphasis)

The basic design of the Constitution, according to the Preamble, includes the establishment of a ‘society based on democratic values, social justice and fundamental human rights’, laying ‘the foundations for a democratic and open society’, and improving ‘the quality of life of all citizens and free the potential of each person’.⁵⁹ A major

54 *Executive Council of the Western Cape Legislature* (n 51 above) para 204.

55 *Premier of KwaZulu-Natal* (n 51 above) para 47.

56 *United Democratic Movement* (n 51 above) paras 15-17.

57 Roznai (n 2 above) 67. See *UDM* (n 56 above) para 17.

58 *S v Mhlungu & Others* 1995 3 SA 867 (CC) para 112.

additional theme is the recognition of the injustices of apartheid, and the intention to move away from and heal those wounds. Here one must recall Sachs's remarks on land reform from 1990, highlighting how the apartheid government's deprivations of the property of mostly black South Africans is certainly one of the major injustices of the past that ought never be repeated.⁶⁰

4.5 Arguments against application: The case of sections 74 and 1 of the Constitution

Van Schalkwyk specifically addresses the applicability of the basic structure doctrine in South Africa and concludes that it probably does not apply.⁶¹ Van Schalkwyk approves of the argument that section 74 of the Constitution is explicit about the fact that *any* provision of the Constitution can be amended and, if anything, section 1, which contains elevated constitutional protection against amendment, is a 'surrogate for the basic structure doctrine' as it contains the most important constitutional principles upon which South Africa is founded. She argues that the framers of the Constitution foresaw changes to section 1 – the most entrenched provision – and the Constitutional Court accepted this fact in the *Second Certification* judgment⁶². To Van Schalkwyk, this indicates that an absolute entrenchment of the Constitution's basic structure was never intended⁶³d.

Van Schalkwyk further approves of the argument that the Constitutional Court, because of the separation of powers principle, takes a conservative approach to review decisions of this nature and is thus unlikely to enforce the basic structure doctrine.⁶⁴ Van Schalkwyk concedes, however, that if democracy becomes so threatened by a proposed constitutional amendment, the Constitutional Court might abandon its conservatism and apply the doctrine.⁶⁵ In the following paragraphs the focus will be on legal arguments around sections 1 and 74 of the Constitution, and not the Constitutional Court's judicial mindset.

59 Preamble to the Constitution.

60 Sachs (n 9 above).

61 C van Schalkwyk 'Die basiese-struktuur-leerstuk: 'n Basis vir die toepassing in Suid-Afrika, of 'n skending van die skeiding van magte?' (2015) 12(2) *LitNet Akademies* 359.

62 *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996 1997* (2) SA 97 (CC).

63 Van Schalkwyk (n 61 above) 349.

64 Van Schalkwyk (n 61 above) 357.

65 Van Schalkwyk (n 61 above) 359.

4.5.1 Section 74 – Bills amending the Constitution

As previously discussed, is it true that sections 74(1), (2), and (3) of the Constitution provide for amendments to any of the provisions of the Constitution. In this respect, Van Schalkwyk is correct. However, the basic structure doctrine does not purport to deprive the ability of a legislature to *amend* constitutional texts – it does not deny to Parliament any power that is bestowed upon it by the Constitution. Indeed, no constitution is fully rigid. Constitutional modifications are well catered for in most constitutions around the world, including that of South Africa.⁶⁶

The basic structure doctrine, instead, posits that certain changes to the constitutional text *do not* amount to amendments, but rather to a legal revolution not recognised by the Constitution. The doctrine attempts to guard against the destruction of the constitutional identity or character, which would amount to a replacement of the Constitution with another constitution – a power usually not given to the legislature. In other words, the basic structure doctrine concerns itself not with amendments, but only with *purported* amendments that, in reality, are not amendments.⁶⁷

The Constitution of South Africa presupposes its own perpetuity and does not provide or allow for its own demise. Thus, while Van Schalkwyk is correct to say that any provision in the Constitution is *amendable*, it does not follow that the basic structure doctrine does not apply. This can be illustrated with the example of writing a speech. One can write a speech condemning bigotry and racism and give it to a colleague for *amendment* – improvement, modification, etc. – but if that colleague changes the topic to an endorsement of bigotry, or to an altogether different topic, it does not amount to amendment anymore, but to a destruction of the character, and thus replacement, of the speech. This doctrine, in other words, should not be of concern to governments that are committed to the existing characters of their constitutions; it should be concerning to those who approach their constitutive laws with revolutionary intentions.

4.5.2 Section 1 of the Constitution – founding values

Van Schalkwyk appears to endorse the idea that section 1 of the Constitution is a ‘surrogate’ or proxy for the basic structure doctrine.⁶⁸ There are, however, some evident problems with this line of reasoning, which will be discussed in the following paragraphs. Section 1, for instance, does not explicitly prohibit Parliament from

66 Roznai (n 2 above) 23.

67 Roznai (n 2 above) 65.

68 Van Schalkwyk (n 61 above) 356.

abolishing itself or the judiciary. Parliament, particularly the National Assembly, is empowered by section 44(1)(a)(i) to amend the Constitution, and a textual reading of section 74, as discussed above, allows Parliament to amend any provision of the Constitution with the requisite majority support of its members in the National Assembly, and where applicable, the National Council of Provinces. This, in theory, bestows on the legislature the power to radically change provisions in chapter 4 of the Constitution that have the consequence of abolishing Parliament itself, or make changes to chapter 8 abolishing the judiciary. These amendments could then transfer all of the powers and authority of the legislature and courts to the executive. Yet, it would be absurd to suppose that in a system of constitutional supremacy such an ‘amendment’ to the Constitution would be permissible.

The courts, and particularly the Constitutional Court per section 167(4)(d) of the Constitution, would be justified in setting that amendment aside. Parliament, in theory, can also, with a mere two-thirds majority, oust the testing right of the courts over legislation, by amending sections 167(3) to (5), in terms of section 74(3) of the Constitution. Indeed, judicial review is not expressly contained as a value in section 1. But it is very conceivable that the Constitutional Court will hold such an amendment itself to be unconstitutional, as the revocation of judicial review renders the entirety of the Constitution redundant and unenforceable.⁶⁹ Indeed, the political branches of government having the constitutional ability to oust the jurisdiction of the courts to engage in judicial review ceased, with the promise never to be repeated again, with the demise of parliamentary sovereignty in 1993.⁷⁰

Malherbe points out that it would be absurd, hypothetically, were provisions falling outside section 1’s strict entrenchment to be regarded as part of the basic structure, but those falling within section 1’s strict entrenchment not – precisely because of the section’s strict entrenchment. He argues, it is submitted correctly, that the stricter a value is entrenched by the constitutional text itself, the greater the chance there should be of that value being regarded as part and parcel of the Constitution’s basic structure.⁷¹ Roederer writes:⁷²

69 EFJ Malherbe ‘Die wysiging van die Grondwet: Die oorspoel-imperatief van artikel 1’ (1999) 2 *Journal of South African Law* 194.

70 See the Preamble to the Constitution, read with secs 165(2), 167(3)(b) and (4)(d). It is also arguable that judicial review is subsumed into sec 1(c) of the Constitution, which entrenches the supremacy of the Constitution and the rule of law. See M Van Staden *The Constitution and the rule of law: An introduction* (2019) 134-135.

71 Malherbe (n 69 above) 196.

72 C Roederer ‘Founding provisions’ in S Woolman & M Bishop (eds) *Constitutional law of South Africa* (2013 2nd edition) 13.3.

Although many of [the values underlying the Constitution] appear in FC Chapter 1, several do not. Some are embodied in the Preamble and elsewhere in the Final Constitution. Others are not mentioned in the Final Constitution at all but are implicit in its structure.

Roederer explains his statement with reference to the doctrine of the separation of powers, which is nowhere explicitly stated in the Constitution, but is implicit in the Constitution's basic structure.⁷³ Section 1 is, however, a useful guide to start identifying the potential content of the Constitution's basic structure. Indeed, Malherbe writes that it could be argued that section 1 includes various constitutional principles by implication.⁷⁴

For instance, section 1(a) proclaims that South Africa is founded, among other things, on the advancement of human rights and freedoms. From this fact one might deduce that an amendment to the Bill of Rights that reduces the scope or weakens the strength of an entrenched right might offend not only section 1 of the Constitution, but the Constitution's very structure, because such a reduction or weakening can never be construed as part of the enterprise of advancing human rights and freedoms.

Furthermore, section 1(c) proclaims the rule of law to be supreme alongside the Constitution. From this fact, too, one can make certain deductions. In *Van der Walt v Metcash*, for instance, Madala J in his minority judgment highlighted some of the principles of the rule of law.⁷⁵ Because the rule of law is supreme, it might be possible to argue that its principles permeate every other provision of the Constitution. In other words, no provision in the Constitution can be construed without regard to the rule of law, understood by scholars to refer to such principles as legal certainty, non-arbitrariness, and proportional and rational governance, etc. Undermining these implied principles of section 1(c), then, might amount to undermining the basic structure of the Constitution.

4.5.3 *Anti-democratic nature of the basic structure doctrine*

Another notable argument that is often raised against the application of the basic structure doctrine is that the doctrine is anti-democratic. This is because it recognises a judicial power to set aside decisions reached by Parliament – the body representative of the will of the people.⁷⁶ This argument, however, is beyond the scope of this paper

73 Roederer (n 72 above) 13.4.

74 Malherbe (n 69 above) 194.

75 *Van der Walt v Metcash Trading Limited* 2002 (4) SA 317 (CC) paras 65-66.

76 Van Schalkwyk (n 61) 352. This argument will likely be particularly pronounced in South Africa, as any amendment to the Constitution will carry with it at least a two-thirds majority in the National Assembly, meaning it is more than a simple majority of the people's representatives who have chosen a particular course of action.

to address in any detail, as it is more concerned with political science and theories of democracy.

All that need be said on this matter is that it is the judiciary's traditional and constitutional function to interpret the law without fear, favour, or prejudice.⁷⁷ In other words, the judiciary must follow wherever the law might lead it. Without the power to set aside legislation that does not comply with the law – in this case, the law of the Constitution as it relates to the latter's basic structure – the promises of constitutional democracy would be unachievable.⁷⁸

5 A challenge to the Amendment Bill?

5.1 Importance of property rights to the constitutional makeup

It is left to be decided, thus, whether property rights, and particularly the right to compensation upon expropriation, is, in fact, part of the basic structure of the Constitution. Responding to this question is far more difficult, not to mention more contentious, than determining whether the basic structure doctrine applies in South Africa. I venture only a cursory attempt at answering this complex question. The Amendment Bill represents the first time in South Africa's history that a provision in the Bill of Rights – section 25 in this case – is to be amended. This is the most opportune time for the basic structure doctrine, if it indeed applies, to be considered.

There is significant disagreement in constitutional and jurisprudential discourse on the place that private property rights occupy, or ought to occupy, in law.⁷⁹ For the purpose of this paper, however, it is sufficient to note that private property rights are, in fact, recognised and entrenched by the Constitution. As Badenhorst and Malherbe note:⁸⁰

The fact that section 25 was eventually included in the constitution is an indication that the negotiators intended to protect property rights more effectively than they are protected by normal private law and other mechanisms.

As a further indication of this entrenchment in the Constitution, one can look to other provisions in the Constitution besides section 25 that in and of themselves *assume* the existence of secure property rights.

77 Sec 165(2) of the Constitution.

78 See also Malherbe (n 69 above) 201.

79 Compare, for instance, AJ van der Walt 'Property rights, land rights, and environmental rights' in D Van Wyk *et al* (eds) *Rights and constitutionalism: The new South African legal order* (1995) 479, and RA Epstein 'The indivisibility of liberty under the Bill of Rights' (1992) 15 *Harvard Journal of Law and Public Policy* 37.

80 P Badenhorst and R Malherbe 'The constitutionality of the Mineral Development Draft Bill 2000 (part 2)' (2001) 4 *Journal of South African Law* 765.

The first such provision is contained in section 14(b), which provides that everyone has the right to privacy, including the right not to have their property searched. Underlying this provision, clearly, is the assumption that South Africans, individually, may own private property, and that their property is secure under their dominium. An argument can thus be made that the Amendment Bill might render the section 14(b) protection redundant, as, theoretically, it would allow government to – more easily – expropriate property and *then* perform the desired search, instead of going through the judicial motions to obtain a warrant. It is true that other considerations of due process will still limit government's powers in this regard, but by removing certain obstacles, like the right to compensation, Parliament would not exactly be engaged in strengthening or advancing human rights and freedoms.

Another provision that assumes property rights is section 205(3), which provides that it is the duty of the South African Police Service 'to protect and secure the inhabitants of the Republic and their property'. The Amendment Bill might undermine this constitutional mandate, as the words 'and their property' might be rendered less meaningful, in fact if not in law, if South Africans' security of tenure is eroded by allowing for non-compensatory expropriation. Finally, there are sections 228 and 229 which deal with provincial and municipal rates on property. Similar arguments to the above can be made here. All of the above provisions assume a protected character for private property in South Africa.

Other arguments for why property rights might be inherent values within the basic structure of the Constitution can certainly be made, with reference to the values of freedom, human rights and human dignity that ought to underlie the constitutional order, as contrasted with the violently anti-property rights regime of the apartheid era alluded to by Sachs.⁸¹ In this respect, if one accepts that section 1 of the Constitution is, in fact, a surrogate or proxy for the basic structure doctrine, and that the Amendment Bill does offend values such as the advancement of human rights and freedoms, it would be necessary for the National Assembly to approve the Amendment Bill with a 75% majority. Malherbe refers to this as the so-called 'spillover effect', meaning that if there is a constitutional amendment to a provision *outside* section 1, but the amendment nonetheless infringes on a value contained in section 1, it amends section 1 by implication; with the consequence that the higher majority of 75% support in the National Assembly, rather than the lower two-thirds majority, becomes the necessary threshold for the validity of the amendment. If this is not the case, Malherbe argues, section 1 would be rendered constitutionally useless.⁸²

81 Sachs (n 9 above).

5.2 Compensation and property rights

But the Amendment Bill does not, and does not purport to, abolish property rights. It simply allows for the possibility of compensation being ‘nil’ – meaning ‘nothing’ – and bestows this discretion in part on Parliament. In other words, a protection for property rights is being weakened. In this respect it is worth considering the best constitutional practice of South Africa’s neighbours and other open and democratic societies around the world when it comes to compensation.

Article 82(2) of the Constitution of Mozambique provides that ‘fair compensation’ is a requirement when government expropriates property.⁸³ Section 19(2)(b)(i) of the Constitution of Eswatini requires that any compulsory taking of property must be accompanied by the ‘prompt payment of fair and adequate compensation’.⁸⁴ Section 17(1)(c) of the Constitution of Lesotho requires law to make provision for ‘prompt payment of full compensation’ upon the compulsory acquisition of property.⁸⁵ Section 71(3)(c)(ii) of the Constitution of Zimbabwe requires law to make provision for the payment of ‘fair and adequate compensation’ where property is compulsorily acquired. Given the recent history of Zimbabwe, it is however no surprise that section 72(3)(a) of the constitution provides that no compensation is payable where agricultural land is expropriated, except for improvements.⁸⁶

Section 8(1)(b)(i) of the Constitution of Botswana provides that law must make provision for the ‘prompt payment of adequate compensation’ upon compulsory acquisition.⁸⁷ Article 16(2) of the Constitution of Namibia provides that ‘just compensation’ must be paid upon expropriation, in accordance with law. The Fifth Amendment to the Constitution of the United States provides that private property shall not ‘be taken for public use, without just compensation’.⁸⁸ Section 3(b)(i) of the Constitution of Kenya disallows the acquisition of property by government unless it ‘is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that requires prompt payment in full, of just compensation to the person’.⁸⁹

82 Malherbe (n 69 above) 196.

83 Article 82(2) of the Constitution of the Republic of Mozambique, 2004.

84 Section 19(2)(b)(i) of the Constitution of the Kingdom of Eswatini, 2005.

85 Section 17(1)(c) of the Constitution of the Kingdom of Lesotho, 1993.

86 Section 71(3)(c)(ii) of the Constitution of the Republic of Zimbabwe, 2013.

87 Section 8(1)(b)(i) of the Constitution of the Republic of Botswana, 1966.

88 Fifth Amendment to the Constitution of the United States of America, 1791.

89 Section 3(b)(i) of the Constitution of the Republic of Kenya, 2010.

It is clear that compensation is almost always married to expropriation around the world. In those countries that do not have constitutional guarantees of compensation, like Canada and the United Kingdom, the legislation that provides for expropriation itself guarantees compensation.⁹⁰ The reason for this is not elusive. Epstein, an American jurist with expertise in the law of eminent domain, writes that just compensation is necessary upon expropriation because it ‘ensures that the individual, who has been forced by law to contribute property to some common improvement, is not wiped out in the process’. Crucially, this requirement ‘assures that the state’s option to compensation can never be exercised at zero price, but only at fair market value’. This, in turn, ensures that ‘no one gets hurt, and any social improvements remain’.⁹¹

In other words, in cases like land reform, compensation ensures that the *bona fide* holder of the property prior to its seizure for land reform purposes, is not placed in a significantly inferior position after the seizure occurs. Exceptions might be made in cases of *mala fide* holders – those who knew the property they possessed was expropriated for ideological and racial purposes prior to 1994 – but as a general rule, holders must be presumed *bona fide*, and therefore entitled to have their dignity, livelihoods, and property rights respected.⁹² Finally, the Amendment Bill bestows on Parliament an unrestrained discretion to determine, in legislation, under which circumstances the courts may find ‘nil’ compensation is payable upon expropriation. If we accept, as discussed above, that the principles of the rule of law as elaborated on by Madala J form part of the basic structure of the Constitution, an argument might be made that the discretion given to Parliament must be circumscribed rather than absolute. Without such a limitation of Parliament’s discretion, the Amendment Bill might offend the basic structure of the Constitution and be liable for invalidation.

90 See for instance the Expropriation Act, 1985, of Canada, which contains a provision titled ‘right to compensation’. Sec 25(1) of the Act obliges government to pay compensation to the ‘owner or holder of an estate, interest or right in the land ... to the extent of their expropriated interest or right’. In the United Kingdom, sec 7 of the Compulsory Purchase Act, 1965, provides that when compensation is determined for expropriated land, the value of the land and the damage done to the land in the course of the expropriation must be factored in.

91 RA Epstein ‘The common law foundations of the Takings Clause: The disconnect between public and private law’ (2014) 30 *Touro Law Review* 274.

92 See variously sec 35(3)(h) of the Constitution; WE Benjamin A *treatise on the law of bills of exchange, promissory notes and checks* (1889) 113; and M van Staden ‘A comparative analysis of common-law presumptions of statutory interpretation’ (2015) 26 *Stellenbosch Law Review* 558, 573.

5.3 Undermining constitutional democracy?

The basic structure doctrine has featured most prominently in cases where governments have attempted to amend constitutions to advance or entrench political interests.⁹³ In this respect, it is worth considering some of the context that surrounds the Amendment Bill, particularly the public participation process and the Bill's preamble. According to research by journalist Alicestine October for the Dullah Omar Institute, parliamentary processes often lack meaningful public participation, with Members of Parliament being dogmatic and hostile to those with opposing viewpoints. Parliament 'was overwhelmed and unprepared' for the number of written submissions received during the constitutional review committee's investigation on expropriation without compensation. The hearings at Parliament itself 'often descended to racial insults and nit-picking of issues and views not consistent with some MPs' perspectives'.⁹⁴ A possible indication of the fact that the majority of committee members entered the process with a foregone conclusion, and that they would not be dissuaded from their chosen course of action, are remarks by Stanford Maila, Co-Chair of the Committee, that: 'Though it is of no significance, 65% of the submissions were against amending the Constitution. ... an overemphasis on numbers would be grossly out of order'.⁹⁵

Finally, it might be worth considering the preamble to the Amendment Bill. The preamble justifies the amendment to the Constitution, among other things, on the grounds that there is a 'hunger for land amongst the dispossessed' and that 'the dispossessed are of the view that very little is being done to redress the skewed land ownership pattern'; that section 25 'must be amended to make explicit that which is implicit'; that 'such an amendment will contribute to address the historic wrongs caused by the arbitrary dispossession of land'; and finally that:

... such an amendment will further ensure equitable access to land and will further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programs.⁹⁶

The obvious problem with these premises of the Amendment Bill is that none of them are supported by evidence. In 2015, the

93 Roznai (n 2 above) 59-78; See also Van Schalkwyk (n 61 above) 352.

94 A October 'Land expropriation shambles highlights how public participation at Parliament is not working' 29 November 2018 <https://www.dailymaverick.co.za/article/2018-11-29-land-expropriation-shambles-highlights-how-public-participation-at-parliament-is-not-working/> (accessed 3 July 2020).

95 African News Agency 'Public submissions on land expropriation wasn't referendum – ANC' 4 December 2018 <https://citizen.co.za/news/south-africa/2045568/public-submissions-on-land-expropriation-wasnt-referendum-anc/> (accessed 3 July 2020).

96 Preamble to the Amendment Bill.

Department of Planning, Monitoring, and Evaluation gave effect to a Cabinet decision by publishing a policy making it compulsory for all new interventions – which include other policies, regulations and legislation – to be accompanied by a socio-economic impact assessment.⁹⁷ These assessments must record all the reasonably foreseeable advantages and disadvantages of an intervention, and also make an attempt at foreseeing consequences that hereinto might have been unforeseen or unintended.⁹⁸ No socio-economic impact assessment was published, which is a good indication that none had been conducted on the supposed benefits, risks, and consequences of expropriation without compensation.

The public, therefore, have been led to believe that there is, in fact, a majoritarian demand for expropriation without compensation, that those who have been dispossessed of their property in the past are unhappy with existing restitutionary measures, that the Amendment Bill simply makes explicit what is already implicit,⁹⁹ that the amendment will, factually, address the imbalances of apartheid, and that the amendment will, factually, lead to empowerment. Consequently, this narrative has been the basis of the democratic discourse around the Amendment Bill.

This is not to say the preamble is incorrect, but simply that all it claims to be the case, remains unproven. Although precarious, it could, therefore, theoretically be argued – if it is successfully demonstrated in court – that the Amendment Bill undermines participatory constitutional democracy.¹⁰⁰ This is because of the arguably invalid premises underlying its preamble, as well as the flawed public participation process that did not adequately factor in opposing viewpoints.¹⁰¹ Such an argument could then support a contention that the Amendment Bill brings about intolerable changes to the Constitution's democratic, participatory, basic structure, and ought to be set aside.

97 Department of Planning, Monitoring, and Evaluation 'Socio-Economic Impact Assessment System (SEIAS) Guidelines' (2015) 3 (accessed 9 July 2020) (available: [https://www.dpme.gov.za/keyfocusareas/Socio Economic Impact Assessment System/SEIAS Documents/SEIAS guidelines.pdf](https://www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/SEIAS%20Documents/SEIAS%20guidelines.pdf)). As executive policy cannot bind Parliament, the SEIAS Guidelines would bind departments and executive functionaries that intend to introduce draft legislation, but not private members' bills.

98 See M van Staden 'Have we been underemphasising public participation?' (2017) <http://www.derebus.org.za/underemphasising-public-participation/> (accessed 3 July 2020).

99 See section 3.3 above.

100 As required by *inter alia* secs 195(1)(e) and (g) of the Constitution; See also *Minister of Home Affairs & Others v Scalorini Centre, Cape Town & Others* 2013 (6) SA 421 (SCA) para 72; *e.TV (Pty) Ltd & Others v Minister of Communications & Others* 2016 (6) SA 356 (SCA) para 45. Both of these cases are judicial pronouncements on the importance of public participation.

101 See T Corrigan 'Constitutional Committee fails public participation test on EWC – IRR' 13 December 2019 <https://www.biznews.com/thought-leaders/2018/12/13/ewc-ong-difficult-path-lies-ahead> (accessed 3 July 2020).

5.4 It depends on the circumstances of the case

None of this is to say that any amendment of section 25 or any other provision in the Bill of Rights is *ipso facto* inconsistent with the basic structure of the Constitution. Indeed, it must always be determined on a case by case basis. Had the Amendment Bill provided, for instance, for expropriation without compensation to only be possible under a small list of defined circumstances; say, abandoned or hopelessly indebted land, then it is submitted no basic structure-challenge could be mounted against it.¹⁰² However, the Amendment Bill goes beyond that: It creates a general principle that property *may* be expropriated without compensation, and it bestows on Parliament an *unrestrained* discretion to determine, in ordinary legislation, in which circumstances the courts may find that no compensation is necessary. If the Amendment Bill is revised to replace the courts with the executive, it is submitted that the basic structure doctrine's viability as a challenge to the Amendment Bill would be significantly strengthened.¹⁰³

6 Conclusion

It is submitted that the more important question during this constitutional event is whether property rights, and particularly the right to compensation that is ubiquitous around the world in cases of expropriation, forms part of the basic structure of the Constitution. On the other hand, questioning whether the doctrine itself is applicable would, in my view, be a waste of intellectual energy: It is trite that the courts, and particularly the Constitutional Court, are the custodians of the Constitution and the rule of law. The courts may not absolve themselves of this important function under the guise of 'deference' to the legislature or respecting the separation of powers. Indeed, section 165(2) of the Constitution puts it beyond doubt that the courts are 'subject only to the Constitution and the law'. The separation of powers principle assumes that each branch of government acts within the law and the constituted powers bestowed

102 Some such circumstances are included in the proposed Expropriation Bill, 2019. However, this bill is an ordinary piece of legislation, and can be amended by Parliament with a simple majority. It therefore does not provide the same level of protection for due process and property rights that a list in the Constitution itself would.

103 It is trite that no suggestions have been made to exclude judicial review entirely. However, the Amendment Bill, in the form in which it was first published, put the decision *per se* whether compensation is payable in the hands of the courts. Committee members have indicated the power to decide must be given to the executive. If this happens, the courts may still conduct rationality or administrative action reviews of the decision, but they themselves would not decide. It is submitted that judicial review is a significantly weaker guarantee of due process and the spirit and purport of the Bill of Rights, than judicial decision-making.

upon it by the Constitution. Where either the executive or the legislature go beyond those constituted powers, the courts would need to correct that violation.

It cannot be said with any degree of certainty whether the basic structure doctrine could successfully be employed to challenge the enactment of the draft Constitution Eighteenth Amendment Bill. However, it has been demonstrated in this paper that an argument can, in fact, be made for such a challenge, which the Constitutional Court would have to consider. Whether the Court will recognise the application of the doctrine and declare the amendment invalid, recognise its application but find that compensation for expropriation does not form part of the basic structure, or simply reject the application of the doctrine, remains to be seen. What is clear is that whatever is decided, such a precedent would dig deep into the nature of the Constitution and constitutional theory in South Africa, and our jurisprudence will be richer for it.