

Role of basic structure under Indian constitution

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Abstract

This paper provides a legal analyses of the Basic Structure doctrine of the Indian Constitution. The Constitution of a country may be regarded as the fundamental law of the land, pertaining to the institution of the State and government of the country. It delineates the powers of responsibilities of the various instrumentalities of the State, imposes limitation upon them, and regulates the relations between the State and its population. It also embodies, and even strives to construct, a common national, political and constitutional identity for the people it covers.

The word "Basic Structure" is not mentioned in the constitution of India. The concept developed gradually with the interference of the judiciary from time to time to protect the basic rights of the people and the ideals and the philosophy of the constitution.

Keywords: basic structure, amendment, ninth schedule, fundamental rights, keshavananda bharti, Indian judiciary

1. Introduction

The "Basic Structure" doctrine is the judge-made doctrine whereby certain features of the Constitution of India are beyond the limit of the powers of amendment of the parliament of India. On April 24, 1973, a Special Bench comprising 13 Judges of the Supreme Court of India ruled by a majority of 7-6, that Article 368 of the Constitution "does not enable Parliament to alter the basic structure or framework of the Constitution" ^[1]. It, however, overruled a decision of a Special Bench of 11 Judges, by a majority of 6-5, on February 27, 1967, that "Parliament has no power to amend Part III of the Constitution so as to take away or abridge the fundamental rights" ^[2].

Instead, the court propounded what has come to be known as "the basic structure" doctrine. Any part of the Constitution may be amended by following the procedure prescribed in Article 368. But no part may be so amended as to "alter the basic structure" of the Constitution. In other words the basic structure is 'Unamendable'. Or in a context in which, any constitutional amendment that violates the 'basic structure' ^[3], of the Constitution would be invalid ^[4]. This basic structure doctrine may be called an 'invention' as it was inspired by an exceptional display of art, courage and craft ^[5], that the Supreme Court exhibited while evolving

this doctrine which counts as one of the greatest contribution of Indian judiciary to theory of institutionalism. Though the judgement of the case is more popular for its lengthy disposition and incomprehensible ratio decidendi ^[6], yet its showcase of a desperate attempt to strike balance of various contesting claims to the guardianship of the Constitution is remarkable.

The doctrine was expanded in the *Minerva Mills* case of 1981. In *Minerva* case ^[7], Palkhivala successfully moved the court to declare that clause (4) and (5) of Article 368 of the Constitution unlawful. These clauses had been inserted as a response by the Gandhi government to the decision in the *Kesavananda* case ^[8] which will be discussed further in the project.

2. The Context in which the Basic Structure evolved:

Provisions for amendment of the Constitution is made with a view to overcome the difficulties which may encounter in future in the working of the Constitution. The time is not static; it goes on changing. The social, economic and political conditions of the people go on changing so the constitutional law of the country must also change in order toward it to the changing needs, changing life of the people. "Constitutional powers are often unlimited in form but limited in practice" ^[9]. The mere existence of a power is not a reason for its exercise; conversely, mere non-exercise of a power does not imply its non-existence. Though the powers dealt with therein exist they must be, and indeed are utilized only sparingly due to their extreme and volatile nature.

Parliament's authority to amend the Constitution, particularly the chapter on the fundamental rights of citizens, was challenged as early as in 1951. After independence, several laws were enacted in the states with the aim of reforming land ownership and tenancy structures. This was in keeping with the ruling Congress party's electoral promise of implementing the socialistic goals of the Constitution contained in Article 39 (b) & (c) of the

¹ *Kesavananda Bharati vs. The State of Kerala*; AIR 1973 S.C. 1461, (1973) 4 SCC 225

² *I.C. Golak Nath & Ors. Vs. The state of Punjab & Ors.*; AIR 1967 S.C. 1643 (1967) 2 SCJ 486

³ It may be noted that even though certain features have been listed as being part of the basic structure, no clear definition of what provisions or features of the Constitution constitute the basic structure of the Constitution has been provided, either in *Kesavananda's* case or in any of the subsequent cases. The matter has been left to judicial discretion.

⁴ *Supra* note 1

⁵ A phrase used by Upendra Baxi in "Courage, Craft and Contention – The Supreme Court in Eighties", 1985

⁶ There has been a considerable debate between the legal scholars and jurists about the true ratio of the case for a multiplicity of the judgement and a summary judgement signed by 9 out of 13 bench.

⁷ *Minerva Mills Ltd. vs. Union of India* (1980) 3 SCC 625.

⁸ The Constitution of India (42nd Amendment) Act, s. 55.

⁹ Dhawan, R., 'Privilege unlimited', *The Hindu*, November 14, 2013.

Directive Principles of State Policy that required equitable distribution of resources of production among all citizens and prevention of concentration of wealth in the hands of a few ^[10] Property owners adversely affected by these laws petitioned the courts. The courts struck down the land reforms laws saying that they transgressed the fundamental right to property guaranteed by the Constitution. Piqued by the unfavorable judgements, Parliament placed these laws in the Ninth Schedule ^[11] of the Constitution through the First and Fourth amendments (1951 and 1952 respectively), thereby effectively removing them from the scope of judicial review. Parliament added the Ninth Schedule to the Constitution through the very first amendment in 1951 as a means of immunizing certain laws against judicial review. Under the provision of Article 31, which themselves were amended several times later, laws placed in the Ninth Schedule pertaining to acquisition of private property and compensation payable for such acquisition cannot be challenged in a court of law on the ground that they violated the fundamental rights of citizens. This protective umbrella covers more than 250 laws passed by state legislatures with the aim of regulating the size of land holdings and abolishing various tenancy systems. The Ninth Schedule was created with the primary objective of preventing the judiciary which upheld the citizens' right to property on several occasions from derailing the Congress party led government's agenda for a social revolution ^[12] Property owners again challenged the constitutional amendments which placed land reforms laws in the Ninth Schedule before the Supreme Court, saying that they violated Article 13 (2) of the Constitution. Article 13 (2) provides for the protection of the fundamental rights of the citizen ^[13] Parliament and the state legislatures are clearly prohibited from making laws that may take away or abridge the fundamental rights guaranteed to the citizen. They argued that any amendment to the Constitution had the status of a law as understood by Article 13 (2). In 1952 (Sankari Prasad Singh Deo v. Union of India ^[14] and 1955 (Sajjan Singh v. Rajasthan ^[15], the Supreme Court rejected both arguments

¹⁰ <https://www.indiankanoon.org>

¹¹ Originally, the Constitution guaranteed a citizen, the fundamental right to acquire hold and dispose of property under Article 19f. Under Article 31 he could not be deprived of his property unless it was acquired by the State, under a law that determined the amount of compensation he ought to receive against such an acquisition. Property owned by an individual or a firm could be acquired by the State only for public purposes and upon payment of compensation determined by the law. Article 31 has been modified six times beginning with the first amendment in 1951 progressively curtailing this fundamental right. Finally in 1978, Article 19f was omitted and Article 31 repealed by the 44th. Instead Article 300A was introduced in part XII making the right to property the right to property only a legal right. This provision implies that the executive arm of the government (civil servants and the police) could not interfere with the citizen's right to property. However, Parliament and state legislature had the power to make laws affecting the citizen's right to property.

¹² Later on, laws relating to the nationalization of certain sick undertakings, the regulation of monopolies and restrictive trade practices, transactions in foreign exchange, abolition of bonded labor, celling on urban land holdings, the supply and distribution of essential commodities and reservation benefits provided for Scheduled Castes and Tribes in Tamil Nadu were added to the Ninth Schedule through various constitutional amendment.

¹³ Article 13 (2) states- "The State shall not make any law which takes away or abridge the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void." The term part refers Part III of the Constitution which lists the fundamental rights of the citizen.

¹⁴ Sankari Prasad Singh Deo v. Union of India, AIR 1951 SC 458

¹⁵ Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.

and upheld the power of Parliament to amend any part of the Constitution including that which affects the fundamental rights of citizens. Significantly the two dissenting judges in Sajjan Singh v. Rajasthan case raised doubts whether the fundamental rights of citizens could become a plaything of the majority party in Parliament.

The Golaknath verdict in 1967 and eleven- judge bench of the Supreme Court reversed its position. Delivering its 6:5 majority judgement in the Golaknath v. State of Punjab case ^[16], Chief Justice Subba Rao put forth the curious position that Article 368 that contained provisions related to the amendment of the Constitution, merely laid down the amending power of Parliament arose from other provisions contained in the Constitution (Article 245, 246, 248) which gave it the power to make laws. Thus, apex court held that the amending power and legislative powers of Parliament were essentially the same. Therefore, any amendment of the Constitution must be deemed law as understood in Article 13(2).

3. Keshavananda Bharti Case: The emergence of Basic Structure Doctrine

Kesavananda Bharti case can be understood as an important episode in a long serial of tiff between Indian parliament and the judiciary headed by the Supreme Court of India triggered over the 'property rights' clause in the chapter 3 (Fundamental Rights) of Constitution of India. Congress party's, under the guidance of Mrs. Indira Nehru Gandhi after the death of party's father and country's first Prime Minister Pt. Jawaharlal Nehru, was committed to bring about land reforms in the country which were popularly understood to be the cause of widespread social inequities in the country. Various constitutional and political steps taken by the party since the dawn of Indian independence were challenged before the Court as unconstitutional since they seem to be violating one or the other fundamental rights of a section of society. The most aggrieved among various classes were the propertied class who felt that the parliament is acting ultra vires Indian constitution every time they brought about a constitutional amendment or legislation in pursuance of land reforms ^[17]. The researcher will start with brief introduction to the 'Fundamental Rights' ^[18] which appears in the Keshavananda case. The legal history which led to the constitutional jurisprudence taking the direction it took in this case, the political situation that prevailed for the issues in the case to have assumed grave importance, the facts of the case and the disposition of the various counsels arguing in this case, the deliberations at the bench, the political pressures upon the institution of judiciary and the impact of it upon the individual choices of the judges on the bench, the manner in which case affected subsequent decision finally the events that followed the case till the end of emergency which lasted from 1975-77 for a better understanding of the political significance of the case.

Inevitably, the constitutional validity of these amendments was challenged before a full bench of the Supreme Court (thirteen judges). Their verdict can be found in eleven separate judgements ^[19] Nine judges signed a summary statement which records the most important conclusions

¹⁶ Supra note 2

¹⁷ Granville Austin, Working a Democratic Constitution, the Indian experience

¹⁸ Supra note 9

¹⁹ Supra note 1

reached by them in this case. Granville Austin notes that there are several discrepancies between the points contained in the summary signed by the judges and the opinions expressed by them in their separate judgements^[20] Nevertheless, the seminal concept of 'basic structure' of the Constitution gained recognition in the majority verdict. All judges upheld the validity of the Twenty-fourth amendment saying that Parliament had the power to amend any or all provisions of the Constitution. All signatories to the summary held that the Golaknath case had been decided wrongly and that Article 368 contained both the power and the procedure for amending the Constitution.

However they were clear that an amendment to the Constitution was not the same as a law as understood by Article 13 (2). It is necessary to point out the subtle difference that exists between two kinds of functions performed by the Indian Parliament:

- a. It can make laws for the country by exercising its legislative power^[21] and
- b. It can amend the Constitution by exercising its constituent power.

Constituent power is superior to ordinary legislative power. Unlike the British Parliament which is a sovereign body (in the absence of a written constitution), the power and functions of the Indian Parliament and State legislative are subject to limitations laid down in the Constitution. The Constitution does not contain all the laws that govern the country. Parliament and the state legislatures make laws from time to time on various subjects, within their respective jurisdiction. The general framework for making this laws is provided by the Constitution. Parliament all one is given the power to make change to this framework under Article 368^[22]. Unlike ordinary laws, amendments to constitutional provisions require a special majority vote in Parliament. Another illustration is useful to demonstrate the difference between Parliament's constituent power and law making powers. According to Article 21 of the Constitution, no person in the country may be deprived of his life or personal liberty except according to procedure established by law. The Constitution does not lay down the details of the procedure as that responsibility is vested with the legislatures and the executive. Parliament and the state legislatures make the necessary laws identifying offensive activities for which a person may be imprisoned or sentenced to death. The executive lays down the procedure of implementing these laws and the accused person is tried in court of law. Change to these laws may be incorporated by a simple majority vote in the concerned state legislature. There is no need to amend the Constitution in order to incorporate changes to these laws. However, if there is a demand to convert Article 21 into the fundamental right to

life by abolishing death penalty, the Constitution may have to be suitably amended by Parliament using its constituent power. Most importantly seven of the thirteen judges in the Kesavananda Bharti case, including Chief Justice Sikri signed the summary statement, declared that Parliament's constituent power was subject to inherent limitations. Parliament could not use its amending power under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution.

4. Restriction on Parliament's power of Amending Provisions in the Constitution and Judicial Review:

The framers of the Indian Constitution were also aware of that if the constitution was so flexible it would be like playing cards of the ruling party so they adopted a middle course. It is neither too rigid to admit necessary amendments, nor flexible for undesirable changes. India got independence after a long struggle in which numerous patriots sacrificed their life. They knew the real value of the freedom so they framed a constitution in which every person is equal and there is no discrimination on the basis of caste, creed, sex and religion. They wanted to build a welfare nation where the social, economic, political rights of the general person recognize. The one of the wonderful aspect of our constitution is Fundamental Rights and for the protection of these rights they provided us an independent judiciary. According to constitution, parliament and state legislature in India have the power is not absolute in nature. The constitution vests in judiciary, the power to adjudicate upon the constitutional validity of all the laws. If a laws made by parliament or state legislature violates any provision of the constitution, the Supreme Court has power to declare such a law invalid or ultra-virus. So the process of judicial scrutiny of legislative acts is called Judicial Review. Article 368 of the constitution gives the impression that the Parliament's amending powers are absolute and encompass all parts of the document. But the Supreme Court has acted as brake to the legislative enthusiasm of Parliament ever since independence with the intention of preserving the original ideals envisioned by the constitution-makers. To Abraham Lincoln, democracy meant a Government of the people, by the people and for the people. So in democratic nation whenever any law passed by parliament violates any provision of constitution or takes away any fundamental rights of the person, the Supreme Court is essential for protection of basic features of the constitution.

It is very difficult to state a single and accurate definition of the term law as it is a general term and has different connotations for different people. On the one hand a common man may think of law as a set of rules he has to obey on the other hand for a judge, it is nothing but a set of guiding principles to be applied in deciding the cases. Law is everywhere, if you examine the human being life, there is Law of Nature. One day everyone has to die and no one is immortal on this earth. God treats everyone equally and all the creations of god are regulated by uniform law. Same as law is necessary for the protection, peace, development and prosperity of any nation. Without law there can be no order and without order there can be no peace and progress. Without law society will be the part of jungle. Everyone will be wild, violent and greedy and mighty has right will prevail. That is why law is mandatory for preventing justice. According to Blackstone, law in its most general and

²⁰ Supra note 17

²¹ By virtue of the power conferred upon it in Articles 245 and 246, Parliament can make laws relating to any of the 97 subjects mentioned in the Union list and 47 subjects mentioned in the concurrent list, contained in the Seventh Schedule of the Constitution. Upon the recommendation of the Rajya Sabha. Parliament can also make laws in the national interest, relating to any of the subjects contained in the State list.

²² However certain constitutional amendment must be ratified by at least half of the State legislatures before they can come into force. Matters such as the election of the President of the republic, the executive and legislative powers of the Union and the States, the High Courts in the States and Union Territories, representation of States in Parliament and the Constitution.

comprehensive sense signifies a rule of action and is applied indiscriminately to all kinds of action whether animate or inanimate, rational or irrational. And in words of Austin "A law is a rule of conduct imposed and enforced by the sovereign". Thus these rules of conduct are essential for peaceful and prosperous living of the people in the country. The sovereign, democratic and secular character of the polity, rule of law, independence of the judiciary, fundamental rights of citizens etc. are some of the essential features of the Constitution that have appeared time and again in the apex court's pronouncements. One certainty that emerged out of this tussle between Parliament and the judiciary is that all laws and constitutional amendments are now subject to judicial review and laws that transgress the basic structure are likely to be struck down by the Supreme Court. In essence Parliament's power to amend the Constitution is not absolute and the Supreme Court is the final arbiter over and interpreter of all constitutional amendments.

5. The implications and impact of the Basic Structure Doctrine according to Keshavananda Ruling

Each judge laid out separately, what he thought were the basic or essential features of the Constitution. There was no unanimity of opinion within the majority view either.

Sikri, C.J. explained that the concept of basic structure included:

- Supremacy of the Constitution.
- Republican and democratic form of government.
- Secular character of the Constitution.
- Separation of powers between the legislative, executive and the judiciary.
- Federal character of the Constitution.

Shelat, J. and Grover, J. added two more basic feature to this list:

- The mandate to build a welfare state contained in the Directive Principles of State Policy.
- Unity and integrity of the nation.

Hegde, J. and Mukherjea, J. identified a separate and shorter list of basic features:

- Sovereignty of India.
- Democratic character of the policy.
- Unity of the Country
- Essential features of the individual freedoms secured to the citizens.
- Mandate to build a welfare state.

Jaganmohan Reddy, J. stated that elements of the basic features were to be found in the Preamble of the Constitution and the provisions into which they translated such as:

- Sovereign democratic republic.
- Parliamentary democracy.
- Three organs of the State.

He said that the Constitution would not be itself without the fundamental freedoms and the directive principles^[23]. Only six judges on the bench (therefore a minority view) agreed that the fundamental rights of the citizens belonged to the basic structure and parliament could not amend it.

Its Impact: In 1975, the Supreme Court again had the opportunity to pronounce on the basic structure of the Constitution. A challenge to Prime Minister Indira Gandhi's election victory was upheld by the Allahabad High Court on grounds electoral malpractice in 1975. Pending appeal, the vacation judge- Justice Krishna Iyer, granted a stay that allowed Smt. Indira Gandhi to function as Prime Minister on the condition that she should not draw a salary and speak or vote in parliament until the case was decided. Meanwhile, parliament passed the Thirty-ninth amendment to the Constitution which removed the authority of the Supreme Court to adjudicate petitions regarding election of the President, Vice President, Prime Minister and Speaker of the Lok Sabha. Instead, a body Constituted by Parliament would be vested with the power to resolve such election disputes. Section 4 of the amendment bill effectively thwarted any attempt to challenge the election of an incumbent, occupying any of the above offices in a court of law. This was clearly a pre-emptive action designed to benefit Smt. Indira Gandhi whose election was the object of the ongoing dispute. Amendments were also made to the Representation of Peoples Acts of 1951 and 1974 and placed in the Ninth Schedule along with the Election Laws Amendment Act, 1975 in order to save the Prime Minister from embarrassment if the apex court delivered an unfavorable verdict. The mala fide intention of the government was proved by the haste in which the Thirty-ninth amendment was passed. The bill was introduced on August 7, 1975 and passed by the Lok Sabha the same day. The Rajya Sabha passed it the next day and the President gave his assent two days later. The amendment was ratified by the state legislatures in special Saturday sessions. It was gazette on August 10. When the Supreme Court opened the case for hearing the next day, the Attorney General asked the Court to throw out the case in the light of the new amendment^[24]. Counsel for Raj Narain who political opponent challenging Mrs. Gandhi's election was argued that the amendment was against the basic structure of the Constitution as it affected the conduct of free and fair elections and the power of judicial review. Counsel also argued that parliament was not competent to use its constituent power for validating an election that was declared void by the High Court. Four out of five judges on the bench upheld the Thirty-ninth amendment, but only after striking down that part which sought to curb the power of the judiciary to adjudicate in the current election dispute^[25]. One judge, Beg, J. upheld the amendment in its entirety. Mrs. Gandhi's election was declared valid on the basis of the amended election laws. The judges grudgingly accepted Parliament's power to pass laws that have a retrospective effect.

6. Conclusion

Within three days of the decision on the election case Ray, C.J. convened a thirteen judge bench to review the Kesavananda verdict on the pretext of hearing a number of petitions relating to land ceiling laws which had been languishing in high courts. The petitions contended that the application of land ceiling laws violated the basic structure of the Constitution. In effect the Review bench was to

²⁴ Supra Note 1

²⁵The Supreme Court struck down section 4 the Thirty-ninth Amendment Act, i.e. Article 329A of the Constitution as it existed in 1975.

²³ Supra Note 1

decide whether or not the basic structure doctrine restricted Parliament's power to amend the Constitution. The decision in the Bank Nationalization case was also up for review. Meanwhile Prime Minister Indira Gandhi, in a speech in parliament refused to accept the dogma of basic structure^[26]. It must be remembered that no specific petition seeking a review of the Kesavananda verdict filed before the apex court- a fact noted with much chagrin by several members of the bench. N.N. Palkhivala appearing for on behalf of a coal mining company eloquently argued against the move to review the Kesavananda decision. Ultimately, Ray, C.J. dissolved the bench after two days of hearings. Many people have suspected the government's indirect involvement in this episode seeking to undo an unfavorable judicial precedent by the Kesavananda decision. However no concerted efforts were made to pursue the case. The declaration of a National Emergency in June 1975 and the consequent suspension of fundamental freedoms, including the right to move courts against preventing detention, diverted the attention of the country from this case. It may be said that the final word on the issue of the basic structure of the Constitution has not been pronounced by the Supreme Court- a scenario that is unlikely to change in the near future. While the idea that there is such a thing as a basic structure to the Constitution is well established its contents cannot be completely determined with any measure of finality until a judgement of the Supreme Court spells it out. Nevertheless the sovereign, democratic and secular character of the polity, rule of law, independence of the judiciary, fundamental rights of citizens etc. are some of the essential features of the Constitution that have appeared time and again in the apex court's pronouncements. One certainty that emerged out of this tussle between Parliament and the judiciary is that all laws and constitutional amendments are now subject to judicial review and laws that transgress the basic structure are likely to be struck down by the Supreme Court. In essence Parliament's power to amend Constitution is not absolute and the Supreme Court is the final arbiter over and interpreter of all constitutional amendments.

7. Suggestion

1. Act 31-B and Ninth Schedule must have definite criterion and standards like Art.31-A. That is to say, it must be clearly demarcated. In fact enough damage has already been done to the constitutional scheme by putting all and sundry laws into the Ninth Schedule. It is high time now to lay down parameters within which a law can be included in the Ninth Schedule. Hence, Act.31-B read with Ninth Schedule needs to be redefined.
2. There are shortcomings in the existing legal system with respect to Ninth Schedule which could be removed. Principles and guidelines must be provided for the category of laws that have to be included in the Ninth Schedule.
3. To review the non-agrarian laws placed in the Schedule, scope has to be given to the judiciary by the Parliament to review those laws in the light of basic structure theory in the express provision of the Constitution.

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