



E-ISSN: 2789-8830
P-ISSN: 2789-8822
IJCLLR 2023; 3(2): 40-43
Received: 02-05-2023
Accepted: 06-06-2023

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Basic structure of Indian constitution: A synoptic study

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Abstract

The basic structure theory has been integral part of any discussion on constitutional issues and the role of the judiciary even though the theory has no textual basis in the Constitution. Its roots can be traced to the early 1950s. In *I.C. Golak Nath v. State of Punjab* (1967), the Supreme Court held that Parliament could not curtail fundamental rights guaranteed under the Constitution. In 1973, a 13-judges Constitution Bench ruled in *Kesavananda Bharati v. State of Kerala* that Article 368 of the Constitution does not enable Parliament to amend the basic framework of the Constitution. The historic ruling came to be known as the “basic structure” doctrine - a judicial principle that the Constitution has certain basic features that cannot be altered or destroyed by amendments by Parliament. Over the years, various facets of the basic structure doctrine have evolved, forming the basis for judicial review of Constitutional amendments.

The term ‘basic structure’ was first used by lawyer M.K. Nambyar in *I.C. Golak Nath*. Basing his arguments off a principle expounded by German thinker Dieter Conrad, Mr. Nambyar contended that Parliament had no power to amend the fundamental rights under Part III of the Constitution. It was, however, a few years later that the concept was outlined in a Supreme Court ruling.

Almost 50 years after it was propounded, the legitimacy of the term “basic structure” and the theory underpinning its doctrinal creation is still seen as an abstract idea in certain quarters, as it is missing from the text of the Constitution. Some legal stalwarts consider this basic structure of the constitution to be an imprecise and elastic concept because the basic features illustrated in the five judgments delivered by the majority in *Kesavananda* do not tally. Since half a century has gone, the enunciation of this theory has withstood the test of time and strengthened the foundations of our Constitution.

Keywords: Constitution, basic structure, Supreme Court, fundamental rights, parliament

Introduction

A spider can be easily distinguished from other insects by the very existence of eight legs. An octopus can be easily identified with the help of its tentacles. The existence of three angles proves that a given figure is a triangle. Petals and green leaves are inevitable parts of a flower. A tree basically has a trunk, roots and leaves. Likewise, every living and non-living being has its own characteristics which are not amenable and are owed to none. Our Indian Constitution, the paramount parchment of the land too has a certain features or rudimentary elements which form the edifice and vitiates the entire constitution if ousted from it. These essential and mandatory characteristics are together named ‘Basic Structure of the Indian Constitution’^[1].

The doctrine of ‘basic structure’ is considered the most potent tool in the hands of the Indian judiciary to maintain the balance of power, the checks and balances that are required for a smooth functioning of a democracy. This doctrine has altered the course of Indian Constitutional law jurisprudence. The article will pay tribute to its origins and efforts to protect and preserve it through the course of history. Additionally, it is believed that the doctrine of basic structure is applicable to constitutional amendments exclusively, however, various judges of the Supreme Court have viewed this aspect differently and there have been contrasting opinions on this subject. Since this does not appear to be a straightforward concept anymore with the doctrine’s applicability in dispute, this article will attempt to trace what different judges of the Supreme Court have stated in their judgments regarding the applicability of the doctrine of basic structure to ordinary legislations and finally conclude Chandrachud, C.J., in *Minerva Mills* case^[2] observed thus, “the Indian Constitution is founded on the bedrock of the balance between Parts III and IV.

To give absolute primacy to one to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles

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is an essential feature of the basic structure of the Constitution.” The rule of law and judicial review was held as basic structure in Waman Rao ^[3], Sampath Kumar ^[4] and Sambamurthy cases ^[5]. Effective access to Justice is part of the basic Structure, according to the ruling in Central Coal Fields case ^[6]. In Kihoto Hollohon ^[7], the Supreme Court has declared, “Democracy is a basic feature of the Constitution and election conducted at regular prescribed intervals is essential to the democratic system envisaged in the Constitution. So is the need of protect and sustain the purity of the electoral process that may take within it the quality, efficiency and adequacy of the machinery for resolution of electoral disputes.” In Bommai case ^[8] Sawant and Kuldip Singh, JJ., have observed: “Democracy and Federalism are essential features of our Constitution and are part of its basic structure.” In the same case, the Supreme Court has ruled that secularism is a basic or an essential feature of the Constitution.

Background of the basic structure doctrine

The question whether fundamental rights can be amended under article 368 came for consideration in the Supreme Court in Sankari Prasad Deo V. Union of India ^[9] in this case the validity of the Constitution (first Amendment) Act, 1951, which curtailed the right to property guaranteed by Article 31 was challenged. The argument against the validity of the First Amendment was that Article 13 prohibits enactment of a law infringing or abrogating the Fundamental Rights, that the word ‘law’ in Article 13 would include any law, even a law amending the Constitution and, therefore, the validity of such a law could be judged and scrutinised with reference to the Fundamental Rights which it could not infringe. Adopting the literal interpretation of the Constitution, the Supreme Court upheld the validity of the First Amendment. The Court rejected the contention and limited the scope of article 13 by ruling that the word ‘law’ in article 13 would not include a constitutional amendment passed under Article 368. The Court observed “we are of the opinion that in the context of article 13 laws must be taken to mean rules and regulations made in the exercise of ordinary legislative power and not amendment made in the exercise of constituent power under article 368 of the constitution.

The Court insisted that there is a clear demarcation between ordinary law, which is made in exercise of legislative powers, and constitutional law, which is made in exercise of constituent power. The Court thus held that Parliament could by following the ‘procedure’ laid down in Art.368 amend any provision of constitution including fundamental rights, in absence of any clear and express limitation to the contrary the plenary power of parliament cannot be restricted. The same question was raised again in 1964 in the case of Sajjan Singh v. State of Rajasthan ^[10], wherein the validity of the constitution (Seventeenth Amendment) Act, 1964, was called in question. The impugned amendment again adversely affected the right to property.

In Golakhnath v. State of Punjab ^[11], (hereinafter referred to as Golakhnath case) the doctrine of implied limitations was brought forth by M.K. Nambiar, a constitutional lawyer, but was not accepted by the Supreme Court. Nambiar, owed his argument in this case to Conrad, who, on his visit to India in 1965, delivered a lecture on ‘Implied limitations on Amending Power’ to the faculty of law at Banaras Hindu University. A paper written on this theme was forwarded to

T.S. Rama Rao in Madras for his comments and this in turn drew Nambiar’s attention to it. Conrad in his lecture in 1965 raised some very important and ostensibly easy questions yet he succeeded in bringing forth their vital nature as there were no easy answers to them. His questions included the likes of, by a valid exercise of amendment power under article 368, whether the Parliament could amend article 1 and divide the Union of India into Tamil Nadu and Hindustan proper? Could a constitutional amendment abolish article 21, could a ruling party observing a depreciation in majority amend article 368 to vest the entire power with the President acting on the advice of the Prime Minister? Could the amending power abolish the Constitution itself and reintroduce monarchy ^[12]?

As a result, to nullify the verdict, Parliament brought 24th amendment and added clearly clause 3 under Article 368 and clause 4 under Article 13 stating that Parliament is having power to amendment the Constitution is not a law making power but it is a constituent power. Thereafter, constitutional validity of 24th Amendment was challenged in the case of *Keshavananda Bahrahi* ^[13]. Supreme Court constitutional bench consisting of 13 judges upheld the 24th Amendment and said that Parliament under Article - 368 can bring an amendment to any provisions of the Indian Constitution including fundamental rights but not for the basic structure. This is how; the Supreme Court gave real birth to this basic structure doctrine to check the uncontrolled power of the Parliament ^[14].

What constitutes basic structure?

In the *Kesavananda Bharati case* Sikri, C.J. for laid down the very first list of features - “discernible not only from the Preamble but from the whole scheme of the Constitution” – that would constitute the “basic foundation and structure” of the Constitution:

1. Supremacy of the Constitution.
2. Republican and Democratic form of Government.
3. Secular character of the Constitution.
4. Separation of powers between the Legislature, the executive and the judiciary.
5. Federal character of the Constitution.

Other judges added the following to the list

6. The dignity of the individual secured by the various Fundamental Rights and the mandate to build a welfare state contained in the directive principles.
7. The unity and the integrity of the nation; 8. Parliamentary System.

In Smt. Indira Nehru Gandhi V. Raj Narain ^[15], the Court, expanding the scope of the Basic Structure, held that there were four unamendable features which formed part of the basic structure, namely”

1. India is a sovereign democratic republic.
2. Equality of status and opportunity shall be secured to all its citizens.
3. The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.
4. The nation shall be governed by a government of laws, not of men.

These, according to them, were "the pillars of our constitutional philosophy, the pillars, therefore, of the basic structure of the Constitution."

In *Minerva Mills Ltd. & Ors v. Union of India & Ors* ^[16], discussing the standard to be applied to what qualifies as the Basic Structure, the Apex Court held that the "The features or elements which constitute the basic structure or framework of the Constitution or which, if damaged or destroyed, would rob the Constitution of its identity so that it would cease to be the existing Constitution but would become a different Constitution."

In *S.R. Bommai v. Union of India* ^[17], expanding the list of basic features held that secularism was an essential feature of the Constitution and part of its basic structure. In this case the Supreme Court explained the concept of basic structure of the constitution, while dealing with the issue of exercise of the power by the Central Government under Article 356 of the Constitution.

In *M Nagraj & Ors. v. Union of India & Or's* ^[18]. The Constitution Bench of the Supreme Court dealing with the issue of basic structure observed that "axioms like secularism, democracy, reasonableness, social justice, etc. are overarching principles which provide linking factor for principles of fundamental rights like Articles 14, 19 and 21. These principles are beyond the amending power of Parliament. They pervade all enacted laws and they stand at the pinnacle of the hierarchy of constitutional values".

In *I.R. Coelho (dead) by L.R.s v. State of Tamil Nadu* ^[19], a Nine Judge Bench of the Supreme Court laid down the concrete criteria for basic structure principle, observing:

Since the power to amend the constitution is not unlimited, if changes brought about by amendments destroy the identity of the constitution, such amendments would be void. Every improper enhancement of its own power by Parliament, be it clauses 4 and 5 of Article 329A, or Section 4 of Forty-second Amendment, have been held to be incompatible with basic structure doctrine, as they introduced new elements which altered the identity of the Constitution, or deleted the existing elements from the Constitution by which the very core of the Constitution is discarded.

Constitutionalism and Basic Structure

People in India seem to have accepted the basic structure doctrine in the same manner as the Americans accepted judicial review of legislation claimed by the Supreme Courts of the United States in *Marbury V. Madison* ^[20]. In determining what basic structure is, the Court will have to keep national consensus about such basic structure in mind. It is impossible to articulate exhaustively the elements which would constitute the basic structure of the Constitution. It will have to be articulated from case to case. During last few years the Supreme Court has intervened with constitutional amendments on the ground of basic structure initially only in five cases ^[21].

In India, the doctrine of Basic Structure is a judicial innovation, and it continues to evolve via judicial pronouncements of the Apex Court. The contours of the expression have been looked into by the Court from time to time, and several constitutional features have been identified as the basic structure of the Constitution; but there is not an exhaustive definition or list of what constitutes the 'basic structure' of the Constitution - the Court decides from case

to case if a constitutional feature can be regarded as basic or not.

The legitimacy of basic structure review may be assessed under three categories: legal, moral, and sociological. The legal legitimacy of such review is established by defending a structuralism interpretation as a coherent and justifiable model of constitutional interpretation. The moral legitimacy of basic structure review rests on a rejection of majoritarian versions of democracy and the adoption of a dualist model of deliberative decision-making in a constitutional democracy. The sociological legitimacy of the doctrine is, to a large extent, contingent on the success of the moral and legal legitimacy arguments ^[22].

Sudhir Krishnaswamy says that the basic structure doctrine acknowledges that the Constitution can be radically changed by the people themselves. But how? Only extra - constitutionally. The Constitution does not provide for a referendum. Even if it were to be amended to provide for one, the Basic Structure Doctrine would strike the amendment down, to the extent that it enables a change in the basic structure. And so, only a popular uprising can change the Constitution radically or replace it with a new one. This will be an extra-constitutional Constitution ^[23].

If this is the only way a Constitution can be changed, there is something wrong with constitutionalism. The Basic Structure Doctrine, thus, in the opinion of the researcher, is solely an elegant, sophisticated doctrine for lawyers and judges. It is a hindrance to democracy and constitutionalism, which are still works in progress.

Conclusion

The basic structure of the constitution is an unclear and flexible concept. There was no harmony among the judges with respect to the components of the basic structure of the constitution. The basic distinctiveness illustrated in the five judgments by the majority of the judges of Kesavananda do not Tally, if we take the common denominator, very few of them can be considered as acceptable basic characteristics for the seven judges. To a certain extent, they overlap. Each of them is vague in itself. The task of identifying basic features is difficult and time-consuming. Nor is the court able to identify once and for all the components of the basic framework of neither the Constitution nor the Parliament has any clear idea of the extent of its power of change. As a result of this situation, the judiciary has become the most powerful wing of the "State" with respect to the legislature and the executive branch ^[24].

The reasoning discussed above shows that if ordinary legislation is exempt from the ambit of the Basic Structure Doctrine then "a lower law would be allowed to achieve what a higher law cannot ^[25]." But this also brings us to the question of why is an expansion of the scope of the Doctrine required to begin with when there are already standard measures enshrined within the Constitution to combat such violations? What would explain the purpose of bringing what can analogically be called a 'nuclear weapon' to a gun fight ^[26]?

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