DOCTRINE OF BASIC STRUCTURE

REVISITING KESAVANANDA BHARATI VERDICT

ON ITS 50TH ANNIVERSARY

Editors

V. K. Ahuja
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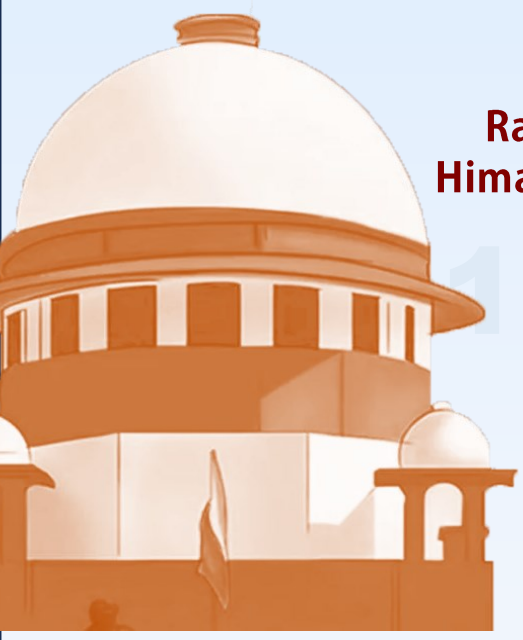
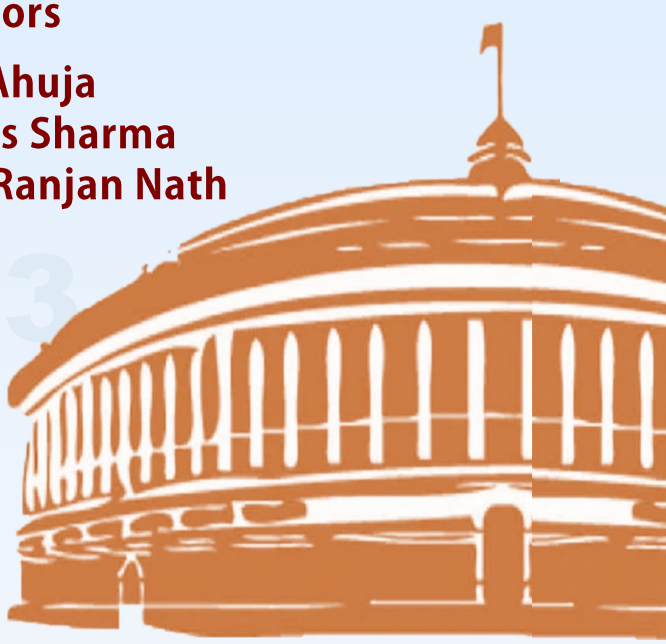
Himangshu Ranjan Nath





Foreword by Justice Hrishikesh Roy, Judge, Supreme Court
Contribution by Justice Ujjal Bhuyan, Judge, Supreme Court
Contribution by Prof. Upendra Baxi

National Law University and
Judicial Academy, Assam
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Title Verso Page

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Foreword

It gives me immense pleasure to pen a foreword for the book 'Doctrine of Basic Structure: Revisiting Kesavananda Bharati v. State of Kerala verdict on its 50th Anniversary' being brought out by National Law University and Judicial Academy, Assam. As part of the ever-growing legal family, I am well aware of the pivotal role that the doctrine has played in shaping Indian constitutional jurisprudence. Born out of the crucible of the landmark judgement in *Kesavananda Bharati v. State of Kerala*, the doctrine has become an inseparable part of our constitutional fabric, guiding the way we interpret and safeguard the Constitution.

Engrained into the fabric of the nation, the 50th anniversary of the historic judgement is indeed a momentous occasion that calls for a deeper reflection and re-examination of principles that lie in the undercurrents of our democratic setup. This commemorative book, a labour of love and scholarship, assembles a collection of essays and insights from legal luminaries, scholars, and practitioners who have dedicated their lives towards better understanding the doctrine and by virtue of the same, the Constitution of India. The book has been able to provide a platform to not only revisit the judgment but also observe its implications, analyse the shortcomings and contemplate a path forward as well.

At the heart of the protracted legal battle over the Government's attempts to acquire temple lands lies the doctrine of basic structure. Though not an idea which was explicitly articulated in the Constitution, it was recognised and affirmed by the

Supreme Court of India as an essential safeguard against arbitrary alterations, holding that certain foundational aspects of the Constitution were so fundamental to principles of democracy, federalism, secularism and individual liberty that they had to be protected at all costs from any alterations or amendments by ruling dispensations. In other words, these features of the Constitution had to remain sacrosanct.

As a living document capable of adapting to evolving needs of the society while preserving its foundational values as well, the doctrine has been able to provide the much-needed stability and continuity within the constitutional framework. This book, a wonderful attempt at revisiting the judgment on its 50th anniversary, takes its readers on an intellectual odyssey. Through various engaging pieces contributed by legal scholars, practitioners and judges, it has been able to offer a comprehensive exploration of the origins, evolution and contemporary aspects of the doctrine while examining the wide-ranging arguments that were made within it as well as the far-reaching ramifications it had on the legal as well as political landscape of the nation.

The doctrine of basic structure, while providing a robust framework for constitutional interpretation, demands vigilance and careful scrutiny as well. It calls upon the judiciary, legal scholars, and citizens alike to ensure that the core principles that the Constitution stand for remain inviolable. Through this book, a renewed commitment to constitutional values must take shape along with a call for deeper understanding of the principles that bind us as a nation. It reminds us that the judgment was not just a historic verdict but also a reaffirmation of the nation and people's collective commitment to democracy, justice, and the rule of law.

I must take this opportunity to express my appreciation at the immense effort put in by the contributors and editors of this voluminous book, in producing a comprehensive work like this

book. Let us recognize the pivotal role that the doctrine has played and continue to play in upholding the ideals that have guided our nation for over seven decades. May this work serve as a source of inspiration, enlightenment, and introspection for all those who seek to understand, uphold, and celebrate the doctrine of basic structure — a doctrine that has not only stood the test of time but has also illuminated the path of justice and democracy, for our great nation.

5th October, 2023 (Justice Hrishikesh Roy)

PREFACE

In the annals of legal history, certain cases stand as monumental milestones, forever etched in the collective memory of a nation. One such landmark judgment that has left an indelible mark on the legal landscape of India is the *Kesavananda Bharati v. State of Kerala* case. As we commemorate the fiftieth anniversary of this historic legal battle, we embark on a journey through time, tracing the origin, proceedings, and profound implications of the case that forever altered the course of Indian constitutional jurisprudence.

The Kesavananda Bharati case, more than just a legal battle, was a crucible where the fundamental principles of democracy, federalism, and individual rights were tested, refined, and ultimately upheld. We shall delve into the intricate details of this case, exploring its socio-political backdrop, the diverse cast of characters involved, the legal arguments that were passionately presented, and the profound consequences it had on the interpretation of the Indian Constitution.

To fully appreciate the significance of the Kesavananda Bharati case, we must first cast our guaze upon the socio-political milieu of India in the early 1970s. The nation was at a crossroads, grappling with a series of constitutional crises that threatened its democratic foundations. The then ruling government, was keen on consolidating power and introducing sweeping reforms that, in the eyes of some, threatened the very essence of democracy.

Against this backdrop of political turbulence, a humble seer named Kesavananda Bharati emerged as an unlikely champion of constitutionalism and the rule of law. His challenge to the Kerala government's attempts to acquire temple lands had evolved into a landmark case that would go on to shape the destiny of the Indian Republic. His determination to protect the religious and property rights of his institution would set in

motion a legal battle that would span multiple years, involve a galaxy of legal luminaries, and engage the conscience of the entire nation.

On the other side of the courtroom, presiding over the destiny of the Indian Constitution, were the judges of the Supreme Court. Chief Justice Sikri, along with twelve other judges forming the largest bench in the court's history, would deliberate over the fate of Kesavananda's challenge to the constitutional amendments introduced by the government. Their wisdom, sagacity, and commitment to preserving the constitutional ethos would become apparent through the course of the hearings.

The legal proceedings in the Kesavananda Bharati case were nothing short of a clash of legal titans. Advocates representing Kesavananda argued passionately that the Constitution's 'basic structure' was inviolable and could not be altered through constitutional amendments. This concept, although not explicitly mentioned in the Constitution, would come to be recognized as a fundamental doctrine that provided a safety net against arbitrary alterations to the Constitution's foundational principles.

On the other side, the government contended that the Parliament's power to amend the Constitution was virtually limitless. They argued that the doctrine of 'basic structure' was an invention of the judiciary and not a valid constraint on the legislative power of amendment. The courtroom debates were marked by intense legal arguments, profound interpretations of constitutional provisions, and an unwavering commitment to the principles of justice and fairness. The legal fraternity and the general public alike awaited the verdict with bated breath, knowing that it would be a defining moment in India's constitutional history.

On April 24, 1973, the Supreme Court delivered its historic verdict. In a closely divided decision, the majority held that while the Parliament had the power to amend the Constitution, but this power was not absolute. The Court, in a 7:6 hairline majority, established the doctrine of 'basic structure', which identified certain core features of the Constitution that were immune from alteration through amendments. This landmark judgment laid down the foundation for judicial review of constitutional amendments and affirmed the supremacy of the Constitution itself over transient political majorities.

The impact of this verdict was seismic. It not only reaffirmed the commitment of the Indian judiciary to uphold the rule of law and constitutionalism but also placed meaningful limits on the power of the government to amend the Constitution at will. This case marked a turning point in India's constitutional history, ensuring that the constitutional principles of democracy, federalism, secularism, and individual rights remained sacrosanct.

As we celebrate the fiftieth anniversary of the 'Fundamental Right's case', it is impossible to overstate its enduring relevance. The doctrine of 'basic structure' has continued to guide the Indian judiciary in interpreting and safeguarding the Constitution. Subsequent judgments, including those related to fundamental rights, the separation of powers, and the rights of minorities, have drawn upon the principles established in Kesavananda Bharati case.

Furthermore, the case has served as a beacon of hope for constitutional democracies worldwide, demonstrating the importance of an independent judiciary in safeguarding the core principles of a democratic constitution. The case has been cited in legal arguments and judgments in various countries, providing inspiration and guidance to those striving to protect the foundations of democracy.

The Kesavananda Bharati's case stands as a testament to the enduring power of justice, the rule of law, and the indomitable spirit of individuals who are willing to stand up for their constitutional rights. It is a saga of resilience, dedication, and unwavering commitment to the principles enshrined in the Indian Constitution.

This book is humble attempt to explore the judgment's profound impact on the Indian legal system, its relevance in contemporary debates, and the lessons it offers for the future; as well as to commemorate fifty years of constitutional metamorphosis and celebrate the enduring legacy of Kesavananda Bharati judgment, the judiciary, and the Indian Constitution itself. As we believe, the Kesavananda Bharati case is not just a legal landmark; it is a living legacy that reminds us of the enduring power of constitutionalism to shape the destiny of nation and protect the rights of citizens.

Editors

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DISCLAIMER

The authors carry whole and sole liability for all statements written in their respective chapters. The Editors shall remain indemnified and be held not jointly and severally liable anyway.

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CONTENTS

CHAPTER 1

BASIC STRUCTURE OF THE CONSTITUTION OF INDIA: COMMEMORATING 50 YEARS OF KESAVANANDA BHARATI VERDICT

Justice Ujjal Bhuyan*

India attained independence on August 15, 1947. The Constituent Assembly was in session. Drafting Committee of the Constituent Assembly led by Dr. Babasaheb Bhimrao Ambedkar after several rounds of intense debate and discussions drafted the longest written constitution of the world having 395 Articles which was adopted by the Constituent Assembly on November 26, 1949 and came into force on and from January 26, 1950.

There are several salient features of the Constitution. Wherever I go, I ask my audience, mostly students, as to which of the provisions of the Constitution according to them is the most important. Some would say, the Preamble to the Constitution of India; others would say Articles 14 or 19 or 21. I agree with them. While the Preamble is the mirror to the Constitution, Articles 14, 19 and 21 not only form a golden triangle but these articles are the heart and soul of the Indian Constitution. Article 14 speaks about equality; Article 19 is about fundamental freedoms of the citizens; while Article 21 is about life and liberty. Each of these Articles forms the essence of the rule of law but these Articles are important as long as the Constitution is in place. For these articles to flourish in their truest sense, it is necessary that the Constitution retains its basic elements and not get replaced by another Constitution

* Judge, Supreme Court of India. Edited version of the speech delivered at the National Law University and Judicial Academy, Assam on August 26, 2023.

altogether. It is in this context that Article 368 of the Constitution of India which deals with the power of Parliament to amend the Constitution assumes great significance. As we shall see, Supreme Court by interpreting this Article has ensured that Articles 14, 19 and 21 and similar other provisions remain embedded in our constitutional jurisprudence.

Granville Austin, a scholar and critique of our constitutional journey, has described the Constitution of India as a social document, the primary objective of which is to build a democratic and equitable society. It is a dynamic document and when framed was far ahead of its time. I would say, even now certain provisions of our Constitution are far ahead of the

Our Constitution strikes at inequality; at an unjust and unequal social order. Essence of our Constitution is equality between men and men and between men and women. It seeks to establish a humane and just society. It is indeed a transformative document.

Friends, today I am not here before you as a Supreme Court judge but as a student of law having an abiding faith in the Constitution of India.

Article 368 first came up for consideration in *Sankari Prasad Singh Deo v. Union of India*[1]. In this case, the Constitution (First Amendment) Act, 1951 which amended the Constitution by insertion of Articles 31A and 31B came to be challenged. These two Articles sought to protect laws providing for taking over of property by way of acquisition or otherwise including by placing those laws in the Ninth Schedule. Supreme Court while upholding the validity of the two Articles, however, held that Parliament's power to amend the Constitution was traceable to Article 368.

[1] AIR 1951 SC 458

In *State of Bihar v. Kameshwar Singh*[2], Supreme Court reversed the decision of the Patna High Court declaring the Bihar Land Reforms Act, 1950 whereby land belonging to zamindars were taken over by the State, as discriminatory and violative of Article 14 of the Constitution. Supreme Court held that Bihar Legislature was competent to enact the said legislation and that the Act did not contravene any provision of the Constitution. Acquisition of land was for a public purpose.

In order to push through land reforms, Parliament enacted the Constitution (Seventeenth Amendment) Act, 1964 by which Article 31A was amended and forty-four enactments were included in the Ninth Schedule seeking to make those enactments immune from judicial scrutiny. This came to be challenged in *Sajjan Singh v. State of Rajasthan*[3]. By a majority judgment, Supreme Court held the said amendment to be constitutionally valid. The court ruled that the power conferred by Article 368 included the authority to modify or amend all provisions of the Constitution, including the fundamental rights.

Thus, till this stage Supreme Court had been holding that no part of our Constitution was unamendable. Parliament may by passing a constitution amendment act in compliance with the requirements of Article 368 could amend any provision of the Constitution, including the fundamental rights and Article 368 itself. The word 'law' appearing in Article 13 did not include constitutional amendment(s).

A family in Punjab, Henry and William Golak Nath, owned large tracks of farm land measuring about 500 acres. In 1953, the Punjab Government came up with the Punjab Security of Land Tenures Act as per which a person could own only 30 acres of land. Golak Nath family was ordered to forego the excess land

[2] AIR 1952 SC 252
[3] AIR 1965 SC 845

and was allowed to keep only 30 acres of land, apart from a few acres for the tenants; the rest would be taken over by the government. Golak Nath family went to the court challenging the validity of the 1953 Act. Additionally, they also urged the court to declare the Constitution (Seventeenth Amendment) Act, 1964 as unlawful.

In *Golak Nath v. State of Punjab*[4], Supreme Court in what was the largest bench till that point of time by a majority of six judges out of eleven overruled the previous decisions and held that though there is no express exception from the ambit of Article 368, fundamental rights included in Part III of the Constitution of India could not by their very nature be subject to the process of amendment provided by Article 368. If such a right was to be amended, a new Constituent Assembly must be convened for making a new constitution or for radically changing it. Supreme Court held that while the Parliament had the power to amend any part of the Constitution, it could not amend or alter the fundamental rights. Parliament's amending powers were not unlimited; any constitutional amendment infringing upon fundamental rights would be unconstitutional and invalid. Thus, *Golak Nath* marked a clear departure from the previous decisions. However, by applying the *doctrine of prospective overruling*, Supreme Court clarified that from then onwards Parliament would have no power to make any amendment to Part III of the Constitution thereby saving the Constitution (Seventeenth Amendment) Act, 1964 and the Punjab Security of Land Tenures Act, 1953 as well as past court decisions.

Golaknath was followed by two other important cases. In *R. C. Cooper v. Union of India*[5], popularly known as the *Bank Nationalization* case, Supreme Court interfered with the decision

[4] AIR 1967 SC 1643
[5] AIR 1970 SC 564

of the Central Government nationalizing fourteen major private banks.

Then came *Madhav Rao Scindia v. Union of India*[6], widely known as the *Privy Purse* case. After India had attained independence in 1947, the princely states were given the option to join the Indian Union and upon their decision to join the Indian Union they were granted certain financial privileges known as *Privy Purse*. Central Government took a decision to abolish the *Privy Purse* of the erstwhile princely rulers in India. This was successfully challenged in *Madhav Rao Scindia.*

It is interesting to note that all the three cases, be it *Golak Nath* or *Bank Nationalization* or *Privy Purse,* where the Central Government suffered adverse rulings from the Supreme Court, had a common thread; these cases were argued by the famous lawyer Mr. N. A. Palkhivala.

A series of land reforms were introduced in what is now the State of Kerala in the 1950s and 1960s. These reforms were aimed at redistributing lands belonging to large land owners to the landless and the poor. In 1963, the Kerala Legislature enacted the Kerala Land Reforms Act which placed a limit on the area of land that a person could hold. The aforesaid Act provided for acquisition of excess land from land owners and its distribution to the landless and the poor. In continuation of such land reforms, Government of Kerala in 1970 imposed certain restrictions on the ownership of land by religious institutions. Kesavananda Bharati was the head or pontiff of the Edneer Mutt. He challenged the constitutionality of the aforesaid Act in the Kerala High Court whereafter the case eventually reached the Supreme Court.

Parliament of India in the meanwhile, passed the Constitution (Twenty-fourth Amendment) Act, 1971 which amended Articles

[6] (1971) 1 SCC 85

13 and 368 clarifying that Article 13 would not apply to any amendment of the Constitution under Article 368 and that Parliament in exercise of its constituent power can amend any provision of the Constitution in accordance with the procedure laid down in Article 368. The Constitution (Twenty-fifth Amendment) Act, 1971 and the Constitution (Twenty-ninth Amendment) Act, 1972 were also passed which sought to limit the fundamental rights of citizens *qua* land and making the amended provisions immune from judicial scrutiny.

The obvious reason for introducing these amendments was to supersede the majority decision in *Golak Nath*. As per the amendments, firstly it was declared that an amendment of the Constitution would not be a 'law' within the meaning of Article 13; secondly, validity of a constitution amendment act would not be open to question on the ground that it takes away or affects a fundamental right.

These amendments also came to be challenged by Kesavananda Bharati in *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala*[7].

This case was heard by a full bench of thirteen judges, the highest ever. There was a tie *i.e.*, 6:6. Justice H. R. Khanna who was part of the bench broke the tie and his opinion became part of the majority decision. The majority held that though Article 368 did not admit of any implied limitation on the amending power, the very meaning of the word 'amend' leads to the following limitation:

> *"While any piecemeal change may be made, the old Constitution cannot be totally destroyed or so radically changed as to lose its identity. Hence, the basic structure or basic features of the existing Constitution cannot be*

[7] AIR 1973 SC 1461

> *amended through the process of amendment as provided in Article 368."*

The amendments were held to be valid and the decision in *Golak Nath* was over-ruled.

Decades later, in *M. Nagaraj v. Union of India*[8], Supreme Court was examining constitutional validity of certain constitutional amendments providing for reservation in promotion with consequential seniority. The question falling for consideration was whether such reservation in promotion violated the right to equal opportunity in public employment; thus violating the right to equality which is a part of the basic structure. In that context, Supreme Court examined the theory of basic structure and held as under:

> *"28. To conclude, the theory of basic structure is based on the concept of constitutional identity. The basic structure jurisprudence is a preoccupation with constitutional identity. In Kesavananda Bharati v. State of Kerala, it has been observed that 'one cannot legally use the Constitution to destroy itself'. It is further observed 'the personality of the Constitution must remain unchanged'. Therefore, this court in Kesavananda Bharati, while propounding the theory of basic structure, has relied upon the doctrine of constitutional identity. The word 'amendment' postulates that the old constitution survives without loss of its identity despite the change and it continues even though it has been subjected to alteration. This is the constant theme of the opinions in the majority decision in Kesavananda Bharati. To destroy its identity is to abrogate the basic structure of the Constitution. This is the principle of constitutional sovereignty. The main object behind the theory of constitutional identity is continuity and within that continuity of identity, changes*

[8] (2006) 8 SCC 212

are admissible depending upon the situation and circumstances of the day."

In *Kesavananda's* case, seven judges out of thirteen held that the objectives specified in the Preamble contain the basic structure of our Constitution which cannot be amended in exercise of the power under Article 368 of the Constitution.

Mr. Fali S. Nariman, in his autobiography *Before Memory Fades* has also referred to the *Kesavananda Bharati* case and the controversies surrounding it. He has written that it was only a day before Chief Justice S. M. Sikri retired that the entire court had assembled to announce its decision. Chief Justice Sikri had presided over the largest bench of justices that ever sat to determine a case. As many as eleven judgments were handed down by thirteen justices. According to him, the judgments were very erudite but short on clarity. The view of the court was in favour of Parliament having the power to amend any provision of the Constitution but in the process could not destroy or alter any basic feature. A summary of the final order was prepared which was signed by nine of the thirteen judges.

This statement of nine judges is also referred to by Granville Austin in his book, *Working a Democratic Constitution: The Indian Experience*.

An Article was published in the newspaper "The Hindu" on April 24, 2013 to celebrate 40 years of the judgment in *Kesavananda Bharati*. Shri. Arvind P. Datar, eminent counsel, had written in the Article that the case of *Kesavananda Bharati* was heard for 68 days, the arguments commencing on October 31, 1972 and ending on March 23, 1973. The judgment was pronounced on April 24, 1973. According to him, the hard work and scholarship that had gone into the preparation of this case was path-breaking. Hundreds of cases were cited and the then Attorney General Mr. Niren De had made a comparative chart analysing the provisions of the Constitutions of seventy one different countries. All the effort was to answer just one main question:

was the power of Parliament to amend the Constitution unlimited? In other words, could Parliament alter, amend or abrogate any part of the Constitution even to the extent of taking away the fundamental rights? The conclusion was by a waferthin majority of 7:6 with the judgments running into 703 pages.

I may mention that Justice Mudholkar had mentioned about the basic structure theory eight years earlier by referring to a 1963 decision of the Supreme Court of Pakistan. Chief Justice of Pakistan, Justice A. R. Cornelius, a Christian, had held that President of Pakistan could not alter the fundamental features of their Constitution. In his memories *Neither Roses Nor Thorns* Justice H. R. Khanna has mentioned about Justice Cornelius. In 1938-39 when Justice Khanna was practicing as a young lawyer in Amritsar, Justice Cornelius was the District and Sessions Judge of Amritsar. It is said that in the course of hearing of the *Golak Nath* case, the great Mr. M. K. Nambiar appearing for the petitioner tried to put forth the concept of basic structure.

Though the executive government should have been happy with the verdict because the majority had over-ruled *Golak Nath* and had upheld the amendments, it was certainly not happy with the basic structure theory propounded in *Kesavananda*.

In his book *Working a Democratic Constitution: The Indian Experience*, Granville Austin has dwelt at considerable length of the *Kesavananda* case. According to him, the basic structure doctrine as propounded in *Kesavananda Bharati* has become the bedrock of constitutional interpretation in India. Because the doctrine reduced the government's freedom to effectively employ the amendments, it treated the ruling as a defeat despite the amendments having been upheld.

As we have noticed, the *Kesavananda* case was the culmination of a serious conflict between the judiciary and the then executive

government headed by Mrs. Indira Gandhi. In 1967, Supreme Court took the rather extreme view in *Golak Nath* that Parliament could not amend the fundamental rights. Two years later Indira Gandhi's government nationalised 14 major banks providing for paltry compensation payable in bond maturing after 10 years. This was struck down by the Supreme Court although it upheld the right of the Parliament to nationalise banks and industries. Thereafter, the government abolished *privy purse*. This was challenged by late Madhavrao Scindia. This was also struck down by the Supreme Court on the ground that it was a constitutional betrayal of the assurance given to the erstwhile rulers by the then Home Minister Sardar Patel. Smarting under three successive adverse rulings which were all argued by Mr. N. A. Palkhivala, the government of the day brought in a series of constitutional amendments that nullified *Golak Nath*, *Bank Nationalisation* and *Privy Purse judgment*s.

As we have seen, these drastic amendments were successfully challenged in *Kesavananda*.

This had an immediate fall out.

The basic structure doctrine was severely criticized as anti-democratic. Instead of Parliamentary sovereignty, it propounded constitutional sovereignty. Some went to the extent of even describing it as a judicial coup.

In a critical appraisal of the *Kesavananda Bharati* case, Mr. Ramesh D. Garg of the Indian Law Institute wrote:

> *"According to the widely accepted principles of constitutional interpretation, the provisions of a constitution should be construed in the widest possible manner. Constitutional law is the basic law. It is meant for people of different opinions. It should be workable by people of different ideologies and at different times. Since it provides a framework for the organisation and working*

of a state in a society which keeps on changing, it is couched in elastic terms and, therefore, it has to be interpreted broadly. No generation has a right to bind future generations by its own beliefs and values. Each generation has to choose for itself the ways of life and social organisation. Constitution should be so adaptable that each generation may be able to make use of it to realise its aspirations and ideals. An amending clause is specifically provided to adapt the Constitution according to the needs of the society and the times. In view of this, no implied limitation can be imposed on the amending power. To do so would be to defeat the very purpose of it.

The whole constitution is basic law. It is not easy to distinguish which part is more basic than the other as there is no objective test to distinguish."

He also referred to ancient law givers of our country who have recognized the principle that "one generation has no right to tie down future generations to its own views or laws even on fundamentals".

Garg was highly critical of Justice Khanna as according to him Justice Khanna had rejected the implied limitations theory and having marshalled weighty evidence and arguments in favour of a broader view of the amending power, dynamic nature of the society, need for change of laws from generation to generation and age to age, suddenly made a somersault at the last stage and conjured up the basic structure theory to limit the amending power of Parliament as if he found it a bit too much to trust the elected representatives for the use of this immense power. He negatived all that he said in support of the wide amplitude of the amending power in the last phase of his judgment where he developed the basic structure theory perhaps without fully realizing its implications.

Another interesting development was taking place at that point of time. Mrs. Indira Gandhi's election to Parliament from Rae

Bareli constituency in Uttar Pradesh was challenged before the Allahabad High Court by her adversary Mr. Raj Narain in an election petition alleging that she had indulged in corrupt practice thus violating provisions of the Representation of the People Act, 1951. Arguments on behalf of Raj Narain were advanced by Mr. Shanti Bhushan. After a prolonged hearing intercepted by petitions to the Supreme Court on various legal issues, Justice Jagmohan Lal Sinha delivered his catalytic judgment on June 12, 1975. By his judgment, he declared the prime minister's election as void because she was guilty of corrupt practice in her election campaign i.e., by using the services of State and Central Government officers in her campaign. When this was challenged before the Supreme Court, it was then in vacation. Mrs. Gandhi this time turned to Mr. Palkhivala to represent her. Mr. Palkhivala and Mr. Fali Nariman sought unconditional stay of the High Court verdict. Supreme Court's vacation judge Justice Krishna Iyer heard the case on June 23 and on the next day, he granted a conditional stay ruling that the electoral disqualification stood eclipsed during the stay; Prime Minister Gandhi could address the Parliament but she could neither participate nor vote in the *Lok Sabha* debates nor draw remuneration as a member.

Then came the emergency. During this period, the government introduced several amendments including the Constitution (Thirty-ninth Amendment) Act, 1975 making elections to the high offices of President, Vice President, Prime Minister and Speaker immune from judicial scrutiny whose elections in case of a dispute could be decided only by an authority or body established by Parliament.

In *Indira Nehru Gandhi v. Raj Narain*[9], Supreme Court though upheld the election of the prime minister however annulled such amendments on the ground that it altered certain basic features

[9] AIR 1975 SC 2299

of the Constitution e.g., principle of free and fair elections; rule of law; or abolishing judicial determination of an election dispute without affording any alternative forum. This judgment was a unanimous one rendered by five judges, four of whom had given minority opinion in *Kesavananda*; in other words they had not subscribed to the basic structure theory. This is indeed a fine example of judicial discipline.

Three days after the Supreme Court reaffirmed the basic structure doctrine in *Indira Nehru Gandhi*, Chief Justice A. N. Ray convened a thirteen judge bench which included eight new judges who were appointed in the meanwhile to review the doctrine of basic structure.

An interesting book titled *The Kesavananda Bharati Case: The Untold Story of Struggle for Supremacy by Supreme Court and Parliament* has been written by late Tehmtan R. Andhyarujina who was a senior counsel practicing in the Supreme Court; earlier Advocate General of Maharashtra and thereafter Solicitor General of India. He had appeared in this famous case along with Mr. Seervai for the State of Kerala. Andhyarujina describes this case as India's greatest constitutional case. Though it was cast in the form of a legal issue on Parliament's power to amend the Constitution, it was in fact culmination of a struggle for supremacy between the Supreme Court and the Parliament. According to him, this judgment introduced in the constitutional law of India the axiom that Parliament cannot by an amendment of the Constitution alter a basic structure of the Constitution. This book gives an interesting ringside view of what was happening in the Supreme Court and in the Parliament through the lens of a lawyer appearing for one of the parties. It also gives an interesting insight into the attempt to review the judgment in *Kesavananda*. He has recorded that on October 20, 1975, Chief Justice A. N. Ray had passed a written order that the court would hear arguments on November 10, 1975 on two questions:

1) whether the basic structure doctrine restricted Parliament's power to amend the Constitution?
2) whether the Bank Nationalization case was correctly decided?

He has written in his book that there was no application for such review and no hearing had taken place on the basis of which order dated October 20, 1975 was passed.

The hearing of the review commenced on November 10, 1975. Mr. Palkhivala appeared to oppose the review. He has given a vivid description of the hearing which took place on November 10 and 11, 1975. In his accounts, he has described as to how Palkhivala argued on those two days. Firstly, he had argued that no case had been made out to review the basic structure theory and that there was no case in which the court had expressed difficulty in applying the theory. It was most inopportune to review the *Kesavananda* case during the emergency but it was his arguments about the consequences of unbridled power of amendment of the Constitution if the limitation of basic structure was revised by the court which had a powerful impact on the bench.

Mr. Andhyarujina in his book records that Palkhivala argued that afternoon (November 11th, 1975) with great force and eloquence holding the court and those present spellbound. Though he was at all times a master orator and a skilful advocate, his arguments on that afternoon were something which those present could never forget. Please remember, Mr. Andhyarujina, represented the other side *i.e.*, State of Kerala and for an opposing lawyer to say this! What a tribute!

Justice H. R. Khanna, who was on the review bench and was witness to Palkhivala's submissions, observed in his memoirs *Neither Roses Nor Thorns* that the height of eloquence reached by Palkhivala on that day may never be surpassed in the Supreme Court.

On November 12, 1975, Chief Justice declared that the bench was dissolved.

About this, Justice Khanna has this to say in *Neither Roses Nor Thorns:*

> *"Palkhivala was still on his feet when the court rose for the day. Next day when we assembled in the chief Justice's chamber he told us that he had decided to dissolve the bench and not to proceed with the matter. Many of the colleagues heaved a sigh of relief on being so told by the Chief Justice. We all agreed with the Chief Justice's move. Soon thereafter we proceeded to the courtroom and the Chief Justice apprised the members of the Bar about the decision we had taken. So ended the attempt to reconsider the correctness of the Kesavananda decision."*

Professor Upendra Baxi as well as Granville Austin has made scathing commentary on the above attempt. According to them, it was the government's most bootless attempt to curb judicial review and to increase the government's authority to work its will unhindered by democratic institutions. In his book, Granville Austin has also referred to the passionate submissions of Nani Palkhivala. According to him, Palkhivala rose in a tense and expectant hush to give what some hearers believe to have been the most eloquent speech delivered in the Chief Justice's court room. He further writes that Palkhivala was so disturbed by the review hearing that the day before, he wrote to the prime minister beseeching her not to review *Kesavananda.* He wrote in his letter that the country's free democracy would not survive overturning the basic structure doctrine. Of course, Austin questioned the propriety of writing such a letter.

To complete the narrative, we may mention about the Minerva Mills case, *Minerva Mills v. Union of India*[10]. To undo *Kesavananda,* amendments were made in Article 368 the effect of which was that there were no limitations, express or implied, upon the amending power under Article 368 which is a constituent power and therefore a constitution amendment act could not be subject to judicial review on any ground.

By following the decision in *Kesavananda*, the Constitution bench in *Minerva Mills* declared such amendment as void since it violated the basic feature of the Constitution. The limited nature of the amending power in Article 368 is itself one of the basic features of the Constitution so that Parliament cannot enlarge its own powers by making itself a new Constituent Assembly. And judicial review is undoubtedly a basic feature.

In *Waman Rao v. Union of India*[11], Supreme Court again reiterated the basic structure doctrine.

According to Austin, the court had re-affirmed that the checks and balances of the Constitution were vital to the preservation of democracy and of the fundamental rights. He put it beautifully by saying that *Kesavananda* had propounded the doctrine, *Indira Nehru Gandhi* had upheld it and *Minerva Mills* engraved it on stone.

A nine-judge bench of the Supreme Court in *I. R. Coelho v. State of Tamil Nadu*[12] held that insertion of new laws into the Ninth Schedule can be challenged on the ground that those are violative of the fundamental rights guaranteed under Articles 14, 19 and 32. Thus the *Coelho* case has further strengthened the basic structure doctrine in the constitutional set up of the country by emphasizing that any amendment to the

[10] AIR 1980 SC 1789
[11] AIR 1981 SC 271
[12] (2007) 2 SCC 1

Constitution if violative of the basic structure doctrine would be struck down by the court exercising the power of judicial review notwithstanding its inclusion in the Ninth Schedule.

Another interesting development post *Kesavananda* is that Supreme Court has declined to foreclose the list of basic structure. So far, quite a multitude of features have been acknowledged as 'basic' by different benches.

S. M. Sikri, Chief Justice of India, in *Kesavananda*, had pointed out amongst others that the republican and democratic form of government is a basic feature of the Constitution. So also Justice Y. V. Chandrachud in *Indira Nehru Gandhi.*

In *Kihoto Hollohon v. Zachilhu*[13] Supreme Court declared that democracy is a basic feature of the Constitution and that free and fair elections conducted at regular prescribed intervals is essential to the system envisaged in the Constitution.

The basic structure concept was resorted to in *S. R. Bommai v. Union of India*[14] although no question of constitutional amendment was involved in that case. Secularism was held to be an essential feature of the Constitution and part of its basic structure. It was also observed that democracy and federalism are essential features of our Constitution and are part of its basic structure.

In a plethora of cases, including in *L. Chandra Kumar v. Union of India*[15], Supreme Court has asserted that independence of the judiciary is a basic feature of the Constitution as it is the *sine qua non* of democracy being the most essential characteristic of a free society. Likewise, judicial review has been held to be a basic and essential feature of the Constitution. If the power of

[13] AIR 1993 SC 412
[14] AIR 1994 SC 1918
[15] (1997) 3 SCC 261

judicial review is abrogated or taken away, the Constitution will cease to be what it is.

As recently as in 2016, Supreme Court in *Supreme Court Advocates-on-Record Association v. Union of India*[16] struck down the Constitution (Ninety-ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 providing for a National Judicial Appointments Commission (NJAC) replacing the collegium system for appointment of judges to High Courts and Supreme Court on the ground that those impinged upon the independence of the judiciary and were also violative of the principle of separation of powers between the executive and the judiciary, which formed part of the basic structure of our Constitution.

After the re-affirmation and extension of the applicability of the doctrine of basic structure or basic feature, it is now clear that so long as the decision in *Kesavananda* holds the field, and this is a judgment of thirteen justices, no amendment of the Constitution would be immune from challenge on the ground that it affects one or other of the basic feature of the Constitution.

[16] (2016) 5 SCC 1

CHAPTER 2

BASIC STRUCTURE: A "SOLID" FOUNDATION OR A "FRAGILE BASTION"?

Prof. (Dr.) Upendra Baxi*

On Social Responsibilities of Reading Cases

Kesavananda Bharati Case[1] was decided on 24th April, 1973 and it expounds a basic constitutional truth that all powers are *constitutional* powers, and no constitutional power is a *constituent* power above and beyond the express text, and indwelling the text of the Constitution. The power to amend the Constitution under Article 368 is also a constitutional power because when the procedure therein is fully complied with what is accomplished is the change *in* but not *of* the Constitution, the power in Parliament to amend the Constitution of India is plenary, vast and varied; but it is not unlimited and must run the gauntlet of preservation of its 'basic structure'. If the (or *this*) Constitution endures, the exercise of amending powers may not change its sovereign, democratic, socialist, secular and the republican character.

This much at least is well-known to the wielders and the yielders of constitutional powers; indeed, the doctrine of implied limitation has been accepted by political, legislative, and executive authorities-- over the past fifty years. It has been, however, found expedient by political class, from time to time to protest, the very idea of the basic structure as negation of Parliamentary sovereignty, spectacularly as archived by 24th, and 39th Amendments and now happened in the case of National

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[1] Kesavananda Bharati v. State of Kerala, 1973 (4) SCC 225; this will be hereafter cited by the first name.

Judicial Appointment Commission Act (here after referred to as NJAC Case). But the idea of limits to amending power has overall been jurisdictionally accepted by Parliament. The debate between the Court and Parliament has been confined to the issue of whether and when the basic structure of the Constitution has been violated or the violation of an essential feature has indeed occurred to an extent that makes inroads into constitutional limits set by the basic structure.

Rather, doctrinal commentators – mostly legal and political philosophers – have offered diverse advocacy either of Parliamentary sovereignty or of the judicial oversight over 'unconstitutional constitutional amendments'.[2]

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[2] The literature here is immense. See Granville Austin, *Working a Democratic Constitution—A History of the Indian Experience* (1999); P. Ishwara Bhat, *Law & Social Transformation in India* (Lucknow, Eastern Book Co., 2009); Niraja Gopal Jayal, *Citizenship and Its Discontents: An Indian History* (Cambridge, Harvard University Press, 2013); Madhav Khosla, *The Indian Constitution: Oxford India Short Introduction*, 2012); Sudhir Krishnaswamy, *Democracy and Constitutionalism,* Oxford University Press, (2009); Anupama Rao, *The Caste Question: Dalits and the Politics of Modern Asia* Berkeley: University of California Press, 2009); S. P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits,*(Delhi, Oxford University Press,2002); Ronojoy Sen, Legalizing Religion: *The Indian Supreme Court and Religion,* https://www.eastwestcenter.org/sites/default/files/private/PS030.pdf (PDF file, 2007); Ujwal Kumar Singh, *The State, Democracy, and Anti-Terror Laws in India* (Delhi, Oxford University Press,(2007); Anirudh Prasad & Chandrasen Pratap Singh, *Judicial Power and Judicial Review: An Analysis of the Supreme Court in Action,* (Lucknow, Eastern Book Company, 2012); Arun Thiruvengadam, "Swallowing a Bitter PIL? Brief Reflections on Public Interest Litigation in India in the Sliding Scales of Justice: The Supreme Court in Neo-Liberal India" in Thiruvengadam, Arun K., *Swallowing a Bitter PIL? Reflections on Progressive Strategies for Public Interest Litigation in India* (2013). Oscar Vilhena, Upendra Baxi and Frans Viljoen (eds.), *Transformative Constitutionalism: Comparing the Apex Courts in Brazil, India and South Africa* (Pretoria University Press 121,140 (2013); Udai Raj Rai, *Fundamental Rights and Their Enforcement* (New Delhi, PHI Learning Pvt Limited, 2011); Anupama Roy, *Gendered Citizenship: Historical and Conceptual Explorations* (Orient BlackSwan (2005); Sanjay S. Jain, Sathya Narayan, *Basic Structure Constitutionalism (Revisiting Kesavananda Bharati)*, (Lucknow, Eastern Book Co.2011); Rajeev Dhavan, *The Supreme Court of India and Parliamentary Sovereignty: A Critique of Its Approach to the Recent Constitutional Crisis,* (Delhi, Sterling, 1977). I have, in my articles, diversely reviewed and critiqued the literature: see Upendra Baxi, *The Indian Supreme Court and Politics,* (Lucknow, Eastern Book Co; 1980);

The political class have maintained a distinct hostility to the idea as it somewhat disables limitless, or absolute Parliamentary sovereignty and its workings. It would be fair to say that no political party has been in favour of the idea of basic structure doctrine and all believe that it is only Parliament and the State legislatures which may decide on the Article 368 scope of amending powers. It reads the Constitution, more or less, as stating the principle of absolute Parliamentary sovereignty whereas the Supreme Court of India insists on the supremacy of all co-ordinate agencies exercising plenary powers within conferred jurisdiction not sovereignty anywhere in, or under the Constitution; in contrast, the Kesavananda and its normative progeny[3] have affirmed implied limitations on the powers to amend the Constitution arising out of the basic structure of the Constitution.[4] We must note that while the doctrine is argued extensively in many situations, it has sparingly been invoked to render valid many a constitutional amendment; vast supreme

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Upendra Baxi, "The Little Done, The Vast Undone: Reflections on Reading Granville Austin's *The Indian Constitution*," *Journal of the Indian Law Institute*, 9: 3. 323-430 (1967); *The Avatars of Judicial Activism: Explorations in The Geography of (In) Justice in Fifty Years of the Supreme Court of India: Its Grasp and Reach,* 156, 209 (Delhi, Indian Law Institute, 2001; S. K. Verma and Kusum, eds.).

Most recently, a valuable analysis is offered by Vijay Kumar. *The Theory of Basic Structure: Saviour of the Constitution and Democracy*, (Delhi, Aakar Books, 2023). Sudhir Krishnaswamy, *Democracy and Constitutionalism (Delhi, Oxford University Press*, 2009).

See also now the valuable comparative exploration by Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, (Oxford. Oxford University Press, 2017).

[3] This refers to decisions after the *Kesavananda*, for example, *Indira Nehru Gandhi v. Raj Narain,* 1992 Supp (2) SCC 651; 1975 Supp SCC 1; *Minerva Mills Ltd. v. Union of India,* (1980) 3 SCC 625; Waman *Rao v. Union of India*, (1981) 2 SCC 362, *Kihoto Hollohan v. Zachillhu*, 1992 SCC Supl. (2) 651; *L. Chandra Kumar v. Union of India,* (1997) 3 SCC 261: 1997 SCC (L&S) 577; *Supreme Court Advocates-on-Record Assn. v. Union of India,* (2016) 5 SCC 1*; M. Nagaraj v. Union of India*, (2006) 8 SCC 212: (2007) 1 SCC.1013; *S. R. Bommai v. Union of India*, (1994) 3 SCC 1; *I.R. Coelho v. Union of India* 2 SCC 1; *Janhit Abhiyan v. Union of India*, 2022 SCC Online SC 1771. These will be hereafter simply referred to by name.

[4] The idea of representation as a juristic idea (the law as it is) and as an ethical idea (law as it ought to be) are at deep variance and often conflict: see for footnotes 22, 23, 24 *infra*.

or plenary Parliamentary powers have been upheld. To take a major example, notwithstanding the doctrine, Parliament has continued to exercise under Article 368 plenary powers (and the Supreme Court has acquiesced with the post-Mandal amendments - the 77th, 81st, 82nd, 85th amendment) without any serious examination of the Supreme Court judgments or the affirmative action policy entailments.[5] To take another example, in the NJAC case itself, the Court refused to consider the Act invalid on the ground that the Bill was enacted in anticipation of the eventually enacted 124th Constitution Amendment Act![6]

I do not here wish to re-state so much what *Kesavananda*, and its normative progeny may have accomplished, my emphasis being primarily here on how not to read a case. We ought to realize the distinction more fully between the ordinary (routine) and extraordinary decisions, even when we know that enormous judicial and argumentative feats are congealed even in non-routine judicial decisions. The distinction between everyday (ordinary) and extraordinary decisions is not an easy one to draw excepting from a litigant and a victim centred standpoint affecting their life choices or lifestyles; the shame and the stigma associated with any kind of detention or incarceration is immense. On the other hand, there are decisions that affect everyone - decisions whether taken by the executive, legislature, or judiciary - that limit or expand basic rights, enhance human rights, or restrict their range creating human righteousness, and affect, for weal or woe, the integrity of the very constitutional structures. Let us call these extraordinary, while appreciating the fact also that the accretion of principles of 'daily' decisions may also emerge eventually as extraordinary re-shaping the juristic and constitutional destiny of India. In any

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[5] Arvind P. Datar, "Our Constitution and Its Self-Inflicted Wounds", *Indian Journal of Constitutional La*w, 92-112O (2007).

[6] Supreme Court Advocates on Record Association v. Union of India (2016) 5 SCC-1 (NJAC Case) *(per* Hon'ble Justice Jagdish Singh Khehar, Justice Chelameswar, Justice Madan B. Lokur, Justice Kurian Joseph and Justice Adarsh Kumar Goel, JJ.].

event, we may not read *Kesavananda*, and its normative progeny, as judicial decisions like any others, but rather inform our habits of reading by special and different anxieties and sensibilities articulated by learned justices. In saying this, I assume, of course, a theory of reading cases which elaborate our *social responsibilities*, as law learners (students and teachers).[7]

Prophecy, Prediction, and Judicial Anxiety

If law is nothing but what courts would decide, every good lawyer and law teacher should be able to foretell what the courts would decide, and I had a fair go at many accurate readings of outcomes of a case. But so far, I have only made one prophecy; writing soon after the justly famous *Kesavananda* decision, I said (in 1974) that while it "creates many paradoxes. … it is not just a reported case on some Articles of the Indian Constitution. Indeed, it is in some sense the Indian *Constitution of the future*".[8]

I like to think of this as a prophecy, but I am not a prophet! Yet at the same time it is more than an evidence-based prediction to say this.[9] The puzzle deepens when we bear in mind that very

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[7] I derive a lot from reading Paul de Mann, *Blindness and Insight Essays in the Rhetoric of Contemporary Criticism* (London, Routledge, (1983); Paul Ricouer, *The Rule of Metaphor: The Creation of Meaning in Language*, (London, Routledge, Robert Czerny with Kathleen McLaughlin and John Costello, S J trans), and Jan M. Broekman, Larry Catà Backer, *Lawyers Making Meaning: The Semiotics of Law in Legal Education II,* (Dordrecht, Springer 2012). I particularly like Ricoeur's notion of "soulful reading" which of course is deeply engaged as against a mechanical reading and his notion of 'surplus meaning'. Also specific to legal interpretation is his notion of "narrative identity "that helps to understand the human suffering and rightness a whole lot better than the third person narratives of violations of basic human rights.

[8] Upendra Baxi, "The Constitutional Quicksands of *Kesavananda Bharat*i and the Twenty-Fifth Amendment", (1974) 1 SCC (Jour) 45 (emphasis added).

[9] The then downtown Boston attorney Oliver Wendell Holmes, Jr. in 1897, presented this: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Distinguishing between this 'standard" from a "Quantum" interpretation of this aphorism, Anthony D'Amato suggests that what Holmes meant was that while the law operates in the present, the "content of the law in the present is a prediction of what courts will decide in the future" and an" allegedly applicable rule of law in the present is

few amendments have been invalidated on the ground of the basic structure, though the doctrine has very often been urged at the Bar as a technology of constitutional construction, and even as the means of interpretation of statutory, and administrative law.

I have used in the title of this Chapter two perspectives: the first refers to a commonplace idea that the basic structure doctrine has provided a solid and workable foundation for Indian constitutionalism and the second stands described as a "fragile bastion" in the opinion of the Court primarily authored by Justice Jagdish Khehar in the NJAC Case.[10] It is the second which is of great interest because the highest constitutional power to change the Constitution is bestowed by Supreme Court itself and stands invested in the name of the Constitution and the people. However, the same Court itself regards the seat, and the seal, of highest power also as a source of maximal vulnerability. Underlying in the evolution of basic structure is the self-perception of the Court of its 'vulnerability'. Despite being a "formidable protector of individual liberty", it remains "a fragile bastion indeed" needing "protection" as "a very vulnerable institution".[11] It is this construction of the highest power as the very source and seat of vulnerability that is crafted endlessly, from case to case, from *Kesavananda* (1973) to *Janhit* (2022).

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the probability that the rule will be affirmed by a court in the future". See, his "A New (and Better) Interpretation of Holmes's Prediction Theory *of Law", (2008). Faculty Working Papers. Paper 163. http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/163.*
In any event that 'prophecy' stands reinforced by V. R. Jayadeven who says that: "It is unlikely that in the future the doctrine would be abrogated rolling back the Constitutional position to the pre-*Kesavananda* days. Nor it is desirable also. Was not the statement that "*Kesavananda* is the Constitution itself— a prophecy"? See V.R. Jayadevan, "Basic Structure Doctrine and its Widening Horizons", *Cochin University Law Review*, 327-373, at 373.

[10] *Supra* note 6, para. 301. See, Upendra Baxi's Foreword, Vinay Kumar, *The Supreme Court of India, Policy Formulator or Active Protector?* VIII, (Delhi, Manak Publications, 2012).

[11] *Supra* note 6, para. 303.

Where from does this sense of vulnerability arise? There are many approaches to answers available on the point. First, vulnerability arising out of Court's own approaches: the anxiety arising from a plurality of judicial opinions on what may be called the basic structure of the Constitution and what may be called essential features (the internal judicial conflict: in short, the *indeterminacy problem*).[12] Second the *source problem:* – is the basic structure, and are the essential features, to be derived from the provisions of the Constitution or its foundational 'principles"?[13] Third, the *decisional problem*: - when one may say is an essential feature stands violated by a constitutional amendment? And the *linkage problem:* Is each violation of essential feature also a violation of basic structure? And finally (though for the time being!) *judicial co-governance of the nation* though the extension of the basic structure doctrine to situations traditionally or constitutionally recognized as belonging to the political or legislative functions.[14]

There are other arenas for constitutional anxiety. One concerns *the reception anxiety* (how others organs may regard constitutional limitations on their power); *the operational anxiety* (new orders and directions stemming from the basic structure doctrine may best be enforced or implemented) and *the legitimation anxiety* how various groups of civil society -

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[12] This may perhaps best be expressed in terms described by Justice Venkatchalliah as 'hazy-grey line A', which it is the Court's duty to identify, "darken and deepen" the demarcating line of constitutionality - a task in which some element of Judges' own perceptions of the constitutional ideals inevitably participates. There is no single litmus test of constitutionality. Any suggested sure decisive test, might after all furnish a "transitory delusion of certitude" where the "complexities of the strands in the web of constitutionality which the Judge must alone disentangle" do not lend themselves to easy and sure formulations one way or the other. It is here that it becomes difficult to refute the inevitable legislative element in all Constitutional adjudications. Kihoto Hollohan v. Zachillhu, 1992 SCC Supl. (2) 651, at para 730D-F.

[13] *Nagraj* affected a paradigm shift in henceforth locating the basic structure from *provisions* to the foundational *principles* of the Constitution. This move pervades the interpretation in the NJAC case.

[14] *Bommai* extended the idea of basic structure to executive acts, but goes much further, but on a proper reading discloses its many splendored discourse.

public intellectuals, academies, civil society groups, the Bar Councils and Associations, retired Justices, and the media - may accept the judicial role and action expanding the functions and frontiers of constitutional judicial review. Put another way, *how fragile is the fragile* "*bastion*"?

The judicial discourse in, and since *Kesavananda,* is replete with constitutional anxiety. This is an aspect which political actors do not at all notice, but it remains astounding that legal academics bypass altogether the pointedly and poignantly articulated judicial and constitutional anxiety!

Slow Reading

However, legal academics and law students should bear a primary responsibility for reading and understanding the actual text and judicial discourse. Who else would read and understand legal and constitutional judicial discourse if not they? But barring some handful exceptions, the sad truth is that what goes in the classrooms and seminars provide intergenerational evidence of *how not* to read a case. It is clear (at least to me) that reading, and reflectivity, go together. Reading while running is no reading; nor is reading an act of raid and plunder. Cash and carry may be a good device for departmental stores but is scarcely a motto for any worthwhile acts of reading.

While it is true there's just no one to tell you about the most correct reading of a case, clear ways of how *not* to read a case do exist. For example, despite Professor Julius Stone's analysis (first propounded in 1947, and reiterated in 1964)[15], averring that almost all cases have multiple *ratioes* and never any one single ratio, the ratio-hunters within us always look for the

[15] Julius Stone, *The Province and Function of Law, Law Aa Logic, Justice, and Social Control,* 149-240, (Sydney, Associated General Publications,1946); Id, *Lawyers' System and Legal Reasonings*, (Sydney, Maitland, 1964).; Id, *Precedent and Law: The Dynamics of Common Law Growth,* (Sydney, Butterworths, 1985).

latter; in the process a lot of epistemic violence is involved in reading of cases.

For another thing, we rarely pursue the political, social, economic, and cultural context of a judicial decision; we are not even aware of the SEC status (social, economic, and cultural status), and the background of justices who write opinions, of the arguing counsel, and the rival positions and perspectives thus carried by arguments, which are reflected in the judgment. We, indeed, skip those *portions* in reading judgments! Nor have we cultivated the art of reading slowly, urged ever since the philosopher Fredrich Nietzsche counselled us a long while ago.[16]

We seek to illustrate the virtue of constitutionally sincere reading by reading the judicial discursive labours in the NJAC. So sloppy are our reading habits that rarely, if ever, perceive that here are two decisions - it is the first, which makes the second possible! The first is concerned the five justices Bench which passed a written, and a reasoned, order on the motion to

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[16] In his *The Dawn: Thoughts on the Prejudices of Morality*. Friedrich Wilhelm Nietzsche wrote thus: "Besides, we are friends of the lento, I and my book. I have not been a philologist in vain — perhaps I am one yet: *a teacher of slow reading. I even come to write slowly*. At present it is not only my habit, but even my taste — a perverted taste, maybe — to write nothing but what will *drive to despair everyone who is 'in a hurry*.' For philology is that venerable art which exacts from its followers one thing above all — to step to one side, to leave themselves spare moments, to grow silent, to become slow — the leisurely art of the goldsmith applied to language: an art which must carry out slow, fine work, and attains nothing if not lento. Thus, philology is now more desirable than ever before; thus, it is *the highest attraction and incitement in an age of 'work': that is, of haste, of unseemly and immoderate hurry-skurry, which is so eager to 'get things done' at once*, even every book, whether old or new. Philology itself, perhaps, will not so hurriedly 'get things done.' It teaches *how to read well, that is, slowly, profoundly, attentively, prudently, with inner thoughts, with the mental doors ajar, with delicate fingers and eyes*. My patient friends, this book appeals only to perfect readers and philologists: learn to read me well!" (See Author's Preface at 14; The Project Gutenberg eBook of The Dawn of Day by Friedrich Wilhelm Nietzsche, 2012, http://www.gutenberg.org/license). There is an appropriate citation from Rig Veda with which the book begins: "There are many dawns which have yet to shed their light. — the emphasis added in the quote highlight the dangers of speed and exalt the virtues of slow reading. I do not think that any of the 'New Education Policy' text in India even mentions once the importance, and integrity, of slow reading!

recuse, the denial of which made possible the second result - the decisions regarding the constitutional invalidity of the NJAC amendment and the Act. Are we at all justified in not *at all* reading the recusal decision? By what authority in the constitution and convention may we 'edit' away a judicial decision in reading of it? Is that any *reading at all?*

I have given my reasons for a negative answer in Article published in 2016.[17] But this paper is simply edited out in law classrooms and 'studies' (publications and seminars). Why so is probably an impertinent question! However, I cannot help saying that this is certainly not a juristically accountable and socially responsible way of reading a judgment!

Hermeneutical Freedom and Social Responsibility

While addressing this theme, I specifically recall the saying of Isaac Bashevis Singer, the Nobel Prize in Literature, 1978, that "*we have no choice but to be free*"[18]. The same words may be extended to the basic structure doctrine which moves us all in the direction of our becoming constitutionally sincere democratic citizens. Or to use the phrase of Eric Fromm, we must learn to develop "the fear of freedom"[19] as inherent to any idea of basic structure that prescribes a constitutional discipline of coordinate branches of governance and limits the sphere of

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[17] Upendra Baxi, "Demosprudence and Socially Responsible/Response-able Criticism: The NJAC Decision and Beyond", NUJS *L. Rev.* 9:153 -172, at—158-162 (2016).

[18] https://www.nobelprize.org/prizes/literature/1978/singer/ lecture/

[19] Erich Fromm, *The Fear of Freedom*, (London, Routledge, 2nd Edition, 2001). Erich maintains that while "modern society has increasingly tended to provide security and liberty, it has not much advanced freedom in sense of the realisation of one's his individual self. Freedom, though it has brought us independence and rationality, has isolated us from one another and made individuals powerless. In the face of agonizing isolation, the alternatives are either to escape or surrender the burden of this freedom by new dependencies and submission, or to advance to the full realisation of positive freedom which is based on the uniqueness and individuality of human beings". Six justices in *Kesavananda* yielded to the fear of freedom, but since 1976 but its normative progeny has, despite some anxieties, avoided the fear of fear. Many have generally the fear of freedom. As concerns judicial independence. What shall we say of the law co-learners?

the supreme power. constitutional choices, or meaning making, is never easy and always open to diverse and rival contentious amongst which the Justices must make a reasoned public choice. Unlike the 'deep state', judicial process and power may never act in the dark.

The questions before the Bench always are, and must remain: What constitutional responsibilities may accompany judicial review power and process? How are some extraordinary interpretative choices to be made by judicial discourse – the travails of judicial interpretation not only of the texts but the contexts of decision-making? And to whom the judiciary may be accountable—to the totality of present incumbent justices, lawyers and litigants, the political executive, the Bar, the communities of jurists or the traditions of the craft of judging and justicing, or to We, the People? The NJAC Case (like the *Kesavananda* normative progeny) illustrates judicial agonizing over these central questions. And these interpretive self-agonizing, generate many a constitutional anxiety.

We have to set against this the power of propaganda in an increasingly globalised world.[20] It involves the branding of whole nations, or a group of nations.[21] It also succeeds at the level of belief in post-truth societies where patent falsehoods are paraded as 'truth' in an easy, or empty minded, embrace of romanticism of power.[22] Is every act of power inherently justified

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[20] See, the path breaking work of Professor B.S. Murty, among the handful of Third World and International Law pioneers to focus on the specific theme of international regulation, *Propaganda and World Public Order: The Legal Regulation of the Ideological Instrument of Coercion*, (New Haven: Yale University Press, 1968).

[21] Gerald Sussman, 'Systematic Propaganda: Branding Democracy: U.S. Regime Change in Post-Soviet Eastern Europe' in Nadia Kuneva (ed), *Branding Post-Communist Nations: Marketizing National Identities in the "New" Europe,* 23-48 New York, Taylor, and Francis, 2012.) The 'branding' continues to. as the situations in to grow (apace, for example, in Iraq, Libya, and Syria.

[22] I have long ago explained the difference between party politics and Constitutional politics in my *Indian Supreme Court and Politics,* Lucknow, Eastern Book Company, (1980). At least, two differences are crucial: first,

because it is claimed to be an act of general will is a typical Rousseau dilemma.

The argument that the NJAC Amendment was expressive of the "will of the people" was forcefully advanced by the then Additional Solicitor General who pointed out that the Bill was passed by 367 MPs in Lok Sabha (with 37 AIDMK members who abstained), 179 from Rajya Sabha (with one animated dissent by Mr. Ram Jethmalani), and 28 Legislative Assemblies.

These facts were acknowledged by all parties and the Court. Relatively unarticulated are the constitutional facts about the composition of legislatures and the first- past -the- post polls electoral system as determined by the Representation of Peoples Act and the Constitution.[23] It is accepted that when Article 358 requires ratification, that the electoral minority all form government on the basis of first past the post system and that indirect elections in upper houses of legislature do not affect their legitimacy or legality. We may then expect s a weighty creation and mobilization of public opinion directed against the very idea of basic structure. But the idea of a constitutional governance is also accepted by constitutional elites and the Court ought to only look for the reasoned elaboration of juridical principles, and not at the complex and changeful, calculus of

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Constitutional politics involves a politics of values embodied in the provisions and principles of a Constitution in conflict of legal interpretation, while power politics is the pursuit of power to rule or govern others. Second, while political leaders and must remain interested in law and policy choices they make, justices are relatively disinterested in the outcomes of any litigation before them, must give regularly published narratives of their reasons, in a situation of high turnover. I have shown elsewhere (in an *India Legal* article welcoming Chief Justice Dr. Dhananjay Chandrachud) that while India had 15 prime Ministers, they have 50th Chief Justice in the 75 years of the Constitution.

[23] The first Constitutionally enables indirect elections, including nominations, in the Rajya Sabha and Legislative Councils in bicameral Indian States (there are only six legislative Councils where an upper house exists) are indirectly elected and not a popularly elected body and the second empowers the Constitutional possibility that a political party has won the minority of national/ regional vote may still constitute a legislative majority, under the Election laws of India.

considerations of political expediency.[24] Otherwise, the "unimaginable" alternative (as Justice Madan D. Lokur wrote in his concurring opinion)[25] is that we will have a partisan Constitution,[26] with a pliable judiciary comprising only of the 'committed judiciary', which we all experienced in the immediacy of rightlessness and sufferings of the imposition of internal emergency during 1975-76.[27]

The Court is resoundingly clear and categorical in saying that the judiciary must defer to the wisdom of the Legislature and accept their views, but Justices must also ensure that they act only "within the parameters of the law, nothing more and nothing less."[28] The validity of amendments "cannot be tested on opinions, however strong they may be or however vividly expressed".

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[24] In Para 143 the Court clearly emphasized: "The strength and enforceability of a Constitutional amendment, would be just the same, irrespective of whether it was passed by the bare minimum majority postulated or by a substantial majority, or even if it was approved unanimously." The will shall be considered peoples will. However, that will be to be constitutionally and judicially read according to the "declared limitations, on the amending power conferred on the Parliament, which cannot be breached".

[25] An observation in Para 535 NJAC must be quoted here in full: "The 99th Constitution Amendment Act and the NJAC Act have reduced the consultation process to a farce a meaningful participatory consultative process no longer exists; the shared responsibility between the President and the Chief Justice of India in the appointment of judges is passed on to a body well beyond the contemplation of the Constituent Assembly; the possibility of having committed judges and the consequences of having a committed judiciary, a judiciary that might not be independent is unimaginable."

[26] A recent – (April 21, 2023) decision of the Supreme Court of the State of Alaska in the Matter of the 2021 Redistricting Case is here instructive. Not every plea that urges the re-drawing of election districts is an exercise in what is normally called 'partisan' Constitutionalism. On the latter concept. See Jon Elster, "Constitutionalism in Eastern Europe: An Introduction", *The University of Chicago Law Review*, 447-482 (1991); Brian Highsmith, "Partisan Constitutionalism: Reconsidering the Role of Political Parties in Popular Constitutional Change" 2019 *Wis. L. Rev.* 911 - (2019).

[27] Gyan Prakash, *Emergency Chronicles: Indira Gandhi and Democracy's Turning Point* (NJ, Princeton University Press, 2016); Upendra Baxi, The Indian Supreme Court and Politics, op. cit.

[28] Supreme Court Advocates-on-record Association & Anr. v. Union of India (2016) 5 SCC 1).

This is what the Court signifies by what is called in NJAC as a theory of "the last word" which I would rather, and following Dean Roscoe Pound would, describe as a "jural postulate" of a "civilized society". The theory prescribes that interpretation of legal and constitutional words (their juristic and social meanings, belongs to the Supreme Court of India). This complex task - of grasping the very basis of the "constitutional scheme" – is now to be accomplished by the touchstone of the basic structure.

Is the NJAC discourse and then, all about a conflict of wills – the adjudicative will verses the executive/legislative will? If so, is the conflict one in the General Will prevails over a particular will? Ought general will always prevail over other will? Why may/ought not the adjudicative will, at certain times, not also articulate a general will? Or is the general will formation always a mix of the executive, legislative and adjudicative will? These questions were not so much directly argued before the Court but is that a good reason at all for law reviews and political science/social theory discourses in a five-year law teaching not reverberating with Rosseau's dilemma in the context of the evolution of the basic structure doctrine?[29]

Shields Against Vulnerability

The quest is on for the protection of the basic structure from vulnerability, it is instructive to note the different principles and

[29] See, Christian Blum, "Dilemmas Between the General and Particular Will – A Hegelian Analysis", *https://revistas.uma.es/index.php/contrastes/article/download/1805/1747* 232-239 (2010).
Closely understood, the dilemma "continuous integration" of the general and particular will is never resolved (as Blum illustrates) but this is pragmatically side-stepped. Blum concludes: "This means that the dilemma is identified as the moment of a superordinate context, the ethical state qua reconciliatory structure, and settled in favour of its preservation, which means that it is negated. Nonetheless, the dilemma's significance is preserved by conceding the legitimately inextricable conflict between both forms of the will in the concrete situation" (at p.239). But the NJAC outcomes affirm Constitutional preservation as the virtue of basic structure to which Parliament may be rightly said to have to have acquiesced. If so, there may not be any conflict of general or particular wills!

practises that protect constitutional judicial review process and power.

First, as the NJAC opinion illustrates at great length, the Supreme Court and the High Courts are "the saviour of the fundamental rights of the citizens of this country, by virtue of the constitutional responsibility assigned to them under Articles 32 and 226, must continue to act as the protector of the civil society" and this would "necessarily contemplate the obligation of preserving the "rule of law", by forestalling the political-executive, from transgressing the limits of their authority as envisaged by the Constitution."[30]

Second, the NJAC Court endorses Justice P.N. Bhagwati's opinion saying that: "it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective… The judiciary stands between the citizen and the State as a bulwark against executive excesses and misuse or abuse of power by the executive, and therefore, it is absolutely essential that the judiciary must be free from executive pressure or influence and this has been secured by the Constitution makers by making elaborate provisions in the Constitution".

Further, the concept of "independence of the judiciary" was not limited only to the independence from executive pressure or influence, but it was a much wider concept, which took within its sweep, independence from many other pressures and prejudices. It had many dimensions, namely, fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong. It was held, that the principle of "independence of the judicial and freedom from prejudices acquired and

[30] Para 197 Repelling any allegations of "sweeping observation", the Court [in Paras 189-291] cites several statements by many leaders of political parties extolling the contribution of courts in this respect'.

nourished by the class to which the Judges belong" and that the principle of "independence of the judiciary" had to be kept in mind, while interpreting the provisions of the Constitution?[31]

Third, the essence of ROL [Rule of Law] involves both "decisional autonomy" (of an individual judge to freely decide) and "institutional autonomy" ("freedom from the pressure from the State").[32] It signifies that the "parameters of decision making, and discretion are always "circumscribed by the Constitution" This is the "essence of decisional independence, not that judges can do as they please".[33]

Fourth, the ROL [Rule of Law] requires respect for "constitutional conventions". As Justice Kuldip Singh stated in the Second Judges Case[34], a convention according to primacy to the CJI in matters of judicial appointments has existed if not from the Government of India Act, 1919, or at least its successor the 1935 Act.[35] And the Court also cites CJI MH Beg as saying that *"where constitutional conventions and practices are so interlinked to the constitutional provisions that they are difficult to disassemble"* but nevertheless constitute an "important and vital" aspect of the law. Thus, the unwritten constitution here informs and intersects with the written text of the constitutional law, both producing and understanding that in practice a "limited primacy" in the President and the Chief Justice of India, for judicial appointments expectants.[36]

The CJI was always accorded 'limited primacy' in matters of elevation, whereas the President enjoyed similar limited primacy

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[31] *Supra* note 6, para 357.
[32] *Supra* note 6, para 312.
[33] *Supra* note 6, para 310.
[34] Advocates-on-Record Association and Anr. v. Union of India, (1993) Supp 2 SCR 659.
[35] *Supra* note 6, para 317.
[36] See, Upendra Baxi, "Constitutional Interpretation and State Formative Practices in Pakistan: A Preliminary Exploration in Comparative Constitutional Law"; *Cardozo Law Review*, 21:132-156(1999-2000).

in consulting other lawyers and justices. That did not mean that the Supreme judiciary can in place of the executive enjoy unbridled power: "This does not mean that a judge may take whatever decision he/she desires to take. The parameters of decision making, and discretion are circumscribed by the Constitution, the Statute, and the Rule of Law. This is the essence of rule of law".[37]

The exalted constitutional offices of the President and the CJI had to operate within a constitutional framework. Thus, stood produced constitutional cooperation between two highest constitutional functionaries. Any breakdown of this constitutional togetherness signals a grave warning of the crisis of law and legitimacy of the Constitution.

I have always read *Kesavananda* and its progeny, as a dialectic between two related concepts: the basic structure and the essential features. The tendencies to identify these is natural but the two concepts must be kept analytically distinct. One way is to think that the basic structure consists in constitutional judicial review and its concomitant, the independence of the judiciary (and the legal profession). It is the refusal or reluctance to concede that any organ of the State or the government has absolute sovereignty that constitutes the basic structure and this is the basic reticence that enables and empowers the articulation of the essential features. What these mean, and whether their violation is such that amounts to a denial of basic structure redress or remedies remains a matter of contingent context and somewhat wayward interpretation.

Important in this context the paradigm shift in *Nagraj* (2006)[38] where the Court averred that "the notion of a basic structure … provides an insight that there are, beyond the words of particular provisions, systematic principles underlying and

[37] *Supra* note 6, para 310.
[38] M Nagraj v. Union of India, (2006) 8 SCC 212.

connecting the provisions of the Constitution" which give "coherence to the Constitution and make it an organic whole."[39] These principles are parts of "constitutional law even if they are not expressly stated in the form of rules. An instance is the principle of reasonableness which connects Articles 14, 19 and 21. …it is only by linking provisions to such overarching principles that one would be able to distinguish essential from less essential features of the Constitution".[40] Are some essential features then the children of a lesser God?

But Justice Chelameswar seems to be taking a different position altogether when he observes that: "The basic structure of the Constitution is the sum total of the basic features of the Constitution"; he instead deploys the expression of 'basic features' that may destroy the 'basic structure', thereby obliterating altogether the distinction between 'structure' and 'features'.[41]

Justice Madan Lokur was most explicit in the NJAC case to rule that any reform of judicial process liable to be tainted with the idea of a "committed judiciary", a "judiciary that is not independent is unimaginable"[42]. Recognizing fully the difficulty with the "possibility of a completely neutral adjudication", Justice Lokur nevertheless asks a question whether a "committed" judiciary was the next best idea. He had no hesitation in asking: "If this does not violate the basic structure of the Constitution, what does?"[43] Without an "independent judiciary, not only everyday life decisions are affected but a dominant executive can ensure that the statutory rights would have no meaning and the fundamental rights of people of the country can be easily trampled upon".[44]

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[39] *Id.* at 23.
[40] *Id.*
[41] *Supra* note 6, para 82.
[42] *Supra* note 6, para 537.
[43] *Supra* note 6, para 536.
[44] *Id*, at 533.

Concluding Observations

I have here merely skimmed the surface of the NJAC decision[45] but I hope to have illustrated, with example of the NJAC decision that offers most of the methods which should be avoided when 'reading' a case. We should be very wary of all kinds of propaganda, politics, and prejudice in understanding what the justices labour to say and do by way of law-making and law saying. It is constitutionally incumbent upon us as law students and teachers (and in my opinion it is high time to instead speak of all *co-learners in law*) to distinguish, and to co-relate, the text to a discourse, as also to the corpus and the genre.[46] No doubt, we may have each our opinion as citizens but all conscientious acts of judging the justices entail acts of slow reading, and recalling from memory what Professor Karl Llewellyn's observed in *Bramble Bush*[47] we should *not look only at what judges say but what they do with what they say.*

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[45] I have primarily looked at (because of space constraints) the learned opinions of three Justices—Justice Khehar, Chelameswar, and Madan Lokur, but not at the additional concurring opinion Kurian Joseph and Adarsh Kumar Goel, JJ. Why do we have a *de facto* system of concurring opinions, and when do they operate as disguised dissents pose critical questions. Moreover, as happened later Justice Joseph in his rather early retirement days publicly said: "I regret my decision to quash NJAC now. I firmly believed, and I do still believe, that independence of the judiciary will be better protected if the Collegium system is followed. But how does the collegium system function? That is the big question. In fact, if you would have read the last paragraph of my judgment, I said that the system requires transparency. There should be secretariat. It's all in the hands of just one assistant... Only one person had files of all charges in the country. We said that that this is not how we should function. But having said that, and having upheld the independence of judiciary, and having struck down the NJAC, the picture I saw was disappointing." Regret NJAC Decision, 2018 Press Conference: Padmakshi Sharma, "A Story of 'Lost Expectations': Ex-SC Judge Justice Kurian Joseph", *Live Law,* 3 June 2023 1:16 PM.
This raises the question whether superannuated Justices should follow certain rectitude in seeking to re-write the opinions they had given while on the High Bench. The situation of retrospective dissent is highly problematic; it is not permitted by the Constitution or the basic structure. I do not burden you with citations of what I have written about this jurisprudence of embarrassment.

[46] Upendra Baxi, "Politics of Reading Human Rights: Inclusion and Exclusion Within the Production 0f Human Rights" in *The Legalization of Human Rights Multidisciplinary Perspectives on Human Rights and Human Rights* Law, 167-184 (London, Taylor and Francis, 2005).

[47] Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study*, (Louisiana, New Orleans Quid Pro Books, 2012).

CHAPTER 3

UPHOLDING CONSTITUTION THROUGH MILESTONE OF KESAVANANDA BHARATI CASE

Prof. (Dr.) Kamal Jeet Singh*
Dr. Manu Sharma**

1. Introduction

The Constitution of India is one of the unique document, which provides the supreme law for the people belonging to diverse culture, religion, and region. The Constitution makers selected the best features of different Constitutions of the world and incorporated them in the Constitution with minor modifications suited to Indian social, economic and political scenario. However, the credit of making it a living document goes to the judicial system. The fact cannot be denied that in the contemporary world the Constitution of India has become a guiding light for various countries like Nepal, Bhutan, Sri Lanka etc. The judicial interpretation and judicial activism have contributed a lot to the sustainability of Indian Constitution. For almost first three decades from the enforcement of the Constitution, the higher judiciary remained passive and confined itself to judicial interpretation of constitutional and legal provisions in strict sense. Earlier, there was hardly any judicial creativity. However, in the late 70's the higher judiciary expanded the scope of literal interpretation. One of such milestones has been achieved by the judiciary in the historic *Kesavananda Bharati case.*[1] It paved new roads for constitutional jurisprudence. By judicial interpretation and creativity, the apex court sets new limits on unlimited sovereignty of Parliament and supremacy of constitution. Indian

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[1] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

judicial system bestowed the system with basic structure theory and redefined the amending power of Parliament. This judgment opened new vistas of constitutional jurisprudence and set a novel precedent for the succeeding cases. The judgment has laid down various principles that have become the bedrock of constitutional law in India. These include the principles of the rule of law, separation of powers, and the independence of the judiciary. In the year 2023 this landmark case completed the successful 50 years of its application. The relevance and impact of this case is reflected by its reaffirmation and application in number of cases without any challenge. This theory acts as a shield for the citizens of India against absolutism and majoritarianism of the Executive and Legislature.

2. Background of the Case

The historic case of *Kesavananda Bharati v. State of Kerala*[2] has resolved a constitutional deadlock which had started in the very beginning of working of constitution. The great constitutional deadlock had been over the amendment of constitutional provisions including fundamental rights. This deadlock was for the first time put before the apex court in the famous case of *Shankari Prasad v. Union of India*[3], in which apex court ruled that an Act of Parliament duly passed under Article 368 would be valid even if it would curtail any of the rights conferred by Part III of the constitution. The view proceeded on the ground that such an Act would not come under the expression *'law'* as mentioned under Article 13(2). Because the expression *'law'* under Article 13(2) is applicable only to legislative measures and not constituent measures. The apex court followed the same precedent in this context till 1967. The next famous case involving same question of law has been *Sajjan Singh v. State of Rajasthan*[4]. The law laid down in *Shankari Prasad case* was affirmed once again by the Supreme Court.

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[2] Supra Note 1.
[3] AIR 1951 SC 458.
[4] AIR 1965 SC 845.

The view expressed by Supreme Court in *Shankari Prasad case* was overruled by apex court in *Golak Nath case*[5], in which it was held that the word *'law'* as used under Article 13(2) would not only cover legislative measures but also constitutional measures. Hence Parliament had no power under Article 368 of the Constitution to make any law taking away or abridging fundamental rights provided under Part III of the Constitution. The basis of the decision of apex court was that the Article 368 related only with the procedure for amending the Constitution but did not confer any power to amend the Constitution.[6] The view expressed by majority in this case was very restricted and raised many constitutional questions regarding the amending powers of Parliament and its scope.

Meanwhile the constitutional 24th amendment Act was passed to get over this decision. 24th Amendment Act expressly empowers the Parliament to amend any provision of Constitution under Article 368. However, the question remains standstill till the Golak Nath case verdict withstands. Likewise, this judgment paved the way for various other amendments like 25th, 26th and 29th Amendment Acts. In this way a constitutional deadlock was created which needed to be resolved. It was after lapse of six years that these constitutional questions were answered and deadlock was resolved by the apex court in the *Kesavananda Bharati case* and laid down another milestone.

3. Law Laid Down in Kesavananda Bharati Case

The famous *Kesavananda Bharati case* through thirteen judges' constitutional bench not only resolved the deadlock but also set a precedent to be followed for years to come. The law laid down in this case opened new gates of innovation and sustainability in the constitutional law. The Supreme Court in *Kesavananda Bharati case* by a thin majority of 7:6 laid down following things:

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[5] I. C. Golaknath and Ors. v. State of Punjab and Anrs., AIR 1967 SC 1643.
[6] *Id.*

3.1 Golaknath Case Overruled:

One of the major achievements in the terms of laying down the law in *Kesavananda Bharati case* has been overruling the *Golaknath case*. With its overruling the law laid down also became obsolete. Golak Nath case laid down that the word *'Law'* in Article 13 (2) of the Constitution covers legislative measures as well as constitutional measures and hence Parliament has no power under Article 368 to make any law taking away or abridging any fundamental right guaranteed under Part III of the Constitution. If the Golak Nath case subsists in the present scenario there would be no deletion of right to property, no change in restrictions of Article 19 and there would be no Article 21A.

3.2 Basic Structure Theory:

The historic *Kesavananda Bharati case* gave a magic wand in the form of basic structure theory. The court by majority held that Article 368 of the Constitution does not enable Parliament to alter the basic structure or framework of the Constitution. Hence by virtue of the provisions of the Constitution under Article 368 can be amended except the basic structure of the Constitution. What exactly amounts to basic structure cannot be defined in water tight compartment and apex court reserves this right with itself by saying what amounts to basic structure will be decided by the court from time to time to meet the ends of justice. The apex court in this case enumerated following as basic and unamendable features of constitution:

i) Supremacy of constitution
ii) Republican and democratic form of government
iii) Secular character of constitution
iv) Separation of power between executive, legislature and judiciary
v) Federal character of constitution

Thereafter the Supreme Court never missed the opportunity to expand the *'basic structure doctrine'*. In its succeeding judgments apex court added more features to basic structure

theory. In *Indira Gandhi v. Raj Narain*[7] Supreme Court held that rule of law is one of the basic structure of the Constitution. In another case of *S. R. Bommai v. Union of India*[8], Supreme Court held that democracy and federalism are the basic structure of the Constitution and cannot be amended. Once again in *Kihoto Hollohan v. Zachillhu & others*[9], the Supreme Court held that democracy and regular elections are the basic features of the Constitution.

Hence, the basic structure theory whose foundation has been laid down in 1973 continued to be reaffirmed, applied and expanded with the changing time to make constitution a working document.

3.3 24th Constitutional Amendment Act Valid:

The constitutional validity of 24th Constitution Amendment Act was challenged in this historic case by Swami Kesavananda Bharati, a mutt chief of Kerala. In the *Golak Nath case,* the apex court ruled that constitutional amendment under Article 368 which *"takes away or abridges Fundamental Right"* would be void. To counter this pronouncement Parliament enacted Constitution (24th Amendment) Act, 1971 to claim that Parliament has power to amend any part of constitution including Fundamental Rights. This amendment inserted clause (4) under Article 13 of the Constitution, providing that this Article would not apply to an amendment of the Constitution under Article 368.[10]

The matter was heard by constitutional bench of 13 judges as the decision given in Golak Nath Case was under review. The apex court upheld the validity of Constitution (24th Amendment) Act, 1971 and further held that the power to amend

[7] AIR 1975 SC 2299.
[8] AIR 1994 SC 1918.
[9] 1992 SCC Supl. (2) 651.
[10] M. P. Jain, Indian Constitutional Law 1772 (Lexis Nexis 2010).

Constitution is to be found in Article 368 itself. Justice Hegde and Justice Mukherjea observed that it is difficult to believe that Constitution makers left such important power to amend Constitution under residuary powers.

4. Relevance in View of Contemporary Changes

4.1 Maintained Constitutional Sustainability:

The law laid down in the case aimed at maintaining the constitutional sustainability. The *"basic structure doctrine"* aims at preserving the core features of the Constitution so that the essence of Constitution can be maintained. Had there been no *"basic structure doctrine"*, there would have been protection of basic features of the Constitution. In the absence of such doctrine the Constitution can hardly survive for a decade or more. The credit of successful working of the Constitution of India even after more 70 years of its enforcement surely be associated with basic structure theory. The 'Fundamental Rights Case' is another name for the *Kesavananda Bharati case*. The Supreme Court observed that it had the authority to invalidate constitutional amendments if that would go against the document's basic structure. This is the reason why the *Kesavananda Bharati case* is imperative.

4.2 Allow Amendments to Meet the Changing Needs of Society:

Change is the law of nature and the Constitution of India is no exception to this rule. Till date the constitutional provision, including the fundamental rights have been amended for around 105 times to meet the changing needs of society and to meet the ends of justice. Right to property mentioned under Article 19 had been deleted from Part III of the Constitution and made a simple constitutional and legal right only. Beside this new Article 21A has been inserted which provides for right to education for the children from 6 to 14 years. However, all the amendments were tested against the basic structure theory.

In the famous case of *Waman Rao v. Union of India*[11] the Supreme Court of India by majority ruled that all amendments to the Constitution made before 24th April, 1973 on which the judgment of *Kesavananda Bharati case* delivered and by which IX Schedule was amended from time to time by inclusion of various Acts and Regulations, were valid and constitutional. But the amendments made after 24th April, 1973 which amended IX Schedule by including various Acts were open to challenge because of basic structure theory. The rule laid down in this case was not limited to Schedule IX but has been applied to all constitutional amendments.

4.3 Retains the Essence of Constitution:

The beauty of Indian Constitution lies in the fact that even after so much of amendments it does not lose its essence and that is the reason for its successful working. *"Retaining the essence of Constitution"* means retaining or preserving the core substance of Constitution, the features without which the Constitution would be a mere hollow structure. It is because of such basic features that Constitution has become a living document, fulfilling the changing needs of society at large. If there would have been no basic structure doctrine, it would have allowed unlimited amendments. It will give a permit for different political parties in power to change the Constitution to meet their political ends.[12] This might result in amending the core and substance of the Constitution. Hence by this judgment Supreme Court very beautifully applied the doctrine of check and balance by which amendment to the Constitution including fundamental rights were allowed but with one qualification that is without altering the basic features of the Constitution.

[11] AIR 1981 SC 271.
[12] *Supra* note 10.

5. Impact of the Judgment

The impact of the landmark judgment delivered by constitutional bench in *Kesavananda Bharati case* cannot be confined in watertight compartment. Its impact is long-lasting and on- going. The fact is established by the apex court in number of cases where reliance is placed on this judgment for deciding the constitutional validity of any amendment as well as for judicial interpretation of any constitutional provision. The ratio of the judgment has been followed as law. Specially the doctrine of basic structure has become an integral part of constitutional jurisprudence. Many constitutional amendments have been tested on the, yard stick of doctrine of basic structure. Since 1973 the Constitution has been amended around 60 times and the Supreme Court has in around 16 cases tested the constitutional validity of such amendment's interns of the basic structure doctrine. On nine occasions the apex court upheld the constitutional validity of such amendments which includes the cases regarding reservation quota for the backward classes, reservation in promotions, quota for economically weaker sections etc.[13]

The ratio laid down in *Kesavananda Bharati case,* was for the first time applied in famous *Indira Gandhi v. Raj Narain*[14] case. In this case the Supreme Court struck down the constitutional 39th Amendment Act, 1975, which barred Supreme Court from hearing a challenge to election of President, Vice- President, Prime Minister and Speaker of Lok Sabha.

The law laid down in 1973 was once again applied in another famous case, *Minerva Mills Ltd. v. Union of India*[15]. In this case the apex court decided upon a clause of Article 368 which gives power and lay down procedure to amend the Constitution states

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[13] Apurva Vishwanath, *Half Century of Application*, p.6, THE INDIAN EXPRESS, 25 April, 2023.
[14] AIR 1975 SC 865.
[15] AIR 1980 SC 1789.

that *"there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution"*.

The landmark case of *Kihoto Hollohan v. Zachillhu & others*[16], in which the constitutional validity of Anti-defection Law mentioned under 10th Schedule was under challenge. 10th Schedule has been added by Constitution (Fifty -Two Amendment) Act. The apex court upheld the validity of 10th Schedule except Para 10 which provided that the decision of Speaker relating to disqualification cannot be reviewed judicially.

In the recent development, another amendment which has been struck down by apex court was the constitutional (Ninety-nine Amendment) Act, 2014. By this Amendment Act, the National Judicial Appointment Commission was established, who would be responsible for appointment and transfer of judges in higher judiciary. By this Amendment Act, an attempt has been made to replace the Collegium system by National Judicial Appointment Commission. The apex court struck down the constitutional amendment on the ground that it violates the independence of judiciary which is one of the basic structures of the Constitution.

This is clear from above analysis that the famous *Kesavananda Bharati* case left footprints for the coming cases to resolve any kind of constitutional deadlock. The decision of this case has been applied to preserve the basic features of the Constitution like democracy, secularism, independence of judiciary, federalism etc.

6. Conclusion and Suggestions

The famous *Kesavananda Bharati case* has been a glaring instance of judicial activism and judicial creativity which opened

[16] 1992 SCC Supl. (2) 651.

new vistas for constitutional jurisprudence. The apex court maintained a balanced approach between two extremes which opens the gates for amendments on one hand and testing them against basic and essential features of the Constitution on other hand. This judicial creativity has been recognised and followed since 1973 without any exception. This case allows each new constitutional amendment to be tested on its own merits. The exact impact and effect of such amendment on the rights guaranteed under Part III of the Constitution must be taken into consideration to decide whether such amendment violates the basic structure or not. The court by majority preserves the essence of the Constitution by protecting basic features of the Constitution against on slaughted of transit political majorities in Parliament. An unqualified amending power would mean that Parliament by 2/3 majority could make changes to any extent or can make it totalitarian State to fulfil its political desires. In this way, Supreme Court saved the Constitution and uphold its sanctity.

The critics have their own opinion for the basic structure doctrine. The doctrine has been criticized on the ground that it finds no mention in the Constitution. The judiciary has assumed to itself greater powers in the name of *"basic structure theory"*. However, the benefits and impact of this theory cannot be ignored at any cost. The criticism of this theory cannot outshine its importance in preserving and sustaining the Constitution. This judgment has set a precedent which is being followed till date and will continue to be followed for preserving the sanctity of the Constitution. There is no iota of doubt that basic structure theory as propounded by *Kesavananda Bharati case* has become an integral part of the constitutional jurisprudence which has been tested efficaciously on the waves of times. Unquestionably, the Constitution has become is stronger with *Kesavananda Bharati case*, being the guardian and protector of the Constitution.

In order to reply the critics, however small they are, some future directions are suggested. The principles of basic structure theory should be added expressly under Article 368 of the Constitution, so, that the theory should get constitutional status, by conferring it constitutional status the legislators will also be aware about the limits and scope of amendment. While amending any constitutional provision, especially Part III of the Constitution, the legislators should keep in mind the basic structure theory. It will also aid in addressing the contemporary challenges more effectively like force conversions, mob lynching, misuse of Article 356 of the Constitution, maintain independence of judiciary etc. It will effectively help in maintaining a balance between amending powers of the Parliament and constitutional safeguards.

CHAPTER 4

CONSTITUTIONALISM AND DOCTRINE OF BASIC STRUCTURE: RETROSPECT AND PROSPECTS

Prof. (Dr.) Yogesh Pratap Singh*

1. Introduction

Man, since antiquity has pondered the problem of how to reconcile the need for order and authority in society with the desire for individual liberty. Alexander Hamilton stated the problem in his famous lines in The Federalist:[1]

> *"In framing a government which is to be administered by men over men, the greatest difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.*
>
> *It took political man many centuries to realize that the good society, in which he possessed rights and in which these rights were secure, was conditioned on the containment of the power holders, whatever the legitimation-factual, religious, or legal-of their social control. In time this purpose appeared to be served best by articulating the restraints society wished to place on the power holders in the form of a set fixed rule-the 'Constitution'—limiting their exercise of political power."*[2]

What is the Constitution? A constitution is perceived as a document that sought to strike a delicate balance between, on the one hand, governmental power to accomplish the great ends of civil society and, on the other, individual liberty. As James

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1 Karl Lowenstein, Political Power and The Governmental Process, The University Of Chicago Press, London 123 (1965).

2 *Id.*

Madison put it in The Federalist Papers, "if men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. The Constitution, thus, became the basic instrumentality of the control of the power process."[3]

The desire to articulate and formalize the basic ordering of the State society in a written document *i.e.* constitution arose as late as the Puritan revolution,[4] in opposition to the claim of absolute and unlimited authority of the long Parliament. It was in the seventeenth century and more insistently, the eighteenth centuries that, under the powerful stimulation of the social-contract concept, the term '*Constitution*' assumed its modern connotation.

It came to signify a single document, containing the fundamentals of the state society and imbued with its specific *telos*, designed to curb the arbitrariness of single power holder- at that time usually, though not invariably, an individual person, the absolute monarch-and to subject him to restraints and controls. For this purpose, the monolithic sovereignty was divided into different segments or departments, to each of which a specific State activity was assigned. This was the *principle of the differentiation* or *specialization of State functions*. To this was added a second correlative: each department should exercise the function assigned to it independently from the others. This was the *principle of functional independence*. The organic unity of the State then was achieved by combining these specialized and autonomous power holders in joint action for the formation

[3] Laurence H. Tribe, On Reading the Constitution. Harvard University Press 6 (1993).

[4] One of the most significant and in some ways far reaching, voices for liberty of conscience and freedom of religion in the early modern period emerged in England during the Puritan Revolution (1640-1660). During this civil war between the Parliamentarians and the Royalists under Charles I, the three kingdoms of the British Isles-England, Scotland and Ireland- witnessed bitter political and military conflict, a struggle that ensued from the collapse of the absolutist rule and religious policies of Charles I.

of the will of the state. All these arrangements, carefully planned in advance, were then to be incorporated in a single document, enacted with specific solemnity, and called the "*fundamental law*" the "*instrument of government*" or the '*constitution*'.

These functional principles evolved slowly, by trial and error. But, after the vast experimentation of the English, American, and French revolutions, constitutional experience reached the stage where there could be agreement on certain minimum requirements of any formalized constitutional order:[5]

a) There should be a differentiation of the various state functions and their assignment to different state organs or power holder to avoid concentration of power in the hands of a single autocratic power holder.
b) There should be a planned mechanism for the co-operation of the several power holders. These arrangements like the *"checks and balances"* familiar to American and French Constitutional theories imply the sharing and, being shared, the limitation of the exercise of political power.
c) There should be a mechanism, likewise planned in advance, for avoiding deadlocks between the several autonomous power holders to prevent one among them, when the constitutionally required co-operation of the others is not forthcoming, from solving the impasse on his own terms and, thereby, subjecting the power process to autocratic discretion. When, under the impact of the democratic ideology of popular sovereignty, constitutionalism had reached the point where the role of the ultimate arbiter of conflicts between the instituted power holders was assigned to the sovereign electorate, the original concept of liberal constitutionalism had been perfected as democratic constitutionalism.

[5] *Supra* note 1.

d) The fundamental law should also contain the explicit recognition of certain areas of individual self-determination-the individual rights and fundamental liberties-and their protection against encroachment by any and all power holders.
e) Finally, there should be a method, also planned in advance, for peacefully adjusting the fundamental order to changing socio-political conditions *i.e.,* the rational method of constitutional amendment in order to avoid the resort to illegality, violence and revolution.

2. Sovereignty, Constitutionalism and Limited Governmental Power

The *telos* of any constitution, in the ontological sense was seen in articulation of devices which controls the governmental power and an attempt to institutionalize such a political and social condition is termed as constitutionalism, the concept of limited government. According to F.A. Hayek:

> *"Constitutionalism means that all power rests on the understanding that it will be exercised according to commonly accepted principles, that the persons on whom power is conferred are selected because it is thought they are most likely to do what is right, not in order that whatever they do should be right. It rests, in the last resort, on the understanding that power is ultimately not a physical fact but a state of opinion which makes people obey."*[6]

Charles McIlwain says that *"Constitutionalism has one essential quality; it is a legal limitation on government."*[7] If constitution and constitutionalism are to be defined in fullest sense, they should be viewed sociologically (functionally). What, that is, is

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[6] F. A. Hayek, The Constitution of Liberty, 181 (1960).
[7] CHARLES HOWARD MCLLWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN, CORNELL UNIVERSITY PRESS 21 (1st ed. 1947), *available at*: http://www.Constitution.org/cmt/mcilw/mcilw.htm. (*Last visited on: 12th September, 2013).*

their social purpose? Walter F. Murphy says, that the fundamental value that constitutionalism protects is human dignity.[8] Murphy differentiates between two quite different political theories-democracy and constitutionalism. The democratic genes stress popular rule and processes to effectuate that rule. The constitutional genes emphasize individual liberty and limitation on government power, even when it is responding to public opinion.[9]

In historical perspective constitutionalism has been the search for the most effective devices for taming and limiting political power, first of the government alone and, then of all and every power holder. Constitution of India was based on liberal ideology of constitutionalism which means all powers are limited. A written Constitution was conceived as a device to control all kinds of governmental powers including the amending power which is claimed to be sovereign in nature.

While Sovereignty may be defined as the possession of supreme and possibly unlimited normative power and authority over some domain, *government* is an institution or organs of state through which that sovereignty is exercised. Once some such distinction is drawn, we see immediately that sovereignty might lie somewhere other than with the government and those who exercise the powers of government. And once this implication is accepted, we can coherently go on to speak of *limited* government coupled with *unlimited* sovereignty. Thus, in constitutional democracies the popular sovereignty is thought to be ultimate and unlimited but the government bodies—e.g., legislature, executive and judiciary through whom that sovereignty is exercised on the people's behalf are constitutionally limited and subordinate. As argued by John Locke, unlimited sovereignty remains with the people who have

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[8] Walter F. Murphy, *An Ordering of Constitutional Values*, S. CALIFORNIA LAW REVIEW 53.703, 758 (1980).
[9] *Id.*

the normative power to void the authority of their government if it exceeds its constitutional limitations.

Another important feature of constitutionalism is that the norms imposing limits upon governmental power must be in some way, and to some degree, be *entrenched*, either legally or by way of constitutional convention.[10] In other words, those whose powers are constitutionally limited *i.e.*, organs of state must not be constitutionally at liberty to change or expunge those limits at their pleasure. Most written Constitutions contain amending formulae which can be triggered by, and require the participation of, the government bodies whose powers they limit. These formulae invariably require something more than a simple decision on the part of the government, through e.g., Presidential fiat or simple majority or special majority in the legislature to invoke a change. In some cases, super-majority votes, referendums, or the agreement of not only the central government in a federal system but also some number or percentage of the governments or regional units within the federal system is required.[11] This amending process must act as a constitutional limitation on the government.[12] If a government institution permitted, at its pleasure, to change the very terms of its constitutional limitations, it would disavow the very essence of constitutionalism.

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[10] https://plato.stanford.edu/entries/Constitutionalism/notes.html #note-7.
[11] https://plato.stanford.edu/entries/Constitutionalism/notes.html #note-8.
[12] Under Article 368 of Indian Constitution, while most of the provisions of the Constitution can be amended by a special majority i.e. total membership of each House and a two-thirds majority of the members present and voting coupled with a Presidential assent, some provisions have been specifically mentioned where amendment will require not just the above-mentioned majority but also a ratification by one-half of the total number of states. These provisions relate to Election of President (Article 54), Manner of election of President (Article 55), Extent of executive power of the Union (Art. 73), Extent of Executive power of the State (Article 162), High Courts for Union Territories (Article 241), Chapter IV of Part V, Chapter V of Part VI, Chapter I of Part XI, the Lists in the Seventh Schedule, Representation of the States in Parliament and the amending power of Parliament.

3. The Illegitimate Quest for Unlimited Amending Power

The question, whether Indian Parliament's power to amend the Constitution is unlimited and absolute? Is there any restriction on Parliament's power to Amend Constitution? If yes, then what is the limitation and how it will be exercised? This question was raised instantly after the commencement of the Constitution and passing of first constitutional amendment.

The validity of the first constitutional amendment which added Article 31-A[13] and 31-B[14] of the Constitution was challenged in *Shankari Prasad Singh Deo v. Union of India.*[15] It was contended that though it may be open to the Parliament to amend the provisions in respect of the fundamental rights, the amendments, would have to be tested in the light of the provisions contained in Article 13(2) of the Constitution. The Supreme Court, with a bench of five judges, unanimously rejected the contention that in so far as the first amendment took away or abridged the fundamental rights conferred by Part III, it should not be upheld in the light of the provisions of Article 13(2).[16]

Justice Patanjali Shastri delivering the judgment of the court said that although "law" must ordinarily include constitutional law, there is a clear demarcation between ordinary law, which

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[13] Article 31 saves five categories of laws from being challenged and invalidated on the ground of contravention of the fundamental rights conferred by Article 14 and Article 19. It includes: (i) Acquisition of estates and related rights by the State; (ii) Taking over the management of properties by the State; (iii) Amalgamation of corporations; (iv) Extinguishment or modification of rights of directors or shareholders of corporations; and (v) Extinguishment or modification of mining leases. It also provides the guaranteed right to compensation in case of acquisition or requisition of the private property by the state.

[14] Article 31B protects the acts and regulations included in the Ninth Schedule from being challenged and invalidated on the ground of contravention of any of the fundamental rights.

[15] (1952) S.C.R. 89.

[16] Article 13 (2) states: The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void. See, (1952) S.C.R. 89.

is made in the exercise of legislative power,[17] and constitutional law, which is made in the exercise of constituent power.[18] Justice Shastri relying on Dicey's doctrine of Parliamentary sovereignty observed that an amendment in terms of Article 368 was the "exercise of sovereign constituent power" and that there was no indication that the constitution-makers intended to make fundamental rights immune from constitutional amendment.[19] Therefore "law" in Article 13 must be taken to mean rules or regulations made in the exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constituent power. Article 13 (2) did not affect amendments made under Article 368.

The issue of power of amendment of constitution once again came before the apex court in *Sajjan Singh v. State of Rajasthan.*[20] The validity of the Seventeenth Amendment was challenged and contention before the five-judge bench of the Supreme Court was that it restricted the jurisdiction of the High Courts and, therefore, required ratification by one-half of the States under the provisions of Article 368.[21] The court unanimously disposed of this contention, but members of the bench chose to deal with a second submission, that the decision in the *Shankari Prasad case* should be reconsidered. The Chief Justice P. B Gajendragadkar while delivering the majority expressed their full concurrence with the decision in the earlier case. The words "amendment of this constitution" in Article 368 plainly and unambiguously meant amendment of all the provisions of the Constitution including fundamental rights. Majority went on to point out that, even if the powers to amend the fundamental rights were not included in Article 368,

[17] (1952) S.C.R. 89.
[18] *Id*
[19] *Id.*
[20] AIR 1965 SC 84.
[21] *Id.*

Parliament could by a suitable amendment assume those powers.[22]

But the highlight of the *Sajjan Singh case*[23] was the concurring opinions of Justices Hidayatullah and J. S. Mudholkar. Justice Hidayatullah and Justice Mudholkar concurred with the majority in final outcome but raised serious doubts on the majority reasoning which accepted undeterred power of the Parliament to amend the Constitution vis-à-vis Fundamental Rights.[24] In the words of Justice Hidayatullah:

> *"The Constitution gives so many assurances in Part III that it would be difficult to think that they were the play things of a special majority. To hold this would mean prima facie that the most solemn parts of our Constitution stand on the same footing as any other provision and even on a less firm ground than one on which the Article mentioned in the proviso stand."*

Justice Mudholkar on the other hand expressed his doubts in followings words:

> *"It is true that the Constitution does not directly prohibit the amendment of Part III. But it would indeed be strange that rights which are considered to be fundamental and which include one which is guaranteed by the Constitution (vide Art. 32) should be more easily capable of being abridged or restricted than any of the matters referred to in the proviso to Art. 368 some of which are perhaps less vital than fundamental rights."*

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[22] *Id.*
[23] AIR 1965 SC 84.
[24] Yogesh Pratap Singh, *Concurring Opinions Enriching Constitutional Discourse*, 61 (1), 113, JILI, 2019.

He further said at the end of his judgment that:

> *"Before I part with this case I wish to make it clear that what I have said in this judgment is not an expression of my final opinion but only an expression of certain doubts which have assailed me regarding a question of paramount importance to the citizens of our country : to know whether the basic features of the Constitution under which we live and to which we owe allegiance are to endure for all time - or at least for the foreseeable future - or whether they are no more enduring than the implemental and subordinate provisions of the Constitution."*

Both judges warned that we ought to be mindful of the potential consequences inherent in granting Parliament limitless power to amend the Constitution. German scholar, Dietrich Conrad while delivering a talk on "Implied Limitations of the Amending Power", in February 1965 in the law department of the Banaras Hindu University also raised similar questions to ponder. Conrad said India hadn't yet been confronted with any extreme constitutional amendment. But jurists, he warned, ought to be mindful of the potential consequences inherent in granting Parliament limitless power to change the Constitution. How we might react? If the legislature were to amend Article 1, for example, by dividing India into two. "Could a constitutional amendment," he asked, "abolish Article 21," removing the guarantee of a right to life? Or could Parliament use its power "to abolish the Constitution and reintroduce… the rule of a Moghul emperor or of the Crown of England?"[25] Or stretching it further could current Parliament in exercise of its unlimited

[25] Some scholars say that the origin of this doctrine was influenced by the German scholar, Dietrich Conrad. His paper focused on the French and German sources for the argument that there are implied limits on the amending power. Prof. Dietrich delivered a talk on "Implied Limitations of the Amending Power", in February 1965 to the law department of the Banaras Hindu University, at a particularly fraught time. This was the time when tussle was going on w.r.t. contentious 17th Constitutional Amendment.

power turn India into a Hindu Rashtra as being demanded by some right-wing organizations?

It was the impact of these two opinions that the same matter[26] was again referred to the larger bench of *Golak Nath v. State of Punjab*.[27] The apprehension of Justice Hidayatullah and Justice Mudholkar was that if we accept the majority opinion in *toto* then fundamental rights will be just a play-thing in the hands of majority. Relying on the reasons provided by these two judges, the eleven–judge bench overturned the earlier precedents of *Shankari Prasad* and *Sajjan Singh* and brought the amending power of the Parliament under the category of ordinary legislative power.

4. The Basic Structure Doctrine: Upholding Constitutionalism

The decision of the Supreme Court in *Golak Nath* compelled the Parliament to bring 24th Constitutional Amendment Act.[28] This Amendment Act of 1971 in order to undo Golak Nath findings, on the one hand, amended Article 13 by inserting clause (4), which provided that nothing in that Article "shall apply to any amendment of this constitution made under Article 368," and on the other, amended Article 368 by inserting words "in exercise of its constituent power" in clause (1). It also amended the marginal note of Article 368 and added word "power" in it.

The constitutional validity of 24th Constitutional Amendment Act was challenged in *Kesavananda Bharati v. State of Kerala*.[29] The thirteen-judge bench of the apex court finally settled the law by conceiving the doctrine of basic structure. The court held that, the Parliament in exercise of its constituent power under

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[26] The Constitutional Validity of the 17th Constitutional Amendment was challenged in the *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845. The same issue was again considered by a eleven judge bench in famous *I. C. Golak Nath v. State of Punjab*, AIR 1967 SC 1643.

[27] AIR 1967 SC 1643.

[28] The Constitution (Twenty Fourth Amendment) Act, 1971, Acts of Parliament, 1992 (India).

[29] AIR 1973 SC 1461.

Article 368 of the Constitution, can change, amend, modify Constitution including the chapter of fundamental rights, however they cannot change or destroy the basic structure of the Constitution. The doctrine of basic structure which truncated the power of the government was first suggested by Justice Mudholkar in *Sajjan Singh case.* Therefore, it can be stated beyond any doubt that the seeds of basic structure doctrine in India was sown by the concurring opinion of Justice Mudholkar in *Sajjan Singh Case*.

Implicit in the concept of written Constitution is that all powers are defined and limited. The American doctrine of implied limitation and lecture delivered by a German professor, Dietrich Conrad on this issue "Implied Limitations of the Amending Power" legitimized the doctrine of basic structure. Article 368 grants Parliament the limited power to amend the Constitution. The phrase "*this Constitution*" and "*the Constitution shall stand amended*" makes it sufficiently clear that after making amendment the remainder which is left should be this Constitution which was drafted by the Constituent Assembly. Thus, any stretch of change under Article 368 cannot create a new Constitution. Such an understanding is also sustained by the literal meaning of the word "amendment", which means "a minor change or addition designed to improve a text."[30] Therefore, for an amendment to be constitutionally valid, the Constitution that remains after change must be the Constitution of India with all those essential features which were present at the time of its conception. It may be pointed out that though it was judicial law making but there was sufficient constitutional nexus. The doctrine was not only legitimate but

[30] Yogesh Pratap Singh, *Bancusprudence*, 63 (4), JILI, 394 (202).

also had sufficient textual and substantial moral rationalisation constructed on idea of constitutionalism.[31]

A prime purpose of any written Constitution is to limit the power of state and its instrumentalities by defining it in clear terms. Doctrine of basic structure was conceived to limit the amending power of the state therefore it was an integral facet of constitutionalism. The doctrine was therefore well conceptualized but poorly defined. There was no consensus amongst judges as to what precisely constitute basic structure. Majority judgment does not laid out all the basic features. Judges have had a field day designating their personal preferences and describing them variously as "basic features", "elements", "structure", or "character." The most commonly accepted basic features are the five enumerated by Justice Sikri in the Supreme Court's 1973 *i.e.,* supremacy of the Constitution, republican and democratic government, secularism, federalism, and the separation of powers. But even these phrases are elastic and therefore lacks precise definition.

5. Basic Structure Doctrine Established

In the past five decades since the induction of the doctrine, the Supreme Court has invoked and applied basic structure principle in several cases. Notwithstanding the uncertainty surrounding the birth of the doctrine, it later got approval and respect within the judiciary over the years as a power controlling mechanism. In spite of the fact that doctrine was conceived with a paper-thin majority, its success was reflected in its acceptance notably by dissenting justices of *Kesavananda* that also in the teeth of Emergency when apex court annulled

[31] Constitutionalism is the idea of having limited Governmental power i.e. its authority or legitimacy depends on its observing these limitations. Constitutionalism, Stanford Encyclopaedia of Philosophy, *First published Wed Jan 10, 2001; substantive revision Wed Dec 20, 2017. See* https://plato.stanford.edu/entries/Constitutionalism/#:~:text=Constitutionalism%20is%20the%20idea%2C%20often,on%20its%20observing%20these%20limitations.

the 39th Constitutional Amendment Act. The principle of basic structure was closely examined and worked out in *Indira Nehru Gandhi v. Raj Narain*,[32] *Minerva Mills Ltd. and Others v. Union of India*,[33] and *Waman Rao and Others v. Union of India.*[34]

Indira Nehru case reaffirmed basic structure doctrine and struck down Cl (4) of Article 329- A, which was inserted by the 39th Constitutional Amendment Act 1975. This amendment was passed to validate the election of Indira Gandhi with retrospective effect and bar the jurisdiction of courts. The apex court observed that "*it violated the free and fair elections which was an essential postulate of democracy forming part of basic structure of the Constitution.*"[35] Justice Y. V. Chandrachud listed four basic features which he considered unamendable: a) Sovereign democratic republic status. b) Equality of status and opportunity of an individual. c) Secularism and freedom of conscience and religion. d) Government of laws and not of men *i.e.,* the rule of law.

After *Kesavananda Bharati* and *Indira Nehru Gandhi case,* the 42nd Constitutional Amendment Act, 1976 was passed which added two new clauses, namely, Cl (4) and (5) to Article 368 of the Constitution. The validity of 42nd Amendment Act was challenged in *Minerva Mills Ltd. and Others v. Union of India*[36] on the ground that they are destructive of the 'basic structure' of the Constitution. The Supreme Court by majority by 4 to 1 struck down clauses (4) and (5) of the Article 368 on the ground that these clauses destroyed the essential features namely 'limited amending power' and 'judicial review'.

One of the seminal rulings of the Supreme Court was made in the case of *Waman Rao v. Union of India*. The court maintained

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[32] AIR 1975 SC 1590.
[33] AIR 1980 SC 1789.
[34] (1981) 2 SCC 362.
[35] Article 329A was later repealed by the 44th Amendment.
[36] AIR 1980 SC 1789.

the constitutionality of Articles 31A and 31B[37] and unmodified Article 31C of the Constitution.[38] The decision is landmark because it established a distinction between the Acts included in the Ninth Schedule both before and after the Kesavananda ruling *i.e.,* 24 April 1973. The properties exchanged and dealt with under laws placed under ninth schedule before 24 April 1973 were done under the expression that the laws *could never come into challenge*. Repealing them now after 24 April 1973 would cause chaos and in order to avoid that, the court held that laws made before the judgment, *i.e.,* April 24, 1973, would be awarded the protection of Article 31B. However, laws made after *Kesavananda case* would not. Implying that if they came under challenge, they would have to be *individually examined* on whether they violated basic structure or not.

In these above referred cases, and many more thereafter, attempt was made to explicate the basic structure principle, and provide some measures of concrete basis for its application, but, nevertheless, the position remained foggy.

6. Basic Structure Doctrine Fortified: *I. R. Coelho Case*

Article 31B which was inserted along with the ninth schedule by the first amendment was still being distorted by the government.[39] The idea of Ninth Schedule was conceived primarily to save 13 land reform legislations but in due course Article 31B became a reservoir of all kinds of laws which government wanted to save from judicial review. The number of legislations placed under the protective umbrella of the ninth schedule rose from 13 to 284. The apex court had already upheld the validity of Article 31B in *Sankari Prasad Singh Deo*

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[37] Added by the First Amendment Act, 1951.
[38] Added by the Act enacting the Twenty-fifth Amendment.
[39] It empowered the Parliament to provide immunity of fundamental rights to the laws included in the ninth schedule. It means that once a law is passed by the legislature is placed in the ninth schedule, they instantly become immune from judicial review on the ground that they violate any of the fundamental rights enumerated in part III of the Constitution.

case and therefore the courts had no clue to develop any parameter to control this power under Article 31B. This position is clearly incompatible with the very concept of constitutionalism, because it is inconceivable that the fundamental rights that are specifically sought to be protected would themselves be put aside and ignored through the invocation of the provisions of Article 31B read with the ninth schedule of the Constitution.[40] Such a situation, would simply mean "destruction of constitutional supremacy" and creation of Parliamentary hegemony. In *Waman Rao,* the apex court on the question "whether invocation of Article 31 B that permits the immunization of laws put in the ninth schedule from judicial review by making the entire part III inapplicable to such laws" is required to be tested on the basis of basic structure doctrine[41] answered in the affirmative. The bench opined that non-application of the basic structure doctrine would make the "controlled Constitution uncontrolled".[42] Therefore, the crux of the matter is whether Article 31B read with the ninth schedule which tends to confer unrestrained power on the legislature by excluding judicial review in the exercise of its amending power could be re-examined *de-novo* in the light of principles of constitutionalism? The nine-judge bench in *I. R. Coelho* examined the issue and held that the Parliament cannot increase the amending power by amending Article 368 to confer on itself unlimited power of amendment and destroy and damage the fundamentals of the Constitution.[43] Though, Article 31B does not carry "any defined criteria or standards by which the exercise of [amending] power may be evaluated" for implanting legislations into the ninth schedule of the Constitution. Nevertheless, as a logical corollary to the principle

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[40] Virendra Kumar, Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance [From Kesavananda Bharati to I. R. Coelho] 49(3), JILI 375 (July-September 2007), https://www.jstor.org/stable/43952120.

[41] I. R. Coelho at 890 (para 138).

[42] *Id.*

[43] *Supra note* 41

that if the "constituent power" under Article 368 cannot be made unlimited, it follows that Article 31B cannot be used as to confer unlimited power. Article 31B cannot go beyond the limited amending power contained in Article 368. This power of amendment has to be compatible with the limits of the power of amendment. This limit came with Kesavananda Bharati's case. Therefore, Article 31B after 24th April, 1973 despite its wide language, cannot confer unlimited or unregulated immunity.

The Bench in I. R. Coelho held that "if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24th April, 1973, such a violation/ infraction shall be open to challenge on the ground that it destroys or damages the basic structure…."[44] This means that mere violation of fundamental rights by the laws incorporated into the Ninth Schedule by virtue of the exercise of amending power in pursuance of Article 31B is not a ground for invalidating the constitutional amendment ipso facto. The court clarified further that "We are not holding such laws per se invalid but, examining the extent of the power which the Legislature will come to possess."[45] These would be void only if it is also held that they are violative of the basic structure of the Constitution. This is the wide extent of judicial review for examining power of the Parliament to grant immunity of fundamental rights to the ninth schedule laws. The Bench also stated that the issue of determining whether the ninth schedule laws are immune of fundamental rights in the exercise of power under Article 368 in pursuance of Article 31B cannot be left to the discretion of Parliament. This will be decided by the courts and for determining whether in a given case the basic structure doctrine has been damaged or not, the following factors need to be kept in mind:

[44] *Id.* at 893.
[45] *Id.* at 884 (para 105).

a) the placement of the violated right in the scheme of the Constitution;
b) the impact of the offending law on that right;
c) the effect of the exclusion of that right from judicial review; and
d) the abrogation of the principle on the essence of that right. Fictional immunity granted by Article 31 B is no bar to undertake such an examination after *Kesavananda Bharati*'s *case*.[46]

7. Basic Structure *Vis-À-Vis* Ordinary Legislations: A Supreme Dilemma

One persisting dilemma which engaged the attention of constitutional scholars is whether the doctrine of basic structure can be applied to test the constitutional validity of ordinary laws or doctrine will be restricted only to constitutional amendments. Decisions of the Supreme Court as usual are consistently inconsistent in this regard. In *Indira Gandhi v. Raj Narain,*[47] three judges clearly held that the doctrine could be applied only to constitutional amendments. In *V. C. Shukla v. Delhi Administration*,[48] the challenge to the Special Courts Act, 1979, on the ground that it violated Articles 14 and 21 was rejected by the court. In *Minerva Mills II* (1986),[49] the Supreme Court dismissed the challenge to the Nationalisation Act which was passed to replace the Sick Textile Undertakings Ordinance of 1974, on the ground of violation of basic structure doctrine.

Later in *Kuldip Nayar v. Union of India,*[50] the Supreme Court reiterated that the doctrine should be strictly limited to constitutional amendments. In *Kuldip Nayar*, the court while dismissing challenges to the validity of the amendments brought about in the Representation of People Act, 1951,

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[46] *Supra note* 41 (para 108).
[47] AIR 1975 SC 1590.
[48] AIR 1980 SC 1382.
[49] AIR 1986 SC 2030.
[50] AIR 2006 SC 3127.

through the RP (Amendment) Act, 2003 held that 'residence' of a member of the Rajya Sabha in the state from which he is elected as a member is not a constitutional requirement, and therefore, in permitting a non-resident to contest the Rajya Sabha poll from a state, the question of violation of basic structure does not arise. The court held that it is no part of federal principle that representatives of state must belong to that state. Hence, if Indian Parliament in its wisdom had chosen not to require residential qualification, it would not violate the basic feature of federalism, the court reasoned. An ordinary legislation passed by the Parliament or State Legislatures, the court held in *Kuldip Nayar*, can be declared invalid or unconstitutional only on two grounds, namely, lack of legislative competence and violation of any fundamental right or any provision of the constitution.

However, prior to *Kuldip Nayar*, the Supreme Court had applied this doctrine to examine the constitutional validity of ordinary laws. In these cases, though the Supreme Court had found ordinary legislations or its provisions as being contrary to basic structure doctrine, the question of applicability of basic structure doctrine to constitutional amendments alone was not raised and considered. For instance, in D.C. Wadhwa and Others v. State of Bihar,[51] the Supreme Court struck down the re-promulgation of ordinances in Bihar on the ground that it violated basic structure. In L. Chandra Kumar v. Union of India,[52] the Supreme Court not only struck down the constitutional amendment depriving the high court of its jurisdiction under Article 226 and 227 (from decisions of an administrative tribunal), but declared Section 28 of the Administrative Tribunal Act, 1985 providing for "exclusion of jurisdiction of courts except the Supreme Court under Article

[51] V. Venkatesan, As Courts Rule on Constitution's Basic Structure, Landmark Doctrine Turns Out to Be Elastic, The Wire, 20th October, 2020. https://thewire.in/law/Constitution-basic-structure-case-histories

[52] AIR 1995 SC 1151.

136 of Constitution" as unconstitutional on the ground that they violated the basic structure doctrine. In Indra Sawhney II,[53] a bench of three judges of the Supreme Court held that a state-enacted law "Kerala State Backward Classes (Reservation of Appointments or Posts in the Services under the State) Act, 1995 (on reservation for the 'creamy layer') violated 'equality" which was basic structure. The Court was of the opinion that what the Parliament cannot do in the exercise of its Constituent power, the State Legislatures too cannot achieve. Chief Justice Jagannadha Rao observed:

> *"What we mean to say is that Parliament and the legislatures in this Country cannot transgress the basic feature of the Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16(1) is a facet.) Whether creamy layer is not excluded or whether forward castes get included in the list of backward classes, the position will be the same, namely, that there will be a breach not only of Article 14 but of the basic structure of the Constitution. The non-exclusion of the creamy layer or the inclusion of forward castes in the list of backward classes will, therefore, be totally illegal. Such an illegality offending the root of the Constitution of India cannot be allowed to be perpetuated even by constitutional amendment. The Kerala Legislature is, therefore, least competent to perpetuate such an illegal discrimination. What even Parliament cannot do, the Kerala Legislature cannot achieve."*[54]

In *Ismail Faruqui v. Union of India*,[55] the court resorted to the basic structure doctrine in order to invalidate an ordinary legislation i. e. the Ayodhya (Acquisition of Certain Areas) Act, 1993 dealing with the demolished Babri Masjid. Similarly, in *G.*

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[53] AIR 2000 SC 498.
[54] AIR 2000 SC 498 ¶ 65.
[55] AIR 1995 SC 605.

C. Kanungo v. State of Orissa,[56] the court used basic structure doctrine to strike down the Arbitration (Orissa Second Amendment) Act, 1991.

There has been no clear explanation of why the basic structure doctrine will not apply to strike down an ordinary law. It seems strange that the basic features *i.e.,* the most sacrosanct part of the Constitution which cannot be abrogated even by the constitutional amendment can be diluted or violated by an ordinary law. This will be bizarre to believe that a statute could pass the test for constitutionality, but breach the basic structure standard. But we do not have clear answer.

8. The Persistent Quest for Parliamentary Hegemony

The basic structure doctrine was condemned as judicial law making having no basis in the Constitution's text. The Government of the day was strongly offended by basic structure doctrine and as a consequence, three senior judges who delivered majority verdict which included the incumbent Chief Justice of India (CJI) were superseded. Violating the established convention of appointing the senior most judge as the CJI, government in an unprecedented move, appointed the fourth senior most judge, Justice A. N. Ray as the next CJI. Justice Ray wrote minority opinion in *Kesavananda Case*.[57] This

[56] AIR 1995 SC 1655.

[57] A brief survey of cases decided by Justice A. N. Ray indicates that he had either favoured the governmental stand or dissented when he was not in position to persuade his colleagues in favour of the government. Justice Ray wrote a scathing yet crisp dissent in *Kesavananda Bharati Case* and observed that there was no limitation on Parliament's power to amend the Constitution. Chief Justice Ray is also well-known for his infamous majority decision in *ADM Jabalpur case* where he stated that Article 21 cannot be enforced if suspended by a Presidential Order under Article 359.
Chief Justice A.N. Ray was not close to his brethren. He was described as aloof from his colleagues, imperious, and enigma. Some of the judges, including some of his appointees, said that Ray as 'completely or entirely with the government, but some gave him credit for being open and honest about his belief that Mrs. Gandhi was the nation's saviour and never tried to hide his support for the emergency. *See* George Gadbois Jr., "Judges of the Supreme Court of India (1950-1989), Oxford University Press (1st ed., 2011).

decision of the government forced the three senior judges to resign in protest. The tussle finally led to the imposition of an emergency lasting 21 months and successfully cut down the independence of the judiciary.

It is not documented much that the most momentous verdict of the Indian Supreme Court in in *Kesavananda Bharati v. State of Kerala* was subjected to a serious attempt to overrule it by another 13 Judges Bench led by then the Chief Justice A. N. Ray. Pursuant to the order of the Chief Justice of India dated 09 October 1975, a 13 judges' bench was constituted which commenced hearing of the review of the *Kesavananda Bharati case*. The Bench consisted of CJI A. N. Ray, Justices H. R. Khanna, K. K. Mathew, M. H. Beg, Y.V. Chandrachud, P. N. Bhagwati, V. R. Krishna Iyer, P. K. Goswami, R. S. Sarkaria, A.C. Gupta, N.L. Untwalia, M. Fazal Ali and P. M. Singhal.

In reaction to this order for review, Mr. Palkhivala who appeared and argued against this review petition wrote a strong letter to PM Indira Gandhi on 09 November 1975 and implored her to stop the reconsideration of basic structure doctrine in the interest of nation. He pleaded in his letter that if Parliament is given an unrestricted power to amend the Constitution, democracy, unity and integrity of the country would vanish, and after her, there would be nobody to hold the entire country together.[58] Basic structure, he argued in the letter was the real safeguard of the minorities and with undeterred amending power, the rule of law would evaporate. He further stated that her own election appeal had been argued in the Supreme Court on the basis that *Kesavananda case* represented the law of the land and it would be strange that within three days of the historic judgment in her favour, the Court should consider

[58] T. R. Andhyarujina, The Kesavananda Bharati Case: The untold story of struggle for supremacy by Supreme Court and Parliament 94 (Universal Law Publishing Co. New Delhi, 2013).

whether that very case should be overruled.[59] He concluded letter by writing:

> *"The hearing in the Supreme Court on the correctness of Kesavananda case begins tomorrow. It need not continue unless the government wants it to. Believe me, my respectful appeal to you is not made out of any lack of confidence in the case for holding Parliament's amending power to be limited, but it is based upon my belief that it would be a great gesture on your part to withdraw the state's plea for unsettling the law. I shall be very happy to call upon you if you so desire."*[60]

Despite this appeal, the review hearing started on 10 November 1975 during the midst of the Emergency when even the reporting of court judgments by the press was restricted. Mr. Palkhivala at the outset raised preliminary objections that *Kesavananda* verdict could not be reviewed because the court in that case had directed that six petitions would be decided in the light of the law laid down in that case. Thus, as long as those petitions were pending before the court, this court cannot review the *Kesavananda case* which was *res judicata* for these six petitions.[61]

He emphatically argued that no case had been made out to review the basic structure doctrine because there is no case where the court had expressed any difficulty to apply the doctrine. He also referred to the fact that the review order was passed by the CJI by a mere administrative order that too on the oral request of the government. Mr. Palkhivala then made out a powerful case about the consequences of unbridled power of amendment of the Constitution if the basic structure limitation is removed by the court. He referred the proposed 41st

[59] *Id.*
[60] *Id. at* p. 95.
[61] *Id. at* p. 96.

constitutional amendment to the Constitution which if passed by the Parliament would give immunity for the most heinous crimes committed by a political person who became a governor.[62]

Much of the arguments turned on how and why the review had been ordered? At one stage the CJI Justice A. N. Ray said that the request for the review had even come from the Petitioners which Mr. Palkhivala fiercely denied as implausible. Justice Ray then stated that the Tamil Nadu government had asked for a review upon which Mr. Govind Swaminathan the Advocate General of the Tamil Nadu promptly got up to deny that any such request had been made by his government. This was a loss of face for the CJI.[63] On 11 November 1975 Attorney General Mr. Niren De replied to Mr. Palkhivala's preliminary objections by saying that he had delivered a political lecture rather that legal submissions. He stated that review decision is made in good faith to overcome the chaotic situation created by the *Kesavananda* verdict. Every constitutional amendment was being challenged in the various High Courts and there is no clarity even in the Supreme Court as to what is the basic structure of the Constitution.[64] Several questions were raised to Mr. De by the judges as to whether there was any pending case in which the court had found any difficulty in applying basic structure doctrine. He could not point out any such petition except one related to right to property which had been declared as not a basic structure of the Constitution in the *Kesavananda case*. The only case which was not a property case was a challenge to the 32nd Constitutional Amendment Act 1973 which had set up administrative tribunal in the State of Andhra Pradesh for deciding service matters excluding the jurisdiction of High Court. Many other searching questions by judges in the

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[62] *Supra note* 58 *at* p. 97.
[63] *Id.*
[64] *Id. at* p. 98.

Bench which did not receive satisfactory answer from the Attorney General.

On next day *i.e.* 12 November 1975, the bench assembled once again in a packed court and resumed the arguments. Hardly had the thirteen judges taken their seats when to surprise of all, the Chief Justice stated "This bench is dissolved." He observed that for two days arguments were found "to go in the air." He further directed that a Constitution bench would hear the constitutional validity of 32nd Constitutional Amendment Act 1973 and that bench could refer the case to the full court if it finds any difficulty in applying the basic structure doctrine. The sudden dissolution of bench to review basic structure has remained a mystery for bar, bench and public.[65] No official record or report exists of this attempt to review Kesavananda judgment. From all account it does appear that the Chief Justice felt uncomfortable at the doubts expressed by some of his colleagues, unequivocal arguments of Mr. Palkhivala, denial of Advocate General of Tamil Nadu in the open court, and the manner in which he ordered the review. But however, wrongly the review was started, it was even more wrong to dissolve the bench without assigning any reasons and in the manner the Chief Justice did.[66]

The basic structure doctrine survived. But the above episode demonstrated the phenomenon that government would not like limitation on their power to amend the Constitution. All successive governments in some or other way have shown their reservation on basic structure doctrine as undemocratic. The present government also appears to be unhappy with the basic structure doctrine because it works as an impediment to the structural changes' government wants to make in democracy and polity.

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[65] *Supra note* 58 *at* p. 101.
[66] *Id. at* p. 104.

9. A Beginning of New Round of Hostility

Structural reforms of the judiciary were included in Bharatiya Janata Party's 2014 election manifesto. After getting power, Prime Minister Modi gave a stern message asking judges particularly of the Supreme Court and High Courts not to be complacent just because they are not under constant scrutiny, like the political class. Introduction of National Judicial Appointment Commission (NJAC) to replace the Collegium System was the beginning of reform, but a constitutional bench of the Supreme Court in *Supreme Court Advocates on Record Association v. Union of India*,[67] while declaring that the judiciary cannot risk being caught in a *"web of indebtedness"* towards the government, declared the National Judicial Appointments Commission (NJAC) Act and the 99th Constitutional Amendment Act "unconstitutional and void" on the ground that it violated basic structure of the Constitution. Justice J. S. Khehar in his presiding judgment held:

> *"It is difficult to hold that the wisdom of appointment of judges can be shared with the political-executive. In India, the organic development of civil society has not as yet sufficiently evolved. The expectation from the judiciary, to safeguard the rights of the citizens of this country, can only be ensured, by keeping it absolutely insulated and independent, from the other organs of governance,"*

The bench with 4:1 majority held that the collegium system, as it existed before the NJAC, would again become "operative." But interestingly, the bench admitted that all is not well even with the collegium system of "judges appoint judges", and that the time is matured to improve the 21-year-old system of judicial appointments. Justice Khehar invited the government: [68]

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[67] (2015) 5 SCC 1.
[68] *Supra note* 67

> *"Help us improve and better the system. You see the mind is a wonderful instrument. The variance of opinions when different minds and interests meet or collide is wonderful."*

Majority view was reprimanded by the dissent of Justice Jasti Chelameswar as repugnant to the spirit of the Constitution. Criticizing the functioning of present collegium system, Justice Chelameswar ardently observed that: *absolute independence of any one of the three branches is inconsistent with core democratic values and the scheme of the Constitution. The amendment only seeks to restore such balance and therefore cannot be said to be destructive of the basic structure of the Constitution"*[69] Later, he refused to participate in the meetings of collegium.

The Supreme Court stating new mechanism unconstitutional and void paved the way for a new round of confrontation. Non-cooperation and delay in judicial appointment mounted tension and resulted in emotional breakdown of the head of the most powerful judiciary of world's largest democracy in presence of PM Modi (2016).[70] With the tears of Chief Justice Thakur, the corrosion of judicial independence also begun and its credibility was measured at its lowest during successive regimes of Chief Justice J.S. Khehar, Dipak Misra and Ranjan Gogoi. Rising corruption charges, 'mutiny of four senior-most judges', changing collegium's recommendation under the executive pressure, supersession of senior judges of High Courts, alleged arbitrary transfers of judges, attempt to impeach CJI, alleged sexual harassment case against CJI and series of verdicts in favour of government mark this phase as the shadiest one in the history of Indian Judiciary. The executive grip over judiciary became firm. The compliment and admiration of executive by

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[69] *Id.*

[70] Salman Khurshid, Lokendra Malik and Yogesh Pratap Singh (eds), The Supreme Court and the Constitution: An Indian Discourse 37(Wolters Kluwer India Pvt. Ltd. 2020).

the judges of Constitutional Courts was another outcome of this control.[71]

Judiciary and Executive were at loggerhead in recent times on various issues including delay in judicial appointments and judicial independence. A new sparked debate started recently with the statement of the Vice President of India while addressing the 83rd All-India Presiding Officer's conference.[72] He criticised the Supreme Court once again, for using the doctrine of basic structure to strike down the constitutional amendment that introduced the National Judicial Appointments Commission Act.[73] He also added that he does not agree with the restriction imposed by the top court that the Parliament cannot amend the 'basic structure' of the Constitution. He said that in a democratic society, the 'basic' of any basic structure can only be the supremacy of the people and the sovereignty of the Parliament.[74] He stated:

> "Executive thrives on sovereignty of the Parliament. Legislatures and Parliament decide who will be chief minister, who will be prime minister. The ultimate power is with the legislature. Legislature also decides who will be there in other institutions. In such a situation, all constitutional institutions – the legislature, the executive, the Parliament – are required to be within their limits. One must not make incursion in the domain of other (sic)."[75]

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[71] *Supra note* 70

[72] Damini Nath, *Citing Basic Structure Doctrine, Vice President Jagdeep Dhankhar Asks 'Are We a Democratic Nation,* INDIAN EXPRESS (12 January 2023), https://indianexpress.com/article/india/citing-basic-structure-doctrine-vice-president-jagdeep-dhankhar-asks-are-we-a-democratic-nation-8375392/

[73] *Id.*

[74] *Id.*

[75] Sanjoli N Srivastava, Kesavananda Bharati judgment Set A Bad Precedent: Vice President Jagdeep Dhankhar On Basic Structure Doctrine, VERADICTUM (12 January 20230, https://www.verdictum.in/app-lite/news/jagdeep-dhankhar-Kesavananda-Bharati-bad-precedence-1457209?hasShare=1 .

The Vice-President while raising question whether Parliament's power to amend the Constitution is dependent on any other institution" said "Is there a new theatre in the Indian Constitution, which says the laws passed by Parliament will only come into force only after our stamp is on it?" He slammed the court's 1973 decision in the *Kesavananda Bharati* case that conceived the basic structure doctrine. He observed:

> *"With due respect to the judiciary, I cannot subscribe to this [that Parliament cannot amend the basic structure]. This house must deliberate. Can this be done? Can Parliament be allowed… that its verdict will be subject to any other authority? When I assumed the office of chairman of the Rajya Sabha, in my maiden address, I said this. I am not in doubt about it.* Yeh nahi ho sakta hain *(this cannot happen)," he said. If such limits are imposed, the very nature of democracy is in danger."*[76]

The Vice President remark on basic structure and judiciary must be seen first in the context where the government has been putting constant pressure on the judiciary especially on its collegium system, accusing it of being inefficient, opaque and 'alien' and second in the context of demand of some Hindu right-wing organizations to declare India a Hindu Rashtra? In both the contexts doctrine of basic structure would be at the focal point in future.

10. The Future of Basic Structure Doctrine: A Knight in the Shining Armour of Indian Constitutionalism

It is beyond any doubt that basic structure doctrine was evolved to stop any kind of majoritarian-driven assault on the foundational principles of the Constitution. It was only because of basic structure doctrine that the draconian 39th

[76] Damini Nath, Citing Basic Structure Doctrine, *Vice President Jagdeep Dhankhar Asks 'Are We a Democratic Nation*, INDIAN EXPRESS (12 January 2023), https://indianexpress.com/article/india/citing-basic-structure-doctrine-vice-president-jagdeep-dhankhar-asks-are-we-a-democratic-nation-8375392/ .

Constitutional Amendment which provided that Prime Minister's election was beyond challenge was struck down by the Supreme Court. The government in fact attempted an amendment which declared that "there shall be no limitation whatsoever on the constituent power of Parliament." This clause was inserted by the government led by Prime Minister Indira Gandhi through 42nd Amendment in 1976.[77] It was declared invalid by the Supreme Court in 1980 and the credit goes to the doctrine of basic structure.

The lengthiest constitution of world's largest democracy has been amended 105 times since its inception in 1950. All these amendments have brought significant changes in the course of Indian Polity. Out of these 105 constitutional amendments, approximately 75 are passed after *Kesavananda Bharati case* which conceived basic structure doctrine. In these past five decades of basic structure doctrine, the Supreme Court has tested 16 Constitutional Amendments on the touchstone of basic structure doctrine. Out of these sixteen, while seven Constitutional Amendment Acts[78] have been declared

[77] The amendment provided: Article 368 (4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty second Amendment) Act, 1976 shall be called in question in any court on any ground;
Article 368 (5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

[78] (1). Clause 4 of 39th Constitutional Amendment Act 1975 which inserted Articles 71(2) and 329A was struck down by the apex court in *Indira Nehru Gandhi Case* AIR 1975 SC 1590 on the ground of violation of basic structure. (2). Section 55 of the 42nd Constitutional Amendment Act, 1976 which added clauses (4) and (5) to Article 368 was struck own in *Minerva Mills vs Union of India* AIR 1980 SC 1789. (3). A sub-clause of 25th Constitutional Amendment Act, 1971 which inserted Article 31-C was declared unconstitutional in *Minerva Mills case*. (4). Clause (5) of Article 371 D along with proviso which was inserted by the 32nd Constitutional Amendment Act, 1973 to exclude High Court's power of judicial review was struck down in *P Samba Murthy v. State of Andhra Pradesh*, (1986). (5). Section 46 of 42nd Constitutional Amendment Act, 1976 which inserted Articles 323A and 323B, Clause 2(d) of Article 323A and Clause

unconstitutional and void partially,[79] only one Constitutional Amendment has been struck down in its entirety[80] on the ground of violation of basic structure doctrine. This displays that the apex court has invoked *"basic structure doctrine"* economically. Therefore, the argument advanced by the governments and opponents of basic structure doctrine that this has made difficult for the government to make constitutional amendments is not sound and rational.

India is a constitutional republic. Sovereignty in constitutional democracy lies with the people. Parliament, government and judiciary are institutions through which that sovereignty is exercised. It may be true that being a Parliamentary form of government more functions are entrusted to government and the Parliament but they are not superior. All are subject to the Constitution. Rather it is the Constitution which is supreme. All the three principal organs are creatures of the Constitution and therefore cannot claim supremacy or unlimited power. The Chief Justice of India Justice D. Y. Chandrachud while

3(d) of Article 323B were declared unconstitutional in *L Chandra Kumar v*s *Union of India* AIR 1990 SC 2263. *(*6). Paragraph 7 of the 52nd Constitutional Amendment Act, 1985 which incorporated 10th Schedule to the Constitution was declared unconstitutional in *Kihoto Hollohan v. Zachillhu* 1992 SCR (1) 686 on the ground that it barred jurisdiction of Courts in connection with the disqualification of a member under this Act. (7). Part IX B of the 97th Constitutional Amendment 2020 which provided for the Constitution and working of cooperative societies was struck down by the apex court *Union of India v. Rajendra N. Shah* (2021) on the ground that Constitutional amendment required ratification by at least one-half of the state legislatures as per Article 368(2) of the Constitution. See https://www.thehindu.com/news/national/supreme-court-in-majority-verdict-quashes-part-of-Constitution-inserted-by-97th-amendment-on-cooperatives/article35419288.ece

[79] In these strike-downs, only some provisions of the Amendment Acts were declared as unconstitutional on the ground of violation of the basic structure doctrine.

[80] The 99th Constitutional Amendment Act along the NJAC Act was declared unconstitutional and void in *Supreme Court Advocates on Record Association v. Union of India* (2015) 5 SCC 1, in its entirety on the ground of violation of basic structure.

delivering the Nani A. Palkhivala Memorial Lecture in Mumbai rightly supported the doctrine in following words:[81]

> *"The basic structure of our Constitution, like the north star, guides and gives certain direction to the interpreters and implementers of the Constitution when the path ahead is convoluted."*[82]

> *"The basic structure or the philosophy of our Constitution is premised on the supremacy of the Constitution, rule of law, separation of powers, judicial review, secularism, federalism, freedom and the dignity of the individual and the unity and integrity of the nation."*[83]

However, 'basic structure doctrine' will remain legitimate to the extent it will adapt itself to a philosophically prosperous constitutional framework. A framework which is based on ideology of constitutionalism i.e., all institutions are controlled by the Constitution in their functional independence and by checks and balance. Most of the cases where basic structure doctrine has been used to strike down constitutional amendments so far are those cases where judicial powers have been curtailed. And therefore, this appears to be a struggle between Parliamentary supremacy vis-à-vis judicial supremacy. The basic structure doctrine as it appears to many has put the judiciary in the exact position of unlimited power that it sought to prevent the Parliament from occupying. The judiciary especially the apex court must invoke basic structure doctrine to upheld the supremacy of the Constitution and not the

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[81] Omkar Gokhale, Aditya Poonia, Basic structure doctrine: V-P criticised it, Chief Justice of India calls it 'north star', guiding light, INDIAN EXPRESS, (22 January 2023) https://indianexpress.com/article/cities/mumbai/basic-structure-doctrine-v-p-criticised-it-chief-justice-of-india-calls-it-north-star-guiding-light-8396576/.

[82] THE PRINT, *Basic structure doctrine a North Star that guides interpreters of Constitution, says CJI Chandrachud* (21 January 2023), https://theprint.in/india/basic-structure-doctrine-a-north-star-that-guides-interpreters-of-Constitution-says-cji-chandrachud/1328005/

[83] *Id.*

supremacy of the judiciary which has happened in the past in few cases. The apex court will have to overcome this misconception.

There are high stake pending cases in the Supreme Court such as validity of the Citizenship (Amendment) Act (CAA), 2019 and the Finance Act, 2017[84] which introduced electoral bonds which are exempted from disclosure under the Representation of Peoples Act, 1951.[85] These laws will be tested on the yardsticks of basic structure and their outcome will decide the future of Indian constitutional democracy. The basic structure doctrine will remain a knight in the shining armour of Indian constitutionalism that will save our constitutional democracy from eccentric demands like 'Hindu Rashtra'.

[84] The Finance Act, 2016 also amended the Foreign Contribution Regulation Act (FCRA), 2010 to allow foreign companies with subsidiaries in India to fund political parties in India, that too with retrospective effect, effectively exposing Indian politics and democracy to international lobbyists who may want to further their agenda.

[85] The petitioner, the Association of Democratic Rights (ADR) has challenged these amendments as being unconstitutional and violative of the doctrines of separation of powers and the citizen's fundamental right to information, which are parts of the basic structure of the Constitution.

CHAPTER 5

CONSTITUTIONAL SUPREMACY VERSUS PARLIAMENTARY HEGEMONY: A CASE STUDY OF COLLEGIUM SYSTEM

Prof. (Dr.) L. S. Nigam*

1. Introduction

The judgment of *Kesavananda Bharati* case[1] may be looked as of the greatest contribution to the constitutional Jurisprudence of India. The largest bench of the Supreme Court heard this case. This bench was constituted to consider whether 11 Judges Bench in *Golak Nath* case[2] has correctly decided, the issue of Parliament's power to amend the fundamental right guarantees in Part III of the Constitution. In *Golak Nath* Case, the Supreme Court has decided that the Parliament could not amend fundamental rights or abridge it. The result of the judgment was that the Parliament was considered to have no power to take away or curtail any of fundamental right even if became necessary to do so for giving effect to Directive Principles of State Policy for the attainment of the objectives set out in the Preamble to the Constitution. The Constitution (Twenty fourth Amendment) Act, 1971 therefore enacted. This amendment expressly empowered, the Parliament to amend any provision including fundamental rights and it made Article 13 inapplicable to Article 368. Section 2, of the Constitution (Twenty fourth Amendment) Act, 1971 reads as under:

> *"2. Amendment to Article 13 – In Article 13 of the Constitution, after clause (3), the following shall be inserted, namely: - (4) Nothing in this Article shall apply to*

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[1] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

[2] I. C. Golakh Nath v. State of Punjab, AIR 1967 SC 1643.

any amendment of this Constitution made under Article 368."

The Supreme Court in Kesavananda Bharati[3] case overruled the Golak Nath case and declared the Constitution (Twenty fourth Amendment) Act, 1971 valid. It is further stated that Art. 368 does not enable the Parliament to alter basic structure or basic framework of the Constitution.

The details of Kesavananda Bharati case are already in public domain, therefore, it is not needed to discuss the other accounts of judgment even though, it seems appropriate to highlight the issue of 'essential features' or 'basic structure doctrine'. They were catalogued[4] as following: -

(1) The Supremacy of the Constitution;
(2) The Sovereignty of India;
(3) The Integrity of the Country;
(4) The Democratic way of Life;
(5) The Republic form of Government;
(6) The guarantee of basic human rights referred to in Preamble and elaborated as fundamental rights in Part III of the Constitution;
(7) A Secular State;
(8) A free and independent Judiciary;
(9) The dual structure of the Union and State;
(10) The balance between the Legislature, the Executive and the Judiciary;
(11) A Parliament form a Government as distinct from Presidential form of government;
(12) The amendability of the Constitution as per basic structure scheme of Article 368.

Thus, Supremacy of the Constitution and free and independent judiciary have been considered as basic structure of the

[3] *Supra* note 1.
[4] *Id*, at para 620, 919, 1332.

Constitution. In the light of above facts, we will discuss some issues like (1) Constitutional Supremacy; (2) Parliamentary Sovereignty and (3) Balance of Power.

1.1 Constitutional Supremacy

Under the doctrine of Constitutional Supremacy, the Constitution is basic and paramount law, to which other laws must conform. Thus, Constitutional Supremacy means that no law or action can violate a Nation's Constitution. Apart from this, Constitutional Supremacy is viewed as checks on the governmental power.

1.2 Parliamentary Sovereignty:

Parliamentary Sovereignty (also called Parliamentary or legislative supremacy) is a concept in constitutional law of some democracies. It holds that legislative body has absolute sovereignty and supremacy over other governmental institutions including executive and judicial bodies. It also holds that legislative body may change or repeal any previous legislation without being questioned by any authority. The doctrine of Parliamentary sovereignty is associated with British Parliament.

1.3 Balance of Power:

In India a false notion, conflict between Parliament and Judiciary has been created. Actually, under the doctrine of balance of power, the legislature, judiciary and other organs have to perform their duties and exercise the powers as conferred to them by the Constitution. In India, as we know, there is no Parliamentary or Judicial sovereignty. The Constitution is only authority which has created all organs, authorities and institutions and these are precisely described. Thus, there is no conflict between judiciary and legislature on principle. Some time, the action of legislature is struck down by the judiciary exercising the power conferred under Articles 137 and 141 of the Constitution. The Article 137 reads:

> *"137. Review of judgment or order by the Supreme Court: Subject to the provisions of any law made by Parliament or rules made under Article 145, the Supreme Court shall power to review any judgment pronounced or order made by it."*

Similarly, Article 141 says:

> *"141. Law declared by Supreme Court to be binding on all Courts: The law declared by the Supreme Court shall be binding on all Courts within the territory of India."*

On the other side the Parliament has full power to make the laws and to amend the Constitution but cannot amend the basic features of the Constitution.

2. Conflict Between Executive, Judiciary & Hegemony by the Parliament

In Kesavananda Bharati case, the Supreme has passed the judgment on 24th April 1973 but government was not comfortable with this judgment, therefore, wanted that the verdict of be turned down. Palkhivala[5] has described as under:

> *"The Emergency was declared on June 26, 1975. On November 10, 1975 a bench of 13 judges of Supreme Court assembled to hear the plea of the Government of India that decision [Kesavananda Bharati Case] should be overruled. On behalf of the citizen, [following] propositions were filed in oppositions of that plea. The censor would not allow them to be published in any newspaper. However, after argument extending over two days the bench was dissolved, and the attempt to confer on Parliament an unlimited power of amending the Constitution happily failed." [Emphasis added]*

[5] N. A. Palkhivala, We the People 183 (Stand Book Stall 1984).

During the emergency, the Constitution (Forty-Second Amendment) Act, 1976 was passed. This amendment was very vast consisting of 58 sections. We will discuss here only Section 4 and Section 55.

> *"S.4 – Amendment of 31C – By this amendment, Fundamental right mentioned in Part III, deprived from their supremacy and made them sub-ordinate to directive principle of State policy (Part IV).*
>
> *S.55 – Amendment of Article 368 – In Article 368 of the Constitution after clause (3) following clauses shall be added –*
>
> *(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this Article [Whether before or after the commencement of section 55 of the Constitution (Forty Second Amendment) Act, 1976] shall be called in question in any Court on any ground.*
>
> *(5) For the removal of doubts, it is hereby declared that there shall be no limitations whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article."*

These amendments were challenged before the Supreme Court in *Minerva Mills* Case.[6] Supreme Court Struck down amendment of Article 31C by majority and clause (4) and clause (5) of Article 368 were also declared invalid and *utra-virus* and struck down unanimously.

2.1 Collegium System:

The word "collegium" is not mentioned in the Constitution of India. It came in force as per judicial pronouncement. At present, the collegium system is having a very important role in

[6] Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789.

the appointments of Judges of Supreme Court as well as of High Courts. So far as Constitution of India is concerned it prescribes as under:

> *"124. Establishment and Constitution of Supreme Court –*
>
> *There shall be a Supreme Court of India consisting of a Chief Justice of India and until Parliament by law prescribes a larger number not more than seven (at present it is thirty-three) other Judges.*
>
> *Every Judge of Supreme Court shall be appointed by the President by warrant under his hand and seal after constitution with such of the Judges of the Supreme Court and of the High Courts in the State as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years.*
>
> *Provided that in case of appointment of a Judge other than the Chief Justice, Chief Justice of India shall always be consulted"*

Now, we will discuss the concept of collegium system and its origin. Collegium system is a system of appointment and transfer of Judges that has evolved through the judgments of the Supreme Court. In brief, it is known as Three Judges Case. Following are the three cases:

(1) *S. P. Gupta v. Union of India*[7] (also known as Judges Transfer Case), 1981.
(2) Supreme Court Advocates-on-Record Association v. Union of India[8], 1993.
(3) Re-Special Reference case[9], 1998.

In *S. P. Gupta* case[10] (also called First Judge Case), Bhagwati J. expressed his dissatisfaction with existing system of

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[7] AIR 1982 SC 149.
[8] AIR 1994 SC 268.
[9] AIR 1999 SC 1.
[10] *Supra* note 7.

appointment of Judges and he suggested that there must be a collegium system to make recommendation to the President in regard to appointment of Supreme Court or High Court Judges. But this concept was not materialized as it requires amendment in Article 124 (2) and 217 (1) of the Constitution of India.

In Supreme Court, Advocates-on-Record Association case also known as *second judges'* case[11], nine judges Constitution bench was consulted. This bench overruled the judgment of first judges case. Actually, it seems to be a judicial pronouncement because of first judges case could not actualized. Thus, by the verdict of second judges cases the collegium system enforced. In this case, Supreme Court reduced the executive's role to minimum and held that judiciary has in judicial appointments. The court stated that no other organ of the state was as capable as the judiciary to adjudge the prospective of candidate's performance, merit and traits. The Supreme Court further stated, in Consultation with CJI means the consent of CJI is necessary.

The third judges' case is special reference case (*Re: Appointment & Transfer of Judges*)[12]. The President of India, K. R. Narayanan in exercise of power conferred to him under Article 143 was referred to Supreme Court of India for Consideration and report its opinion, on several issues. The third judges' case was almost similar to judgment given in second judge case. In Summary it was held that the CJI has to require to consult a collegium of four senior judges in place of two. In this case, many other propositions were also laid down.

2.2 National Judicial Appointment Commission (NJAC):

The NJAC was established by the Constitution of India (Ninety-Ninth Amendment) Act, 2014. This Act (then Bill) was passed by Lok-Sabha on 13 August 2014 and by Rajya-Sabha on 14

[11] *Supra* note 8.
[12] *Supra* note 9.

August 2014. It was also ratified by 16 State Legislatures and subsequently assented by the President of India on 31 Dec 2014 and notified in Gazette of India on the same day. By this amendment, new Articles 124A, 124B and 124C were inserted and Articles 124, 127, 128, 217, 222, 224, 224A and 231 were amended.

In *Supreme Court Advocates-on-Record Association v. Union of India*[13], the Supreme Court through a constitution bench upheld the collegium system by 4:1 majority and struck down the NJAC on 16 October 2015. Thus, the NJAC was a proposed body which would have been responsible for recruitment, and appointments for Judges of Supreme Court and High Courts, is no longer exist.

3. Conclusion

The present paper, begins with milestone constitutional verdict of the Supreme Court in Kesavananda Bharati case. In this case, as we know, the Supreme Court has enumerated basic structure or essential features doctrine, which referred to a free and independent judiciary. It further pronounced that basic structure cannot be amended by exercising the power under Article 368. The Supreme Court has delivered many judgments, as per the constitutional provisions and power conferred to them. Sometimes, judgments went against the wishes of the executive, then to achieve the target, attempts were made either through the judicial system itself or through the amending the Constitution through legislature. It may be reminded that during the emergency, on the request of the Government a 13 judges' bench was constituted to revisit the Kesavananda Bharati case. H. R. Khanna J.[14] who was the part of this bench observed as under:

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[13] AIR 2015 SC (Supp) 2463.

[14] H. R. Khanna, Neither Roses nor Thrones 75 (Eastern Book Company 1987).

> *"……. Next day when assemble in the chief justice chamber, he told us that he had decided to dissolve the bench and not to proceed with the matter. Many of the colleagues heaved a sigh of relief on being so told by the Chief Justice, we all agreed with Chief Justice's move. Soon after we proceeded to the court room and the Chief Justice and the members of the Bar about the decision, we had taken, so ended the attempt to reconsider the correctness of Kesavananda decision."*

H. M. Seervai[15] has also reproduced the questions and answer between Justice Khanna and the Attorney General. During the emergency, the Constitution (Forty Second Amendment) Act 1976 was passed to over-rule several constitutional rights. Some of them were struck down by the Supreme Court and some others were withdrawn through the Constitution (Forty Fourth Amendment) Act 1978.

In the above background, the collegium system may be assessed. It has been evolved through the judicial pronouncement. Earlier the President of India has asked to submit opinion of the Supreme Court, in *Supreme Court Advocates-on-Record Association v. Union of India*[16]. This was a significant sign of balance of power between the executive and judiciary. Another side NJAC was established through 99th Constitution Amendment Act, 2014. This too was struck down by the Supreme Court.

In an academic paper political deliberations are not needed even though sometimes it requires elaboration of the facts and circumstances. The issue of collegium system was reopened by

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[15] H. M. Seervai, Constitutional Law of India 2657 (Universal Law Publishing 2015).
[16] *Supra* note 8.

the then law minister Kiren Rijiju[17]. He criticized the collegium system for lack of transparency, loopholes and non-incompatibility. He further said that court should not take the task of appointment of Judge itself.

Recently, the National Judicial Commission Bill 2022 (Bill No. LXXXVI of 2022) has been introduced by Bikash Ranjan Bhattacharya, a Member of Parliament. We do not know whether this will resolve the issue and minimize the disagreement or lead to further litigation or observed as hegemony by the Parliament.

[17] Kiren Rijiju has written a four pages letter (06/01/2023) to CJI seeking Government Representatives in the Judges Appointment. This information is available in public domain (print as well as electronic media).

CHAPTER 6

CHECKS AND BALANCES: EXPLORING JUDICIAL REVIEW IN THE INDIAN CONSTITUTIONAL FRAMEWORK

Prof. (Dr.) Kamlesh P. Joshipura *

Mr. Samrat R. Upadhyay **

1. Introduction

The supremacy of the Constitution and the independence of the judiciary are part of the basic structure of the Indian Democratic System. The judiciary has played a very vital role during the course of judicial activism or matters moved through public interest litigation, and some of the landmark judgments pronounced by the Supreme Court have consolidated and strengthened the concepts of social justice. At this juncture, frankly speaking, prior to writing this article, I could not prevent myself from referring to the book "Off the Bench", authored by the great Justice V. R. Krishna Iyer. In his book, under the chapter "Justice and Justising", he quotes the renowned justice Holmes' observation that since the best part of his life had been spent as part of the judiciary, it would be less than fair to himself not to seek to critique and correct that institution when he notices something going wrong. Further, Justice V. R. Krishna Iyer says, quoting Frankfurter stated:

> *"Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Just because the holders of judicial offices are identified with the cause of justice, they may forget their common human frailties."*[1]

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[1] Justice V. R. Krishna Iyer, "Off the Bench", p. 13 (2001 Ed.).

In India, the judiciary holds a very prestigious place and will continue to do so. The Indian courts has delivered some of the best judgments in the interest of the socially and economically deprived segments of society in general, as well as for the improvement and protection of the labour class, the rights of women, and the welfare of marginalised groups. In addition to these, while expanding the horizons of fundamental rights, the judiciary has pronounced certain landmark, long-lasting judgments establishing certain matters as rights, such as the right to education and the right to life and livelihood under Article 21. Even while taking into consideration certain important articles that fall under the directive principles of State policy, the Apex Court proactively and pragmatically established certain welfare-related measures as a result of policy decisions at the government level. Even today, the endeavours for which they continue to be undertaken consistently.

2. Constitutional Backdrop

The architects of the Constitution and the leaders of the Indian freedom movement simultaneously accepted a wide range of opposing philosophies, forces, and social facets. The farmers of the Indian Constitution adopted, among other things, a set of guiding ideas, including adult franchise, Parliamentary democratic republicanism, fundamental rights, and achieving social justice as the cornerstones of the Indian Constitution. The federal structure was established to put in place a mechanism of federal governance with a strong Parliamentary centre and other equivalent structures in order to give effect to the decided principles through harmonious consensus. The Constitution's primary goal is to define the source of constitutional authority as well as the goals it aims to establish and advance. The objectives, and resolutions of the Constituent Assembly had declared that all powers and the authority of sovereign independent India are constitutional units and organs of

government are derived from the people.[2] The Preamble to the Constitution starts with 'We the People of India', so as it is the resolve of the people of this country to constitute India into a sovereign democratic republic. It is very much clear that, framers of the Constitution have given importance to the sovereignty of the people[3]. The Preamble to the Constitution specifies certain objectives that reflect the basic structure of India's Constitution and that cannot be amended as the Supreme Court of India emphasis in *Kesavananda Bharati v. State of Kerala,* In this case the Apex Court opined that "the true position is that every provision of the Constitution can be amended provided in the result the basic foundation and the structure remains the same." The basic structure may be said to consist of the following features:

i) The supremacy of the Constitution,
ii) Republican and democratic form of government,
iii) Secular character of the Constitution,
iv) Separation of powers between legislature, executive and judiciary; and
v) Federal character of the Constitution.[4]

The elements of the Kesavananda Bharati ruling were reinforced in *Indira Nehru Gandhi v. Raj Narain and Ors.*[5] and *Minerva Mills Ltd. v. Union of India and Ors.*[6] Again in the year of 2000 the Supreme Court reinforced the principle of separation of powers between the legislature and the executive and the judiciary and emphasised the principle of an independent judiciary[7].

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[2] Constituent Assembly debates, 22nd January, 1947.
[3] Motilal v. Uttar Pradesh Government AIR 1951 (185); Referred to in Sahary, Constitution of India: An Analytical Approach (2nd Ed.).
[4] Kesavananda Bharati v. State of Kerala. AIR 1973 SC 1461; Referred in H. M. Seervai, Constitutional Law of India, VOL - II, and Austin, Working A Democratic Constitution, Pg. 258.
[5] 1975 AIR 1590, 1975 SCC (2) 159.
[6] AIR 1980 SC 1789.
[7] State of Bihar v. Balmukund Shah AIR 2000 SC 1296.

The Indian Constitution has not made a rigid division of powers between the three pillars *i.e.* executive, legislature, and judiciary, although the doctrine of separation of powers has not been categorically recognised under the constitutional scheme, but the Constitution framers have cautiously and meticulously defined the functions of all the three organs of the state *i.e.* legislative, executive and the judiciary have to function within their own limits demarcated under the Indian Constitution. No particular organ can transgress the functions assigned to another. The smooth functioning of the Parliamentary democratic system depends upon the inherent strength and independence of each of its organs. No doubt that Judicial Review is a powerful weapon to restrain unconstitutional exercise of power by the legislature, the expanding avenues of judicial review has taken in its fold the concept of social Justice but at the same time while exercising the power of judicial review it is prerequisite that the judiciary should restrict itself in self-imposed discipline in particular and the judicial restraint in general.[8]

Constitutional democracies, including India, are built on the idea of the separation of powers in conjunction with judicial review. The idea of the separation of powers develops a system of checks and balances to guarantee efficient democratic governance, even though it does not imply an unbending and rigid division of authority. By assigning specific functions and powers to each branch of government, the Indian Constitution provides the framework for governance and prevents the accumulation of power in a single entity.[9] Such power is aided by the judiciary's function in judicial review, which makes sure that the executive and legislative branches respect individual rights and act in accordance with the Constitution. By using its

[8] Asif Hamid v. State of J&K AIR 1989 SC 1899; Referred in SAHARY, Constitution Of India: An Analytical Approach 276 (2nd Ed.).
[9] Granville Austin, The Indian Constitution: Cornerstone of A Nation, 62 (1st ed., 1966).

judicial review authority, the Indian judiciary protects the Constitution from any infringements by the other arms of government. India's constitutional democracy flourishes by supporting democratic values and protecting the rights of its citizens, and it does so by upholding the principles of separation of powers and judicial scrutiny.

3. Implication of Basic Structure Doctrine:

As far as the emerging and ongoing debate in Indian polity is concerned, it is being said that judicial activism has considerably exceeded its boundaries and has reached up to the domain of legislative and executive functioning, and of course, if any organ exceeds its boundaries, it is not in the interest of democracy and the basic principle of the doctrine of separation of powers. Frequent interventions in the overall working of the executive and legislature sometimes weaken the effectiveness of the judicial pronouncements. The proactive role of the Indian judicial system contributed greatly in the area of social and economic justice, but one should not forget that ultimate power lies in the people of India through the legislature, which has the popular mandate of the people. As far as the Indian polity is concerned, every political party, *i.e.*, major political parties, comes out with a manifesto under which the respective political party announces certain promises, policies, and welfare steps at the time of the election. Naturally, this is a healthy tradition in any democratic country. Not only that, sometimes a particular party comes to power on the basis of the promises made before the election and attracts the voters, and the respective political party gets the mandate to rule on the basis of their manifesto.

So, the ruling party, through its executive action, can take appropriate policy-level decisions in the larger interest of society. It is their natural right, and that should not be suffocated if it is within the scope of constitutional validity. If the democratically elected government enjoys a popular mandate, it means that it should be allowed to work in its sphere as per the constitutional scheme. Safeguarding checks

and balances is a very essential part of the success of any Constitution, but believing that every governmental decision is subject to strict scrutiny by the judiciary is the most unwelcome and unhealthy citation of the polity. In the Indian Constitution, there is an ongoing debate regarding the supremacy among organs of the state, *i.e.*, who is supreme, the Parliament or the Judiciary? Of course, it is not possible for anyone to give the answer straight away regarding the supremacy of one or another organ, but at the same time, one should not forget that the Parliament has the popular mandate of this country. Unlike the British Parliament or the Parliamentary system, where there is no written Constitution, the British Parliament enjoys unrestricted powers and is a sovereign authority in every sense in the absence of the power of judicial review. It is also very much significant to note that the United States Constitutional framework is having the mechanism of judicial review. With this power to interpret the Constitution the US Judiciary assumes supremacy in the United States.[10]

The drafters of Indian Constitution wisely arrived at a conclusion, balancing the powers and functions of each organ with clear-cut definitions and demarcations. In a sense, both Parliament and the Supreme Court have supremacy in their respective areas. The Constitution fully empowers the Parliament to amend most parts of the Constitution except its basic structure. It appears that there is scope for checks and balances, or, in other words, harmonious balancing in accordance with the constitutional scheme. The constitutional scheme of separation of powers requires the conferment of the power of judicial review on the judiciary, and this particular aspect is an acknowledged basic feature of the Constitution. Justice J. S. Verma, in his book “New Dimensions of Justice”,

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[10] Constitutional Origins, Structure and Change in Federal Countries, Vol - I, A Global Dialogue On Federalism, Published For International Association Of Centres For Federal Studies, (Mcgill Queen’s University Press, 2005).

has categorically cautioned about the boundaries of judicial reach as:

> *"It is expected that Judiciary would keep everyone within the bounds indicated by the Constitution. But the bounds are equally applicable to the Judiciary itself and the Constitution has entrusted us with the additional task of not merely keeping everyone else within bounds but also to remain within bounds ourselves."*[11]

It appears from the constitutional scheme that the people's mandate for governance is with the Executive in specific and the Legislature in general. Justice J. S. Verma stated:

> *"If we remember that the final word in governance is not with us but with the people and that we only discharge a delegated function. A delegate can never claim to be superior then the principal. Also, for the purpose of achieving the constitutional goals of ensuring socio-economic justice, proper access to the courts is important. The powers which are given to us are not provisions meant for aggrandisement, they are meant to sub-serve the constitutional purpose and to uphold the majesty of law."*[12]

Judicial activism and judicial restraint are two sides of the same coin in accordance with the Constitutional Supremacy, so judicial activism should not become judicial adventurism, and thus, the role of whistleblowers on the side of the judiciary needs to be blown for a limited purpose and with caution. It needs to be remembered that courts cannot run the government nor the administration in abuse or no-use of power and get away with it. The courts have the duty of implementing the constitutional safeguards that protect individual rights but cannot push back

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[11] J. S. Verma, New Dimensions of Justice 14 (Universal Law Publishing Company 2000).
[12] *Id.*

the limits of the Constitution to accommodate the challenged violation.[13]

4. Judicial Review and Basic Structure Doctrine:

As a strong believer in the institution of an independent judiciary, which is the repository of the people's aspirations and faith, judicial review is a powerful instrument to harmonise the federal structure enshrined in the Constitution of India. From time to time, debates on judicial review have always been ongoing, not only in India but in many other countries too. The facets of judicial review could have been argued, but they should be in harmony. Generally, it is believed that the judicial review of administrative or legislative actions in India means the review of the decision-making process, not the decision itself. During the Constituent Assembly debates, noted jurist K. M. Munshi opined that he was in favour of upholding the supremacy of judicial review and stated:

> *"It is equally necessary that judicial review should be permitted where there is a wrongful deprivation of the fundamental right to own property contained in our Constitution; where the Legislature has seized property by acting outside its powers or without fixing the amount of compensation or the principles on which to determine such compensation or where there is expropriation under the guise of acquisition; where the principles laid down are illusory or where the principles or the manner or the form of compensations are not calculated- to yield a fair equivalent; or where the whole thing amounts—as my eminent friend pointed out—to a fraud on the Constitution".*[14]

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[13] A. S. Anand, *Judicial Review - Judicial Activism - Need for Caution*, 42 JILI 159 (April 2000).

[14] Constituent Assembly Debates, Vol. IX, 1303.

In India, complete and strict separation of powers is not practically workable. Separation of powers works within the parameters of checks and balances aiming at protection and promotion of rights as well as social interests and efficient administration to fulfil the task of social welfare. Accepting the principle of judicial supremacy, it is also clear that independent and efficient administration is also necessary to cater to the needs to achieve the goal of a social welfare state. As observed by Prof. Upendra Baxi, the Constitutional Scheme does not embody any formalistic and dogmatic division of powers.[15] The Indian Constitution has indeed not recognised the doctrine of separation of powers in its absolute rigidity, but the functions of different organs have been sufficiently differentiated.

The constitutional structure, which is not only based on judicial intervention, provides security for legislative autonomy and civil society engagement in every democratic nation. There is no denying that the Parliament has absolute power in Indian politics, even as it upholds the supremacy of the people in this nation. The areas of social justice and social well-being have greatly benefited from judicial activism and judicial review, but ultimately, Parliament has the mandate of the average person, *i.e.*, we, the people of India.

Across the globe, the idea of judicial review has been incorporated into democratic governance. The judiciary plays an essential role in maintaining the rule of law and safeguarding constitutional promises. The court is able to interpret and apply the Constitution whenever and wherever the rights and liberties of a citizen are threatened. Judicial review promotes social justice, protects individual rights, and guards against potential power abuses. In the Indian context, the judiciary's exercise of judicial review has been instrumental in promoting equality,

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[15] Upendra Baxi, Development in Indian Administrative Law, Public Law in India 134 (1982).

justice, and human rights.[16] Noteworthy judicial decisions by Indian legal scholars have played a pivotal role in rectifying societal injustices and providing relief to marginalized and disadvantaged communities.[17]

The Doctrine of Separation of Powers, in our Indian Constitution in its true sense means that the pillars of the powers of the constitutional scheme *i.e.,* executive, legislation and judiciary shall be confined strictly and exclusively to a separate organ of the constitutional scheme. There shall be no transgressing either of the functions. Although the doctrine of separation of powers has not been placed under the Constitution in its strict and absolute rigidity but the framers of our Constitution have very much meticulously defined function of various organs of the state *i.e.,* legislature, executive and judiciary have to work within their own demarcation lines drawn by the constitutional schemes. It is crucial to remember that the capacity and independence of the institutions are essential to ensuring that the democratic process runs smoothly and harmoniously. The two facets channelled by the people, the legislature and the executive, are in charge of all administrative functions related to government.

It is important to highlight that the government has generally accepted many judicial decisions and has treated the recommendations given in those decisions sincerely and carefully. Since its inception, India has adhered to the principle of constitutional supremacy. Political leadership and judicial decisions have both contributed to the social change process while resulting in very positive social effects.

5. Conclusion

In conclusion, our constitutional framework includes a strong system of checks and balances, with judicial review playing a

[16] M. P. Jain, Indian Constitutional Law, 32 (LexisNexis, 2017).
[17] *Supra note* 9 p. 50.

key role in preserving the precarious balance of power. The court protects the Constitution by using its authority of judicial review to make sure that the legislative and executive branches' activities stay within the parameters of lawfulness and constitutional legitimacy. With the passage of time, this procedure has changed as important cases have shaped the parameters of judicial review in India. The Supreme Court is crucial in safeguarding the ideals of democracy, fairness, and fundamental rights since it is the ultimate interpreter of the Constitution.

Judicial review is an essential weapon for protecting citizens' rights and freedoms since it invalidates unconstitutional laws, defends individual liberty, and reins in governmental abuses. A fine balance must be struck between judicial activism and respect for the elected institutions of government, though. The Indian judiciary contributes to the stability, justice, and advancement of the country by using a sophisticated approach to judicial assessment, but at the same time it should maintain the strict boundaries that have been attributed to it. The lasting power of India's checks and balances, grounded by the institution of judicial review, remains a cornerstone of its constitutional democracy as it continues to develop and face new challenges. Categorically, the constitutional choices and priorities made by the respective countries reflect their distinctive historical background, political culture, and characteristics of the masses. The constitutional priorities that any country sets also reflect the political thought and wisdom of its founders. Especially their understanding of the particular challenges in anticipation confronting the country and of the aims and objectives the country should be towards seeking to achieve the desired goals. The framers of the Constitution are very much convinced to seek the broadest possible dimensions during their task of drafting the Constitution, just as the constitutional experts always find it useful to consider the constitutional choices in the best possible way. As far as the Indian perspective is concerned, the Constitution will always

remain a guiding force, as India is an extremely plural society and inclusiveness is the inherent identity of the ancient Indian knowledge system.

CHAPTER 7

SEEKING JURISPRUDENTIAL BASIS FOR BASIC STRUCTURE: AN ASSESSMENT

Prof. (Dr.) T. R. Subramanya*
Mr. Sreenidhi K. R.**

1. Introduction

The basic structure doctrine adopted by the Supreme Court of India as the preferred method in reviewing the validity of constitutional amendments[1], presents us with an interpretive process that attempts to safeguard the Constitution from the kind of change which would alter its very framework. The doctrine requires that, an impugned amendment be tested to determine whether or not, it modifies or alters the basic structure of the Constitution.

Although "basic structure"[2] is, at best, a nebulous concept and therefore renders any attempt at a definition impossible; over the years the court has indicated that several features of the Constitution do indeed form a part of its 'basic structure'. These are sometimes referred to as basic features. However, as the Supreme Court has largely been illustrative[3] in naming these features, we may conclude that none of these concepts or features is envisioned as a basic feature on its own conceptual framework and therefore any amendment related to any one

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[1] Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr., AIR 1973 SC 1461

[2] The term was first proposed in the current contextual frame of reference by M. K. Nambyar while arguing in I. C. Golaknath and Ors. v. State of Punjab and Anrs., 1967 AIR 1643. See, Martin van Staden, *Property Rights and the Basic Structure of the Constitution: The Case of the Draft Constitution Eighteenth Amendment Bill*, 14 PRETORIA STUDENT L. REV. 169 (2020).

[3] P. Chopra, Ed., The Supreme Court Versus the Constitution: A Challenge to Federalism, Sage., 28 (2006).

such basic feature would not be invalid *per se*. The court would have to assess the effect of such an amendment on the way in which that particular feature has been incorporated in the Indian Constitution and then test whether the same is altered or modified or destroyed in any way.

However, nowhere in the Constitution of India do we find any direct or indirect reference to any such doctrine.[4] Where does one turn then, to identify the constitutional/jurisprudential basis of this doctrine that has endured five decades of constant scrutiny at the highest levels and consequently, what do these periodic explorations into the intricate arguments concerning this doctrine indicate? Is the doctrine inconsistent with our constitutional ethos or is it an infallible truth.

2. Amending the Constitution of India: the Constitutional Frame of Reference

Once a Constitution is made, adopted and enacted, in the exercise of a 'primary constituent power', subsequent change is mostly permitted through a preconceived process of amendment, often provided for, in the constitutional text.[5] The same is identified as, secondary constituent power or amending power.[6] Originally Article 368 of the Constitution of India prescribed two procedures for amendment[7], classified on the basis of which part of the Constitution was to be amended.[8] The first mandating that amendment may be made through a bill passed with at least a two thirds majority and the second

[4] S. Krishnaswamy, Democracy and Constitutionalism In India: A Study of The Basic Structure Doctrine 168 (Oxford University Press., 2010).
[5] Y. Roznai, Amendment Power, Constituent Power, and Popular Sovereignty: Linking Unamendability and Amendment Procedures. The Foundations and Traditions of Constitutional Amendment .23-49 (2017).
[6] *Id.*
[7] INDIA CONST. art. 368.
[8] *Id.*, cl. 2.

requiring ratification by at least half of the state legislatures, the latter in case of provisions specified in the proviso.[9]

Shankari Prasad Singh Deo v. Union of India[10], witnessed the first challenge to the validity of a constitutional amendment.[11] In this first Indian case related to unconstitutional constitutional amendments, the basic issue was to determine the limits that exist on the amending power of the Parliament.[12] The court declared that the restrictions under Article 13 would be applicable to ordinary laws made under the Parliament's power to legislate rather than to amendments made under Article 368 which represented a constituent power of the Parliament.[13] This meant that the question of amendability was decided favourably on behalf of the Parliament, with the Supreme Court clarifying that the power to amend extended to all parts of the Constitution of India.

In spite of the first amendment being declared valid, resistance to agrarian reforms and consequent challenge to land reform legislation persisted and in response the spate of amendments attempting to mitigate the roadblocks continued. In an attempt at saving more legislation from being challenged, the Parliament passed the seventeenth amendment to the Constitution of India[14], inserting more such legislation into the Ninth Schedule. Apart from seeking remedy on the grounds of non-compliance of the proper procedure laid down in Article 368, a secondary prayer was made by the petitioners[15], asking the Supreme Court to reconsider the previous decision in Shankari Prasad's case.

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[9] *Id.*
[10] AIR 1951 SC 458
[11] The Constitution (First Amendment) Act, 1951, Acts of Parliament, 1992 (India)
[12] C. C. Aikman, The Debate on the Amendment of the Indian Constitution, 9 VICTORIA U. WELLINGTON L. REV. 357 (1978).
[13] *Id.*
[14] The Constitution (Seventeenth Amendment) Act, 1964, Acts of Parliament, 1992 (India).
[15] Sajjan Singh v. State of Rajasthan, A.I.R. (52) 1965 S.C. 845

Denying the same, the five-judge bench headed by Chief Justice Gajendragadkar, clarified that they saw no ambiguity either in Article 368, or in Article 13.[16]

The majority judges laid down that the term amendment as used therein, clearly laid down that the Parliament acting under the same could amend any provision within the Constitution.[17] Although they were convinced about the inviolability of the fundamental rights, the judges reposed faith in the makers, that they had indeed believed that is the Parliament competent enough to be entrusted with the power to amend these rights if needed.[18] The hon'ble Chief justice went on to clarify that as Article 368 prescribes the procedure for amendment, it follows naturally that the power of amendment is also derived from the same provision and that the Parliament has the exclusive power to amend some parts of the Constitution and the power to amend some other parts in consultation with the legislatures of at least half of the states.[19] The power of amendment itself was not to be considered as limited in any way. However, in one of the minority opinions Hidayatullah J. expressed deep reservations in accepting that fundamental rights could be subject to the amending power as prescribed under Article 368.[20]

A larger bench was constituted in *I. C. Golaknath v. Union of India*, as a result of the strong reservations expressed by the minority judges in *Sajjan Singh*[21]. The issues being discussed resulted directly from the majority opinion therein. Chief amongst them were, the issue of whether constitutional

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[16] *Id.*
[17] *Supra* note 14.
[18] S. L. Agarwal,1965. *Constitution Seventeenth Amendment Act, 1964: Its Validity*. JOURNAL OF THE INDIAN LAW INSTITUTE, 7(3), pp.252-261.
[19] R. Rattan, India: *The Indian Parliament and the Fundamental Rights By Pb Gajendragadkar*. (Tagore Law Lectures), 29(2) INDIA QUARTERLY 168-170. (1972)
[20] *Supra* note 17.
[21] *Id.*

amendments were covered in the definition of law under Article 13. Secondly, whether a fundamental right in part III of the Constitution of India be amended under Article 368 and whether the power of the Parliament to amend the Constitution arises from Article 368 or whether the provision merely provides the procedure and that the power derives from a different source[22].

In *Shankari Prasad*[23] Justice Patanjali Shastri had observed that there was a clear distinction between the ordinary legislative power and the power to make constitutional amendments. He further observed that a similar distinction exists in the US Constitution as well.[24] Further in *Sajjan Singh*, the court agreed with this line of reasoning, with Justice Gajendragadkar expressing "full concurrence" while adding his own reasoning in support of this conclusion. He observed that Part XX of the Constitution of India which consists of only one article, is plain and unambiguous. The Article lays down that the procedure for amendment shall be as described therein. He referred specifically to the usage of the phrase "amendment of the Constitution" which clearly means that the provision refers to amendment of all parts of the Constitution and to imply that the provision has provided for the procedure without indicating what can be amended, would indeed be a restrictive interpretation of Article 368.

Ironically Justice Hidayatullah used similar reasoning in interpreting Article 13(2). He sought to reserve his opinion on that point, clearly distancing himself from the view that "law" under Article 13 does not include constitutional amendments. He indicated that the definition of law did not expressly exclude amendments and therefore it would indeed seem that the makers did not seek to indicate any such exclusion. On the

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[22] *Supra* note 20
[23] Sankari Prasad Singh Deo v. Union of India, 1951 AIR 458
[24] *Id.* at p. 461

amendability of fundamental rights, Justice Mudholkar expressed that although there was no express prohibition on amending the provisions of Part III, he still had some reservations on the issue as it would be strange for these rights to be abridged as easily as any of the other provisions in spite of them being considered as fundamental.

However, the majority view was that the makers of the Constitution did not make the rights immutable. Many of the rights in part III were clearly not absolute, with restrictions being prescribed in part III itself. Justice Gajendragadkar illustrated his point by referring to Article 19 wherein restrictions for the freedoms provided in Article 19(1)(a) to (g) were clearly provided for under Articles 19(2) to (6). He further stated that if the makers had intended the rights under part III to remain outside the purview of Article 368, it would have been more prudent for them to have placed an express prohibition against such amendments in Article 368 itself.

On the question of whether Article 368 merely prescribes the procedure or whether it acts as the source of power, both Justice Hidayatullah and Justice Mudholkar noted the absence of a specific provision conferring an exclusive power. However, the majority view remained in complete concurrence with the decision in *Shankari Prasad*.

I. C. Golaknath v. State of Punjab[25] overruled both *Shankari Prasad* and *Sajjan Singh,* declaring that constitutional amendments would be considered as law under Article 13. It was further reasoned that Article 368 merely prescribed the procedure for amendment and wasn't the source of the power to amend, which was an extension of the residuary legislative power of the Parliament under Articles 245 and 246[26]. This reasoning implied that there is no difference between the

[25] AIR 1967 SC 1643.
[26] *Id.*

constituent power and legislative power and therefore both will be equally subject to judicial review under Article 13, which in turn made part III unamendable.

3. The Basis of Basic Structure: Implications and Interpretations

In 1965 Prof. Dietrich Conrad, a German professor of constitutional law on a visit to India was lecturing in the Banaras Hindu University on the topic, "Implied Limitations of the Amending Power"[27], which is said to have had a great impact on the development of the basic structure doctrine in India. During the course of his lecture Prof. Conrad is reported to have presented extreme illustrations and uneasy propositions to propose the theory of implied limitations[28]. Conrad was developing his argument from the earlier writings of the renowned German theorist Carl Schmitt and the French constitutional lawyer Maurice Hauriou.

Schmitt derived his theory of implied limitations as emerging from constituent power[29]; he believed that constituent power existed separately and alongside the Constitution itself, lending validity to the Constitution and that the fundamental questions concerning its existence formed, what he called, *a Constitution in the positive sense* which should be differentiated from the written Constitution.[30] Hauriou believed that constituent power was something exercised by a Constituent Assembly only but a procedure of amendment may be prescribed. However, some fundamental principles of a Constitution were to be considered

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[27] A. G. Noorani, 2001. Behind the 'basic structure' doctrine. Frontline, 18(9), p.46.

[28] S. Prateek, *Today's Promise, Tomorrow's Constitution: 'Basic Structure', Constitutional Transformations and the Future of Political Progress in India* 417 NUJS L. Rev., 1, (2008).

[29] C. Schmitt, Verfassungslehre, Duncker & Humblot, 1928.

[30] B. A. Schupmann, Carl Schmitt's State And Constitutional Theory: A Critical Analysis (Oxford University Press, 2017).

to have a higher legitimacy and would therefore act as a limitation against the power to amend.[31]

Conrad's propositions were somewhat of a combination of a little of both, using the distinction between amending power and constituent power as the main tool of interpretation while dealing with Article 368, calling for the doctrine of implied limitation as a doctrine of last resort in interpreting the amendment provision in the Constitution of India[32]. Accordingly, he proposed that no amendment should abrogate any of the provision, not even partial changes are not to be made if they alter the very identity of the Constitution.[33]

As one of the leading counsels in *Golaknath*[34], the veteran constitutional lawyer M. K. Nambiar called for the use of this doctrine of implied limitation in interpreting Article 368 and thereby introduced the idea of unamendability of some aspects of the Indian Constitution. However, the court did not agree with any of these arguments and relying on the marginal note, declared that Article 368 did not consist of the power to amend, but outlined the procedure only. The power, as per the majority opinion, emerged from Articles 245, 246 and 248 of the Constitution.

The arguments made therein did however bear fruition in *Kesavananda*[35]. In *Golaknath*[36] it was decided that Art. 368 merely prescribed the procedure for amendment wasn't the source of the amending power of the Parliament. The government responded to this judgment by passing the 24th

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[31] M. Hauriou, Précis De Droit Constitutionnel. (Sirey. 1923).
[32] M. Polzin, *The Basic-Structure Doctrine and its German and French Origins: a Tale of Migration, Integration, Invention and Forgetting*, 5(1), ILR, 45-61 (2021).
[33] *Id.*
[34] L. C. Golak Nath and others v. State of Punjab and Another, 1967 AIR 1643
[35] His Holiness Kesavananda Bharati Sripadgalvaru and others v. State of Kerala and Another, AIR 1973 SC 1461.
[36] *Supra* note 34.

Amendment[37] expressly empowering the Parliament to amend all parts of the Constitution of India including part III. This along with the 25th, 26th and 29th amendments were challenged for being unconstitutional.[38] The primary issue in *Kesavananda*[39] therefore, was whether the judgment in *Golaknath* would be overruled or not, requiring an unprecedented 13 Judge bench constituted in anticipation of the same. The bench, through a narrow majority of 7:6 overruled Golaknath and held that while Article 368 does indeed confer the power to amend any part of the Constitution, the Parliament may not alter the basic structure of the Constitution in the course of such amendment.

The judgment in *Kesavananda* is unique in many respects as it presents, amongst many other features, diverse opinions, erudite analyses, an acute understanding of comparative constitutionalism and most significantly, an ingenious solution to an enduring problem. It must again be repeated at this point that the doctrine has no basis in the constitutional text. However, intricacy and nuance in interpreting the various concepts have yielded the required justification for the same. This has been one of the major criticisms against the basic structure doctrine that many have held on to. However, it is also one that is answered most easily. It may simply be pointed out that there are many such concepts under the Constitution of India which have no basis in the text thereof and it is simply impossible to ignore these concepts and doctrines without severe repercussions. In his seminal work on the subject, 'Democracy and constitutionalism', Prof. (Dr.) Sudhir Krishnaswamy answers this question by pointing out at the doctrine of separation of powers, arguing that the same is

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[37] The Constitution (Twenty-fourth Amendment) Act, 1971, Acts of Parliament, 1992 (India).
[38] *Id.*
[39] *Id*

undoubtedly an established doctrine in spite of its apparent lack of express mention in the text.[40]

Basic Structure therefore, finds acceptance through the unique and ingenious interpretation of such doctrines and concepts. One of the foremost task was to differentiate between constituent power and amending power.[41] The former to be exercised only be an exclusive organ created to exercise constituent power, while the latter could be vested with the Parliament. This was expressed specifically by Justice Shelat and Justice Grover who clarified that only a Constituent Assembly convened for the very purpose would have an unfettered power to completely abrogate or even repeal the Constitution, which shows that a body acting in accordance with Article 368 wouldn't have the power to do the same as it would not have the same status as that of a Constituent Assembly.[42] On the other hand Justice Sikri opined that implied limitations on the amending power would prevent abuse of the same by a hypothetical political party with a two thirds majority and prevent them from becoming totalitarian or enslave the people.[43]

Further the question of understanding the term amendment in the right sense was discussed by almost all the judges in the majority who were of the opinion that the same would not include the ability to destroy or repeal the Constitution. The clarified that in using the term amendment, it was clearly indicated that the Constitution must not be allowed to lose its identity in spite of whatever changes or alterations have been affected.[44]

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[40] S. Krishnaswamy, Democracy and Constitutionalism in India: A Study Of The Basic Structure Doctrine 169 (Oxford University Press, 2010).
[41] *Supra* note 34.
[42] Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr., AIR 1973 SC 1461 p. 1585.
[43] *Id*, at 1534.
[44] *Id*, at 1860.

Finally, one of the most important arguments put forth in the judgments was that of the constitutional scheme; the notion that the Constitution had a structure which may not be altered. The court referred to the preamble as an indicator of the basis of the Constitution's foundation, indicating the framework built on the bedrock of eternal principles and values which found specific mention in the preamble as an assurance of the equality, dignity and freedom of the individuals. Justice Sikri considered these to be of such great impotence that they should never be allowed to be destroyed through any method of amendment.[45]

This allusion to a structural interpretation did indeed gain such popularity that the same approach was adopted in a number of subsequent judgments of the Supreme Court of India, representing a move away from textual and originalist interpretations that had been in vogue thus far, with the court considering that it was no longer bound by the original intention of the makers[46].

The impact of the Kesavananda judgment and the establishment of the basic structure doctrine was far reaching indeed, with attempts being made to reverse the same through a 13 judge Kesavananda review bench being constituted. This was however short lived as the government could not prove that the basic structure doctrine would prove detrimental to legitimate amendments, with the bench eventual being dissolved.[47] The subsequent move by the Parliament in attempting to render the doctrine toothless through the 42nd amendment was met with a challenge in *Minerva Mills*[48]. The

[45] *Supra note* 42 at 1535.
[46] S. P. Sathe, India: From Positivism to Structuralism in Interpreting Constitutions: A Comparative Study 215-265 (Oxford University Press, 2006).
[47] H.M. Seervai, Constitutional Law of India: A Critical Commentary, M N Tripathi (1991).
[48] Minerva Mills v. Union of India, AIR 1980 SC 1789.

Supreme Court upholding Kesavananda, declared Sec. 55 of the Amendment Act[49] as invalid.

Indira Gandhi[50], further strengthened the position of the basic structure as it was the first case wherein Kesavananda was treated as a binding precedent. The case was also important as the court considered through this case, different kinds of basic structure review.[51] The political manoeuvrings taking place during the time in India were of great significance and the basic structure doctrine proved that it was more than just a fanciful theoretical construct, but rather a shield that protected the Constitution against the excesses of majoritarianism.[52] While *Waman Rao*[53] reiterated and ensured applicability of the basic structure Doctrine, IR Coelho, offered the apex court an opportunity to reconsider and clarify the issues related to the doctrine. In the latter the court even established the 'rights test' to determine the validity of an amendment.[54]

4. Conclusion

It is indeed of singular consequence that the basic structure doctrine finds itself an enduring reality of the Indian Constitution's identity. The jurisprudential basis of which emerges from deep within the fundamental principles of constitutional interpretation. The Supreme Court as the interpreter of the Constitution and the adjudicator of constitutional issues, is duty bound to perceive and interpret the Constitution as a whole and not as a sum of its parts. It is this understanding that enables the Supreme Court in developing a holistic approach in appreciating the overall scheme of the Constitution. It is therefore undeniable that the

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[49] Constitution (Forty-Second) Amendment Act 1976, Acts of Parliament, 1992 (India)
[50] Indira Gandhi v. Raj Narain AIR 1975 SC 2299.
[51] *Supra* note 42
[52] *Id.*
[53] Waman Rao and Ors v. Union of India and Ors, (1981) 2 SCC 362.
[54] I. R. Coelho v. State of Tamil Nadu & Ors, AIR 2007 SC 861.

Supreme Court must consider any attempt at interpretation or any review of an amendment, so as to ensure that the interpretation or amendment is not inconsistent with such an overall scheme of the Constitution. The same is reflected in the principles underlying the basic structure doctrine, which though seemingly alien to the text and heritage of the Constitution of India, established itself as an enduring doctrine of immense value and importance due to the fact that its foundations reach deep down into the depths of constitutionalism; they emanate from the very basic principles considered eternal and transcendental forming the very core of constitutional theory and philosophy.

CHAPTER 8

DEMOCRACY AS A BASIC FEATURE OF THE CONSTITUTION: EXPLORING THE DOCTRINE'S IMPACT ON ELECTION JURISPRUDENCE

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> *"The basic structure of our Constitution, like a North Star, guides and gives a certain direction to the interpreters and implementers of the Constitution when the path ahead is convoluted."*
>
> – Justice D.Y. Chandrachud[1]

1. Introduction

In 1973, the Supreme Court of India delivered a landmark decision in the case of *Kesavananda Bharati v. State of Kerala and Another*,[2] unveiling the basic structure doctrine that transformed the country's constitutional history. This historic ruling, the culmination of an extensive 68-day hearing by a panel of 13 judges, challenged the notion of unrestricted Parliamentary supremacy in amending the Constitution, emphasizing the importance of protecting citizens' fundamental rights and upholding constitutional principles.[3] The doctrine of basic structure, established through this judgment, ushered in a new era of constitutional scrutiny, ensuring that all constitutional amendments would be evaluated against the basic structure of the Constitution. As we commemorate 50

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[1] D. Y. Chandrachud, (Chief Justice of India). (2023, January 21). Speech presented at the 18th Nani Palkhivala Memorial Lecture, organized by the Bombay Bar Association, Mumbai, India.

[2] AIR 1973 SC 1461.

[3] *Id.*

years since this pivotal judgment, it is crucial to reflect on its enduring impact, as it reshaped the constitutional landscape, redefined the relationship between the judiciary and legislature, and fortified the protection of core principles and values in contemporary India.

1.1 The Basic Structure Doctrine: a Cornerstone of Constitutional Interpretation

Initially focused on challenges to constitutional amendments, the basic structure doctrine in constitutional law has over the years undergone evolution and broadened its scope. Early critiques of the doctrine primarily revolved around two main aspects: the contention that the plurality opinions in the landmark Kesavananda Bharati case lacked a definitive ratio decidendi, thus creating uncertainty regarding their status as authoritative precedents,[4] and the argument that the case misunderstood the interplay between Parliamentary sovereignty and judicial review, leading to calls for its reconsideration or dismissal.[5] The lack of unanimity in defining the nature and identification of basic features of the Constitution further raised concerns, with sceptics suggesting that broad constitutional principles deemed as basic features needed to be more suitable for judicial application. [6]

Nevertheless, the judiciary's unwavering adherence to the basic structure doctrine, even in drastically different political contexts, as evidenced by cases like *Indira Gandhi v. Raj Narain*[7] and *Minerva Mills v. Union of India*[8], has convinced many

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[4] See, P. K. Tripathi, 'Kesavananda Bharati v. State of Kerala: Who Wins?', (1974) 1 SCC (Journal) 3; See also, J. Minnatur, 'The Ratio in the Kesavananda Bharati Case', (1974) 1 SCC (Journal) 74.

[5] R. Dhavan, Supreme Court and Parliamentary Sovereignty, New Delhi: Sterling Publishers, 1976.

[6] See, R.D. Garg, *'Phantom of Basic Structure of the Constitution: A Critical Appraisal of Kesavananda Case'*, (1974) 16 JOURNAL OF THE INDIAN LAW INSTITUTE, (1974) 16, at p. 243.

[7] AIR 1975 SC 2299.

[8] AIR 1980 SC 1789.

sceptics of its significance and validity. Notably, Justice Chandrachud's transition from dissent in Kesavananda Bharati to supporting the doctrine in *Waman Rao v. Union of India*[9] has been called the "pilgrim's progress" by Baxi.[10] This shift of opinion is not limited to Chandrachud alone, as other constitutional commentators like Seervai[11], Sathe[12], and to a lesser extent Baxi[13] have also experienced a similar change of convictions. Consequently, the basic structure doctrine has profoundly impacted the reputations of judges and academic commentators, challenged their previous views and prompted a reassessment of their understanding of constitutional principles.

The concept of "basic structure" implies the existence of a fundamental framework within a Constitution. It refers to the limitations or constraints placed on the amending powers of the Parliament, which prevent amendments that affect the Constitution's core or primary structural elements. These structural elements embody the essence and defining characteristics of the Constitution. The interpretation of the term is subjective and can vary. One significant explanation can be found in the ruling of a five-judge panel of the Supreme Court in the case of *M. Nagraj v. Union Of India*[14]. This ruling provides a comprehensive understanding of the concept of basic structure within the context of constitutional law as:

> *"Basic Structures are systematic principles underlying and connecting the provisions of the Constitution. They*

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[9] AIR 1981 SC 271.
[10] U. Baxi, Courage, Craft and Contention, Bombay: N.M. Tripathi Ltd, 1985, at p. 64, 97.
[11] H. M. Seervai, Constitutional Law of India, (4th edn) Bombay: N.M. Tripathi Ltd, 1967, at p. 1117, 3109–70.
[12] S. P. Sathe, 'Amenability of Fundamental Rights: Golaknath and the Proposed Constitutional Amendment', (1969) Supreme Court Journal, at p. 33–42, 63–98.
[13] U. Baxi, *Constitutional Changes: An Analysis of the Swaran Singh Committee Report*', (1976) 2 SCC (Journal) 17.
[14] AIR 2007 SC 71.

> *give coherence and durability to the Constitution. These principles are part of constitutional law, even if not expressly stated. This doctrine has essentially developed from the German Constitution. It isn't based on literal words. The theory of Basic Structure is based on the concept of 'constitutional identity'. The main object behind the theory is continuity, and within that continuity, identity."*[15]

Thus, from preserving constitutional identity to safeguarding core principles, the doctrine of the basic structure ensures the continuity of fundamental values within the constitutional framework. One key element considered a basic feature of the Constitution is democracy.[16] Democracy, emphasising popular sovereignty, free and fair elections, and representative government, is recognised as an essential pillar of the constitutional order.[17] The basic structure doctrine acts as a bulwark against any attempt to undermine or dilute democratic principles, reinforcing the notion that democracy is an integral and indispensable component of the constitutional fabric.[18] By upholding the basic structure doctrine, the judiciary plays a crucial role in protecting and nurturing the democratic essence of the Constitution, thereby safeguarding the rights and aspirations of the citizens.

2. Understanding the Significance of Democracy in the Constitution

Historically, democracy has been threatened by constitutional amendments.[19] In the wake of World War II, European nations, having witnessed threats to their democratic institutions, sought to protect their newly established constitutional orders

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[15] *Supra note* 14.
[16] Constitution of India, Preamble (1950).
[17] G. Austin (1999). Working a Democratic Constitution: A History of the Indian Experience. New York: Oxford University Press. 69.
[18] *Id.*
[19] See, Y. Roznai, (2013). *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, The American Journal of Comparative Law, 61(3), 657–719.

from sabotage. They implemented "unamendable" clauses in their Constitutions, safeguarding fundamental norms for democracy, human rights, and the rule of law that even legislative supermajorities could not alter.[20] These measures aimed to ensure the durability of their democratic systems and preserve their essential principles.[21] In contrast, India's path to democracy emerged in response to British colonial control rather than internal governance challenges.

The Indian Constitution did not include specific provisions protecting unamendable principles, as the framers understood the need for flexibility to accommodate the anticipated social revolution.[22] However, during India's early years as a democracy, political elites made amendments to the Constitution in an antidemocratic manner under the pretext of social change.[23] The Supreme Court intervened and invoked the "basic structure" doctrine, asserting that certain core elements of the Constitution were beyond amendment. Despite its ongoing controversial nature, the basic structure doctrine serves as a pertinent solution to address the challenges encountered by post-authoritarian societies and dominant-party democracies, tackling issues like restricted political competition, insufficient checks and balances, and executive overreach, especially in democracies that have not yet witnessed a peaceful transfer of power.[24]

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[20] The eternity clause in Article 79(3) of the German Basic Law serves as a prominent example by invalidating any amendment that attempts to derogate from the principles of human dignity, federalism, and social democracy.

[21] *Supra* note 19.

[22] *Supra* note 17.

[23] See, L. Pye, (1970). Authoritarian Politics in Modern Society: The Dynamics of Established One-Party Systems. Edited by Samuel P. Huntington and Clement H. Moore, American Political Science Review, 64(4), at p.1264-1265; See also, Giliomee, H., & Simkins, C. (1999). The Awkward Embrace: One-Part Domination and Democracy in Industrialising Countries (1st ed.). Routledge; Choudhry, Sujit. (2009). 'He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy, Constitutional Court Review, p.1-86.

[24] *Supra note* 23.

Throughout history, democracy has been defined and understood in different ways by scholars and leaders. Aristotle defined it as "rule by the majority"[25], while President Lincoln famously characterised it as: "a government of the people, by the people, and for the people".[26] Seeley viewed it as "a government in which everyone has a share"[27], and Dicey described it as "a form of government in which the governing body represents a relatively large portion of the entire nation".[28] Bryce emphasised the dispersal of governing power among community members rather than its concentration in a single group.[29] Austin's narrative and analysis of the Indian Constitution identify three critical features— the spirit of democracy, the pursuit of a social revolution, and the preservation of unity and integrity— that collectively maintain a delicate balance within the Indian constitutional framework.[30] The Indian Constitution exemplifies the democratic principle by granting power to the people of India, who exercise it through elected representatives. Universal adult suffrage, free and fair elections, and independent electoral machinery are essential components of democracy, all of which are upheld by the Indian Constitution, reflecting the nation's steadfast commitment to democratic ideals.

Thus, at the core of the Indian Constitution lies democracy, which serves as its foundation and ensures the protection of rights and freedoms. The landmark Kesavananda Bharati case reinforced the supremacy of democracy and its inseparable

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[25] Aristotle. (1998). Politics, Translated by C. D. C. Reeve. Indianapolis: Hackett Publishing Company.
[26] A. Lincoln, (1863, November 19). Gettysburg Address. Delivered at the dedication of the Soldiers' National Cemetery in Gettysburg, Pennsylvania.
[27] J. R. Seeley, (1876). The expansion of England: Two courses of lectures. London: Macmillan. at p. 132
[28] A. V. Dicey, (1885). Introduction to the Study of the Law of the Constitution. London: Macmillan, p.67.
[29] Bryce, James. The American Commonwealth. Vol. 1. Macmillan, 1888, p.33.
[30] G. Austin, The Indian Constitution: Cornerstone of a Nation. Oxford: Clarendon Press, 1966.

bond with the constitutional framework.[31] Over the past five decades, democracy has been pivotal in guiding India's progress, fostering inclusive development and social cohesion. However, challenges persist, emphasising the need for vigilance and collective action. As we commemorate this milestone, it is crucial to reflect on the importance of free and fair elections, a fundamental feature of the Constitution, in upholding democratic values.

3. Evolution of Election Jurisprudence: Strengthening Democracy Through Judicial Pronouncements

The Hon'ble Supreme Court of India, from the landmark case of *N. P. Ponniswamy v. Returning Officer*[32] in 1952 to the recent judgment in *Anoop Baranwal v. Union of India*[33] in 2023, has consistently interpreted the Constitution to uphold the principles of free and fair elections, thereby safeguarding the fundamental tenets of the basic structure doctrine. By nurturing civil society, promoting citizen participation, ensuring transparency, protecting press freedom, fostering inclusivity, strengthening institutions, leveraging technology, and addressing threats to democratic norms, we can fortify the fabric of our democracy and safeguard its principles for future generations.[34]

In India, several laws have been enacted to ensure free and fair elections, including the Representation of the People Act of 1950 and 1951, the Registration of Electors Rules of 1960, the Conduct of Election Rules of 1961, the Presidential and Vice-Presidential Rules of 1974, and the Anti-defection Law of 1985. These legislations address various aspects of elections, such as

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[31] S. Ganguly, (2017). *India's Democracy at 70: The Troublesome Security*, State Journal of Democracy, 28(3), at p.117-126.
[32] AIR 1952 SC 64.
[33] Writ Petition (Civil) no.104/2015, along with Writ Petition (Civil) 1043 /2017, Writ Petition (Civil) 569/2021, Writ Petition (Civil) 998/2022, judgment dated 3.3.2023.
[34] *Supra note* 33.

candidate eligibility, dispute resolution, electoral conduct, and political defection. The Supreme Court of India, with its jurisdiction over the Constitution and administrative authorities, plays a crucial role in safeguarding fundamental rights and ensuring a balance among public institutions through its power of judicial review.[35] As long as the courts uphold the Basic Structure Doctrine as a guiding principle for preserving the democratic system, there will be ongoing challenges in the area of elections that will call for the implementation of more robust legislation and reforms to strengthen the fairness and integrity of the process.

Interestingly, *Indira Gandhi v. Raj Narain*[36] case holds immense significance when discussing the role of democracy within the basic structure doctrine. Occurring in the aftermath of the Emergency period in India, this landmark judgment emphasised the paramount importance of free and fair elections in a democratic society. Prime Minister Indira Gandhi's appointment of Justice A.N. Ray, a dissenting judge, as the Chief Justice of India, superseding three senior judges, brought forth implications for the judiciary. This move was influenced by Gandhi's desire for a compliant Supreme Court to support her envisioned social revolution.[37] However, this appointment was strategically linked to the election petition filed by Raj Narain, Gandhi's political opponent, alleging corruption. Subsequently, the Allahabad High Court invalidated Gandhi's election, leading her to declare an 'internal emergency' and enact constitutional amendments to consolidate her power.[38] Consequently, the Congress party passed two constitutional amendments: the Constitution (Thirty-eighth Amendment) Act shielded emergency proclamations, presidential ordinances, and declarations of Presidents' Rule from judicial scrutiny, while the

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[35] Article 13 of the Constitution of India.
[36] AIR 1975 SC 2299.
[37] *Supra* note 17.
[38] *Id.* at p.309-11.

Constitution (Thirty-ninth Amendment) Act nullified the electoral laws violated by the Prime Minister and prevented the courts from reviewing the legitimacy of her election.[39]

Amidst this backdrop, the case of *Indira Gandhi v. Raj Narain*[40] emerged, with the Supreme Court unanimously invoked the basic structure doctrine by a majority of four to one to invalidate the Thirty-ninth Amendment, which sought to remove the judicial review of the Prime Minister's election; however, upheld her election on the grounds that retrospective laws were not inherently unconstitutional.[41] Notably, three justices, Chief Justice Ray and Justices Chandrachud, Mathew, and Khanna, who had previously rejected the basic structure doctrine in Kesavananda Bharati case, now embraced it to varying degrees as a means to curb the Prime Minister's abuses of power. Their judgments emphasized that the Thirty-ninth Amendment's infringement on judicial review contravened the basic structure doctrine. This surprising turn demonstrated a shift in the Court's stance, as the majority of the justices embraced a doctrine they had previously rejected, highlighting the importance of the rule of law, the judicial resolution of electoral disputes, and the principle of free and fair elections as integral components of the basic structure doctrine.

The court's application of the basic structure doctrine in the Indira Gandhi case, specifically examining the 39th Amendment's impact on democracy and judicial review, serves as a valuable starting point for exploring the expansion of the doctrine. It is essential to refer to Justice H. R. Khanna's opinion in this landmark judgment to understand its profound impact:

> *"All the seven Judges [in Kesavananda Bharati case] who constituted the majority were also agreed that democratic*

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[39] *Id.* at p.319.
[40] AIR 1975 SC 2299.
[41] *Id.*

> *set-up was part of the basic structure of the Constitution. Democracy postulates that there should be periodical election, so that people may be in a position either to re-elect the old representatives or, if they so choose, to change the representatives and elect in their place other representative. Democracy further contemplates that the elections should be free and fair, so that the voters may be in a position to vote for candidates of their choice. Democracy can indeed function only upon the faith that elections are free and fair and not rigged and manipulated, that they are effective instruments of ascertaining popular will both in reality and form and are not mere rituals calculated to generate illusion of deference to mass opinion. Free and fair elections require that the candidates and their agents should not resort to unfair means or malpractices as may impinge upon the process of free and fair elections."*[42]

Interestingly, Justices Chandrachud and Justice Mathew diverged in their conclusions while assessing whether the 39th Amendment Act undermined the basic feature of democracy.[43] Justice Mathew argued that the amendment violated the doctrine by removing the requirement for election disputes to be resolved through judicial means, while Justice Chandrachud held an opposing view.[44] Despite their shared understanding that democracy is a foundational aspect of the Constitution and that the 39th Amendment posed a threat to this fundamental feature, their disagreement arose from their interpretations of the basic feature of democracy and the extent to which the judiciary should regulate state actions through the lens of basic structure review.

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[42] AIR 1975 SC 2299.
[43] *Id.* at p. 2320.
[44] *Supra note* 43.

Justice Mathew identified the basic feature of democracy as comprising three elements: the existence of pre-established laws and regulations governing elections, the involvement of an impartial executive body in conducting fair elections, and the resolution of election disputes through a judicial tribunal.[45] He concluded that the 39th Amendment undermined this basic feature by granting Parliament the power to decide certain election disputes, bypassing the judicial process he deemed essential for upholding democratic principles.[46] In contrast, Justice Chandrachud argued that although the amendment affected the process of resolving election disputes, it did not destroy the democratic structure of the government because the fundamental principle of majority rule and the electoral process itself remained intact.[47] He cautioned against drawing broad conclusions based on a single instance, stating that an isolated act of immunity does not necessarily undermine the democratic framework of the government.[48] While Justices Mathew and Chandrachud arrived at different conclusions, their approach to basic structure review centred on safeguarding democratic principles and ensuring that the democratic framework of the government remains intact. This difference in interpretation highlights the inherent complexities and potential disagreements when evaluating the concept of democracy within the framework of the basic structure doctrine, as judges engage in substantive analysis and utilize general constitutional principles to assess specific state actions challenged in each case.

The *Indira Gandhi v. Raj Narain* case is a potent reminder that democracy thrives when the strong electoral system accurately reflects the people's desires. It affirms that citizens have the unhindered right to choose their representatives freely and

[45] *Id.* at p. 2372–3 (Mathew, J).
[46] *Id.*
[47] *Id.*, at p. 2467 (Chandrachud, J).
[48] *Id.*

impartially. The case also provides a precedent for judicial review in electoral affairs, highlighting the judiciary's function as a bulwark of democracy, preserving the integrity of free and fair elections, and giving voters a forum to express grievances related to elections. The lessons learned from this critical case still apply today, highlighting how crucial it is to maintain the legitimacy of electoral systems. Public confidence in the electoral process is increased by emphasising accountability, openness, and fairness.

4. Examining the Constitutional Rights and Limitations of Voting and Candidacy

As discussed earlier, the Constitution of India includes numerous measures to ensure a fair election process for India's national and state legislatures.[49] These measures are the foundation for two laws, the Representation Act of 1950 (Act 43 of 1950) and the Representation of People Act of 1951 (Act 43 of 1951), enacted to ensure democracy thrives. However, the relationship between the elected and the electorate is not expressly covered by the constitutional or statutory provisions, even though they control the election process. They don't explicitly state what the candidates should say to the electorate, consequently forcing the electorate to make an ill-informed decision, unaware of the qualifications and suitability of the candidate.[50] Therefore, such ignorant decisions have the effect of adversely affecting the democratic foundations. Consequently, the Delhi High Court had to consider the issues and suggestions made by the Law Commission in *Association for Democratic Reforms v. Union of India*[51]. The petitioner, a non-profit organisation, argued in a petition submitted under Article 226 that voters have a right to 'informed voting' and that this right can only be realised if detailed information about the

[49] The Constitution of India, Part XV, Art. 324-329.
[50] See, Rodney Austin, (1996), "Freedom of Information: the Constitutional Impact" In The Changing Constitution, edited by Jeffrey Jowell and Dawn Oliver, Oxford University Press, at p.399.
[51] AIR 2001 Del 126.

candidates is provided.[52] Additionally, it begged that information on candidates' criminal records be made public and open.

The Delhi High Court examined the recommendations of the Law Commission, the Election Commission, and the Vohra Committee, all of whom had expressed concern about the connection between political parties and criminals, and ordered the Election Commission to collect comprehensive information regarding the candidates participating in elections, encompassing several aspects.[53] Firstly, it necessitates details regarding any convictions for offenses that carry a prison sentence, enabling voters to make informed decisions.[54] Additionally, the Commission seeks information about the assets owned by the candidates, promoting transparency and accountability.[55] Moreover, it seeks facts that shed light on the competence, capacity, and suitability of the candidates as representatives, ensuring that qualified individuals are elected.[56] Lastly, the Election Commission also deems it necessary to obtain information that aids in assessing the competence and capability of the political parties endorsing the candidates for Parliament or state legislature, further enhancing the electoral process.[57]

Thus, the Court noted that Article 19(l)(a)'s protection of citizens freedom of speech and expression "comprehends the right to know - the right to receive information regarding matters of public concern". [58] The court emphasised the importance of the right to know in the context of elections as: [59]

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[52] *Id.*
[53] *Id.* at p.126-138
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Supra note* 51.
[58] *Id.* at p.135.
[59] *Id.*

> *"For making a right choice it is essential that the past of the candidate should not be kept in dark as it is not in the interest of the democracy and wellbeing of the country. The antecedents of a person standing for election must be placed under public gaze and that is possible only when all wraps covering information about him are cast away. For the survival of democracy it is essential that the voter casts an educated vote based upon his knowledge derived from information supplied to him about the candidates."*

The court recognised the detrimental impact of criminalising politics and allowing criminals to hold political positions, acknowledging that both actions undermine the functioning of a democratic state.[60] It emphasised the crucial need to make voters aware of a candidate's criminal tendencies and activities, as concealing such information only perpetuates and exacerbates the problem of political criminalisation.[61] The court emphasised that an informed electorate, capable of choosing to support or reject a candidate based on knowledge of their criminal history, would strengthen democracy and combat the vices of corruption and criminality in politics.[62] By providing information about candidates' activities, political parties would be compelled to reconsider fielding candidates with criminal records. Therefore, it is essential for voters to have access to information regarding a candidate's criminal background.

The Union of India challenged the Delhi High Court's directions to the Election Commission to the Supreme Court in the matter of *Union of India v. Association for Democratic Reforms*.[63] The Supreme Court supported the High Court's decision nonetheless, highlighting the vital role of free and fair elections in maintaining democracy. It emphasised the significance of having informed voters and argued, in the context of the right

[60] *Id.* at p.137.
[61] *Id.*
[62] *Supra note* 51.
[63] (2002) 5 SCC 294.

to know, that there was no justifiable reason to exclude the right of a voter to obtain crucial information about their representative, who holds a position of paramount importance.[64] The Supreme Court also emphasised how important free and fair elections and informed voters are to democracy. Any biased information, false information, incomplete information, or lack of knowledge leads to an uneducated populace, which ultimately compromises the legitimacy of democracy. [65]

Thus, in light of these considerations, the Supreme Court issued an order directing the Election Commission to collect and provide essential information for the public's benefit. This information includes:

> *"(a) whether a candidate has a history of being convicted, exonerated, or discharged in a criminal case;*
>
> *(b) whether the candidate has faced accusations of crimes carrying a prison sentence of two years or more prior to filing their nomination;*
>
> *(c) details regarding the assets of the candidate, their spouse, and their dependents; and*
>
> *(d) additional pertinent information about the candidate. By ensuring the availability of such information, the Court aimed to empower voters and foster a transparent and accountable democratic process."* [66]

5. Challenges and Reforms: Addressing Criminalization and Strengthening Election Laws

Furthermore, in addressing the voting rights of incarcerated individuals, the Hon'ble Supreme Court upheld the validity of Section 62(5) of the Representation of Peoples' Act (RPA), which

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[64] G. Dixit, & A. V. Mishra, (1996). Election Commission as a 'Watchdog of Free and Fair Election Journal of Democracy, 7(1), at p. 4-54
[65] (2002) 5 SCC 294 , at p.317.
[66] *Supra note* 65.

bars convicted and undertrial prisoners from voting in elections.[67] The court emphasized that the language and extent of the provision are sufficiently broad to cover all individuals confined in prisons, while expressly excluding those under preventive detention as per applicable laws. In the case of *Mahendra Kumar Shastri v. Union of India*[68], the Supreme Court observed that Section 62(5) imposes a disability that applies equally to all individuals in similar circumstances, preventing them from contesting elections or offering themselves as candidates. The provision was deemed reasonable and in the public interest, aimed at maintaining the integrity of the electoral process by ensuring purity in selecting people's representatives. The court emphasised that the right to vote is not a fundamental or constitutional right but a statutory right, subject to limitations imposed by the law.[69] Similarly, the right to stand as a candidate and participate in elections is not a common law right but a special right established by statute, which must adhere to the conditions stipulated therein.

Reiterating this ratio, in *Anukul Chandra Pradhan v. Union of India and others*[70], a Bench of three learned Judges, expressed the following view:

> *"There are provisions made in the election law which exclude persons with criminal background of the kind specified therein from the election scene as candidates and voters. The object is to prevent the criminalisation of politics and maintain probity in elections. Any provision enacted with a view to promote this object must be welcomed and upheld as subserving the constitutional purpose. The elbow room available to the legislature in classification depends on the context and the object for*

[67] Mahendra Kumar Shastri v. Union of India and Anr, (1984) 2 SCC 442.
[68] *Id.*
[69] *Id.*
[70] (1997) 6 SCC 1.

enactment of the provision. The existing conditions in which the law has to be applied cannot be ignored in adjudging its validity because it is relatable to the object sought to be achieved by the legislation. Criminalisation of politics is the bane of society and negation of democracy. It is subversive of free and fair elections which is a basic feature of the Constitution. Thus, a provision made in the election law to promote the object of free and fair elections and facilitate maintenance of law and order which are the essence of democracy must, therefore, be so viewed. More elbow room to the legislature for classification has to be available to achieve the professed object."

Thus, the Supreme Court of India has played a crucial role in shaping electoral reforms through its landmark judgments. By requiring candidates to disclose their criminal records, financial situations, and educational backgrounds, the court empowers voters to make informed decisions and safeguards the public interest. These measures enhance transparency, integrity, and democratic values within the electoral process, preventing individuals involved in serious offences from entering politics and curbing the accumulation of post-election wealth that could undermine democracy. With its judicial review and jurisdiction authority, the Supreme Court ensures that government and legislative bodies adhere to constitutional mandates, contributing to free and fair elections and upholding the principles of transparency, accountability, and inclusivity in India's democratic system.

In addition to ensuring free and fair elections, the regulation of political campaign finance can also be viewed through the lens of freedom of speech and expression, which is recognized as a fundamental right in India. Freedom of expression is considered

a 'basic' human right[71] and a 'preferred' right[72], indicating its critical importance in a democratic society. The Indian Constitution upholds the principle that a democratic political society and its government, based on people's consent, can only thrive when open and unrestricted discussion exists.[73] It's a prevalent assumption that electoral campaigns with more financial support will reach more voters, resulting in more favourable results.[74] This assumption, however, ignores any possible adverse effects linked to the pursuit of more financing. First, people with political clout can put unjustified pressure on financial sources.[75] Second, strong private companies might strike "quid pro quo" deals with politicians, making elected officials put the welfare of special interest groups ahead of the broader public.[76] Thus, the challenges inherent in democratic elections necessitate political finance regulation to mitigate risks and protect the democratic process.

The 2001 Report of the National Commission to Review the Working of the Constitution highlights the significant risk of corruption in the public sphere posed by the current system of election campaign financing.[77] It reveals that election funds often originate from unaccounted criminal money, undisclosed funds from business groups, kickbacks, and commissions related to contracts, contributing to widespread corruption. In

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[71] L. I. C. v. Manubhai, (1992) 3 SCC 637.
[72] Odyssey Communications (P) Ltd. v. Lokvidayan Sanghatana, (1988) 3 SCC 410.
[73] S. Chandalia, & A. Lekhi, (2013). Regulation of Election Campaign Finance in India: Making Elections truly Free and Fair. NUJS L. Rev., 6, 503.
[74] *Id.*
[75] See, M. Dahm, & N. Porteiro, (2008). Side Effects of Campaign Finance Reform. Journal of the European Economic Association, 6(5), at p.1057–1077; See also, Smith, David Austen. (1997) "Interest Groups: Money, Information, and Influence." Perspectives on Public Choice: A Handbook. Ed. Dennis C. Mueller. Cambridge University Press, at p.209-230.
[76] See, D. R. Ortiz, (1998). The Democratic Paradox of Campaign Finance Reform. Stanford Law Review, 50, at p. 893-914.
[77] M. N. Venkatachaliah, Report of the National Commission to Review the Working of the Constitution, March 31, 2002, available at http://lawmin.nic.in/ncrwc/finalreport/v1ch4.htm (Last visited on June 13, 2023).

this context, the basic structure doctrine recognises the fundamental importance of freedom of speech and expression in fostering a meaningful democratic society. It provides a framework to balance diverse voices with transparency and fairness in campaign financing. By upholding the principles of the basic structure doctrine, India acknowledges the essential role of free expression in a democratic system and facilitates the formulation of laws and regulations that promote democratic discourse, safeguard citizen rights, and uphold the democratic fabric of the nation.

6. Preserving the Integrity of Elections: Role and Independence of the Election Commission

The Election Commission of India, an independent constitutional authority, has also played a pivotal and indispensable role in shaping the progress of Indian democracy. With its constitutional duty of conducting elections that are free, fair, and peaceful, the Election Commission's influence has been reinforced by the Supreme Court of India through numerous judgments, which provide guidance not only to the courts but also to the Election Commission, electoral bodies, central and state governments, political parties, and candidates participating in elections. The Constitution Bench, led by Justice Krishna Iyer, emphasised the vital role of the Independent Election Commission in conducting elections, highlighting its connection with Article 324 and Article 329(b) of the Constitution and affirming that a strong and autonomous Election Commission is crucial for upholding the integrity of democracy, protecting citizens' rights, and preserving the constitutional framework.[78] The Hon'ble Supreme Court in *T. N. Seshan v. Union of India*[79] and others, further recognised the significance of free and fair elections as a fundamental aspect of our democratic republic, emphasising the need for an

[78] Mohinder Singh Gill & Another v. Chief Election Commissioner & Others, 1978 SCR (3) 272.
[79] (1995) 4 SCC 611.

independent body, insulated from political and executive influence, to ensure the purity of the election process. These landmark rulings serve as guiding principles that ensure the integrity and effectiveness of the electoral process in India.

Interestingly, the recent judgment of the Hon'ble Supreme Court in the case of *Anoop Baranwal v. Union of India*[80] focused on upholding the independence of the Election Commission and preserving its credibility to establish safeguards that ensure the conduct of free and fair elections. In a Public Interest Litigation filed by Anoop Baranwal in January 2015, it was argued that the current system of appointing members to the Election Commission of India (ECI) by the Executive is unconstitutional and has compromised the ECI's independence. The PIL sought the Court's intervention to establish an independent Collegium-like system for ECI appointments, contending that the current process violates Article 324(2) of the Constitution. Article 324 grants the power of appointment to the President, subject to Parliamentary law, but as no such law exists, appointments have been made based on the Prime Minister's recommendations. The Union defended the existing mechanism, emphasizing the integrity of past Chief Commissioners and asserting that the matter falls within the executive domain. On October 23, 2018, the Chief Justice Ranjan Gogoi-led bench referred the case to a five-judge constitution Bench, and on January 6, 2020, a similar petition by Ashwini Kumar Upadhyay was tagged with this case. After extensive hearings in November 2022, the Constitution Bench decided to reform the appointment process to ensure the independence of the Election Commission. They established a committee comprising the Prime Minister, the Leader of the Opposition in Parliament, and the Chief Justice of India, which will provide recommendations and advise the President on ECI appointments until Parliament enacts a separate law.[81] The Supreme Court highlighted the

[80] *Supra* note 33.
[81] *Supra note* 30

crucial role of an independent Election Commission in upholding the fundamental principles of free and fair elections, which is an integral part of ensuring adherence to the basic structure doctrine.

7. Conclusion

On the occasion of the 50th anniversary of the Kesavananda Bharati case, it is evident that free and fair elections hold paramount importance as fundamental pillars of democracy, constituting an integral element of the basic structure doctrine enshrined within the Indian Constitution. The Supreme Court of India has played a pivotal role in safeguarding democratic values by resolving electoral disputes and dynamically interpreting laws to expand the rights of voters. The Kesavananda Bharati judgment, alongside the concept of the basic structure doctrine, continues to ensure the protection, reformation, and preservation of free and fair elections in India. By recognising their significance, India reaffirms its unwavering commitment to equality, representation, and the will of the people, thus reinforcing the democratic framework and preserving core national values. The conduction of periodic free and fair elections through adult franchise remains an indispensable feature of democracy, serving as a fundamental essence of the Parliamentary system and firmly embedded within the basic structure doctrine.[82] Looking ahead, it is imperative to cherish and uphold the sanctity of free and fair elections, as the Kesavananda Bharati judgment and the concept of the basic structure doctrine will persistently safeguard, reform, and ensure their integrity in the Indian electoral process for future generations.

[82] Manoj Narula v. Union of India, (2014) 9 SSC 1.

CHAPTER 9

BASIC STRUCTURE: MAGNUM OPUS OF THE CONSTITUTION AND SAVIOUR OF FOUNDATIONAL FUNDAMENTALS[1]

Prof. (Dr.) K. L. Bhatia*

1. Introduction

Expounding of the basic structure was possible because of the changing political circumstances playing with the Constitution as a play thing that presented new problems that required judicial creativity in constitutional interpretation. Basic structure expounds an inroad for experiential transformative jurisprudence. Had *Kesavananda Bharathi, 1973,* not been there, the supremacy of the Constitution could have been the prey of authoritarianism or autocratic democracy which could have been detrimental to Rule of Law to sustain the Rule of Life.

Expounding principle signifies that our Constitution is not a seasonal document; it is a permanent document; it is not static like dead wood; it is dynamic and a living organism since it seems to have acquired legitimacy as a highest norm of public law.[2] Basic structure demonstrates the judicial craftsmanship

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[1] This is the revised version of author's Supreme Court Expounding Transformative Jurisprudence in India: The Genesis of Law, Justice and Morality, 2015; Cases and Materials on Constitutional Law of India: Fons Juris of Foundational Fundamentals, 2016; Federal Structure of the Textual Constitution of India: Fons Juris of Constitutional Patriotism Cases and Materials, 2019.

[2] Justice H. R. Khana in his book Making of India's Constitution, pp. 1-3. Has said: "The framing of a Constitution calls for the highest statecraft. Those entrusted with it have to realize the practical needs of the government and have, at the same time, to keep in view the ideals, which have inspired the nation. They have to be men of vision, yet they cannot forget the grass-roots. … A constitution at the same time has to be a living thing, living not for one or two generations but for succeeding generations of men and women. It is for that reason the provisions of the Constitution are couched in general terms, for the

of Justices outstanding for their ability, robust common sense, and conscientiousness, high-sense of justice, in depth insights into law, courage of conviction, and visionary humane approach, which are reflected in the judgments that have illustrious, profound and positive impetus in the systematic, scientific and methodological growth of Indian common law giving shape to the expounding philosophy of transformative constitutional jurisprudence. Thus, basic structure is Justices' juris vicissitude as magnum opus of Judicial Process *lingua franca* since "self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."[3]

The reading of the deliberations of the Founder Architects of the Constitution recorded in the Constituent Assembly Debates suggests that it is impossible as well as impracticable to suggest that they intended the Constitution itself to suggest answers to the manifold problems that they would confront succeeding generations. Chief Justice Charles Evens Hughes had said, "We are under a constitution, but the Constitution is what the judges say it is".[4] Thus, unequivocally we can say that constitution is what the judges of the Apex Court expound. The case *Kesavananda Bharati v. State of Kerala*[5] , decided on 24 April 1973, with hair-thin margin majority 7:6, consisting of 703 pages, has saved Indian democracy, as a basic feature of the Constitution, by expounding the genesis of basic structure. This previse (prediction or foresee farsightedness) is based on the experiences of the past dissenting opinions espoused or coined by Justices Hidayatullah and Mudholkar in *Sajjan Singh v. State of Rajasthan*[6] that there are certain fundamental

great generalities the Constitution have a content and significance that vary from age to age and have, at the same time transcendental continuity about them. ... A constitution states, or ought to state, not the rules of the passing hour, but the principles for an expanding future."

[3] Morey v. Doud, 354 US 457.

[4] C. E. Hughesa, Addresses of Charles Evans Hughes 1906-1916, 185-186 (Wentworth Press 2016).

[5] (1973) 4 SCC 225.

[6] AIR 1965 SC 1965.

principles/features of the Constitution which are not within the reach of infinite or unlimited power of the Parliament under Article 368 to amend. The Apex Court expounded that Parliament could amend any part of the Constitution so long as it did not alter or amend the basic structure or essential features of the Constitution. This was the implied or inherent limitation on the amending power of the Parliament encapsulated in Article 368. In the backdrop of this, it seems that the expounding approach solely makes the Constitution living or living organism. Problems of constitutional interpretations are central to the notions of living constitution expounding its never-ending growth. The terms, words, phrases and expressions in the textual constitution do not change, but their meaning is expounded in such a way that unfolds the modes and mores of constitutional interpretation. Expounding constitutional interpretation resists the traditional tendency that judicial law-making is a myth. Expounding constitutional interpretation tends to look into the original meaning or original intent of the constitution makers, viz., elucidation of potentially relevant post-constitutional development, that is, which interpretation best accords with ethos or morals as well as socio-economic-political character and unity and integrity of the Nation with the blend of free economic market, privatization, globalization and competition. This means the judicial elaboration of decisional doctrines to derive answers to constitutional knotty questions, viz., the search or quest for meaning to the words, terms and expressions of constitutional language thus evaporating the childish myth that judicial law-making is not reality. Judicial power – judicial review—of the Apex Court extends to all cases arising under the Constitution including the constitutional amendments espousing "judicial exclusivity" and "judicial inclusivity" in constitutional interpretation.

2. Foundational Fundamentals - The Genesis

Constitution of India is the soul of our country India, *Bharat* - the Union of States. It is the *suprema lex* of India. It is the

symbol of Unity in Diversity. It is a treasure of national heritage. It is the conscience of our country India. It is the sacred gospel of our nation containing the aspirations of "We the people of India" and aimed at strengthening the unity, integrity and harmony of the nation. It is not a seasonal document; it is a permanent document that binds the posterity for ages. It is expounded by the Supreme Court. In this context the constitutional text does not change, but its interpretation undergoes a change. The words, terms and expressions in the Constitution having one meaning in one context may be given somewhat different meaning in another context. "While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning", expoused Justices Black and Frankfurter, Conflict in the Court. In this process, the judicial interpretation, though slow and gradual, plays a dominant role. The Supreme Court of India has from time to time given a new, innovative and creative meaning to the words, terms and expressions in the Constitution so as to make the 20th Century document sub-serve the needs of a vast, expanding and developing Indian civilization of 21st Century with the blend of free economic market, privatization and globalization, social justice, economic justice and distributive justice without many formal amendments being effectuated in its text. In the backdrop of this, the pragmatic, innovative and realistic approach to the constitutional language invented by basic structure, which is not mere philosophy but practicum, has to be preserved, conserved and promoted and there is nothing pretentious about it as the ship of suspicion has no shore to reach. "The Constitution of India", as expounded by Justices Dipak Mishra and Prafulla C. Pant in *Prahlad v. State of Haryana*[7], is "an organic document, confers rights. It does not condescend or confer any allowance or grant. It recognizes rights and the rights are strongly entrenched in the

[7] (2015) 8 SCC 688 (694).

constitutional framework, its ethos and philosophy, subject to certain limitations. Dignity of every citizen flow from the fundamental precepts of the equality clause engrafted under Article 14 and right to life under Article 21 of the Constitution, for they are the "*fons juris"* of our Constitution. The said rights are constitutionally secured" being the foundational fundamentals of the basic structure. This is the vision and mission of our Constitution, and "where there is no vision the people perish."[8]

In the backdrop of the above, it seems that the founding authors of the Constitution of India did what the Federalists, particularly Adams, James Madison, Thomas Jefferson, Alexander Hamilton and John Jay, did with veneration as architects of American Constitution for its durability.[9] And, the Supreme Court of India did by expounding basic structure for Indian Constitution's durability since the founding authors made a case in favour of constitutional supremacy as against despotic government or elective despotism. This is the genesis of basic structure which the founding authors of basic structure created with enlightened phrase of Justice Vivian Bose "Flashing the flaming sword of its inspiration".[10]

3. Preamble – Entrenched an Immutable Basic Structure of Edifice of the Constitution of India

Our Constitution's spirit is the Preamble, which is the Backbone of our Constitution. It is the guiding spirit for Indian Nation on the touchstone of Basic Features of our Constitution. Preamble indicates the language and expressions of the Constitution as its Vision-Mission and not in a rigid or exhaustive sense. The constitutional language of Preamble states that the expressions are not mere legal, constitutional and political principles, but

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[8] Constituent Assembly Debates, Vol. 1, 9 December, 1946.
[9] Julian Boyd (ed.) The Federalists - Papers of Thomas Jefferson (Princeton University Press 1958).
[10] Virendra Singh v. State of Uttar Pradesh, AIR 1954 SC 447.

they are moral and spiritual principles binding the posterity for ages to come. The Preamble is not a mere solemn resolution; it is something more than a resolution. It is declaration; it is a firm resolve; it is a pledge and an understanding. It is not a spirit of narrow legal wording, but a majestic expression of constitutional morality, constitutional polity and constitutional culture. It is an expression of dedication to the people of India. The Preamble, in fact, is the very life and breath of the Constitution which the founder-authors have framed. Its dedication to the people of India unequivocally speaks about the people of India, *viz.,* the sovereignty will vest in the whole body of the people of India. The founder-authors expressed that the sovereignty of the people of India will not be bartered away or bargained in the name of Commonwealth; it does not vest in any foreigner. Sovereignty does not vest even in the Government; Government only represents the people of India. This, in an ocean within a tear, is the message of basic structure expounded in *Kesavananda Bharati* case on 24 April 1973.

4. Mosaic of Indian Federal Structure - Interdependence and Not Independence

Federalism is one of the most conceived essential features of the Constitution of India. Federalism, illuminated by the competing traditions, devised by the Founding-Authors, developed by the growth of constitutional politics, compared with the development's aftermath the World War II as well as decolonization giving rise to a new constitutional culture, viz., constitutional democracy impregnated with federalism, enriched by the judicial decisions, and analysing the new ideas as well as new paradigms as conceivable new challenges to federalism in quest of future directions. New challenges to federalism are the basis for the new tensions/conflicts/irritants/frictions; new challenges are the base point of an in depth inquisitive of modern federalism which is seen as a need to stress the dynamics of flexibility and adaptability. This comes close to understand the federal spirit in governmental Centre-State relations realistically aiming at

rendering services to mankind in general and weaker segments of society in particular.

The textual Constitution of India does not refer to the expression federalism in any of its provisions and, therefore, it may not be possible to describe it or characterize it with professed constitutional language such as 'federalism', 'quasi federal and quasi unitary' and 'centralization with decentralization'. Be that as it may, by illuminating the structure of the textual Constitution of India, the Founder Authors were to lay down a clear road map for the political structure of India as it was a momentous as well as historic shift from colonization to decolonization. Colonization as a wound seems to have to give rise to the invention of the principle and practice of independence within the system and culture of a written Constitution that could work on the culture of 'interdependence, 'mutual reciprocal and friendly to each other'. In the making of the Constitution of India, a document of governance and good governance, the Founder Authors did not mention even for once the expression, term and word federal or federalism in any of its provisions including the opening language of its Preamble. Nevertheless, given the functional approach power structure, it discerns that the constitutional culture is federal in spirit. Our constitutional scheme is not professed traditional theory of federalism but has been refashioned the beautiful culture of Indian federalism in the scheme of mutually reciprocal friendly relations between the Centre and its constituent units (Union of States) where both the Centre and the States are interdependence on each other and not independent from each other to antagonizing each other, an emblem of indestructible union of destructible units. This is the functional as well as experiential culture and as such it is 'cooperative federalism', 'coordinative federalism', 'organic federalism' unparalleled in the family of constitutionalism in the globe. In the back drop of the above, the Apex Court of India expounded federalism as the Basic Structure of the Constitution of India in *Kesavananda Bharati case*, 1973 that could not be destroyed and shattered

by any political party in power as a play thing in their hands. This is the mosaic of Indian federal structure.

In a recent historic and path-breaking judgment *State Bank of India v. Santosh Gupta*[11] (known as SARFAESI CASE) the Apex Court of India has in unequivocal words expressed that the Constitution of India is a mosaic drawn from the experiences of nations worldwide. The federal structure of this Constitution is largely reflected in Part XI, namely, Legislative Powers of Parliament, State Legislatures enumerated in Articles 245-255 read with Union List, State List and Concurrent List of Schedule VII and Administrative Relations between Union and the States enjoined in Articles 256-263, 353, 355, 356, 365, 339, 350A, 72, 162, 252, 256, 282, and Fiscal Relations embodying the co-operative system of revenue distribution between the Union and the States.

The author opines that all federal Units (States) of federal India, without exception, are mutually friendly reciprocal to each other and not distant from each other. Union and its federal Units (States) are mutually reciprocal friendly and inter-dependent, not antagonizing, to/on each other and not independent from each other. The federal structure enjoined in the textual Constitution of India by its Founder Authors is magnum opus on the lines of constitutional patriotism.

5. Concept of Fundamental Rights Quintessence of Basic Structure of 'Mutually Inclusive' and Not 'Mutually Exclusive'

State is duty bound to secure to all its citizens Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all fraternity assuring the dignity of the individual. This is the soul of basic structure and that cannot be destroyed or changed or varied as a play thing in the hands

[11](2017) 2 SCC 538.

of those in power under the constitutional language of Article 368 to suit their political will. This in an ocean within a tear is the message of basic structure expounded in *Kesavananda Bharati case*.

The concept of fundamental rights or human rights or fundamental freedoms or basic rights may be traced to the conception: *"Man is born free but everywhere he is in chains"*, which has had the roots in the human thinking (particularly natural law philosophers like Locke and Rousseau) since seventeenth century revolving around the theory that man has certain basic, natural and inalienable rights or freedoms, and it is the function of the State to recognize such rights to flourish without undesirable and incompatible limitations so that human liberty is preserved, human personality flourished as well as developed and democratic life promoted. The modern concept of human rights or fundamental rights or fundamental freedoms or basic rights may be traced in the Declaration of French Revolution, 1789 which declared: *"The aim of all political association is the conservation of the natural and inalienable rights of man"*. The vision of French Constitution is inherent in *'liberty'* in pursuit of human happiness. The Bill of Rights (first ten amendments to the United States of America Constitution, 1787) is the gospel of human rights, liberty and equality.

In the backdrop of this, there are certain basic questions relating to the genesis of fundamental rights in India. What should be the conception of fundamental rights? What did it make the founding authors to incorporate fundamental rights in the textual Constitution of India? Whether fundamental rights, human rights and basic rights are identical or synonymous or distinct from each other? These were the basic and fundamental questions before the Constituent Assembly of India. The founding authors of the textual Constitution of India were convinced that fundamental rights are rooted in equality and liberty in assuring human dignity to promoting fraternity in pursuit of human happiness and fundamental in securing

justice - social, economic and political - to all its citizens in the good governance of the country for the good of the people in democracy. Fundamental rights are born out of equality, liberty and human dignity that being the life blood of democracy. This was gathered from the experiences of totalitarianism, despotism, authoritarianism, autocratic governments and colonialism. The Constituent Assembly was seized of the significance of the fundamental rights within the textual Constitution of India because of the experiences of the past where there was least respect for the fundamental and basic rights of the people of India and as such the Founders did not want to carry a black shadow of the past over the present and the future. Be that as it may, it discerns that the fundamental rights have had their deep roots in the struggle for independence of India from the despotic governments and colonialism.[12] Thus, the founding authors of the textual Constitution of India included the fundamental right in the Constitution with the hope that true liberty and equality with fraternity would grow to achieving human dignity. This is evident from the expounding decisions of the Apex Court that present a new judicial gospel of liberty, equality, dignity and fraternity as being basic features of basic structure as *magnum opus* of the Constitution, such as *Kesavananda Bharati v. State of Kerala*[13], *Maneka Gandhi v. Union of India*[14] , *S. R. Bommai v. Union of India*[15], *Shreya Singhal v. Union of India*[16] cases.

Before *Maneka Gandhi's case* the fundamental rights encapsulated in Articles 12-35 were considered to be distinct from each other and identified as independent of each other on the basis of the thesis "mutually exclusive" (mutual exclusivity)

[12] Granville Austin, The Indian Constitution Cornerstone of a Nation 63 (Oxford University Press 2012).
[13] (1973) 4 SCC 225.
[14] (1978) 1 SCC 248.
[15] (1994) 3 SCC 1.
[16] (2015) 5 SCC 1.

from each other.[17] From *Maneka Gandhi* onward the judicial policy has been remodelled that they are not distinct or independent from each other, rather, they are "mutually inclusive" (mutual inclusivity) to each other. For example, when we talk about equality, reservation, compensatory discrimination, compensatory justice, permissible discrimination, we refer to the discussion and explanation to Articles 14, 15, 16, 29 and 30 as mutually inclusive. In this context mutually inclusivity refers to social democracy which aims at achieving social and economic justice. When we talk about equality and liberty, we refer to Articles 14, 19, 20, 21 and 22 on the touchstone of mutually inclusive which aim at achieving social and political democracy towards the ends of social and political justice.[18] *Maneka Gandhi and Shreya Singhal* cases are *sui generis* in this perspective. That is, a law that deprives a person of his liberty has had to withstand or survive the test of Articles 14, 19 and 21 to be constitutionally valid and compatible. If a law deprives a person of his liberty due to his detention under the preventive detention law, then such a law may have to endure the test of Articles 14, 19 and 21 to be constitutionally valid.

In the same vein as well as stratum, the constitutional nuances of Fundamental Rights and Directive Principles of State Policy have to be analysed as expounded by Apex Court. In the language of the Supreme Court in the above-mentioned cases both fundamental rights and Directive Principles of State Policy are important part of the Constitution of India and have been described as the conscience of the Constitution. Fundamental rights and Directive Principles of State Policy were designed to be the chief instruments in bringing about the great reforms of the social revolution. Both have helped to bring the Indian

[17] This was the legal position in A. K. Gopalan v. State of Madras, 1950 SCR 88, the case that ruled for nearly three decades till the arrival of *Maneka Gandhi case.*

[18] Shreya Singhal v. Union of India, (2015) 5 SCC 1.

society closer to the Constitution's goal of social, economic and political justice for all. The purpose of the fundamental rights is to create an egalitarian society, to free all citizens from coercion or restriction by society and to make liberty available for all. Without faithfully implementing the Directive Principles of State Policy, it is not possible to achieve the welfare State contemplated by the Constitution. The object is to maintain a balanced approach between fundamental rights and directive principles and without this balanced approach they shall appear to be empty vessels. The textual Constitution of India aims at bringing about the synthesis between fundamental rights and directive principles by giving to the fundamental rights a pride of place and to the directive principles a place of permanence. Together they form the core of the Constitution. Together they constitute its true character. They strike a balance between the rights of individuals and the general good of the society. The basic object of conferring freedoms on individuals is the ultimate achievement of the ideals set out in directive principles. Directive Principles of State Policy are not "mere rope of sand". If the State fails to create conditions in which the fundamental freedoms could be enjoyed by all, the freedoms of the few will be at the mercy of the many and then all freedoms will vanish. In the backdrop of this, it is impermissible for the Parliament to take away or abridge any of the fundamental rights ingrained in the Constitution and the power conferred on the Parliament of India under Article 368 does not permit it to damage or destroy any of the basic or fundamental features or essential features of the Constitution. Both Fundamental Rights and Directive Principles of State Policy are sacrosanct in the governance of the State. Civil and Political rights are meaningless without the venerating ends of social and economic rights.

In the backdrop of the above, there are some inquisitives for further in-depth probing. What is the relevance and utility of the

cases, namely, *I. R. Coelho v. State of Tamil Nadu*[19], *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat*[20], *and Javed v. State of Haryana*[21] in the realm of jural postulates of relationship between fundamental rights, Directive Principles of State Policy and fundamental duties from the precepts of basic structure?

The higher judiciary of the country has expounded that Uniform Civil Code shall augur for the unity and integrity of India. The legislature has to shun its role like 'willing to wound and afraid to hurt' in this perspective and that shall not destroy the basic structure of the Constitution.

6. Conclusion

The expounding of the basic structure thesis has experiential value in the annals of amending power of the Parliament of India[22], which is not unlimited and that the amending power cannot be used to alter the basic structure or the essential features of the textual Constitution of India that may "deface and defile" our Constitution. In the backdrop of the above, the following inquisitive need in depth probing for experiential learning law:

1. Cases decided prior to *Kesavananda Bharati* are, now, only of academic interest. The Apex Court in those cases followed rigid, analytical-imperative and archaic approach in interpreting the power of the Parliament of India in amending the Constitution under Article 368. As such, the Supreme Court's situation was fluid one. It is *Kesavananda Bharati case* wherein the Supreme Court came out of the cage of fluid situation and settled the law by expounding

[19] (2007) 2 SCC 1.
[20] (2005) 8 SCC 534.
[21] (2003) 8 SCC 369.
[22] Soli Sorabjee & Arvind P. Datar, Nani Palkhivala The Courtroom Genius (LexisNexis 2019).

that Parliament can amend any provision of the Constitution, but it does not enjoy infinite power to destroy the basic features or identities of the basic structure.

2. The Preamble of the Constitution of India is the backbone and it is an integral part of the basic structure of the Constitution of India because it identifies its basic features that make the beautiful fabric of constitution, constitutional law and constitutionalism.
3. What is the form of the Constitution of India and the form of the Government that the founding authors conceived for the posterity for ages to come?
4. What are the distinct features of constitution, constitutional Law and constitutionalism?
5. The Supreme Court of India has identified distinct basic features of the basic structure of the Constitution of India that are beyond the amending --- unlimited or infinite --- power of the Parliament.
6. The Supreme Court of India in *Kesavananda Bharati case* and subsequent cases has explained the concept of basic structure. Explain in an ocean within a tear phrase the concept of basic structure.
7. The federalism is the basic structure that Parliament is not allowed to destroy it. What is that unique notion of Indian federalism?
8. The expressions sovereign, socialist, secular, democratic, republic constitute basic structure.
9. he expressions equality, justice, liberty, fraternity, dignity of the individual and unity and integrity of the Nation have been identified as basic features of basic structure. Enumerate the list of such cases decided by the Supreme Court of India which have identified such expressions as basic structure that Parliament cannot destroy under Article 368.
10. The Supreme Court of India does not merely interpret the textual constitution, but expounds with elocution

the textual constitution with least confounding confusion that binds the posterity for ages to come.

11. Though the textual constitution of India does not explicitly mention the expression federalism, but federalism is a unique feature of basic structure that states that Indian federalism is indestructible union of destructible units.
12. Fundamental rights are given a transcendental position under our Constitution and are kept beyond the reach of the Parliament under Article 368.
13. There is difference between constituent power and constituted power. Constituent power is exercised by the Parliament under Article 368, and constituted power is derived from Articles 245-255 of the Constitution and not from Article 368 which only prescribes procedure of amendment of the provisions of the Constitution. Whether an amendment is law in terms of Article 13? Whether an amendment under Article 368, if inconsistent or in derogation of fundamental rights, can be challenged for judicial scrutiny?
14. Fundamental Rights are the modern name for what have been traditionally known as natural rights and as such inalienable.

CHAPTER 10

COMPENDIUM ON THE DOCTRINE OF BASIC STUCTURE UNDER THE INDIAN CONSTITUTION

Prof. (Dr.) Raghuram Patnaik*

1. Introduction

Constitution of India is a living organic document and keeps pace with the changing time. There are two modes of providing the requisite dynamism to the Constitution; one may be formal and the other informal. The formal mode involves the amendment of the Constitution while the informal way is adopted by the Supreme Court[1] unlike the formal amendments, while they remain quite often invisible and innumerable.[2] Thus the Constitution of India is unarguably supreme and has a clear expositive expression stated in its "Objective Resolution" as contained in the Preamble.

In the beginning, a substantial question of law aroused as to the interpretation of the Constitution under Article 13, enunciated in Part-III of the Constitution, which laid categorical prohibition on the States not to make any law which takes away or abridges the rights conferred by that law, to the extent of contravention to the fundamental rights, be void. In a sequel of social urgency the Parliament abolished *Zamindari* system despite it was guaranteed under Article 31 as fundamental right, by virtue of Constitution First Amendment Act, 1951.[3] The thematic

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[1] Art.145 (3) read with Art. 142 of the Constitution of India.

[2] See, Statement of Indian law: Supreme Court of India Through its Constitutional Bench Decisions since 1950: A Juristic Review of its intrinsic value and juxtaposition; *Virendra Kumar*, JILI, April-June 2016, at p. 190

[3] Art. 368 of the Constitution empowers the Parliament, notwithstanding anything in this Constitution to amend the Constitution in accordance with the procedure laid down in the provisions of the Art. itself. Such an amendment could be by way of addition, variation or repeal any provision of this Constitution.

problem as to whether an amending law falls within the ambit of 'law' envisaged under Art.13 (2) was answered affirmatively.[4] Thus the ruling of the Supreme Court made it clear that for the exercise of Parliamentary power under Art.368 can be exercised in respect of all the provisions of the Constitution; otiose or simply non-existent for amending fundamental rights[5] as was visible cognately in later amendments[6]. Justice *Mudholkar* provided his own independent view that the paramount importance of the citizens is to know whether the basic feature of the Constitution can endure them for all time or at least for the foreseeable future.[7]

2. Contextual Ground for Basic Structure

In a gradual metamorphosis the question as to amending power that can be exercised in the fundamental rights given in Part-III of the Constitution, so as to adversely affect the guarantee reflected in them. This matter was challenged in *His Holiness Kesavananda Bharati* v. *State of Kerala*[8] and enabled the Parliament to amend each and every part of the Constitution subject of course that its basic feature or structure shall not be damaged or destroyed and such laws shall be subject to judicial review by the Supreme Court. In the resultant cumulative effect the principle of inviolability of fundamental rights was found after *Golak Nath* v. *State of Punjab*.[9] case. However the basic structure principle remained doubtful or suspicious after its formal emergence. It was seemingly so and owed to the sharp differences of judicious opinion of Supreme Court Judges which

[4] Sri Sankari Prasad Singh Deo v. Union of India, AIR 1951 SC 458.
[5] *Supra* note 2 at p.197.
[6] In *Sajjan Singh* v. *State of Rajasthan,* AIR 1967 SC 845 the question as to whether an amended law enacted under Art.368 is immune from 'judicial review' as covered under IXth Schedule was sanguinely clarified that it is subject to judicial review.
[7] *Id.* at p.866.
[8] AIR 1973 SC 1461.
[9] AIR 1967 SC 1643.

changed the constitutional history of India albeit prospectively but it remained non-functional for almost three decades or so.

Firstly, the basic structure doctrine remained almost as suspicious or doubtful after its emergence because of divided judicial out come and its intrinsic value as a result it affected the acceptability of the principle. *Secondly*, there was continuing ambiguity in the spell out of the basic structure doctrine for which crystallization of perseverance, identification or defining the same remained as enigma. It was apparent in the case between *Indira Nehru Gandhi* v. *Raj Narain*[10] where K. K. Mathew, J. held that, "the concept of basic structure, as brooding omnipresence in the sky, apart from specific provisions of the Constitution, is too vague and indefinite to provide a yardstick for the validity of an ordinary law"[11].

In fact in a series of cases between *Minerva Mills Ltd.* v. *Union of India*[12], *Waman Rao* v. *Union of India*[13], *Maharao Sahib Sri Bhim Singh Ji* v. *Union of India*[14], an attempt was made to find out or explore the content of the concept of basic structure, but no tangible or substantial breakthrough could be made[15].

Thirdly, there used to be criticisms that from its inception the Basic Structure Doctrine had its fragile character in view of the fact that Apex Court validated the Constitution (Twenty-ninth Amendment) Act, 1972 subject to the condition that the two Land Reforms laws as found in Entry 65 and 66, are added in the 9th Schedule, whereby it did not violate the basic structure. As a result the natural growth of the doctrine was in ambivalence.

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[10] AIR 1975 SC 2299.
[11] *Id.* at p. 2389.
[12] AIR 1980 SC 1789.
[13] AIR 1981 SC 271.
[14] AIR 1981 SC 234.
[15] *Virendra Kumar*, 'The Proposed Perspective of the Doctrine of Basic Structure of the Constitution', Journal of AIR, 1982 at pp. 55-59. Relied.

3. Evolution of the Basic Structure Doctrine

A new fillip was found in the case between *I. R. Cohelho* v. *Union of India*[16], where for the first time the court admitted that the Parliament has no unlimited or un-qualified power to amend the Constitution as a matter of semblance of Basic Structure derived from the fact that separation of powers envisage the strategy of checks and balances to safeguard constitutionalism which indeed is the foundation of democratic system of governance[17] . The court further went to emphasize that the power of amending the Constitution as a kind of species called constituent power and therefore is a derivative power[18]. Thus only if the changes brought about aim to destroy the identity of the Constitution then it should be void.[19] For example the mandate of federal features contained in the Constitution cannot be abrogated which is basic.

Another important feature declared to be basic was the 'judicial review' because it makes the existence of the Constitution realized. Needless to say that it serves to fruitilise the separation of powers as a part of good governance otherwise there would have been illusion in the exercise of powers between Centre and the States. The perspective of fundamental rights was further explored and it was expounded that all the fundamental rights given in the Part-III of the Constitution are covered under the scanner of basic structure[20] as they are for the existence of mankind in view of its inalienable, primordial and transcendental value[21]. Therefore it was decided that protection of fundamental rights, a remedial right, was created under Article 32, which itself is a fundamental right and accordingly considered as basic sentinel on the *qui vive*[22].

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[16] AIR 2007 SC 861.
[17] *Id.* at p. 891.
[18] *H. M. Seervai,* Constitutional Law of India, 4th Edn. 2010.
[19] Supra note 16 at pp. 887-888.
[20] *Id.* at p. 884.
[21] *Id.* at p. 872.
[22] *Supra note* 16 at p. 871 (See Para 39).

In the metamorphosis of finding power of Parliament in the exercise of amendments under Article 368 read with Article 31B of the Constitution to grant absolute immunity at will was not found to be compatible with the basic structure doctrine[23]. The theory of 'rights test' ushered in the process of exposition of basic structure aims firstly, to avoid possibility of indiscriminate proliferation of the 9th Schedule and secondly, it expanded the ambit of judicial review. In fact the doctrine of basic structure is considered to be the window of the power of judicial review intact so that abrogation of such power would itself be treated as violation of basic structure[24].

A relative ease was further seen[25] in furthering the concepts behind basic structure when the court applied the *sine-qua-non* of the 'degree test' to find egalitarian equality, over-reaching principles and reading Article 21 with Article14 and held that basic structure enables to facilitate a judicious opinion in the conflict of 'degree of abrogation' and 'degree of elevation' so as to arrive at over-arching principle[26] as against ordinary principle of equality[27]. Accordingly the doctrine of basic structure, as it stands now, is no more limited in its application to the constitutional amendments under Art. 368 but also in respect of all other laws passed by the legislature in the exercise of their normal or ordinary law making power.

Ironically such extensive power is considered to be of critical importance in view of the fact that India remaining under the

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[23] Glanrock Estate (P) Ltd. v. State of Tamil Nadu, (2010) 10 SCC 96.
[24] *Id.* as emphasized by *S. H. Kapadia,* CJI at p. 102.
[25] For example if any of the fundamental rights are to be changed a corresponding change has to be made in the three Lists covered under Art. 245.
[26] In *T. N. Godavarman* v. *Union of India,* AIR 1997 SC 1228 it was held that Art. 21 is based on an 'overarching principle' and furnishes basis for application of basic structure. Later in the same vent the court found that 'Doctrine of Sustainable Development', 'Precautionary Principle' and 'Polluter Pays Principle' all have emerged as functional basis for the operation when Article 21 was allowed to be read with Art.14.
[27] *Supra note* 23 at p. 108.

domain of a written Constitution[28]. In the process, the constitutional validity of the 9th Schedule laws on the touch stone of Basic Structure Doctrine can be adjudged by applying the direct impact and effect test whereas the form of amendment is not relevant factor but the consequence thereof would be determinative factor[29].

The question as to whether the Parliament has the legislative competence to vest intrinsic judicial function that have been performed by the High Courts and allowing any Tribunal outside the judiciary; more specifically the constitutionality of National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT)[30] ; was tantamount to decided that the legislature is competent to create Tribunals with reference to specific enactments including the Company Act, 1956, but subject only to the Basic Structure Doctrine[31]. The court reaffirmed that the fundamental principle as to 'Rule of Law', 'Separation of powers between Legislature, Executive and Judiciary' and independence of judiciary are integral parts of the basic structure of the Constitution[32].

Similarly in *Dr Subramanian Swamy* v. *Director, Central Bureau of Investigation*[33] , where the question to the constitutionality of Section 6-A of the Delhi Special Police Establishment Act, 1946, which underwent an amendment (Amendment Act, 45) in 2003 and accordingly required that the CBI has to take prior permission of the Central Government to conduct any inquiry or investigation in case of any offence committed under the Prevention of Corruption Act, 1988, provided the offender

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[28] *Supra note* 23 while examining the validity of 34th Amendment to the Constitution.
[29] *Supra note 16* at p.892.
[30] Set up under Chapters 1B and 1C of the Company Act, 1956, as amended in the Companies (Second Amendment) Act.
[31] *Union of India v R. Gandhi*, (2010) 11 SCC 1: Madras Bar Association v. Union of India, (2014) 10 SCC 1.
[32] *Id.* at Para 57 (ii).
[33] Quoted from Union of India v, R. Gandhi, (Supra fn. 31) at Para 56 (ix).

is/was not below the rank of Joint Secretary and happens to be an employee of the Central Government. The Court affirmatively held that the application of amended rule makes that classification only on the basis of status in the Central Government Service as such is opposed to principle of equality which is based on the philosophy of basic structure and accordingly is void[34].

4. Conclusion

There was unanimity and collective conclusion among the Judges in expounding the principle, specifically the essence of basic structure.[35] But in doing so the Apex Court was in juxtaposition while deciding the core value of independence of judiciary in the matter of constitutionality of the National Judicial Appointments Commission (NJAC) Act, 2014[36], which purported to replace the Collegium system of judge(s) appointments to the Supreme Court and the High Courts, but firmly held that 'independency of judiciary' is an integral part of the inviolable basic structure of the Constitution for which the Act was struck down.

The basic structure theory propounds that neither there is Parliamentary supremacy nor judicial supremacy rather it is fundamentally and essentially about the centrality of the Constitution. It is essential to render justice in each case accordingly the need for discovering the applicable standard and that is the Basic Structure Doctrine.[37]

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[34] The court accepted the argument about graft matters which provides doubt in finding *prima facie* truth.
[35] *Supra note* 16.
[36] Enacted in pursuance of the 99th Amendment of the Constitution, by the Central Government on 13th April, 2015.
[37] *Supra note* 16 at p.892.

CHAPTER 11

INDOMITABLE BASIC STRUCTURE OF THE CONSTITUTION

Prof. (Dr.) Chidananda Reddy S. Patil*

1. Introduction

The case of *His Holiness Kesavananda Bharati v. State of Kerala*[1] and another promises to go down in the history of democracy in India, wrote Kuldip Nayar in his book titled *Supersession of Judges*, in the immediate aftermath of the decision of the Supreme Court delivered on 24th April 1973. He observed:

> *"This is not so because this is for the first time that issues of such magnitude have come before the court of law but because the principles laid down by this judgment have given destiny of free India a certain direction".*[2]

His words have come true and the Kesavananda judgment stands out like a beacon that helps the Constitution of India to navigate through turbulent times.

Framing a constitution is a bold venture on the part of a population to set direction and chalk out the course for the functioning of the nation to realise the primordial goals contemplated in the Constitution.[3] A Constitution is perceived as a document that sought to strike a delicate balance between, on one hand, governmental power to accomplish the great ends of civil society and, on the other, individual liberty.[4] Limitations

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1 AIR 1973 SC 1461.

2 Kuldip Nayar, *Supersession of Judges*, (Delhi: Hind Pocket Books Pvt. Ltd., 1973) p.137.

3 Chidananda Reddy S. Patil, "In the Hope of Transformation into an Egalitarian Society," *Pragyan: Journal of Law,* Vol.11, Issue 1, 2021, p.1.

4 Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution*, (London: Harvard University Press, 1991) p. 6.

on the part of the government are necessary for obvious reasons. As James Madison put it in The Federalist Papers:

> *"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught the mankind the necessity of auxiliary precautions."*[5]

The Constitution of India has adopted such auxiliary precautions.

Every State necessarily has a constitution which is the fundamental law or body of laws, written or unwritten, in which may be found (a) the form of organisation of State, (b) the extent of power entrusted to the various agencies of the State, and (c) the manner in which the powers are to be exercised. The term constitution signifies a single authoritative document or a small group of documents embodying the fundamental political institutions of a State. Gattel emphasises the point that De Tocqueville has more particularly in mind, another meaning which is commonly attached to the term constitution, that of an instrument of special sanctity, distinct in character from all other laws, alterable only by a peculiar process which differs to a greater or less extent from the ordinary process of legislation.[6] The primary concern of constitutional law "is with the creation and regulation of power within the State". Thus, it can be said that a constitution provides the fundamental features of

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[5] *Supra note* 4.
[6] Raymond Garfield Gettel, ed., *Readings in Political Science*, (Cambridge: Ginn and Company, 1911), pp.287-88.

government and the form of organisation of the State, the extent of power available with the State, and the limitations on its exercise.[7]

In understanding a constitution the other line of approach has been to link the concept of 'authority', which is the hallmark of law, to the 'value preferences' of the community that can be given empirical reference, *i.e.*, consensus among the people as to certain basic values. The constitution would, therefore, be the expression of the desire to pattern the behaviour of members of a political community and to so programme their institutions as to encourage these basic values.[8]

In the words of H. R. Khanna J.:

> *"A constitution is the basic law relating to the government of the country. It defines various organs of the State, enumerates their functions and demarcates their fields of operation. But a constitution is more than that. It is the vehicle of a nation's progress. It has to reflect the best in the past traditions of the nation; it has also to provide a considered response to the needs of the present and possess enough resilience to cope with the demands of the future. A constitution at the same time has to be a living thing, living not for the one or two generations but for succeeding generations of men and women."*[9]

An attempt is made in this paper to study how the constitution is interpreted to retain the basic features at the same time accommodating the changes necessitated by the contemporary society keeping the power at bay from becoming authoritarian.

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[7] C. V. Keshavamurthy, Amending Power under the Indian Constitution: Basic Structure Limitations, (New Delhi: Deep and Deep, 1982), pp.9-10.
[8] *Id.*, p.9.
[9] H. R. Khanna, *Making of the India's Constitution*, 2nd ed. (Lucknow: Eastern Book Co., 2008), p.3.

2. Constitution to be an Organic Document

Constitution making is a qualitative and massive exercise on the part of a generation of a state to adopt a policy which will serve the people who adopted the constitution and also the future generations. Stability of constitution is for the good of the nation. Uncertainty is disastrous for the national progress and provides a lurking space for fissiparous tendencies. The constitution should have ability and agility to withstand all sorts of onslaughts by selfish and petty minded. In order to be stable, a constitution should be a complete constitution which can adopt itself to the changing needs of generations and cater to their needs and to avoid any sort of revolt or revolution against it.

John W. Burgess states the following as the fundamental parts of a proper constitution:[10]

a) Organisation of the state for the accomplishment of the future changes in the constitution. This is usually called the amending clause and the amending power which it describes and regulates.

b) The constitution of liberty.

c) The constitution of government.

Again, Burgess classifies these three fundamental parts in to seven principles, viz.:

1) The organisation of the State i.e., Sovereignty of the constitution.

2) The continued organisation of sovereignty within the constitution.

3) The tracing out of the domain of civil liberty within the constitution, by the sovereignty, the State.

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[10] *Supra note* 6.

4) The guarantee of civil liberty ordinarily against every power, except the sovereignty organised within the constitution.

5) Provision for the temporary suspension of civil liberty by the government in the time of war & public danger;

6) Organisation of the government within the constitution, by the sovereignty, the State; and

7) The security of the government against all changes, except by the sovereignty organised within the constitution.

The Indian Constitution when tested against the above seven fundamental parts proves to be a complete constitution. The second principle, 'continued organisation of sovereignty within the Constitution' finds expression in Article 368 which provides for the power of the Parliament to amend the Constitution. The Parliament is vested with the constitutive power and there is no need for the sovereign power holders, the people of India to assemble to amend the Constitution.

The organisation of the State for the accomplishment of future changes in the Constitution, or, the organisation of Sovereignty within the Constitution is identified by political thinkers as a fundamental requisite in any constitution. This is the most important part of the Constitution. Upon its existence and truthfulness *i.e.*, its correspondence with real and natural conditions, depends the question as to whether the State shall develop with a peaceable continuity or shall suffer alternations of stagnation, retrogression and revolution. Though the inevitability of the amending power has not been denied, in its application to practical situations divergent forms have been expressed on the ease of the amending process as well as the width of amending power.[11]

[11] *Supra note* 7, p.11.

3. Theoretical Basis for Limited Amending Power

While considering the extent or width of amending power, always there will be a controversy; while the legislature will be trying to assert itself and claim unlimited power, the judiciary as the guardian and final interpreter of the Constitution will refuse to concede so much of power to the legislature. The controversy on the reach of the amending power arises from two lines of thinking.[12] One argues that the amending power, unless expressly limited is, by its quality, unlimited, and thus permits a total revision, provided the procedural formalities are complied with. This does not admit limitations even though the power is exercised by delegates of the ultimate sovereign, for the reason that the delegates are the representatives of the ultimate sovereign. This contention is supported with the thesis that the majority's voice should prevail under all circumstances. The other approach argues that "the majority principle has spent its force at least in terms of basic values. Certain aspects of the process are no longer amenable to it only is a structured way, at set times, through particular *procedures and within ultimate limits set by fundamental values*. In a given community, the basic values do not change from one generation to the next. On the contrary, they are reaffirmed and strengthened as the genuine pursuit of enlightenment proceeds. Therefore every amending body must necessarily have limitations on its amending power and it becomes the more so when the delegates of the ultimate Sovereign come to exercise this power.

Another vital aspect is the width of amending power that is legally and legitimately available in the hands of an agent. It is judicially received that the power of an agent can never be the equal of the principal. This principle would not broke an exception in the field of constitutional law either. The little residue of power remains with the principal that enables a revocation of agency even if he would have constituted one as

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[12] *Supra note* 11 p.13.

an agent to act for him under all circumstances would be enough to underline the fact that the agent can never be equal of the principal.[13]

The theory of representative government is viewed from three different angles viz., (i) the theory of Sovereignty of the people and established cannons of political conduct, (ii) the not so full representativeness of representative bodies, and (iii) the lesser quantum of powers available at the hands of representative bodies, would lead to the conclusion that a representative government is a limited government. The limitation may be either express or implied. Therefore, in relation to the exercise of constituent power by the representative bodies, it becomes inevitable to identify limitations in constitutions which do not have express empowerment of full powers. This principle of popular sovereignty will not permit any other alternative. This has become the more so in the light of the modern approach to identify the Constitution as a document of values which a society has selected to cherish, foster, protect and further.[14]

4. Contemplation of Social Revolution Under the Constitution

The Constitution of India is the fundamental policy choice of the people of India. The nature of the Constitution is brought out well by Granville Austin as under:[15]

> *"The Indian Constitution is first and foremost a social document. The Majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Yet despite the permeation of the entire constitution by the aim of national renascence, the core of the commitment to the social*

[13] *Id.*, p.20.
[14] *Id.,* pp.20-21.
[15] Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, (New Deli: Oxford University Press, 2019) p.63.

revolution lies in Parts III and IV, in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the Constitution.

The Fundamental Rights and Directive Principles had their roots deep in the struggle for independence. And they were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India. The Rights and Principles thus connect India's future, present and past, adding greatly to the significance of their inclusion in the Constitution, and giving strength to the pursuit of the social revolution in India."

The social revolution was put at the top of the national agenda by the Constituent Assembly when it adopted the Objectives Resolution, which called for social, economic and political justice, and equality of status, opportunity, and before the law for all people. The Directive Principles of State Policy would make explicit the 'socialist', as well as the social revolutionary, content of the Constitution.[16]

The Constitution of India came into force on 24th January, 1950. In the process of its working for initial three decades the Parliament, a representative body, had claimed and purported to assert its supremacy in amending the Constitution without admitting any limitations whatsoever. The judicial response to such assertions of unqualified amending power has been by identifying limitations on the amending power that is organised within the Indian Constitution. The latest position reached in this regard is the identifying of a concept of 'Basic Structures' of the Constitution.[17] The formal acknowledgement of the basic structure theory was made in *Kesavananda's* case.[18]

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[16] Granville Austin, *Working of a Democratic Constitution*, (New Delhi: Oxford University Press, 2003) p.71.
[17] *Supra* note 7, p.7.
[18] Kesavananda Bharati Sripadangalveru v. State of Kerala, AIR 1973 SC 1461.

The tussle between the Parliament and the Judiciary started when the Parliament enacted laws and brought amendments to fundamental rights in the Constitution in order to translate the social justice principles contained in the directive principles. Certain of these laws were challenged for violating of fundamental rights and subsequently fundamental rights themselves were amended. This process pitted the judiciary against the Parliament in the claim to be the guardian of the Constitution. The process found its precipitation in *Kesavananda's* case.

5. Contest For Supremacy

The *Kesavananda Bharati* case has a political background- the conflict between the Parliament and the Supreme Court on Parliament's claim to amend fundamental rights and the Court's claim to void such amendments. The Government also complained that its social and economic legislations for the benefit of the people which required amendments to Fundamental Rights particularly the right to property were being thwarted by an unsympathetic Supreme Court. The *Kesavananda* case was therefore heard and decided in a surcharged atmosphere of tension between the Court and the Government, the likes of which had not been witnessed previously. This atmosphere regrettably also affected some judges in the case and resulted in disregard of the norms of judicial detachment expected of the judges of the highest court.[19]

The contest began when two previous judgments of *Shankari Prasad v. Union of India*[20] and *Sajjan Singh v. State of Rajasthan*[21] which had upheld Parliament's power to amend the fundamental rights by the 1st, 4th and 17th Constitutional

[19] T. R. Andhyarujina, *The Keshavananda Bharati Case*, (New Delhi: Universal Law Publishing Co., 2011) p.8.
[20] AIR 1951 SC 458
[21] AIR 1965 SC 845

Amendments were overruled by the Supreme Court in *Golak Nath v. State of Punjab.*[22] However, those amendments continued to remain valid as the Court invoked the doctrine of "prospective overruling". The Supreme Court by a narrow majority of 6:5 held that Parliament has no power to amend Fundamental Rights in the Constitution at all as they were "primordial rights necessary for the development of the human personality" and were given a "transcendental position in the Constitution". Article 13(2) of the Constitution prohibited even an amendment to the Constitution which took away or abridged a fundamental right.[23] The majority held that the law in Article 13(2) included even amendments to the Constitution and consequently, if an amendment abridged or took away a fundamental right guaranteed by Part III of the Constitution, the amending Act itself was void and *ultra vires*. It was made out that the power to amend the Constitution is not in Article 368 but in the residuary entry for legislation by Parliament in List I Entry 97. Article 368 according to this view was only procedural for making an amendment.

The decision of *Golak Nath* led to the passing of the Constitution (24th Amendment) Act, 1971, which made significant changes in Article 368. Firstly, it sought to nullify the effect of *Golak Nath* by adding clause (4) to Article 13 which provides that nothing in Article 13 shall apply to any amendment of the Constitution made under Article 368. Secondly, this amendment made a change in the marginal note to Article 368 by substituting "Power of Parliament to amend the Constitution and procedure therefor" for "Procedure for amendment of the Constitution". This was done because Subba Rao, CJ in the *Golak Nath* was of the view that Article 368 provided only the procedure for amendment to the Constitution and the power to amend the Constitution is to be found elsewhere. In order to make it sure, it is provided in the opening paragraph of Article 368, now

[22] AIR 1967 SC 1643
[23] *Supra* note 19, pp.9-10

numbered as clause (1), that Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of the Constitution in accordance with the procedure laid down in that article. Parliament is thus empowered to amend any provision of the Constitution, including the fundamental rights. This amendment, therefore, recognises the distinction between any ordinary law and a constitutional amendment, a position not acceptable to the majority in *Golak Nath*. Subsequently, 25th, 26th and 29th Amendments to the Constitution were made abridging or taking away the fundamental rights in some respects.[24]

6. Kesavananda's Case and Emergence of Basic Structure Doctrine

The validity of the 25th, 26th and 29th Amendments was challenged by His Holiness Kesavananda Bharati wherein a writ petition was filed initially to challenge the validity of the Kerala Land Reforms Act, 1963 as was amended in 1969. But as the Act was amended in 1971 during the pendency of the petition and was placed in the Ninth Schedule by the 29th Amendment, the petitioner was permitted to challenge the validity of the 25th, 26th and 29th Amendments to the Constitution also. This challenge raised the question whether *Golak Nath* case was rightly decided by the Court. A bench of 13 judges was constituted to consider the correctness of the Golak Nath case. His Holiness Kesavananda Bharati played no part in the historic case apart from lending his name, just as Henry Golak Nath has played no part in *Golak Nath* Case. Both of them lent their names to the Court's decisions without benefitting from the decision.[25]

The *Kesavananda* case was the culmination of a struggle for supremacy over the power to amend the Constitution between

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[24] M. P. Singh ed., *V. N. Shukla's Constitution of India*, 13th ed. (Lucknow: Eastern Book Co., 2017) pp.1086-7.
[25] *Supra* note 19, p.11.

Parliament and Government of the day on one hand and the Supreme Court of India on the other. The battle began from the time the Supreme Court in *Golak Nath* held that fundamental rights could not be amended by Parliament. During the sixty-six days of hearing of the case, Government made every effort to reverse the *Golak Nath* case. Despite all efforts, judicially and extra-judicially, to secure a verdict in their favour, although the *Golak Nath* case was overruled, the Parliament/Government lost the battle when on the day of delivery of eleven judgments on 24th April 1973 a dubious 'View of the Majority' by seven judges against six others holding that "Article 368 does not enable Parliament to alter the basic structure or frame work of the Constitution" was pronounced in the Court.[26]

Today, the readers have the benefit of more information regarding the *Kesavananda's* case which was not found in records of the Supreme Court. The information has poured into the public domain through the writings and speeches of those who participated in the case and who witnessed the assiduous arguments and interaction with the judges. One of the eminent advocates who appeared in Kesavananda was T. R. Andhyarujina. The legal fraternity is benefitted by his book titled *The Kesavananda Bharati Case: The untold story of struggle for supremacy by Supreme Court and Parliament*, wherein he has given the firsthand account of what went on in the Supreme Court. Most importantly, this book reveals the stratagem of Sikri, CJ on the day of delivery of judgment on 24th April 1973 by which he formulated the so-called 'The view by Majority'. The propositions in the so-called 'The View by the Majority' are today uncritically considered the ratio of the case and treated as established law.[27]

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[26] *Id*, p.1.

[27] *Supra note* 19, p.3; This book also considers the scope of the 'basic structure of the Constitution' as expounded in the crucial judgment of Justice H. R. Khanna in *Keshavananda* case which tilted the scales against

Before the thirteen judges bench that was constituted to re-consider the correctness of the majority judgment in *Golak Nath* case, the petitioners began by justifying the correctness of *Golak Nath* case on the first day of hearing but hardly has the hearing progressed when Sikri CJ., a party to the majority judgment in *Golak Nath* case took the Petitioners by surprise by telling Palkhivala that it may not be necessary to consider the correctness of the *Golaknath* decision as the Constitution 24th Amendment had now changed the whole situation by amending Article 368 giving Parliament unlimited power to amend the Constitution and by adding Article 13(4). He said that when the draft of the *Golak Nath* judgment was being prepared he had wanted to put a reservation in the judgment for an amendment made by Parliament or Article 13 but it was not included by Subba Rao CJ. He therefore suggested that the line of enquiry should be whether there were inherent and implied limitations in the amending power in Article 368.[28]

Taking the cue from Sikri CJ. the petitioners then changed the course of their arguments and challenged the amending power of Parliament on inherent and implied limitations on Parliament to amend the Constitution. Six judges – Sikri CJ. Justices Shelat and Grover, Hegde and Mukherjea and Jaganmohan Reddy by four separate judgments held that the amending

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Parliament/Government. Did Justice Khanna include Fundamental Rights as part of the basic structure? This was a highly controversial matter. It was resolved by a strange exercise of Justice Khanna clarifying his own judgment two years later in Indira Gandhi v. Raj Narain (AIR 1975 SC 2299) which has been accepted in later judgments of the Court. pp.4-5

[28] *Id.*, p.41The concept of the "structure of the Constitution" as a limitation on the amending power of Parliament had in fact been argued in the *Golak Nath* case by counsel M. K. Nambyar for the petitioners who has derived support for it from a German academician Prof. Dieter Conrad who had delivered a lecture on "Implied limitations on the Amending Power" to the law faculty in the Banaras Hindu University in 1965. Subba Rao CJ. observed that there was considerable force in the argument but he held that it was not necessary to consider this submission as so far as fundamental rights were concerned the question could be answered on a narrow basis and this question could arise for consideration only if Parliament sought to destroy the structure of the Constitution embodied in provisions other than Part- III of the Constitution. pp.41-42

power was limited by various inherent and implied limitations in the Constitution including fundamental rights. Six other judges – A. N. Ray, Palekar, Mathew, Dwivedi, Beg, and Chandrachud delivered six separate judgments and each held by separate judgments that there were no limitations on the amending power of Parliament. One judge H. R. Khanna J. expressly rejected that the view of the six Sikri-led judges that there were "inherent or implied limitations on the amending power". Khanna J. held that the amending power was plenary in every sense, but the word 'amendment' in Article 368 by its limited connotation did not lend itself to abrogating the Constitution. Any amendment to the Constitution had necessarily to retain "the Basic structure and framework of the Constitution after amendment".[29]

In this context, it needs to be appreciated that the six judges who were in favour of limitation on amending power referred to expressions such as 'basic features' or 'basic structure' or 'basic elements' or 'essential features' of 'fundamental features' etc. in different contexts. Khanna J. held that the limitation of the basic structure or framework arose only from the limited scope of the word 'amendment' and he rejected the theory of inherent and implied limitations on the amending power.

6.1 Formulation of the 'View by the Majority'

After all the eleven judgments of the Court were orally pronounced in Court on 24th April, 1973, Sikri CJ. produced and read out in Court a paper which was titled as the 'View by the Majority' and passed it on for signatures of all thirteen judges on the bench. It consisted of the six propositions. One of the propositions was Proposition No. 2 to the effect that "Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution". These very words were lifted from Justice Khanna's conclusion. As 'View by the Majority'

[29] *Id.*, pp.42-43

paper was passed along for signatures of the judges on the bench, four judges, Justices Ray, Mathew, Dwivedi and Beg would have nothing to do with it and demonstrably refused to sign it. Each of them just passed on the paper to their next colleague on the bench. Nine judges CJ. Sikri, Justices Hegde, Grover, Shelat, Jaganmohan Reddy, Palekar, Khanna, Mukherjea and Chandrachud each signed the statement. Never has the Supreme Court had seen such a spectacle. This so-called 'View by the Majority' of the bench has been assumed to be the decision in Kesavananda case.[30] The archives of Supreme Court has this paper, signed by nine judges, as given under:[31]

"The view by majority in these writ petitions is as follows:

1. *Golak Nath's case is overruled.*
2. *Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution.*
3. *The Constitution (Twenty-fourth Amendment) Act, 1971 is valid.*
4. *Sec. 2(a) and (b) of the Constitution (Twenty-first Amendment) Act, 1971 is valid.*
5. *The first part of Section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971, is valid. The second part, namely, 'and no law containing a declaration that it is for giving effect to such policy shall be called in question in any Court on the ground that it does not give effect to such policy' is invalid.*
6. *The Constitution (Twenty-ninth Amendment) Act, 1971 is valid.*

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[30] *Supra note* 28 p.50.

[31] The nine judges who signed 'View by the Majority' are S. M. Sikri, CJ., J. M. Shelat, K. S. Hegde, A. N. Grover, P. Jaganmohan Reddy, D. G. Palekar, H. R. Khanna, A. K. Mukerjea and Y. V. Chandrachud JJ. The four judges who did not sign are A. N. Ray, K. K. Mathew, M. H. Beg and S. N. Dwivedi JJ.

The Constitution Bench will determine the validity of the Constitution (Twenty-sixth Amendment) Act, 1971, in accordance with law.

The cases are remitted to the Constitution Bench for disposal in accordance with law. There will be no order as to costs incurred upto this stage."

There was no consensus among the seven judges who held that the Parliaments power is limited as to what constituted basic structure. Sikri CJ. explained the concept of basic structure by way of giving illustrations such as: 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, executive and the judiciary, and 5) federal character of the Constitution. He held that this structure is built on the basic foundation of the dignity and freedom of the individual and this cannot by any form of amendment be destroyed.

Shelat and Grover, J.J. illustrated the basic elements of the constitutional structure by adding to those already mentioned by Sikri CJ. 1) The mandate to build a welfare state contained in Part-IV of the Constitution, and 2) the unity and integrity of the nation.

Hegde and Mukherjea, J.J. illustrated the basic elements or fundamental features such as 1) sovereignty of India, 2) democratic character of the polity, 3) the unity of the country, 4) the essential features of the individual freedoms secured to the citizens, and 5) the mandate to build a welfare state and egalitarian society.

Jaganmohan Reddy J. found elements of the basic structure in preamble and its translation in various provisions; in his view a sovereign democratic republic, Parliamentary democracy and the three organs of the State, fundamental principles contained in Part-III and Part-IV.

Khanna J. agreed in principle with all the above six judges that an amendment of the Constitution could not have the effect of destroying or abrogating the basic structure or framework of the Constitution.

6.2 Is there a Ratio in 'View by the Majority'

The 'View by the Majority' cannot be the ratio of the Kesavananda judgment. If a ratio has to be extracted from the eleven judgments in the Kesavananda case it could not have been done in the manner of asking judges to merely subscribe to the 'View by the Majority'. It is fallacious to say that, the 'View by the Majority' was that "Parliament could not amend the basic structure or framework of the Constitution". That was only the conclusion of one single judge- Justice Khanna. Nine judges by merely signing a statement could not create a the 'View by the Majority' when six of the seven – CJ. Sikri, Justices Shelat and Grover, Hegde and Mukherjea and Jaganmohan Reddy- who were in favour of limitation on amending power had not subscribed to the limitation of the basic structure for the same reasoning and in the same sense as the seventh judge- Justice Khanna.[32]

H. M. Seervai immediately after the judgment raised an objection to the so-called 'View by the Majority' in his criticism written immediately after the case was decided.[33] However, he later changed his view and approved of the basic structure limitation on the amending power following the Emergency in which the amending power was misused. His legal objection to the so-called 'View by the Majority' remains even with his changed view as expressed in the 4th edition of his book *Constitutional Law of India*, wherein he submits that the

[32] *Id.*, pp.58-59.
[33] (1973) Bom LR 47

summary signed by 9 judges has no legal effect at all and is not the law declared under Article 141.[34]

After analysing the result of the *Kesavananda* case, Palkhivala who appeared for petitioners observed that the 'greatest common denominator' between the six judges led by Sikri CJ. and Justice Khanna became the judgment of seven judges and constituted the majority view of the Supreme Court.[35] He wrote:[36]

> *"Six judges decided the case in favour of the citizen and six in favour of the State. Justice Khanna agreed with none of these twelve judges and decided the case midway between the two conflicting viewpoints. Thus by a strange quirk of fate the judgment of Justice Khanna with whom none of the other judges agreed has become the 'law of the land'."*

The law laid down in Kesavananda came to be accepted subsequently in *Indira Nehru Gandhi v. Raj Narain.*[37]

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[34] *Supra* note 19, p.59.
[35] *Id.,* p.62.
[36] (1973) 4 SCC Journal 57
[37] In *Indira Nehru Gandhi v. Raj Narain* (AIR 1975 SC 2299) amended Article 329A(4) & (5) was challenged on the assumption that the majority in Kesavananda case had decided that Parliament's amending power was limited by basic structure of the Constitution. There was no examination of what was the decision or ratio of the eleven judgments in Kesavananda case. In fact Ray CJ. noted in his judgment: "It should be stated here that the hearing has proceed on the assumption that it is not necessary to challenge the majority view in Kesavananda Bharati case". Mathew J. also observed that: "I proceed on the assumption that the law as laid down by the majority should govern the decision, although I did not share that view". Chandrachud J. however said that: "The law declared by the majority of 7:6 in the fundamental right case must be accepted by us dutifully and without reserve as good law under Article 141 of the Constitution".

The atmosphere in which the Kesavananda case was decided has been described as 'poisonous' by Glanville Austin. He states of the case as under:[38]

> *"The Bench's glory was in its decision, not in the manner of arriving at it, which reflected ill on itself and on the judiciary as an institution. The hearing consumed five months. The judges' deliberation process was bizarre. Their individual opinions were chaotically articulated. The relations of one or more judges with the executive branch during the case were thought to have been improper. As one judge (Justice Chandrachud) understandably put it, the case was 'full of excitement and unusual happenings'."*

India's greatest constitutional case was regrettably heard and decided in a manner most un-conducive to a detached judicial decision.

The most important contribution of this judgment is the basic structure theory. This theory or doctrine effectively arrived at a workable compromise between two diametrically opposite views represented by the pre and post *Golak Nath* phases. Either view would not have worked given the changed political scenario and dwindling adherence to constitutional conventions. The basic structure theory restores the power of Parliament to amend any part of the Constitution. At the same time, Parliament's power is not unlimited and no amendment can violate the fundamental or essential features or, as they are now popularly called, the basic structure of the Constitution.[39] *Kesavananda Bharati*, in a sense, was a judicial compromise as the power of Parliament to amend the Constitution to a large extent was restored. The only limitation was that it could not alter the basic structure or

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[38] *Supra* note16, pp. 258-259

[39] Soli J. Sorabjee & Arvind P. Datar, *Nani Palkhivala: The Court Room Genius*, (Nagpur: LexisNexis Butterworths Wadhwa, 2012) pp.131-2.

essential features. While conceding this power to Parliament, the Supreme Court reserved to itself the poser of judicial review and thus ensured a system of checks and balances amongst the three wings of Government.[40] About the worth of the case Sorabjee and Datar observe that:[41]

> *"Whatever its defects and the manner in which the case was heard and judgment delivered, the formulation of the basic structure theory saved democracy and preserved rule of law. Our political leaders, with nothing else in mind but political vote banks and the next election, will never be able to destroy the basic features of our Constitution."*

7. Fiasco of Revisiting Kesavananda

The Government was deeply unhappy with the judgment in *Kesavananda* case. On the day of the judgment the Government superseded three senior-most judges who had decided against the government and appointed Justice A. N. Ray on the retirement of Sikri CJ. as the Chief Justice who had decided in favour of Parliament. In 1975 the Government, with the help of Ray CJ. tried to reverse the majority verdict, in the *Kesavananda* case by attempting to review it by another bench of thirteen judges. The contemporary developments that culminated in this event are very interesting.[42]

In the climate of tension prevailing after supersession of the three judges, an unexpected development took place on 12th June, 1975 when Sinha J. of the Allahabad High Court held Indira Gandhi guilty of two corrupt electoral practices under section 123(7) of the Representation of People Act, 1951, and disqualified her for 6 years in an election petition by Raj Narain. However, the judge stayed his judgment for 15 days to enable Indira Gandhi to appeal to Supreme Court. While Indira

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[40] *Id.,* p.139.
[41] *Id.,* p.142.
[42] A detailed account of the developments is to be found in T. R. Andhyarujina, Supra n.19, pp.89-92

Gandhi's appeal was pending in the Supreme Court, on 10th August 1971, Parliament enacted the Constitution 39th (Amendment) Act, 1975, inserting Article 329A in the Constitution by which a dispute of a Prime Minister's election was retrospectively taken out of the jurisdiction of courts and freed from ordinary election laws and it was enacted that no election of a Prime Minister would be declared void by any Court. Parliament also passed the Election Laws (Amendment) Act, 1975 by which electoral offences for which India Gandhi was disqualified under the Representation of Peoples Act, 1951 by Allahabad High Court were retrospectively nullified by changing the law. Thus Indira Gandhi's election was sought to be validated by these amendments.

On 1st September, 1975 during the hearing of Indira Gandhi's appeal, the Attorney General Mr. Niren De made an oral application to the Chief Justice for early hearing of certain petitions in land ceiling cases in which the question of violation of basic structure of the Constitution was involved. On 9th October, 1975 the arguments in the election appeal were concluded and judgments were reserved. Even before the judgment was delivered, on 20th October, 1975 Chief Justice Ray issued a written order that the Court would hear arguments on 10th November, 1975 on whether or not the basic structure doctrine restricted Parliament's power to amend the Constitution. Generally, a review of an earlier judgment is ordered by the Court only after a judicial hearing by a bench which feels a doubt about its correctness. No such hearing had taken place before the Chief Justice made the order for review on the application of Government.

Nani Palkhivala had appeared for Indira Gandhi in the appeal before the Supreme Court before emergency seeking annulment of the Allahabad High Court's verdict against her. However, once the emergency was imposed, he courageously returned her brief

and became an outspoken critic of the authoritarian regime.[43] On 7th November, 1975, the election appeal of Indira Gandhi was allowed and the Allahabad High Court judgment disqualifying her was set aside relying upon the amended Representation of Peoples Act which had retrospectively removed the disqualifications in her case but held that the Constitution (39th Amendment) Act, 1975 was unconstitutional. Except the Chief Justice, the judges held that the constitutional amendment was unconstitutional for violating the basic structure. The Chief Justice held that it was invalid for other considerations and made a significant reservation that, "The hearing has proceeded on the assumption that it is not necessary to challenge the majority view in Kesavananda Bharati's case".[44]

On 10th November, 1975 Chief Justice A. N. Ray convened a full bench of 13 judges. There is no official record of the hearing but we have brief accounts from observers of the arguments made on 10th and 11th November, 1975 as found in various publications. The bench was to consider the issue: "Whether the power of amendment of the Constitution is restricted by the theory of basic structure as propounded in Kesavananda Bharati case".

Palkhivala felt so strongly against the review that just one day prior to the hearing, on 9th November, 1975 he wrote a long letter to Indira Gandhi, the then Prime Minister. He pleaded that if the Parliament was given an unlimited power of amending the Constitution, the high degree of probability is that the basic structure of the Constitution which postulates a free democracy and the unity and integrity of the country will vanish within a few years. He, thus, concluded the letter as:[45]

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[43] L. K. Advani, *My Country My Life*, (New Delhi: Roop & Co., 2008), p.237.
[44] *Supra* note 19, p.92
[45] M. V. Kamath, *Nani A. Palkhivala- A Life*, (New Delhi: Hay House India, 2007, p.191.

> *"The hearing in the Supreme Court on the correctness of Kesavananda's case begins tomorrow. It need not continue unless the government wants it to. Believe me, my respectful appeal to you is not made out of any lack of confidence in the case for holding Parliament's amending power to be limited, but it is based upon my belief that it would be a great gesture on your part to withdraw the State's plea for unsettling the law. I shall be very happy to call upon you if you so desire".*

The appeal was of no avail. In an article[46] T. R. Andhyarujina has remarked that this letter was of 'doubtful propriety'. He observes that Palkhivala congratulated Indira Gandhi on the success of her appeal but went on to request her to withdraw the Government's attempt to get the *Kesavananda judgment* reconsidered. Palkhivala also praised Indira Gandhi by pointing out that India was the only country that continued to have political stability while Pakistan, Burma and Ceylon, which had become independent at the same time, were facing political instability and wrote: "The greatest credit for this achievement is due, apart from the outstanding personality of your father and yourself, to the basic structure of the Constitution".[47]

To the surprise of everyone, Palkhivala who was the principal exponent of limitations on the amending power of Parliament in *Kesavananda* case in 1973 but who had returned the brief of Indira Gandhi on the proclamation of emergency in her election case, now appeared in one of the petitions for a coal mining company to oppose the review by the Court.[48]

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[46] T. R. Andyarujina, "The Untold Story of How Keshavananda Bharati and the Basic Structure Doctrine Survived an Attempt to Reverse them by the Supreme Court", (2009) 9 SCC Jour. p.33.

[47] *Supra* note 39, p.145.

[48] It was at this juncture that the legal fraternity in India recorded one of the greatest ever triumphs in defence of the 'Basic Structure' of the Constitution. *Supra* note 43, p.237.

In support of his stand that the government's application for review of *Kesavananda* case should be rejected, Palkhivala raised two pleas before the Court:

1. The present full bench *cannot* overrule the *Kesavananda judgment*; and
2. Even if it can, it *should not*.

Palkhivala made the following points to support the first plea, which was preliminary in nature:[49]

1. In the *Kesavananda* case the full bench did not dispose of the six petitions before it, but only remitted them to the Constitution Bench for disposal in the light of its judgment. Five of these petitions are still pending disposal. Therefore, the Supreme Court cannot overrule its own decision so long as the proceedings in which it was rendered are still pending. A live case cannot be buried.
2. The full bench ruling in earlier petitions has become *res judicata* as far as those petitions are concerned, and the Constitution Bench can dispose of them only in accordance with that ruling. On the other hand, the Constitution Bench, in disposing of the petitions listed before the present full bench, will have to apply the ruling of the present full bench. Under Article 141 of the Constitution the law declared by the Supreme Court is binding on all courts including the Supreme Court itself. Two contradictory decisions cannot possibly be the law of the land at any given point of time, and cannot be applied by the Constitution Bench at the same time.
3. The Constitution Bench hearing the earlier petitions will have the unstable choice of applying either

[49] *Supra* note 45, p.195.

a) The ruling of the present full bench, ignoring the point of *res judicata* which is legally impossible, or

b) The ruling of the *Kesavananda* case *after* it has been overruled- which is equally impossible.

Some of the points Palkhivala made to support the second plea, briefly put, are as under[50]:

1. The *Kesavananda judgment* has only restrained Parliament from destroying or altering the basic structure of the Constitution. The rule of law, the priceless human freedoms like the right to personal liberty, freedom from arbitrary arrest, free speech and free press, which are a part of the basic structure of free democracy, are protected. Thus the *Kesavananda* case ensures that tyranny and despotism shall not masquerade as Constitutionalism. It is an astounding request from the government that such a judgment should be overruled.

2. In the *Kesavananda* case the full bench had rejected two other points urged on behalf of the citizens, viz. that (a) Parliament cannot abridge any fundamental right, and (b) Article 31C was wholly invalid. A request by a citizen to consider the judgment would have been, rightly, rejected; and the government does not stand on any higher footing.

3. As laid down by the Supreme Court in several cases, the criterion to be applied for overruling an earlier decision is that of (a) 'manifest error' and (b) 'baneful effect on the general interest of public' resulting from that judgment. (a) A 'manifest error' has been held to be an error on the face of the record, like overlooking a statutory provision or a binding authority. Just because some judges hold a different view, the view dissented from cannot possibly be said to be vitiated

[50] *Supra note* 45 pp.196-99

by a 'manifest error'. (b) The sad happenings in the country since the *Kesavananda* case leave no doubt that whereas the judgment in that case is conducive to immeasurable public good, overruling that judgment would have the baneful effect on public interest.

4. During the period of two-and-a-half years which had elapsed since the *Kesavananda judgment*, nothing has happened to justify its overruling, while many depressing and painful developments have taken place which would justify it being left undisturbed. Several Acts have been put in the Ninth Schedule with a view to excluding their scrutiny by the court; and two constitutional amendments (39th and 41st) have been made which represent the ultimate in contempt for the rule of law.

5. The Supreme Court has already held a part of the 39th Amendment invalid on the basis of *Kesavananda judgment*. The court would be stultifying itself, and would cause grave misgivings in the public mind about the stability and continuity of the law, if immediately after partly invalidating the 39th Amendment on the basis of the *Kesavananda judgment* it proceeds to reconsider that very judgment. Judicial propriety cannot favour the court striking down a significant constitutional amendment as crossing the limits of amending power and then proceeding to consider whether the amending power should be held to be limitless.

6. The *Kesavananda* case was heard by the largest bench ever constituted as of then; the hearing took the longest time ever- five months; and the vastest material ever brought together in a single case formed the record. No case has been made out for reconsidering a ruling arrived at after the fullest and the most detailed consideration.

7. The present time is the most importunate for reconsidering the *Kesavananda* ruling. The fundamental rights are abrogated. There is no effective opposition within the Parliament, and the important leaders of the opposition parties are languishing in jail without a trial. There is no opposition outside Parliament since the right to dissent is curbed. Judicial decisions and reports of proceedings in courts, Parliament and the state legislatures cannot be published except in a form which is acceptable to censor. No judicial conscience can grant the principle of unlimited power to Parliament at a time of such despotism.

8. Reconsideration of *Kesavananda* case would set an undesirable precedent and would have a pernicious effect on the continuity of the law. Following the precedent set by this full bench, another full bench may be convened, at an equally short interval, to consider the judgment of this full bench. The process can be unending.

9. Apart from the question of whether a bench of 13 judges is competent to overrule a judgment of an earlier bench of 13 judges, in a matter of such immeasurable importance the past practice and traditions of the Supreme Court require that a bench which is no larger should not seek to reconsider the *Kesavananda judgment*.

Palkhivala's impassioned appeal deeply moved all the judges, except the Chief Justice. One of the judges observed: "Never before in the history of the court has there been a performance like that". Justice Khanna said: "It was not Nani who spoke. It was Divinity speaking through him. His brother judges were also of same opinion."

The next day, 11th November, the attorney general told the court that a review of *Kesavananda judgment* was absolutely necessary as 'Parliament does not know where it stands' in

relation to its power to amend the Constitution. But the long arguments put forth by him made no impact on court. The next day, 12th November, the courtroom as usual was full, and lawyers were in heavy attendance, when to everyone's surprise the chief justice announced: "This bench is dissolved".[51]

Palkhivala argued brilliantly against the government's application for reconsideration of the Kesavananda decision. So powerful and persuasive were his submissions that some of the judges accepted his arguments on the very first day, the others did so the next day. By the end of the second day, Chief Justice Ray was reduced to a minority of one! The following day, he simply dissolved the Bench, ending a shameful attempt to alter the basic structure.[52] Justice H. R. Khanna said this about Nani Palkhivala's performance in that episode as: "The height of eloquence to which Palkhivala had risen during the hearing has seldom been equalled and has never been surpassed in the history of the Supreme Court'.[53] Thus came to an end the inglorious chapter in the history of the Constitution.

Till today, it remains a mystery as to why a review Bench was constituted. Perhaps the Chief Justice thought that barring Justice Khanna, the other judges who heard *Kesavananda Bharati* and continued on the Bench had held against the basic structure doctrine. Even if three of the new judges decided against the doctrine, they could easily set it aside. What was missed by a hair's breadth in *Kesavananda Bharati* was attempted to be achieved through the review petition, a clumsy attempt that miserably failed.[54]

When the review failed, the Government/ Parliament passed the Constitution 42nd Amendment Act, 1976 during the emergency on

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[51] *Supra note* 45 p.199.
[52] *Supra* note 43, p.237.
[53] *Id.*
[54] *Supra* note 39, p.152.

18th December, 1976 to amend Article 368 to nullify *Kesavananda* verdict and give Parliament unlimited powers to amend the Constitution and also to eliminate judicial review of any amendment to the Constitution. This amendment remained unchallenged till 1980 when in *Minerva Mills v. Union of India*[55] with a different complexion of the Supreme Court under Y. V. Chandachud CJ., the amendment was nullified with the court holding that the amendment itself violated the basic structure of the Constitution which gave only limited amending powers to Parliament. With the judgment in Minerva Mills case Parliament/Government lost the contest and the basic structure limitation on amendment of the Constitution secured an all-time legitimacy. The basic structure thereafter became an axion of the Constitution.[56]

The basic structure doctrine places substantive and procedural limits on the amending process provided in the Constitution. Any constitutionally and politically nuanced project of radical constitutional change must integrate the pronouncements of the Supreme Court on the basic structure doctrine. The basic structure review is independent and distinct from rights based judicial review under Articles 13, 32 and 226, federal-state competence and constitutional law compliance review under Articles 245 and 247, and common law and administrative law review which has been partially assimilated into Articles 14 and 21 rights to equality, and life and personal liberty respectively.[57]

Since Kesavananda, the Supreme Court has invoked the basic structure doctrine to strike down constitutional amendments, legislative and executive actions several times.

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[55] AIR 1980 SC 1789

[56] *Supra* note 19, p.2.

[57] Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine*, (New Delhi: Oxford University Press, 2010) pp. xv &xviii; the author analyses the legitimacy of basic structure in legal, moral and sociological terms, and argues that the doctrine has emerged from a valid interpretation of the Constitutional provisions.

8. Conclusion

In the context of Indian Constitution, it is now accepted that the original will is prior and superior to the will of any representative of the people. The Constitution as the expression of the original will is binding upon all subsequent legislative, executive and judicial bodies.[58]

Events subsequent to *Kesavananda* case have shown the necessity of the basic structure doctrine and it has been the bulwark against repeated attempts of politicians to subvert the Constitution. It is now accepted by everyone in India that Parliament should not be given unlimited power to amend the Constitution. Whatever its defects and the manner in which the case was heard, the formulation of the basic structure theory saved democracy and preserved rule of law. Our political leaders, with nothing else in mind but political vote banks and the next election, will never be able to destroy the basic features of our Constitution.[59]

Because of its constant efforts to guard the basic structure, the Supreme Court is criticised to be a Constituent Assembly in constant session. It is a trite saying that the public memory is short. Now and then the politicians for obvious political reasons make statements questioning the sanctity of the basic structure and assert that the Parliament has power to amend even basic structure. That is more easy said than done. By now the population has often exhibited its maturity by intelligent voting and surprised political parties. Even if the amendment escapes the judicial scrutiny using the touchstone of basic structure, it cannot escape the scrutiny of the sovereigns of India, "We the People".

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[58] *Supra* note 7, p.91.
[59] *Supra* note 39, pp.141-42.

CHAPTER 12

BASIC STRUCTURE DOCTRINE AS AN OPEN-ENDED LEGAL DOCTRINE: A BOON OR BANE?

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1. Introduction

"Law is neither intelligible nor intelligently made."
– Jeremy Bentham

Bentham was a proponent of legal positivism and criticized the complexity and lack of clarity in legal systems. He believed that laws should be clear, accessible, and easily understood by the general public. Bentham argued for the reform of legal systems to make them more rational, consistent, and based on utilitarian principles.

In *Krishta Goud & Bhoomaiah v. State of Andhra*[1], the Supreme Court Bench presided over by Justice V.R. Krishna Iyer stated with clarity: "As Judges, we cannot rewrite the law whatever our views of urgent reforms, as citizens, may be". Notwithstanding such caution, it is seen in jurisdictions across the world, that judges not only declare law as to what it ought to be but also create law during the process of interpretation. Charles Evans Hughes said "we are under a constitution and constitution is what the judges say it is"[2]. As an aid to interpretation certain doctrines are conceived by the judiciary. Such legal principles are pronounced with mere illustrations without dealing with them exhaustively. The judiciary apply legal principles

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[1] Krishta Goud & Bhoomaiah v. State of Andhra, (1976) 1 SCC 157.
[2] M. Pusey, Charles Evans Hughes 204 (Columbia University Press 1963).

underlying such doctrines on a case-to-case basis by adopting non-catalogue approach thus conferring on itself huge discretion. Keeping open the scope and applicability of legal principles underlying such doctrines leads to multiple interpretations. As a result, an element of uncertainty is introduced in these decisions that become precedents to be followed in future as the Law of the land. Judiciary, thus, whether intentionally or inadvertently make the legal system nebulous by creating a law with blanks to be filled from time to time and making its decisions unpredictable.

An open-ended doctrine is a legal principle or concept that is intentionally flexible, adaptable, and allows for interpretation and application in various situations. They provide a framework that can evolve and respond to changing circumstances and societal needs. Open-ended doctrines often lack precise definitions or fixed boundaries, allowing courts and legal authorities to exercise discretion in applying the doctrine to specific cases. This flexibility allows for a broader interpretation of the law and permits the doctrine to address emerging issues or unforeseen situations. One example of an open-ended doctrine is the *'reasonable expectation of privacy'*[3] in Fourth Amendment jurisprudence in the United States.

The concept of a reasonable expectation of privacy is intentionally open-ended to accommodate changes in technology and evolving societal norms. Courts have the flexibility to apply this doctrine to emerging issues such as electronic surveillance, digital privacy, or new forms of communication. Open-ended doctrines are often seen in constitutional law, where they provide a foundation for constitutional interpretation and application in a changing society. These doctrines may encompass concepts such as fundamental rights, equal protection, or the preservation of the

[3] Richard G. Wilkins, Defining the "Reasonable Expectation of Privacy": An Emerging Tripartite Analysis, 40 VANDERBILT LAW REVIEW 1077 (1987).

constitutional order. The interpretation and scope of open-ended doctrines are subject to ongoing debate and may evolve through judicial decisions over time.

Closer home, Basic Structure Doctrine is a legal principle in India that allows the judiciary to interpret and protect the Constitution through declaration of certain fundamental principles and features of the Constitution. The origin and source of basic structure doctrine is unknown. Justice Sikri speaking for the majority in Kesavananda Bharati introduced it. Though he has never divulged the source and origin, it is believed attributable to Article 79(3) of German basic Law[4]. While open-ended doctrines like the Basic Structure Doctrine can have advantages, they also come with some disadvantages.

2. Few Other Examples of Open-Ended Doctrines

2.1 The Living Constitution Doctrine (United States)

The 'living constitution doctrine'[5] is an open-ended doctrine in the United States that recognizes the Constitution as a dynamic document that evolves and adapts to changing societal values and needs. This doctrine allows for the interpretation of the Constitution in light of contemporary circumstances, ensuring its continued relevance and effectiveness. It is criticized on the ground that unelected judges have been using this clause to justify enacting their own policy proposals and preferences upon each of the 50 States, when the fact of the matter is that each and every state has differed social and economic values and each state legislature should be able to determine their own policies about pressing societal issues to reflect the beliefs of their constituents. When unelected judges impose their own policy preferences upon an entire nation, this undermines the very separation of powers between the federal and the State

[4] Helmut Goerlich, Concept of Special Protection for Certain Elements and Principles of the Constitution Against Amendments and Art. 79(3) Basic Law of Germany, 1 NUJS L. REV. (2008).
[5] David Strauss, The Living Constitution (Oxford University Press 2010).

governments that framers of the Constitution designed in the first place.

2.2 Proportionality Doctrine (International Human Rights Law)

The Proportionality Doctrine[6] is an open-ended legal principle used in international human rights law, particularly in the context of balancing fundamental rights with competing interests. It allows courts to assess the proportionality of a government action or restriction on rights, weighing the necessity, suitability, and proportionality of the measure to achieve a legitimate aim. This doctrine provides a flexible framework for protecting human rights while considering the specific circumstances of each case. Critics of this doctrine argue that the proportionality doctrine lacks predictability and certainty in its application because it relies on subjective assessments and there is a lack of clear guidelines and precedents, making it difficult for individuals and governments to anticipate how the doctrine will be applied in specific cases. This can lead to uncertainty in the law and hinder effective decision-making.

2.3 Implied Constitutional Rights[7] (Australia)

In Australia, the High Court has recognized implied constitutional rights that are not explicitly stated in the Constitution. These implied rights, such as freedom of political communication, have been derived from the structure, history, and text of the Constitution. The recognition of these open-ended rights allows for a broader protection of individual liberties along with those which are explicitly enumerated in the Constitution. Critics to this notion argue that implied constitutional rights are not democratically derived and lack the

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[6] Bibliography, Proportionality in International Humanitarian Law: Consequences, Precautions, and Procedures, OXFORD ACADEMIC, New York, 17 June 2021.

[7] Rosalind Dixon, *An Australian (partial) bill of rights*, Vol. 14, Issue 1, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, January 2016, Pages 80–98.

democratic legitimacy that is associated with explicitly stated rights in a Constitution. They contend that these rights are created by unelected judges and are not subject to the same democratic processes and public deliberation as explicit constitutional provisions do. As these rights are developed through judicial interpretation, they can be subject to changing interpretations over time, leading to inconsistent outcomes and unpredictability in legal decisions. Also, it is argued that this allows judges to engage in judicial activism, shaping the law according to their own personal values and beliefs rather than deferring to the intentions of the framers of the Constitution.

2.4 Open Textured Statutory Interpretation[8] (United Kingdom)

Open-textured statutory interpretation is an approach followed in the United Kingdom that allows for flexibility in interpreting legislation. This approach acknowledges that statutes often contain open-ended language, leaving room for interpretation and adaptation to changing circumstances. It enables judges to consider the purpose, context, and underlying principles of legislation when applying the law. Opponents argue that open-textured statutory interpretation risks undermining the intent of the legislature. They contend that by focusing on the purpose or policy behind the legislation, judges may effectively rewrite or modify the law to align with their own understanding of the desired outcome. This can be seen as an encroachment on the legislative branch's authority and the separation of powers.

3. Advantages of Open-Ended Doctrines With Specific Reference to Basic Structure Doctrine

It can be seen that there is a common thread of advantages and disadvantages in this approach. A few advantages of open-ended doctrines are:

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[8] Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585 (1996).

3.1 Flexibility

Open-ended doctrines provide flexibility in interpreting and adapting the Constitution to the changing needs of society. They allow the judiciary to ensure that the Constitution remains relevant and effective over time. For example, the basic features mentioned in the Constitution of India are only illustrative and not by any means exhaustive. Whether a feature of the Constitution is basic or not is to be determined from time to time by the Court as and when the question or need arises. Justice O. Chinnappa Reddy in his book *'The Court and the Constitution of India: Summits and Shallows'*[9] says that Chief Justice S. M. Sikri, who led the Kesavananda Bharati Bench, never divulged from where he derived the basic structure formula. Since there are no signposts signaling basic feature of the Constitution, every attempt to discover it becomes a *'voyage of discovery'*.

3.2 Protection of Rights

The open-ended legal principle has been aptly reflected in the approach of our Supreme Court while interpreting and giving an expanded view to the Fundamental Rights embodied in our Constitution. The Supreme Court said

> *"a Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure forages to come and consequently has to be adapted to the various crises of human affairs."*[10]

It invoked the spirit of the Constitution and not merely letter of it and included inherent rights such as freedom of press, right to education, prohibition of sexual harassment at work place, right to reasonable and fair procedure, right to travel abroad,

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[9] O. Chinnappa Reddy, The Court and the Constitution of India: Summits and Shallows (Oxford University Press 2008)
[10] M. Nagaraj v. Union of India, (2006) 8 SCC 212, pp. 240-41, para 19.

etc. as an integral part under the realm of Part-III of the Constitution of India.

The Basic Structure Doctrine helps in safeguarding the fundamental rights by preventing the legislature from amending the Constitution in a way that would undermine the core principles and values enshrined in it. However, all fundamental rights are not considered basic. For example, right to property was held to be no basic feature of the Constitution. Nevertheless, right to equality enshrined under Article 14 was protected as basic feature. This in fact substantiate the aforesaid advantage of flexibility built in the doctrine. Depending on the nature of the fundamental right and the extent of its invasion in a given case, it could be said that if basic structure of the Constitution was damaged. Few specific examples are:

3.2.1 Right to Privacy

In the landmark case of *Justice K.S. Puttaswamy (Retd.) v. Union of India*[11], the Supreme Court of India recognized the right to privacy as a fundamental right implicit in the right to life and personal liberty guaranteed under Article 21 of the Constitution. This decision invoked the unwritten right to privacy and had far-reaching implications on issues like surveillance, data protection, and Aadhaar (India's biometric identification system). In this judgment, the Supreme Court adopted a *'Constitution's dark matter'* approach, a principle said to be laid down by it in Kesavananda Bharati case, that the basic structure of the Constitution cannot be abrogated is the most outstanding and brilliant exposition of the 'dark matter' and is a part of our Constitution, though there is nothing in the text suggesting that principle.

[11] 2017 10 SCC 1, Chelameswar, J., pp. 14, para 12

3.2.2 Freedom of Speech and Expression

The Supreme Court has interpreted the right to freedom of speech and expression (Article 19(1)(a)) expansively to include certain unwritten rights. In the case of *S. Rangarajan v. P. Jagjivan Ram*[12], the court held that freedom of expression includes the right to receive information and ideas, and any restriction on this right must be justified on grounds mentioned in Article 19(2).

3.2.3 Gender Equality

The judiciary has played a significant role in expanding the scope of gender equality beyond the explicit guarantees in the Constitution. In *Vishaka v. State of Rajasthan*[13], the Supreme Court recognized the right to protection from sexual harassment at the workplace as a fundamental right, even though it was not explicitly mentioned in the Constitution. This decision laid down guidelines to ensure a safe working environment for women.

3.2.4 Environmental Protection

The Supreme Court has recognized the right to a clean and healthy environment as an integral part of the right to life under Article 21. In the case of *M.C. Mehta v. Union of India*[14], court held that the right to life includes right to enjoy pollution-free water and air. This decision led to formulation of several environmental laws and establishment of institutions for their enforcement.

Similar approach can be seen in USA Bill of Rights wherein the general Statute of Connecticut authorizing police to barge into bed rooms of citizens was held to be affront to Right to Privacy, though it was not specifically mentioned in Bill of Rights.

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[12] 1989 (2) SCC 574.
[13] 1997 6 SCC 241.
[14] AIR 1987 SC 965.

Besides US, Ireland and Canada also recognized unenumerated and unspecified Rights as basic to the Constitution.

3.3 Open Ended Doctrine as a Tool for Judicial Review

In US open-ended legal principles, such as privacy, equal protection, and due process, have been employed by the courts to interpret and invalidate laws that were seen as unconstitutional or inconsistent with evolving societal values and understandings. Few examples are as follows:

- *Roe v. Wade*[15]: When the basic structure doctrine was propounded in India, in the same year, the U.S. Supreme Court also applied the open-ended principle of privacy to strike down a Texas law that criminalized abortion. The Court found that a woman's right to terminate her pregnancy fell within the sphere of privacy protected by the Due Process Clause of the Fourteenth Amendment. It is pertinent to note once gain the ratio has been over turned in *Dobbs v. Jackson Women's Health Organization*[16] in 2022 evidencing uncertainty in judicial decision making.
- *Obergefell v. Hodges*[17]: The Supreme Court held that state ban on same-sex marriage violated Equal Protection Clause of the Fourteenth Amendment. The Court applied an open-ended interpretation of the principles of equality and human dignity to extend marriage rights to same-sex couples.
- *Brown v. Board of Education*[18]: In this landmark case, the Supreme Court overturned the *'separate but equal'* doctrine established in *Plessy v. Ferguson*[19]. The Court held that state laws segregating public schools basing upon race violated the Equal Protection Clause of the

[15] 410 U.S. 113 (1973)
[16] 597 U.S. (2022)
[17] 576 US 644 (2015).
[18] 347 U.S. 483 (1954).
[19] 163 U.S. 537 (1896).

Fourteenth Amendment. The decision relied on an open-ended interpretation of equal protection and evolving understanding of racial equality.

- *Lawrence v. Texas*[20]: The Supreme Court struck down a Texas law that criminalized consensual same-sex sexual activity. The Court held that the law violated the Due Process Clause of the Fourteenth Amendment, protecting individuals' liberty interests. The decision relied on an open-ended interpretation of privacy and the evolving concept of personal autonomy.

Similarly, Indian Post-Kesavananda judicial history is replete with examples wherein fundamental rights were protected from legislative and executive excesses. In the Indian context, the Constitution of India provides for judicial review to ensure the Constitutionality of laws and government actions. Vires of a law is tested on the anvil of basic features doctrine. This Open-ended legal principle empowered the judiciary to review and strike down constitutional amendments that violate the very basis of the Constitution structure, thus acting as a check on the power of the legislature and executive. It helps in maintaining a balance of power among the three branches of government. If it were not for the Judicial Review, Fundamental Rights would have been left as mere platitudes. Accordingly, judicial review was declared as basic feature of the Constitution. While the Constitution explicitly guarantees certain fundamental rights, the judiciary has also recognized and protected a number of unwritten or implied rights. Here are a few examples of judicial review cases in India:

- Section 66A of the Information Technology Act, 2000: In the case of *Shreya Singhal v. Union of India*[21], the Supreme Court struck down Section 66A of the IT Act, which criminalized certain online speech, including

[20] 539 U.S. 558 (2003).
[21] AIR 2015 SC 1523.

causing annoyance, inconvenience, or insult. The court held that the provision was vague, over broad, and violated the right to freedom of speech and expression guaranteed under Article 19(1)(a) of Constitution.

- Section 377 of the Indian Penal Code: In *Navtej Singh Johar v. Union of India*[22], the Supreme Court decriminalized consensual same-sex relations by reading down Section 377 of the IPC. The court held that Section 377 violated the rights to equality, privacy, and dignity, enshrined under Articles 14, 15, 19, and 21 of the Constitution.
- National Judicial Appointments Commission Act, 2014: In the case of *Supreme Court Advocates-on-Record Association v. Union of India*[23], the Supreme Court struck down the National Judicial Appointments Commission Act, which sought to replace the existing collegium system for the appointment of judges. The court held that the law encroached upon the independence of the judiciary and was against the basic structure of the Constitution.
- Aadhaar Act, 2016 (Certain Provisions): In the case of *Justice K.S. Puttaswamy (Retd.) v. Union of India*[24], the Supreme Court upheld the constitutionality of the Aadhaar Act but struck down certain provisions. The court held that mandatory linking of Aadhaar for certain services violated the right to privacy. It also struck down provisions that allowed private entities to use Aadhaar data for authentication purposes.
- Section 497 of the Indian Penal Code: In *Joseph Shine v. Union of India*[25], the Supreme Court struck down Section 497 of the IPC, which criminalized adultery. The court

[22] AIR 2018 SC 4321.
[23] AIR 2015 SC 5457.
[24] (2019) 1 SCC 1.
[25] (2019) 3 SCC 39.

held that the provision violated the right to equality and privacy and perpetuated gender stereotypes.

3.4 Consistency and Stability

By establishing certain fundamental principles as the bedrock of the Constitution, open-ended doctrines contribute to the stability of the constitutional system. They provide a solid foundation that transcends short-term political changes. Allowing itself freedom of interpretation the apex court brings in stability and consistency. By establishing the basic structure of the Constitution, the doctrine provides a framework for consistency and stability in the interpretation and application of constitutional provisions. It helps prevent arbitrary changes to the Constitution.

3.5 Safeguard against Authoritarianism

The Basic Structure Doctrine acts as a safeguard against potential abuses of power by the government. It prevents the ruling party or majority from making fundamental changes to the Constitution that could undermine democratic principles and establish authoritarian rule.

3.6 Protection of Minority Rights

The doctrine helps protect the rights and interests of minority groups by ensuring that their constitutional protections cannot be easily altered or disregarded through constitutional amendments. This can contribute to a more inclusive and equitable society.

3.7 Preservation of Constitutional Identity

Open-ended doctrines like the Basic Structure Doctrine play a crucial role in preserving the constitutional identity of a nation. They prevent the dilution or erosion of the core principles that define the country's constitutional framework.

4. Disadvantages of Open-Ended Doctrines Like the Basic Structure Doctrine are:

4.1 Subjectivity and Lack of Clarity

Open-ended doctrines are often subjective in nature, as they require judges to determine what constitutes the *'basic structure'* of the Constitution. This can lead to differing interpretations and lack of clarity, making it difficult to predict or understand the limits of judicial power.

4.2 Potential for Judicial Overreach

Critics argue that open-ended doctrines give judges excessive power to strike down laws and constitutional amendments, leading to potential judicial activism. They argue that unelected judges should not have the final say on constitutional matters, as it undermines democratic principles. Detractors of open-ended doctrines argue that they give the judiciary excessive power to interfere with the legislative and executive branches. They express concerns that judges may overstep their authority and encroach upon the domain of the other branches of government[26].

4.3 Inflexibility in Addressing new Challenges

Open-ended doctrines may face challenges in adapting to new and unforeseen circumstances. Critics argue that the rigid application of the basic structure can impede necessary constitutional reforms or prevent the Constitution from evolving with societal changes. The judiciary, in fact, very recently relied on the Basic Structure to strike down the 99th Constitutional Amendment Act in *Supreme Court Advocates-on-Record Association & Anr. v. Union of India*[27], which sought to set up a National Judicial Accountability Commission to replace the

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[26] R. Shunmugasundaram, *Judicial activism and overreach in India,* 72 AMICUS CURIAE, 2007, pp. 22-28.
[27] (2016) 5 SCC 1.

current system of appointment of judges by the Collegium system. Reliance on a principle coined by judges themselves to uphold the insularity and independence of the judiciary has irony writ large on its face.

4.4 Lack of Democratic Accountability

The power of the judiciary to determine the basic structure limits the ability of elected representatives to make changes to the Constitution. This raises concerns about the lack of democratic accountability in the judicial decision-making process. Open-ended legal doctrines can bypass the democratic process by allowing judges to make decisions that have significant implications for society. Critics argue that these doctrines empower unelected judges to make law-like determinations, which undermines the principle of democratic accountability. They believe that decisions of such magnitude should be left to elected representatives who are directly accountable to the people.

4.5 Lack of Democratic Consensus

The Basic Structure Doctrine can be seen as an imposition of judicial will over the will of the elected representatives. Critics argue that decisions about constitutional amendments should be made by the people's elected representatives, rather than the judiciary.

4.6 Interpretational Challenges

Open-ended doctrines, by their nature, require judges to make subjective determinations about the basic structure of the Constitution. This can lead to differing interpretations and disagreements among judges, potentially causing confusion and inconsistency in the application of the doctrine.

4.7 Potential for Stalling Reforms

Some critics argue that open-ended doctrines may hinder necessary constitutional reforms by imposing rigid constraints

on the ability to amend the Constitution. This can make it difficult to address emerging social, political, and economic challenges effectively.

4.8 Delayed or Stalled Legal Proceedings

The openness and flexibility of certain legal doctrines can lead to prolonged legal proceedings. Parties involved in a case may argue over the interpretation and application of open-ended doctrines, leading to extended litigation and delays in the resolution of legal disputes. This can result in increased costs and a loss of efficiency in the legal system.

4.9 Potential for Inconsistency and Lack of Coherence

Open-ended doctrines may lead to inconsistency and lack of coherence in the law. When multiple judges have the authority to interpret and apply open-ended principles, it can result in divergent opinions and conflicting outcomes. This can create confusion and undermine the overall effectiveness and integrity of the legal system.

5. Mounting Criticism of Basic Structure Doctrine

While the majority of the Supreme Court upheld the Basic Structure Doctrine, there were dissenting opinions that expressed criticism of the doctrine. Justice H. R. Khanna, in his dissenting opinion, criticized the Basic Structure Doctrine for giving excessive power to the judiciary. He argued that the doctrine went beyond the powers of the judiciary and interfered with the amending power of the Parliament. Justice Khanna was of the view that the Parliament should have the authority to amend any provision of the Constitution.

Justice A.N. Ray, another dissenting judge, expressed concerns about the uncertainty and lack of clarity that the Basic Structure Doctrine introduced. He argued that the doctrine did not provide clear guidelines or a precise definition of what constituted the basic structure of the Constitution. Justice Ray

believed that the doctrine could lead to judicial activism and judicial overreach.

Of late, it is also contended that a judgment represents the judgment of the entire bench and not just of the majority needs a review particularly in cases of wafer-thin majority as is the case in Kesavananda.

Recently, Jagdeep Dhankar, Vice president of India stated:

> *"Democracy sustains and blossoms when the legislature, the judiciary and the executive act in tandem and togetherness to fructify constitutional goals and realize aspirations of the people. Judiciary cannot legislate in as much legislature cannot script a judicial verdict…In a democratic society, the basic of any 'basic structure' has to be the supremacy of mandate of people. Thus, the primacy and sovereignty of Parliament and legislature is inviolable."*

He said, adding that he does not subscribe to the Kesavananda Bharati ruling.

Single party dominance of 70s has returned to day and attempts to establish Parliamentary supremacy cannot be ruled out. It is worth noting that the doctrine has not stalled any useful, beneficial constitutional amendment and so far, judiciary invoked the doctrine sparingly. Notwithstanding, judiciary attracted some criticism on NJAC constitutional amendment and thus bringing to the fore the debate as to Basic Structure Doctrine.

It is important to note that despite these dissenting opinions, the majority of the Supreme Court upheld the Basic Structure Doctrine in the Kesavananda Bharati case, and it continues to be a significant legal principle in India. However, these criticisms raised important points regarding the potential drawbacks and challenges associated with the doctrine.

6. Conclusion

Open ended doctrines like basic features doctrine efficiently allow law to adapt to changing dynamic circumstances and stand in support of democracy against majoritarian anarchy. Nevertheless, such doctrines are mainly criticized on two grounds. One, promotion of what is not there in the text of the Constitution. Two, the doctrine itself is made so nebulous and uncertain as to make it prone to further litigation. 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. Be that as it may, rejecting such doctrines only amount to throwing the baby with the bath water. The solutions worth consideration is one, to review the concept of majority judicial decision making by incorporating a principle that certain important decisions must be made either unanimously or with clear majority to be binding as a precedent. Two, the legislature should *suo motu* codify the issues covered by such doctrines to bring certainty to ambiguous theories propounded by judiciary.

CHAPTER 13

CONSTITUTION WITHIN CONSTITUTION: RENISANCE OF BASIC STRUCTURE DOCTRINE

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1. Introduction

The Constitution is considered to be ultimate norm of Indian society where in there are mandatory principles on which the society is based have been incorporated. The essential principles of the Constitution have been derived from society itself. These principles have been modified and then accordingly incorporated according to the need of society. Had the Constitution contained any alien principles then definitely these principles would not have been effective in the Indian society. The Constitution is therefore mirror image of society and it is the ultimate criteria of validity of any law or executive action in Indian society. There must be ultimate principles in which line of society is based. This ultimate and supreme principle is basic structure of our Constitution.

The idea is that society can be organized and regulated on the basis of some set principles of law, the Constitution will always remain at work. Constitution is ultimate document, and it is based on certain essential principles which are invaluable these principles are essential identity of Constitution, and no legislative or executive action can violate these principles.[1]

Wherever the Constitution is silent about any proceeding in a particular circumstance then the concerned constitutional

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[1] I. R. Coelho v. State of Tamil Nadu AIR 2007 SC 861.

functionary has to develop practices and convention which are in keeping with the broad spirit of Constitution. It is constitutional and moral duty of the concerned constitutional functionaries to establish healthy constitutional practice in such situation.[2]

Further in famous case of M. Nagraj, Supreme Court reiterated that it is about limit and aspiration of Constitution, it is about constitutional dominance and constitutional supremacy. It is not only about constitutional supremacy rather it is more about continuance of constitutional supremacy. Further court elaborated that Supreme Court is not bound by the text of the Constitution rather its fidelity is towards spirit of Constitution.[3] Spirit is the basic essence *i.e.* basic structure of Indian Constitution.

2. Evolution of the Doctrine of Basic Structure

The origin of basic structure doctrine can be traced back in various segments, the concept gradually metamorphized. It has transversed for decades and then finally in case of Kesavananda Bharati the concept was evolve. In the leading landmark case of Kameshwar Prasad Singh[4] it was contended that law of amendment also is law for the purpose of Article 13 (2)[5], and therefore any amendment to the Constitution which takes away or abridges the fundamental right will be unconstitutional.

The first amendment which has added Article 31A, 31B with 9th Schedule restricts Article 14 and 19 is unconstitutional. It was held that amending power of Parliament is a superior power and it is not the same as ordinary law-making power hence the word law in Article 13(2) does not include a constitutional

[2] B. R. Kapoor v. State of Tamil Nadu AIR 2001 SC 3257.
[3] M. Nagraj v. Union of India AIR 2007 SC 71.
[4] Kameshwar Prassad Singh v. State of Bihar AIR 1951 Pat 91.
[5] INDIA CONST.art. 13(2)

amendment and thus the First Amendment is not hit by Article 13(2) it is valid. Thus, they saved validity of Article 31A and 31B.

However, the First Amendment was challenged in Shankari Prasad case[6] five judges' bench of Hon'ble Supreme Court speaking through Justice Patanjali Shastri held that law of amendment is a superior law and restriction of Article 13(2) does not apply upon law of amendment and therefore First Amendment is not violating Article 13(2) and is not unconstitutional.

Further, in Sajjan Singh[7] the constitutional validity of 17th amendment was challenged. It was the constitutional bench of Hon'ble Supreme Court speaking through Justice Gajendragadkar held that law of amendment under Article 368 is a superior law and is not hit by Article 13(2). Therefore 17th amendment is not unconstitutional. Another very interesting facts of this case was that, for the first time the term *basic feature* was used, and the credit goes to Hon'ble Justice Madhulkar and Justice Hidayatullah. it can be said that the seed of basic structure doctrine was sown in this very case.

In the next case of Golaknath[8], paradigm shift was witnessed in Supreme Courts approach, the 11 judges bench of Supreme Court speaking through Chief Justice Subba Rao overruled Shankari Prasad case and Sajjan Singh case the court held that the source of law making power is Article 245[9] itself and all Article 245 in itself is *subject to provisions of this Constitution* and thereby it is subject to Article 13(2). Accordingly, the amending power of Parliament is subject to Article 13(2).

Thus by any amendment the Parliament can't take away or abridge the fundamental right. Accordingly, the court held that

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[6] Shankari Prassad Singh Deo v. Union of India AIR 1951 SC 458.
[7] Sajjan Singh v. State of Rajasthan AIR 1965 SC 845.
[8] I. C. Golaknnath v. State of Punjab AIR 1967 SC 1643.
[9] INDIA CONST., art. 245

Article 31 (A), 31(B) are unconstitutional and Sajjan Singh and Shankari Prasad case are overruled. However, in the light of grave consequences of retrospective overruling the court declared that overruling is prospective. The court evolved the doctrine of prospective overruling which means it cannot be applied from back date rather will apply on the date of judgment.

Court held that the procedure of amendment is there in Article 368, but power is not there, further it was held that power of Article 368 is somewhere else, that is Article 245 its source of law-making power it has to be read with VII Schedule, read with entry 97, list I. The court wrongly held that power to amend Constitution lies in Article 245. The judgment was criticised for creating confusion as to the matter that 'where does the power to amend the Constitution lies'.

In order to neutralise the judgment of Golaknath Parliament brought 24th amendment and major changes was brought in Article 368 of Indian Constitution. Earlier the word power was not there only procedure was written, 24th amendment added first clause and the word power in the marginal note of Article 368[10].

First clause in Article 368 was added with the intention to give the widest possible amending power to the Parliament. The word *notwithstanding* suggested that in amending the Constitution, Parliament was not bound by any restriction in the Constitution. Moreover, the amending power was declared not to be an ordinary law making power rather it was a *constituent power* as if the Parliament had same power to amend the Constitution as Constituent Assembly had to create the Constitution.

[10] INDIA CONST., art. 368

Also, the use of any provision in Article 368 suggested that the Parliament could even repeal any provision of Constitution. The question raised was that can such wide and unrestricted amending power be acquired by the Parliament for itself?

The *Privy Purse* case[11] and the *Bank Nationalization* case[12] open the way of Kesavananda Bharati[13] popularly known as fundamental right case opened the horizons of the Constitution. Certain issues which was placed before the court were

- What should be the rule of interpretation?
- What is the source of amending power?
- Can it be said that amendment is done by the people of India directly through Parliament and people being sovereign can make any amendment in the Constitution that they want?
- What is the scope and extent of the word *amend* and *amendment*?
- Is there any conflict between Article 13(2) Article 368?

As far as first issue is concern, in this case the validity of 24th, 25th and 29th amendment was challenged and also the validity of Golaknath judgment was challenged. Further the court held that rule of interpretation should be the rule of purposive interpretation. In purposive interpretation first of all the purpose of Constitution has to be seen and the purpose of amendment has to be examined.

The entire scheme of the Constitution, the intention of the framers of the Constitution, the Constituent Assembly debate also have to be seen in that light it has to be examined as to which interpretation serves the purpose best, then that interpretation has to be adopted, if more than one interpretation

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[11] Madhav Rao Schindia v. Union of India AIR 1970 SC 298.
[12] Ramesh Chandra Cooper v. Union of India AIR 1971 SC 564.
[13] His Holliness Kesavananda Bharati Sripadagalvoru v. State of Kerala AIR 1973 SC 1461

is possible then courts should go for that interpretation which would serve the purpose best.

As far as second issue is concerned *i.e* what is the source of amending power? Court answered this issue that before 24th amendment also it was Article 368 itself and after 24th amendment also it is Article 368 which deals with power to amend the Constitution, therefore there was no need to read the amending power in any other provision of the Constitution. Golaknath judgment to that extent was overruled.

The next issue was concerned with the fact that can it be set that amendment is done by people of India directly through Parliament? The court held that Parliament is a constitutional body elected by people and once elected it acts independently and for every decision soft Parliament a referendum is not held, it is the Parliament which amends the Constitution and not the people of India directly. Moreover, the people may be political sovereign, but legal sovereignty is vested in the Constitution. Constitution will prevail over the mandate of people.[14]

Moving to further issue *i.e.* scope and extent of the word amend and amendment it was held that the Constitution is not inert document rather it is the charter for complete socio-economic revolution in Indian society. The Indian Constitution his first and foremost a social document and it is based upon certain essential principles which are the principles on which Indian societies functions and in no circumstances can this principle be taken away from the Constitution. They are the basic ideals which had guided the freedom movement, and which are the ultimate aspiration of the Indian society.

Further court explained that these principles provide vitality (life) Indian Constitution and in no circumstances can this principle be taken away. The scope of amendment lies within

[14] B. R. Kapoor v. State of Tamil Nadu, AIR 2001 SC 3257.

domain of this principles, Parliament is free to amend any and every provision of Indian Constitution including fundamental right, but it cannot take away or abridge the basic structure of Indian Constitution. Fundamental rights are amendable but only to the extent that the basic structure is not destroyed.

The doctrine of implied limitation would apply Indian Constitution in context of Article 368 *basic structure* is one such implied limitation. The court also held in reference to Articles 368 the doctrine of *reading down* has to be applied. it means broad interpretation cannot be given if the very purpose of Article would defeat.

3. Comparison Between Constituent Power of Parliament and Constituent Power of Constituent Assembly

Constituent power of Parliament cannot be compared to constituent power of Constituent Assembly, as the constituent power of Constituent Assembly was the original power where that of Parliament is derivative power. The Parliament derives its power from the Constitution and hence it cannot rise above the Constitution to change the very essence of the Constitution. No doubt the amending power of the Parliament is constituent power, which is superior to ordinary law-making power, but it has to be exercised within the restriction of the Constitution.

As far as issue of conflict between Article 13(2) and Article 368 is concerned it was held that their needs to be done a harmonious construction between two articles. Article 13(2) deals with ordinary legislation whereas Article 368 deals with superior power *i.e.* the constituent power of Parliament to amend the Constitution that is not covered by virtue of Article 13(2).

4. Is Doctrine of Basic Structure Vague Doctrine?

The court answered question in affirmative manner and held that doctrine of basic structure is not a vague doctrine. It was made clear that it was not technically possible enumerate all the

elements of basic structure in one go s any case has to resolve around the basic issues raised in that case. Any observation of the court which is beyond the basic issue shall be an obiter dictum which would not be binding upon subordinate courts.

In the present case[15] the issue is not as to various elements of basic structure rather the issue is validity of the Golaknath judgment and the scope and extent of the amending power of Parliament, does it is not technically possible to enumerate an exhaustive list. It was also held that weather an element is part of basic structure or not can be examined only as in when a matter comes up for hearing before the court.

There are certain principles of law like rule of natural justice, rule of law, reasonableness fairness, non-arbitrariness which cannot be rigidly, precisely, and exactly defined still these principles are effectively applicable principles. Regarding element of basic structure there is essential test in Constitution itself. Any principle if removed would defeat the fraternity and consequently unity and integrity of nation would be essential part of basic structure. For example, the concept of secularism or social justice if removed would result into loss of faith in the Constitution and in the society and would thus disrupt fraternity.

On the other hand, removal of right to property as fundamental right may affect only some individuals but by and large the society as such would not get affect add the fraternity would not get affected. Thus, right to property is not part of basic structure. Article 368 has therefore two-fold restriction, procedural restriction which is covered by Article 368(2) and substantive restriction which would cover basic structure would apply upon Article 368(1). Hence, Golaknath judgment was

[15] His Holliness Kesavananda Bharati Sripadagalvoru v. State of Kerala AIR 1973 SC 1461.

overruled and 1st, 17th, 24th and 29th amendment was held to be constitutional.

Further again in case of Minerva mills[16] again the doctrine of basic structure was invoked in the instant case it was observed that the directive principle of State policy under Article 39(b) (c) is bound to come in conflict with fundamental rights under Article 19 (1) and Article 14 as in order to implement the policy of preventing unequal distribution of wealth there has to be an encroachment upon right to property.

Such encroachment is inevitable and the rule of purposive interpretation suggest that acquisition of property for agricultural reform and for infrastructural development is rather more important than right to property and hence 25th amendment giving superiority to DPSP. Article 39(b and c) upon Article 14 and 19 is not unconstitutional rather it is example of harmonious construction between fundamental rights and director principal of State policy.

It was held that the balance between fundamental right and directive principle of State policy is an element of the basic structure of document and any amendment which upsets the balance would be unconstitutional by giving a general superiority to all the directive principle of State policy upon fundamental right the harmony between the two will get upset. There has to be a circumstantial balancing between two and one cannot be given general superiority over the other.

5. Conclusion

Basic structure doctrine is about constitutional identity and constitutional supremacy. The element of basic structure are some omnipresent principles which the Constitution entail. The

[16] Minerva Mill v. Union of India AIR 1980 SC 1789.

court gave *essence of right test*[17] by which in case of amendment to fundamental right, its constitutionality depends upon the basic principles of Constitution which the amendment effected and only if the essence of that right is violated the amendment will be considered to big violative of basic structure. The test was further extended in case of I. R. Coelho[18].

Whenever a fundamental right is amended it is not the essence of that fundamental right alone which has to be examined rather the essence of all fundamental rights together has to be examined, a synoptic of all fundamental rights has to be taken in order to find out whether basic structure has been violated or not. The various element of basic structure cannot be seen in isolation rather it is intermingled with each other and hence the isolated examination of one element will not be sufficient.

Any amendment to the 9th Schedule can always be challenged on the grounds of its being violated of basic structure and such amendment once challenged, and further if law is found to be violative of basic structure, then the amendment will be declared to be unconstitutional, and the law will come out of the 9th Schedule and now the law can be declared to be unconstitutional. However, this can be done with respect to those amendments which were made on or after 24th April 1973. Supreme Court cannot in one go examine all such amendments rather it can examine the amendments as and when a case comes before it.

[17] His Holliness Kesavananda Bharati Sripadagalvoru v. State of Kerala AIR 1973 SC 1461.
[18] I. R Coelho v. State of Tamil Nadu AIR 2007 S.C

CHAPTER 14

CONSTITUTIONAL JURISPRUDENCE DEVELOPED AS A RESULT OF THE KESAVANANDA VERDICT

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1. Introduction

> *"As a safety valve to preserve Indian democracy, the basic structure doctrine in Kesavananda should live on."*
>
> – Ziya Mody

On April 24th, 1973, a historical judgment was passed by the largest ever bench constituted in the Supreme Court, *i.e.*, a 13 judge bench with a ratio of 7:6, which set a benchmark in the Indian constitutional law by saving democracy. The journey of the case began with the land reform dispute and finally ended up in evolving the basic structure theory. The Kesavananda Bharati case upholds the provisions enshrined in the Indian Constitution. The term 'basic structure' is now very familiar to people. It was said that the 'basic structure' doctrine is the judge-made law that is required to be introduced to put restrictions on the power of Parliament. The major judgment that came from this case is that the Parliament can amend any part of the Constitution without affecting the 'basic structure'. What is included in the basic structure is explained in the various cases. Initially, this doctrine was applicable only to the

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amending purpose, however with time, it has found its application beyond its limited scope.

2. Evolution of Basic Structure Doctrine

The question of whether the fundamental rights can be amended by the Parliament under Article 368 has come up as an important debate in front of the apex court within one year since the Constitution came into operation. In *Shankari Prasad v. Union of India*[1], the constitutional validity of the First Amendment Act of 1951, which abridges the right to property, was challenged. The apex court declared that the Parliament has the power to amend the Constitution, which is provided under Article 368, which also includes the power to amend the fundamental rights. The court further ruled that the word 'law'[2] in Article 13[3] includes only the ordinary laws and not the constitutional amendment Acts. Hence, the Parliament has the power under Article 368 to take away any of the fundamental rights by passing the Amendment Act, and such a law will not be void under Article 13 of the Constitution of India.

In *Sajjan Singh v. State of Rajasthan*[4], the validity of the 17th Constitutional Amendment Act was challenged, which added a certain number of statutes to the 9th Schedule. The Parliament's right to amend fundamental rights was not in dispute, but the case involves an issue related to the failure of Parliament to follow the procedure for amending the Constitution. Although the petition was dismissed by the judges, this is the first time the seed of basic structure has been taken up by Justice Mudholkar by stating that *"it is also a matter for consideration whether making a change in a basic feature of the Constitution*

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[1] AIR 1951 SC 458.
[2] It includes: permanent laws enacted by the Parliament or the State Legislature; temporary laws like the ordinances issued by the first citizen of India, and non–legislative sources of law, i.e., customs or usages that have the force of law.
[3] Laws inconsistent with or in derogation with the fundamental rights are *void ab initio*.
[4] AIR 1965 SC 845.

can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution".

In *I. C. Golak Nath v. State of Punjab*[5], in this the constitutionality of the First, Fourth, and Seventeenth Amendment Acts was challenged. The court overturned its earlier decision given in the Shankari Prasad case and ruled that the Parliament cannot take away the fundamental rights and held that the Amendment Act, which comes under the definition of 'law' given under Article 13 of the Constitution, are unconstitutional. The judiciary puts the fundamental rights in a superior position by declaring that they are divine, untouched, and transcendent, so that even if all the members of the Parliament vote agreeably, it would not have any impact on them. This was the first time the court applied the principle of 'prospective overruling'[6] in this case.[7]

3. Critical Analysis of the Kesavananda Bharati Case

The case, which is known as the 'basic structure doctrine case' or 'fundamental rights' case, has completed its 50 years in the year 2023. This case is very significant in Indian legal history. The basic structure doctrine was introduced by the judiciary to safeguard the rights of citizens. If we look into the history of this case, then this case was not built in one day; this case is the result of the decision passed in the Golak Nath case, where the judiciary ruled that the fundamental rights are sacrosanct and divine and are not be amendable, which resulted in the passing of the four amendments to the Constitution by the Parliament in order to prove its dominance over the judiciary in the matters of amending the fundamental rights. At this time, a petition was filed in the Supreme Court by Kesavananda Bharati, who was

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[5] AIR 1967SC 1643.

[6] The decision made in any specified case would have its impact only in the future and not have a retrospective effect on the prior cases.

[7] Ziya Modi, Basic Instinct: A Landmark in Modern Constitutional Jurisprudence: Kesavananda Bharati v. State of Kerala (1973), Azb & Partners Advocates and Solicitors, last accessed on May 25 , 2023, 8:05 AM.

the head of the religious Math in Kerala. This petition was against the Land Reform Act passed by the Kerala Government in 1969, which took away the property of the people for the social welfare and development of society. There was some property of the Math, of which Kesavananda Bharati was the head. On March 21, 1970, he filed a petition under Article 32 of the Constitution in the Supreme Court, looking for protection of the rights under Articles 25, 26, 14, 19(1)(f), and 31 of the Constitution. Then, when the petition was still in court, the Kerala Government again passed the Kerala Land Reforms (Amendment) Act, 1971, followed by several constitutional amendment Acts like the 24th, 25th and 29th to overturn the judgment in the Golak Nath case. The issues that were in front of the court were[8]:

a) Whether the 24th Constitutional Amendment Act passed is valid or not?
b) Up to what amount does Parliament have the power to amend the Constitution?
c) Whether the 25th Constitutional Amendment Act was valid or not?

The petitioners put forth their argument by saying that in the Golak Nath case, it was said that the Parliament doesn't have unlimited power and cannot amend the fundamental rights, and there is an infringement of Article 19(1)(f) in this case. While the respondent side argued that the supremacy of the Parliament is also a fundamental feature and that, for the sake of society, the Parliament can pass any Act as the Parliament is directed by the Directive Principle of State Policy and it has the unlimited power to amend the Constitution. The Supreme Court held by a 7:6 majority judgment and clearly stated that Parliament can amend any clause or any part of the Constitution for the welfare of the people without affecting the basic structure of the

[8] Manoj Marireddy, *Case Analysis of Kesavananda Bharati v. State of Kerala* , Volume Number 3 ,IJLSI, 635-646, 635& 637, 2021.

Constitution. The Court then further upheld that 24th Constitutional Amendment Act and is valid, but found the 1st and 2nd parts of the 25th Amendment Act *ultra vires* and stated that Parliament has the power to amend the Constitution to the extent that it does not affect the basic features or the foundation of the Constitution. The 29th Constitutional Amendment Act was considered valid, which puts the Kerala Acts in the 9th Schedule. Article 368 is independent and is not controlled or affected by Article 13(2). Parliament cannot alter any basic feature without which the Constitution will lose its divine integrity or meaning. What comes within the ambit of the basic structure doctrine is completely up to the judges to decide, and every Act or amendment firstly needs to pass the basic structure test, and judges will decide whether such an act is violating the basic feature or not, then it will be valid or not. Even the Parliament has the power to amend the fundamental rights to the extent that they fall under the ambit of the basic structure. The decision in this case was given after a lot of discussions and with a clear mind that if the Parliament was given unrestricted power, it could misuse that power and do things for their benefit and in their favour. There was a need for the introduction of the basic structure doctrine so that the rights of the citizens and Parliament would remain protected and preserved. Nearly 30 amendments had already been passed before it went into effect, and around 120 amendments have been passed so far since the Indian Constitution was enacted in 1950.

This case helped in developing a new constitutional jurisprudence by innovating the doctrine of basic structure and preserved the identity of the Constitution by the largest ever bench. The main protagonist of this case was the famous senior advocate Nani Palkhivala, whose powerful argument helped put a restriction on the unlimited powers of the Parliament. He pleaded that the ultimate power is vested in 'we, the people', and if the Parliament were given unlimited power, then it could affect the independence of the judiciary which is the necessary requirement of any federal country. The major observation that

comes out of this case is that no one is above the Constitution, and the Supreme Court has incomparable authority when the matter relates to the protection of the basic framework of the Constitution. The Supreme Court has made it very clear that if Parliament has the power to amend or pass any amendment, it has the right to review and scrutinize it and to check whether the said amendment is affecting the basic structure doctrine or not.[9]

4. Criticism of the Kesavananda Bharati Case

The major criticism that came up in the Kesavananda case was that there is no mention of the basic structure doctrine in the Constitution, while Sathe has said that this judgment was an attempt to rewrite the Constitution, although the doctrine of basic structure has very little to do with what is written in the Constitution. It also came into play in the Golak Nath case, which finds more support from the constitutional text than the Kesavananda Bharati case, where the court has included the constitutional amendments in the ambit of the definition of 'law' given in Article 13(2) of the Constitution. It was said that the Kesavananda case was too lengthy, as the judgment was nearly 700 pages long, so it becomes very difficult to understand what the judge's opinion collectively mean and what exactly constitutes the basic structure. The basic structure doctrine was also criticised for being counter-majoritarian and causing imbalance in the democracy as the power was given to the Supreme Court to decide which amendment Act fulfilled the basic structure test. Therefore, it is clear from the case that the judiciary has been given the authority or power to decide the validity of the Constitutional Amendment Acts.[10]

[9] *Supra note* 8.
[10] Supra note 7.

5. Amendments Passed by Parliament to Supersede Judiciary

When the Golak Nath case's judgment was pronounced simultaneously, the Parliament passed several Constitutional Amendment Acts, such as the 24th Constitutional Amendment Act, the 25th Constitutional Amendment Act, and the 29th Constitutional Amendment Act, to supersede the judiciary.

24th Constitutional Amendment Act**:** It was passed to nullify the judgment passed by the court in the Golak Nath case. It deals with the fact that the Constitutional Amendment Act is not law under Article 13(2) of the Constitution, and the Parliament has the power to amend, alter, or repeal any of the provisions of the Constitution.

25th Constitutional Amendment Act**:** The 4th Constitutional Amendment Act was concerned with Article 31. Because of this Amendment Act, the property acquisition could not be challenged on the ground of the sufficiency of compensation, but in the R. C. Cooper case, which is also known as the bank nationalization case, the Supreme Court struck down the cause. Section 2(a) of the amendment Act which was inserted in Article 31 by the 4th Amendment Act; which stipulates that no such law can be questioned on the ground that such compensation, is not enough. The 25th Amendment Act inserted the word 'amount' in place of 'compensation'. Section 2(b) was also added, which clearly stated that the right to property under Article 19(1)(f) cannot be used in opposition to Article 31.

It gave Articles 39(b) and 39(c), which were described as the most classically socialist Articles on the DPSP by Granville Austin, as they are put in priority or preference over the Articles of freedom, property, and equality. Moreover, it even took away the power of the court to decide whether the law passed by the Parliament is fulfilling the purpose mentioned in the Directive Principle of State Policy or not.

29th Constitutional Amendment Act: This amendment Act puts two land reforms on the 9th Schedule of the Constitution, *i.e.*, the Kerala Land Reforms Amendment Act, 1969, and the Kerala Land Reforms Act, 1971.[11]

6. Is it Possible for a Law to Violate the Basic Structure Without Being Opposed to Constitution?

This question has an answer, which is explained by the Supreme Court in the case of *Indira Gandhi v. Raj Narain*[12], where an explanation was added to Section 77 of the Representation of the People Act, 1951. It was said that the expenditure incurred by the political party in relation to the election of the candidate would not constitute the expenditure incurred or authorized by the candidate. Basically, this gives the political parties the opportunity to spend a huge or extensive amount without any limitations. This is something that is not prohibited by the Constitution, but it is against the principle of democracy, and hence it is against the basic structure doctrine. This is one of the best examples of the above-specified question.[13]

7. Minerva Mills: an Important Case Where Parliament Tried to Win the Battle of Supremacy

When the 42nd Constitutional Amendment Act was passed in 1976, whereby some major changes were made. There was an alteration in Article 31C, whereby the amendment took away the supremacy of the fundamental rights and made them subordinate to the DPSP. Here, more importance was given to the DPSP than to the fundamental rights. Article 368 was amended, and certain clauses were added to it. Clause 4 new

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[11] Saji Koduvath , Kesavananda Bharati Case : Effect and outcome – Never Ending Controversy, Saji Koduvath Associates, last accessed on May 24, 2023, 9:29 PM, https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2022346_code1522995.pdf?abstractid=2022346&mirid=1.

[12] 1975 AIR 865.

[13] Sayan Mukherjee, *The Unconventional Dimensions of the Basic Structure Doctrine*: An insight, 1,NULJ, 45, 47&51, 2011.

inserted stipulates that the amendment made before the 42nd Constitutional Amendment Act cannot be questioned in court on any ground. Clause 5 stipulates that there is no restriction or control of the legislature's amending power, which was given to it by the Constitution in Article 368.

These amendments were challenged in the famous case of *Minerva Mills v. Union of India*[14], where a prominent jurist and a renowned lawyer, Palkhivala, put forward his argument, which led to nullifying the amendment made to Article 31C. The majority found it against the basic structure doctrine. Although Justice Bhagwati opposed this decision, it was passed by the majority of judges. Justice Chandrachud, the then CJI, has put forward the argument that Article 31C has taken away the two sides of the golden triangle of the Constitution, *i.e.*, Articles 14, 19, and 21, which provides to the people a surety that the promise held forth by the preamble to secure justice, equality, and fraternity will be discharged properly without vitiating the right to liberty and equality. The Court further overturned the Clauses 4 and 5 that were added to Article 368, as they were found to be invalid and not in contravention of the provisions of the Constitution.

The argument that was put forward was that the limiting amending power is itself a basic structure, and the limiting power of the Parliament cannot become unlimited merely by exercising that power, as it affects and destroys the supremacy of the Constitution. It also destroys the balance of power between the legislature and the judiciary. In this very statement, the court declared the power of judicial review an essential feature of the Constitution and put it within the ambit of the basic structure doctrine. It also strengthened the principle of the basic structure of the Constitution and declared that the Constitution was founded at the base of the balance between

[14] AIR 1980 SC 1789.

the fundamental rights and the DPSP. They both are cooperative, and complement to each other, and form the nucleus of the commitment and dedication to do social welfare things for the people.[15]

8. What Comes Under the Ambit of Basic Structure?

The term basic structure was first introduced by M. K. Nambiar and other counsels at the time of arguing the matter in the case of Golak Nath. But this concept came into existence in 1973 in the case of Kesavananda Bharati. Nowhere in the Constitution is this basic feature or basic structure doctrine defined.[16] It was said that judges don't make laws; instead, they just interpret them, and the legislature was there to make laws, but if we look into the jurisprudence, then in the realist theory, the judges used to make laws. In various case laws, the elements that constitute the basic structure were introduced. Following are some of such instances:

a) *Minerva Mills v. Union of India*[17]: In this case, the Supreme Court ruled that the harmony between fundamental rights and the DPSP is an essential feature of the basic structure doctrine.
b) *S. P. Gupta v. Union of India*[18]: There is no provision in the Constitution that expressly mentions that the rule of law and independence of the judiciary are the basic features, but it was observed in this case that they are the basic features of the Constitution.

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[15] Abhinav Shukla, *Minerva Mills Ltd . & ors .v. UOI : A Significant case that India should never forget ,Prime legal*, last accessed on May 26, 2023 , 10:00 AM, https://primelegal.in/2022/10/30/minerva-mills-ltd-ors-v-uoi-a-significant-case-that-india-should-never-forget/.

[16] Vinaya Sharma, Review of Indian Constitution in light of present day social structuring : Basic Structure Doctrine, SSRN, (May 25, 2023, 11:30 PM), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2661405_code1497574.pdf?abstractid=2661405&mirid=1

[17] AIR 1980 SC 1789.

[18] AIR 1982 SC 149.

c) *S. R. Bommai v. Union of India*[19]: In this case, the Supreme Court held that India has been a secular country since the formation of the republic, and while interpreting Article 368, it held that secularism and federalism are the basic features of the Constitution.

Several other elements were also included in this list of basic features: single citizenship, judicial review, blend of rigidity, universal adult franchise, Parliamentary form of government, etc. in a catena of cases by the apex court.

9. Conclusion

On the 50th anniversary of the verdict, in the Kesavananda Bharati case the Chief Justice of India, D. Y. Chandrachud, has said that "the basic structure doctrine is a north pole star that guides interpretation of the Constitution" and that it is a "rare success story".

Decoding the Kesavananda Bharati case is not at all simple even post 50th anniversary of its date of judgment, but one thing is sure that it has saved the Constitution, protected the independence of the judiciary, and set a limit on the power of the Parliament to amend the Constitution. Even though the clarity of the basic structure doctrine developed case by case post this landmark judgment, this case has contributed a lot in the area of constitutional studies and jurisprudence.[20] This case has restored the faith of people in the judiciary. Although the petitioner, Kesavananda, did not win the case in which he challenged the Kerala Land Reform Act, the judgment that came from this case, with the efforts of Kesavananda, Palkhivala, and the majority judges, helped the country remain the largest

[19] AIR 1994 SC 1918.

[20] Pragya Dixit, *Kesavananda Bharati v. State of kerala Case Analysis (Basic Structure*) , Law Circa ,last accessed on May 25 , 2023, https://lawcirca.com/kesavananda-bharati-v-state-of-kerala-case-analysis-basic-structure/.

democracy in the world.[21] Even now, we can see that different formulations of the basic structure doctrine have emerged in South Korea, Japan, and certain Latin American and African countries. This case will always hold a special place in the history of constitutional jurisprudence.[22]

[21] Shalu Singh , *Kesavananda Bharati Case and the Basic Structure Doctrine*, Finology , last accessed on May 25, 2023, https://blog.finology.in/Constitutional-developments/kesavananda-bharati-case.

[22] Utkarsh Anand , *Kesavananda Bharati Case: SC Creates Special Web Page on 50th Anniversary*, Hindustan Times, last accessed on May 25, 2023, https://www.hindustantimes.com/india-news/supreme-court-marks-50th-anniversary-of-kesavananda-bharati-case-with-special-web-page-on-basic-structure-doctrine-Constitution-judicialreview-separationofpowers-basicstructure-supremecourt-101682319375265.html .

CHAPTER 15

I³ (INTRICACY, IMPORTANCE AND IMPACT) OF DOCTRINE OF BASIC STRUCTURE: A WORTHY WEAPON TO WATCH-OVER THE LAW OF LAND

Prof. (Dr.) Madhu Soodan Rajpurohit*

> *"The basic structure of our Constitution, like a North Star, guides and gives a certain direction to the interpreters and implementers of the Constitution when the path ahead is convoluted,"*
>
> — Justice D. Y. Chandrachud

1. Introduction

India completed 50 years on 24th April, 2023 of the land mark judgment of *Kesavananda Bharati v. State of Kerala*[1], which propounded the doctrine of 'Basic Structure' in Indian scenario.

Rousseau has rightly said "the man is born free but everywhere he is in chains". Right from beginning the man require some sort of governance as he being social and comparatively more developed creature in living kingdom. More the intellectual, more the chances of misusing of it, and that's why some sort of correctional mechanism is required for the proper and flawless governance of the society. In jungle law the rule is – 'might is always right'; but in a civilized society it is the law which protects the rights of the weak also and it becomes the real power for getting the justice.

The grandeur of our national freedom lies in the fact that the target it set before itself was not only tofight for the liberation of

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[1] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

the country from the irons of British rule but also to rebuild Indian Society on the vibrant philosophy of social revolution.

The Constitution of India clearly reflects the will of the political sovereign through its preamble and in 'We the People of India'. It again clearly defines each limb and its role in the constitutional scheme. So is with the Judiciary, which an equally important in the constitutional Governance.

Freedom was not an end in itself. It was only a means to achieve an end; the end being to freeIndia through a new Constitution, to feed the starving millions, to clothe the naked masses, and to give every Indian the fullest opportunity to develop himself according to his capacity.[2]

An American Judge *Bensan* said once "Nothing reckless more in human heart than broadeningsense of injustice. Illness we can put up with but injustice makes in want to pull thing down." These words have even more significance in our country.[3]

The judiciary plays a vital role for achieving the aims as required by our founding fathers of the Constitution. Doctrine of 'Basic Structure' propounded by the full bench judgment of Kesavananda Bharati's case. Separation of judiciary from the executive is mandated in Article 50 of the Constitution, with the independence of judiciary as a necessary consequence.[4] Later, the doctrine of separation of powers was raised to the status of a basic feature of the Constitution in *Indira Gandhi v. Raj Narain*[5], wherein it was observed, thus:

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[2] M.G. Chitkara and P.L. Mehta, Law and the Poor 9 (Ashish Publishing House 1991).
[3] S.C. Gupta, Supreme Court of India- an Instrument of socio-legal advancement 150 (Deep and Deep Publications 1995).
[4] Chandra Mohan v. State of U.P., AIR 1966 SC 1987.
[5] AIR 1975 SC 2299.

> *"... the exercise by the legislature of what is purely and indubitably a judicial function is impossible to sustain in the context even of our co-operative federalism which contains no rigid distribution of powers but which provides a system of salutary checks and balances".*

This concept is now a recognised part of the basic structure of the Constitution, and is at the core of the constitutional scheme.[6]

To keep every organ within the limits of constitutional power, there are inherent checks and balances. The grey areas are meant to be covered by healthy conventions developed on the basis of mutual respect keeping in view the common purpose to be served by the exercise of that power. Many such conventions have been developed, those remaining need to be expedited to avoid any semblance of conflict.[7]

However, the judiciary was active right from beginning of the legal system, but there is always a hue and cry when some big guns are caught and becomes subject to it. In that case the questions of judicial activism raise its head. Similar hue and cry crept, when the judgment in Kesavananda Bharati came, as the then ruling government did not want such kind of pronouncement by Apex Court. As a result, first time in Indian judicial history of Supreme Court, three senior-most judges were superseded, for this reason they resigned, and appointed Justice A.N. Ray as Chief Justice.

2. Definition of Judicial Activism

The debate is going on the controversy about its definition as it has not been resolved yet. Black's Law Dictionary defines judicial activism as "a philosophy of judicial decision-making

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[6] State of Bihar v. Bal Mukund, AIR 2000 SC 1296.
[7] J. S. Verma, 'Judicial Activism Should be Neither Judicial Ad Hocism nor Judicial Tyranny'. Posted online: Friday, April 06, 2007.

whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent."[8]

It is argued some times that judicial activism is an attack on legislation. It is also termed as self-assumption of powers of legislature itself. In simple words the judicial activism reflected in an interpretation of laws sometimes looks like a political dialogue.

For some judicial activism is coined by some interested persons in government and the legislation wing. When they fail to answer a call to honour the orders and opinions of the judiciary, they start shouting. Because, the judges are interpreters of the laws and not the activists.

Though our learned judges drive safely on the established roads, they risk deviation in case of an urgent call for protecting the spirit of our Constitution. They overstretch when legislatures or executives cross the line of control drawn in Constitution. But it's equally true that the judges neither symbolize the people's will, nor they are answerable to the people.

Justice V. R. Krishna Iyer, expressed in his unique and elegant way, views on the working of the constitutional functionaries: "The Indian experience with regard to the Executive, Judicative and Legislative instrumentalities over four decades has been one of exploitation darkening into misgiving, misgiving deepening into despair and despair exploding as adventurist violence. The categorical imperative for stability in democracy is, therefore, to see that every instrumentality is functionally kept on course and any deviance or misconduct, abuse or aberration, corruption or delinquency is duly monitored and

[8] Black, Henry Campbell. Black's Law Dictionary. 10th ed. St. Paul, MN: West Publishing, 1999

disciplinary measures taken promptly to make unprofitable for the delinquents to depart from the code of conduct and to make it possible for people, social activists, professional leaderships and other duly appointed agencies to enforce punitive therapeutics when robed culprits violate moral-legal norms."[9]

It shall be not out of the way to say that - In a country where majority of the people do not even read the laws passed by the Parliament, there is a good chance that Parliaments and State legislatures exploit the ignorance and pass laws that can be dangerous in the long run. Hence there should be a check on such Parliamentarians. That's where judicial activism pitches in.

The Government has proved its incapability to tackle the problems of the underprivileged strata of the society, as their condition went on waning, in spite of several pompous legislative declarations and pontific executive announcements. Ultimately, the marginalized masses of the people opted for the judicial therapeutics to heal the ailing democracy. And, in response, the judiciary, leaving behind its traditional moderate role has adopted an active role. And, with new spirit and support of the masses, not only has this third wing interpreted the existing legislation in such a way as to ensure the maximum of human freedom, but has galvanized the other two wings too to act for the noble cause of public good. The changing stance of the judiciary as characterized by some recent judicial pronouncements has often been termed as 'activism' on the part of the judiciary or 'Judicial Activism'.

Some political pundits described it as 'judicial over-activism'. Some other political as well as legal scholars have raised the question that the judiciary has usurped powers in the pretext of public interest. Many others feel that the judiciary, by its

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[9] V. R. Krishna Iyer, Justice at Crossroads 265 (Deep and Deep Publications 1994).

activism and interference, is actually preventing the executive from going astray.

Albeit some definitions are worth of quotation. Justice Gulab Chand Gupta has enunciated judicial activism thus:

> *"Legislature, while enacting a law, cannot visualize all situations arising in future and needing the support of law. New situations generally and usually develop and the law has to be so interpreted and applied to solve problems arising out of such situations. In this process, the judicial creativity or craftsmanship is utilized to fill in the gaps between the law as it is and the law as it ought to be. In built in this process is the ability of 'proper perception' and commitment to proper social values. This judicial creativity is called 'Judicial Activism'."*[10]

In this way he affirmed the opinion of Justice V.G. Palshikar[11] who has asserted that judicial activism means "An active interpretation of existing legislation by a judge, made with a view to enhance the utility of legislation for social betterment".

Whereas Justice J. S. Verma[12] has been more emphatic in laying down the exact norms of sufficient activist criterion. The learned judge has remarked:

> *"Judicial Activism is required only when there is inertia in others. Proper judicial activism is that which* ensures *proper functioning of all other organs and the best kind of judicial activism is that which brings about results with*

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[10] Gulab Gupta, "*Judicial Activism - A National Necessity*", CENTRAL INDIA LAW QUARTERLY, Vol. 12, Part 1, January-March, 1999, pp. 1-13, at p. 1.
[11] V. G. Palshikar, "*Judicial Activism*" ALL INDIA REPORTER, Journal Section, 1998, p. 201.
[12] The core of Justice Verma's judicial philosophy in The Indian Express January 23, 1998, at p. 7.

the least judicial intervention. If everyone else is working, we don't have to step in."

3. Judicial Activism - Historical Background

The seeds of judicial activism were sown by English concepts like 'equity' and 'natural rights' on the American soil where it bloomed into the concept of 'judicial review'. The landmark judgment in *Marbury v. Madison*[13] paved the way for judicial opposition to the legislative omnipotence. With this power of judicial review got in heritage, the American judiciary commenced the modern concept of judicial activism in 1954 in the case of *Brown v. Board of Education*[14] where the Supreme Court of America struck down the laws of segregation of Negroes especially in the field of public education. By a series of judgments after *Brown v. Board of Education*, the court ruled out all the laws which legally segregated the Negroes in almost all the fields of day-to-day life.

Arthur Schlesinger Jr. introduced the term "judicial activism" to the public in a Fortune magazine Article in January 1947. Keenan Kmiec discusses Schlesinger's Article *"The Supreme Court: 1947"* from Fortune, January 1947. Schlesinger's Article profiled all nine Supreme Court justices on the Court at that time and explained the alliances and divisions among them. The Article characterized Justices Black, Douglas, Murphy, and Rutledge as the *"Judicial Activists"* and Justices Frankfurter, Jackson, and Burton as the "Champions of Self Restraint." Justice Reed and Chief Justice Vinson comprised a middle group.

According to Kmiec, the methods by which judges may involve in judicial activism:

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[13] 1 Cranch 137 (1803); Oklahoma v. Civil Services Commission, 330 U.S. 127 (1947); Association of Data Processing Organizations v. Camp, 397 U.S. 150 (1970); Cotovsky- Kaplan Association v. United States, 507 F.2nd , 1365 (1975).
[14] 28 347 U. S. 483.

- Overturning legislation passed by an elected legislature, using an interpretation of the Constitution that is not clearly mandated or implied by the constitutional text;
- Ruling against the text or intent of a statute, using an improper or overreaching interpretation;
- Ruling against judicial precedent in a way that is a radical or unjustified departure from accepted interpretation;
- Holding legislation unconstitutional based on flawed precedent;
- Selectively using obscure case law or foreign law, in preference to what more pertinent case law or statutory law; and
- Use by state courts of a single subject rule to nullify legislation or state constitutional amendments, in a questionable manner.[15]

David Strauss of the University of Chicago Law School has argued that judicial activism can be narrowly defined as one or more of three possible things:

- overturning laws as unconstitutional
- overturning judicial precedent
- ruling against a preferred interpretation of the Constitution

Critics of *Strauss'* view have argued that these definitions include only legal interpretation. They argue that a judge may be termed "activist" based on the remedy chosen, even if the legal interpretation is not "activist".

[15] Keenan D. Kmiec, The Origin and Current Meanings of Judicial Activism. Berkeley Law Library (2004)

Various American cases and judicial shifts throughout the Supreme Court's history have prompted accusations of judicial activism or overreaching.

4. Indian Scenario

If we trace the origin of the judicial activism in India then we find its traces in the year 1893. For a very long time the courts in India had shown a traditional approach in interpreting the covert mandate of the Parliament expressed in the laws. However, the oldest remarks of activejudiciary, back to 1893, when Justice Mehmood of the Allahabad High Court delivered a dissenting judgment which sowed the seed of activism in India. It was a case of an under-trialwho could not afford to engage a lawyer. So, the question was whether the court could decidehis case by merely looking at his papers. Mehmood held that the pre-condition of the case being 'heard' (as opposed to merely being read) would be fulfilled only when somebody speaks. So he gave the widest possible interpretation of the relevant law and laid the foundation stone of the judicial activism in India.

Judicial activism, in India, is a movement from personal injury to public concern by relaxing,expanding, and broadening the concept of *locus standi.* Judicial activism is correlated, with a progressive movement from 'personal injury standing' to 'public concern standing' to allowing access to justice to *pro bono publico*, that is, public spirited individuals, groups and organizations, onbehalf of 'lowly and lost' or 'underprivileged' or 'underdogs' or 'little men' who on account of constraints of money, ignorance, illiteracy have been bearing the pains of excesses without access to justice.

One of the meanings of judicial activism is that the function of the court is not merely to interpret the law but to make it by

imaginatively sharing the passion of the Constitution for social justice.[16]

Lord Hewart, CJ, has asserted, "It … is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[17] Judicial Activism is the response to his assertion.

In a democratic system of governance, the most effective watchdog is the people. Institutions aid when the public is vigilant. The greatest asset and the strongest weapon in the armoury of the judiciary is the confidence it commands and the faith it inspires in the minds of the people in its capacity to do even-handed justice and keep the gauges in equilibrium in any dispute. Judiciary in India has by and large relished enormous public confidence. However, the judicial authorities are not protected to public scrutiny. Even Chief Justice of India Adarsh Sen Anand (as he then was) has realized that the real source of strength of the judiciary lies in the public confidence in it and the judges have to ensure that this confidence is not lost.

Independence of judiciary is a prerequisite for an effective democracy. The Indian Constitution has made sumptuous provisions to protect the independence of judiciary. The independence of judiciary has been held by the Supreme Court to be a fundamental feature of the Constitution. Therefore, it cannot be intruded upon by legislation and even by constitutional amendment.[18] But whether a dominant judiciary acting in a tyrannical manner should go without let or

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[16] Suk Das v. Union Territory of Arunachal Pradesh (1986) 2 SCC 401; *Sheela Barse v. Union of India* (1986) 3 SCC 632.
[17] Simon James and Chantal Stebbings (eds.), A Dictionary of Legal Quotations 80 (Universal Law Publishing Co.Pvt. Ltd. 1997).
[18] Kashmir Singh, "*Appointment of Judges of the Supreme Court*" in B.P. SEHGAL (ED.), LAW, JUDICIARY AND JUSTICE IN INDIA, 112 – 125 (Deep and Deep Publications 1993).

hindrance. The under – mentioned prophesy of Justice V. R. Krishna Iyer (as he then was) is penetrating and time alarming:

> *"What human hunger has precedence over the quest for justice? Whatforensic process is not robed fraud if it is overawed by Authoritarian Power or faces the firing squad for ruling against Might in favour of Right? What system of government deserves to be called civilizedwhere justice to the humblest and the highest is not free and fair and dispensed by judges without fear or favour, affection or ill will? This vulnerable yet impregnable value of independence of the judiciary is not the pampered privilege of elite brethren but the people's dearest imperative in societies where imperiled human freedoms still matter."*[19]

Judicial intervention is legitimate when it comes within the scope of permissible judicial review. The thin dividing line demarcating appropriate and inappropriate judicial intervention is drawn on the basis of functions allocated to the different branches by the Constitution. In the borderline cases, a legal question at the core determines the need for judicial intervention. Purely political questions and policy matters not involving decision of a core legal issue are outside the domain of judiciary.[20]

A. G. Noorani[21] states:

> *"Zeal leads judges to enter areas with whose terrain they are not familiar; to order minutiae of administration*

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[19] V. R. Krishna Iyer, in K.L. Bhatia (ed.) Judicial Activism and Social Change 57 (Deep and Deep Publications 1990).

[20] J. S. Verma, 'Judicial Activism Should Be Neither Judicial Ad Hocism nor Judicial Tyranny' Posted online: Friday, April 06, 2007.

[21] A. G. Noorani in his article on `*Judicial Activism v. Judicial Restraint*', published in SPAN magazine of April/May, 1997 edition; quoted by Supreme Court in *Common Cause (A Regd. Society) v. Union of India (UOI) and Ors.,* AIR 2008SC 2116.

> *without reckoning with the consequences of their orders. Judges have made orders not only how to run prisons but also hospitals, mental homes and schools to a degree which stuns the professional. In their judgments they draw on material which is untestedand controversial and which they are ill-equipped to evaluate."*

In recent years, millions have cheered activist judges precisely because they have clearly encroached into the territory of the executive. These activist judges are widely seen as the only hope for justice that ordinary folk have in the face of a callous, venal and incompetent executive.

Former Chief Justice P. N. Bhagawati, stated:

> *"It is for the judge to give meaning to what the legislature has said and it is this process of interpretation which constitutes the most creative and thrilling function of a judge. … The judge infuses life and blood into the dry skeleton provided by the legislature and creates a living organism appropriate and adequate to meet the needs of the society…There is no need for judges to feel shy or apologetic about the law creating roles….The Supreme Court has developed a new normative regime of rights and insisted that a state cannot act arbitrarily but must act reasonably and in public interest on pain of its action being invalidated by judicial intervention…In last few years the Supreme Court has, through intense judicial activism, becomea symbol of hope for the people of India."*[22]

The US Supreme Court laid down a pragmatic test in *Baker v. Carr*[23], for judicial interventionin matters with a political hue,

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[22] Chief Justice P.N. Bhagwati, *"Judicial Activism in India"*, Lecture delivered, at University of Wisconsin LawSchool, Madison, USA, in June 2010; and published by India Today [http://www.law.wisc.edu/alumni/gargoyle/archive/17_1/gargoyle_17_1_3.pdf].

[23] 369 US 186 (1962).

apart from those expressly allocated to another branch. It held that thecontroversy before the court must have a "justiciable cause of action and should not suffer from a lack of judicially discoverable and manageable standards for resolving it". This is a pre-requisite forjudicial intervention. Otherwise, the policy of '*judicial hands-off*' should govern, because such a matter is required to be dealt with by another branch. The position under the Indian Constitution is similar.

5. Concept Behind Judicial Activism

There are two popular theories enunciating the factors which led to the origin and growthof judicial activism viz. the 'Theory of Vacuum Filling' and the 'Theory of Social Want'.

(i) The *Theory of Vacuum Filling* implies that due to inaction or laziness of any organ,a power vacuum is created and the remaining organs of the government start fillingthat vacuum by expanding their horizon, because power vacuum may cause disaster to the fabric of democracy and rule of law. Thus, judicial activism is the result of the vacuum created by the two organs (*i.e.*, legislature and executive) of the government. These theorists submit that nature doesn't permit a vacuum. What has come to becalled hyper activism of the judiciary draws its strength, relevance and legitimacy from the inactivity, incompetence, disregard of law and Constitution, criminal negligence, corruption, greed for power and money, utter indiscipline and lack ofcharacter and integrity among the leaders, ministers and administrators.

(ii) The *Theory of Social Want* states that the origin and growth of judicial activism liesin the failure of existing legislations to cope up with the problems of our society. Ultimately, the judiciary responded to the knock of the poor and the oppressed forjustice. The supporters of this theory opine that "judicial activism plays a vital role in bringing in the societal

> transformation. It is the judicial wing of the state that injects life into law and supplies the missing links in the legislation …Having beenarmed with the power of review, the judiciary comes to acquire the status of a catalyst on change."

These theorists submit that it was the worsening social condition of our society due to which the judicial activism originated. Some feel that the great contribution of judicial activism in India has been to provide a safetyvalve and a hope that justice is not beyond reach.

6. A Seer Who Saved the Constitution

Kesavananda Bharati, a seer from Smarta tradition of Advait Vedanta, led the Edneer Mutt, a Hindu monastery in Kerala's Kasargod district. In February, 1970, he challenged the 1969 Land Reforms, enacted by the then C. Achuta Menon Government of Kerala, which affected his Mutt also.This case, *Kesavananda Bharati and Ors v. State of Kerala and Ors*[24], was heard and decided after marathon 68 working days, by a 13 judge bench, the largest to be in constituted in the history of Supreme Court, on 24 April, 1973 and created history. The 13 judges bench in 7:6 majority come toend with a conclusion that the Constitution's 'Basic Structure' cannot be altered by Parliament and is inviolable. However, the 'Basic Structure', though mentioned few[25], but was not strictly defined, allowing space for interpretation in future Supreme Court judgment, as and when required.

By a simple act of approaching the apex court, a Seer (*Kesavananda Bharati*) saved the Constitution of India and paved the path for number of other judgments. The Indian

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[24] AIR 1973 SC 1461.

[25] Like, *e.g.* — Supremacy of the Constitution, The Rule of Law, The Federal Character of the Constitution, Separationof powers between the Legislature, the executive and Judiciary, the Protection of Fundamental Rights.

Constitution, Indian democracy and Indian Governance could have been verydifferent without him.

7. Doctrine of Basic Structure - a Judicial History

In the case of *Sajjan Singh v. State of Rajasthan*[26] (decided on 30/10/1964), Justice *J. R. Mudholkar* had first used the phrase 'basic feature' and opined that it should be given permanency.[27] Soon after the judgment, *Professor Henry Conard*, in February, 1965 mentioned of it in his lecture on *"Implied Limitations of the Amending Power"*, delivered at Law Faculty, Banaras Hindu University, Banaras.[28]

Mr. M.K. Nambiyar, a leading constitutional lawyer, raise the argument of implied limitation on Parliament, before the Supreme Court in case of *Golak Nath v. State of Punjab*[29], but this was not accepted. However, the majority felt that "there is considerable force in this argument", but though it was felt unnecessary to pronounce on it. Supreme Court said, "This

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[26] Sajjan Singh v. State of Rajasthan, AIR1965 SC 845.

[27] According to eminent scholar *Fali S. Nariman*, Justice *Mudholkar* had first used the phrase 'basic feature' in the case of *Sajjan Singh v. State of Rajasthan* (AIR 1965 SC 845). Justice Mudholkar had got the idea of a basic feature from a judgment of Chief Justice *AR Coohelius* of the Pakistan Supreme Court, wherein he had observed that the President of Pakistan under the 1956 Constitution though empowered to remove difficulties in the Constitution, had no power to remove a fundamental feature of the Constitution (*Fazlul Quader Chowdhry v. Mohd. Abdul Haque,* PLD 1963 SC 486).
Quoted by Swapnil Tripathi in her article "Remembering Professor Conard: The Geneius behind the Basic Structure Doctrine", [See — https://thebasicstructureconlaw.wordpress.com/2020/04/24/remembering-professor-conrad-the- genius-behind-the-basic-structure-doctrine/]

[28] In February 1965, Prof. Conrad was invited to deliver a lecture at the Banaras Hindu University in India, wherein he spoke on the topic of 'Implied Limitation of the Amending Power'. He cited the Nazi regime and how it defaced the Weimar Constitution in its quest for power, to highlight the dangers of an easily amendable constitution. According to Conrad, an amending body no matter how powerful cannot change the very structure, which supports its constitutional authority. In other words, an amending body (i.e., legislature) cannot change the very constitution and its provisions thatgave it the power of amendment in the first place. There exist certain implied limitations upon an amending body according to which certain areas or principles in the Constitution are beyond reach.
This came to be called the Doctrine of Limitation.

[29] AIR 1967 SC 1643.

question may arisefor consideration only if Parliament attempts to destroy the Constitution embodied provisions otherthan in Part III of the Constitution".

The Doctrine of Basic Structure was established through the historical landmark judgment of *Kesavananda Bharati v. State of Kerala*[30], which proved to be the turning point in constitutional history and paved the path for many other judgments of constitutional importance.[31]

8. Importance and Significance of the Judgment

The landmark judgment of *Kesavananda Bharati v. State of Kerala*[32], altered the constitutional history of India for two

[30] AIR 1973 SC 1461: (1973) 4 SCC 225.

[31] For example —

Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299: In this case, the Supreme Court held that the right tovote was a fundamental right and that the election of a Prime Minister could be challenged in court.

Maneka Gandhi v. Union of India, AIR 1978 SC 597: In this case, the Supreme Court expanded the scope of the right to life and personal liberty guaranteed by Article 21 of the Constitution and held that the procedure established by law must be reasonable, just, and fair.

Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789: In this case, the Supreme Court upheld the principleof basic structure and struck down parts of the 42nd Amendment to the Constitution, which had given Parliamentthe power to amend any part of the Constitution without judicial review.

S. R. Bommai v. Union of India, AIR 1994 SC 1918. In this case, the Supreme Court laid down guidelines for the exercise of the President's power to dismiss state governments and imposed restrictions on the use of Article356 of the Constitution, which deals with the imposition of President's Rule.

Vishaka v. State of Rajasthan, AIR 1997 SC 3011: In this case, the Supreme Court recognized sexual harassment at the workplace as a violation of a woman's fundamental right to equality and laid down guidelinesto prevent such harassment.

Aadhaar case [Justice K.S. Puttaswamy (Retd.) v. Union of India, (2019) 1 SCC 1: Here the Supreme Court held that the Aadhaar Act was constitutional but struck down several provisions that violated the basic structure of the Constitution, such as mandatory linking of Aadhaar with bank accounts and mobile numbers.

Sabarimala temple case (Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1: Here the Supreme Court held that the ban on entry of women of a certain age group to the Sabarimala temple in Kerala violated the basic structure of the Constitution, which includes the principles of equality and non-discrimination.

[32] AIR 1973 SC 1461.

reasons — *firstly*, it prevented Parliament of India from amending Part III, dealing with fundamental rights, of the Constitution; and *secondly*, it establishedthe supremacy of the Judiciary in the matters of interpretation of the Constitution.

However, in case of *Golak Nath v. State of Punjab*[33], the limit to political power was set by subjecting Article 368's amending power to the discipline of fundamental rights; but from Kesavananda Bharati's case, the basic structure doctrine recognised the basic identity of the Constitution, and it cannot be destroyed by any amendment. This judgment emerged as an opportunityfor the wise exercise of co-constituent power by the Supreme Court. It articulated vast plenary powers of the executive and legislature and abandoned the argument of fear by holding that the possibility ofabuse of power is no ground for its non-conferment. It empowers the judiciary and established that itis the proper protector of the Constitution. The decision in *Supreme Court Advocates-on-record Association & Anr. v. Union of India*[34], (popularly known as NJAC case), decided makes it compellingly clear that the power may be exercised only "within the parameters of the law, nothing more and nothing less" and the validity of amendments "cannot be tested on opinions, however strong or vividly expressed". Judicial independence is important as the "essence" of rule of law, which embeds both "decisional autonomy" and "institutional autonomy". It gave contours to the present constitutional panorama of the country.

9. Application of Doctrine in Past Half Century

A careful examination of the application of the doctrine over past half century discloses a significant pattern; although the Apex Court has invoked it sparingly, it has mostly struck down amendments where judicial powers have been curtailed.

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[33] AIR 1967 SC 1643.
[34] (2016) 5 SCC 1.

Since 1973, the year of *Kesavananda Bharati judgement*, the Constitution got amended more than 60 times. In these five decades, the Supreme Court has tested constitutional amendments againstthe doctrine of basic structure in at least 16 cases.

In nine of these 16 cases, the Supreme Court has upheld constitutional amendments that had been challenged on grounds of violation of the basic structure doctrine. Six of these cases relate to reservations — including the quota for Other Backward Classes (OBC) and Economically Weaker Section (EWS), and reservations in promotions.

The Supreme Court has struck down a constitutional amendment entirely just once - The Constitution (Ninety-ninth Amendment) Act, 2014, which established the National Judicial Appointments Commission (NJAC), the body that would have been responsible for the appointment and transfer of judges, replacing the current Collegium system. The amendment was struck down by a five-judge Constitution Bench in 2015 on the grounds that it threatened "judicial independence", which the court ruled was a basic feature of the Constitution in NJAC case.[35]

In six instances since 1973, including the *Kesavananda*[36] ruling itself, the Supreme Court has "partially struck down" a constitutional amendment. In all these cases, the provision that was struck down related to the denial of judicial review.

In *Kihoto Hollohan v. Zachillhu and Others*[37], the Supreme Court upheld The Constitution (Fifty-second Amendment) Act that introduced the Tenth Schedule or the so-called "anti-defection law" in the Constitution. The only portion of the amendment

[35] *Supra note* 34.
[36] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.
[37] *Id.*

that was struck down was the one that stated that the decisions of the Speaker relating to disqualification cannot be judicially reviewed.

In *Union of India v. Rajendra N Shah*[38], in 2021, a three-judge Bench of the Court struck down a portion of The Constitution (Ninety-seventh Amendment) Act, 2011, but on procedural, not on basic structure grounds. The amendment changed the legal regime for cooperative societies, and the court ruled that cooperative societies within a state, as opposed to inter-state, would fall under the State List, which means that a constitutional amendment relating to it must be ratified by half the states as prescribed in the Constitution.

In *Kesavananda Bharati v. State of Kerala*[39] while the court upheld the land ceiling laws that were challenged, it struck down a portion of the 25th Amendment (1972) whichstated that "if any law is passed to give effect to the Directive Principles" it cannot "be deemed to be void on the ground that it takes away or abridges any of the rights contained in Article 14, 19 or 31".

In *Indira Gandhi v Raj Narain*[40] the SC applied the principle laid down in the Kesavananda ruling for the first time in this case. It struck down The Constitution (Thirty-ninth Amendment) Act, 1975, which barred the Supreme Court from hearing a challenge to the election ofPresident, Prime Minister, Vice-President, and Speaker of Lok Sabha.

In *Minerva Mills Ltd v. UOI*[41] The SC struck down a clause inserted in Article368 (which gives the power and lays down the procedure to amend the Constitution), which said there shall be no limitation whatever on the constituent power of Parliament

[38] LL 2021 SC 312.
[39] AIR 1973 SC 1461
[40] AIR 1975 SC 2299.
[41] AIR 1980 SC 1789.

to amend by way of addition, variation or repeal the provisions of this Constitution.

In *P. Sambamurthy v. State of Andhra Pradesh*[42] the SC struck down a portion of the 32nd Amendment (1973), which constituted an Administrative Tribunal for Andhra Pradesh for service matters, taking away the jurisdiction of the High Court.

L. Chandra Kumar v Union of India[43] the SC court struck down a portion of the 42nd Amendment, which set up administrative tribunals excluding judicial review by High Courts.[44]

10. Conclusion

The Supreme Court's key role in making up for the weariness of the Legislature and the ineptitude of the Executive is praiseworthy.

Judicial activism is appropriate when it is in the domain of legitimate judicial review. It should be neither judicial *ad hocism* nor judicial tyranny. Judicial activism is justice in material form. What is inherent in the body of the Judiciary has come on surface, to do justice and to stop miscarriage of justice. It has shed its shyness of adolescence and has learnt to face bravely the odds put by the establishment.

Lord Shiva is the Lord of Law and Justice according to Indian mythology. We can say that the judicial activism is incarnation of Lord Shiva and has a Third Eye of Lord Shiva to burn what is injustice. For that, every constitutional judge must be active and

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[42] AIR 1987 SC 663.
[43] AIR 1997 SC 1125.
[44] Apurva Vishwanath, "50 years of Kesavananda Bharati case and its legacy: How Supreme Court has invoked the basic structure doctrine over the years", Indian Express, New Delhi, April 25, 2023. https://indianexpress.com/article/explained/explained-law/kesavananda-case-and-its- legacy-sc-has-used-doctrine-sparingly-pushed-back-against-attempts-to-shackle-judicial-review- 8572292/ (visited on 27-2-2023).

never passive or negative. Judicial activism is a blood - cell of the Judiciary.

Therefore, the phraseology “Judicial Activism” is nothing but a new facet and expanded meaning to judicial interpretation and its implementation within permissible limits cannot be termed as a mere fiction inasmuch as with passage of time basic meaning do not change, but expansions aregiven new colour to the meaning.

Doctrine of Basic Structure being backbone of the Constitution of India is an instrumental inmaking sure the protection of the fundamental principles of democracy and preserving the rights of citizens. This doctrine is a will to the power and resilienceof India’s democratic institutions and the judiciary’s responsibility to sustain the Constitution. It is rightly said by CJI Chandrachud that Basic Structure of our Constitution is like a North Star, which gives and guides the path to the interpreters and implementers of the Constitution. Hence, the “Doctrine of Basic Structure” is a worthy weapon to watch-over the law.

CHAPTER 16

CONSTITUTIONAL IDENTITY, CONSTITUENT POWER AND JUDICIAL REVIEW- A JURISPRUDENTIAL DISCOURSE ON BASIC STRUCTURE

Prof. (Dr.) Ishrat Husain*
Mr. Priyadarshi Jha**

1. Introduction

1.1 Aim of Inquiry

Much of what is written on the Basic Structure doctrine, though prolific in nature, fails to provide a philosophical understanding of the concept. Indubitably, after giving thoughtful consideration to the said argument relating to the lacunae cited above, one might get impelled to ask certain rudimentary questions as to the basis of the doctrine, its origin, its evolution, etc. This inquiry assumes importance *firstly* because there exists a literature gap in this area delineating the philosophical basis of the aforementioned doctrine and *secondly,* such a philosophical explanation would help the discourse to grow and others to critically view the discussions surrounding the said doctrine.

The upshot of this chapter could be stated in the following words. The formation of constitutional Identity in a democratic polity is a direct result of the exercise of Constituent Power vested in the *People* (as opposed to constituted power which is vested in the State, that is, formed after the exercise of Constituent Power, for example, the Parliament) and such an identity is immutable and unchangeable, which was described

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by the Supreme Court of India[1] as Basic Structure of the Constitution. Such an identity is not amenable to change, by a Constituted body like the Legislature, simply the fact that change to the identity of the Constitution can only be done by the exercise of Constituent Power which is vested with the *People* and not with the Legislature.

This might be confounding for most of the readers, if not for all of them. Thus this chapter aims to unpack the relationship of the different concepts mentioned above and how they act in tandem. We shall start by engaging with some preliminary ideas.

1.2 Preliminary Ideas

What identity must be ascribed to a Constitution has been a question, long debated by various legal thinkers. But such a debate is of recent origin. Earlier the debate was focussed on ascertaining the identity of the nation, defined either as *Volkgeist or Character National* by thinkers like *Savigny and Rousseau* respectively. As the name suggests constitutional Identity could be defined as the identity of the Constitution.

What is this Identity? What is the locus of such an identity? These are some of the rudimentary questions that will be answered in this work.

Garry Jacobsohn in his famous work[2] seeks to understand Constitutional Identity in the context of constitutional change. Constitutional Change simply mean amendments that are made to the Constitution. Now Jacobsohn's discussion primarily revolves around the extent of the changeability of such an identity by the process of amendment.

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[1] Minerva Mills v. Union of India, AIR 1980 SC 1789.
[2] Gary Jeffrey Jacobsohn, Constitutional Identity (Harvard University Press 2010).

The moot question, therefore, is – Can the identity of the Constitution be changed to such an extent, by the means of an amendment, that it becomes unrecognizable?

He engages in this discussion in the context of India with reference to the evolution of the Basic Structure doctrine as devised in the case of *Kesavananda Bharati v. State of Kerala*[3]**.** It is clear that Jacobsohn attaches a certain measure of immutability with his conception of Constitutional Identity, so much so that it is unchangeable by any device of change. However, such an understanding can aptly be labelled as short-sighted. Authors like *Monika Polzin*[4] take a much broader view of the concept and engage in a nuanced manner to understand Constitutional Identity. She strikes a distinction between identity developed by the general provisions and by the *eternity clauses.*

An objection that could be raised by the supporters of Jacobsohn's idea is that the identity generated by the general provisions is not identity in the true sense for they are subject to change. But such an argument could be repelled by saying that they are the identity of the Constitution, though ephemeral in nature, nonetheless. It is also to be mentioned here for the benefit of the readers that Jacobsohn's conception of identity relies heavily on the concept of *identity* propounded by Thomas Reid, who described identity in a sense of *'continuity'.* This paper majorly focuses on understanding the concept of Constitutional Identity by referring to the various Comparative Constitutional Law thinkers such as Michel Rosenfeld, and Jurgen Habermas. But before proceeding to discuss the idea of Constitutional Identity as discussed by Jacobson, it is incumbent on us to

[3] AIR 1973 SC 1461.
[4] Monika Polzin, *Constitutional Identity as a Constructed Reality and a Restless Soul*, 18, GER. L. JOU. 1595 (2017) https://www.cambridge.org/core/journals/german-law-journal/article/Constitutional-identity-as-a-constructed-reality-and-a-restless-soul/664451F50BA00AF676350CBECB677323.

decipher the idea of Constituent Power and bust some of the myths associated with it.

2. The Enigma of the Concept of Constituent Power

2.1 Rousseau's Conception

Supreme Court of India in a catena of judgment[5] has held that Parliament in the exercise of *ordinary legislative power* makes law (reference can be made to Art. 246 and 248 of the Constitution of India) and in exercise of its *constituent powers* amends the Constitution (reference must be made to Art. 368). This understanding could be appositely assessed as erroneous, reasons for which would be provided hereinafter.

But here it is advisable, in order to have an effectual understanding of the concept of Constituent power, to chalk out a general definition of said concept. Constituent Power, in general terms, means the power by the exercise of which the something is constituted. The notion arises from the Enlightenment, a rationalizing and secularising movement in 18th-century European philosophy. It is based on two prerequisites: acknowledgment of the people as the ultimate origin of political power and endorsement of the notion of a Constitution as a construct. The notion is most relevant when the Constitution is comprehended as a legal instrument that obtains its legitimacy from a principle of self-governance, namely, that the Constitution represents the people's constituent power to establish and revise the institutional structures that govern them.[6]

Thinkers such as Carl Schmitt, Dieter Conrad, and Abbey Sieyes talk in greater length about the concept of Constituent

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[5] Janhit Abhiyan v. Union of India, 2020 SCC OnLine SC 624.

[6] Martin Loughlin, *The Concept of Constituent Power,* CRITICAL ANALYSIS OF LAW WORKSHOP, UNIVERSITY OF TORONTO, (2013), https://www.law.utoronto.ca/utfl_file/count/users/mdubber/CAL/12-13/Loughlin-Paper-Constituent%20Power.pdf .

Power. Interestingly enough, none of them make a reference to Jean Jacque Rousseau. He was the first person to talk about Constituent Power.

Rousseau is associated with the idea of *General Will* which is defined as the common will of the people. For he was of the opinion that if public truth is to be reached then it can only be reached democratically, meaning thereby that an individual in a society should subject himself only to those laws to which he agrees. In other words, they are the authors of the law that governs them. They are free in real terms (where in obeying the laws they are obeying themselves).

Thus, people find Rousseau to be a purveyor of direct democracy. In other words, every legislative action taken either has to be ratified by the citizens or it must emanate from the citizens. But if he is a proponent of direct democracy, then we may fail to separate ordinary legislative power from constituent power.

Rousseau, in his book *The Social Contract,* decried the idea of direct democracy and labelled it as *impractical,* but yet insisted on the direct ratification, for law to be legitimate. Thus, herein Rousseau's idea of the *law* assumes importance. Thus, the readers must be cautioned that this *law* shall not be confused with the general conception of law that is harboured. For him rules directed toward particular actions are general rules but now *law.*

Rousseau held that: 'law considers actions in abstract and is addressed to a body of nation'. Thus, it is clear that rules that seek to regulate the actions of individuals are not *law* as envisaged by Rousseau. *Law* according to him are the conditions of civil association and it is a political fact on which the existence of society's social order hangs.

Laws are something "close to what we would call constituent principles of the political society"[7]. *Law* is something that lies outside the domain of governmental works and relates to the political organization of the State.

Thus, herein the distinction between legislative and executive power is imperative for understanding Rousseau's conception of Constituent Power. Most thinkers construe Executive Power to be defined as the power of execution of laws and maintaining everyday civil affairs. A finer reading of Rousseau's work would highlight that the Executive Power of the government (according to him) would include some ordinary law (shall be read as *rule*) making and judicial determination with respect to the violation of such rules.

And Legislative Power as envisaged by him is the constituent power that was supposed to be exercised by *the people* and belonged to *the people*. Executive Power belonged to the government. This is the reason why Rousseau would say that every time a new legal rule is to be enacted, the sovereign need not appear. Only when a decision with respect to the political form and organization of the society is sought to be taken that the sovereign, that is, the people, exercising the legislative power, would appear. He said that- "the sovereign 'does not always show itself', that the people only made rare appearances in an already constituted commonwealth".[8]

Herein the legislative power of the sovereign is untrammelled and unlimited, capable of changing the polity and creating new institutions. Thus, we must understand that the government exercising the executive power is a constituted power, not

[7] Frank Marini, Popular Sovereignty but Representative Government: The Other Rousseau, 11, Mid. J. Pol. Sci., 451, 462-463 (1967).
[8] Jean Jacuque Rousseau, 'The Social Contract' in The Social Contract and the Discourses, 260.

capable of changing the *laws,* which can only be changed by the exercise of constituent power, exercised by *the people.*

2.2 Schmitt's Conception

As mentioned above, neither Seiyas nor Schmitt refers to the work of Rousseau. Carl Schmitt is clinical in his work for accentuating the difference between Constitution and constitutional laws. Schmitt tries to understand the concept of Constituent power by juxtaposing Constitution and constitutional laws. In chapter 8 of his book written under the rubric of *'The Constitution Making Power'* he discusses the meaning of Constitution-making power as 'the authority or the power to make a decision regarding the type and form of its political existence'. This conception presumes the existence of political unity. Laughlin in relation to this aspect, opines that: "Constituent power exists only when that multitude can project itself not just as the expression of the many (a majority) but – in some senses at least - of the all (unity)."[9]

A Constitution, formulated by the exercise of Constituent power is not valid because it is in consonance of a *just norm* it is valid because it stems from a politically willed act of *the people* (having political unity) with respect to the political form of the social order. Such *'will'* of a group having political unity is the basis of the validity of the Constitution. We may here refer to Dieter Conrad for better apprehension of the validity of Constituent Power:

> *"The very essence of the concept is that an exercise of the constituent power does not depend for its validity either on its legality or illegality in terms of the pre-existing order, but entirely on the positive character as an act of self-*

[9] Supra note 6.

> *determination, i.e. a decision which can in a real sense be attributed to the authorship of the citizenry as a whole."*[10]

Thus it has to be borne in mind that, if the 'will' of 'the people' is the sole basis of the Constitution then, the arrival of the new Constitution would change 'the people' into the 'subject' of the new Constitution. Thus the 'will' is the reason why 'the subject' came into existence, therefore the subject can never (who are vested with the Constitutive Power) change 'the will' (a difference between the people and the subject is sought to be struck).[11]

Thus, the political will would always remain above the Constituted bodies. Every conflict related to the foundations of the Constitution or the political foundations must be solved by the *will* of *the people* by the exercise of the Constitution-making power.

2.2.1 Nature of the Will or the Constituent Power

At this juncture some discussion must be made with respect to the nature of the *will.* The *will* that is the basis of the Constitution-making power is unlimited and untrammelled, uninhibited by anything. Schmitt holds-

> *"All constitutionally constituted powers and competencies are based on the Constitution-making power. However, it can never constitute itself in terms of constitutional law. The people, the nation, remain the origin of all political*

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[10] Dietrich Conrad, Constituent Power, Amendment And Basic Structure Of The Constitution: A Critical Reconsideration 94 (1970).

[11] For here we may try to understand the difference between Constituent Power and Constituted Power. The latter is the result of the exercise of the former. Besides this, for better clarity, it is stated that Constituted Power give rise to Constituted bodies such as Parliament which are limited (in terms of their power) in nature. In other words, their power is restricted by the Constituent Power itself which is visible from the fact that such a constituted body is placed in a legal setup with a limited mandate for example *lawmaking* as opposed to constitution making. This Constitution vests authority in the constituted authorities to legislate, adjudicate and govern in the interests of the group. By limiting, channelling and formalizing these competences, the Constitution itself becomes an instrument of power-generation.

> *action, the source of all power, which expresses itself in continually new forms, producing from itself these ever-renewing forms and organizations. It does so, however, without ever subordinating itself, its political existence, to a conclusive formation."*[12]

Also, in order to understand the precise nature of Constituent Power, we may profitably refer to Joel Colón- Ríos's work *Constituent Power and the Law,* wherein he opines that-

> *"Even though the sovereign had an unlimited legislative (constituent) power, such a power is not correctly described as arbitrary. In fact, as noted earlier, the sole function of the sovereign was to adopt laws that applied to the whole community. A sovereign who engages in functions that have a particular object (e.g. a Constituent Assembly that adopts ordinary laws or engages in adjudicative or executive functions) is not acting as a sovereign but as a government (a situation that would be present in a democracy and that for Rousseau was at the very least inadequate) In the same way, a government that acts as a sovereign is an illegitimate one: absolute monarchies were not legitimate, at least not when attributed with the power of altering the law. Put in a different way, the people, in the exercise of their constituent power, can create any Constitution it wants (that is to say, can establish any form of government) but can never give away its legislative power. And even if, as we will see below, the original establishment of a Constitution may require the intervention of an individual Constitution-maker (a gifted law-giver, of which Lycurgus provided one of the best examples), the Constitution would*

[12] Carl Schmitt, Constitutional Theory 128 (Translated by Jeffrey Seitzer, Duke University Press Durham and London 2008).

> *not become valid 'until it has been put to the free vote of the people.*[13]

What we can conclude from the perusal of the aforementioned paragraph is that Constituent Power is unlimited in nature and it is the Sovereign, that is, *the people* which is vested with Constituent Power. The moment there is some restriction or mandate attached with the exercise of power then such a body is not *the sovereign*, thereby not exercising the Constituent Power. The Parliament of India is there with the limited purpose of making laws for the country and derives its power from the articles of the Constitution[14]. Thus, since it is limited in its mandate it cannot be called the sovereign, exercising Constituent Power. Most importantly, Constituent Power is untrammelled to such an extent that it can choose any form of political existence. It can choose to exist in any form be it a democracy or a dictatorship. Lastly, such a can never be lost or exhausted. It would be ludicrous to assume that *the people,* the sovereign, would lose its power to constitute the political fact of the society, once it has exercised it. Such a power is inexhaustible and imperishable.

2.2.2 Distinction between Constitution and Constitutional Laws

Thus, herein the distinction between the constitutional laws and Constitution, perforce, becomes really important. Constitution is the *will* of the people with respect to the political form of their existence. However constitutional laws are the ancillary law brought in, framed after the arrival of the Constitution, by which the subjects govern themselves.

The Constitution is for *the people* who may exercise its Constituent power, if any question arises as to the political

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[13] Joel Colón- Ríos, Constituent Power and the Law 44-45 (Oxford University Press 2020).
[14] Supra note 11.

foundation of the social order, whereas the constitutional law is for *the subject* where they will exercise their power with respect to the normal functioning of the laws that are required for effective implementation of the vision envisaged by the *will.* Thus, how the Constitution can be changed cannot be provided by the constitutional law, such a decision can only be taken by *the people* by virtue of the exercise of their *will.* Thus, we may see that Basic Structure, that is, the Constitution is not amenable to change by the exercise of power under Article 368 (which in philosophical terms provides only for the amendment of Constitutional Laws).

Parliament is Constituted body created in the exercise of Constituent power. What it does in the exercise of its legislative power is that it creates constitutional laws which are to supplement the Constitution. Thus, Schmitt holds-

> *"That the Constitution can be changed should not be taken to mean that the fundamental political decisions that constitute the substance of the Constitution can be eliminated at any time by Parliament and be replaced through some other decision. The German Reich cannot be transformed into an absolute monarchy or into a Soviet republic through a two-thirds majority decision of the Reichstag"*[15]

3. Some Influential Ideas Relating to Constitutional Identity

Having discussed some of the preliminary observations regarding the concept of constituent power we shall now move on to analyse some of the ideas related constitutional identity rendered by some of the legal thinkers.

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[15] Priyadarshi Jha, '*Basic Structure and Constituent Power'*, LIVE LAW, (May 20, 2023, 9:23 PM), https://www.livelaw.in/columns/basic-structure-and-constituent-power-220076 .

3.1 Jurgen Habermas

Habermas connects the idea of nation with its commitment to various constitutional principles such as human rights and democracy. Further, he engages with an idea of what he refers to as *'Constitutional Patriotism'.* Constitutional Patriotism is nothing but political attachment to the values and norms of a Constitution. Jan Werner in his article[16] explains Habermas's idea of *Constitutional Patriotism* in the following words:

> *"It argues that the purpose of Constitutional patriotism, as a set of beliefs and dispositions, is to enable and uphold a liberal democratic form of rule that free and equal citizens can justify to each other. The object of patriotic attachment is a specific constitutional culture that mediates between the universal and the particular, while the mode of attachment is one of critical judgment. Constitutional patriotism results in a number of policy recommendations that are clearly different from policies that liberal nationalists would advocate."*

Further, he maintains the identity of a Constitution is shaped by a context. All the Constitutions replete with the same universal ideas result in having a different identity is because of their different culture and constitutional history.

3.2 Rosenfeld's Idea

He is of the opinion that Constitutional Identity seeks to create an imagined society with an imagined self-image. Rosenfeld's understanding of the concept of constitutional identity has three facets. *Firstly* the fact of having a Constitution is itself a marker of identity, that is, polity having a Constitution differs from the one not having it. *Secondly*, for identity one may refer to the content of the document. *Thirdly,* the context in which the

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[16] Jan-Werner Müller and Kim Lane Scheppele, *Constitutional Patriotism: An introduction,* 6 Int. *Journ. Con.L.*, 72, 77 (2008) https://doi.org/10.1093/icon/mom037.

Constitution is supposed to operate will have a definite impact on the identity of the Constitution.

He accedes to the argument that the national identity of a country is different from constitutional identity. However, a question is raised as to how the nation's identity is to operate within a constructed framework, for the nation's identity cannot be extinguished. He answers it by saying that all such identities will be allowed to properly flourish and function within the bounds of the constitutional setup. Reconciliation is sought to be struck between the various identities that are at play in the society and the constructed identity. Such an abstraction will engage in a tussle with all the other identities, some will be allowed to function and some will remove. Constitutional Identity is found in the text of the Constitution, identified and brought forth by the Judiciary.

He further construes the aforesaid idea in the following way-

> *"that a Constitution acquires an identity through experience, that this identity exists neither as a discrete object of invention nor as a heavily encrusted essence embedded in a society's culture, requiring only to be discovered. Rather, identity emerges dialogically and represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as a determination of those within the society who seek in some ways to transcend this past."*[17]

3.3 Jacobsohn's Idea

Jacobsohn's idea of constitutional identity has to be understood in the context of Constitutional Change. He describes identity as a representative of aspirations and commitments which are to be understood in the context of the past of the nation. In

[17] Michel Rosenfeld, Constitutional Identity, The Oxford Handbook Of Comparative Constitutional Law 756-757 (Oxford University Press 2014).

simpler terms, constitutional identity is a negation and reaction to the injustices of the past and it seeks to create a future that is diametrically opposed to the construction of the past.

3.3.1 Identity that Matters

He discerns *'identity'* by referring to the ideas of Thomas Reid and Charles Taylor. Admittedly, they were defining identity concerning an individual, not with reference to the State or the Constitution. Nonetheless, it could give us some idea as to how to go about pursuing this idea. Taylor understands identity as something to be understood in a context and background. This context and background indubitably affect the identity of an individual. To remove religion, society, and culture from the process of understanding identity would be to remove what matters. In other words, the self develops an identity while it dialogically interacts with its background which constitutes of religion, culture, and society.

For understanding *identity,* he also relies on the Scottish philosopher Thomas Reid. His idea is for an identity to be there must be *"Continued uninterrupted existence".* Further, he refers to James Madison who was of the opinion that for a Constitution to establish an identity it has to have not only a text describing principles and rules but also an actual constitutional practice materializing such words into deeds.

3.3.2 Burkean Idea of Constitutional Identity

Edmund Burke one of the supporters of the American Revolution was of the view that the prejudices of the community render an identity to a Constitution. The core of the Constitution is constituted by the prejudices of the community that it seeks to govern, which is nested in the principle of inheritance known as prescription. This prescription has two specific features:

3.3.2.1 Continuity

Like Reid, Burke too emphasizes on the need of continuity, wherein the identity of a Constitution develops as it passes

through ages and times and after interacting with events of political and social relevance. Thus, identity discloses itself only after the passage of time and when it interacts with its surrounding. Constitutional Identity is nothing but an assortment of the changes that occur in a society with its natural progression.

3.3.2.2 Discovery

It simply emphasizes on the fact that Constitutional Identity should be *discovered.* But before proceeding further it must be stated that Burke fiercely opposed French Revolution. Thus, he yearns for the intactness of the social order. So, for him, a discovery was limited only to discovering an identity that is already there in society.

Burke's understanding of Constitutional Identity is very much visible from his speech given in the British Parliament relating to the impeachment of Warren Hastings. One of the defences taken by Hastings was that basic rules constituting the societal order of the Great Britain did not apply to India. Burke repelled that statement by saying that the bedrock of the Britain's system was resting on the immutable principle of natural justice. The rule of law that was the deeply rooted in the Constitutional Culture of Britain was a part of its inheritance. In other words, there are some laws of justice (eternal in nature) inherited by Britons as a part of their tradition which signifies the identity of the British Community. Some of the principles such as the Rule of law are deeply rooted in the institutional framework of the Great Britain which forms part of their identity which cannot be tinkered with even in far-off colonized territories.

He exclaimed:

> *"My lords, you have now heard the principles on which Mr. Hastings governs the part of Asia subjected to the British Empire. Here he has declared his opinion that he is a despotic prince; that he is to use arbitrary power; and, of*

> *course, all his acts are covered with that shield. "I know," says he, "the Constitution of Asia only from its practise. My Lords, the East India Company have not arbitrary power to give him; the King has no arbitrary power to give him; your Lordships have not; nor the Commons, nor the whole Legislature. We have no arbitrary power to give because arbitrary power is a thing which neither any man can hold nor any man can give. No man can lawfully govern himself according to his own will; much less can one person be governed by the will of another. We are all born in subjection all born equally, high and low, governors and governed, in subjection to one great, immutable, pre-existent law, prior to all our devices and prior to all our contrivances, paramount to all our ideas and all our sensations, antecedent to our very existence, by which we are knit and connected in the eternal frame of the universe, out of which we cannot stir."*[18]

Admittedly Constitutional Identity is a constructed identity that may more often than not be at variance with the identity of the society. Additionally, a construction is sought to be imposed on the existing identity. Indubitably, there exists a perennial tension between the society and the Constitution. So, Monika Polzin is right when she says that-

> *"However, constitutional identity is nothing more and nothing less than a constructed reality that can be regarded as a constitutional state's restless soul. It exists only as a constructed, simplified, imagined reality that will most likely also be contested and subject to change. Constitutional identity and the reliance on it in particular by national courts should therefore not be regarded as something sacred and absolute that can be compared to*

[18] Edmund Burke's Speech on the Impeachment of Warren Hastings, https://www.ourcivilisation.com/smartboard/shop/burkee/extracts/chap12.htm (Last visited May 22, 2023).

an imagined stable heart. Instead, constitutional identity should be treated with caution."

4. Stitching the Idea of Constituent Power With Constitutional Identity- Basic Structure and Its Guardian

Having explained the rudimentary concepts, the ground is ready for further deliberations relating to the Doctrine of Basic Structure. Since inception, thinkers like Rousseau and then Schmitt categorised Constituent and Constitutive Power differently, where the former resides in *the people* and the latter is vested in (a limited fashion) in the different wings of the State. The idea of *law* as enunciated by Rousseau vividly captures the concept of Constituent Power vested in *the people* that are used to define the political foundation of a given society. As mentioned above, Carl Schmitt defines the Constitution-making power that is vested in *the people,* as the power to define the political form of the social existence.

The concept of Constitutional Identity, as posited by Jacobhson, is best comprehended within the framework of constitutional change, specifically, the amendments made to the Constitution. Based on the philosophy of Thomas Reid, it is evident that an identity *(must be understood as Constitutional Identity)* would possess *continued uninterrupted existence,* thereby exhibiting a certain degree of permanence. The Basic Structure of the Constitution represents the enduring and unchanging essence of the Constitution's identity. Any change that would undermine the fundamental principles of the Constitution would have a profound impact on the functioning of the polity.

Jacobson's allusion to Charles Taylor is pertinent in suggesting that the formation of identity occurs through its interaction with the surrounding context. The Constitution was attributed with an identity through the application of Constituent Power. However, this identity is revealed only, in the event of a particular dispute that pertains to the fundamental political decisions of the

society. Therefore, it is evident that the disclosure of identity occurs exclusively through legal proceedings, in which the Judiciary assumes the role of the ultimate authority to ascertain whether a specific aspect of the Constitution, constitutes an integral component of the Basic Structure. It is noteworthy to mention that the Constitutional Identity, which constitutes the fundamental characteristic of a Constitution, is a matter of discovery (we may recall the idea of *discovery* given by Burke). The determination of whether a particular feature of the Constitution constitutes an element of the Basic Structure is made by the Constitutional Courts, as it were.

Stated differently, the determination of whether a particular aspect of the Constitution constitutes the part of the Basic Structure or the identity of the Constitution necessitates an examination of the potential harm that would be inflicted upon the entire constitutional structure, were that aspect to be eliminated.

Thus, when Constituent Assembly sat to draft the Constitution for India, they chose to stick to a political form, for the society which was democratic in nature and adorned by the principle of equality, separation of powers, secularism etc. These were some of the basic political facts or decisions on which the society hanged. These political facts or decisions as to the form of existence constituted the identity of the Constitution which was not amenable to change. Therefore, in the exercise of its constituent power, a particular identity was ascribed to the Constitution of India. Now keeping in mind, the difference between Constituent and Constituted Power, it is clear that such an identity was given to the Constitution only by the exercise of Constituent Power and the Constitution that came into being was a repository of Constitutive power. Thus, Parliament can never tinker with the identity of the Constitution. This gives us a philosophical understanding of the Doctrine of Basic Structure of the Constitution which is unchangeable by a transient majority.

Thus, now if one carefully analyses the Basic Structure doctrine the reasoning of the judgment would appears to make sense. Herein when the people sat to frame the Constitution for India, exercised their constituent power that is they made a political decision with respect to the foundation and form of the state they wanted to create where the State would be governed by the Rule of Law, Separation of Power, Secularism, Republicanism etc. Such a State with all these attributes was to govern the subjects of the newly framed Constitution. As expatiated above it is clear that decision with respect to the political form of the social order or the state (Such as rule of law, separation of power) was taken by the people for the subject who were to be governed by the new Constitution. Thus, the Parliament, which is vested with constituted power, cannot change the basic feature of the political foundation of the state such as Rule of law, Separation of powers because such decisions fall in the realm of the Constituent power, left exclusively to be exercised by *the people.*

Here we may refer to the ideas of Gary Jacobsohn in his Article where he argues that identity which is ascribed to a Constitution, is a political fact on which a society hangs, is developed in a social context:

> *"Consider the debate over secularism in India. The Indian Con was adopted against a backdrop of sectarian violence that was the latest chapter in a complex centuries-old story of Hindu-Muslim re on the Asian subcontinent. Much of that history had been ma peaceful coexistence; nevertheless, the bloodbath that accompanied Partition reflected ancient contestations and insured that the communal harmony would be a priority in the Constitution process. But it was not the only priority. If not as urgent, then as important, was the goal of social reconstruction, which, as argued elsewhere, could not be addressed without constitutional recognition of the state's interest in the 'essentials of religion'. So religion's penetration into the fabric of Indian life, and so historically entwined was it in*

> *the configuration of a social structure that any reasonable standard grossly unjust, that the framers' hop democratic polity meant that state intervention in the spiritual could not be constitutionally foreclosed. The design for secularism India required a creative balance between socioeconomic reforms could limit religious options."*[19]

For this Jacobsohn refers to the case of *S. R. Bommai v. Union of India*[20], wherein the Court affirmed the central government's power to remove the elected governments in three states due to their purported inability to uphold and adhere to the constitutional obligation of secularism. The Court concurred that the aforementioned governments had failed to act "in accordance with the provisions of the Constitution" by enforcing emergency powers as stipulated in Article 356. This discussion helps us to explicate the idea that *identity* develops in a context. The environment, prevailing in India, after the demolition of Babri Mosque, impelled the identity (of secularism) to re-assert itself by the medium of Constitutional Courts. In other words as and when the situation came, the Court was vested with the duty (*via device of Judicial Review)* to see whether or not the prevailing situation and turmoil warrants interference, from the identity of the Constitution.

Same was true for, *Kesavananda Bharati case* and *Indira Gandhi Nehru*[21]*,* wherein the political turmoil in the country, bordering on tyranny, afforded an opportunity to the Judiciary to visit the basic political foundation. An attempt was made by the Judiciary to check as to what were some of the most important political facts on which the society hanged and whether certain actions (in the forms of amendments passed repetitively by the government either to ride roughshod or to annul court decisions) had the potential to change such political

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[19] Gary Jeffrey Jacobsohn, *Constitutional Identity,* 68, REV. OF POL. 361, 379 (2006).
[20] AIR 1994 SC 1918.
[21] 1976 (2) SCR 347.

facts. These opportunities helped the judiciary to assert the identity of the Constitution which were not amenable to change by the exercise of Constituted power by the Parliament. This brings us to the final leg of the paper, which relates to the role of Constitutional Courts in a democracy.

For that we may refer to Hans Kelsen's idea on the role of Constitutional Court in Democracy. The Kelsenian framework, which featured an independent constitutional adjudicator from the regular judiciary, was a relatively new concept in nations that underwent oppressive Fascist and Nazi regimes. Prior to this, the majority of Europe regarded constitutional oversight as incongruous with Parliamentary democracy and the unified state. Enver Hasani[22] while discussing the nature of the Constitution opines that-

> *"The point of the Kelsen model (for Constitutional Courts) is simply to maintain the Constitution as an inalienable act, something not to be subject to the will of any majority or even the government, but rather to codify certain fundamental values rather than norms."*

This shows us that in order to protect the identity of the Constitution or the basic structure, we need an independent Constitutional Court vested with the power to check, the validity of the amendment passed by the legislature and whether or not the amendment tinker with the identity of the Constitution.

For this we may refer to the idea of *Tribunate* expounded by Rousseau in his work *Social Contract*. He begins his discourse by maintaining that executive power of the government shall be exercised so as to maintain *the laws* and *the constituent power* of the sovereign, not to alter it. Thus, in order to protect the

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[22] Enver Hasani, Judicial Review of Democracy- Maintenance of Democracy as a Functionalist Mission in the Jurisprudence of the Constitutional Court of Kosovo, Südosteuropa, 530, 534 (2020) https://www.degruyter.com/document/doi/10.1515/soeu-2020-0036/pdf .

sovereign and its constituent power, he proposed the establishment of court called *Tribunate,* which will be vested with the power to repel the encroachment, on the constituent power, made by the government of the day.

This was a measure was recommended to protect the Constituent Power against Constituted power. Such a tribunate was not to be deemed to be a part of the executive. The primary function of the tribunate would be to curtail the regular governmental authority, rather than the legislative (constituent) power of the sovereign populace. The ultimate objective was to avert the disintegration of the state, which transpired when a ruler fails to govern the state in conformity with the laws and seizes the supreme authority.

5. Conclusion

The main conclusion of this chapter can be expressed as in the following words. The development of Constitutional Identity within a democratic society is a consequence of the utilization of Constituent Power that is bestowed upon the People, as opposed to constituted power that is vested in the State subsequent to the exercise of Constituent Power, such as the Parliament. This identity is considered to be unalterable and permanent and has been recognized by the Supreme Court of India as the Basic Structure of the Constitution. The identity in question is resistant to amendment done by a constituted power, simply, for the reason that the exclusive authority of the Constituent Power to effect changes to the Constitution's identity is vested in *the people*, rather than the Legislature.

CHAPTER 17

24TH CONSTITUTIONAL AMENDMENT ACT, 1971: A CRITICAL ANALYSIS

Prof. (Dr.) C. P. Gupta*

Ms. Kavita Kumari**

1. Introduction

> *"An unamendable Constitution is the worst tyranny of time or rather very tyranny of time."*
>
> -Mulford[1]

As the fundamental law of the nation, a Constitution holds legal authority over both the governing bodies and the citizenry. It fulfils a multitude of roles within a contemporary welfare society. One potential function is to act as a repository for a collection of fundamental political values within a given society. A Constitution must embody these principles by prohibiting state intervention in matters of religion and establishing procedures that require the government to prosecute individuals for criminal offences only after a fair trial in which the defendant is afforded legal representation.

In a contemporary welfare democracy, the legislature, executive, and judiciary hold equivalent positions in terms of their constitutional obligations. The allocation of authority between organs of government is subject to constant flux, as each entity vies for supremacy and strives to fulfil its constitutional duties more effectively. Conversely, modifications to a Constitution could potentially stem from self-serving or factional objectives. Given that a Constitution establishes the regulations of the

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[1] Mulford, The Nation p.155 quoted by Dr. Ashok Dhamija's 'Need to Amend a Constitution' 2007, p 12.

political sphere, it is plausible that those in authority may be inclined to modify these regulations in order to prolong their stay in power, safeguard their status, marginalize opposing factions or minority groups, or restrict civil and political liberties. The aforementioned alterations possess the potential to diminish, or even subvert, the principles of democracy.

According to Harold J. Laski, the field of law experiences both periods of transformation and periods of preservation. It is not a static system of timeless regulations that exist beyond the constraints of temporal and spatial contexts. The degree of respect that one can attain is determined by the level of justice that one embodies. The ability to embody ideals of justice is contingent upon one's deliberate endeavour to respond equally to the broadest range of demands that one encounters.[2] For a Constitution to be deemed as dynamic and progressive, it is imperative that it possesses the ability to adjust, display flexibility, and remain adaptable. The purpose of establishing a mechanism for amending the Constitution is to address potential challenges that may arise during the implementation of the Constitution in the future. There is no particular age group that possesses a dominant paradigm of intellect, nor is any age group entitled to impose restrictions on future generations in terms of shaping governance to suit their own interests. In the hypothetical scenario where no provisions were made, the populace would be left with no recourse but to resort to drastic measures such as revolution in order to effect changes to the Constitution.

It is worth noting that, similar to other written Constitutions, the Indian Constitution includes provisions for amendment as outlined in Article 368. The provision in question confers upon the Indian Parliament the authority to exercise its constituent power to modify the Constitution through means of addition,

[2] Krishan Keshav, Constitutional Law 280, (Singhal Publications, 2016).

alteration, variation, or repeal of any provision, in accordance with the procedure prescribed under the relevant Article.[3] The initiation of a constitutional amendment requires the introduction of a Bill with a specific purpose in either House of Parliament. The Bill must be passed by both Houses with a majority of the total membership and a minimum of two-thirds of the members present and voting. In the event that a proposed amendment by the Parliament results in any alteration that affects the States, it is mandatory for the amendment to receive acceptance from the Legislatures of no fewer than fifty percent of the States through a resolution passed by said legislatures. Only then may the amendment be presented to the executive head for their concurrence. Upon completion of this process, the Bill is submitted to the President, who is required to provide his assent to the bill. The Constitution has been amended and will now remain in effect. Upon initial examination, it appears that Article 368 confers unrestricted and absolute authority without any limitations or exemptions. Constitutions must be adaptable to societal shifts and evolving values, while also safeguarding against impulsive or insufficiently deliberated alterations that may have immediate effects.

2. Amendment – Conceptual Analysis

The entirety of the natural world, ranging from the most minuscule entities to the grandest, including but not limited to particles of sand and celestial bodies such as the sun, as well as living organisms spanning from Protista to human beings, is characterized by a perpetual state of emergence and dissolution, an unceasing state of flux marked by constant movement and alteration.[4] Article 368 confers upon the Parliament the power to modify the Constitution. The etymology of the term 'amendment' can be traced back to the Latin word '*amendere*', which denotes the act of rectifying or altering any error or

[3] Constitution of India Art. 368.

[4] Available at https://www.marxists.orearchivehnancAvorks/1883/donlch01.htm on (2nd April 2023 at 12:46pm).

mistake. According to Black's Law Dictionary, an amendment is a formal modification or addition that is suggested or implemented in a statute, construction, pleading, order, or any other instrument. It involves making changes through the addition, deletion, or correction of text, particularly in the alteration of wording.[5]

There exist two distinct approaches to the process of amendment, namely formal and informal. The concept of informal amendment is manifested through conventions and other means, whereas formal amendment is observed in nations with a written Constitution, such as India and the USA. The latter provides a mechanism for amending the Constitution through the interpretation of the judiciary. The authors of the Constitution designed the document to be adaptable to evolving circumstances and the nation's development. The aforementioned factors of a socio-economic and political nature that are present within our nation have been incorporated into the process of amending the Constitution. The Constitution of our country exhibits a combination of rigid and flexible characteristics, as it includes an amendment process that has been influenced by the model used in South Africa. The political system in question exhibits a combination of the characteristic inflexibilities and adaptabilities observed in prominent democratic nations worldwide:

1. The provisions that hold lesser significance can be amended through a process similar to the passing of regular legislation in Parliament.
2. According to Article 365, provisions that are deemed significant and essential necessitate a special majority.
3. According to Article 368, provisions that affect the nation as a whole or a majority of states, ultimately impacting

[5] Garner, 'Black Law Dictionary', 8th Edition, p.89.

the federal character of the country, must be ratified by over 50% of State Legislatures.

2.1 Power and Procedure for Amending the Constitution

Article 368 of the Constitution provides for the power of Parliament to amend it and the procedure thereof. The process of amending the Constitution has set it apart from other written Constitutions, as it is comparatively less rigid. Therefore, it can be classified as possessing both rigid and flexible properties. Certain components may be subject to more straightforward modifications, while others require adherence to a specific protocol. The Indian federation is distinct from others in that the states do not hold a substantial role in the broader context of this issue. In the event of ordinary legislative procedures, when both the Lok Sabha and Rajya Sabha encounter an impasse, a joint session is convened. In the event of a constitutional amendment, its passage is contingent upon the agreement of both chambers, and there exists no mechanism for resolving a stalemate in such a scenario. The amendment of the Constitution can be achieved through three distinct methods. The Constitution offers two methods for its amendment.

1. The initiation of a constitutional amendment is limited to the introduction of a Bill with the specific purpose in either house of Parliament. The amendment process requires the passage of the Bill in both houses. The decision shall be made by a majority of the total membership of the house.
2. According to the constitutional amendment process, a bill must be presented to the President for approval by a two-thirds majority vote of the members present and voting in the respective house.
3. Upon the President's assent, the Constitution shall be amended in accordance with the provisions of the Bill. Certain provisions necessitate a simple majority for amendments.

The ordinary lawmaking process has the capacity to amend specific provisions, with the majority of provisions being amendable through this procedure.[6] Several provisions of the Constitution contain ambiguous language regarding the ability of Parliament to enact ordinary legislation to address current circumstances. It is incumbent upon States to assume an active role prior to the enactment of legislation by Parliament. The potential disagreement between the Parliament's amending power regarding Art. 3, which pertains to the reorganization of States, may necessitate modifications to the First and fourth Schedules by the Parliament in order to facilitate the passage of the legislation. Prior to enacting this legislation, it is imperative to consider the perspectives of the impacted States.

2.2 Article 368 and its Amendment:

The Constitution (Twenty-fourth Amendment) Act of 1971 identified the very first amendment to Art. 368[7], with the intention of nullifying the implications of the ruling in the Golak Nath case. Prior to 1967, the highest judicial body had consistently upheld the view that no aspect of our Constitution was unalterable, and that Parliament possessed the authority to amend any provision of the Constitution, including Part III and even Article 368, by adhering to the requirements outlined in Article 368.[8]

In the case of Golak Nath, the majority opinion overturned prior rulings and determined that while Article 368 does not explicitly exempt Fundamental Rights outlined in Part III of the Constitution, these rights are inherently immune to the amendment process provided for in Article 368. As such, any amendment to these rights would require the convening of a new Constituent Assembly to create a new Constitution or

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[6] Article 368 of Indian Constitution, available at https://indiankanoon.org/doc/594125/, (27th April 2023) at 12:32pm.
[7] Golak Nath v. State of Punjab, AIR 1967 SC 1643.
[8] Shankari Prasad v. Union of India, AIR 1951 SC 458.

significantly alter the existing one. The Golak Nath's majority decision was replaced by the Constitution (24th Amendment) Act, 1971. This was achieved by adding element (4) to Article 13 and clause (1) to Article 368. Consequently, an amendment to the Constitution, passed in accordance with Article 368, will not be considered 'law' as defined by Article 13. Additionally, the validity of a Constitution Amendment Act cannot be challenged on the basis that it takes away or impacts a fundamental right. The Amendment in question elucidated that Article 368 pertains to the Parliament's 'constituent' authority, whereas Article 13 concerns its 'legislative' authority. Furthermore, the Amendment established that Parliament, in the exercise of its 'constituent' power under Article 368, possesses the ability to effectuate alterations to the Constitution by repealing any of its provisions, including Article 368 itself. This stands in contrast to the previous interpretation in Golak Nath's case, which held that Parliament could only make modifications to the Constitution. Clause (3) of Article 368 explicitly stipulated that Article 13 would not be applicable to any Constitution Amendment Act. The aforementioned proposal was reinforced by the inclusion of clause (4) into Article 13 through the identical Amending Act[9].

However, despite the intricacy of these modifications, they were unable to dissuade the Supreme Court from nullifying a Constitutional Amendment Act on a fundamental basis, as evidenced by the Kesavananda and Raj Narain cases. The case of *Kesavananda Bharati v. State of Kerala*[10] resulted in a majority of 7:6 in a Full Bench of 13, which invalidated the second part of Art 31C. This was inserted by the Constitution (25th Amendment) Act, 1971. The grounds for invalidation were that it sought to take away the principle of judicial review, which was deemed to be one of the 'basic features' of the Constitution.

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[9] *Supra note* 8.
[10] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 (paras 759, 850, 1174,1282,1395,1840, 1916, 2079).

It is noteworthy that the court held, overruling Golak Nath[11], that Fundamental Rights did not constitute one of such basic features as to fetter the amending power conferred by Art. 368. The majority of the Constitution Bench in the case of *Indira Gandhi v. Raj Narain*[12] invalidated clause 4 of Article 329, which was added by the 39th Amendment Act in 1975. The basis for this decision was that the clause modified certain fundamental aspects of the Constitution, such as the principle of "free and fair elections" (paragraph 213), the rule of law (paragraphs 343, 628), and the elimination of judicial resolution of election disputes without providing an alternative forum (paragraphs 213, 679).

Therefore, the 42nd Amendment Act incorporated clause (4) and (5) explicitly states that no Court has the authority to declare any Constitution Amendment Act invalid, even if there is procedural non-compliance with the requirements of Article 368. The Minerva Mills case saw the Constitution Bench of the Supreme Court invalidate clause (4) and (5) of Article 368. This was due to the provisions, which were introduced by the 42nd Amendment Act in 1976, attempting to exclude judicial review. This was deemed to be in violation of one of the fundamental features of the Indian Constitution, as established in the Kesavananda case. As long as this ruling remains in effect, the Supreme Court retains the authority to examine all Constitution Amendment Acts to determine whether they have had any substantive impact on the fundamental tenets of the Constitution or the procedural safeguards outlined in other provisions of Article 368.[13]

The Janata Government's attempt to revise the provisions of Article 368 and implement a referendum for modifying specific 'basic features' of the Constitution through the 45th Amendment

[11] Golak Nath v. State of Punjab, AIR 1975 SC 1643.
[12] Indira Nehru Gandhi v. Raj Narain. AIR 1975 SC 2299 (2396-71).
[13] *Id.*

Bill was unsuccessful due to their inability to attain a two-thirds majority in the Rajya Sabha. This was due to the combined opposition of the Congress (0) and (I) Parties. It is noteworthy that this effort was made by the Janata Government.

3. Judicial Interpretation on Constitutional Amendments

India underwent several phases during its more than two-century-long period of colonization. India possesses a substantial expanse of arable land and sustains a significant population engaged in the agricultural industry. Several land revenue schemes were implemented, with the Zamindari system being the most notable. The aforementioned had several limitations and constituted a significant contributor to instances of extortion and harassment within agricultural communities. Upon India's attainment of Independence, the abolition of Zamindari became a primary objective, in accordance with the historical and future socialist principles envisioned by the framers of the Constitution for the nation. In order to eradicate the issue of Zamindari, the Parliament implemented a range of land settlement and acquisition initiatives across the nation. The implementation of the scheme by the Union and various State Legislatures was met with significant opposition, as is common with most legislative actions. Despite providing relief to a large sector, the scheme was subject to numerous petitions alleging infringement of Fundamental Rights.

The inquiry regarding the amendment process under Article 368 was initially raised in 1951. The case of *Kameshwar Prasad Singh v. State of Bihar*[14] pertained to the Bihar Land Reforms Act and was deemed unconstitutional due to its infringement upon the Fundamental Right to Property, as outlined in Article 19(1)(f). This decision was reached by interpreting the interplay between the Fundamental Rights and Directive Principles of

[14] AIR 1951 para 91.

State Policy. In response to the ruling made by the Patna High Court, the Parliament enacted the First Amendment Act of 1951, which introduced Articles 31A and 31B. These Articles provide significant insight into the origin and development of the basic structure doctrine. Article 31A stipulates that the State's acquisition of property and corresponding compensation shall not be subject to legal challenge under Articles 14, 19, and 21. Article 31B was responsible for the establishment of the Ninth Schedule, which served as a safeguard for laws enacted by Parliament and subsequently included in the Ninth Schedule, thereby rendering them immune to legal challenges based on fundamental rights. In essence, it removed the judicial oversight of the State's requisitioning of property.

The First Amendment Act of 1951 pertained to the restriction of the right to property, which was previously safeguarded by Article 31. The case of *Shankar Prasad Singh v. Union of India*[15] was subject to challenge, and is notable as the initial instance in which the amendment provision of the Constitution was addressed. Subsequent to the inauguration of the Constitution, certain states such as Bihar, Uttar Pradesh, and Madhya Pradesh implemented agrarian land reform laws that resulted in the dispossession of a substantial portion of land holdings belonging to zamindars. Several individuals impacted by the matter subsequently submitted writ petitions in their respective High Courts. They made an allegation that their Fundamental Right had been violated. The Bihar Land Reforms Act, 1950 was declared null and void by the Patna High Court.

Subsequent to this event, the Constituent Assembly, which was then operating as a temporary legislative body, enacted the Constitution's First Amendment Act in 1951. Articles 31A and 31B have been incorporated to exclude land reform legislation from judicial review, thereby rendering it immune to legal

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

scrutiny. The creation of the ninth schedule through Article 31B has resulted in the safeguarding of laws contained within it from potential challenges before the Supreme Court based on allegations of infringement upon Fundamental Rights[16]. The First Amendment Act was contested on the basis that it allegedly infringes upon the rights granted by Part III, which are prohibited by Article 13(2) and therefore invalid. The assertion mentioned above was invalidated by the Supreme Court, which underscored that the authority to modify the Constitution, including Part III, is encompassed within Article 368. Additionally, the term 'law' in Article 13, Clause 2 does not encompass constitutional law, but solely pertains to ordinary law. The court deemed it necessary to employ the Harmonious Construction approach in order to reconcile the apparent contradiction between Article 13(2) and Article 368, which are both broadly worded and in conflict with one another[17]. This pertains solely to the regular legislation enacted through the exertion of legislative authority, and excludes constitutional amendments which are enacted through the exercise of constituent power. Consequently, the validity of a constitutional amendment remains intact even in the event of abridgment or revocation of any of the Fundamental Rights. From 1951 to 1964, there was a notable absence of discourse surrounding the amendment provision, until it was brought to the forefront during the case of Sajjan Singh.[18]

Article 31A was amended by the Constitution (Seventeenth Amendment) Act of 1964, resulting in the placement of forty-four statutes in the Ninth Schedule. The challenge was based on the assertion that it had an impact on the authority of High Courts as per Article 226. Moreover, it has been argued that the ratification of the 17th amendment by the States should have followed its passage by the Parliament. The aforementioned

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[16] *Supra note* 15.
[17] *Id.*
[18] I. C. Golak Nath v. State of Punjab, AIR 1967 SC 1643: 1967(2) SCR 762.

procedure is delineated in Article 368 and was not adhered to, thus rendering it susceptible to being deemed invalid.

The primary concern pertained to the potential invalidity of the 17th Amendment Act of 1964. The majority of a five-judge bench on the Supreme Court dismissed the argument by a vote of 3:2. The petitioners argued that the land reform provisions outlined in the challenged Act fall under the jurisdiction of State Legislatures as per Entry 18 of the State List in Schedule VII, and therefore cannot be legislated upon by Parliament. Additionally, it is stipulated by Article 245 and 246 that the Parliament is not authorized to enact any legislation pertaining to the laws of a State. The prevailing opinion held that the essential nature and character of the act was to safeguard specific land reform laws from being subject to infringement of the Fundamental Right. The petitioner's argument was dismissed as the objective was to assist multiple state legislatures in implementing agrarian reforms with utmost adherence. The observation was made that the impact on Article 226 was merely indirect and consequential, resulting from the 17th Amendment Act. The prevailing opinion was that it did not have any impact on Article 226.

The court reaffirmed its ruling in Shankari Prasad, which pertained to the interplay between Article 13 and Article 368. The assertion was made that the notion of fundamental rights being perpetual and unassailable was dismissed, and instead, the authority of the Indian Parliament to modify any and all aspects of the Constitution was upheld. The salient aspect to be noted in this instance pertains to the judges who dissented, specifically Justice Hidayatullah and Justice Mudholkar. Mudholkar J. asserted that while the majority may have differentiated between Article 13 and Article 368, it is imperative for the Indian Parliament to adhere to the principle that every Constitution comprises of certain fundamental or essential components that are not subject to amendment. The individual displayed reluctance in articulating their perspective regarding

the potential exclusion of constitutional amendment from the term 'law' as stipulated in Article 13(2).

According to Justice Hidayatullah, there exist certain guarantees in Part III that should not be treated lightly by a special majority. The Golak Nath case relied upon the argument presented by Hidayatullah J. to establish the principle of non-amendability of fundamental rights. Conversely, the Kesavananda case was founded on Mudholkar J.'s perspective regarding the fundamental features of the Constitution. The aforementioned dissenting viewpoints have provided a foundation for contesting the legitimacy of the First, Fourth, and Seventeenth Amendment Acts. An eleven member bench of judges issued a verdict with a split of 6:5. The petitioners, who were the next of kin of Henry Golak Nath, submitted a petition asserting that the Financial Commissioner's assessment of their land was erroneous and therefore contravened their Fundamental Rights as enshrined in Article 19(f) and (g) and Article 14 of the Constitution. A request was made to issue specific directives declaring that the three amendment acts in question are in violation of fundamental rights as previously mentioned.

The majority in the instant case overturned the rulings of Shankari Prasad and Sajjan Singh cases. The court determined that the power of Parliament to amend is restricted, and it is not authorized to revoke or curtail the Fundamental Rights enshrined in Part III. The rationale behind it was as follows:

1. The Article 368 confers solely procedural power to amend, while lacking substantive power. Article 248 contains the residuary power to amend, as it is not explicitly provided for in any Article or entry in any list.
2. The term 'law' has been expanded to encompass constitutional law, in contrast to prior rulings. Hence, any amendment to the Constitution that violates Part III would be deemed unconstitutional according to Article 13(2).

3. The term 'amend' connotes slight adjustments to existing provisions rather than significant or substantial changes.
4. Due to changes in Part III of the Constitution, which pertains to Fundamental Rights, it is necessary for the Parliament to convene a new Constituent Assembly.

The majority opinion asserted that Fundamental Rights are an integral component of the Constitution and cannot be violated. Furthermore, it was stated that there is no distinction between the legislative and constituent processes, and that the process outlined in Article 368 is not a constituent process. The doctrine of Prospective Overruling was implemented as a strategic manoeuvre to protect the Supreme Court from potential negative consequences resulting from the Parliament's authoritarian regime during that period. The aforementioned ruling stipulates that pre-existing laws cannot be contested, and only modifications that impinge upon any of the Fundamental Rights are subject to judicial review. Moreover, if the decision were to be implemented retroactively, it could potentially cause chaos and panic throughout the entire nation, given that the amendments in question pertain to agrarian reforms. The aftermath of the Golak Nath verdict resulted in the introduction of a private bill by a Member of Parliament Mr. Nath Pai in the Lok Sabha, aimed at nullifying the aforementioned judgment. Despite facing limited support, the 24th and 25th Constitutional Amendment Bills were enacted following the victory of the Congress party in the 1971 general elections where:

1. A new provision, namely clause 4, was incorporated into Article 13, stipulating that the legislation enacted under this Article shall not have any impact on any modifications made under Article 368.
2. New marginal heading, "Procedure for amendment of this Constitution," was replaced with a new one that reads, "Power of Parliament to amend the Constitution and Procedure thereof."

3. The addition of Sub clause (1) to Article 368 stipulated that Parliament, when exercising its constituent power, is authorised to amend any provision of the Indian Constitution through the means of addition, variation, or repeal, in accordance with the procedure outlined in Article 368.
4. The requirement for the President's assent was mandatory.
5. The addition of Clause (3) to Article 368 was intended to provide immunity from Article 13.

A writ petition filed by Swami Kesavananda Bharati, the chief of a mutt in Kerala, challenged the constitutional validity of the 24th and 25th Amendment Act in the case of *Kesavananda Bharati v. State of Kerala.*[19] After a period of sixty days, the bench of thirteen judges heard arguments from both sides and ultimately reached a decision on April 24th, 1973, with a majority of seven to six. The observation was made that Article 368 contains the power to amend. Moreover, it is argued that the provisions pertaining to the procedure of amendment are among the most crucial provisions of our Constitution. The opinions presented in the cases of Shanhari Prasad and Sajjan Singh regarding the power to amend were deemed correct, whereas the stance taken by Golak Nath was invalidated. It is now acknowledged by the court that a distinction exists between conventional law and constitutional law. The implication is that the power vested in Article 368 enables the abridgment of Fundamental Rights and other constitutional provisions. The aforementioned assertion does not confer boundless powers of amendment upon the Parliament, as it remains subject to the Doctrine of Basic Structure. Any amendment that undermines any fundamental characteristics would be deemed ultra vires. Some of the basic features as laid down in this case are as follows:

[19] Kesavananda Bharati v. State of Kerala AIR 1973 SC 1461.

- Supremacy of the Constitution;
- Republican and Democratic form of government;
- Secular character of the Constitution;
- Separation of Powers; and
- Federal Character of the Constitution.

This enumeration of characteristics is not comprehensive and will differ depending on the particular circumstances. The judiciary has the authority to interpret the Constitution as necessary to prevent any potential harm to its fundamental principles resulting from amendments to its core features.

In the case of *Raj Narain v. Indira Gandhi*[20], Section 4 of the 39th Constitutional Amendment Act of 1975 was examined. The government's actions can be categorised into three main areas. Firstly, it aimed to exempt the Prime Minister and other Union Officials from the typical legislative process. Secondly, it sought to invalidate the Allahabad High Court's decision that had declared Indira Gandhi's election to Lok Sabha as invalid. Lastly, it precluded the Supreme Court from exercising its power of judicial review to consider any appeals. The Apex Court has upheld the argument and ruled Section 4 as unconstitutional. The initial segment of Section 4 was deemed to contravene three fundamental aspects of the Constitution. The decision was invalidated based on the fundamental principles of democratic governance, the division of governmental authority, and the principles of fairness and impartiality. According to Article 329 clause (b), resolution of an election dispute shall be achieved through a judicial process, which shall be initiated by filing a petition with an authority designated by the Legislature in accordance with the law. The proposed amendment seeks to undermine a fundamental aspect of democratic governance, namely the conduct of free and fair elections, which is a crucial constitutional principle. This would be achieved through the

[20] 1972 SCR (3) 841.

modification of Article 329A, which would dilute the aforementioned article.

The potential destruction of the Separation of Powers was imminent due to the absence of a rational basis for the establishment of a privileged regulation governing the election of the Prime Minister. The electoral process has transformed the amendment process into a primarily political instrument, rather than one that is subject to the expertise of constitutional scholars and the unambiguous interpretation of the judiciary. The Act in question was deemed to be in violation of the fundamental principle of natural justice, known as "*audi alteram partem*," which requires that both sides be given an opportunity to be heard. The absence of a designated forum for the petitioner contesting the election of the Prime Minister has led to the conclusion that this represents a manifestation of authoritarianism. Consequently, the resolution of election disputes will be subject to the discretion of the legislature, as stipulated by relevant legislation. Such an action could potentially undermine the fundamental framework of the Constitution.

The principle of the rule of law was deemed a fundamental characteristic of the Constitution, as it was being contravened by the law that stipulated that the dispute resolution process must be immune from any form of challenge. Finally, it should be noted that the principle of basic features pertains exclusively to Constitutional Amendments and not to regular legislation. This is due to the fact that these two areas belong to distinct fields, with constitutional law being considered a higher law and ordinary legislation being limited to its specific enacted legislation. The court placed significant emphasis on the intention of the framers of the Constitution to establish a regulated rather than an unregulated Constitution, which has been observed to be the case in recent times. The Supreme Court's decision was imperative in order to restrain the Parliament's unrestrained authority, which was obtained

through the amendment of Article 329 and had marginalized the Judiciary, a crucial component of democracy.

In 1974, the Parliament passed the Sick Textile Undertaking (Nationalization) Act which pertains to the acquisition and management of ailing mills. The validity of an order issued under Section 18A of the Industrial (Development and Regulation) Act, 1951 was contested in the case of *Minerva Mills v. Union of India*[21]. The case primarily concerned the challenge of clauses (4) and (5) under Article 368, which were newly inserted by Section 55 of the 42nd Amendment Act of 1976. If these recently added clauses persist in their operation, the 39th amendment would be safeguarded from legal challenges due to its inclusion in the IX Schedule. The 42nd amendment has introduced modifications to the Preamble, specifically the inclusion of terms such as 'sovereign socialist secular democratic republic', with the aim of reinforcing the constitutional commitment to the unity and integrity of the nation. The primary purpose behind the insertion of these clauses was to render null and void the verdict delivered by the Supreme Court in the Kesavananda Bharati case.[22] Article 368, Clause 4 was designed to strip the courts of their authority to challenge any constitutional amendment. Clause 5 was designed to grant significant authority to Parliament in the exercise of constituent power, without any corresponding limitations. The Constitution conferred unrestrained authority upon Parliament, allowing for the possibility of nullifying any constitutional provisions.

The court ruled that the authority to demolish is not equivalent to the authority to modify. The authority to make amendments is a restricted power, and the Parliament is incapable of expanding this power through its exercise. Consequently, the Parliament is constrained from exceeding boundaries and

[21] AIR 1980 SC 1789.
[22] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

undermining fundamental and indispensable aspects of the Constitution. The decision rendered by the majority underscores the significance of fundamental rights in contemporary democracies, as they constitute an intrinsic component of modern societies. The statement posits that Part III and Part IV constitute the fundamental pillars of the Indian Constitution. Both of these components must be interpreted in a cohesive manner. The court has established a relationship between Part III and Part IV, whereby the achievement of Directive principles should not override Fundamental Rights. Both features of the Indian Constitution, namely, the judiciary and the executive, are crucial and hold great significance. Any action that disrupts or undermines the equilibrium between these two entities would be deemed a violation of the fundamental framework of the Constitution. The Indian Constitution's basic structure has been identified by the Supreme Court to include the following features:

- Limited power of Parliament to amend the Constitution;
- Harmony and balance between Fundamental Rights and Directive Principles;
- Fundamental Rights (Article 14 and 19 with relation to exercise of Article 31C); and
- Power of Judicial Review (with respect to clause 4 under Article 368).

The court also rendered clauses (4) and (5) null and void, thereby allowing Article 368 to function independently of them.

4. Conclusion & Suggestions

Over the period of time, the Constitution undergoes changes in response to evolving circumstances. The supreme law of a nation that applies to all individuals within its jurisdiction. The ability of a nation to adapt to changing times is crucial for its survival. The Indian Constitution has undergone more than 100 adaptations since its inception in 1950.

The evidence suggests that while a written legislation may be less inflexible in nature, it still falls short in comparison to the world's most ancient written Constitution. The Constitution of India exhibits a combination of rigidity and flexibility in its provisions. This concept has been formulated with consideration to the historical context of the nation, wherein over 565 fragmented and unstructured states were present during the period of attaining independence. India is a federal union comprising of states that are destructible, while the United States is characterized by indestructible states, similar to the indestructible union.

The framers of the Constitution, recognizing the significance of accommodating the requirements of a vast populace, demonstrated foresight by incorporating provisions for amendments to prevent the recurrence of previous errors. The provision for this amendment was implemented to incorporate global changes and maintain the nation's pace with other developed countries. The objective is to establish a society that prioritises the welfare of its citizens, even in the presence of diverse Diasporas, with the aim of attaining overall wellbeing and self-reliance. Despite the existence of significant disparities such as those based on religion, language, caste, and region, the persistence of India as a unified nation can be attributed to the foresight of its founding fathers. The clarity of this particular vision was obstructed by the Parliamentary action of self-serving as a judge to preserve the election of the Prime Minister. During the 1970s, there was an emergence of a totalitarian regime, and in response, the Indira Gandhi government employed various measures to maintain their hold on power. The prioritisation of a continuous and unbroken office has resulted in the neglect of regional concerns and the well-being of the populace. The situation involved the appointment of a Chief Justice of India who did not meet the traditional criteria for the position, and even surpassed a judge who had previously held the role. The attempted usurpation of the judiciary by the ruling government was not only imperative at the time, but also for future

generations who would have been negatively affected by the consequences of such actions. Hence, in the event that the judiciary transgressed a boundary, it did so with the intention of upholding the optimal outcome.

CHAPTER 18

THE STANCE OF "BASIC STRUCTURE" OF THE CONSTITUTION: IT'S RELEVANCE IN CONTEMPORARY INDIA

Prof. (Dr.) Mohammad Traiq*
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1. Introduction:

> *"A Constitution is an ever developing thing and is continuously ongoing as it embodies the spirit of the nation. The impact of the past enriches it now and makes the future richer than the present."*
>
> – Edmund Burke[1]

India is a "union of States", usually referred to as Bharat. It is governed by a Parliamentary system and is a "Sovereign Socialist Secular Democratic and Republic". The Constitution established a federal framework and a Parliamentary form of government with certain unitary characteristics. As per Article 79, there shall be a "Parliament consisting of President and two Houses *i.e.* the Council of States and the House of the People". The President who is the "Constitutional Head" of the Union's Executive shall exercise all powers and functions vested in him directly or indirectly. However, as stated in Article 74(1) of the Constitution, "the President shall perform his or her functions in accordance with the recommendations supplied by a Council of Ministers led by the Prime Minister".

The Constitution lays down the essential structure of governance, in accordance to people's choice to be ruled. It

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[1] Edmund Burke (1729 –1797) was an Anglo-Irish statesman, economist, and philosopher.

includes provisions for the executive, legislative, and judicial departments of government. The Constitution specifies each organ's duties in addition to its powers and also governs the relationship between those organs as well as of the government and the people.

The Constitution is an evolving instrument, not a fossil that may be altered as necessary to meet societal demands. All other law in the country is subordinate to the Constitution and every law made by the legislature therefore, must be in accordance with the Constitution. The three national goals established by the Constitution are: Democracy, Socialism and National Integration.

The Parliament and the State Legislatures are empowered to adopt laws within their prescribed ambit respectively. This power however, is 'not absolute'. The judiciary on the other hand, has the authority to rule on the constitutionality of all laws. If any provision of the Constitution is abused by a legislation enacted by Parliament or State Legislatures, the apex court had the right to declare the statute "unconstitutional and void". Notwithstanding, the draftsmen of the Constitution wanted it to be a flexible tool of governance rather than a strict blueprint. Hence, Parliament was entrusted with the "power to amend" the Constitution.

Although, the plain text of Article 368 of the Constitution gives the impression that Parliament's amending power is absolute and can change the entire document; in reality, the judiciary can put brake to the legislative enthusiasm of Parliament while doing so. With the intention of preserving the original ideals as envisioned by the Constitution-makers, the apex court pronounced that Parliament could not distort, damage or alter the basic features of the Constitution under the pretext of amending it.[2]

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[2] Venkatesh Nayak, *The Basic Structure of the Indian Constitution*, CONSTITUTIONNET, (June 05, 2023, 10:20 PM), https://Constitutionnet.org/vl/item/basic-structure-indian-Constitution.

The term "basic structure" finds no mention in the Constitution. The idea that the "basic structure" of the Constitution cannot be altered by the Parliament developed gradually through time and in diverse contexts with an objective that the essence of our democracy remains intact while simultaneously defending the rights of the people. The basic structure concept assists in the maintenance and preservation of the Constitution's spirit that came through the landmark *Kesavananda Bharati v. State of Kerala*[3] *judgment* in 1973. Since then, the Apex Court has functioned as the interpreter and adjudicator of all amendments made to the Constitution in order to keep the true spirit of the Constitution alive.

2. The Doctrine of Basic Structure

> *"The doctrine of basic structure is nothing but a judicial innovation to ensure that the power of amendment is not misused by Parliament. The idea is that the basic features of the Constitution of India should not be altered to an extent that the identity of the Constitution is lost in the process".*[4]

Because of the changing character of society, the Constitution has to be altered on a regular basis. A stalled Constitution is a substantial impediment to the nations' progress. In order to handle any issues 'we the people' may encounter in coming times, a provision for revising or modifying the Constitution was created, because time is not static; it always changes. For this changing nature, the Constitution provided for 'amending powers' to the Parliament of India otherwise an extra-constitutional means, such as war would have taken place if the Constitution was kept stagnant.

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[3] (1973) 4 SCC 225; AIR 1973 SC 1461.
[4] Kritika Goyal, *Basic Structure Doctrine,* CLEARIAS, (June 05, 2023, 10:25 PM) https://www.clearias.com/basic-structure-doctrine/.

The concept of 'basic structure' demonstrates the concept of 'constitutionalism' by preventing the governing majority's harsh actions from destroying the heart of the Constitution. Our democracy was saved by restricting constituent power; or else, the Parliament's unlimited authority would have turned India into a monarchy. The doctrine of basic structure helps in retaining the fundamental principles of our Constitution, which our founding fathers so painstakingly crafted. Further, it strengthens our democracy by explicitly articulating separation of powers in which the judiciary is independent of the other two institutions. Additionally, the Supreme Court's power has been substantially elevated, possibly making it the one of the most dominant court in the world.

A comprehensive summary of what the 'basic structure' of the Constitution comprised of is subject to judiciary's interpretation of the same on a case-by-case basis.

In *Kesavananda Bharati* case the 'doctrine of basic structure' was brought to life and it gained the limelight. It was held that the basic structure of the Indian Constitution could not be abrogated even by a constitutional amendment. The judgment, however, did not define the doctrine but enlisted some of the basic structures[5] of the Constitution.

In *Minerva Mills*[6] case, the judiciary had very loosely defined the basic framework by stating that Parliament has the authority to amend the Constitution, which was made with the utmost care by the founding fathers, whenever societal needs call for it. But it is to be remembered that the Constitution is a cultural

[5] The 'basic structure' of the Constitution as per CJI Skri held in Kesavananda verdict are: supremacy of the Constitution, unity and sovereignty of India, democratic and republic form of government, federal character of the Constitution, secular character of the Constitution, separation of powers and individual freedom.

[6] Minarva Mills v. Union of India (1980) 3 SCC 625.

heritage and its integrity and identity should not fall under the purview of questions.[7]

3. Evolution of the Doctrine of Basic Structure

In a long run, the concept of the Constitution's 'basic structure' has developed largely. The Apex Court has evolved the notion of basic structure *via* several influential decisions pertaining to this doctrine.

3.1 Position Prior to *Golaknath* Verdict

As early as 1951, there were disagreements about Parliament's authorization to alter/amend the Constitution, particularly the provision dealing with citizens' fundamental rights. Following independence, many laws were established in the States to alter tenancy and land ownership patterns. "*This was in accordance with the ruling Congress party's electoral promise of implementing the Constitution's socialistic goals contained in Article 39 (b) and (c) of the Directive Principles of State Policy, which required equitable distribution of production resources among all citizens and prevention of concentration of wealth in hands of a few*".[8] The property owners who felt betrayed by these laws filed petitions in the court. The courts refuted the land reform policies and determined that the impugned reforms were against the Constitution's fundamental right to property. In response to the unfavourable rulings, Parliament added these laws to the Ninth Schedule of the Constitution in 1951 and 1952, respectively, by means of the First and Fourth Amendments, rendering them immune from judicial review.

The amendment made in 1951 added the contentious Articles[9] to the Constitution. Article 31B created the Ninth Schedule,

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[7] Rachit Garg, *Basic structure of Indian Constitution*, IPLEADERS LAW SIKHO, (June 05, 2023, 11:00 PM), https://blog.ipleaders.in/basic-structure-of-indian-Constitution/.
[8] *Supra* note 5.
[9] INDIA CONST. art. 31A and art. 31B, added by The Constitution (First Amendment) Act, 1951.

broadly stating that "no law enacted under it may be challenged for violating fundamental rights as defined in Article 13(2) of the Constitution". And as per Article 13(2)[10], the Parliament may not enact legislation that restricts freedoms guaranteed by Part III; any such legislation that does so is invalid. In *Shankri Prasad Singh Deo v. Union of India*[11], a petition lied in the apex court challenging Articles 31A and 31B on the pretext of being violative of Part III of the Constitution and hence should be declared void. The Supreme Court held that the power to amend the Constitution including fundamental rights is conferred under Article 368, and the word 'law' as mentioned under Article 13(2) does not include an amendment of the Constitution. There is a distinction between Parliament's law-making power, that is, the legislative power and Parliament's power to amend or constituent powers."

In other words, the Indian Parliament had the unrestricted power to amend the Constitution which implied that even the fundamental rights of citizens could cease to exist. Even the Indian Constitution could be repealed if this precedent was to be applied in letter and spirit.[12]

Following this, a number of constitutional amendments were made, and in the case of *Sajjan Singh v. State of Rajasthan*[13], the breadth of the amendments was once more disputed. The 17th Constitutional Amendment, which added over 44 pieces of legislation to the Ninth Schedule, was examined by a panel of five judges in the Sajjan Singh case. Although all of the justices

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[10] INDIA CONST. art. 13, cl. (2). The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
[11] 1951AIR 458, 1952 SCR 89.
[12] Vivek Sood, *Revisiting Kesavananda Bharati judgment And The Shield Of Basic Structure Doctrine It Gave To We The People,* OUTLOOK, (June 06, 2023, 09:30 PM) https://www.outlookindia.com/national/revisiting-kesavananda-bharati-judgment-and-the-shield-of-basic-structure-doctrine-it-gave-to-we-the-people-weekender_story-280666.
[13] AIR 1965 SC 845.

agreed with Shankari Prasad's decision, Hidayatullah and Mudholkar JJ's concurring judgment was the first to highlight concerns about Parliament's unfettered ability to change the Constitution and restrict people's fundamental rights.

3.2 The Golaknath Verdict

An eleven-judge Supreme Court bench revised its opinion in 1967. CJI Subba Rao in a 6: 5 majority, had the 'rare opinion' that Article 368, comprising provisions relevant to constitutional amendments, simply lay forth the method for amending the Constitution in the *I. C. Golaknath v. State of Punjab*[14] case. He believed that Parliament lacked the power to change the Constitution under Article 368. Instead, Articles 245, 246 and 248 read with Entry 97 of List I of the Constitution gave Parliament its modifying authority (*i.e.*, the constituent power). It was decided that the legislative and amending powers of Parliament were substantially same and therefore, any amendment to the Constitution was 'law' as given under Article 13(2). It was rejected that the ability to amend the Constitution is a sovereign power apart from legislative authority and is thus exempted from judicial review.

The judgment had a prospective impact therefore the First, Fourth, and Seventeenth Amendments were not deemed illegal by the Court. However, any further amendments violating fundamental rights could not be made. The Court also ruled the decisions of *Shankari Prasad* and *Sajjan Singh* cases as bad precedent to the extent that Article 13(2) did not recognize constitutional amendment made under Article 368.

3.3 The Constitution (Twenty Fourth Amendments) Act, 1971

The 24th Amendment Act was enacted, to abrogate the Supreme Court ruling in *Golaknath*. The following were the major points

[14] 1967 AIR 1643, 1967 SCR (2) 762.

of changes which were introduced to the Constitution through this Amendment:

a) A new "clause (4)" was inserted to Article 13 stating, "nothing in this Article shall apply to any amendment of this Constitution made under Article 368".
b) The marginal heading of Article 368 was reframed to "Power of Parliament to amend the Constitution and Procedure, therefore" from "Procedure for amendment of the Constitution".
c) A new sub clause (1) was added to Article 368 which reads as, "notwithstanding anything in this Constitution, Parliament may, in the exercise of its Constituent Power amend by way of addition, variation, or repeal any provision of this Constitution in accordance with the procedure laid down in this Article".
d) The President of India was under the obligation to give his assent to any Bill amending the Constitution by changing words from "*it shall be presented to the President who shall give his assent to the Bill and thereupon*" to "*it shall be presented to the President for his assent and upon such assent being given to the Bill".*
e) A new reaffirming "clause (3)" was added to Article 368 which stated that, *"nothing in Article 13 shall apply to any amendment made under this Article".*

3.4 The Kesavananda Bharati Verdict

Swami Kesavananda Bharati[15] contested Kerala government's attempts to put limitations on the administration of its property under two land reform legislations in 1970. Swami filed a case

[15] Kesavananda Bharati was an Indian Hindu monk who served as the Shankaracharya of Edneer Mutt, a Hindu monastery in Kasarogod district, Kerala India from 1961 until his death. He was the petitioner in Kesavananda Bharti v. State of Kerala case.

under Article 26[16] of the Constitution after being persuaded to do so by renowned lawyer N. Palkhivala. It's around 700 long pages judgment and is one of the most celebrated and remarkable judgment of Indian judiciary. The Kerala Land Reforms Act, 1963 validity was challenged as the same was placed in Ninth Schedule by 29th Amendment Act. The aggrieved was allowed to challenge the constitutional validity of 29th Amendment Act clubbing together with the validity of 24th and 25th Amendment Act.

The landmark decision was carried out by a 13 judges' bench with a 7: 6 majority, overruling the *Golaknath* verdict. The decision was made that while the power of Parliament to amend the Constitution is broad and affects all Articles, it's not unrestricted to the extent that it might undermine the Constitution's fundamental elements or structure as our Constitution has certain identity. The majority supported the 24th Amendment Act's constitutionality, which stated that *"the Parliament has the authority to change any or all provisions of the Constitution"*. The *Golaknath judgment*, according to the majority signatories, was rendered incorrectly, and Article 368 possessed the authority and process for altering the Constitution. The majority also made it clear that, contrary to what is stated in Article 13(2), a constitutional amendment is not the same as a 'law'. Most importantly, in this case, seven of the thirteen judges in this case, including CJI Sikri who signed the summary statement, declared that Parliament's constituent power was subject to inherent limitations. Parliament could not use its amending powers under Article 368 to 'damage',

[16] INDIA CONST. art. 26, Freedom to manage religious affairs: Subject to public order, morality and health, every religious denomination or any section thereof shall have the right -
(a) to establish and maintain institutions for religious and charitable purposes;
(b) to manage its own affairs in matters of religion;
(c)to own and acquire movable and immovable property; and
(d) to administer such property in accordance with law.

'emasculate', 'destroy', 'abrogate', 'change' or 'alter the basic structure or framework of the Constitution.[17]

The judges herein did not provide for the lists of what basically constitutes 'basic structure' but furnished for an illustrative list of what may comprise of basic structure. Following the decision, the popular consensus was that the court was attempting to impose its will on Parliament, but the Court was soon presented with a chance to explore the concept of basic structure in other leading cases.

4. The Stance of Kesavananda Bharati Case: Post-Verdict

Indra Nehru Gandhi v. Raj Narain[18], was the first ruling in which faith in 'doctrine of basic structure' was acknowledged or we could say reaffirmed. An appeal against the judgment of the Allahabad High Court invalidating the election of then Prime Minister was challenged. The Parliament passed the Thirty-ninth Amendment Act which "removed the authority of the Supreme Court to adjudicate petitions regarding elections of the President, Vice President, Prime Minister and Speaker of the Lok Sabha"[19], while the appeal was pending in the Court. Through the amendment, essentially Section 4 of the Act, restricted attempts of the court of law to challenge the election of any aforesaid posts and also made it clear that all the electoral issues, if any, would be resolved by a panel established by Parliament. This was definitely a proactive step taken to favour Indira Gandhi, who was the subject of the conflict.

The apex court relying on the judgment of *Kesavananda Bharati* case stated various other features which are to be included as basic structure[20] of the Constitution. Despite the juries'

[17] *Supra* note 2.
[18] 1975 AIR 865, 1975 SCR (3) 333.
[19] S*upra* note 2.
[20] According to Justice H. R. Khanna, democracy is a basic feature of the Constitution and includes free and fair elections. Justice K. K. Thomas held that

disagreement on basic structure of the Constitution, the overwhelming position maintained that the Constitution contained a core substance that was sacred.

4.1 The Constitution (Forty-Second Amendments) Act, 1976

This is one of the most significant amendments to the Constitution of India enacted by Parliament led by Indira Gandhi in the year 1976. Generally called as 'mini constitution', this Amendment Act was the most talked one. The following attributes by this amendment were added to the Constitution:

a) The Preamble was amended for the first time and included the words, 'Socialist', 'Secular' and 'integrity'
b) The Seventh Schedule was amended and five subjects from state list were shifted to concurrent lists, viz., education, forests, protection of wild animals and birds, weights and measures and administration of justice, Constitution, and organization of all courts except the Supreme Court and the High Courts.
c) The power of judicial review of High Courts was restricted.
d) A new Part IVA and Article 51A was added to the Constitution consisting of fundamental duties.
e) The DPSPs was given precedence over fundamental rights and three new DPSPs were added.

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the power of judicial review is an essential feature. Justice Y. V. Chandrachud listed four basic features which are: sovereign democratic republic status, equality of status and opportunity of an individual, secularism and rule of law. According to Chief Justice A. N. Ray opined, strangely, that democracy was a basic feature but not free and fair elections. Justice K. K. Mathew agreed with Ray, C.J. that ordinary laws did not fall within the purview of basic structure. But he held that democracy was an essential feature and that election disputes must be decided on the basis of law and facts by the judiciary. Justice M. H. Beg disagreed with Ray, C.J. He contended that supremacy of the Constitution and separation of powers are basic features as understood by the majority in the Kesavananda Bharati case. Beg, J. emphasised that the doctrine of basic structure included within its scope ordinary legislation also. *See also*: VENKATESH, *supra* note 2

f) Removed all limits on Parliament's power to amend the Constitution under Article 368.

Likewise, many other provisions were also added to the Constitution by this Amendment Act.

Within less than two years, in 1980, in *Minerva Mills v. Union of India*[21], the Supreme Court declared "two provisions of the 42nd Amendment as unconstitutional which prevented any constitutional amendment from being 'called in question in any Court on any ground' and accord precedence to the Directive Principles of State Policy over the Fundamental Rights of individuals respectively"[22].

In *Waman Rao v. Union of India*[23], it was made clear that all the amendments made to the Constitution after the *Kesavananda Bharati judgment* was open to judicial review. All legislation placed in Ninth Schedule after 1973 is open to judicial review in any courts.

The case of *L. Chandra Kumar v. Union of India*[24] again stated that the power of judicial review under Article 32 of the Supreme Court and Article 226 of the High Court is part of the basic structure doctrine and these powers cannot be diluted by transferring them to administrative tribunals.

In *I. R. Coelho v. State of Tamil Nadu*[25], the Supreme Court propounded "the importance of judicial review and removed the shield legislature took to shield the laws violative of fundamental rights, from judicial review. The supremacy of judiciary as the final interpreter of law was finally restored by

[21] (1980) 3SCC 625.
[22] S*upra* note 5.
[23] 1981 2 SCC 362.
[24] 1995 AIR 1151, 1995 SCC (1) 400.
[25] AIR 2007 SC 861.

putting an end to long debate of Parliament's amending power subject to judicial review".

5. Relevance of Doctrine of Basic Structure in Contemporary India

The Constitution is an evolving statute that will witness a growth and expansion of the fundamental doctrine of basic structure in the future. Today we are witnessing various changes in the Constitution either by way of amendments or some landmark judicial judgments. 'Right to privacy' which was an implicit right under the Constitution is now declared to be fundamental right guaranteed to all its citizens.[26]

The 99th Amendment Act, 2014 was challenged to be constitutionally invalid in the Apex Court in *Supreme Court Advocates-on-Record Assn. v. Union of India*[27] in the year 2015. The impugned amendment together with National Judicial Appointment Commission Act, 2014, establishing an independent body to nominate judges to both the courts and to replace the existing collegium system was enacted by the Parliament. The issue was whether the challenged amendment and legislation were invalid because it affected or harmed the 'basic structure' of the Constitution.

The judiciary to remain independent and separate from other two organs, the petitioners argued that the judiciary's supremacy and executive's exclusion from judicial nominations and its procedures are essential. The respondents on the other hand argued that the judiciary's autonomy is unaffected by its dominance in appointing judges. Even when executive nominations are made, the judiciary's independence is not jeopardised. Alternatively, the supremacy and independence of the judiciary are both retained under the redesigned system.

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[26] Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors. Writ Petition (Civil) No.494 of 2012; (2017)10 SCC 1; AIR 2017 SC 4161.
[27] AIR 2015 SC 5457.

The said amendment and legislation promoted accountability and openness while contributing to required reform without jeopardizing the basic framework of the Constitution.

The Court rejected the argument and declared by 4:1 majority, that the new approach breaches the 'basic structure' of the Constitution, which mandates the prioritization of judiciary in the appointment of judges. In the existing framework such domination is prohibited. The contested amendment therefore, cannot be upheld as a result. The proposed amendment which added Articles 124A, 124B, and 124C have drawn huge criticism for sabotaging the rule of law, the separation of powers and the independence of the judiciary.

In 2017, through *Justice K.S. Puttaswamy (Retd.) v. Union of India*[28], where the constitutional validity of Aadhaar Act was challenged being an invasion on right to privacy of individuals and promoting a surveillance State. The Apex Court unanimously held that the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution. The above decision overruled *M. P. Sharma v. Satish Chandra*[29] and *Kharak Singh v. State of Uttar Pradesh*[30] ruling stating that 'right to privacy' was not specifically protected as fundamental right under the Constitution.

Most recently, on reaching fifty years of the landmark Kesavananda Bharati judgment the doctrine gained some limelight. The Vice President Jagdeep Dhankar, addressing the inaugural address at the 83rd All India Presiding Officers Conference, called *"doctrine of basic structure as a bad precedent, and asserted that Parliamentary sovereignty and autonomy are quintessential for the survival of democracy and*

[28] Writ Petition (Civil) No.494 of 2012; (2017)10 SCC 1; AIR 2017 SC 4161
[29] (1954) SCR 1077
[30] (1964) 1 SCR 332

cannot be permitted to be compromised by the executive or judiciary"[31]. He made this assertion by criticising the scrapping of NJAC Act in 2015. The statement of Dhankar was largely criticised.

However, days after this remark of the Vice President, the present CJI D.Y. Chandrachud stated, "the basic structure doctrine a North Star that guides and gives direction when the path ahead is convoluted. The CJI said this doctrine helps interpreters and implementers of Constitution when the path ahead is convoluted".[32] "The craftsmanship of a judge lies in interpreting the text of the Constitution with the changing times while keeping its soul intact", he added. The CJI further noted that Indian judiciary has changed remarkably in recent years in favour of eliminating "strangulating regulations, augmenting consumer welfare and supporting commercial transactions".

6. Conclusion

The 'doctrine of basic structure' amplified in all these years and the judiciary's adoption of the doctrine strengthened our Constitution intrinsically, making it considerably stronger today. The judiciary always aimed at strengthening the Constitution by keeping its core intact and rejecting the amendments or legislations which violated the heart of the Constitution. The Constitution strikes for ideal balance. In order to accommodate social expectations, the State is free to alter and develop its legal and economic policies by adhering to the constitutional mandates. If we analyse, we will find that we have

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[31] News, India News, *"We Can't Have Ostrich – Like Stance": Vice President Takes On Judiciary*, NDTV, (Jan. 12, 2023, 10:51 AM), https://www.ndtv.com/india-news/court-cant-dilute-Parliaments-sovereignty-vice-president-jagdeep-dhankhar-amid-row-over-judicial-appointments-3684810

[32] Abhro Banarjee, *Days After V-P Dhankhar's Criticism, CJI Calls Basic Structure Doctrine a 'North Star',* NEWS18, (Jan. 22, 2023, 10:03 IST), https://www.news18.com/amp/news/india/basic-structure-doctrine-like-north-star-that-guides-interpreters-of-Constitution-when-path-ahead-is-convoluted-cji-chandrachud-6888955.html

come a long way and these five decades is a vision of eminent jurist Palkhivala which he foresighted back in those days.

The CJI stated that, "nonetheless, the larger picture of legal culture and local dimensions of law, which are dictated by the local context, should never be obfuscated. Law is always grounded in social realities"[33].

Thus, a lot has changed and a lot remains to be changed, but what remains constant is the core spirit of the Constitution of India.

[33] *Id.*

CHAPTER 19

DOCTRINE OF BASIC FEATURES: AN ASSERTION OF SUPREMACY OF THE CONSTITUTION OVER PARLIAMENT

Prof. (Dr.) Mithilesh Vishwakarma*

1. Introduction

A democratic Constitution of any country is the reflection of socio-political situations of the people who have ultimately consented to be governed by laws and the power of making laws contained in the Constitution. It represents the spirit of the people who wished to have harmonious existence without any provision there in detrimental to the interest of majority of the population. A thorough analysis of the socio-political conditions of India that prevailed during Mughal and British reveal that majority of population lived degraded human life devoid of human values, equal treatment, social political and economic justice. This majority population under the guidance of community leaders fought for the emancipation from the rule of Britishers.

Britishers did start treating human being as human being and expected Indians to have their Constitution to govern people. After the rejection of the draft Constitutions prepared by Indian leaders and failure to draft and produce Constitution on another two opportunities[1] this present Constitution adeptly drafted and adequately provisioned for a democratic republic. British Government agreed to transfer the power of governance to

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[1] B. R. Ambedkar, Words of Freedom, Ideas of a Nation, 62-63 (Penguin Books India 2010); (In 1927, Lord Birkenhead Challenged to produce own constitution, first constitution called "The Nehru Constitution" was not accepted, second chance given after Round Table conference in 1930 but no result and third chance to draft given to Sapru Committee failed (in 1945).

Indian leaders which finally resulted India becoming a sovereign state with a vision of establishing a sovereign democratic republic and securing among other thing[2] social, economic and political justice to all citizens. The finally adopted and enacted Constitution of India is the repository of rights and power of people of this country. It includes in it the implied power, if not expressly provided, which would enable the organs of the state to protect the interest of people it exists to govern. Every single term used in the making of this Constitution was well deliberated and finalised in tune with intent of people through the able and worthy members present in the Constituent Assembly.

The social condition of the people of the country is no secret that there lived 60 million untouchables deprived of means of livelihood surviving on begging[3], landless farmers as the lands whether cultivable or otherwise were in the ownership of socially and educationally rich people from upper strata of caste ridden society. Since education and political awareness had not touched the people of lower strata of society their participation in political decision making was negligible. Under such complex and typical social and political conditions the task before the executive and legislative organs of the State was an uphill task especially defusing the concentrated economic power with proper constitutional mandate.

The Part III of the Constitution provided fundamental rights to persons and the citizens which remained enforceable by the State and part IV of the Constitution mandated the State to secure to citizens means of livelihood. Ensure ownership and control of material resources by proper distribution. Ensure that there is no concentration of wealth and means of production to the common detriment[4]. Now in order minimise the apparent

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[2] INDIA CONST., Preamble.
[3] B. R. Ambedkar, *Supra* note 1, at pp. 93
[4] INDIA CONST. art. 39.

inequality prevalent regarding land ownership the land reform laws or the land ceiling laws were needed so the land less people engaged and willing to make farming as means of livelihood could be given minimum required land. And for this purpose, the fundamental right to property contained under Article 19(1)(f), and Article 31 became obstacle on the way of legislature because right to own property cannot be denied and on the other hand to distribute land to landless citizens as a constitutional obligation, violation of Articles 19(1)(f) and 31 could not be avoided.

Parliament through Constitution Amendment Act, 1951 inserted Article 31A and 31B to fully secure the constitutional validity not only of Zamindari abolition law but other agrarian reform legislations along with certain other Acts. Secondly this created Ninth Schedule in the Constitution for placing in it some thirteen such legislations thereby making these laws immune from being challenged before the Court for their constitutional validity.[5]

The 1st Constitution Amendment Act was challenged questioning the limit and extent of power of Parliament to amend Constitution under Article 368[6]. Supreme Court upheld the amendment holding that the power of Parliament to amend Constitution under Article 368 includes the amendment of Fundamental Rights and the word "law" used in Article 13(2) does not include the constitutional amendment using constituent power under Article 368. The socio economic and the political conditions of the country were such that subsequent constitutional amendments, 4th and 17th weakened the Fundamental rights of citizens, increased the power of executive and well-established supremacy of Parliament over Constitution as the constituent power was distinguished from

[5] V. N. Shukla (Mahendra P. Singh Rev), V N Shukla's Constitution of India, 303, Eastern Book Publishing 2017)
[6] Shankari Prasad Singh Deo v. Union of India, AIR 1951 SC 458.

legislative power of making law[7]. Thus, from 1951 to 1965 the laws made violating the fundamental right could not be challenged for violation of Articles 14, 19 and 31.

Finally 1st ,4th, and 17th constitutional amendments were challenged[8] and the Court was convinced that the decision of Shankari Prasad followed in Sajjan Singh's case was wrong and it required to be overruled as early as possible but under the circumstances, the decision of prospective overruling was propounded by the Supreme Court to avoid chaos in the country. Because by declaring previous laws and acts of distribution of land to landless peasants as invalid could bring more unpleasant situation.

2. Fear of Frightful Consequences: Genesis of Basic Structure Doctrine

System of Majority and minority judgment, though puts forth a relief to the petitioner but keeps the avenues open for further development of law in the minority judgments. Though majority decisions in Shankari Prasad and Sajjan Singh cases prevailed but in Sajjan Singh's case minority side Justice M. Hidayatullah and Justice J. R. Mudholkar expressed grave doubt as to whether Parliament could be treated as having unlimited power to amend the Constitution[9]. Thus, minority judgments warned of the frightful consequences. Since this question was of extreme importance and the correctness of judgment of Shankari Prasad case was not challenged in Sajjan Singh's case, Chief Justice K. Subba Rao constituted a bench of 11 Judges in the case of Golak Nath to define the limits of the power of Parliament to amend Constitution and in particular the Fundamental Rights. Nani Palkhivala pointed out the

[7] Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.
[8] I. C. Golak Nath v. State of Punjab, AIR 1967 SC 1643.
[9] Soli. Sorabji & Arvind P. Datar, Nani Palkhivala: The Courtroom Genius 48 (LexisNexis Butterworths 2012).

dangerous consequences of not placing any limitation on the amending power under Article 368.

Question was raised as could Parliament delete all Fundamental Rights? Could it altar the federal structure of India?[10] M. K. Nambiar put forth the argument of "Implied limitations of amending power" an Article of German Jurist Dieter Conrad[11]. Justice K.N. Wanchoo of the bench termed such argument as out of fear and refused to impose implied limitation on amending power believing that Parliament will not abuse such power of amending Constitution which later turned otherwise with the 24th and 25th constitutional amendments. The political morality and instinct of statesmanship in politicians was still developing in the country that has become sovereign recently with people divided and struggling for means of livelihood, education and sectorial interests.

This way the majority judgment of Golak Nath held that Parliament cannot amend or alter any of the Fundamental Rights contained in Articles 14 to 32 of the Constitution. It is important to mention here that Justice J. R. Mudholkar introduced the concept of 'basic features' when he stated that solemn and dignified preamble is the epitome of basic features of the Constitution and indicia of the intention of the Constituent Assembly and referred to the decision of Supreme court of Pakistan where Chief Justice had that power of President to remove defects will not extend making an alteration in the fundamental features of Constitution[12]. This judgment rendered the Parliament powerless in respect of amendment of Fundamental Rights and attracted criticism from constitutional scholars. The verdict was unacceptable by the Parliament obviously as it had limited the power of amendment. The views expressed in the minority judgement by Justice R. S. Bachawat

[10] *Supra note* 9 p. 51.
[11] *Id.*
[12] *Id.*

is worth taken notice of as he said-static system of law is the worst and an unamendable Constitution meant that agrarian reform and progress will be at a standstill; even the unique feat of 500 million at a special convocation would not be able to amend fundamental rights contained in Part III. The only way for the deadlock to be resolved was by way of revolution and such a situation was not intended by the framers of the Constitution.[13] This minority view opened the avenues for a middle path whereby the agrarian reform could not be stopped and the sanctity of Constitution is also upheld.

This judgment brought the Supreme Court and the Congress party government led by Smt. Indira Gandhi at loggerheads. In fact, struggle for supremacy existed between Supreme Court and the Parliament in the light of the facts that Democracy has to care for the will and rights of the people and governments cannot stop their efforts to protect the interests of people who elected them to power to rule them. We cannot deny that the law originates from the social and political facts of a particular time period. It is worth mentioning the political conditions prevalent in the regime of Smt. Indira Gandhi, her political stature in the country and the neighbouring countries and the judicial psyche of the country to uphold the democracy and the supremacy of Constitution.

The chief architect of the Constitution and great visionary of the time representing six to seven crores untouchables of India Dr. B. R. Ambedkar had already cautioned his people while addressing the All- India Depressed Classes Conference on 18 July, 1942 at Nagpur that "*If democracy lives, we are sure to reap fruits of it. If democracy dies, it will be our doom*".[14] Our Constitution is the outcome of consolidation of spirit of majority of awakened people who agreed to promote fairness and provide

[13] Golak Nath v. State of Punjab, AIR 1967 SC 1643 pp. 1718-1730.
[14] B R Ambedkar, Words of Freedom, Ideas of A Nation, 27 (Penguin Books India 2010).

equal opportunity to develop and prosper to their people by fair distribution of resources. Since spirit of people changes with change in social, political and economic conditions a mechanism was incorporated in the Constitution to accommodate their spirit in the Constitution. Smt. Indira Gandhi fought election giving slogan "*garibi hatao*" means remove poverty in the moths of February-March 1971. Accordingly, Parliament brought 24th and 25th Constitutional Amendment in July 1971 and 29th Constitutional Amendment in 1972.

The purpose of these amendments was to get over the restraint imposed by the verdict of Golak Nath case. 24th amendment changed the scope of Article 13(2) whereby amendment made under Article 368 was not a law challengeable under Article 13 even if it infringed the Fundamental Rights of citizens, secondly, amendment in Article 368 provided a bill presented to President of India will be assented and President had no power to send back the bill for reconsideration. By 25th amendment the word 'compensation' used in Article 31 was substituted with word 'amount' thus keeping the money paid in lieu of acquisition of property, out of the power of the court to review for justification. A new Article 31C was inserted which protected any laws made to implement the objects of Directives Principles of State Policies particularly enshrined in Article 39(a)and(b) and prohibited any court even to take up a petition for challenging the laws whose preamble clearly stated to give effect to the Directive Principles of State Policies. Prohibiting the court from taking any petition which challenges that a particular law would not secure the objects of directive policy, became the main bone of contention between Parliament and Supreme Court. The effect was that DPSP gained priority over Fundamental Rights. Thus, so called obstruction created by judiciary in the way of social and economic justice was aimed to be removed.

The political will prevailed over the verdict of Supreme Court given in Golak Nath case. In furtherance of social and economic

justice 29th Constitutional Amendment made in 1972, inserted the Kerala Land Reforms Act, 1963 along with amendments done in it in 1969 and 1971 in the Ninth Schedule with a view to make it immune from being challenged for violation of Fundamental Rights. The political wit and judicial wit produced an undercurrent in the intellectual circle of the country. Finally certain provisions of Kerala Land Reforms Act and the Constitution Amendment Act of 1969 were challenged by Kesavananda Bharati[15] before the Supreme Court.

3. Case of Kesavananda Bharati[16]

On the occasion of commemorating 50 years of the Kesavananda Bharati case it is pertinent to bring out and discuss some significant facts and genius arguments that saved the Constitution and its role in changed socio-political situation like the one present today as a community and its intelligently swayed away people seem bent upon changing the very nature of the Constitution today. The political situation that times was that India had won a war with Pakistan creating a new nation Bangladesh and the Political leadership had gained more popularity among innocent and politically illiterate majority of India. The case is popularly known as Fundamental Right case where two erstwhile rulers and some mining, sugar and coal companies had filed in all six writ petitions with 20 interveners.

Since the question involved had far reaching effects, notices were issued to the Advocate Generals of various States. The largest Constitutional bench comprising of 13 judges (CJI S. M. Sikri, Justices J. M. Shelat, K. S. Hegde, A. N. Grover, A. N. Ray, P. Jaganmohan Reddy, D. G. Palekar, H. R. Khanna, K. K. Mathew, M. H. Beg, S. N. Dwivedi, A. K. Mukherjea and Y. V.

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[15] His Holiness Kesavananda Bharati Sripadagalvaru was the head of Edneer Math, in Distt. Kasaragod, Kerala. The amendment act had authorised the state to acquire some lands of the Muth. Therefore, he challenged the constitutionality of these acts along with the amending power of the Parliament.

[16] His Holiness Kesavananda Bharati v. The State of Kerala and others, (1973) 4 SCC 225.

Chandrachud) heard the case for 68 days delivered judgment in 703 pages.[17] The validity of constitutional amendments 24th, 25th, and 29th was in question. Whether Parliament under 368 could abrogate the Fundamental Rights and deny the judicial review of such amendment. The main question was whether the Parliament has unlimited power under Article 368 to add, vary or repeal any provision of the Constitution? And whether Article 31C denying judicial review of laws is valid?

Since Palkhivala had taken an argument in Golak Nath case about the doctrine of implied limitation on amending power, he put forth the same argument and repeatedly referred Hitler's-subversion of Weimar Constitution and converting of Germany in Dictatorship. The repeated reference irked Justice A. N. Grover. It is imperative to quote some arguments between Justice Grover and the Court room genius N. A. Palkhivala[18] to show how he convinced the bench to limit the amending power provided under Article 368. The exchange of arguments is:

> *"Justice Grover - What is the point in taking us to these facts? If the Parliament has power to amend Fundamental Rights, it would remain unaffected irrespective of what happened in Germany or is likely to happen anywhere.*
>
> *Justice Grover (After few days) - We need not go into politics.*
>
> *Palkhivala - I accept.*
>
> *Justice Grover - Sometimes you go into politics and we are provoked to go into it.*
>
> *Palkhivala - I want to know whether this case can be decided without going into the ambit of politics. But when I talk of totalitarian regimes and democracy, they form part of constitutional arguments. As Justice Grover*

[17] *Supra* note 9 pp. 108, 112, 123.
[18] *Id.* p. 112.

objected to the use of word "totalitarian" Palkhivala agreed to use word "undemocratic".

Justice Dwivedi - Has any court decreed that there is an implied limitation on the power to wage war?

(Palkhivala was taken aback by the question; paused, took off his spectacles wiped them and softly replied)

Palkhivala - With the utmost respect your Lordship may I say that no express power to make war is provided in the Constitution. May I ask the indulgence of this court to be excused from dealing with this topic since it is not germane to the present case."

A communication between Justice Dwivedi and Palkhivala[19] is given below however suggestion of Justice Dwivedi was questioned by Justice P. Jaganmohan Reddy as to how a judge could give such assurance.

"Justice Dwivedi - If you agree property rights being taken away, I would get Parliament to declare that other fundamental rights would not be taken away.

Palkhivala - Have I referred so far at any time to property rights? I was dealing with the implied limitations and natural rights etc."

The 13-judges bench was of the view that the verdict of Golak Nath case was difficult to sustain so court asked Palkhivala to concentrate on the implied limitations on amending power and so Palkhivala made submissions on Articles 13 and 368. Few submissions made on Article 368 are worth mentioning here.

On Article 368, he submitted among other points that "the Article should not be read as the death wish of the Constitution or as a provision for its legal suicide. Parliament cannot arrogate to itself under this Article the role of official liquidator of the

[19] *Supra* note 9 pp. 135-136.

Constitution. Since the Article is silent on the subject matter and extent of amending power it should have regard to the genesis and general scheme of the Constitution. Article 368 did not start with non obstante clause 'notwithstanding anything in this Constitution' and used word 'amend' instead of less significant words *i.e.*, add, alter, repeal or vary."[20]

On Article 13(2) in one of the significant submissions he submitted that "If word Law did not include a constitutional amendment; the consequences would be quite startling. Parliament could by a requisite majority repeal the entire chapter on fundamental rights merely by calling the law a constitutional amendment"[21].

On Article 31 C in one of the significant submissions he said that "Article 31C destroyed and damaged the core or essence of several essential features of the Constitution as it destroyed the supremacy of the Constitution and gave a blank charter to Parliament and all the state legislatures to defy and ignore the Constitution. Thus, Article 31C was a monstrous on the Constitution. It had a built-in mechanism for the dissolution of the true democracy that India had so far been, cessation of the rule of law, disintegration of the nation, and the birth of a totalitarian regime"[22].

Accordingly, Palkhivala put forth before the court some 12 (twelve) essential features of the Constitution which were later reproduced by Justice A.N. Ray in his judgment but the total submission made were not accepted instead judges put forth various essential features that needed to be kept out of the limit of Article 368. To quote - CJ S. M. Sikri named 5, Justice J. M. Shelat and Justice A.N. Grover -6. Justice K. S. Hegde and Justice A. K. Mukherjea-5 and Justice P. Jaganmohan Reddy

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[20] *Supra* note 9 p. 116.
[21] *Id.* p. 117.
[22] *Id.* p. 119.

enumerated four basic structures of the Constitution.[23] Though there existed contradictory views regarding application of implied limitation on the power of amending Constitution under Article 368 but the majority views overruled the verdict of Golak Nath case and held that Article 368 does not enable Parliament to alter the basic structure or frame work of the Constitution.

Though some questions raised even by the majority judges remained to be answered yet the doctrine of basic structure got recognition in this historic case, judgment a lengthy document of more than seven hundred pages brought criticism too as rightly remarked by Prof. Upendra Baxi in his Article "Kesavananda Bharati" that it created an "illiterate Bar" as the lengthy judgment was unlikely to be read by majority of the Bar. This is very true even on today's context. Though the main issues before the bench and major arguments mainly of Senior Advocate Nani Palkhivala have been put in forms of Article yet students of law and teachers only get time to go through relevant points and arguments advanced by Palkhivala. Arguments relating to democracy really form the part of constitutional arguments can be understood from one of the arguments advanced by the then Attorney General of India Niren De, when he said to the court in this case that – "the court's future would be at stake. Consequences have to be borne in mind if the decision went against the government"[24].

On this occasion of commemorating 50 years of the case the judge who tilted the balance towards recognising the limitation on amending power was Justice H. R. Khanna who till the first part of his judgment differed but while dealing with Article 31C he held that the basic structure or the framework of the Constitution could not be abrogated by the exercise of the power of amendment[25]. Otherwise till then there was going to be tie in

[23] *Supra* note 9 pp. 132-133.
[24] *Id.* at p. 121.
[25] *Supra* note 9 p. 125.

the system of judgment by majority and minority. The last portion of judgment of Justice Khanna, as the future events would show, saved the democracy and prevented India from degenerating into a totalitarian regime or a one- party government[26].

During the last illness of Nani Palkhivala, Justice H. R. Khanna visited him and recalling the Nani's performance during the hearing of review petition in the Kesavananda Bharati case told to the brother of Nani that – "It was not Nani who spoke. It was divinity speaking through him".[27] The frightful and shocking consequences of abusing constitutional powers by political party was seen in the country immediately after a day of Kesavananda Bharati case in appointment of the Chief Justice of India and later after Habeas corpus case heard by Justice H. R. Khanna during emergency again in appointment of Chief Justice of India.

In both cases the political leadership and her government was disappointed by the judges who did not toe the line of then government of Smt. Indira Gandhi. On April 25,1973 Justice AN Ray was appointed by the then Indira Gandhi regime, superseding three senior judges of the top court; Justices J. M. Shelat, A. N. Grover and K. S. Hegde which was viewed as an attack on the independence of the judiciary. In the Habeas Corpus judgment, it was held that citizens have no right to life and liberty during a national Emergency and Justice H R Khanna dissented from this judgment the after effect was that Justice M H Begh was appointed as Chief Justice of India superseding Justice H R Khanna who was senior to Justice M H Begh in 1977. Justice H R Khanna resigned. Later, the New York Times wrote an editorial lauding Justice Khanna, saying "if India ever finds its way back to the freedom and democracy

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[26] *Id.* p. 103.
[27] *Supra* note 9. Foreword by By Behram Ardeshir, Palkhivala the brother of Nani Palakhivala.

someone will surely erect a monument to Justice H R Khanna of the Supreme Court"[28].

4. Doctrine of Basic Structure: Saviour of Democratic Constitution

It should be borne in mind that "had there not been a restraint on the amending powers of the Parliament through the doctrine of Basic structure, the nature of Indian Constitution and the condition of people would have been what was feared in Kesavananda Bharati case as is clear from the wide range of amendments made by 42nd Constitutional Amendments. Consistent efforts were "on" by the politicians and legal experts of the congress party to take further the views of a powerful politician and leader of the country Smt. Indira Gandhi to establish supremacy of Parliament. On June 12, 1975 Allahabad High Court held her election as Member of Parliament as illegal and debarred her from continuing as Prime Minister and contesting elections for six years.[29] This was challenged in Supreme Court; pending the case she got the National emergency[30] declared by the President and brought 39th constitutional amendment screening the election of the Speaker of Lok Sabha and Prime Minister from being challenged in court but before a Parliament committee through Article 329A. The revengeful attitude of Executive continued with newer means and ways to cripple the Supreme Court from discharging its moral and constitutional obligations. However, this amendment was held unconstitutional as was violating the basic structure of the Constitution[31] *i.e.* judicial review.

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[28] https://economictimes.indiatimes.com/news/politics-and-nation/two-hours-given-to-justice-a-n-ray-to-decide-on-cji-post/articleshow/65007659.cms?from=mdr, accessed on 25-5-2023.

[29] Indira Gandhi v. Raj Narain, AIR 1975 SC 2299.

[30] https://www.mha.gov.in/sites/default/files/RTI_ISIdiv_210814_0021_408.PDF (June25, 1975 National Emergency was imposed and was revoked on 21-3-1977).

[31] https://www.india.gov.in/my-government/Constitution-india/amendments/Constitution-india-thirty-ninth-amendment-act-1975 accessed 25-5-2023.

The 99th Constitution Amendment Act, 2014 further attempted at weakening the power of Supreme Court by involving itself in the appointment of judges with ulterior motive of influencing judiciary during adjudications as is clear from the communications of between Attorney General and judges which were during Kesavananda's case and consequences thereafter. The court struck down Constitution (99th Amendment) Act, 2014 and consequently the NJAC Act as unconstitutional and void to safeguard the basic structures of Constitution as the court held that "involvement of the executive in the appointment of judges impinged upon the primacy and supremacy of the judiciary, and violated the principle of separation of powers between the executive and judiciary which formed part of the basic structure of the Constitution"[32]. Here again on the point of transparency, accountability and objectivity dissenting opinion of the judge needed mention in the majority view that ameliorating steps were to be taken in collegium system.

Minority view agreed that "the present collegium system lacks, transparency, accountability and objectivity and barring occasional leaks, the public had no access to information relating to it. And that the proposed composition of the NJAC could have acted 'as a check on unwholesome trade-offs' within the collegium and incestuous accommodations between Judicial and Executive branches"[33]. From the above cases it is evident that so far attempts by Parliament to establish its supremacy by using the power given under Article 368 were made in effective and the nature and supremacy of Constitution was upheld. But the nature of man whether in judiciary or in politics cannot be taken to be stable and unmovable in changing socio-political conditions. The glaring example of verdict in EWS reservation case[34] shows that interpretation of the terms of

[32] Supreme Court Advocates-on-record Association & Anr. v. Union of India, (2016) 5 SCC 1.
[33] *Id.*, per Justice Chelameswar.
[34] Janhit Abhiyan v. Union of India, Writ petition (Civil), No 55 of 2019.

Constitution depends on the level of value neutrality a decision maker has achieved.

In other words, in democracy decision by majority and minority system should be followed only when there is democratic representation in the body of decision makers. The arguments of dissenting judgment in this case puts beyond doubt, the fear of being subordinated the supreme institution which rose to the occasion and not only saved Constitution but the democracy by evolving a doctrine of basic structure. In the EWS case majority arguments should have taken into account the spirit behind the words and not only words alone in used in Article 16(4) "any backward class of citizens". Questions remained unanswered as to when and how this Economically Weaker Section was created and recognised. Without there being any information about this new class in the country where educationally and socially declared class of people were excluded.

On the question of constitutionality of the 103rd constitutional amendment the minority views expressed by Justice Ravindra Bhat and Chief Justice U. U. Lalit, should have been considered when they said that "though the concept of EWS reservation itself permissible, but the Amendment is unconstitutional. And that "this court has for the first time in several decades of the republic avowed an expressly discriminatory principle; the Amendment's language of exclusion undermines the fabric of social justice and the exclusion of SC/STs and OBCs from EWS reservations violates the basic structure of the Constitution[35]. This judgment will be an example of supremacy of Parliament over Constitution with the favourable attitude of some judicial mind that ostensibly seconded the views of Parliament. Whereas judicial mind did not get swayed away in Kesavananda's case

[35] https://www.scobserver.in/reports/ews-reservation-judgment-sc-upholds-103rd-amendment-in-3-2-split-verdict/ accessed on 26-5-2023.

despite open threat by executives of dire consequences if the verdict goes against government[36].

5. Conclusion

On this memorable occasion of 50 years of Kesavananda Bharati case, nation should pay tribute to the Judges of majority views and to the courtroom genius Senior Advocate Nani Ardeshir Palkhivala who was honoured by Princeton University with Honorary Doctorate and who got award of "living legend of Law from International Bar Association along with the Advocates like Soli. J. Sorabji, D. M Popat, C. K. Daphtary, M. C. Chagla, Anil Diwan, M. L. Bhakta, Ravindra Narain and J. B. Dadachanji. Nani Palkhivala singly convinced the judicial minds that were brainstorming very seriously to find out some way to show a path whereby open confrontation between Parliament and the Supreme Court could be set to rest and a workable solution could be reached.

The Doctrine of Basic structures was evolved that saved the Constitution consequently the democracy in this country. Today domination of politicians of ruling parties interns the Parliament on the other two organs of the state, has created a situation where the highest court of the country has to express concern. While speaking in a function organised by the Bar Council of India, Chief Justice D. Y. Chandrachud said that higher judiciary is flooded with bail applications because judges at grassroot are reluctant to grant bail not because they do not understand crime but there is sense of fear of being targeted for granting bail in heinous cases.[37] It's time to acknowledge the contribution of Nani Palkhivala as a statesman, saviour of Constitution , unity and integrity of the nation in addition to the development of tax law and constitutional law which is evident

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[36] *Supra* note 9.

[37] https://timesofindia.indiatimes.com/india/lower-court-judges-hesitant-to-give-bail-chief-justice-of-india-dy-chandrachud/articleshow/95646464.accessed on 26-5-2023.

from the letters he wrote to the Prime Minister Indira Gandhi during emergency to quote some sentences of the letter of 9 November 1975:

> *"My dear Indira ji - I am most distressed and perturbed by the government's attempt to get the judgment of Kesavananda's case overruled. May I request you to consider the following points.1---.2. If Parliament is given unlimited power of amending Constitution, the high degree of probability is that the basic structures of the Constitution which postulates a free democracy and the unity and integrity of country will vanish within a few years. After you, who will be able to hold entire country together? The state would fight for greater autonomy than is desirable. It is, to my mind, inconceivable that freedom and the unity of country can survive for long after Parliament's supremacy over Constitution is established."*[38]

The fear of frightful consequences of review of Kesavananda's case were not baseless, Appointment of Chief Justice A. N. Ray as CJI ignoring seniority of three judges had already sent the message of being in tune with Parliament. However, a 13-judge bench with 8 new judges excluding Justice H. R. Khanna assembled on 10 November 1975 to hear review of Kesavananda's case, after some time suddenly bench was dissolved by CJI and the review petitions failed. The social-political conditions of country today where lower judiciary is not functioning due to sense of fear speaks a lot about the protection of elements that are targeting judges without any fear. Though evolution of doctrine of basic structures in the historic case of Kesavananda Bharati, took sacrifices of career and voices of many learned judges but it ensured on many occasions that unity, integrity democracy, fundamental rights of people and supremacy of Constitution remain. Nation on this

[38] *Supra* note 9 pp. 399-400.

occasion expects that sense of fairness, value neutrality and respect for humanity would prevail. That people in power should take lessons from the views and arguments expressed in this case.

CHAPTER 20

CONSTITUTIONAL JURISPRUDENCE DEVELOPED AS A RESULT OF THE VERDICT OF THE KESAVANANDA BHARATI CASE

Prof. (Dr.) Virender Kumar Sharma*

"While we want this Constitution to be as solid and as permanent a structure as we can make it, nevertheless there is no permanence in Constitutions."

– Jawaharlal Nehru

1. Introduction

The Constitution of India is a supreme, special, legal document which gives clear road map to all three organs of the government in Centre and State to perform their duties and functions within its sphere. No organ of the government is supreme. All three organs of the government should work within the boundary of the Constitution. There must be an express provision under the Constitution to consider, the validity of the actions of the individual organ as well as to justify their orders. But, when there is a gap in constitutional law to check the unjustified actions of the government, then judiciary can evolve or invent some doctrine to uphold the constitutional supremacy. The Apex Court laid down the doctrine or principle should be only at exceptional circumstances to resolve the constitutional crisis. If Judiciary continues in preparing guidelines and evolving doctrines for all cases as general rule, it will be a great threat to the democratic principles and also contradictory to the theory of separation of power.

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Pursuing this objective, the doctrine of basic structure was evolved by the Apex Court which imposed implied limitations upon the amendment power of the Parliament.[1]

The legitimacy of basic structure review may be assessed under three heads: legal, moral and sociological. The legal legitimacy of such review is established by defending a structuralist 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 contingent on the success of the moral and legitimate regimes.

2. Historical Background

Generally, it is always argued that the basic structure doctrine is an outcome of long struggle and conflict between the Parliament and the Judiciary however, this doctrine came into existence not because of confrontation which existed between Judiciary and Parliament, but, because of the passive approach of the framers of the Constitution, where they did not give any scope and place for agrarian reforms under the provisions of the original Constitution. Further, incorporating the right to property under the list of fundamental rights was also one of the factors responsible for giving birth to this doctrine by the Apex Court in 1973.

If framers had not brought right to property under Part-III of Indian Constitution, we would have not seen the case of *Kameshwar Singh v. State of Bihar* [2]. Because of this case, the then Prime Minister Jawaharlal Nehru brought Ninth Schedule[3]

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[1] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1473.
[2] AIR 1951 Pat.91.
[3] Ninth Schedule was introduced in the Constitution by the Constitution First Amendment Act 1951.

read with Article 31-B[4] of the Constitution in the first amendment in order to give much importance to agrarian reforms which was one of the manifests of Indian Congress before independence. If we would have not had this 1st amendment, Shankari Prasad's[5] case would have not come into the picture. After

Shankari Prasad's case this doctrine was for the first time conceived in Sajjan Singh's case.[5] In these two cases, Supreme Court in fact respected and upheld the decision of Parliament for giving scope for agrarian reforms through Ninth Schedule.

Thereafter, the Supreme Court in Golaknath's case[6] stated that amendment will also come under the definition of 'law'. When 'law' has limitations under Article 245 of the Constitution (subject to the Provisions of the Constitution), 'amendment' will also have limitations. Till date, there is no single express provision under the Indian Constitution to limit the amendment power of the Parliament. But, for the very first time, Supreme Court in this case imposed implied limitation on the amending power of the Parliament by adding the word 'amendment' under the definition of 'law' according to Article 13(3)(a). As a result, to nullify the verdict, Parliament brought 24th amendment10 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 Kesavananda Bharati

[4] Without prejudice to the generality of the provisions contained in Article 31-A,none of the Acts and Regulations specified in Ninth schedule, nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Re Shankari Prasad v. Union of India, AIR 1951SC 458.

[5] Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.

[6] I. C. Golaknath v. State of Punjab, (1967) 2 SCR 762.

case.[7] Supreme Court constitutional bench consisting of 13 judges (7:6) 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. Hence, right to property is the main cause and responsible right for evolving this doctrine.

3. What Constitutes Basic Structure

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:

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, executive and the judiciary
5. federal character of the Constitution

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

1. the mandate to build a welfare state contained in the Directive Principles of State Policy
2. unity and integrity of the nation

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

1. sovereignty of India
2. democratic character of the polity
3. unity of the country

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[7] *Supra* note 1.

4. essential features of the individual freedoms secured to the citizens
5. 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:

1) sovereign democratic republic
2) Parliamentary democracy
3) three organs of the State He said that the Constitution would not be itself without the fundamental freedoms and the directive principles.

Only six judges on the bench (therefore a minority view) agreed that the fundamental rights of the citizen belonged to the basic structure and Parliament could not amend it.

4. Conclusion

Over the years, the Supreme Court has been applying the doctrine of basic structure to invalidate ordinary legislations, sometimes directly, at other times tangentially. In *Indira Sawhney v. Union of India*,[8] Kerala State Backward Classes (Reservation of Appointments or Posts in the Services under the State) Act, 1995 on creamy layer was held to be violative of the basic structure of the Constitution. In *L. Chandra Kumar v. Union of India*,[9] the Supreme Court held that clause 2(d) of Article 323A and clause 3(d) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226 and 227 and 32 of the Constitution, are unconstitutional. Section 28 of the impugned Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323A and 323B were, to the same extent, held to be unconstitutional. The Supreme Court stated that the jurisdiction conferred upon the high courts

[8] 1 SCC 168 at 202, para 65.
[9], (1994) 3 SCC 1.

under Articles 226 and 227 and upon the Supreme Court under Article 32 of the Constitution is part of the inviolable basic structure of our Constitution. In *S. R. Bommai. v. Union of India*,[10] the concept of basic structure was resorted to although no question of constitutional amendment was involved in that case. The Supreme Court held that policies of a state government directed against an element of the basic structure of the Constitution would be a valid ground for the exercise of the central power under Article 356, that is, imposition of the President's rule. There have been arguments for the doctrine of basic structure, against the basic structure and a third school of thought that denies the existence of anything called unamendable basic structure of the Constitution. The third school believes, that people revolted not against the non-essential parts of a Constitution but against its essential ones, if they became an obstacle in their progress. That, ultimate legal sovereignty resides in the people. Therefore, if amendments were to help a Constitution to survive, they must include changes in the allegedly essential part of the Constitution. Wherever one may place their allegiance, it is undeniable that the doctrine of basic structure is essential to the constitutionalism in India as has been proved in the Indira Gandhi era where this doctrine was the only shield standing between an all-powerful Parliament and the people, owing to legislative excesses by reckless usage of Article 368.

The elusive contours of this doctrine still stump academicians, lawyers and judges alike, however, the irrefutable fact remains that the doctrine of basic structure of the Constitution needs to be revisited by the Supreme Court, whenever the chance so arises, and aspects such as its applicability, content and scope need to be elucidated in unambiguous terms.

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[10] (1997) 3 SCC 261.

CHAPTER 21

DOCTRINE OF BASIC STRUCTURE: A CONSTITUTIONAL AXIOM

Prof. (Dr.) Vibha Sharma*

1. Introduction

The development of a State is undoubtedly reflected in the laws that it makes which assist its citizens in realizing their full potential as human beings, ever developing, evolving, and progressing. Part III of the Constitution deals with individual freedoms and rights necessary for a human being to achieve full potential whereas Part IV of the Constitution provides for social advancement, hence a healthy balance should be maintained between the two. However, it is indisputable that rights, including Fundamental Rights, can be trampled upon by the action or inactions of the governments, other public bodies, and legislatures. The Supreme Court of India exercises constitutionally conferred jurisdiction of judicial review, which is original and final under Article 32, and called the 'very soul of the Constitution'. The Supreme Court under Article 32 is seen as the guardian and protector of the rights of the people and citizens of India.

A State with a written Constitution generally has functions of the three organs of the State clearly delineated and their powers clearly demarcated. This generally results in certain limitations on the power of each organ. In India too, the Constitution is supreme and there are laid down limitations for each organ of State. Indian Constitution being the largest written Constitution, does not only lay down the structure of the three organs of the State but also lays down their powers and

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limitations thereon in the favour of its people and Indian citizens.

Under the scheme of the Indian Constitution, the Parliament has a two-fold task, viz. making laws according to the needs of the time and amending the Constitution when necessary. That the normal laws of the land, when passed by the Parliament or State Legislatures were subject to the provisions of the Constitution (especially Part III) was never disputed. However, the Parliament considered that when it passed amendments to the Constitution it was not exercising normal legislative power but the Constituent power, and as such this power was not subject to the provisions of Part III or judicial review by the Supreme Court. This is the starting point of dispute between the Parliament and the Supreme Court, of which the Doctrine of Basic Structure is the outcome. The chapter proposes to explore the development of the Basic Structure through some of the cases, its scope, the ground realities, the validity of its criticism, and its relevance.

2. The Unfolding of the Doctrine of Basic Structure

In *Shankari Prasad Deo v Union of India*[1], the validity of the First Amendment to the Constitution for insertion of Articles 31A and 31B was challenged *inter alia* on the grounds that these two provisions limit the scope of the right to property which was at that time a Fundamental Right. The Five Judges Bench of the Supreme Court applying the principle of harmonious construction[2] held that the power to amend the Constitution including the Fundamental Rights was contained in Article 368

[1] AIR 1951 SC 458.

[2] In short, we have two articles each of which is widely phrased, but conflicts in its operation with the other. Harmonious construction requires that one should be read as controlled and qualified by the other. Having regard to the considerations adverted to above, we are of the opinion that in the context of Article 13 "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of Constituent power with the result that Article 13(2) does not affect amendments made under Article

and that the word "law" in Article 13(2) does not include amendment of the Constitution, which was made in exercise of the constituent and not legislative power. It also held that Article 368, entitled 'Procedure to amend the Constitution', in fact, gives "Power" to the Parliament to amend the Constitution including Fundamental Rights. In *Sajjan Singh v. State of Rajasthan*[3] the 17th amendment was challenged. The majority of the five Judges Bench stood by the decision given in the case of Shankari Prasad. The idea of limited amending power was however mooted by Mudholkar J. in his dissenting opinion in this case.

In *I. C. Golak Nath and Others v. State of Punjab and Another*[4] the 1st, 4th, and 17th amendments were challenged. The Supreme Court held that Parliament's power to amend the Constitution could not be used to abridge the Fundamental Rights, in Part III because a constitutional amendment was deemed to be 'law' under Article 13 which prohibited Parliament from making any law abridging the rights. The concept of implied limitation on the amending power was also raised[5] but not accepted.

Amending power of the Parliament was once again was the subject matter of dispute in the landmark Kesavananda Bharati's case (Fundamental Rights case)[6] which laid down the Doctrine of Basic Structure by recognizing the limited power of the Parliament to amend the Indian Constitution. In this case, the majority, *inter alia*, overruled Golak Nath's case and held that Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution. For ease of

[3] AIR 1965 SC 845.
[4] 1967 (2) SCR 763.
[5] The concept of 'Basic Structure' was brought up during the hearings, pleaded as an alternative argument, by the advocates of Golak Nath, principally Shree M. K. Nambiar, one of the leading constitutional lawyers.
[6] His Holiness Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225.

understanding and clarity, the following parts from the judgment of Justice Khanna are relevant in which it was held:

> *"the words 'amendment of this Constitution' and 'the Constitution shall stand amended' in Article 368 show that what is amended is the existing Constitution and what emerges as a result of amendment is not a new and different Constitution but the existing Constitution in an amended form. The language of Article 368 thus lends support to the conclusion that one cannot while acting under the Article repeal the existing Constitution.....If the power of amendment does not comprehend the doing away of the entire Constitution but postulates retention or continuity of the existing Constitution, though in an amended form, question arises as to what is the minimum of the existing Constitution which should be left intact in order to hold that the existing Constitution has been retained in an amended form and not done away with. In my opinion, the minimum required is that which relates to the basic structure or framework of the Constitution. If the basic structure is retained, the old Constitution would be considered to continue even though other provisions have undergone change. On the contrary, if the basic structure is changed, mere retention of some articles of the existing Constitution would not warrant a conclusion that the existing Constitution continues and survives."*

And thus, the Doctrine of Basic Structure was propounded.

According to the Judges in the case, the enumeration of Basic Structure/features was merely illustrative and not exhaustive, viz. Supremacy of the Constitution, Republican and Democratic form of government, Secular and federal character of the Constitution, Separation of Power, Unity and Integrity of the nation, Sovereignty of India etc.

In *Indira Gandhi v. Raj Narain*[7] the decision of the Supreme Court helped to cement the basic structure theory and give it constitutional validity[8]. It was unequivocally held that the Rule of Law is the basic structure of the Constitution. This point has been reemphasized by the Court in *Indra Sawhney v. Union of India (II)*[9].

The constitutional validity of clauses (4) and (5) of Article 368 and Section 55 of the 42nd Amendment Act was challenged in *Minerva Mills Ltd. v. Union of India*[10]. While considering the scope and extent of the application of the doctrine of basic structure a comprehensive decision was pronounced in which the Supreme Court unanimously held clause (4) which excluded the judicial review of the constitutional amendments and clause (5) which transgressed the limits of amending power, of Article 368 and Section 55 of the 42nd Amendment Act unconstitutional holding that the limited amending power is itself a basic feature of the Constitution which cannot be destroyed and the judicial review of constitutional amendments cannot be excluded.

Independence of the judiciary has been ruled to be the basic feature of the Constitution as it is the most essential characteristic of a free society, a *sine qua non* of democracy. This means that the judiciary ought to be kept free from the influence of political considerations and therefore judicial appointments cannot be left to the absolute discretion of the executive[11].

The Supreme Court in *S. P. Sampath Kumar v. Union of India*[12] recognized the power of judicial review as a basic and essential feature of the Constitution. Similarly, in *L. Chandra Kumar v.*

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[7] AIR 1975 SC 2199.
[8] Fali S. Narman, The State of The Nation, Hay House India, 4th Reprint, 2017, p. 196.
[9] AIR 2000 SC 498.
[10] AIR 1980 SC 1789.
[11] Supreme Court Advocates-on-Record Assn. v. Union of India AIR 1994 SC 268.
[12] AIR 1987 SC 386.

Union of India[13] held that the power of judicial review which is vested in the High Courts under Articles 226 and 227 and the Supreme Court under Article 32 of the Constitution, is an integral and essential feature of the Constitution, consisting part of its basic structure.

In *M. Nagaraj & Others v. Union of India*[14] the Court introduced the test of overarching principles and also quoted with approval a working test that was evolved by Chandrachud J., as he was then, in the Election case. The doctrine of basic structure is not based on literal wordings. The features of the Doctrine of Basic Structure are beyond the words of a particular provision of the Constitution. They are systematic principles underlying and connecting the provisions of the Constitution. These principles give coherence to the Constitution and make it an organic whole. They are part of constitutional law even if they are not expressly stated. An instance is the principle of reasonableness which connects Articles 14, 19 and 21 of the Indian Constitution. Some of these features may be so important and fundamental as to qualify as an essential feature or part of the Basic Structure of the Constitution and hence not open to amendment. It is only by linking provisions to such overarching principles that one would be able to distinguish the essential from less essential features of the Constitution. The principles of Federalism, Secularism, Socialism etc., though beyond the words of a particular provision, are also such overarching principles. Thus, according to the test of overarching principles, a principle is to be first established as part of the constitutional law and as such binding on the legislature. Only then it can be examined whether it is so fundamental as to bind even the amending power of the Parliament *i.e.* to form part of the basic structure of the Constitution.

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[13] L. Chandra Kumar v. Union of India (1997) 3 SCC 261.
[14] (2006) 8 SCC 212.

According to the test evolved by Chandrachud J., as he then was, for determining whether a particular feature of the Constitution is a part of its Basic Structure one has perforce to examine in each individual case the place of the particular feature in the scheme of our Constitution. Its object and purpose and consequences of its denial on the integrity of the Constitution as a fundamental instrument of a country's governance.

The matter of granting protection to Acts by including them under the 9th Schedule came up again before the Supreme Court in *I. R. Coelho*[15]. In this case the Court held that judicial review having been a part of the basic structure doctrine, the mere fact of an Act being placed in the 9th Schedule granting it fictional validity against the total Part III of the Constitution shall trigger judicial review under Article 32.

A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If the former is the consequence of the law, whether by amendment of any Article of Part III or by insertion in the 9th Schedule, such law will have to be invalidated in the exercise of the judicial review power of the Court. In cases of insertion in the 9th Schedule first, the violation of rights of Part III is required to be determined, then its impact is examined and if it shows that in effect and substance, it destroys the basic structure of the Constitution, the consequence of invalidation has to follow.

The judgments in Kesavananda Bharati's case read with Smt. Indira Gandhi's case, requires the validity of each new constitutional amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys the basic structure. The impact test, which means the form of an amendment is not the relevant

[15] I. R. Coelho Reference Case (2007) 2 SCC 1.

factor, but the consequences thereof would be the determinative factor, would determine the validity of the challenge.

Even though the Act is put in the 9th Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental rights taken away or abrogated pertain to the basic structure.

Such constitutional adjudication shall be performed by examining the nature and extent of infraction of a fundamental right by a statute sought to be protected and on the touchstone of basic structure doctrine as reflected in Article 21 read with Article 14 and 19 by application of the 'Right test' and the 'Essence of the Right test' taking the synoptic view of the Articles of Part III. If the infraction affects the basic structure, then such a law(s) will not get the protection 9th Schedule.

If validity of any 9th Schedule law has already been upheld by the Supreme Court, it would not be open to challenge again on the principle declared in this judgment. But if a law held to be violative of any rights in Part III is subsequently incorporated in the 9th Schedule after 24 April 1973 such a violation/infraction shall be open to challenge on the ground of basic structure doctrine.

The 9th Schedule case[16] decided by a Nine Judges Bench by a unanimous judgment is one of a class. It traced, "the factual background of framing of the Constitution and noticed the developments that have taken place almost since its inception in regard to interpretation of some Articles of the Constitution." It has thus examined all the important cases in which Doctrine of Basic Structure was used and, in the process, removed the tangles and harmonized the law laid down by the Supreme

[16] I. R. Coelho v. State of Tamil Nadu AIR 2007 SC 861.

Court in earlier cases. In this case the Court also clarified certain other related academic and legal points as follows:

(a) Quoting Dr. H. M. Seervai, the Court held Constituent power relates to making of a Constitution and is vested only in a Constituent Assembly. There is no outside check on this power. The power given in a written Constitution to an authority, say, Parliament, to amend the Constitution is a power derived from the Constitution itself and is by it's very nature limited in terms of the provisions contained in the Constitution.
(b) Fundamental Rights are not distinct islands of rights, unconnected to each other. They are in fact connected to and support each other on the basis of their foundational values. Collectively they form a comprehensive test against the arbitrary exercise of state power.
(c) Interpretation of Part III of our Constitution (Fundamental Rights) has to be undertaken in a generous and purposive manner which would enable the citizen to enjoy the rights guaranteed by it in the fullest measure.
(d) Some Fundamental Rights are part of the Doctrine of Basic Structure. The Basic Structure doctrine is a concept which is in a way wider than Fundamental Rights. Federalism, Separation of Powers etc. are subjects which are apparently a part of the Basic Structure Doctrine but the provisions relating to them do not feature in Part III and they are not Fundamental Rights therein.
(e) The Doctrine of Basic Structure is now well established as an implied limitation on the power of the Parliament to amend the Constitution.

One of the most important judgments of the Supreme Court of India to date in this case the Doctrine of Basic Structure was clearly enunciated and the law relating thereto was streamlined.

3. Ground Realities and Practical Wisdom

The Constitution of India provides for Separation of Powers, viz. the Executive, Legislative, and Judicial, though not as strictly or with rigidity as that of the American Constitution. However, it is interesting to note that generally there have been power struggles between the legislative and Judicial organs of the State from the very beginning. Under the Indian Constitution, the executive organ of the State generally does not come in conflict with the judiciary, as the Council of Ministers controls the functioning of bureaucracy in the name of the President and also forms part of the legislature.

The Golak Nath case was remarkable as it began the great war, as distinct from earlier skirmishes, over Parliamentary versus judicial supremacy. The rumours of government's attempts to pack the Courts, particularly the Supreme Court of India, with an object of striking a balance between the political and governmental sentiment in favour of a philosophical realignment within the Supreme Court have always been around and can be said to have predated the Fundamental Rights decision[17] pronounced on the 24th of April 1973, a day prior to the retirement of Justice Sikri, the then Chief Justice of India. The fact that the three senior most judges of the Supreme Court were superseded, despite the then President Shree V.V. Giri's objections and advise that the appointment of Justice A. N. Ray, as the Chief Justice of India, was against the tradition of appointing the Chief Justice as per the seniority and with President's consultation with the retiring Chief Justice about his successor, the Political Affairs Committee reaffirmed its decision and the Chief Justice was so appointed.[18] However, the reaction by bench and bar to the suppression demonstrated deep attachment to constitutionalism and especially devotion to the

[17] Granville Austin, Working A Democratic Constitution- A History of the Indian Experience, Oxford University Press, 1999 p. 269.
[18] *Id.* at p. 279.

judicial system country had inherited and made its own.[19] Before moving further, it would be apt to refer to one of the foretelling statements, out of many, made by Dr. B. R. Ambedkar in the Constituent Assembly, "*Bhakti*, or what may be called the path of devotion or hero worship, plays a part in its (India's) politics unequalled in magnitude by the part it plays in the politics of any other country in the world…In politics, *Bhakti* is a sure road to degradation and to eventual dictatorship"[20].

It is very unlikely that India will ever forget the period of Emergency from 26th June 1975 to 21st March 1977, reflecting the extents up to which the representatives of the people may go. Though the circumstances of the time may have had some justifications for the centralization of the power at that time[21], but the attempts made through a succession of amendments to the Constitution and to subvert judicial independence brings forth a different picture of the collaboration of the executive branch and Parliament. The grounds for such attempts, among other things[22], can be said to be in the ruling of Allahabad High Court Case[23] which voided the election (1971) of the Prime Minister due to being found guilty of 'corrupt practice' of using the service of state and central government officers in her campaign and another by the Supreme Court of India[24] decided in 1974 in which it was held that an election expense incurred by any person with the candidate's consent of which a candidate

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[19] *Supra note* 17 at p. 292.
[20] B. R. Ambedkar, CAD, vol.11. no. 11, 979.
[21] "This action is totally within our constitutional framework, and it was undertaken in order not to destroy the Constitution but to preserve the Constitution, to preserve and safeguard our democracy"- Prime Minister Smt. Indira Gandhi, Speech to the Lok Sabha in the debate proceeding its approval of the Emergency 4 Speech reprinted in Preserving Our Democratic Structure, Division of Audio-Visual Publicity, GOI, New Delhi, 1975.
[22] Granville Austin, Working A Democratic Constitution- A History of the Indian Experience, Oxford University Press, 1999 p. 314.
[23] State of Uttar Pradesh v. Raj Narain 1975 AIR 865, Smt. Indira Nehru Gandhi v. Shri Raj Narain & Anr. It was pronounced on 12th June 1975.
[24] Kanwar Lal Gupta v. Amarnath Chawla and Others 1975 (2) SCR 2599.

took advantage should be treated as an authorized expense and had to be included in the candidate's report of election expenses. The 38th Amendment (interalia barring the judicial review of Proclamation of Emergency), 39th Amendment by which Article 329A was inserted to undo the Allahabad judgment, the election petition and the laws relating to it. Ousting the Supreme Court, an 'authority' or 'body' created by Parliament by law to decide the elections of Prime Minister, Speaker etc., this amendment was successfully challenged (the Election case)[25] and Clause (4) of Article 329A was struck down.

The doctrine has been criticized as being alien to the Indian Constitution, not having any textual basis therein, as against the principle of Parliamentary supremacy/sovereignty and as an example of tyranny of the unelected over the elected. Admittedly, there is no text in the Indian Constitution which can be said to be laying down the doctrine of basic structure, nonetheless there is no dispute that the doctrine is based on sound legal principles. As can be seen from the fact that since its inception in the past years it has never been challenged by any government in power. In fact, evolution and laying down of the doctrine was a prescient and wise act as has been born out by subsequent developments. The claims about sovereignty/ supremacy of the Parliament and tyranny of unelected over elected lack legal basis. In a written Constitution none of the three organs is supreme. It is only the Constitution which is supreme and at a higher level than the three organs of the State which it creates. The Constitution specifically provides for judicial review of the law made by the Parliament and the State legislatures; hence the above contention of tyranny is also without any basis. State's excesses continue under every majoritarian government and the citizen need to be protected against such excesses.

[25] Indira Nehru Gandhi v. Raj Narain 1975 (Supp.) SCC 1.

4. Scope of the Doctrine of Basic Structure

It is generally believed that only constitutional amendments can be subjected to the test of the basic feature structure and not legislative measures. However, a different view is deducible from the judgment of the Ninth Schedule case as can be seen below.

Article 31B clearly provides that Acts inserted in Schedule Nine remain subject to the powers of competent legislatures, be it the Parliament or State legislatures and are liable to be repealed or amended by them. No State legislature has the power to amend or repeal any part of the Constitution. It is therefore clear that insertion of the Acts in the Ninth Schedule does not make such enactments a part of the Constitution.

Next, let us consider an Act which destroys the Secular character of the State. Even when the Parliament, in exercise of its constituent power provides it protection under Article 31B and the Ninth Schedule such an Act cannot be put beyond the purview of the Basic structure doctrine and is bound to be set aside if found to be violative of it. Now let us examine the scenario when such an Act destroying the secular character of the State is not provided any protection. No constitutional amendment under Article 31B and insertion in the Ninth Schedule takes place. Under such a situation to argue that such an Act not being a constitutional amendment is outside the scope of the doctrine of basic structure will be nothing short of missing the woods for the trees.

Admittedly, the doctrine of basic structure was evolved to safeguard the citizens from the majoritarian state's excesses. Therefore, the contention that it shall not apply to normal enactments and the state excesses can continue is not valid. What an enactment cannot do even when granted protection under Article 31B and the Ninth Schedule, it cannot possibly be allowed to do without such protection. It is submitted that the violations of the doctrine of basic structure are judged by impact and effect test. If the consequential effect of an enactment

passed by the Parliament or the State is violative of the principles of the basic structure doctrine it will have to be set aside. The law on the subject is therefore not as yet settled.

5. Conclusion

The largest Bench sat for the longest time to decide issues of grave moment not only to the future of this country but to the future of democracy itself[26]. The outcome was the Doctrine of Basic Structure. The decisions of the Supreme Court on the question of amendability of the Indian Constitution involve a high policy- making function on the part of the judiciary. The doctrine of basic structure was a bold and creative interpretation based on the feeling among the judges that certain values and ideals embedded in the Constitution should be preserved and be not amenable to any process of constitutional amendment. The doctrine seeks to preserve the basic, core, constitutional values against the onslaught of transient' majority in Parliament.

The life of law is experience and not logic. Events subsequent to the formulation of the basic structure doctrine made it clear that constitutional amending power could be misused to usher in an undemocratic regime and deprive the people of their rights. Even the critics of the Supreme Court and the doctrine of basic structure then became convinced of the sagacity and the rightness of the Court's approach. It is a safe assumption that the 'basic features' theory has protected the Constitution from being mutilated out of recognition at the altar of political expediency. A Constitution is a national heritage and not the property of one single party howsoever mighty it may be, and no single party has thus a right to institute amendments in the

[26] Fali S. Nariman, The State of the Nation, Hay House Publishers (India) Pvt. Ltd., Reprint 2017, p. 190.

Constitution merely in party interest, rather than in national interest.[27]

Legal principles and laws are a safeguard against legislative tyranny. However, there are no laws that cannot be subverted and no dictator who cannot be overthrown. In the final analysis it is 'We, the people of India' who are the true saviours of our Constitution.

[27] M. P. Jain, Indian Constitutional Law, LexisNexis Butterworths Wadhwa, Nagpur Reprint 2011, P.1779.

CHAPTER 22

BEYOND KESAVANANDA: EXPLORING THE EVOLUTION AND CONTEMPORARY RELEVANCE OF THE DOCTRINE OF BASIC STRUCTURE

Dr. Sanjula Thanvi[*]
Dr. Neha Sharma[**]

1. Introduction

The Constitution of India is a dynamic document that has adapted over time to meet the evolving needs and challenges of the nation. One of the fundamental principles that has emerged in Indian constitutional law is the doctrine of basic structure, which was initially elucidated in the momentous Kesavananda Bharati case in 1973. This doctrine maintains that specific fundamental aspects of the Constitution, including principles of democracy, secularism, and the rule of law, cannot be modified or revoked by the government through ordinary legislative or executive action. Since its inception, the doctrine of basic structure has become a cornerstone concept in Indian constitutional law and has been subject to ongoing debate and discussion. This chapter aims to explore the evolution and contemporary significance of the doctrine of basic structure beyond the context of the Kesavananda Bharati case.[1]

To comprehend the significance of the doctrine of basic structure, it is crucial to scrutinize the historical and political backdrop in which it was established. The doctrine of basic structure was shaped by a multitude of historical factors, such as the Indian independence movement, the Constituent

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[1] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

Assembly, and the influence of international models of constitutionalism. Furthermore, it was impacted by the political and societal obstacles of the Emergency period in India, during which civil liberties were suspended, and the government aimed to expand its power. In this chapter we will scrutinize the historical and political context of the doctrine of basic structure and how it has developed over time. Additionally, we will explore the contemporary relevance of the doctrine of basic structure, particularly in the context of recent constitutional challenges and debates surrounding the role of the judiciary in safeguarding fundamental rights and democratic principles. Through this analysis, we aim to contribute to a deeper comprehension of the doctrine of basic structure's significance in Indian constitutional law and its ongoing relevance in shaping the future of Indian democracy.[2]

2. The Evolution of Basic Structure Doctrine

The Kesavananda Bharati case marked a seminal moment in Indian constitutional law, as it recognized the doctrine of basic structure as a fundamental principle of the Constitution.[3] Nevertheless, the interpretation and application of this doctrine have undergone considerable evolution over time. In the years that followed the Kesavananda decision, the Supreme Court continued to apply and refine the doctrine, identifying new features as part of the basic structure, such as the independence of the judiciary and the power of judicial review.[4]

Despite its fundamental importance in Indian constitutional law, the doctrine of basic structure has been the subject of ongoing debate and criticism. Critics have argued that the doctrine is too vague and subjective, while others have contended that it unduly limits the government's ability to make

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[2] Upendra Baxi,. The Crisis of the Indian Legal System: Alternatives in Development. (2nd ed., New Delhi, Oxford University Press, 2011).
[3] Supra note 1.
[4] S. P. Sathe, Judicial Activism in India: Transgressing Borders and Enforcing Limits, 120-22 (Oxford University Press, 2002).

necessary changes to the Constitution.[5] The doctrine has been the subject of several high-profile cases in recent years, including challenges to the constitutional validity of the National Judicial Appointments Commission Act, 2014 and the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 which aimed to establish a unique identification system for all citizens.[6]

Nevertheless, the doctrine of basic structure remains a bedrock principle of Indian constitutional law, influencing the interpretation and application of the Constitution. As India faces new challenges and undergoes transformations, it is likely that the doctrine will continue to evolve and adapt to the changing needs of society.[7]

3. The Scope and Limits of Basic Structure

The basic structure doctrine has been at the centre of contentious debates and controversies in Indian constitutional law, with ongoing discussions surrounding its scope and limitations. While the doctrine recognizes certain core aspects of the Constitution as immutable and beyond the government's reach, its interpretation and implementation have come under close scrutiny and criticism. Critics argue that the doctrine is overly subjective and ambiguous, giving the judiciary excessive leeway to intervene in the affairs of the legislative and executive branches.[8] Nonetheless, proponents of the doctrine assert that it serves as a vital safeguard against the government's power, preserving the fundamental principles of democracy and the

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[5] For example, see Madhav Khosla, *The Basic Structure Doctrine is Basic, but the Question Remains: Basic for What*? THE WIRE (September 4, 2017), https://thewire.in/law/the-basic-structure-doctrine-is-basic-but-the-question-remains-basic-for-what.

[6] Joseph Shine v. Union of India, (2018) 10 SCC 1; K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

[7] Rohit De, The Strange Life and Afterlife of the Basic Structure Doctrine, 50 (51) ECONOMIC AND POLITICAL WEEKLY (2015).

[8] Arun K. Thiruvengadam, *Judicial Activism, Basic Structure, and Separation of Powers in India*, 129(1) Political Science Quarterly (2014).

rule of law from the encroachment of fleeting political expediency.[9]

One area of controversy surrounding the basic structure doctrine is its scope. Although the doctrine was originally established in Kesavananda Bharati to protect certain fundamental features of the Constitution, the definition of these features and their interpretation have remained a subject of disagreement.[10] In recent years, the Supreme Court has broadened the scope of the basic structure doctrine to encompass new elements, such as the right to privacy and the principle of non-arbitrariness, leading some to fear that the doctrine may become too expansive, threatening the separation of powers.[11]

Another area of debate is the limits of the basic structure doctrine. Although the doctrine has been a powerful instrument for protecting fundamental rights and principles, critics argue that it can constrain the government's ability to make necessary constitutional amendments, potentially hindering India's ability to adapt to changing circumstances. The challenges to the National Judicial Appointments Commission Act and the Aadhaar Act illustrate this tension between the doctrine's protective role and its potential to restrict government action.[12]

Despite the ongoing debates and controversies, the basic structure doctrine remains a foundational principle of Indian constitutional law, shaping the interpretation and application of the Constitution. As India faces new challenges and changes, the scope and limitations of the doctrine will continue to be

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[9] Rajeev Dhavan, "Basic Structure: The Search for Coherence," The Hindu, March 23, 2018.
[10] Granville Austin, Working a Democratic Constitution: The Indian Experience, 316-317 (New Delhi: Oxford University Press, 1999).
[11] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1; Shayara Bano v. Union of India, (2017) 9 SCC 1.
[12] National Judicial Appointments Commission v. Union of India, (2016) 8 SCC 1; Justice K.S. Puttaswamy (Retd.) v. Union of India, (2019) 1 SCC 1.

tested and debated, underscoring the enduring relevance and significance of the basic structure doctrine in shaping the future of Indian democracy.[13]

4. Basic Structure Doctrine and Democracy

Evaluating the 'Judiciary's role in constitutional governance' is an imperative area of study within the realm of constitutional law. The basic structure doctrine, which serves as a quintessential checkpoint for the government's power, ensures that the Constitution's vital principles remain sacrosanct. The judiciary, being the final interpreter of the Constitution, plays a pivotal role in safeguarding the basic structure of the Constitution, and preserving democratic values.[14]

In this context, the judiciary's independence and impartiality are sacrosanct for ensuring the sanctity of the Constitution. It acts as a sentinel on the qui vive to protect democracy and check the arbitrary exercise of power by the government. The judiciary's ability to interpret the Constitution in a fair, objective and neutral manner serves as the bedrock of constitutional governance, enabling it to serve as a guarantor of the rights of citizens.[15]

Furthermore, the judiciary's power to strike down unconstitutional laws serves as a critical aspect of constitutional governance, allowing it to act as a safeguard against the government's actions that are beyond the purview of the Constitution. It ensures that the government remains accountable to the people and functions within the framework of the Constitution.

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[13] Sujit Choudhry & Madhav Khosla, *The Basic Structure Doctrine*, 14(1) Annual Review of Law and Social Science 96 (2018).

[14] *Basic structure doctrine*, LEGAL SERVICE INDIA. https://www.legalserviceindia.com/legal/article-3430-basic-structure-doctrine.html.

[15] Guarantor, Merriam-Webster Dictionary. https://www.merriam-webster.com/dictionary/guarantor

In conclusion, the judiciary's role in constitutional governance is crucial for preserving democratic values, upholding the basic structure of the Constitution, and ensuring that the government functions within the confines of the Constitution. Its independence, impartiality, and proficiency in interpreting the Constitution are essential for maintaining the balance of power and securing the rights of citizens.

5. Basic Structure Doctrine and Federalism

Analysing the 'Implications for Centre-State Relations' is a compelling and consequential topic in Indian constitutional law. The basic structure doctrine, which serves as a bedrock to preserve the fundamental characteristics of the Constitution from erosion, plays a crucial role in maintaining the federal character of the Constitution.[16]

Federalism, a unique aspect of the Indian Constitution, carves out a delicate balance of powers between the Centre and the States. The basic structure doctrine serves as an essential checkpoint to check the Centre's exercise of power and prevent it from infringing upon the States' rights and powers. The judiciary plays a pivotal role in upholding the basic structure of the Constitution and ensuring that the principles of federalism are not disturbed, particularly in situations where the Centre is attempting to interfere with the States' powers.[17]

Centre-State relations in India have always been a contentious and contested issue, with disputes ranging from financial autonomy to legislative powers to administrative control. However, the basic structure doctrine has proven to be a potent

[16] *Supra* note 14.

[17] Centre-State relations, PRESS INFORMATION BUREAU. https://pib.gov.in/newsite/PrintRelease.aspx?relid=172465.

tool for the judiciary to strike down laws and policies that violate the federal character of the Constitution.[18]

In conclusion, the basic structure doctrine and federalism are intricately linked, with the former serving as a safeguard to protect the latter. The judiciary's responsibility of upholding the basic structure of the Constitution and preserving federalism is critical in ensuring that power is balanced between the Centre and the States.

6. Basic Structure and Socio-Economic Rights

The concept of 'basic structure and socio-economic rights' is an essential issue in the constitutional law in India. The basic structure doctrine is a constitutional principle that ensures that the essential features of the Constitution cannot be altered or destroyed by the government. At the same time, socio-economic rights guarantee citizens' access to basic amenities such as food, housing, education, and healthcare. The inclusion of socio-economic rights in the Indian Constitution is a significant step towards a more inclusive and egalitarian society.[19]

However, the challenges to incorporating socio-economic rights within the framework of the Basic Structure doctrine are significant. Critics argue that the doctrine primarily serves to protect civil and political rights, such as freedom of speech, and not socio-economic rights. In contrast, supporters of socio-economic rights argue that they are essential for ensuring the well-being and dignity of citizens.[20]

The judiciary's role in adjudicating disputes concerning socio-economic rights is critical. The Indian judiciary has, in some

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[18] Federation of Indian Chambers of Commerce and Industry v. Union of India, (AIR 1982 SC 149).

[19] National Human Rights Commission. https://nhrc.nic.in/socio-economic-rights.

[20] *Basic structure doctrine and socio-economic rights*. LEGAL SERVICE INDIA. https://www.legalserviceindia.com/legal/article-2064-basic-structure-doctrine-and-socio-economic-rights.html

cases, taken a progressive stance towards socio-economic rights, particularly in cases related to the right to education and right to health. However, there are challenges to realizing socio-economic rights due to financial and resource constraints.[21]

The inclusion of socio-economic rights in the Constitution is a significant step towards promoting social justice and inclusivity. However, challenges to the realization of these rights exist, and the judiciary must play a critical role in balancing these competing interests within the framework of the Basic Structure doctrine.

7. Basic Structure and Global Perspectives:

The Basic Structure doctrine in Indian constitutional law has received widespread recognition for its role in preserving the essential features of the Constitution. The doctrine is unique to the Indian legal system and has been applied in various cases to strike down laws that are incompatible with the Constitution's basic structure. However, it is worthwhile to compare and contrast the Indian doctrine with similar doctrines in other jurisdictions to gain a global perspective on the role of constitutional review in safeguarding constitutional values.

One of the most significant global comparisons is with the doctrine of Constitutional Supremacy in the United States. In the United States, the Supreme Court has the power to interpret the Constitution and declare laws unconstitutional if they are in violation of the Constitution's provisions. The principle of judicial review has been established in the United States for over 200 years and is an integral part of the American constitutional system. The difference between the Basic Structure doctrine and the American doctrine of Constitutional Supremacy lies in the scope of review. In India, the Basic Structure doctrine is a

[21] *Right to education: Indian Supreme Court judgment. (2012),* UNESCO. https://en.unesco.org/themes/education-and-sustainable-development/access-quality-education/legal-instruments/right-education-indian-supreme-court-judgment.

tool to preserve the essential features of the Constitution, whereas, in the United States, the Supreme Court has the power to strike down any law that is inconsistent with the Constitution.[22]

Another important comparison is with the doctrine of Proportionality in Germany. The German Constitution establishes the principle of proportionality, which requires the government to balance its interests against the fundamental rights of individuals. The Proportionality doctrine requires the government to demonstrate that any restriction on fundamental rights is necessary to achieve a legitimate aim and that no less restrictive measure could have been used to achieve that aim. The Basic Structure doctrine in India also involves balancing the interests of the government against the fundamental rights of individuals, but it does not require the same degree of proportionality analysis as the German doctrine.[23]

Comparisons with other jurisdictions highlight the unique nature of the Basic Structure doctrine in Indian constitutional law. The doctrine is not only a tool for safeguarding constitutional values, but it is also a mechanism for ensuring that the Indian Constitution remains relevant in the changing social and political landscape. The Basic Structure doctrine has been applied in several cases to ensure that the Constitution remains consistent with the principles of democracy, federalism, and secularism.

8. Conclusion

The Basic Structure doctrine stands as a vital component of Indian Constitutionalism, having been established in the

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[22] *Constitutional Supremacy*. LEGAL INFORMATION INSTITUTE, .https://www.law.cornell.edu/wex/ Constitutional supremacy

[23] *Proportionality*. CONSTITUTIONAL LAW REPORTER. https://Constitutionallawreporter.com/category/Constitutional-protection-of-fundamental-rights/proportionality/.

landmark Kesavananda Bharati's case. The Basic Structure concept has drawn criticism for being undemocratic because it allows unelected judges to invalidate constitutional amendments. The idea has also been praised by those who support it as a safeguard against authoritarianism and majoritarianism. Despite facing criticism from some quarters, the doctrine's importance in preserving the essential features of the Constitution and ensuring its relevance in a rapidly changing society cannot be overstated. Looking to the future, the doctrine will continue to encounter new challenges and opportunities, particularly with regards to socio-economic rights and federalism. However, the Basic Structure doctrine also presents a unique opportunity to promote a culture of constitutionalism in India, fostering a society that respects human rights, democracy, and the rule of law. In navigating the complexities of governance and development, it remains essential to maintain a balance between the power of the judiciary and elected representatives. By serving as a tool for ensuring this balance and reflecting the will of the people, the Basic Structure doctrine can uphold the Constitution as a living document for the betterment of all.

CHAPTER 23

CONSTITUTIONAL SAFEGUARDS: REVISITING THE DOCTRINE OF BASIC STRUCTURE IN INDIA

Dr. Kavita Lalchandani*

1. Introduction

The Constitution is the expression of the aspirations of countless people of a nation and projects the structure, functions, duties and powers of the organs of the government and also of the citizenry. It is a solemn organic and almost perpetual document of sacrosanct significance and it is created to last for ages. The Constitution however, cannot afford to be rigid and inflexible or else it will collapse in due course of time and therefore, room for amenability must exist therein. It is lightened to a floating dock which while being firmly attached to its moorings remains flexible enough to bear the caprices moods of the waves.[1]

The Constitution has been regarded as a binding law that regulates the conduct of the organs of the State inter se and the relationships of State and citizens, after the decision in *Marbury v. Madison*[2]. As John Marshall CJ observes that *"the Constitution is the supreme law of the land and, it is emphatically province and the duty of the judicial department to say what the law is"*[3]. Since then, it is self-evident that the interpretation of the Constitution is the function of judiciary. In a sense, the

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[1] Ajit Singh & Ors v. State of Punjab & Ors., AIR 1996 SC 1189.

[2] Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803).

[3] Ronald Rotunda, Modern Constitutional Law-Cases and Notes 6 (American Case Book Series 2016).

principle of supremacy of the Constitution is preserved and sustained through judicial review.

At the outset, it may be observed that the Supreme Court of India[4] have engaged in the task of furnishing justification of the doctrine of basic structure in terms of standards and principles. It is interesting to note that Prof. H. L. A. Hart, in his postscript, has explicitly acknowledged that in his concept of law, he did not pay adequate attention to the principles and standards as he did to primary and secondary rules.

Indian Constitution is basically a Federal Constitution having a clear tendency of turning unitary if the national interests so necessitate. In India, H. M. Seervai and Mr. N. A. Palkhivala undoubtedly both contributed very rich in evolution of the doctrine of basic structure under Indian Constitution. The objective is to review the application of the basic structure after it has been put in place five decades ago. This single doctrine altered the judicial and political landscape of the country. It is rightly said that one knows the value of oxygen only when one is deprived of it. Similarly, value of basic structure can be determined only by visualising by what would have happened if this doctrine had not become part of our constitutional law. It is almost certain that India would have not survived as a democracy but would have slowly degenerated into a totalitarian State. To understand the doctrine of basic structure we need to be acquainted with Art. 368 of Constitution for two reasons:

1. Power to amend or change the Constitution is one of the most important features, which a flexible document like Constitution must contain.
2. As it originally stood with two words under Article 368 of Constitution of India *i.e.*, amend in the first part (provision) and change in the second part (proviso).

[4] I. R. Coelho v. State of Tamil Nadu, AIR 2007 SC 861.

With the plain reading of Art. 368 of Constitution, it means if any amendment or change is made the Constitution shall stand amended. The second important is the word change used so far as the proviso is considered goes as far as substitution but does not go beyond. The first part of Art. 368 allows us to reach every part of the Constitution and change or amend it as it stood. The second part *i.e.*, proviso deals with different specified subject matter[5] *i.e.*

(i) Article 54, Article 55, Article 73, Article 162 or Article 241, or
(ii) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
(iii) Any of the Lists in the Seventh Schedule, or
(iv) The representation of States in Parliament, or
(v) Goods and Service Tax Council[6]
(vi) Representation of States in Parliament, IV Schedule
(vii) The provisions of Article 368 itself.

These above subjects say that this can be dealt by way of change, but not only Parliament has to pass it nevertheless it has to go for ratification by the State.

2. Constitutional Safeguards and Doctrine of Basic Structure

Ironically, the term 'basic structure' does not appear anywhere within the text of Article 368. Furthermore, in the case of *Kesavananda Bharati v. State of Kerala*[7], no judge specifically referred to any specific Article or group of articles that would define the basic structure. However, while analysing the judgments in the said case, it becomes apparent that the doctrines of basic structure embody the fundamental and

[5] J. N. Pandey, Constitutional Law of India 804 (Central Law Agency, 2014).
[6] INDIA CONST. art. 279A, *amended* by The Constitution (One Hundred and First Amendment) Act, 2016.
[7] AIR 1973 SC 1461.

indispensable principles that serve as the foundation of our Constitution.

The doctrine of Basic Structure is a cornerstone of the Indian constitutional jurisprudence, which establishes the fundamental principles and values that form the foundation of the Constitution of India. This research work critically analyses the concept of the Basic Structure of the Constitution of India, exploring its historical background, evolution, and impact on the Indian legal system. It delves into the various landmark judgments that have shaped and defined the contours of the doctrine of Basic Structure, while also examining the implications and limitations associated with this doctrine and also discusses the relevance of the doctrine of Basic Structure in safeguarding the fundamental rights and democratic ideals enshrined in the Indian Constitution.

In the case, *Shankari Prasad v. Union of India*[8], the Hon'ble Supreme Court made a significant ruling stating that Article 368 grants the authority to amend the Constitution, encompassing the Fundamental Rights as well. The Court clarified that the term 'Law' mentioned in Article 13(2) does not extend to include constitutional amendments. Thus, a clear distinction exists between Parliament's legislative power, which pertains to creating laws, and its power to amend or exercise constituent powers in shaping the Constitution.

Further, the Court made an observation, stating that:

> *"In the context of Article 13, the term 'law' should be understood as rules and regulations formulated through the ordinary exercise of legislative power, excluding amendments to the Constitution made through the exercise of constituent power. Consequently, Article 13(2)*

[8] AIR 1951 SC 458.

does not impact amendments carried out under Article 368."

However, in the case of *Sajjan Singh v. State of Rajasthan*[9], a five-judge bench examined the legality of the 17th Constitutional Amendment, which added 44 statutes into the 9th Schedule. While all the judges concurred with the ruling of Shankari Prasad, it was the first instance when Justices Hidayatullah and Mudholkar expressed reservations in their concurring opinion regarding the unrestricted authority of Parliament to amend the Constitution and potentially limit the fundamental rights of citizens and further the issue of implied limitation was raised.

The case of *Golaknath v. State of Punjab*[10] went one step ahead and held that no part of Part III could be amended at all. This decision was rightly overruled later in the case of *Kesavananda Bharati v. State of Kerala*[11]. The essence of the Kesavananda Bharati ruling was that Article 368 did not allow Parliament to modify the basic structure of the Constitution. Mr. Palkhivala presented a comprehensive set of 12 principles that, in his view, formed the basic structure of the Constitution. These principles, as outlined in the judgment of A.N. Ray J., are as follows:

1. The Constitution holds supreme authority.
2. India's sovereignty is paramount.
3. Preservation of the country's integrity.
4. Upholding a democratic way of life.
5. Maintaining a republican form of government.
6. Ensuring the guarantee of basic human rights detailed in Part III of the Indian Constitution.
7. Establishment of a secular state.
8. A judiciary that is free and independent.
9. The existence of a dual structure comprising the Union and States.

[9] AIR 1965 SC 845.
[10] 1967 SCR (2) 762).
[11] AIR 1973 SC 1461.

10. Striking a balance between the legislature, executive, and judiciary.
11. Adherence to the Parliamentary form of government, distinct from the presidential form.
12. While Article 368 permits amendments, it cannot empower Parliament to alter or dismantle any essential features of the Constitution.

The above-mentioned list is not an exhaustive list and the courts through various judgments have enumerated many more items as the doctrine of basic structure. The Apex Court in Kesavananda case refereed to world various Constitution and then through the majority of 7:6 held that the Parliament through Article 368 of the Constitution of India can amend the preamble and the Constitution but without altering or changing the Basic Structure of the Constitution. The decision given in this case became a constitutional benchmark. In 1985, the Supreme Court of Bangladesh adopted the basic structure doctrine primarily relying on the decision delivered in Kesavananda Bharati Case[12].

Through the Kesavananda case, when the validity of constitutional amendment is questioned the Supreme Court or High Court has to consider two points:

1. Whether the procedure required under Article 368 have complied with?
2. Whether the amendment destroys the basic structure of the Constitution?[13]

In *M. Nagaraj v. Union of India*[14], two new tests called as the twin tests were required to be satisfied in the matter of application of the principle of basic structure. These were called the width test and test of identity and the two different tests warranted two

[12] *Supra note* 11.
[13] Raghunatharoa Ganpatrao v. Union of India, AIR 1993 SC 1267.
[14] (2006) 8 SCC 212.

different judicial approaches. These two tests were applied to uphold the validity of the 77th, 82nd and 85th Amendments. By employing the width test, the judiciary can assess whether the limits of a specific power have been exceeded. When analysing the provisions of Article 16(4-A) and (4-B), the Supreme Court applied this test and determined that the amendments in question did not eliminate the ceiling limit of 50%, the exclusion of the creamy layer, or the compelling reasons related to backwardness, inadequate representation, and administrative efficiency.

The doctrine of Basic Structure in India stands as a remarkable constitutional safeguard, serving as a guiding principle in ensuring the endurance and sanctity of the Indian Constitution. Through the exploration of this doctrine, we have gained valuable insights into its significance and impact on the constitutional framework of the country.

The unveiling of the doctrine of Basic Structure has provided a crucial mechanism for protecting the core values, fundamental rights, and democratic principles enshrined in the Indian Constitution. It serves as a powerful tool to prevent any arbitrary changes or amendments that may undermine the essence and spirit of the Constitution.

By recognizing certain essential features as part of the basic structure, such as the supremacy of the Constitution, secularism, democracy, and the separation of powers, the doctrine acts as a bulwark against any potential erosion of these foundational principles. It ensures that the Constitution remains a living and dynamic document while maintaining its fundamental character. The doctrine of Basic Structure has played a pivotal role in safeguarding the rights and liberties of individuals, promoting social justice, and maintaining a balance of power between different organs of the state. It has been instrumental in upholding the constitutional checks and

balances, preventing the concentration of power and potential abuses by the executive, legislature, or judiciary.

The doctrine of Basic Structure has contributed to the stability, consistency, and predictability of the Indian constitutional system. It has provided a framework for constitutional interpretation and judicial review, ensuring that any constitutional amendments are in harmony with the basic structure and do not undermine the democratic ideals and principles enshrined in the Constitution.

The doctrine of basic structure gained further clarity through three significant judgments during that decade. In the case of *Indira Nehru Gandhi v. Raj Narain*[15], a constitutional amendment pertaining to the election of the Prime Minister and the Speaker was invalidated by the court for contravening the fundamental principles of democracy (as held by Justices Mathew and Khanna), the rule of law (as stated by Chief Justice Ray), and equality (as asserted by Justice Y. V. Chandrachud). Subsequently, in *Minerva Mills v. Union of India*[16], the Parliament sought to override the Kesavananda judgment by introducing the 42nd Amendment Act[17], which explicitly declared unlimited amending power without scope for judicial review. However, the Court struck down this amendment on the grounds that the limited amending power of the Parliament itself formed a part of the basic structure. In *Waman Rao v. Union of India*[18], it was established that laws included in the 9th Schedule, which were previously immune from fundamental rights review, still needed to be evaluated based on the touchstone of the basic structure before receiving immunity.

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[15] AIR 1975 SC 2299.
[16] AIR 1980 SC 1789.
[17] 42nd Amendment Act, 1976 – Inserted two new parts i.e. Part IVA and Part XIVA. It substituted 36 Articles in the Constitution.
[18] (1981) 2 SCC 362.

Through a series of judgments collectively known as the Tribunals Cases, the Court affirmed that judicial review by the Supreme Court under Article 32 and by the High Courts under Article 226 was an essential feature. This principle was initially articulated in *S. R. Bommai v. Union of India*[19] and further solidified in the decisions of *Ismail Faruqui v. Union of India*[20] and *Aruna Roy v. Union of India*[21]. In *I. R. Coelho v. State of Tamil Nadu*[22], the Court included Articles 14 (right to equality), Article 19 (fundamental freedoms), and Article 21 (right to life) in the list of basic features.

Over the course of time, the judiciary did not want to brandish this doctrine as a Trojan horse to help penetrate the already weakened separation of powers between the three organs. In the case of *Bhim Singhji v. Union of India*[23], the Supreme Court made it abundantly clear that the doctrine basic structure cannot be expanded to encompass the right to property. The Court emphasized that the very purpose of the Constitution is to alleviate poverty and, in doing so, eliminate the concentration of property.

Similarly, as evident in the cases of *Indira Nehru Gandhi v. Raj Narain*[24] (commonly known as the Election case) and *Kuldip Nayar v. Union of India*[25], the court unequivocally established that the basic structure doctrine does not apply to ordinary legislations enacted by Parliament, thereby limiting its scope exclusively to constitutional amendments. The court clarified that an ordinary law or legislation can be invalidated based on two grounds: 1) violation of fundamental rights enshrined in the Constitution, and 2) legislative incompetence.

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[19] AIR 1994 SC 1918.
[20] AIR 1995 SC 605.
[21] AIR 2002 SC 3176.
[22] AIR 2007 SC 861.
[23] 1981) SCC 166.
[24] AIR 1975 SC 2299.
[25] AIR 2006 SC 3127.

Indeed, the non-application of the doctrine in such circumstances can potentially cause greater harm to the Constitution, as it renders laws passed by Parliament immune to judicial scrutiny. Rendering this doctrine ineffective would pave the way for a totalitarian regime, as emphasized in the case of *Ashoka Kumar Thakur v. Union of India*[26], where it was stated that *"When judicial review is prohibited, democracy fades away".*

3. Principle of Equality & Doctrine of Basic Structure

In this an attempt is made to briefly examine, whether or not the principle of gender equality constitutes one of the essential features of basic structure of our Constitution. The signing and ratification of the CEDAW by India gives this matter a greater relevance than it had before. At a time when India asserts that it is one of the thresholds of becoming a superpower and maintaining a permanent seat in the UN Security council, gender inequality breaches remain unabated.

It is crucial to recognize that Constitution form the fundamental framework and legal system of a nation, establishing the foundation for the relationship between the state and its citizens, as well as among the citizens themselves. As such, they have a significant impact on enshrining gender rights, including the vital principle of gender equality.

Equality was held to be an essential feature of basic structure of the Constitution by the Supreme Court of India. The concept of equality is one by way all persons are treated equally and alike, by equality before the law. There should not to be any discrimination between persons on the grounds of their religion, race, caste, place of birth, sex, language and the same cannot operate as the limitation on the people for any purpose[27].

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[26] 1972 (1) SCC 660.
[27] INDIA CONST. art. 15, cl. (1) & (2).

However, equality and equal treatment to all can be postulated only when all people are actually equal. In a society like India, there is a demand for egalitarian equality[28]. Social justice and equal economic opportunities would be put to paper tigers if no positive steps are taken for their proper implementations. In other words, there is a need to treat those people who are placed equally, with inequality. For the same, special provisions were made for women and children[29], reservation in seats for educational institutes and public employment[30], etc. Mathew J. took the view that the various facets of equality were reflected in Article 14, 15, 16, 17, 18, 25, etc[31].

A reference to basic structure in the context of gender equality is furnished by the decision of the Supreme Court in *Velamuri Venkata Sivaprasad v. Kothuri Venkateswarlu*[32]. This case involved the interpretation of Section 14 of Hindu Succession Act, 1956 and by placing reliance on C. Masilamani Mudalier 1996, the court observed:

> *"It is firmly established as a legal principle that legislations with socio-economic implications should be interpreted in the broadest possible sense; otherwise, the legislature's intent would be frustrated. The recognition and protection of rights should be given full consideration, as that is the purpose for which the specific legislation has been enacted. Gender bias is a topic of global debate, and the fundamental structure of the Constitution embraces the principle of equality, rejecting gender bias. Gender equality is a cornerstone of our Constitution."*

Therefore, the objective of the judiciary should be to accord due importance to the requirements of the Constitution when

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[28] Indira Sawhney v. Union of India (1992 Suppl. (3) SCC. 217).
[29] INDIA CONST. art. 15, cl. (3).
[30] INDIA CONST. art. 16, cl. (4), (4-A) & (4-B).
[31] Indira Gandhi v. Union of India, 1975 AIR 2299.
[32] 1999 AIR SCW 4583.

interpreting statutes, particularly those that involve women. The basic structure doctrine involves challenge to the constitutional validity of provisions of Hindu Minority and Guardianship Act, 1956[33] and of Guardians and Wards Act, 1890[34] in *Githa Hariharan v. Reserve Bank of India*[35].

In light of the above discussion, it may be safely concluded that linkage of gender equality with the basic structure doctrine may only be the first step towards elimination of discrimination, barriers and stereotypes against women in a predominantly patriarchal society.

The doctrine of legislative competence may generally be used only to invalidate laws and executive actions, whereas basic structure doctrine may be invoked to seek redressal against both legislature and executive inaction, if it is assumed that it triggers positive obligation in the context of realisation of ideal of gender equality. The court may use gender equality and basic structure to fix accountability of public institutions by issuing *suo moto* declaratory orders against them for practicing indirect gender discrimination.

4. Conclusion

The concept of doctrine of basic structure is established by the Apex Court of India, however, its specific contents cannot be conclusively determined. There are certain key elements consistently emerge in the apex court's rulings, such as the sovereign, democratic, and secular nature of the polity, the rule of law, the independence of the judiciary and the fundamental rights of citizens. These aspects have repeatedly surfaced in the court's pronouncements, reaffirming their status as essential features of the Constitution. In a recent case in May 2023, the

[33] Hindu Marriage Act, 1955, § 6, No. 25, Acts of Parliament, 1955 (India).
[34] Guardians and Wards Act, 1890, § 19(b), No. 8, Acts of Parliament, 1890 (India).
[35] (1999) 2 SCC 228.

Supreme Court of India, *All India Judges Association v. Union of India*[36], further emphasized that the independence of the Judiciary is an integral part of the basic structure of our Constitution.

In conclusion, the Doctrine of Basic Structure serves as a formidable constitutional safeguard, playing a crucial role in preserving the integrity and stability of a nation's constitutional framework. By bringing the Doctrine of Basic Structure to the forefront, its significance as a mechanism is recognised to prevent any amendment or revision from undermining the fundamental principles and values enshrined in the Constitution. Through its application, this doctrine acts as a protective barrier against potential abuses of power, ensuring the preservation of rights, liberties, and democratic ideals that serve as the foundation of a fair and inclusive society. As it is analysed, the intricacies of the 'doctrine of basic structure', a person gains a deeper understanding of its role in fostering constitutional harmony and providing a framework for progressive and inclusive governance. It serves as a reminder that while a Constitution may evolve with the changing times, its core principles must remain intact to safeguard the essence of justice, equality and democracy for future generations.

[36] Writ Petition (Civil) No. 643/2015, www.livelaw.in visited on 2nd June, 2023.

CHAPTER 24

A BRIEF ANALYSIS OF CONSTITUTIONAL JURISPRUDENCE DEVELOPED AFTERMATH KESAVANANDA BHARATI VERDICT

Dr. S. P. Meena*
Dr. Pooja Jain**

1. Introduction

Globally, Kesavananda Bharati case is regarded as a pioneer and one of the most crucial rulings of the Supreme Court of India. This case is popularly known as the 'fundamental rights' case. Constitution interpretation is a challenging task. A group of jurists, academics, and intellectuals drafted the Constitution, the mother of all laws, with the aim of bestowing rights and enforcing obligations on the populace of an independent sovereign State. The social contract by which a nation's citizens are governed is its Constitution. Unlike regular statutes, which are merely legal papers, it is a political-legal document. Since a Constitution is the fundamental law of the State, it takes precedence over all other laws, including statutes passed by the legislature, in the legal system. It is the fundamental standard, as stated.

1.1 What is Jurisprudence?

Jurisprudence means study of law. How the law is to be read, interpret, understand, and apply is dealt with the help of jurisprudence. *Kesavananda Bharati v. State of Kerala*[1] case popularly known as the fundamental rights case helped the jurists, lawyers, and judges ascertain the true meaning of the

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[1] AIR 1973 SC 1461

law passed by the legislature by providing the rules of interpretation.

The philosophy of law is known as jurisprudence. To put it another way, it aims to provide the most general explanation possible of what the law is all about by outlining the core concept and justification for the written law. This will assist people in better grasping the law's foundations and identifying the real and true rules of law. Usually, when we talk about and work with the law, we talk about specific legal topics, administrative/substantive law, or procedural law, such as income tax, labour law, family law, service law, criminal law, civil law, and tort law. Instead of talking about these specific subjects, jurisprudence talks about things like: What is law? Law is a collection of guidelines designed to control society because if the judiciary is not independent, it typically lacks the bravery to nullify legislative or executive action or to order the executive to operate in accordance with the law. What does it accomplish? It accomplishes the basic object of understanding the law as it is and what it ought to mean. What role does it play in the nation's legal framework?

1.2 What is Constitution?

A set of essential laws and regulations which govern the functioning of a nation-state or any other organization is called 'Constitution'. Higher standards of legitimacy and integrity should be set out for a Constitution because it is the supreme law in a country. It shall set out the basic principles, administrative structures, procedures, and individual rights of a State while establishing its strategy for development. The interpretation and implementation of the Constitution and its fundamental principles are at issue in constitutional law. It constitutes the basis on which individuals have access to certain fundamental rights, in particular those relating to life, privacy, freedom of movement, association etc. It provides for a check in front of government while exercising its powers of intervention in respect of individuals' rights, liberties and

property. If intervention has to be made, it must comply with the rules of procedural fairness.

A. V. Dicey, a constitutional scholar, interpreted the term 'Constitution' as consisting "of all rules which directly or indirectly affect the distribution or the exercise of sovereign power in the state, including all rules which define the members of the sovereign power, all rules which regulate the relations of such members to each other, or which determine the mode in which the sovereign power, or the members thereof, exercise their authority".

The Constitution, as Chief Justice Marshall of US Supreme Court stated in *Mc. Mulloch v. Maryland*, is the basic document that will endure for a very long time. Accordingly, there are differences in the principles of its interpretation to a certain extent from those of common law. constitutional principles must not be interpreted in such a literal manner.

2. Summary of the Case

The chief monk at Edneer Mutt, a convent monastery in the Kasaragod district of Kerala, was Kesavananda Bharati. There was a small plot of land of the Mutt that Bharati owned. The Kerala Legislative Assembly passed the Land Reforms Amendment Act in 1969. As per the Act, the Government could have taken over certain of the land belonging to the Mutt. Bharati moved to High Court and eventually to the Supreme Court under Article 32 in March 1970 to enforce the rights that were guaranteed to him by the Constitution under Article 25, Article 26, Article 14, Article 19(1)(f) and Article 31.

As the petition was pending before the Court, the Kerala State Government introduced another amendment to the instant land reform law in 1971. In so doing, the arguments of the appellants bring to mind the validity of a number of amendments that have been introduced by Parliament in order to undo the effects of

Golaknath v. State of Punjab[2]. The petitioner challenged, in particular, three constitutional amendments – 24th Amendment[3], 25th Amendment[4] and 29th Amendment[5] as to their constitutional validity. On 24 April 1973, a thin majority of 7:6 ruled that any provision of the Constitution could be amended by Parliament in order to fulfil its social economic obligations which had been envisaged by the Preamble, provided that such amendment did not affect the basic structure of the Constitution. The majority delivered a precedent-setting decision, holding that any provision of the Constitution may be amended by the Parliament to carry out the socioeconomic guarantees made to the people in the Preamble, so long as the amendment did not fundamentally alter the Constitution.

The Constitution bench in the Kesavananda Bharati case ruled that Parliament could amend any part of the Constitution so long as it did not alter or amend the basic structure or essential features of the Constitution. In order to prevent Parliament from exploiting its amending powers, the doctrine of basic structure is nothing more than a judicial innovation. It is believed that there should be no dilution of the basic characteristics of the Constitution, which might lead to its identity being lost.

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[2] 1967 AIR 1643, in which the Supreme Court ruled that Parliament could not amend any provisions of the Constitution.

[3] It restored the absolute power of the Parliament to amend any part of the Constitution including Part III (fundamental rights). The Act provides that when a Constitution Amendment Bill passed by both Houses of Parliament is presented to the President for his assent, he should give his assent. The president was made duty bound to give assent to a Constitution Amendment Bill when presented to him. It amends Article 13 of the Constitution to make it inapplicable to any amendment of the Constitution under Article 368. Article 13(4) and 368(3) were inserted through 24th Amendment. Article 13(4) says *"Nothing in this article shall apply to any amendment of this Constitution made under article 368"*.

[4] In case of the removal of the President from office or of his death or resignation, the Vice President shall become President. The 25th Amendment was part of a series of measures taken by Indira Gandhi to increase her power, and establish one-party rule.

[5] Resulted in the expansion of Ninth Schedule of the Constitution of India in 1972 that comprised laws from Kerala regarding land reform.

The basic structure doctrine was further clarified in *Minerva Mills v. Union of India*.[6] The 42nd Amendment of 1976 had been enacted by the Parliament in response to the Kesavananda Bharati judgment in an effort to reduce the power of the judicial review of constitutional amendments by the Supreme Court. According to the basic structure doctrine, if such changes are not intended to alter the fundamental structure of the Constitution, it is for Parliament to exercise boundless discretion in making constitutional amendments. The core principles of the Constitution were not discussed by the panel, leaving it in the hands of the courts to interpret them. Subsequently, the Court has already referred to that fact in a number of further judgments. The Court also held that the term 'amendment' referred in Article 368 cannot mean an amendment that would change the basic structure of the Constitution. Such a modification would have to pass the fundamental structure test if it was intended by Parliament to amend provisions of the Constitution.

Since the Constitution grants Parliament limited amending powers, it is not within its competence to take over that very power in an absolute way. One of our Constitution's essential features is that it provides for a limited power to amend; therefore, the limits on this power cannot be abolished. In other words, it is not possible for Parliament to expand its amending power under Article 368 in order to exercise itself the right to repeal or abrogate and destruction of basic and essential features of the Constitution. The bearer of the restricted power

[6] AIR 1980 SC 1789, The case of Minerva mills vs. Union of India is the finest case which talks about the advantages of the checks and balances system. It is the most important judgment which guarded the 'basic structure' of the Constitution from being amended by the Parliament. The Constitutionality of section 4 and 55 of the 42nd amendment act, 1986 gave the Parliament unlimited power to amend the Constitution and hence, were struck down by the honourable Supreme Court.

shall not be able, by using that power, to transform it into a limitless one.

3. Conclusion

Challenging a State land reform Act up to becoming one of the most important landmark verdicts, the fundamental rights case is celebrating 50 years. It has come a long way and so is the constitutional jurisprudence with all the basic structure doctrine protectors. The basic structure doctrine is the basic feature of our Constitution. The majority of the bench wished to preserve the Constitution, by preserving its fundamental characteristics. It follows that the judgment is based on good reasons and it has been given after thorough analysis, constitutional jurisprudence of a number of aspects. The bench said that it was possible for Parliament to abuse this power and governments would change it in accordance with their views or whims if they were given an unfettered ability to amend. That kind of unbridled power conferred on the government would have made it possible to change, for example, the fundamental principle and essence of our Constitution. It was necessary to have a doctrine that could protect the rights of both Parliamentarians and Indian citizens; after considering this need, the Court has come up with a basic structure doctrine that protects those rights.

It is worth noting that India has seen more than one hundred changes since independence compared to the US, where only 27 amendments have taken place. The spirit of the Constitution as well as the ideas of its makers had not been altered despite this large number of changes made to our Constitution. The identity and spirit of the Constitution are still intact, thanks to the Kesavananda ruling by the Supreme Court where the Court with the help of constitutional jurisprudence put a limit in the amending power of the Parliament. We have a stable Constitution because of this historic case. constitutional jurisprudence has evolved a long way and has helped the drafters and interpreters to apply their minds while legislating.

Although the petitioner had lost this case, in part, the judgment of the Supreme Court that upheld the amendability of the Constitution in Kesavananda Bharati proved to be a major victory for India's democracy and prevented the Constitution from falling apart.

CHAPTER 25

UNLEASHING THE POWER OF THE BASIC STRUCTURE DOCTRINE: IMPLICATIONS AND EVOLUTION

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1. Background and Context of Kesavananda Bharati Case:

The Kesavananda Bharati case, officially, *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala* (1973), is a landmark judgment in Indian constitutional law that had far-reaching implications. It involved a constitutional challenge to the validity of the 24th Amendment Act, 1971, which sought to curtail the power of judicial review by expanding the amending power of Parliament.

The case arose when the petitioner, Kesavananda Bharati, the head of the Edneer Mutt in Kerala, challenged the Kerala Land Reforms Act, 1963, which sought to impose restrictions on the management and disposal of the properties owned by religious institutions. The petitioner contended that the Act violated the fundamental rights guaranteed under Articles 14, 19, and 31 of the Constitution.

During the hearing, a larger constitutional issue emerged regarding the extent of Parliament's amending power. The central question before the Supreme Court was whether Parliament could amend any part of the Constitution, including its basic structure, without any judicial review. The case witnessed a marathon hearing that lasted for several months.

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In its judgment, the Supreme Court, led by Chief Justice S. M. Sikri, established the concept of the 'basic structure doctrine' the idea that there are certain core features or basic elements of the Constitution that cannot be amended by the Parliament, as they form the bedrock of the constitutional framework.[1] This doctrine was a crucial departure from the earlier position that Parliament had unrestricted amending power.

The Supreme Court, through a majority decision of 7:6, held that while Parliament had the power to amend the Constitution, such amendments should not destroy or damage its basic structure. The Court emphasized that the basic structure of the Constitution was derived from the principles of democracy, federalism, secularism, and the protection of fundamental rights. These principles were deemed to be inviolable and formed the foundation of the constitutional edifice[2].

The Kesavananda Bharati case marked a significant turning point in Indian constitutional jurisprudence. It limited the amending power of Parliament and established judicial review as a safeguard against constitutional amendments that violate the basic structure of the Constitution. Since this landmark decision, the Supreme Court has consistently applied the Basic structure doctrine to strike down amendments that infringe upon the core principles and values of the Constitution[3].

1.1 Constitutional Issues Raised in Kesavananda Bharati

The Kesavananda Bharati case, officially known as *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala* (1973), raised significant constitutional issues and involved several parties. The case primarily dealt with the scope and limits of

[1] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.
[2] *Id.*
[3] Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299.

Parliament's amending power and the protection of the basic structure of the Constitution. The issues raised in this case are:

a) Amending Power of Parliament: The central question was whether Parliament had unlimited power to amend any provision of the Constitution, including its basic structure, without any judicial review.
b) Basic Structure of the Constitution: The case also involved the determination of the concept of the basic structure of the Constitution, *i.e.*, the core principles and fundamental features that cannot be amended or altered by the Parliament.

2. Concept of the Basic Structure Doctrine and Its Implications

The concept of the 'basic structure' was propounded for the first time in Kesavananda Bharati case. The Basic structure doctrine refers to the idea that there are certain core features or basic elements of the Constitution that cannot be amended by the Parliament, as they form the foundation or bedrock of the constitutional framework. The doctrine establishes limitations on the amending power of Parliament and ensures the preservation of the essential characteristics of the Constitution.

The Supreme Court, through a majority decision of 7:6, held that while Parliament had the power to amend the Constitution, such amendments should not destroy or damage its basic structure. The Court identified the basic structure as a set of principles derived from the Constitution's text and history. These principles include democracy, federalism, secularism, separation of powers, judicial review, rule of law, and the protection of fundamental rights. Implications of this doctrine are:

a) Limitation on Amending Power: The basic structure doctrine imposes a limitation on the amending power of Parliament. It prevents the Parliament from making amendments that alter or destroy the essential features

of the Constitution. This ensures the stability and continuity of the Constitution

b) Protection of Fundamental Rights: The basic structure doctrine strengthens the protection of fundamental rights. It prevents the Parliament from amending the Constitution in a way that undermines or dilutes the fundamental rights guaranteed to individuals. This ensures that the core rights and liberties remain inviolable.
c) Preserving Constitutional Balance: The doctrine helps in preserving the balance between the different organs of the state and the federal structure of the Constitution. It prevents the Parliament from making amendments that upset the delicate balance of powers between the Union and the states and maintains the federal character of the Constitution.
d) Judicial Review as a Safeguard: The basic structure doctrine reinforces the role of judicial review as a safeguard against unconstitutional amendments. The judiciary has the power to strike down amendments that violate the basic structure, ensuring that the amending power is not misused to undermine the Constitution's core principles.
e) Evolution of Constitutional Interpretation: The doctrine allows for the evolution of constitutional interpretation over time. It recognizes that the Constitution is a living document that can adapt to the changing needs and aspirations of society while maintaining its basic structure and principles.

The Kesavananda Bharati case and the establishment of the basic structure doctrine marked a significant turning point in Indian constitutional jurisprudence. It set a precedent for subsequent cases where the judiciary has applied and further developed the basic structure doctrine to protect the integrity and sanctity of the Constitution. The doctrine got upheld after Kesavananda Bharati in the following subsequent cases:

a) *Indira Nehru Gandhi v. Raj Narain* (1975): In this case, the Supreme Court applied the basic structure doctrine to strike down certain provisions of the 39th Constitutional Amendment Act, which sought to immunize certain acts of the Prime Minister from judicial scrutiny. Here, the Court held that the principles of democracy, free and fair elections, and judicial review formed part of the basic structure, and the amendment violated these principles.
b) *Minerva Mills Ltd. v. Union of India* (1980): The Supreme Court, in this case, reaffirmed the basic structure doctrine and held that the Parliament's power to amend the Constitution under Article 368 is not unlimited. In this case, the Court struck down certain provisions of the 42nd Amendment Act, which had conferred wide powers on the Parliament to amend any part of the Constitution.
c) *Waman Rao v. Union of India* (1981): The Court applied the basic structure doctrine and held that amendments made under Article 368 cannot destroy the basic features or structure of the Constitution. Here, it got clarified that amendments that violate fundamental rights, the principles of federalism, secularism, and the separation of powers would be invalid.
d) *S. R. Bommai v. Union of India* (1994): In this case, the Supreme Court emphasized the federal character of the Indian Constitution and held that the principles of federalism and secularism are part of the basic structure. The Court declared that any attempt to destroy the democratic, federal, and secular features of the Constitution would be struck down.
e) *L. Chandra Kumar v. Union of India* (1997): The Court held that judicial review is an integral part of the basic structure and cannot be taken away or abrogated by a constitutional amendment. It reaffirmed that the power of judicial review is a basic feature that ensures the supremacy of the Constitution and the rule of law.

f) *Supreme Court Advocates-on-Record Association v. Union of India* (2015): In this case, the Court reiterated the importance and application of the Basic structure doctrine while striking down the National Judicial Appointments Commission (NJAC) Act[4]. It held that the independence of the judiciary is an integral part of the basic structure and cannot be compromised.

g) *Justice K. S. Puttaswamy v. Union of India* (2017): Although not directly related to the Basic structure doctrine, this judgment expanded the scope of fundamental rights by recognizing the right to privacy as a fundamental right[5]. It affirmed that the right to privacy is an essential component of human dignity and personal autonomy, which are part of the basic structure.

These cases demonstrate that the basic structure doctrine continues to be a guiding principle in Indian constitutional law. The judiciary has consistently applied and developed the doctrine to protect the fundamental principles and values enshrined in the Constitution. The doctrine serves as a safeguard against any unconstitutional amendments that may undermine the basic structure of the Constitution.

2.1 Significance of Recognizing the Basic structure doctrine in Indian Context

The recognition of the Basic structure doctrine holds immense significance in Indian constitutional law point of view. Here are some key aspects highlighting its significance:

a) Limitation on Amending Power: The basic structure doctrine imposes a limitation on the amending power of Parliament. It ensures that Parliament does not have unlimited authority to amend the Constitution as it

[4] Supreme Court Advocates-on-Record Association v. Union of India, (2015) 4 SCC 1.
[5] K. S. Puttaswamy v. Union of India, (2017) 10 SCC 1

pleases. By preserving the basic structure, the doctrine prevents arbitrary changes to the Constitution and provides stability and continuity to the constitutional framework.

b) Protection of Fundamental Rights: The basic structure doctrine plays a vital role in safeguarding fundamental rights. It prevents the Parliament from diluting or abrogating fundamental rights through constitutional amendments. By preserving the core values underlying fundamental rights, such as equality, liberty, and justice, the doctrine ensures that the rights of individuals are protected and not subject to arbitrary modifications.

c) Preservation of Constitutional Balance: The recognition of the basic structure doctrine helps maintain the balance between different organs of the state and preserves the federal structure of the Constitution[6]. It prevents any amendments that upset the delicate balance of powers between the Union and the states. This ensures the harmonious functioning of the constitutional system and prevents any erosion of federalism.

d) Upholding Constitutional Principles: The basic structure doctrine upholds the core principles and values enshrined in the Constitution. It ensures that democratic principles, such as free and fair elections, remain integral to the constitutional order. It also protects the principles of secularism, judicial independence, and the rule of law. By safeguarding these fundamental principles, the doctrine helps maintain the integrity and essence of the Constitution.

e) Judicial Review as a Safeguard: The basic structure doctrine reinforces the role of judicial review as a safeguard against unconstitutional amendments. It empowers the judiciary to review and strike down amendments that violate the basic structure. This

[6] S. R. Bommai v. Union of India, (1994) 3 SCC 1.

ensures that the amending power of Parliament is not misused to subvert the Constitution's fundamental principles.

f) Evolution of Constitutional Interpretation: The recognition of the basic structure doctrine allows for the evolution of constitutional interpretation over time. It acknowledges that the Constitution is a living document that can adapt to changing circumstances while preserving its essential features. The doctrine permits a dynamic and progressive interpretation of the Constitution to meet the needs and aspirations of society.

The significance of recognizing the basic structure doctrine lies in preserving the core values, principles, and integrity of the Indian Constitution. It acts as a bulwark against arbitrary amendments and ensures that the Constitution remains a dynamic and enduring document that protects the rights and liberties of individuals and upholds the democratic and federal character of the nation.

2.2 Basic Structure Doctrine as a Limitation on the Amending Power of Parliament

The doctrine acts as a crucial limitation on the amending power of Parliament in India. Here are key points highlighting this aspect:

a) Preserving the Essential Framework: The basic structure doctrine ensures that Parliament cannot amend the Constitution in a manner that destroys or damages its basic structure. The doctrine recognizes that there are certain core features and fundamental principles of the Constitution that form its essential framework. These features, such as democracy, federalism, secularism, and protection of fundamental rights, are considered inviolable and cannot be tampered with through ordinary amendments.

b) Judicial Review of Constitutional Amendments: The basic structure doctrine empowers the judiciary to review and strike down amendments that violate the basic structure. The courts act as the guardians of the Constitution and have the authority to examine the constitutional validity of amendments. If an amendment is found to be in conflict with the basic structure, it can be declared unconstitutional and void.
c) Protection of Fundamental Rights: The basic structure doctrine ensures the protection of fundamental rights from arbitrary amendments by Parliament. Fundamental rights are considered an integral part of the basic structure. Therefore, any amendment that seeks to dilute or abrogate fundamental rights can be challenged and invalidated by the courts.
d) Limiting Unconstitutional Amendments: The basic structure doctrine prevents Parliament from making unconstitutional amendments to the Constitution. It curtails the amending power by setting boundaries within which Parliament must operate. Parliament cannot use its amending power to alter the essential features of the Constitution or undermine its basic structure.
e) Striking a Balance: The basic structure doctrine strikes a balance between the need for flexibility and the necessity of preserving the core principles of the Constitution[7]. While Parliament has the power to amend the Constitution, it must exercise this power within the framework set by the basic structure. This ensures that the Constitution remains adaptable to changing times without compromising its foundational principles.
f) Ensuring Stability and Continuity: By placing limits on the amending power, the basic structure doctrine ensures stability and continuity in the constitutional framework. It provides a safeguard against radical or

[7] Waman Rao v. Union of India, (1981) 2 SCC 362.

arbitrary changes to the Constitution that may undermine its core values. This stability allows for the effective functioning of the legal and political system in the country.

In summary, the basic structure doctrine acts as a significant limitation on the amending power of Parliament. It prevents Parliament from amending the Constitution in a manner that destroys or damages its basic structure, ensuring the preservation of fundamental principles and protecting the rights of individuals.

2.3 Basic Structure Doctrine and Court's Power to do Judicial Review

The basic structure doctrine has significant implications for the power of judicial review in India. Here are key points highlighting these implications:

a) Authority to Review Constitutional Amendments: The basic structure doctrine empowers the judiciary to review and strike down constitutional amendments that violate the basic structure. This extends the power of judicial review beyond ordinary legislation to the realm of constitutional amendments. The courts have the authority to examine the constitutional validity of amendments and declare them unconstitutional if they undermine the basic structure.

b) Safeguarding Constitutional Integrity: The basic structure doctrine strengthens the role of judicial review in safeguarding the integrity of the Constitution. By allowing the judiciary to scrutinize and potentially invalidate constitutional amendments, the doctrine ensures that the Constitution remains true to its core principles and values. It prevents the amendment process from being used to subvert the Constitution's foundational framework.

c) Protection of Fundamental Rights: The basic structure doctrine reinforces the power of judicial review in

protecting fundamental rights. Fundamental rights are considered an essential part of the basic structure. The doctrine prevents Parliament from diluting or abrogating fundamental rights through constitutional amendments. The judiciary acts as the guardian of individual rights and has the authority to strike down amendments that violate these rights.

d) Preserving Constitutional Balance: The basic structure doctrine allows the judiciary to maintain the balance between different organs of the State and protect the federal structure of the Constitution. Judicial review ensures that the Parliament does not exercise its amending power to upset the delicate balance of powers between the Union and the states. The courts play a crucial role in upholding the federal character of the Constitution through the application of the Basic structure doctrine.

e) Upholding the Rule of Law: The basic structure doctrine reinforces the importance of the judiciary in upholding the rule of law. Judicial review is an essential mechanism for ensuring that the exercise of power by the legislature, executive, and other authorities remains within the constitutional bounds. The doctrine ensures that the actions of all branches of government are subject to scrutiny and conform to the principles of the Constitution.

f) Dynamic Interpretation of the Constitution: The basic structure doctrine allows for a dynamic interpretation of the Constitution over time. The judiciary's power of judicial review, under the doctrine, enables the interpretation and application of constitutional provisions in a manner that upholds the basic structure. This allows for the adaptation of the Constitution to the changing needs and demands of society, while preserving its essential features.

In summary, the Basic structure doctrine enhances and reinforces the power of judicial review in India. It enables the

judiciary to review and strike down constitutional amendments that violate the basic structure, thereby safeguarding the integrity of the Constitution, protecting fundamental rights, maintaining constitutional balance, upholding the rule of law, and allowing for a dynamic interpretation of the Constitution.

3. Power of Judiciary to Strike Down Constitutional Amendments that Violate the Basic Structure

In India, the judiciary has the authority to strike down constitutional amendments that violate the basic structure doctrine. Here are the key points explaining how the judiciary exercises this power:

a) Power of Judicial Review: The power of judicial review, inherent in the Indian Constitution, empowers the judiciary to review the constitutional validity of laws, including constitutional amendments. The judiciary acts as the guardian of the Constitution and has the authority to interpret and apply its provisions.
b) Application of the basic Structure Doctrine: The basic structure doctrine provides a framework for the judiciary to evaluate the constitutionality of amendments. It holds that certain fundamental features and principles form part of the basic structure and are beyond the amending power of Parliament. Amendments that violate the basic structure can be deemed unconstitutional.
c) Identifying the Basic Structure: The judiciary determines the components of the basic structure through a process of judicial interpretation[8]. Over the years, through various judgements, the Supreme Court has identified key elements of the basic structure, including democracy, federalism, secularism, independence of the judiciary, and protection of fundamental rights. The Court examines the

[8] Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625.

amendment's impact on these essential features to assess its validity.

d) Scrutinizing the Amendment's Impact: When a constitutional amendment is challenged, the judiciary examines its impact on the basic structure and fundamental principles of the Constitution. The Court assesses whether the amendment undermines or destroys the core features that form the foundation of the Constitution. If it finds that the amendment violates the basic structure, it can be struck down as unconstitutional.

e) Judicial Determination of Constitutionality: The judiciary exercises its power of judicial review to determine the constitutionality of amendments that violate the basic structure. The Supreme Court, being the ultimate interpreter of the Constitution, has the authority to make final decisions on such matters. It ensures that the amending power of Parliament is exercised within the limits set by the basic structure.

f) Pronouncing the Amendment Unconstitutional: If the judiciary concludes that a constitutional amendment violates the basic structure, it can declare the amendment as unconstitutional and void. This means that the amendment is deemed to have no legal effect and is struck down. The judiciary's pronouncement has the force of law and binds all authorities and individuals within the country.

The power of the judiciary to strike down constitutional amendments that violate the basic structure doctrine reflects its role as the guardian of the Constitution. Through the exercise of judicial review, the judiciary ensures that the amending power of Parliament is not used to undermine or destroy the fundamental features and principles that form the backbone of the Constitution. The Court in a catena of cases have applied the basic structure doctrine to invalidate legislations which are already mentioned in the above.

4. Kesavananda Bharati Judgment Strengthening the Fundamental Rights

The Kesavananda Bharati judgment established that fundamental rights are an integral part of the basic structure of the Constitution. The Court recognized that these rights are essential to preserve the democratic character, human dignity, and individual freedom enshrined in the Constitution. By including fundamental rights in the basic structure, the judgment ensured that their protection becomes a paramount consideration in constitutional interpretation.

The Kesavananda Bharati case also imposed limits on the amending power of Parliament by recognizing the basic structure doctrine. This doctrine prevents Parliament from amending the Constitution in a manner that infringes upon or abrogates fundamental rights. It ensures that the protection and enforcement of fundamental rights cannot be compromised through ordinary legislative amendments.

The judgment affirmed the authority of the judiciary to review and strike down constitutional amendments that violate fundamental rights or the basic structure. The Court recognized the role of the judiciary as the guardian of the Constitution and entrusted it with the responsibility to protect fundamental rights from arbitrary amendments. This strengthened the power of judicial review in safeguarding the rights of individuals.

Moreover, the Kesavananda Bharati case expanded the scope of fundamental rights by adopting an expansive interpretation. The Court held that fundamental rights are not limited to the rights expressly enumerated in the Constitution but encompass a broader range of rights essential for human dignity and freedom. This interpretation enabled the judiciary to recognize and protect new rights based on evolving societal needs and values. The judgment reinforced the justiciability of fundamental rights by affirming their enforceability through judicial review. The Court emphasized that fundamental rights

are not mere aspirations but enforceable rights that can be claimed and protected in courts. This strengthened the position of individuals to seek legal remedies when their fundamental rights are violated.

Further, the Kesavananda Bharati judgment prohibited constitutional amendments that dilute or abrogate fundamental rights. It declared that Parliament cannot use its amending power to alter the basic structure or infringe upon the essential features of the Constitution, including fundamental rights. This safeguarded the inviolability and supremacy of fundamental rights.

In summary, the Kesavananda Bharati judgment significantly strengthened the protection of fundamental rights in India. By including fundamental rights in the basic structure, limiting the amending power, affirming the authority of judicial review, expanding the scope of rights, reinforcing justiciability, and prohibiting amendments that dilute rights, the judgment ensured the robust protection of individual freedoms and human rights in the country.

5. Judicial Roadmap While Striking Down Constitutional Amendments that Violate the Basic Structure

In India, the judiciary has the authority to strike down constitutional amendments that violate the basic structure doctrine. Here are the key points explaining how the judiciary exercises this power:

a) Power of Judicial Review: The power of judicial review, inherent in the Indian Constitution, empowers the judiciary to review the constitutional validity of laws, including constitutional amendments. The judiciary acts as the guardian of the Constitution and has the authority to interpret and apply its provisions.
b) Application of the basic Structure Doctrine: The basic structure doctrine provides a framework for the judiciary to evaluate the constitutionality of

amendments. It holds that certain fundamental features and principles form part of the basic structure and are beyond the amending power of Parliament. Amendments that violate the basic structure can be deemed unconstitutional.

c) Identifying the Basic Structure: The judiciary determines the components of the basic structure through a process of judicial interpretation. Over the years, through various judgments, the Supreme Court has identified key elements of the basic structure, including democracy, federalism, secularism, independence of the judiciary, and protection of fundamental rights. The Court examines the amendment's impact on these essential features to assess its validity.

d) Scrutinizing the Amendment's Impact: When a constitutional amendment is challenged, the judiciary examines its impact on the basic structure and fundamental principles of the Constitution. The Court assesses whether the amendment undermines or destroys the core features that form the foundation of the Constitution. If it finds that the amendment violates the basic structure, it can be struck down as unconstitutional.

e) Judicial Determination of Constitutionality: The judiciary exercises its power of judicial review to determine the constitutionality of amendments that violate the basic structure. The Supreme Court, being the ultimate interpreter of the Constitution, has the authority to make final decisions on such matters. It ensures that the amending power of Parliament is exercised within the limits set by the basic structure.

f) Pronouncing the Amendment Unconstitutional: If the judiciary concludes that a constitutional amendment violates the basic structure, it can declare the amendment as unconstitutional and void. This means that the amendment is deemed to have no legal effect and is struck down. The judiciary's pronouncement

has the force of law and binds all authorities and individuals within the country.

The power of the judiciary to strike down constitutional amendments that violate the basic structure doctrine reflects its role as the guardian of the Constitution. Through the exercise of judicial review, the judiciary ensures that the amending power of Parliament is not used to undermine or destroy the fundamental features and principles that form the backbone of the Constitution.

6. Future Challenges Surrounding the Scope and Application of the Basic Structure Doctrine

a) Evolving Interpretation of Basic Structure: One challenge lies in the evolving interpretation of the Basic structure doctrine.[9] As societal values, constitutional principles, and legal dynamics evolve, there may be debates and disagreements on the exact components of the basic structure. Courts will need to adapt and interpret the doctrine in light of contemporary challenges and changing circumstances.

b) Clarity on Components of Basic Structure: Another challenge is the need for greater clarity regarding the specific components of the basic structure.[10] While certain elements like democracy, federalism, and secularism have been widely recognized, there may be debates over the inclusion of additional principles. Achieving consensus and providing clear guidelines on the essential features of the basic structure can enhance predictability and coherence in the application of the doctrine.

c) Balancing Judicial Review and Legislative Sovereignty: The balance between judicial review and legislative

[9] S. P. Sathe, "Basic Structure Doctrine: An Inevitable Constraint on Constitutional Amendments in India," 2 NUJS L. Rev. 9, 14 (2009).
[10] Arun K. Thiruvengadam, "The 'Basic Structure' Doctrine as Transformative Constitutionalism: An Indian Perspective," 3 Int'l J. Const. L. 759, 763 (2005).

sovereignty poses a significant challenge.[11] While the basic structure doctrine empowers the judiciary to strike down unconstitutional amendments, there is a delicate balance between judicial oversight and the autonomy of the legislature. Striking the right balance is crucial to prevent judicial overreach and maintain the democratic principles of the Constitution.

d) Potential Misuse for Political Ends: The basic structure doctrine may face challenges arising from its potential misuse for political ends.[12] There is a risk that political actors may attempt to challenge constitutional amendments merely to obstruct legislative reforms or advance their own agenda. Courts will need to exercise caution and ensure that challenges to constitutional amendments are based on genuine violations of the basic structure and not on political considerations.
e) Impact on Constitutional Amendments: The scope and application of the Basic structure doctrine can influence the process of constitutional amendments.[13] The doctrine acts as a constraint on the amending power of Parliament, potentially making it more challenging to bring about constitutional reforms. Balancing the need for constitutional stability with the ability to address changing social, economic, and political realities will be a critical challenge.
f) Consistency in Judicial Pronouncements: Achieving consistency in judicial pronouncements related to the Basic structure doctrine is another challenge.[14] As different benches of the Supreme Court and high courts interpret and apply the doctrine, there may be variations in approaches and outcomes. Ensuring

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[11] Granville Austin, "The 'Basic Structure' Doctrine in Comparative Perspective," 59 Cambridge L.J. 66, 73 (2000).
[12] Pratap Bhanu Mehta, "The Basic Structure Doctrine: A Case Study in Judicial Ambivalence and Intellectual Incoherence," 45 EPW 3981, 3985 (2010).
[13] Abhinav Chandrachud, "Basic Structure Doctrine and Constitutional Transformation in India
[14] *Id.*

consistency and coherence in the application of the doctrine across different cases and jurisdictions will be essential for maintaining the integrity of the judicial system.

In summary, the scope and application of the basic structure doctrine will continue to face challenges in the future. Evolving interpretations, clarity on components, maintaining the balance between judicial review and legislative sovereignty, guarding against misuse, influencing constitutional amendments, and ensuring consistency in judicial pronouncements are some of the key challenges that the judiciary will need to address.

7. Potential for Evolving Interpretations of the Basic Structure Doctrine in the Future

The basic structure doctrine in India has the potential for evolving interpretations in the future due to several factors:

a) Societal and Legal Evolution: As society evolves and legal principles develop, there may be a need to reinterpret the components of the basic structure.[15] The interpretation of concepts like democracy, federalism, secularism, and judicial independence may evolve to reflect changing social, political, and legal contexts.
b) Emergence of New Constitutional Challenges: New constitutional challenges may arise in the future that require the judiciary to apply the basic structure doctrine in novel ways.[16] Technological advancements, globalization, and emerging issues such as privacy rights, environmental concerns, and socio-economic rights may present new challenges that demand fresh interpretations of the basic structure.

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[15] Upendra Baxi, "Taking Rights Seriously: 'The Indian Supreme Court and Fundamental Rights' Revisited," 1 NUJS L. Rev. 1, 14 (2008).
[16] Namita Wahi, "The Supreme Court's judgment on Aadhaar: An Analysis," 5 NUJS L. Rev. 173, 180 (2012).

c) Jurisprudential Developments: The basic structure doctrine may evolve through jurisprudential developments and judgments of the Supreme Court.[17] Each new judgment can influence the interpretation and application of the doctrine. The Court's reasoning, principles established, and the evolving body of case law can shape future interpretations of the basic structure.
d) Interpretative Disagreements: There may be interpretative disagreements among judges and legal scholars regarding the scope and content of the basic structure.[18] Different perspectives on the essential features and principles may lead to varying interpretations. These disagreements may be resolved through future judicial pronouncements or scholarly discourse, contributing to the evolution of the doctrine.
e) Comparative Constitutional Law Influence: The basic structure doctrine may draw inspiration from developments in comparative constitutional law.[19] Comparative analysis of constitutional principles and practices in other jurisdictions can influence the interpretation of the basic structure. Courts may look to global trends and international standards to shape their understanding of the essential features of the Indian Constitution.
f) Constitutional Amendments and Challenges: Future constitutional amendments and challenges to their validity can shape the interpretation of the basic structure doctrine.[20] Amendments that impact the core features of the Constitution may necessitate a re-examination of the basic structure. The Court's

[17] Anupama Roy, "Reading Kesavananda Bharati with and against Jurisprudence on Recognition," 9 NUJS L. Rev. 9, 16 (2016).
[18] Saurabh Bhattacharjee, "A Post-Mortem of Basic Structure Doctrine in Kesavananda Bharati Case," 3 NUJS L. Rev. 9, 11 (2010).
[19] Pratap Bhanu Mehta, "Comparative Constitutional Law: India and the United States," 53 Am. J. Comp. L. 279, 284 (2005).
[20] S.P. Sathe, "The Kesavananda Bharati Case: The Untold Story," 3 NUJS L. Rev. 133, 135 (2010).

response to such challenges can contribute to the evolving understanding of the doctrine.

It is important to note that the judiciary plays a significant role in interpreting and developing the basic structure doctrine. The Supreme Court, as the final interpreter of the Constitution, will have the authority to shape the future trajectory of the doctrine through its judgments.

8. Conclusion

In conclusion, the Kesavananda Bharati case and the subsequent development of the basic structure doctrine have had a profound impact on Indian constitutional law. The recognition of basic structure has strengthened the protection of fundamental rights, limited the amending power of Parliament, and served as a safeguard against unconstitutional amendments.

The doctrine's significance lies in its ability to preserve the core principles and values enshrined in the Constitution, ensuring the endurance of democratic governance, federalism, secularism, and judicial independence. It acts as a constitutional check on the exercise of power and prevents the erosion of fundamental rights and the basic structure of the Constitution.

The doctrine has been further clarified and expanded upon in subsequent judgments, such as Minerva Mills, Waman Rao, Coelho, Bommai, NJAC Case, and Puttaswamy. These cases have reinforced the principles established in Kesavananda Bharati and provided additional insights into the scope and application of the doctrine.

However, the doctrine is not without challenges. Evolving interpretations, clarity on the components of the basic structure, maintaining the balance between judicial review and legislative sovereignty, guarding against misuse, influencing constitutional amendments, and ensuring consistency in

judicial pronouncements are some of the future challenges that need to be addressed.

The potential for evolving interpretations of basic structure exists due to societal and legal evolution, emerging constitutional challenges, jurisprudential developments, interpretative disagreements, comparative constitutional law influence, and constitutional amendments and challenges. The judiciary, through its judgments and interpretation, will play a crucial role in shaping the future trajectory of the doctrine.

Overall, the basic structure doctrine stands as a crucial constitutional principle that upholds the supremacy of the Constitution, protects fundamental rights, and ensures the integrity of the Indian democratic framework. Its continued application and interpretation will be essential in upholding the constitutional values and principles enshrined in the Indian Constitution, serving as a vital safeguard for the nation's democratic fabric.

CHAPTER 26

24TH CONSTITUTIONAL AMENDMENT AND ITS AFTEREFFECTS: A JURISPRUDENTIAL ANALYSIS

Dr. Shalini Saxena*
Ms. Pooja**

1. Introduction

The process for modifying the Constitution of India is neither flexible nor strict, but rather a hybrid of the two. Article 368 of Part XX of the Constitution deals with the powers and procedures of the Parliament to alter the same. In exercising its constituent authority, the Parliament may amend any provision of the Constitution by adding, modifying, or repealing it in conformity with the procedure established.

The 24th amendment is regarded as crucial in the history of constitutional law and existing laws. It not only overruled a Supreme Court ruling, but also went against it by granting Parliament the authority to freely change the Constitution's fundamental rights.[1] In the years before the Golak Nath Case, the Supreme Court insisted that fundamental rights might also be amended. The court decided that the fundamental rights were transcendental in nature and that Parliament could not limit or eliminate any of them.

In response to the Supreme Court's decision, Parliament, in the 24th Amendment Act of 1971, made adjustments to the ability of the fundamental rights to be amended. Articles 13 and 368 were changed by the 24th Amendment Act of 1971. It stated that

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[1] Seeya Bhasin, *Analysis Of Constitutional Amendment – 24th Amendment To The Indian Constitution*, Indian Journal of Law and Legal Research, Volume IV Issue VI | ISSN: 2582-8878 pg no. 1-6.

Article 368 of the Constitution grants the Parliament the authority to limit or eliminate any fundamental right, and that such an Act will not constitute a law within the sense of Article 13 of the Constitution.[2]

The Supreme Court confirmed the constitutionality of the 24th Amendment Act, stating that the Parliament has the authority to restrict or eliminate any of the fundamental rights, but it also established an entirely novel concept known as the 'basic structure' of the Constitution. The Supreme Court considered the constitutionality of the 24th, 25th, 26th, and 29th constitutional Amendments in *Kesavananda Bharati v. State of Kerala*[3]. As a result, the Golaknath case's ruling got overturned with the decision that Article 368 does not allow Parliament to change the basic structure or framework of the Constitution. The 24th and 29th Amendment Acts were declared lawful. Section 3 of the 25th Constitutional Amendment Act was found to be valid in its first part, however the subsequent part, which states that no statute containing a declaration that it is for the purpose of carrying out such policy may be challenged in any court on the grounds that it does not carry out such policy was questionable, thereby opening the door to judicial review.

2. The Historical Context of the 24th Constitutional Amendment Act

The historical background concerning the enactment of 24th Constitutional Amendment Act can be understood from the following discussions.

[2] Negi Mohita, *The Significance of the 24th Amendment to the Constitution of India*, YOURARTICLELIBRARY, https://www.yourarticlelibrary.com/indian-Constitution/the-significance-of-the-24th-amendment-to-the-Constitution-of-india/5493 (last visited June 04, 2023).
[3] AIR 1973 SC 1461.

2.1 Shankari Prasad v. Union of India[4]

In this case according to the Supreme Court, the ability of the Parliament to amend the Constitution under Article 368 includes the ability to change fundamental rights. Although an amendment to the Constitution is a law, the Court noted that there is a distinct line via legislative as well as constituent power. It was further established that the term "law" as defined in Article 13(2) comprises ordinary law made in the exercise of certain legislative power, but does not include amendments to the Constitution issued in the operation of some constitutional power.

2.2 Sajjan Singh v. State of Rajasthan[5]

In this case, the constitutionality of the Constitution (17th Amendment) Act of 1964 was called in question. This change undermined the right to property under Article 19(1)(f) by adding various other land buying activities in the 9th Schedule. In this case, a question identical to that presented in Shankari Prasad's case was also raised. The Supreme Court maintained the majority judgment in the Shankari Prasad case, ruling that the word 'amendment of the Constitution' relates to modifications to all of the Constitution's clauses, *i.e.*, Article 368 is applicable to all Parts of the Constitution.

2.3 I. C. Golaknath v. State of Punjab[6]

In this case, the Supreme Court overruled, by a small majority, its own earlier judgments supporting Parliament's jurisdiction to change all provisions of the Constitution, including Part III related to basic rights. As a result of the judgment, it is believed that Parliament lacks the authority to remove or limit any of the fundamental rights protected by Part III of the Constitution, even if doing so becomes necessary for carrying out the Directive

[4] AIR 1951 SC 458.
[5] AIR 1965 SC 845.
[6] AIR 1967 2 SCR 762

Principles of State Policy and achieving the goals outlined in the Preamble of the Constitution of India. As a result, it is deemed necessary to explicitly state that Parliament has the authority to alter any Article of the Constitution in order to bring the provisions of Part III under the purview of that power.[7]

2.4 The Twenty-fourth Constitution Amendment Act, 1971

In response to this decision, Parliament enacted the 24th Amendment Act, which added a provision in Article 368 stating that Parliament has the authority to revoke any of the fundamental rights. It restored Parliament's absolute ability to change any provision of the Constitution, including provisions of Part III. The Act states that when a Constitution Amendment Bill is brought to the President for his assent after being enacted by both Houses of Parliament, he must do so. It changes Article 13 of the Constitution to make it inapplicable to any Constitutional Amendment Bill presented to him.[8] The 24th Amendment Act also added Articles 13(4) and 368(3). According to the added Article 13(4),

> *"Nothing in this Article shall apply to any amendment of this Constitution made under Article 368".[9] As per the amendment in Article 368(3). "Notwithstanding anything in the Constitution, the Parliament may, in the exercise of its granted constitutional power, amend by way of a discrepancy, addition, or repeal any constitutional provisions by the manner established in this Article,".*[10]

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[7] Ahmed, M. N. (2023). BASIC STRUCTURE DOCTRINE THEORY (Amending Power under Article 368).

[8] *The Constitution (Twenty-fourth Amendment) Act, 1971*, National Portal of India, https://www.india.gov.in/my-government/Constitution-india/amendments/Constitution-india-twenty-fourth-amendment-act-1971 (last visited June 05, 2023).

[9] *Constitution 24th Amendment Act, 1971*, GKTODAY, https://www.gktoday.in/Constitution-24th-amendment-act-1971/ (last visited June 05, 2023).

[10] The Constitution of India, 1950 (India).

3. 24th Constitutional Amendment Act, 1971: Need and Relevance

The relevance of the 24th Constitutional Amendment Act, 1971 may be observed in the fact that during Indira Gandhi's regime, the unjustified DPSPs became important due to oversharing of fundamental Rights. This 24th amendment grants Parliament power over basic rights of individual. As a result, the Amendment expanded the rights of the Parliament but, not of the people.

As previously mentioned, the Supreme Court reversed its prior decisions in the Golak Nath case, by a very thin majority, affirming Parliament's authority to amend all provisions of the Constitution, including Part III. The Parliament passed the 24th Amendment Act to overturn the Supreme Court decision in *I. C. Golaknath v. State of Punjab.*[11] The Supreme Court's earlier ruling that the Parliament has the right to amend all of the Constitution, including Part III of the Constitution, which is in conformity with Fundamental Rights, was reversed by the court's ruling. The government had to change Article 368 in order for the Parliament to amend provisions and also include fundamental rights within the scope of its amending procedure.[12]

In order to make it clear that Article 368 permits constitutional alteration and describes the procedures to do so, the 24th Amendment was made to specifically express the same. The Act further stipulates that, following approval by both Houses of Parliament, the President must provide his approval before a Constitution Amendment Bill presented to him. In addition, it proposes to change Article 13 of the Constitution so that it no longer applies to any modifications made in compliance with

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[11] AIR 1967, 2 SCR 762

[12] *Aishwarya Sandeep, Significance of 24th Amendment of the Indian Constitution,* https://aishwaryasandeep.com/2021/09/21/significance-of-24th-amendment-of-the-indian-Constitution/ (last visited June 06, 2023).

Article 368.[13] The 24th Constitutional Amendment is crucial for the reasons that because of it citizens' rights, the extent to which the judiciary can assist people in upholding their constitutional rights in the face of government interference and the extent to which the legislative authority is empowered to amend the Constitution with unquestionable powers were at stake.

4. 24th Constitutional Amendment Act, 1971: Constitutional Validity

The Parliament enacted the 24th Amendment to overturn the Supreme Court's decision in *Golaknath*. The judgment turned around the Court's previous observation which empowered the Parliament to amend the Constitution, including Part III. Parliament had no authority to restrict fundamental rights as a result of the ruling. So, the government wanted to take control over the same and wishes to put fundamental rights under Parliament's control and prevent the courts from reviewing those changes, which would overturn the ruling.

The 24th Constitutional (Amendment) Act came into force on 5th November, 1971 and the same was criticized by the Indian media for having an overly broad scope and questionable legality. Jurists and all of the surviving members of the Constituent Assembly at the time also opposed this Amendment. The Supreme Court also questioned the constitutional validity of the 24th Constitutional (Amendment) Act, 1971 in the case of *Kesavananda Bharati v. State of Kerala*[14]. This judgment curtailed Parliament's power to amend or remove fundamental rights through an amendment under Article 368 of the Constitution and held: *"Article 368 does not enable Parliament to alter the basic structure of framework of the*

[13] Katz, E. (1995). On amending Constitutions: the legality and legitimacy of Constitutional entrenchment. Colum. JL & Soc. Probs., 29, 251.
[14] Keshavanandan Bharti v. State of Kerala AIR 1973 SC 1461

Constitution"[15] It can be referred here that what precisely comprises the 'basic structure' of the Constitution has been left open by the Court.

5. 24th Constitutional Amendment Act, 1971 and Kesavananda Bharati Case

In the landmark decision of *Kesavananda Bharati*, the power to amend was deemed to be channelled and constrained, and the primary topic of discussion was the basic structure doctrine. The majority of the judges (seven in number), including CJI Sikri, in this case decided in favour of the petitioner stating that Parliament don't have absolute power to amend the Constitution. The remaining six judges observed that the Parliament has absolute power to amend the same. The majority came to the conclusion that some parts of the Constitution that are essential for the existence of the Constitution itself cannot be changed or amended. As regards to whether the 24th Constitutional (Amendment) Act, 1971 was constitutional or not; the court stated that the Amendment Act to is constitutional.

6. Significance of the Basic Structure Doctrine

The basic structure doctrine indicates that the Parliament has unlimited power or authority to amend the Constitution, provided that such amendments do not alter its basic structure. The contours of 'basic structure' for our Constitution was however, not exclusively outlined by the bench and left it to the courts' interpretation in future cases. The Court at later point of time has nonetheless, categorised some basic features in a number of other cases.

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[15] *Supreme Court upholds validity of 24th Amendment*, The Hindu, 25th April, 1973, Available at https://www.thehindu.com/archives/from-the-archives-fifty-years-ago-april-25-1973-supreme-court-upholds-validity-of-24th-amendment/article66773762.ece (last visited June 07, 2023).

Additionally, the Parliament has been given boundless power to amend the Constitution, dependent upon the way that it doesn't adjust what was named as the 'basic structure' of the Constitution. It has been found out that the Constitution's essential and fundamental components, without which the doctrine will lose its identity and uniqueness, cannot be altered by the Parliament.

Because of the ruling in Kesavananda, the 'basic structure' test will now have to be applied to all amendments that the Parliament intends to make to any provisions of the Constitution. The Kesavananda Bharti judgment from this point of view was fruitful as it overruled the Golaknath judgment and provided power to the Indian Parliament to amend the Constitution with the caution of 'basic structure'.

The most prevalent criticism of the basic structure doctrine is that it does not have a foundation in the Constitution. Beyond the scope of the power to amend, there is no provision that can indicate that the Constitution has 'basic structure'. The idea that the basic structure doctrine is inappropriate and even harmful to constitutional legitimacy is yet another major criticism of this doctrine. Additionally, there is no clear explanation of the fundamental structure, rendering the doctrine ambiguous.

7. Conclusion

The Constitution acts as the supreme law of the land and it can only be changed when there is a compelling necessity and a solid case for doing so owing to modifications in the social and economic landscape. In Golaknath case, the Supreme Court held that Parliament could not in any way amend the Constitution which created a deadlock. The 24th Amendment Act was enacted with intent to overturn that decision and was questioned for its overbroad breadth and dubious constitutionality. The Supreme Court, providing a way out in this situation by upholding the constitutionality of the

Amendment Act in Kesavananda Bharati and established a new concept of the 'basic structure' of the Constitution. This novel invention of the Court is laudable and foresighted which prevented the Parliament from amending the Constitution as per their wish and aspiration.

CHAPTER 27

UNEASY STANDOFF BETWEEN JUDICIARY AND EXECUTIVE: CASE OF JUDICIAL ACTIVISM

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Prof. (Dr.) Debarati Halder[**]
Dr. Rekha Kumari R. Singh[***]

1. Introduction

> *"There is no disagreement in the House that our Judiciary must be both independent from the Executive and competent in its own right. And the dilemma is how to secure these two objects."*
>
> — Dr. B.R. Ambedkar

The expression 'separation of powers' dates back to the 18th Century, when French philosopher Montesquieu first used it. According to him, the three pillars of government were the legislature, the executive, and the judiciary. Legislative bodies have the authority to enact laws on behalf of a nation or other political entity.[1] The executive branch of government makes policy decisions, appoints officials, and represents the state internationally.[2] The administration of justice falls under the jurisdiction of the government's judicial branch.[3] He believed that protecting the liberties of the people required the establishment of three separate but cooperative branches of government. According to him, each branch may set its own

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[1] Kailash Rai, Administrative Law, Allahabad Law Agency, 2009-page no. 42.
[2] C.K. Takwani, Lectures on Administrative Law, Eastern Book Company, 2019 pp no.33- 39.
[3] http://www.m-w.com/dictionary/legislature (visited on May 23, 2023).

boundaries with regard to those of the other two without impeding on the responsibilities of the others. Numerous nations have implemented this form of government.

The term 'separation of powers' was coined by French philosopher Montesquieu who viewed the legislature, executive, and judiciary as the three pillars of the government. The term 'legislature' refers to a legislative body with the authority to compose and pass laws. Among other responsibilities, the executive branch of government is responsible for representing the state abroad, supervising the enforcement of laws, and appointing top government officials. The administration of justice is the responsibility of the judicial branch of the government. To safeguard the liberties of the people, he believed it essential to establish three institutions of governance that were both independent and cooperative. According to him, each branch of government could limit the authority of the others without appearing to do so. This form of government has been widely adopted by nations worldwide.

Following its own independence from colonial rule, India included several provisions in its Constitution that reflect this form of government. Due to their mutual encroachment, India has recently witnessed a conflict between these branches. When judicial review was expanded to include the ninth schedule of the Indian Constitution, this became more apparent. It was asserted that the court had usurped legislative authority in the name of judicial activism. The Supreme Court's orders on the 27% quota measure for OBCs in educational institutions are another instance in which the judiciary has been accused of encroaching on legislative authority. Given the duration of time (sixty years) that has passed since independence, very few instances of judicial overreach into legislative matters have been contested.[4]

[4] Tarumoy Chaudhuri, Relations of Judiciary and Executive in India, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672222.

The executive and judicial departments have been at odds ever since the Constitution was ratified. The Constitution of India, India's founding Constitution, lays forth the country's political structure by outlining the distribution of power amongst the Federal Govt. and the States. If the executive branch starts acting like the judiciary, the government would inevitably become autocratic. The executive branch is in charge of establishing and carrying out the country's policies. The courts have been given the ability to put a stop to abuses of power. The checks and balances structure of our government guarantees the independence and responsibility of each branch. It is possible to dispute the administrative action in court if it is regarded too restrictive.

The recent executive order mandating the installation of the *Aarogya Setu* app is an example of executive authority being used arbitrarily and without regard for the right of citizens to privacy in relation to their personal information. As a result of judicial intervention, the administration eventually modified its decree. The National Judicial Appointments Commission is an outstanding illustration of the tension between the executive and judicial branches. The Supreme Court ruled against the issue of judicial appointments because it would have *jeopardised* the independence of the judiciary and granted the executive branch excessive deference.[5]

Without authority, the system is incapable of ruling. Consequently, powers are crucial to system regulation. In general, the purpose of a country's Constitution is to define the fundamental or primary or apex organs of government and administration, their respective structures, compositions, powers, and principal functions, as well as the rules that govern

[5] https://scroll.in/article/961396/judges-sould-strike-down-executive-actions-that-are-unConstitutional-says-justice-deepak-gupta

their political relationship with the people.[6] However, the Constitution only stipulates the most fundamental requirements for these organisations. Constitutional law is not the appropriate venue for debating every regulation. It is essential to remember that 'constitutional law' incorporates not only the 'Constitution' but also applicable statutes, court decisions, and conventions.

While the Constitution must always address these three branches of government, it is free to create any new branch it thinks is important enough to enshrine. In India, for instance, every five years a Finance Commission must be formed to settle the federal government's and the states' monetary obligations to one another. Furthermore, it firmly established the Election Commission with the objective to guarantee fair and open elections. In the *Chander Hass case*[7], a two-judge panel of the Supreme Court cited Montesquieu and unanimously agreed with his assessment of the hazards associated with separation of powers. These has been "rightly criticised for 'outreach' and encroachment in the domain of the other two organs", *i.e.*, Parliament and the Executive, by the Indian Judiciary.[8]

2. Separation of Powers

In order to avoid the misuse of power, Montesquieu advocated for a separation of powers between the legislative, executive, and judiciary.[9] This implies that the government must uphold the rights guaranteed to all citizens by the Constitution. This is the case because each part of government serves as a check on the others. This optimizes the performance of every organ. The legislative branch is prohibited from crafting laws that violate

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[6] Wade & Phillips, Const. & Adm. Law, 1, 5 (IX Ed., ed Bradley) K.C. Wheare, Modem Constitutions, 1 (1971); O Hood Phillips, Coast and Adm., Law, 5 (1987)
[7] Divisional Manager Aravali Golf Club v. Chander Hass, (2008) 1 SCC 683: (2007) 12 SCR 1084: (2008)3 JT 221.
[8] M. P. Jain, Indian Constitutional Law,Volume 1, (2000).
[9] The Declaration of The Rights of Man and Citizen was passed by the French National Assembly in the year 1789.

the preamble of the Constitution or the Bill of Rights. The executive is not permitted to be negligent when implementing the law. Using its own mechanisms for appeal, review, revision, and reference, the judiciary oversees its own operations.

In practice, this means that decisions made by one branch of government are insulated from the influence of the other branches. The decisions are made without external influence. This ensures that if one organ commits an error or omission, the other organ, or in the case of the judiciary, the same organ, can rectify the situation. Having separate functions does not imply that the organs will operate independently, as this would be contrary to the principle of separation of powers.

Indeed, the concept of checks and balances complements the separation of powers. In other words, each limb must monitor the others to ensure that they are not shirking their duties. Separating the powers of each branch ensured that the freedoms of the people would be maintained and tyranny would be avoided.

Power has been distributed amongst the three organs such that the task of the legislature is to make laws, the executive is to implement such laws made, and the judiciary has been empowered to interpret such laws within the limits set by the Constitution, as stated by Justice Ramaswamy in *Kartar Singh v. State of Punjab*[10]. Similarly, in *I. C. Golak Nath v. State of Punjab*[11], Justice Subbarao observed, "the Constitution creates distinct constitutional entities, namely the Union, the State, and the Union Territories". The three main governmental branches—legislature, executive, and judiciary—were formally recognised. It lays forth the precise boundaries within which each entity

[10] 1995 AIR 1726, 1995 SCC (4) 101.
[11] 1967 AIR 1643, 1967 SCR (2) 762.

must behave in order to make use of the delegated power. They have to do their jobs within the constraints that have been set.

3. Inter-Relation Between Judiciary and Executive

Article 50 of Part IV of the Constitution of India, which incorporates the Directive Principles of State Policy, establishes the relationship between the Judiciary and the Executive.[12]

3.1 Limits on the Judiciary and Executive

There are checks and balances in place to prevent the Judiciary from usurping the Executive's authority. Courts cannot impeach any member of the Executive under any circumstances. Only if there is disagreement may issue directives. As long as the executive branch does not violate the rights of its citizens, the judiciary has no business interfering with its operations. In the absence of a statute authorising such review or control, a court would not intervene in the exercise of judgment and discretion by a public governing body so long as it remains within the body's legal powers and jurisdiction. However, the executive is also prohibited from interfering with the operations of the judiciary. Officers of the executive branch are not permitted to rule on the constitutionality of laws or exercise judicial authority. They cannot discern whether a person has the legal authority to challenge an administrative decision in court (also known as 'standing'). Court orders are final and non-modifiable.

3.2 Judiciary and Executive Powers

When disputed in court, the courts may declare executive orders/ activities unconstitutional. We will investigate a few additional instances where the Judiciary can serve as a check on the Executive below. During a judicial review, the judge looks into whether or not the decision or action of a public entity was

[12] Art. 50. Separation of Judiciary from Executive. —The State shall take steps to separate the judiciary from the executive in the public services of the State.

in line with the Constitution. Judicial reviews look at the process through which a judgment was reached rather than its merits. The judicial system will not replace a government agency's judgment of what is fair with its own.[13]

3.3 Application of Judicial Review

Certain rulings by immigration officials and the Immigration Appellate Authority; Decisions made by local authorities in carrying out their responsibilities in providing numerous social benefits and special education for children who require such education.

It is frequently asserted that the principle of judicial review results in judicial intrusion into other government departments.[14] Justice K. G. Balakrishnan, Chief Justice of India, once said, "The use of judicial review to establish the legality of legislation and to examine an executive decision might generate friction between the judge and the legislative and executive departments. Such tension is natural and to some extent desirable".

3.4 Writs

The Supreme Court has exclusive original jurisdiction over the protection of Fundamental Rights of the citizens guaranteed under Article 32 of the Constitution. It may issue writs like habeas corpus, mandamus, prohibition, quo warranto, and certiorari to make sure people follow the rules. Writs have the potential to be utilised in the process of maintaining a power balance between the Executive and Judicial branches.[15]

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[13] http://www.judiciary.gov.uk/judgment_guidance/judicial_review/index.htm (visited on May 23, 2023).
[14] http://www.indianexpress.com/story/27889.html (visited on May 23, 2023).
[15] Art. 32. (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

Public Interest Litigations (PILs) are an additional weapon available to the public for using the judicial system to restrain the executive branch. Due to the relative ease of submitting a complaint against a Public Body, PILs have also been criticised for being abused by a group of individuals seeking notoriety through the proceedings.

On the other hand, the Executive may exercise limited authority over the Judiciary in limited circumstances. The nation's or a state's chief executive, such as the President or Governor, appoints judges. The Supreme Court and other tribunals must rely on the Executive branch for the execution of their decisions. The leaders of the Executive branch nominate candidates for judicial positions. In addition, as the nation's administrative head, the President has the authority to grant a pardon to a person who has been given an exceptionally severe sentence, even if that punishment has been upheld by the Supreme Court.

4. Conflict Between Executive and Judiciary

Without a shadow of a doubt, the function of the court in modern times has changed dramatically, moving away from its traditional position and towards a more participative one, in order to meet the evolving requirements of society. The Supreme Court of India does more than just settle disputes; it serves as the ultimate interpreter of the Constitution of India and other enacted laws, the saviour of citizens' fundamental rights, and a watchdog to keep checks on constitutional transgressions by other organs of the State.[16] As was mentioned earlier, the Constitution gives the court broad authority to perform its duties, including the ability to issue writs and hear applications for special leave. What's more, everything that leads to a further expansion of such powers gives the court another tool to accomplish the aims it has defined in the Constitution. Another case that helps to clarify this idea is the evolution of Public

[16] Union of India v. Raghubir Singh 1989 (2) SCC 754.

Interest Litigation from a theoretical concept to a solid legal procedure.[17]

There has been a dramatic change in the court's working routine, leading many to believe that the judiciary now plays a more prominent role in national politics than ever before. With increasing judicial participation in other areas of state activity, the court system seems to be able to achieve what it could not under the old structure.

Looking back over the last fifty years in India, we can see how the Supreme Court's position and decisions have swung significantly depending on factors like the relative authority of various parts of government. A recent flurry of judicial decisions highlights this shift, although the judgments may be read in several ways.[18] At other times, however, the judiciary has clearly encroached upon the domain of other state organs in its efforts to guarantee optimum freedom to the people and galvanise the other two organs of the govt. to work for the public good, despite the fact that it has acted capriciously in disregard to the essence of the Constitution. The Supreme Court appointed a Special Investigation Team to probe the problem of black money after hearing arguments in *Ram Jethamalani and Others. v. Union of India*[19] having dismissed the Union's appeal.

It said that the problems we are dealing with involve large amounts of unaccounted-for money supposedly in possession of certain named people and loose connections between them. Because of this, we have to voice our serious constitutional concerns. The Indian government says that there is a huge amount of money that can't be found. Show Cause Notices were sent out a long time ago. Yet, for unknown and probably unknowable reasons, the investigations into the case moved

[17] P.P.Craig & S.L.Deshpande, Rights, Autonomy and process; Public Interest Litigation in India" 9 Oxford Journal of Legal studies 356 (1989)..
[18] Prof. Upendra Baxi, Courage, craft & Contention 7 (1985).
[19] 2011 (4) ALLMR (SC) 815..

slowly. Even the people who had been named had not been asked real questions yet. These mistakes are very bad, especially when they are seen in the context of the country's overall security, both inside and outside.

As a result of the above, the Court has heard key arguments in the current writ petitions, and it is imperative that the requisite orders be given at this time.[20] Below, we address (i) the Union's request to create a Special Investigation Team and (ii) the Petitioners' request for the Union of India to provide the supporting papers it used to craft its answer.[21]

The instant writ suit was brought in 2009 by a group of prominent lawyers, activists, academics, and former government officials, such as Ram Jethmalani, Jalbala Vaidya, K. P. S. Gill, Prof. B. B. Dutta, etc.[22] Additionally, they have established a group called Citizen India with the claimed goal of improving governance and the overall operation of public institutions.[23]

According to the facts of this case, the claim of Petitioners was:

> *"There have been numerous reports in the media and also in scholarly publications that various individuals, mostly citizens, but may also include non-citizens, and other entities with presence in India have generated and secreted away large sums of money, through their*

[20] https://www.casemine.com/judgement/in/5609af01e4b0149711415516.
[21] S.C.: Whether Special Investigation Team so constituted was to be charged with responsibility of preparing a comprehensive action plan, including creation of necessary institutional structures that can enable and strengthen country's battle against generation of unaccounted monies, and their stashing away in foreign banks or in various forms domestically, (JULY 4, 2011), https://taxcaselaw.com/s-c-whether-special-investigation-team-so-constituted-was-to-be-charged-with-responsibility-of-preparing-a-comprehensive-action-plan-including-creation-of-necessary-institutional-structures-that-ca/.
[22] https://indiankanoon.org/doc/1232445/
[23] *Id.*

> *activities in India or relating to India, in various foreign banks, especially in tax heavens, and jurisdictions that have strong secrecy laws with respect to the contents of bank accounts."*[24]

The Petitioners claim that the vast majority of these funds are untraceable and are the product of illegal activity, either inside or outside of India but with links to the country. Petitioners further claim that a substantial portion of the funds in question originated in India but were illegally removed from the country by means including, but not limited to, tax avoidance.[25]

Petitioners claimed; (i) that the mere existence of such funds points to grave deficiencies in the administration of nation because it indicates a significant absence of control over illegal pursuit by which such funds are generated, avoidance of taxes, and use of illegal means of transaction of funds; (ii) that these funds are then laundered and brought back into India, to be used in both lawful and unlawful activities; and (iii) that the use of numerous unlaundered funds is a major problem in India.[26]

The Petitioners further contend that some of the large sums of money that have no clear source include the funds of prominent Indians, such as the funds of the members and leaders of a number of political parties. It was also contended that the Indian government and its authorities have been exceedingly inattentive in monitoring the myriad criminal operations that create untraceable monies and the accompanying tax evasion, and in trying to prevent the external and inward flow of these illicit funds. Petitioners further argue that they don't feel any effort is being made to go after persons or companies that have

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[24] The revelation of details of bank accounts of individuals, without establishment of prima facie grounds to accuse them of wrong doing, would be a violation of their rights to privacy, available at: https://www.lawweb.in/2012/09/the-revelation-of-details-of-bank.html
[25] Ram Jethmalani & Ors vs Union of India & Ors on 4 July, 2011.
[26] *Id.*

stashed money overseas. It was argued strongly that not enough work had been done to track down the money stashed in various bank accounts in a variety of countries, to try to retrieve it, or no sufficient action on ground has been taken to stop this nuisance.[27]

Further, in *Abhay Singh v. State of Uttar Pradesh and others*[28] the court has given directives, this time instructing the Union of India and the States to establish regulations for the usage of red lights and the provision of protection for private individuals and dignitaries at the expense of the State. The Court stated that since constitutional position holders would only utilise red lights when on duty, it would neither degrade other people nor make them feel superior.[29] Most state and Union Territory governments have legislation and notifications allowing red lights on vehicles conveying large numbers of persons other than 'high dignitaries'. They also permitted more people to utilise red lights with flashers, whether on duty or not. The appropriate authorities and agencies of State Governments and Union Territories have failed to stop red-light misuse. Police are hesitant to check automobiles with red lights since so many individuals use it to commit crimes around the country.

Judges may take it upon themselves to help improve circumstances for citizens if the government or another party violates the peoples' basic rights. Peoples' expectations of the judicial system to rescue them and safeguard their basic liberties and rights are understandably high under these conditions. Judicial Activism emerges as a result of the overwhelming strain these places on the court system to

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[27] *Supra note* 26.
[28] SLP No. (C) No. 25237/2010.
[29] M. Mohan, RED LIGHT ON VEHICLES – only dignitaries as specified by ..., https://advocatemmmohan.wordpress.com/2013/12/12/red-light-on-vehicles-only-dignitaries-as-specified-by-central-and-state-as-per-proviso-iii-to-rule-1081-of-the-1989-rules-and-as-prescribed-in-clauses-c-and-d/

alleviate the suffering of the general public, the same was held in the case of *Nand Kishore v. State of Punjab*[30].

Pravasi Bhalai Sangathan v. Union of India[31] has established that the Court has always made it clear that its directions have been given only in cases where there is a complete lack of legislation, *i.e.*, no statutes or regulations in place to ensure that a fundamental human right is really enforced. The court has exercised its constitutional duty to enforce the law in the event that the administration fails to do so for any reason. If there is no statute or set of laws in place to address a certain circumstance, the court may issue guidelines to offer relief while the legislature fills the void. All of these rulings demonstrate that the judiciary did not encroach on executive power but rather carried out its duties in accordance with the Constitution.

The judicial perspective is intended to uphold judicial restraint norms and should not get out of control. *Akhilesh Yadav v. Vishwanath Chaturvedi*[32]and *State of Haryana v. Ch. Bhajan Lal.*[33] Etc. made it very clear. It is worth mentioning that if a person takes an action that is arbitrary, unreasonable, or otherwise in violation of any statutory provisions or penal law, the court can grant relief after considering the evidence presented and the relevant statutory provisions. However, the court should not issue an order that is so complex that it cannot be carried out.

Similarly, in *Asif Hameed v. State of Jammu and Kashmir*[34]**,** a three-judge bench of the Supreme Court stated that "before adverting to the controversy directly involved in these appeals, we may have a fresh look at the inter se functioning of the three

[30] 1995 (6) SCC 614.
[31] AIR 2014, SCC 1591.
[32] (2013) 2 SCC 1).
[33] AIR 1992 SC 604.
[34] AIR 1989 SC 1899.

organs of democracy under our Constitution". Despite the Constitution's lack of explicit recognition of the theory of separation of powers, the framers were careful to specify the roles of each branch of government. The Constitution specifies separate but equal roles for the legislative, executive, and judicial branches. No one body part may assume the duties of another. The Constitution vests power and discretion in these bodies, thus it is essential that they operate and make decisions in accordance with the rules laid forth for them. Judicial review is a potent tool for limiting the legislative and executive branches' ability to overstep their constitutional bounds. The scope of judicial review has broadened to include issues of social and economic fairness. The sole constraint on our own use of power is the self-imposed discipline of judicial restraint, whereas the legislature's and executive's exercise of authority is subject to judicial restraint.

In *Vishaka v. State of Rajasthan*[35], a case regarding workplace sexual harassment of women, a three-judge panel of Supreme Court issued orders that would be considered as law under Article 141 of the Constitution until the Parliament passes a law.

Since 1950, tensions between the executive branch and the judiciary have been widespread. When the government finally ended the Zamindari System for good in 1951, a fight broke out between the executive branch and the judiciary.[36] In *Kameshwar Singh v. State of Bihar*,[37] the Patna High Court ruled that the Bihar Land Reforms Act[38] was unconstitutional since it went against Article 14[39] of the Constitution. Article 31 property

[35] (1997) 6 SCC 241.
[36] https://sage-tips.com/interesting/what-was-the-development-that-added-to-the-tension-between-the-executive-and-the-judiciary/
[37] AIR 1951 Pat 246.
[38] Bihar Act 30 of 195.
[39] 14. Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India

petitions have been contested by many other petitioners. By enacting the First constitutional Amendment in 1951, the Nehru Government made the act constitutionally protected. The change added to Article 31B *i.e.* Ninth Schedule, which shields the Act from judicial review.

When Justice Deepak Gupta was retiring, he remarked that unconstitutional executive action should be struck down by the courts. However, Attorney General K. K. Venugopal has offered another take on the same topic. He argued that the Supreme Court's habit of regularly expanding basic rights via judicial legislation puts the judiciary too far into the sphere of the administration.[40]

Many court rulings throughout time have planted the seeds of conflict between the judiciary and the executive branch. The *I. C. Golaknath v. State of Punjab*[41], *Kesavananda Bharati v. State of Kerala*[42], *State of U. P. v. Raj Narain*[43], *Madhav Rao v. Union of India*[44] *Maneka Gandhi v. Union of India*,[45] etc. are some of the examples of such conflicts.

Since the Government sometimes sends the recommendation list back to the collegium for reconsideration if it thinks any candidate unsuitable or undesirable, this inherent power of the executive in appointment has caused friction between the government and the Judiciary.

One such heated disagreement occurred in 2018 when Law Minister Ravi Shankar Prasad sent Chief Justice of India

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Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

[40] Aditi Das, Judiciary is crossing its limit and interfering with Executive, https://lawessential.com/all-blogs/f/judiciary-is-crossing-its-limit-and-interfering-with-executive?blogcategory=Constitutional+Law

[41] 1967 AIR 1643, 1967 SCR (2) 762.

[42] Writ Petition (civil) 135 of 1970.

[43] 1975 AIR 865, 1975 SCR (3) 333.

[44] 1971 AIR 530, 1971 SCR (3) 9.

[45] 1978 AIR 597, 1978 SCR (2) 621.

Deepak Mishra a letter in which he disagreed with the CJI's suggestion to nominate two justices to the Supreme Court. Collegium's suggestion to elevate Uttarakhand High Court's Chief Justice K.M. Joseph to the Supreme Court was sent back for reconsideration by the government.[46]

5. The Case of Judicial Activism

The attainment of numerous rights in order to do away with the exploitative environment in which Indians had been living for generations was a fundamental motivation for Indians to battle to mould India into an independent country. The splendour of national liberation is founded in the fact that it sought to do more than just liberate India from British control; it also sought to rebuild Indian society on the dynamic ideology of social revolution. The pursuit of liberty was not the goal. It was but a means to a goal, that being the liberation of India under a new Constitution, the provision of food for the hungry millions, clothing for the unclothed masses, and advancement opportunities for all Indians in accordance with their individual abilities. The government of India has been passing a number of laws with the goal of achieving the aforementioned goal.

For a social activist, the objective of the law is to improve society. The Indian Constitution views the judiciary as a progressive movement instrument. Legislators cannot foresee every future situation that will necessitate the rule of law when drafting a bill. As new circumstances arise, the law must be interpreted and implemented to accommodate their resolution. This process incorporates the proper vision and commitment to good societal principles, and it uses judicial inventiveness to reconcile the voids between the law what it is and the law what it should be. This type of novel legal reasoning is referred to as judicial activism. In other words, "active interpretation of existing

[46] Naman Sherstra, Ways to Counter Conflicts Between Executive and Judiciary, (February 14, 2021).

legislation by a judge with the purpose of enhancing the utility of legislation for social improvement" is judicial activism.

To advance the aims of justice, judges must utilise the powerful instrument of judicial activism to modify the law to the realities of the contemporary world. The sphere of judicial activism is proportional to the court's ability to engage in judicial review. When judicial review is granted authority over not only executive action, as in the United Kingdom, but also legislative action, as in the United States, and even constitutional amendment, as in India, its reach expands substantially.

When the letter of the law appears insufficient to achieve justice in a particular case, judicial activists dig deeper to discover its underlying spirit. To make sure that the desired outcome is within the legal fabric and contributes to the growth of the law, without undermining the credibility of the legal process due to ambiguity or adhocism, the exercise must be complex, delicate, and skilful. The decision must be based on a principle that can be applied to analogous situations in the future. To be acknowledged by the courts, a decision must advance the law by expanding its scope.

The responsibility of ensuring that the law conforms to the changing requirements and aspirations of the community and promotes social justice has been assigned to the judiciary. Judicial activism is the foundation of this strategy. According to Bhagwati J., "judicial activism is now a central feature of every political system that vests adjudicatory power in a free and independent judiciary acknowledging the reality of this justice".

To be more precise, Justice J. S. Verma has established the exact criteria for an adequate activist criterion. The sage judge observed, "judicial activism is only necessary when others are inactive". Effective judicial activism diminishes the function of the judiciary in accomplishing policy objectives. If everyone else is doing their part, there is no need for us to do ours.

6. Conclusion

It is not novel for the executive and judicial branches to experience friction and conflict. However, it's not just a domestic concern. As time and society have advanced, a number of new issues have emerged. As a result of the unanticipated inquiries that are being presented, the courts and administration must deal with previously unknown issues. In order to resolve these issues, new strategies and instruments are being implemented. As a result of one state institution's incursion into the territory of the other, friction and conflict arise between the two state institutions.

It is well-known that the Indian Constitution establishes three branches of government and specifies their respective duties and responsibilities. The judiciary's role is to adjudicate legal disputes. The executive is accountable for governance. However, these bodies do not always agree, and disagreements can arise when a court, whose position has shifted dramatically, deems an executive opinion or action to be illicit or unconstitutional.

The concept of separation is as ancient as tension and conflict. It is a well-established fact that when authorities are divided, there is more space for interference. In spite of the fact that the proponents of the principle of separation of powers through a written Constitution did so with the intention of reducing conflict, the exact inverse has occurred. Due to the lack of a codified Constitution, England has no documented history of constitutional conflict. In spite of India's written Constitution and commitment to the principle of separation of powers, the country's long history of conflict and tension extends back well before independence.

It is gratifying to see that the general public continues to place a high value on our country's judicial system despite growing discontent with the executive and legislative branches' ability to provide effective governance that is responsive to the needs and challenges of our time. As custodian and defender of the people's

fundamental liberties, the judicial branch has performed admirably. According to former CJI Dr. A. S. Anand, when the court overturns an executive order, it does so not out of a desire for conflict or to demonstrate its superiority, but rather to fulfil its constitutional duty and to uphold the grandeur of law. In all such situations, the court fulfils its sentinel role.

Long-standing disagreements exist between the judiciary and the executive branch. To maintain the constitutional framework (separation of powers), these sectors must cooperate on a basis of compromise. If the Judiciary meddles in matters too much, the executive's ability to manage the state will be hampered. In making judicial appointments, the executive branch must be accorded the same deference and authority as the judiciary. The judiciary, which is an independent branch of government, places a premium on the selection procedure. As a result, the collegium system was preferred over the NJAC because it gave the judiciary more authority than the government. Cooperation and harmony will bolster the relationship between the executive and the judiciary.

CHAPTER 28

THE JOURNEY OF THE DOCTRINE OF BASIC STRUCTURE UNDER INDIAN CONSTITUTIONAL SCHEME: AN OVERVIEW

Dr. Ripon Bhattacharjee[*]
Ms. Shrabana Chattopadhyay[**]

1. Introduction

Following a decade of slumber in the repository of India's constitutional history, the argument over the Constitution's 'fundamental structure' has re-emerged before the common mass. The National Democratic Alliance administration (composed of 24 national and regional level parties) set up National Commission to Review the Working of the Constitution (the Commission) and pledged that the core framework of the Constitution would not be changed. Several times, the Commission's chairman, Justice M. N. Venkatchalliah, has stressed that the Commission's mandate does not permit it to investigate the Constitution's fundamental structure.

The Congress (I) and the two Communist opposition parties have made it abundantly clear that the review exercise was nothing more than a sham to gain legitimacy for the government's plan to adopt radical constitutional reforms that would destroy the fundamental structure of the document.

Even among educated urban Indians, there is a lack of understanding of the significances of a notion on which the whole controversy took place during 1970s and 1980s. This debate is an effort to map the waterways of that time, which

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were choppy due to a fight for supremacy between the State's legislative and judicial branches.

The Constitution of India grants exclusive legislative authority to Parliament and the state legislatures. This authority is limited in scope. The authority to rule on the constitutionality of legislation is vested in the courts by the Constitution. The Apex Court has the authority to pronounce a law established by Parliament or a state legislature illegal or ultra vires if it breaches any provision of the Constitution. Despite this safeguard, the Constitution was not intended to be an inflexible blueprint for government. As a result, Parliament was given the authority to make constitutional changes. Article 368 of the Constitution seems to imply that Parliament has the authority to alter any and all provisions of the Constitution. After 1947, however, the Apex Court acted as a controller of whims of legislative power of the Parliament. The highest court ruled that Parliament may not distort, harm, or modify the Constitution's core elements on the pretext of altering it, with the goal of upholding the novel goals imagined by the makers of the Constitution. 'Basic structure' is not a term that appears anywhere in the Constitution. In the landmark Kesavananda Bharati case decided by the Supreme Court in 1973, this idea was finally acknowledged[1]. Since then, the Supreme Court has been the final authority on how the Constitution and Parliamentary changes should be interpreted.

2. The Pre-Kesavananda Position

As early as 1951, some began questioning Parliament's ability to make changes to the Constitution, notably the section dealing with citizens' basic rights. Following independence, several States passed legislation to change their land ownership and tenancy systems. Following through on its electoral promise to implement the Constitution's socialistic goals (as outlined in

[1] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225: AIR 1973 SC 1461.

Article 39(b) and 39(c) of the DPSPs), the ruling Congress Party has ensured that all citizens benefit from a more evenly distributed share of the nation's productive resources. Those who stood to lose from these regulations filed petitions with the courts. The land reforms legislations were invalidated by the courts on the grounds that they violated citizens' constitutionally protected right to private property. Parliament's displeasure with the unfavourable rulings prompted the First and Fourth Amendments (1951 and 1952) to the Constitution, placing these laws outside the reach of the courts and essentially removing them from judicial review[2].

To shield some legislation from judicial scrutiny, Parliament included the Ninth Schedule in the Constitution as part of the first amendment in 1951. Laws placed in the Ninth Schedule, which deal with the acquisition of private property and the compensation payable for such acquisition, cannot be challenged in court on the grounds that they violate the fundamental rights of citizens, per the provisions of Article 31, which were themselves amended several times later. More than 250 legislations established by state legislatures to limit the extent of landholdings and do away with different tenancy arrangements fall under this umbrella of protection. The Ninth Schedule was enacted primarily to stop the court, which had repeatedly sided with individuals in protecting their right to

[2] 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 Forty-fourth Amendment. Instead Article 300A was introduced in Part XII making 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 legislatures had the power to make laws affecting the citizens' right to property.

private property, from derailing the Congress party-led government's plans for a revolutionary social change[3].

Once again, landowners have argued before the Supreme Court that the constitutional changes that included land reforms measures in the Ninth Schedule violated Article 13(2) of the Constitution.

The citizen's basic rights are guaranteed by the state under Article 13(2). Parliament and State Legislatures cannot pass legislation that might deny or limit citizens' constitutionally protected rights, as stated in Article 13(2)[4]. According to their interpretation of Article 13 (2), every change to the Constitution is a law. The Supreme Court ruled against these claims in 1952 (*Sankari Prasad v. Union of India*[5]) and 1955 (*Sajjan Singh v. State of Rajasthan*[6]), upholding Parliament's authority to change any provision of the Constitution, even those that impact individual's basic rights. However, two dissenting justices in the Sajjan Singh case voiced concerns that people' basic rights would become a partisan pawn.

2.1 The Golaknath Verdict

The Supreme Court's position was overturned in 1967 by a panel of eleven judges. Chief Justice Subba Rao's unusual opinion that Article 368, which provides for amendment of the Constitution, only spelled out the amending method was

[3] Later on, laws relating to the nationalisation of certain sick industrial undertakings, the regulation of monopolies and restrictive trade practices, transactions in foreign exchange, abolition of bonded labour, ceiling 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 amendments.
[4] Article 13(2) states- "The State shall not make any law which takes away or abridges 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 to Part III of the Constitution which lists the fundamental rights of the citizen.
[5] AIR 1951 SC 458.
[6] AIR 1965 SC 845.

expressed in the 6:5 majority judgment in the case *Golaknath v. State of Punjab*[7]. The ability to change the Constitution was not granted to Parliament by Article 368. Parliament's authority to enact laws (plenary legislative power) derives from other provisions of the Constitution (Articles 245, 246, 248), which give it the authority to modify the Constitution (constituent power). In light of this, the highest court ruled that Parliament's modifying authority and legislative powers were fundamentally equivalent. Accordingly, any constitutional modification shall be treated as law in accordance with Article 13(2).

The majority opinion based its ruling on the idea that Parliament's ability to modify the Constitution is subject to 'implied limitations'. According to this theory, the Constitution guarantees the protection of citizens' basic rights. Fundamental rights were set aside by the people when they gave themselves the Constitution. This restriction on Parliament's authority was reportedly articulated in Article 13. Because of the nature of the Constitution and the freedoms it guarantees, Parliament is unable to alter, restrict, or diminish these fundamental rights. The Supreme Court decided that the fundamental rights could not be amended without the constituent power. They noted that, if necessary, Parliament might call for a Constituent Assembly to make changes to the basic guarantees. Simply put, the highest court of the land decided that a number of provisions deep inside the Constitution could not be amended via the normal channels.

2.2 Nationalisation of Banks and Abolition of Privy Purses

The Congress party lost control of numerous states and the national legislature within a few of weeks after the Golaknath judgment. A private member's bill was presented and argued both on the floor of the house and in the Select Committee by Barrister Nath Pai, but it was ultimately unable to be enacted owing to political compulsions at the time. However,

[7] AIR 1967 SC 1643.

Parliament's power was again tested when it approved measures to increase farmers' access to bank credit and ensure that wealth and productive resources were distributed fairly and by:

a) Bank nationalisation; and
b) Abolition of Privy Funds that had been guaranteed to the royal families in perpetuity.

Both measures were deemed unconstitutional by the Supreme Court, notwithstanding Parliament's justification that they were carrying out the DPSP. The Supreme Court and Parliament were clearly at odds on how the Constitution's protections for individual liberties should be balanced against the DPSP. One aspect of the conflict was the relative authority of Parliament and the judiciary in interpreting and upholding the Constitution.

The rich, who make up a minority compared to the massive, poor masses for whom the Congress administration claims to conduct its socialist development agenda, were also at odds with the party over the need of protecting private property.

Indira Gandhi, then India's prime minister, called for elections less than two weeks after the Supreme Court overturned the president's decision to de-recognize the princes.

The Constitution itself became a campaign topic in India's elections for the first time. Eight of the ten election manifestos in 1971 demanded constitutional amendments to restore Parliament's sovereignty. A. K. Gopalan, a member of the Communist Party of India (Marxist), even advocated for the complete replacement of the Constitution with one that recognised the people's true sovereignty[8]. The Congress party gained a two-thirds majority and returned to power. The socialist platform of the Congress party, which included a return of

[8] Granville Austin, Working a Democratic Constitution: The Indian Experience, p. 235 (Oxford University Press, New Delhi,1999)

Parliament's sovereignty via fundamental revisions to the Constitution, had been backed by the voters.

Parliament attempted to recoup momentum via a flurry of changes made between July 1971 and June 1972. It reassumed for itself the only authority to alter Part III of the Constitution, which deals with basic liberties[9]. The President is now required by law to sign any legislation that amends the Constitution once it has been approved by both houses of Parliament. Some restrictions on the use of right of way were legislated. Article 39(b) & 39(c) of the DPSP[10] superseded Articles 14[11] and 19[12] of the Constitution.[13] The Ninth Schedule places all laws pertaining to land reforms outside the reach of the courts and eliminated the privy purses of former rulers[14].

[9] INDIA CONST. as amended by the Constitution (Twenty-fourth amendment) Act 1971

[10] Constitution of India, 1950, Article 39(a), Acts of Parliament, 1950 (India): Certain principles of policy to be followed by the State: The State shall, in particular, direct its policy towards securing
(a) that the citizens, men and women equally, have the right to an adequate means to livelihood;
Constitution of India, 1950, Article 39(a), Acts of Parliament, 1950 (India): Article 39(b): that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

[11] Constitution of India, 1950, Article 14, Acts of Parliament, 1950 (India): Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

[12] Freedom of speech and expression, the right to assemble peacefully, the right to form unions and associations, the right to move freely and reside in any part of India and the right to practise any profession or trade are the six fundamental freedoms guaranteed under Article 19. The right to property was also guaranteed in this section until 1979 when it was omitted by the Forty-fourth amendment during the Janata party regime.

[13] INDIA CONST. as amended by the Constitution (Twenty-fifth amendment) Act, 1971

[14] INDIA CONST. as amended by the Constitution (Twenty-sixth amendment) Act 1971 and The Constitution (Twenty-ninth amendment) Act, 1972 respectively

3. The Kesavananda Landmark: the Development of the Basic Structure Doctrine

Unsurprisingly, the Supreme Court's entire bench of thirteen justices faced a challenge to the constitutionality of these revisions. You may find their decision in eleven distinct rulings[15]. The nine judges involved in this case have all agreed on a summary statement that summarises their key findings. Granville Austin points out that the judges' signed summary contradicts their judgments in their individual rulings on a number of issues[16]. The Constitution's fundamental idea of its 'basic structure', however, was upheld by the majority decision.

All of the courts agreed that Parliament may modify the Constitution at will, hence the Twenty-fourth Amendment was affirmed. Every person who signed the summary believed that the Supreme Court's decision in the Golaknath case was incorrect and that the authority and mechanism for altering the Constitution were found in Article 368. In Article 13(2), however, they made it clear that a constitutional amendment is not the same as a law.

The Parliament has two distinct functions: (a) creating national legislation via its legislative authority[17] and (b) modifying the Constitution through its constituent power. The power of the constituents always takes precedence over the power of the legislature. Indian Parliament and State legislatures, in contrast to the Parliament of Britain, being the supreme body owing to the absence of a written Constitution, are subject to specific limitations specified by the Constitution. Laws governing the

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[15] Kesavananda Bharati, *supra* note 1

[16] S*upra* note.8 at p.265.

[17] By virtue of the powers 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 (Council of States or the Upper House in Parliament) Parliament can also make laws in the national interest, relating to any of the 66 subjects contained in the State List.

nation that are not included in the Constitution. Parliament and State Legislatures regularly pass legislation on a wide range of topics, each within their own purviews. The Constitution establishes the broad parameters within which such legislation may be enacted. According to Article 368[18], only Parliament has the authority to make modifications to this structure. constitutional provisions cannot be changed via the normal legislative process.

Perhaps another illustration can assist clarify the difference between Parliament's constituent authority and legislation making powers. No citizen shall be deprived of life or personal liberty, except in accordance with procedures established by law, as guaranteed by Article 21 of the Constitution[19]. Due to legislative and executive authority, the Constitution does not specify operational specifics. Offences that warrant criminal penalties, such as imprisonment or the death penalty, are codified in statutes passed by Parliament and State Legislatures. Procedures for enforcing these laws are set by the government, and those charged are tried in court. It just takes a majority vote in the relevant State Legislature to make changes to these laws. Changing these statutes does not need revising the Constitution. It may be necessary for Parliament to use its constituent authority to alter the Constitution in a suitable manner in order to transform Article 21 into the basic right to life by removing the death sentence.

[18] However certain Constitutional amendments 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 amending provisions themselves, contained in Article 368, must be amended by following this procedure

[19] Constitution of India, 1950, Article 21, Acts of Parliament, 1950 (India): "Protection of Life and Personal Liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

The Kesavananda Bharati case was heard by a total of thirteen judges, and seven of those justices, including the Chief Justice Sikri, who signed the summary statement, came to the conclusion that the constituent power of Parliament was restrained by constitutional limits. The constitutional provision known as Article 368, which gives Parliament the power to amend the Constitution, cannot be used to change the "basic structure" or "framework" of the Constitution.

3.1 Basic Features of the Constitution According to the Kesavananda Verdict

Separately, each judge detailed what he considered to be the Constitution's most fundamental provisions. Even among those who shared the dominant position, there remained disagreement.

Sikri, C.J. outlined what was meant by 'basic structure' stating: "The Constitution is supreme; we have a republic and a democratic form of government; it is secular; the legislative, executive, and judicial branches are separate; and the government is a federal system."

J. Shelat and J. Grover expanded this list by include the following two characteristics:

1. The directive in the DPSP to create a welfare state; and
2. National solidarity and steadfastness

Hegde, J., and Mukherjea, J., came up with their own, condensed list of characteristics such as: India's independence, the country's indivisibleness, the fundamental rights of its inhabitants, and the duty to create a welfare state are all guaranteed by the Constitution.

According to Jaganmohan Reddy, J., the Preamble and the clauses into which it translates include aspects of the core characteristics, including a sovereign democratic republic, a

Parliamentary democracy, and a separation of powers among the three branches of government are the basic features. He argued that the Constitution's basic protections and guiding ideas make it what it is.[20]

Six of the justices, a minority, agreed that citizens' basic rights were part of the basic framework and could not be changed by Parliament.

3.2 View of Minority:

Justice M. H. Beg, Justice K. K. Mathew, and Justice S. N. Dwivedi, all members of the minority, agreed that Golaknath had been decided incorrectly. Many people believe that Justice A.N. Ray's elevation to Chief Justice, at the expense of three more experienced justices, immediately after the announcement of the Kesavananda judgment was done so for political reasons. All three contested amendments were found to be constitutional, the court ruled. According to Justice Ray, the Constitution cannot be divided into essential and non-essential components. They all believed that Parliament, using its authority under Article 368, could make significant amendments to the Constitution.

As a whole, the Kesavananda Bharati majority upheld Parliament's authority to alter the Constitution in any way it sees fit, so long as it does not undermine the document's foundations. However, there was not a unified view on who should fill those underlying positions. The Supreme Court almost went back to the Sankari Prasad (1952) stance by reinstating the pre-eminence of Parliament's amending authority, but in the end it enhanced the power of judicial review far further[21].

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[20] S*upra* note 1 at p. 637-38.

[21] The majority view declared certain parts of the Twenty-fifth amendment invalid especially those relating to Article 31(c) and upheld the Twenty-ninth amendment- for a detailed account see GLANVILLE *supra* note.8 at p.265.

4. Reaffirmation of the Doctrine of Basic Structure – the Indira Gandhi Election Case

It wasn't until 1975 that the Supreme Court was invited to weigh in on the Constitution's basic foundation for the third time. In 1975, the Allahabad High Court accepted the legitimacy of a challenge to Prime Minister Indira Gandhi's election victory on the grounds that the election had been tainted by electoral fraud. The verdict is still being challenged, but in the meanwhile, Justice Krishna Iyer, who is on vacation, ordered a stay to enable Smt. Indira Gandhi to continue acting as Prime Minister even though she will not get a salary, be allowed to speak or vote in Parliament, or be able to receive any other benefits associated with the position. In the meanwhile, the Thirty-ninth Amendment to the Constitution, which was enacted by Parliament, removed the Supreme Court's authority to hear election petitions for the President, Vice President, Prime Minister, and Speaker of the Lower House. This ended the Supreme Court's jurisdiction over election petitions for those four positions. Election issues would instead be settled by a panel established by Parliament. Any legal challenge to the legitimacy of an incumbent holding one of the aforementioned posts was rendered moot by Section 4 of the Amendment Bill. It was obvious that this was an attempt to end the argument over Smt. Indira Gandhi's election before it had started.

In addition to the Amendment Act of 1975, the Representation of the Peoples Acts 1950 and 1951 were amended and added to the Ninth Schedule to protect the Prime Minister from public humiliation in the event of an unfavourable ruling by the Supreme Court. The government's bad faith was on full display in the lightning-fast passage of the 39th Amendment. On August 7th, 1975, the measure was introduced and quickly approved by the Lok Sabha. The Rajya Sabha, also known as the Upper House or House of Elders, voted in favour of it the day after, and then the President of India signed it into law two days after that. The ratification of the amendment took place in extraordinary sessions of state legislatures on Saturdays. Publication

occurred on August 10th. The following day, when the Supreme Court resumed hearing the case, the Attorney General moved to dismiss it in light of the revised modification.

Legal representation for Raj Narain, Mrs. Gandhi's opponent who challenged her election, said that as because it compromised voters' ability to cast fair ballots, the amendment was in direct opposition to the Constitution's basic framework and the ability of the courts to examine election results. Attorneys also contended that Parliament lacked the authority to exercise its integral power to legalize a vote that the Apex Court had already pronounced null and invalid.

Only after striking down the provision that aimed to limit the jurisdiction of the court to arbitrate in the present election dispute did four of the five justices on the bench uphold the Thirty-ninth amendment[22]. The whole amendment was affirmed by Judge Beg. With the new election regulations in place, Mrs. Gandhi's election was upheld as legitimate. The Court reluctantly acknowledged Parliament's authority to enact retroactive legislation.

4.1 Components of Basic Structure Based on Decision of Election Case:

Again, the judges had differing opinions on what constitutes the Constitutions underlying framework. Justice H.R. Khanna argued that the Constitution guarantees free and fair elections as part of its commitment to democracy. Justice K.K. Thomas once said that judicial review is a crucial component. In his opinion, four fundamental aspects that cannot be changed, as outlined by Justice Y.V. Chandrachud, has been held as the part of basic structure. These are: strict adherence to the rule of law (also known as 'government of laws and not of men'),

[22] The Supreme Court struck down Section 4 of the Thirty-ninth amendment Act, *i.e.* Article 329A of the Constitution as it existed in 1975.

secularism, freedom of conscience and Religion, and a constitutionally guaranteed separation of church and state are all hallmarks of a true democratic republic.

Chief Justice A. N. Ray argued that the Constitution did not apply to the constituent authority of Parliament because it was above the Constitution and not subject to the concept of separation of powers. This means that Parliament might shield election dispute provisions from judicial scrutiny. Oddly, he considered democracy a prerequisite but not free and fair elections. Ordinary legislation, Justice Ray said, does not fall within the purview of fundamental characteristics.

Justice K. K. Mathew concurred with the Chief Justice that fundamental structure did not apply to everyday statutes. However, he believed that democracy was crucial, and that judicial bodies should make decisions about election disputes according to the law and the evidence.

Justice M. H. Beg wrote a dissenting judgment in which he claimed that the Constitution would be unnecessary if Parliament's constituent power were determined to be superior to it. The Supreme Court[23] has exclusive jurisdiction over judicial matters, which the High Courts and Parliament are not authorised to carry out. In the Kesavananda Bharati case, he contended that the separation of powers and the majority's view of the Constitution's supremacy were key parts of the case. Beg,

[23] A comparison with the Westminster model would bring out the subtleties involved in this matter more clearly. The United Kingdom does not have a written Constitution like India or the USA. The British Parliament is a sovereign body and there is very little difference between constitutional law and ordinary law in that country. The Indian Parliament owes its existence to a written constitution that was put together by another sovereign body, namely, the Constituent Assembly. Parliament's powers (including the power to amend) are not sui juris but essentially derived from this Constitution. Therefore it cannot be said to occupy a position superior to the Constitution.

J. underlined that common law is included by the notion of fundamental structure.

Although the justices were divided on what exactly made up the Constitution's skeleton, the overwhelming opinion maintained that the Constitution did, in fact, include certain unalterable essentials.

5. Constitution of Review Bench to Revert the Kesavananda Bharati Case:

Within three days of the Election case decision, Ray, J., under the premise of reviewing several petitions about land ceiling legislation pending in high courts, called for a thirteen judge bench to revisit the Kesavananda ruling. The petitions claimed that the very act of enforcing land ceiling limitations was a violation of the Constitution. The Review bench's job was to basically evaluate whether Parliament's ability to modify the Constitution was constrained by the fundamental structure theory. The decision in case of Bank Nationalisation was also up for review.

While this was going on, Prime Minister Indira Gandhi argued in Parliament that we should reject the theory of fundamental structure[24].

The fact that no formal petition was submitted before the Supreme Court for a review of the Kesavananda judgment was observed with dismay by various judges. In opposition to the motion to reconsider the Kesavananda judgment, Palkhivala, representing for a coal mining business, argued persuasively. After two days of proceedings, Chief Justice Ray disbanded the bench. Many individuals believe the government was behind these events in an attempt to reverse the precedent established

[24] Speech in Parliament- October 27, 1976: see Indira Gandhi: Selected Speeches and Writings, vol. 3, p.288.

by the Kesavananda verdict. The matter was not actively pursued, though.

The restriction of basic liberties, such as the ability to move courts against preventative imprisonment, after the proclamation of a National Emergency in June 1975 drew focus away from this problem.

6. The 42nd Amendment and Sardar Swaran Singh Committee:

In view of the country's previous history of national crises, the Congress Party swiftly organised a committee chaired by Sardar Swaran Singh to look into the potential of amending the Constitution. Following its advice, the government amended the Constitution with the 42nd Amendment (which was ratified in 1976 and went into effect on January 3rd, 1977) to make a number of modifications, notably to the Preamble. The change includes, among other things:

a) gave priority to the DPSP over Articles 14, 19 and 21. Laws cannot be challenged on the DPSP, as per the new wording of Article 31C[25];
b) established that previous and future constitutional modifications cannot be challenged on the grounds of their constitutionality in any court;
c) withdrew all fundamental rights revisions from judicial review; and
d) Parliament's ability to modify the Constitution according to Article 368 has all restrictions abolished.

[25] Article 31C stated that laws passed to implement the Directive Principles of State Policy could not be challenged in courts on the ground that they violated any fundamental right. Prior to the Forty-second amendment this clause was applicable only to Article 39 (b) & (c) of the Directive Principles which dealt with equitable distribution of wealth and resources of production.

7. Reaffirmation of the Doctrine of Basic Structure – The Minerva Mills and Waman Rao Case:

Less than two years after Parliament's amending powers were restored to almost absolute terms, the proprietors of Minerva Mills (Bangalore), a failing industrial concern nationalised by the government in 1974, contested the Forty-second amendment in the Supreme Court[26]. Well-known constitutional attorney and petitioners lawyer N. A. Palkhivala decided against challenging the government's conduct on the basis of a violation of the petitioners' right to property. He recast the case as an attack on Parliament's authority to make constitutional changes.

Mr. Palkhivala argued that Parliament now has unrestricted jurisdiction to make changes according to Section 55 of the Amendment Act[27]. In the Kesavananda Bharati and Indira Gandhi's Election Cases, the Supreme Court acknowledged the idea of fundamental structure. The effort to immunise constitutional modifications from judicial scrutiny ran afoul of this doctrine. He went on to say that the new version of Article 31C was unconstitutional since it ran counter to the Constitution's opening paragraph and peoples' basic liberties. It also deprived the courts of their oversight role.

Both arguments were supported in a majority decision (by a vote of 4:1) delivered by Chief Justice Y. V. Chandrachud., Judicial scrutiny of constitutional changes was affirmed in the majority opinion. They argued that Parliament has unrestricted authority to modify the Constitution according to paragraphs (4) and (5) of Article 368. They argued that the courts would be unable to review the amendment if it compromised or weakened the Constitution.

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[26] Minerva Mills Ltd. v Union of India (1980) 3 SCC 625.
[27] INDIA CONST. Article 368 (4) & (5) as amended by the Constitution (Forty-second amendment) Act 1976.

The court agreed with Chandrachud, C. J., and found that the Constitution itself has a limited amendment authority. Bhagwati, J., who wrote the dissenting opinion, agreed with this assessment, arguing that no authority, no matter how high, could claim to be the exclusive judge of its power and behaviour under the Constitution[28].

According to the majority, the amendment to Article 31C was unconstitutional because it threw off the Constitution's natural balance between fundamental freedoms and guiding principles.[29] Because it has not been repealed or removed by Parliament, the change to Article 31C is still technically in effect. Nonetheless, it is applied to cases in the same way it was before the 42nd Amendment.

The Supreme Court ruled that any constitutional modifications made after the date of the Kesavananda Bharati judgment were subject to judicial review in another case involving a similar conflict regarding agricultural land.[30] After the Kesavananda Bharati verdict, the courts may also evaluate any new legislation added to the Ninth Schedule. They may be challenged if they are seen to overstep Parliament's authority or to threaten the

[28] Such a position seems contrary to the philosophy of separation of powers that characterize the structure of governance in India. The Constitution provides for a scheme of checks and balances between the three organs of government namely, the legislature, the executive and the judiciary, against any potential abuse of power. For example, the judges of the Supreme Court and the High Courts in the States are appointed by the executive i.e. the President acting on the advice of the Prime Minister and the Chief Justice of the Supreme Court. But they may be removed from office only if they are impeached by Parliament. This measure helps the judiciary to function without any fear of the executive. Similarly, the executive is responsible to Parliament in its day to day functioning. While the President appoints the leader of the majority party or a person who he believes commands a majority in the Lok Sabha (House of the People or the Lower House) a government is duty bound to laydown power if the House adopts a motion expressing no confidence in the government.

[29] Bhagwati, J. upheld its validity and concurred that the government's takeover of the sick mill was valid.

[30] Waman Rao v Union of India 1981 2 SCC 362. The Supreme Court decided this case along with that of Minerva Mills.Bhagwati, J. who was in the minority again incorporated his opinions on both cases in a single judgment.

Constitution's underlying principles. Between its responsibility to interpret the Constitution and Parliament's power to amend it, the Supreme Court reached a workable compromise.

8. Conclusion

As things stand, it seems improbable that the Supreme Court will ever provide its final ruling on a case involving the Constitutions' fundamental structure. Although the existence of a fundamental structure to the Constitution is generally accepted, its precise elements will not be known unless Court judgment reveals so. To counter this, the Supreme Court often refers to the Constitution's protections for the rule of law, judicial independence, individual rights, etc. As a result of this disagreement between the Legislature and the judiciary, judicial review has been extended to all legislation and constitutional amendments, and the Supreme Court is now empowered to overturn any legislation that it finds to be in violation of the Constitution's core structure. Since the Supreme Court is the ultimate arbitrator and interpretation of all constitutional amendments, Parliament's ability to modify the Constitution is not unlimited.

CHAPTER 29

A THEMATIC REVIEW OF BASIC STRUCTURE DOCTRINE: ORIGIN, UTILITY AND APPLICATION IN CONTEMPORARY TIMES

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1. Introduction

The Basic Structure Doctrine is a constitutional principle that establishes certain fundamental features of the Constitution as immutable and beyond the amending power of the Parliament. It was first propounded by the Supreme Court of India in the case of *Kesavananda Bharati v. State of Kerala*[1] and has since become a cornerstone of Indian constitutional law. The primary objective herein in this chapter will be to provide an in-depth understanding of the Basic Structure Doctrine, including its origins, development, and implications, thus, shedding light on the theoretical and practical aspects of the doctrine. We begin by tracing the historical development of the Indian Constitution, highlighting key events and influences that shaped its creation. We shall also highlight the key principles that form the foundation of the 'basic structure doctrine'[2], including democracy, secularism, federalism, rule of law, and judicial review & elucidate how these principles are considered the basic structure components that cannot be amended or abrogated.

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1 AIR 1973 SC 1461.

2 Manoj Mate, "Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective" (May 18, 2010). 12 San Diego International Law Journal 175 (2010), Available at SSRN: https://ssrn.com/abstract=2312057 (last visited on June 10, 2023).

Also highlighted is the dynamic nature of the Basic Structure Doctrine, allowing for evolution and adaptation to changing societal needs for the Constitution is often described by scholars[3] as living Constitution[4]. Discretion of the Court in determining the scope and boundaries of the basic structure and the flexibility it provides within its contours is explored. The significance of the doctrine in safeguarding fundamental rights and ensuring constitutional supremacy and how the doctrine acts as a check on the arbitrary exercise of power[5] by the legislature shall also be discussed herein. Besides, the criticism and challenges faced by the doctrine, including concerns regarding judicial activism, democratic legitimacy, and the potential for judicial overreach, various perspectives on the doctrine's effectiveness and scope are considered. Finally, the implications of basic structure for our legal system and its democratic institutions are discussed along with the potential future developments and challenges in the application of the doctrine.

1.1 Historical Background

Constitution of India was the residue of the legacy started by the Government of India Act, 1935. Some features of the Government of India Act that suited well for free India was taken into consideration by the drafters of the Indian Constitution while the others were eclipsed.[6] Features of Federal Legislature and Provincial autonomy were taken from the Government of India Act, 1935[7]. The 1935 Act divided powers between the Centre and the Province which was better for the administration

[3] Jack M. Balkin, "Framework Originalism and the Living Constitution" 103 Northwstn.. Univ. Law Rev. 550 (2009).
[4] David A. Strauss, "Do we have a Living Constitution" 59 Drake L. Rev. 973 (2011).
[5] See Justice H.R. Khanna's opinion in *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461 para 1445.
[6] Doctrine of eclipse
[7] Government of India Act, 1935

at ground level as well. However, it did not talk about the Fundamental rights of the population.

The fundamental rights were adopted in our Constitution by the Constitution makers from several other Constitutions along with the Universal Declaration of Human Rights (UDHR)[8] which contained 30 Articles, and covers the most fundamental rights and freedoms of people (collectively and individually) everywhere in the world. International Covenant on Civil and Political Rights (ICCPR)[9] is an international human rights treaty adopted in 1966 and ratified by India in 1979. It enables people to enjoy a wide range of human rights, including those relating to: freedom from torture and other cruel, inhuman or degrading treatment or punishment, fair trial rights, freedom of thought, religion and expression, privacy, home and family life and equality and non-discrimination. Fundamental rights are now part of Part III of the Constitution. Article 38 and 39 of Indian Constitution[10] defines distributive Justice. Distributive justice means fair distribution of resources among those who are in need of it. Indian Constitution defines three types of justice: a) Social Justice, b) Economic Justice, and c) Political justice. Concurring with Kesavananda Bharati[11] case in *S. R. Bommai v. Union of India*[12], the apex court held that social justice and judicial review are two basic features of the Indian Constitution.

All three types of justice, social, economic and political are closely related to each other. One can't be obtained unless and until the other two are present. Social justice can be obtained only when economic and political justice is present. Indian Constitution under Part III[13] enforces all three types of justice

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[8] UDHR available at https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf (last visited on June 10,2023)
[9] ICCPR available at https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/ccpr.pdf (last visited on June 10,2023)
[10] Art. 38 and 39
[11] *Supra* note 1
[12] MANU/SC/0444/1994.
[13] Part III of The Constitution of India

by making provisions relating to equality under Article 14 and 15.[14] In today's time judiciary is the protector of civil rights, it acts as custodian of fundamental rights. It plays an important role in enforcement of all three types of justice given under Indian Constitution. Judiciary has played an important role in the establishment of justice in the country and to make the concept of justice given in preamble a reality. The approach of judiciary has been progressive in this regard and it has shown through its decisions that justice is an essential ingredient of a developed and law abiding society.

In cases like *Maneka Gandhi v. UOI*[15] (right to liberty) the court has enforced the concept of social justice. Without presence of all forms of justice any society can't develop as a constitutional society therefore keeping it in mind framers of our Constitution included this concept in the Preamble as well as in Part III and IV of the Indian Constitution. There is strong need for coordination among all three organs of the government to establish a system based on justifiable approach.

The concept of political justice was highlighted in the famous case of *A. K. Gopalan v. State of Madras*[16] which dealt with the constitutionality of preventive detention law. Apex Court upheld the constitutionality of the said law and held that the fundamental rights, which include the right to life and personal liberty were not absolute and could be curtailed by the state for reasons of national security.

The landmark case of *Kesavananda Bharati v. State of Kerala*[17] is the turning point for the recognition and establishment of the Basic Structure Doctrine. It delves into the constitutional crisis leading to the case and the Supreme Court's decision, which

[14] The Constitution of India, Art. 14,15.
[15] MANU/SC/0133/1978.
[16] AIR 1950 SC 27.
[17] *Supra* note 1.

introduced the concept of the basic structure. We begin by analysing the judicial reasoning and interpretation behind the Basic Structure Doctrine, emphasizing the Court's power of judicial review in protecting and preserving the Constitution's core values. Subsequent judicial pronouncements and cases that have expanded and fortified the Basic Structure Doctrine are highlighted. Notable cases such as *Indira Nehru Gandhi v. Raj Narain*[18], *Minerva Mills Ltd. v. Union of India*[19], and *Waman Rao v. Union of India*[20] will be discussed in detail.

2. The Indian Perspectives: Before and After Kesavananda

In the famous case of *Kesavananda Bharati v. State of Kerala*[21], the notion of basic structure was first established in India. Supreme Court ruled in this case that a constitutional amendment cannot change the Constitution's fundamental framework. The supremacy of the Constitution, the rule of law, the separation of powers, the federal structure of government, the secular character of the Constitution, and the protection of fundamental rights etc. were held as comprising the Basic Structure of the Constitution that the Court identified as being a part of its fundamental structure.[22] This list is not exhaustive. It was left to the judiciary to determine what Basic structure was and what it was not.

In *Sankari Prasad Deo v. Union of India*[23], the claim that amending power of the Parliament is subject to substantive restrictions was first put forth. Article 13 of the Constitution, which forbids the State from passing laws that violate any of the fundamental rights listed in Part III, was the foundation of the

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[18] AIR 1975 SC 2299.
[19] AIR 1980 SC 1789.
[20] 1981 2 SCR 1.
[21] *Supra* note 1.
[22] Lok Sabha Secretariat," A Comprehensive Note on Indian Constitution- A Source Code to Billion Dreams" Available at https://loksabhadocs.nic.in/Refinput/Research_notes/English/04122019_153433_1021204140.pdf (last visited on June 10, 2023).
[23] AIR 1951 SC 458.

challenge in Sankari Prasad, which unsuccessfully challenged the 1st Constitutional Amendment in 1951. The validity of the first amendment was questioned on the ground that with the insertion of Art 31A and Art 31B limited the scope of right to property, a fundamental right.[24]

Fourteen years later, in *Sajjan Singh* v. *State of Rajasthan*[25] a Constitution bench upheld the decision in Sankari Prasad. However, Justices Hidayatullah and Mudholkar expressed doubts about the verdict. Hidayatullah J. opined that the many assurances given in Part III made it difficult to visualize fundamental rights as mere "playthings of a special majority." Mudholkar J. observed that the framers may have intended to give permanency to certain "basic features" such as the three organs of the State, separation of powers etc. He also questioned whether a change in the basic features of the Constitution could be defined as an "amendment" within the meaning of Article 368, or whether it would amount to rewriting the Constitution itself.[26]

The position of law was then reversed in *I.C. Golak Nath* v. *State of Punjab*[27]. An eleven-judge bench of the Supreme Court, by a slender margin of 6:5, and by divided majority opinions, held that the Parliament had no power to amend Part III of the Constitution. All provisions dealing with fundamental rights were thus placed beyond the reach of the legislature. To remove difficulties created by the decision of the Court in Golak Nath case Parliament enacted the 24th Amendment Act. The validity of the said Amendment was challenged in Kesavananda Bharati.

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[24] M. L. Singhal, "Right to Property and Compensation under the Indian Constitution", April-June 1995 Journal of ITJR, Lucknow available at https://ijtr.nic.in/articles/art41.pdf (last visited on June 10, 2023).
[25] AIR 1965 SC 845.
[26] Satchidananda Mishra, Amendment of Indian Constitution: An Overview, in Constitution and Constitutionalism in India, 46 (Surya Narayan Misra et al eds., 1999)
[27] AIR 1967 SC 1643.

The doctrine of basic structure which as stated earlier was first recognized in India by the Supreme Court in the landmark case of *Kesavananda Bharati v. State of Kerala*[28] in 1973.The Kesavananda Bharati case is one of the most significant and landmark judgments in the history of the Indian judiciary. The case was heard in the Supreme Court of India in 1973 and was a result of a legal dispute between Kesavananda Bharati, the head of a Hindu monastery in Kerala, and the State of Kerala. The case was related to the Kerala Government's attempts to introduce land reforms that would have limited the ownership of private property[29]. The Constitution of India had been adopted in 1950, and by the 1960s, the Indian government had introduced various constitutional amendments. One such amendment was the 24th Amendment Act of 1971, which aimed to curtail the powers of the judiciary and the scope of judicial review. The 24th Amendment Act[30] also sought to amend Article 368 of the Constitution to make it clear that Parliament had the power to amend any part of the Constitution, including the fundamental rights.

In 1964 when the Parliament passed the 17th Constitutional Amendment Act, which sought to secure the constitutional validity of acquisition of land and estates which fall under the Ninth Schedule[31]. This amendment was challenged in this case. In its judgment, the Supreme Court upheld the validity of the 17th Constitutional Amendment Act and the Supreme Court

[28] *Supra* note 1.
[29] Anadi Tiwari, 50 Years Of Kesavananda Bharati Judgment: A Look At Evolution Of Doctrine Of Basic Structure & Its Present Status, April26, 2023 available at https://desikaanoon.in/50-years-of-kesavananda-bharati-judgement-a-look-at-evolution-of-doctrine-of-basic-structure-its-present-status/ (last visited on June 10,2023).
[30] The Constitution (Twenty-fourth Amendment) Act, 1971 available at https://www.india.gov.in/my-government/Constitution-india/amendments/Constitution-india-twenty-fourth-amendment-act-1971 (last visited on June 10,2023)
[31] The Constitution (Seventeenth Amendment) Act, 1964 available at https://www.india.gov.in/my-government/Constitution-india/amendments/Constitution-india-seventeenth-amendment-act-1964 (last visited on June 10,2023)

determined that Article 368 grants the Parliament to modify any Article in the Constitution. The Court restated that Article 13 only applies to regular laws and not to constitutional amendments, whereas Article 368 is exclusively applicable to constitutional law. The majority verdict held that the Parliament possesses the power to amend the fundamental rights of the citizens.

Although the concept doctrine of basic structure was for the first time recognized and established in the case of Kesavananda Bharati, but its origin was the case Sankari Prasad. The question that arose in the case *Sankari Prasad* was whether fundamental rights can be amended under Article 368 came for consideration in the Supreme Court. The validity of Constitution's 1st Amendment Act, 1951 which added Articles 31A and 31B of the Constitution was challenged. This amendment was questioned as it abridged the rights stated in Part III of the Constitution. The apex court rejected the above reasoning and held that fundamental rights can be amended due to the powers contained in Article 368. The same viewpoint was expressed by the Court in the Sajjan Singh's case.

In the Golak Nath's case, 17th Amendment which inserted certain acts in Ninth Schedule was challenged. Supreme Court held that the Parliament had no power to amend Part III of the Constitution and set aside its decision in Sankari Prasad and Sajjan Singh case.

Various famous cases in India where the doctrine of basic structure has been upheld include Minerva Mills Ltd. v. Union of India[32], Indira Nehru Gandhi v. Raj Narain[33], I. R. Coelho v. State of Tamil Nadu[34], Waman Rao v. Union of India[35], M.

[32] *Supra* note 4.
[33] *Supra* note 3.
[34] (2007) 2 SCC 1
[35] *Supra* note 3.

Nagaraj v. Union of India[36], Indra Sawhney v. Union of India[37], Madras Bar Association v. Union of India,[38] etc.

3. Boundaries of the Doctrine

Each judge laid out separately in the landmark judgment of Kesavananda, what he thought were the basic or essential features of the Constitution. There was no unanimity of opinion within the majority view either[39]. For instance, Sikri, C.J.[40] gave his list of what he considered basic structure to be. He included in his list:

a) Supremacy of the Constitution;
b) Republican and democratic form of government;
c) Secular character of the Constitution;
d) Separation of powers between the legislature, executive and the judiciary; and
e) Federal character of the Constitution

Shelat, J. [41]and Grover, J.[42] added two more to this list. These were:

a) The mandate to build a welfare state contained in the Directive Principles of State Policy; and
b) Unity and integrity of the nation

Hegde, J.[43] and Mukherjea, J.[44] had their own list. This included:

a) Sovereignty of India;

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[36] (2006) 8 SCC 212.
[37] 3 SCC 217.
[38] 10 SCC 15
[39] Zia Modi, "Ten Judgments that changed India", Penguin India
[40] Ex- Chief Justice of India from 22 January 1971 until his retirement on 25 April 1973.
[41] Hon'ble Justice Jaishanker Manilal Shelat was a Judge of the Supreme Court of India from February 1966 to April 1973.Previously, he had served as the third Chief Justice of the High Court of Gujarat from May 1963 till his elevation to the Supreme Court of India
[42] Hon'ble Mr. Justice A.N. Grover served in Supreme Court of India from 11/02/1968 to 31/05/1973
[43] Hon'ble Justice K S Hegde Hegde became a judge in the Supreme Court of India in 1967. He gave his resignation on 30 April 1973 when his junior colleagues was appointed the Chief Justice of India.He also served as the seventh Speaker of Lok sabha from 21 July 1977 to 21 January 1980.
[44] Hon'ble Justice A.K. Mukherjea served as a judge in the Supreme Court of India from 14/08/1972 to 23/10/1973

b) Democratic character of the polity;
c) Unity of the country;
d) Essential features of the individual freedoms secured to the citizens; and
e) Mandate to build a welfare state

Jaganmohan Reddy, J. [45] said that basic structure was found in the Preamble to the Constitution. His list included:

a) Sovereign democratic republic;
b) Parliamentary democracy
c) Three organs of the State

Hence different judges gave different interpretations of basic structure. In the absence of a consensus, the definition was left open ended and up to the judiciary to decide.

3.1 The Minority View

Justice A. N. Ray, Justice M. H. Beg, Justice K. K. Mathew, Justice S. N. Dwivedi, Chandrachud J., and Phalekar J. gave the minority judgment and felt that Golaknath was wrongly decided. They upheld the validity of all the three amendments challenged before the court. Ray, J. held that all parts of the Constitution were essential, and no differentiation can be made between essential and non-essential parts. They all agreed that the Parliament can make fundamental amendments in the Constitution by exercising the power under Article 368. It is unfortunate that despite such a slender verdict of 7:6, the minority judgment was rarely discussed in public domain. The judicial application of mind of these learned judges never captured public notice. We all been busy is eulogising the majority judgment. Not to undermine the learned judges of the

[45] Hon'ble Mr. Justice P. Jaganmohan Reddy served as a judge in the Supreme Court of India from 01/08/1969 to 22/01/1975.

majority we feel that the minority never became a part of public discourse in times to come.

4. Recognition of the Basic Structure Doctrine

4.1 Recognition of the Basic Structure Doctrine in US

The Doctrine of Basic Structure is not explicitly recognized in the US Constitution. Unlike the Indian Constitution, the US Constitution does not contain any provision that outlines the basic features or structure of the Constitution that cannot be amended by the Congress or the states. However, the US Constitution has some provisions that serve a similar function as the doctrine of basic structure in India. For example, the Bill of Rights, which consists of the first ten amendments to the US Constitution, sets forth certain fundamental rights and protections for individuals, such as freedom of speech, religion, and the press, as well as the right to bear arms and the right to a fair trial. Another important feature of the American amendment process is that it requires a heightened level of participation of the people (State Constitutional Conventions, State Legislature and the Congress). If any amendment is passed, it must have passed through severe public and political scrutiny. Moreover, the US Constitution has a system of checks and balances and separation of powers that ensures that no single branch of government can become too powerful. The US Supreme Court is also empowered to interpret the Constitution and strike down any law that is found to be unconstitutional. While the doctrine of basic structure is not officially recognized in the US Constitution, the principles of the Constitution, including individual rights, checks and balances, and separation of powers, serve a similar function in preserving the integrity and stability of the American democracy.

There are no specific cases in the United States that directly establish the Doctrine of Basic Structure as it exists in India. However, there are several landmark cases that have established the principles of judicial review and constitutional

interpretation in the United States that are relevant to this concept. One of the most well-known cases is *Marbury v. Madison*[46] which established the principle of judicial review in the US. In this case, the Supreme Court declared that it had the power to declare acts of Congress unconstitutional if they violated the Constitution. Another important case is *McCulloch v. Maryland*[47], which established the supremacy of the US Constitution over state laws. In this case, the Supreme Court held that Congress had the power to establish a national bank, and that Maryland could not impose taxes on it because it would interfere with the federal government's power. In addition, several other cases have established specific protections for individual rights and liberties, such as *Brown v. Board of Education*[48], which declared segregation in public schools unconstitutional, and *Roe v. Wade*[49], which established a woman's right to choose abortion as protected by the Constitution.

While these cases do not establish the doctrine of basic structure as it exists in India, they demonstrate the importance of constitutional interpretation and judicial review in preserving the integrity and stability of the US Constitution. The Indian doctrine of basic structure has drawn the attention of American constitutional scholars like H. L. Tribe[50] and Akhil Reed Amar[51]. Tribe agrees that amendments may not alter fundamental values of the Constitution to such an extent that may be equivalent to regime change or revolution or create inconsistency within the regime. Amar also recognizes a seemingly paradoxical exception to amenability and claims that the 'inner logic' of the Constitution calls for the entrenchment

[46] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
[47] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
[48] Brown v. Board of Education, 347 U.S. 483 (1954)
[49] Roe v. Wade, 410 U.S. 113 (1973).
[50] Tribe, L. H. (1983). "A Constitution We Are Amending: In Defense of Judicial Role. Harvard Law Review, 97, 433, 441.
[51] Amar, A. R. (1988). "Philadelphia Revisited: Amending the Constitution Outside. University of Chicago Law Review, 55, 1043, 1072.

of certain (first amendment, for example) values. "Entrenchment of constitutional norms through the eternity clause (explicit limits on amendment power) or basic structure doctrines (implicit limits on amendment power) or transnational norms (Supra-Constitutional limits on amendment power) are therefore not devoid of reasoning." [52]

4.2 Recognition of the Basic Structure Doctrine in UK

The doctrine of basic structure is typically based on the principle of judicial review, which is the power of a court to review the actions of the executive and legislative branches of government and to strike down laws or actions that are deemed to be unconstitutional.

Parliamentary supremacy provides the foundation for judicial review in the UK. The courts have no authority to set aside any legislation as unconstitutional. They ensure those exercising public authority must act within the limits of their respective powers. It is viewed that the authority of the court in judicial review is to ensure that public authorities act in accordance with Parliament's intent as established in Statute. The courts' jurisdiction is supervisory; they focus on the legality of the decision made by the public authority rather than the merits of the decision.

In countries where the doctrine of basic structure is recognized, it typically gives the courts the power to declare certain provisions of a Constitution as being unamendable or sacrosanct. This means that even the legislative branch of government cannot amend or repeal these provisions without violating the Constitution.

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[52] Roznai, Y. (2017). "Unconstitutional Constitutional Amendments: The Limits of Amendment Powers (1st ed.). Oxford University Press, pp. 124-126.

Unlike some other countries that have adopted the doctrine, UK has a flexible, unwritten Constitution that can be amended by an Act of Parliament without any limitations or restrictions[53]. There are no provisions that are so fundamental to UK's Constitution that they cannot be amended or abrogated by Parliament.

In UK, Parliamentary supremacy is a key constitutional principle that holds that Parliament is the supreme law-making body, and that no other institution or authority can override or interfere with its decisions. However, the concept of constitutional principles is still relevant in UK's context. These principles are based on common law and convention, rather than being enshrined in a written Constitution. They are often seen as fundamental to the functioning of UK's democratic system, and they are used by courts to interpret and apply the law.

Examples of constitutional principles in UK include the rule of law, the separation of powers between the executive, legislature, and judiciary, and the principle of Parliamentary sovereignty, which holds that Parliament has ultimate authority over the country's laws. These principles are not codified in a single document or statute, but they are widely accepted as being central to UK's constitutional framework.

While the doctrine of basic structure is not part of UK's Constitutional framework, the *Miller II* case[54] demonstrated that there are certain principles that are seen as fundamental to UK's Constitution, and that courts may interpret and apply these principles in their decisions. The *Miller II* case was a landmark legal case in UK that centred on the country's withdrawal from

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[53] The Constitution Society, "The UK Constitution", available at https://consoc.org.uk/the-Constitution-explained/the-uk-Constitution/ (last visited on June 10, 2023)

[54] R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland ([2019] UKSC 41)

the European Union (EU). The case was heard by the Supreme Court of UK in September 2019 and resulted in a unanimous decision that had significant implications for the Brexit process.

The Miller II case arose from the UK government's decision to invoke Article 50 of the Treaty on EU, which triggered the process for the country's withdrawal from the EU.[55] The government subsequently passed the European Union (Withdrawal) Act 2018, which was designed to give effect to the withdrawal agreement. However, a group of MPs and campaigners argued that the Act was incompatible with the principle of Parliamentary sovereignty, which is a key feature of UK's unwritten Constitution. They argued that the Act would allow the government to make changes to UK's law without sufficient Parliamentary scrutiny, which would undermine the sovereignty of Parliament.

The case was heard in the English and Scottish courts, with conflicting rulings being issued by different judges. The Supreme Court ultimately agreed to hear an appeal[56] against the Scottish court's decision, and the case was heard in September 2019. In its unanimous decision, the Supreme Court held that, "the government's decision to prorogue, or suspend, Parliament for five weeks in the run-up to the Brexit deadline was unlawful. The court held that the prorogation had the effect of frustrating or preventing the ability of Parliament to carry out

[55] R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) REFERENCE by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review REFERENCE by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review, Hilary Term [2017] UKSC 5 available at https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf (last visited on June 10, 2023).

[56] R (on the application of Miller) (Appellant) v. The Prime Minister (Respondent), Cherry and others (Respondents) v. Advocate General for Scotland (Appellant) (Scotland),[2019] UKSC 41 available at https://www.supremecourt.uk/cases/docs/uksc-2019-0192-judgment.pdf (last visited on June 10, 2023).

its constitutional functions without reasonable justification. Additionally, the court held that the European Union (Withdrawal) Act 2018 was incompatible with the principle of Parliamentary sovereignty. The court held that the Act effectively allowed the government to make changes to UK's laws without sufficient Parliamentary scrutiny, which violated the principle of Parliamentary sovereignty. This part of the decision was based on the principle that the UK's Constitution is founded upon the principle of Parliamentary sovereignty, which means that Parliament has ultimate authority to make and unmake laws.

The Miller II case was significant in its implications for the Brexit process, as it highlighted the importance of Parliamentary scrutiny and oversight in a constitutional democracy. The case also highlighted the key role of the UK's unwritten Constitution in shaping the country's legal and political landscape. The Miller II case did not directly address the doctrine of the basic structure of UK's Constitution. Rather, it focused on the issue of whether the government's decision to prorogue Parliament was lawful. The case did not undermine Parliamentary supremacy, but rather reinforced it by emphasizing the importance of Parliament's Constitutional functions and its ability to hold the government to account.

4.3 India, USA and UK: Comparative Viewpoint

The doctrine of basic structure is a legal concept that has only been recognized in India, and not in UK or USA. Therefore, a comparative analysis of this doctrine between these three countries would need to take into account these differences in legal systems and constitutional principles. In India, the doctrine of basic structure is a constitutional principle that holds that certain fundamental features of the Constitution cannot be altered or destroyed through constitutional amendment. These fundamental features include the democratic form of government, the separation of powers, the rule of law, and the basic rights and freedoms guaranteed to

citizens. This doctrine has been used by the Indian Supreme Court to strike down constitutional amendments that are deemed to be in violation of these fundamental features. In contrast, in UK, the concept of Parliamentary sovereignty holds that Parliament is supreme and can make or unmake any law it chooses. However, UK does not have a formal written Constitution, and therefore, the idea of a basic structure of the Constitution is not as explicit as in India. Instead, UK relies on a series of constitutional conventions and laws, such as the Human Rights Act to protect fundamental rights and principles. In USA, the concept of the basic structure of the Constitution has not been formally recognized by the Supreme Court. However, US Constitution includes a system of checks and balances, separation of powers, and fundamental rights that are protected by the judiciary. The US Constitution also includes an amendment process that allows for changes to be made to the Constitution, but with certain limitations, such as the need for a supermajority of states to approve the amendment.

To make a comprehensive analysis of the doctrine of basic structure in UK, USA, and India, it may be helpful to establish certain parameters or criteria for comparison. These parameters could include the legal frameworks and constitutional principles that protect fundamental rights and principles, the role of the judiciary in interpreting and enforcing these protections, and the constitutional amendment process and any limitations or constraints placed upon it. By establishing these parameters, a comparative analysis can provide a more detailed and nuanced understanding of how the doctrine of basic structure operates in each country and how it relates to broader principles of constitutional governance.

4.4 Supremacy of the Constitution

The principle of supremacy of the Constitution is a fundamental principle of constitutional governance that is recognized in many countries around the world. In UK, the principle of Parliamentary sovereignty means that Parliament is the

supreme lawmaking authority and can make or unmake any law it chooses. However, since the enactment of the Human Rights Act in 1998, UK has also recognized the principle of constitutional supremacy, which holds that the courts have the power to interpret and apply the Constitution, and that law made by Parliament must be consistent with the Constitution. In USA, the principle of constitutional supremacy is enshrined in the Supremacy Clause of the US Constitution, which states that the Constitution and federal laws made pursuant to it are the supreme law of the land. This means that federal laws cannot contradict the Constitution, and state laws cannot contradict federal laws. In India, the principle of constitutional supremacy is also recognized, and the Constitution is the supreme law of the land. However, the Indian Constitution also recognizes the principle of Parliamentary sovereignty, which means that the Indian Parliament has the power to make and amend the Constitution. This tension between constitutional supremacy and Parliamentary sovereignty has led to the development of the doctrine of basic structure.

4.5 Separation of Powers

The separation of powers is a fundamental principle in modern democratic systems that requires the division of government into different branches with distinct functions and powers In US the Constitution divides the federal government into three branches: the legislative, executive, and judicial. The legislative branch is responsible for making laws, the executive branch is responsible for enforcing laws, and the judicial branch is responsible for interpreting laws. The system of checks and balances ensures that no single branch becomes too powerful. Additionally, the states have their own legislative, executive, and judicial branches. In India, the Constitution also provides for a separation of powers, with the government divided into the legislative, executive, and judicial branches. However, there is a certain degree of overlap between the branches, and the executive branch has significant control over the legislative

branch. The President is the head of state, while the Prime Minister is the head of government. In UK, the separation of powers is not as distinct as in US and India. The government is divided into three branches: the legislative, the executive, and the judiciary. However, the executive branch is drawn from the legislative branch, and the Prime Minister is both the head of government and a Member of Parliament. The judiciary is independent but does not have the power to strike down laws as unconstitutional. While UK does have a division of government into three branches – legislative, executive, and judicial – there is a significant overlap between these branches, particularly between the legislative and executive branches.

4.6 Rule of Law

The rule of law is a fundamental principle that underpins democratic societies and guarantees equality before the law. In US, the rule of law is enshrined in the Constitution and the Bill of Rights, which establish the basic framework for the legal system. The legal system is based on common law, which is developed through judicial decisions, and statutory law, which is created by the legislature. The judiciary has significant independence and is responsible for interpreting and enforcing the law. In India, the Constitution establishes the rule of law as a fundamental principle and guarantees the protection of individual rights. The legal system is based on a combination of common law and civil law, and the judiciary is independent and has the power to strike down laws that are deemed unconstitutional. In UK, the rule of law is also a fundamental principle, but it is based on a combination of common law, statute law, and human rights laws. The judiciary is independent and responsible for interpreting and enforcing the law, but there is no written Constitution that establishes the basic framework for the legal system.

4.7 Judicial Review

Judicial review is a legal process that allows a court or judiciary to review the decisions and actions of the executive and legislative branches of government. In UK, judicial review is a process by which the High Court and the Court of Appeal can review the lawfulness of decisions made by public bodies, including government ministers, local authorities, and other bodies exercising public functions. The UK system of judicial review is based on the principle of ultra vires, which means that a decision or action can be challenged if it is beyond the legal authority of the decision-maker. But the judicial review is not as much conclusive and strong because by this Supreme Court cannot declare any Parliamentary laws or amendment unconstitutional. In US, judicial review is a power held by the federal courts, which allows them to review the constitutionality of laws and actions by the government. The principle of judicial review in the US was established in the landmark case *Marbury v. Madison* in 1803, in which the Supreme Court declared that the Constitution gave it the power to strike down unconstitutional laws. In India, judicial review is also an essential part of the legal system. The Constitution provides for judicial review of legislative and executive actions by the judiciary, including the Supreme Court and High Courts. The power of judicial review in India is not explicitly mentioned in the Constitution but has been derived from various provisions, including the fundamental rights guaranteed to citizens.

4.8 Limited power of the Parliament to amend the Constitution

The power of the Parliament or legislature to amend the Constitution varies in UK, US and India. In UK, Parliament is sovereign, and there is no written Constitution. As a result, there is no formal limitation on Parliament's power to amend laws, including constitutional laws. However, there are certain constitutional conventions and traditions that limit the power of Parliament, such as the convention that the House of Lords will

not block legislation that implements the government's manifesto commitments. In US, the Constitution can only be amended through a strict process laid out in Article V of it. This process requires that an amendment be proposed by a two-thirds vote of both houses of Congress or by a convention called for by two-thirds of the state legislatures, and then ratified by three-fourths of the state legislatures or by conventions in three-fourths of the states. In India, the Constitution can be amended by a special majority of both houses of Parliament. This means that a constitutional amendment must be passed by a two-thirds majority of the members present and voting in each house, as well as majority of the total membership of each house. Additionally, some provisions of the Constitution, such as those related to the federal structure of the country, require the approval of at least half of the State Legislatures.

By discussing on several basic structure doctrines, in the above-mentioned parameters, we can conclude that India has a great and glorious reputation on the establishment and explicitly recognition of the doctrine of basic structure. In US, this doctrine is not explicitly established and recognized but, have been applied in several case law as this Constitution having the exclusive separation of power and the scope of judicial review. On the other hand, being an unwritten and flexible Constitution, UK Constitution does not recognize the concept. Although in the *Millar II* case, we have seen a glimpse of the basic structure doctrine in an orthodox nature, as rather than establishing constitutional supremacy, the Parliamentary supremacy upheld by the application of this doctrine in the case.

5. Conclusion, Recommendations and Way Forward

5.1 Conclusion

A Comparative analysis suggests that the doctrine of basic structure is a legal concept that has only been recognized in India, and not in UK or USA. Therefore, a comparative analysis

of this doctrine between these three countries would need us to consider these differences in legal systems and constitutional principles. In India, the doctrine of basic structure is a constitutional principle that holds that certain fundamental features of the Constitution cannot be altered or destroyed through constitutional amendment. These fundamental features include the democratic form of government, the separation of powers, the rule of law, and the basic rights and freedoms guaranteed to citizens. In contrast, in UK, the concept of Parliamentary sovereignty holds that Parliament is supreme and can make or unmake any law it chooses. However, UK does not have a formal written Constitution, and therefore, the idea of a basic structure of the Constitution is not as explicit as in India. Instead, UK relies on a series of constitutional conventions and laws, such as the Human Rights Act, to protect fundamental rights and principles. In the USA, the concept of the basic structure of the Constitution has not been formally recognized by the Supreme Court. However, the US Constitution includes a system of checks and balances, separation of powers, and fundamental rights that are protected by the judiciary. The US Constitution also includes an amendment process that allows for changes to be made to the Constitution, but with certain limitations, such as the need for a supermajority of states to approve the amendment.

Overall, while the doctrine of basic structure has been developed and applied in different ways in India, US, and UK, it reflects a common understanding that certain fundamental principles of the Constitution are essential to the functioning of a democratic society and cannot be altered or abrogated by legislative or executive action.

If one examines the individual opinions of the learned judges in *Kesavananda* case, do we conclude that the Parliament, in the exercise of its constituent power have the right to amend Fundamental Rights? 10 out of the 13 judges have held that Parliament isn't barred from amending fundamental rights. It

means that the majority agreed that fundamental rights can be amended and there is no implied restriction in doing so. The alternate question to be asked is could it be said that the majority has upheld the Basic Structure doctrine? 7 out of the 13 judges have used the expression "basic structure", which they've mainly differed in their individual understanding of what must constitute this basic structure. In the absence of a common consensus on the same, it cannot be held to be a majority judgment.

It is now important to move on to answer further pivotal questions. If the majority opinion coined the expression "basic structure", was it a correct judgment? The next question is whether the judgment serves its purpose which it intended? The Constituent Assembly Debates give the answers. The Assembly made no distinction between essential and non-essential features of the Constitution. No special status was given to some provisions of the Constitution vis a vis other. We see that most of provisions of our Constitution are amended by a simple majority of the total membership of each House and a two-thirds majority of the members present and voting, while other provisions will need the above mentioned majority and a ratification by one-half of the total number of states. There was no intention expressed to make any part of the Constitution unamendable. This topic was never even debated. The 1st amendment made important changes to fundamental rights was passed with no one questioning the power to amend. This is testimony to the fact that there was no intention to make Part III unamendable.

The Constituent Assembly debates never mentioned the term "Basic Structure". Then where from this term came? It was the Chief Justice of Pakistan Alvin Cornelius who first used the term "basic structure" in *Fazulal Quader Chawdry v. Mohd. Abdul*

Haque[57]. It is an irony that the country which coned this term could not save the fundamental rights of the people of its country of origin. Hence serious questions need to be asked about it.

The judiciary keeps adding new items to the list of "basic structure", thus giving them the immunity enjoyed by the basic structure. The doctrine has been finetuned periodically to accommodate judicial ideology and morality. The judiciary relied on the basic structure to strike down the 99th Constitutional Amendment Act that sought to set up a National Judicial Appointment Commission. The doctrine has placed the judiciary in a position of unlimited power, one that it wanted to prevent the Parliament from occupying. Seervai made an argument in Kesavananda Bharati that the amending power given to Parliament must be coextensive with the power of judicial review given to judiciary, else the judiciary would become supreme. This argument was repelled, stating that judicial review will ensure the supremacy of the Constitution and not the judiciary, but the same could not be concluded about the amending power of Parliament. This is disrespect for electoral democracy. The wisdom of the Constituent Assembly is replaced by the wisdom of the Court. The Constitution makers drafted the world's longest Constitution and still forgot to incorporate a doctrine as important as the Basic Structure is hard to digest. Maybe it is time for the erudite judges of the Supreme Court of India to have a relook at this and return back to the earlier times.

5.2 Recommendations

Based on the analysis of the doctrine of basic structure in the Constitutions of the UK, USA, and India, we find that, the doctrine of basic structure has been used to prevent the government from making certain changes to the Constitution that could undermine its basic structure. However, there have

[57] 1963 PLD 486(SC).

been concerns about the potential misuse of this doctrine to obstruct legitimate constitutional amendments. To address these concerns, the Indian Supreme Court could provide clearer guidance on the scope and application of the doctrine of basic structure. An alternative to this could be to clearly document what comprises of the Basic structure and what it doesn't comprise of. Leaving it to discretion of judiciary would amount to acceding judicial supremacy to the prejudice of other organs of the State, thereby negating the checks and balances theory.

Here we may learn from UK where although the doctrine of basic structure may not have a formal role, there are still certain constitutional principles and values that are fundamental and unamendable. It may be useful to consider codifying these principles and values in the written Constitution itself to provide greater clarity and certainty. All in all, it is important for countries to have a clear understanding of their constitutional principles and values and to ensure that these are adequately protected from encroachment by the government or other actors. Similarly, judiciary also must not engage in unnecessary activism and overreach to defeat the intent legislature or the executive, The doctrine of basic structure can be a useful tool in this regard, but it is important to ensure that it is applied in a judicious and principled manner to avoid potential abuses.

5.3 Way Forward

As Justice K. K. Mathew in his minority judgment in *Kesavananda* quoted Wilson who said "a living Constitution must be Darwinian in structure and practice" and that "a Constitution is an experiment as all life is an experiment". In words of Dr. Ambedkar, "every generation has a right to change the Constitution to suit its needs and aspirations". After 50 years of this landmark judgment, is it still relevant or has it lost its relevance. If constitutional amendment and Acts are to be tested at the anvil of basic structure, the we are really asking ourselves if the will or judiciary superior to the will of people and

what right the judiciary would have to impose its own ideology and moral standards on the people.

What we really need is a consensus amongst the three organs of the State about what comprises the basic structure and what it does not, or we simply abrogate it. Is the system of Parliamentary supremacy practiced in UK the answer to Indian democratic tradition or is it the check and balances theory which is more appropriate. These are questions which need deep analysis and further research in future.

CHAPTER 30

DOCTRINE OF BASIC STRUCTURE: IS IT A SHIELD FOR DEMOCRACY OR A 'JUDICIAL COUP' TOWARDS LEGISLATURE AND EXECUTIVE?

Ms. Parthvi Ahuja*
Ms. Prapti Singh**

1. Introduction

The term basic structure has not been used anywhere in the Constitution of India. It was used for the first time in the *Golaknath case*[1] by Advocate M. K. Nambiar and other counsels, who were arguing for the petitioner.[2] The doctrine that 'basic structure' of the Constitution cannot be amended was propounded 50 years back on 24th April, 1973 by a 13 Judges Bench of the Supreme Court in the case of *Kesavananda Bharati v. State of Kerala*[3] The judgment was delivered with a marginal majority of 7:6.

It is interesting to note that in 1965, Dietrich Conrad, a constitutional expert from Germany gave a speech at the Banaras Hindu University, Varanasi, in which he stated that on first principles "*any amending body organised within a statutory scheme, howsoever unlimited its power, cannot by its very structure, change the fundamental pillars supporting its constitutional authority*".[4] Thereafter, in 1967, as aforesaid, the

* Advocate, Supreme Court of India.
** Advocate, Supreme Court of India.
[1] 1967 AIR 1643, 1967 SCR (2) 762.
[2] See Venkatesh Nayak, "The Basic Structure of the Indian Constitution", available at https://Constitutionnet.org/vl/item/basic-structure-indian-Constitution, accessed on 27 August 2023.
[3] AIR 1973 SC 1461: (1973) 4 SCC 225.
[4] See Fali S. Nariman, "Basic Structure, So Far", available at https://indianexpress.com/article/opinion/columns/fali-s-nariman-writes-why-we-need-basic-structure-8915239/, accessed on 31 August 2023.

term basic structure was used by the counsels in the *Golaknath case*. Finally, in 1973, it was propounded by the Supreme Court as a doctrine in the *Kesavananda Bharati case.*

A plain reading of Article 368 of the Constitution does not suggest any restriction on the power of Parliament to amend the Constitution. However, after *Kesavananda*, a proposition was established in crystal clear terms that the power of Parliament to amend the Constitution was not absolute and unfettered; and the same was confined to the extent that the basic structure was not touched by way of amendment. The ultimate power lies with the Supreme Court to interpret and decide whether any constitutional amendment or the law made by the Parliament had the effect of amending basic structure of the Constitution or not. The doctrine of basic structure was used widely in the past 50 years, without laying down its exact meaning. This led to so much criticism. The critics of the doctrine that basic structure of the Constitution cannot be amended, are of the opinion that *Kesavananda Bharati* was decided by a thin majority of 7:6 and was never debated thereafter. It was, since then, being followed as a settled principle of law.[5]

Also, in *L. Chandra Kumar* v. *Union of India and Others*,[6] the Supreme Court while referring to *Kesavananda Bharati* stated:

> *"The identification of the features which constitute the basic structure of our Constitution has been the subject-matter of great debate in Indian constitutional Law. The difficulty is compounded by the fact that even the*

[5] The doctrine of basic structure was referred in many cases such as *Indira Nehru Gandhi* v. *Raj Narain*, AIR 1975 SC 2299; 1976 (2) SCR 347; 1975 Suppl. SCC 1; *Minerva Mills Ltd. & Ors* v. *Union of India & Ors.,* AIR 1980 SC 1789; 1981 SCR (1) 206; *Fertilizer Corporation Kamgar* v. *Union of India and Others*, AIR1981 SC 344; 1981 SCR (2) 52; *L. Chandra Kumar* v. *Union of India and Others*, 1997 (2) SCR 1186; *I.R. Coelho (Dead) by Lrs* v. *State of Tamil Nadu & Ors.*, AIR 2007 SC 861 and many more cases.

[6] 1997 (2) SCR 1186.

> *judgments for the majority in Kesavananda Bharati] are not unanimously agreed on this aspect".*[7]

In absence of clarity in the meaning of basic structure; and its continuous use by judiciary, the critics had gone to the extent of calling the doctrine of basic structure as "judicial coup"[8] and "constitutional coup"[9].

2. Meaning of 'Basic Structure'

What is the basic structure of the Constitution? Interestingly, there was no unanimity between the judges, and many of them expressed their individual opinions on what is included in the basic structure. For example, Justice S. M. Sikri, the then Chief Justice of India explained basic structure in an inclusive manner. According to him, "supremacy of the Constitution"; "republican and democratic form of government"; "secular character of the Constitution"; "separation of powers between the legislature, executive and the judiciary"; and the "federal character of the Constitution" were included in basic structure of the Constitution. Other judges added "the mandate to build a welfare state contained in Part IV of the Constitution", i.e. Directive Principles of State Policy; and the "unity and integrity of the nation". Some other judges identified the features of Constitution such as "sovereignty of India"; "democratic character of the polity"; "unity of the country"; "essential features of the individual freedoms secured to the citizens"; and "mandate to build a welfare state", as constituting basic structure of the Constitution. "Sovereign democratic republic";

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[7] *Id.*, para 62.
[8] Nitin Meshram and Dilip Mandal, "Basic structure' doctrine a judicial coup against Parliament. Gogoi is right in debating it", 11 August, 2023, available at https://theprint.in/the-fineprint/basic-structure-doctrine-a-judicial-coup-against-Parliament-gogoi-is-right-in-debating-it/1710027/, accessed on 31 August 2023.
[9] R Jagannathan, "Time's come to draw new lines", August 22, 2023, available at https://timesofindia.indiatimes.com/blogs/toi-edit-page/times-come-to-draw-new-lines/, accessed on 27 August 2023.

"Parliamentary democracy" and "three organs of the State" were also stated by some as basic structure.

In Indira Nehru Gandhi v. Raj Narain,[10] the Supreme Court stated that "to be a basic structure, it must be a terrestrial concept having its habitat within the four corners of the Constitution". Further, Justice Y. V. Chandrachud stated that in his view that the unamendable features of the Constitution being part of the basic structure are (i) India as a "Sovereign Democratic Republic"; (ii) "Equality of status and opportunity"; (iii) No religion of State and the entitlement of all persons "to freedom of conscience and the right freely to profess, practise and propagate religion"; and (iv) the "Government of laws, not of men". Justice Chandrachud called these features as pillars of constitutional philosophy, as well as that of basic structure.[11] He further stated that "the theory of basic structure has to be considered in each individual case, not in the abstract, but in the context of the concrete problem".[12] The views expressed by Justice Chandrachud give lot of freedom to the judges to decide what constitutes basic structure, as it is to be considered in each individual case and not in the abstract terms.

Later in Fertilizer Corporation Kamgar v. Union of India[13], Justice Y.V. Chandrachud called jurisdiction of the Supreme Court under Article 32 as an "important and integral part of the basic structure of the Constitution."

In *Minerva Mills Ltd. v. Union of India*, discussing the standard to be applied to what qualifies as the basic structure, the Apex Court held:

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[10] AIR 1975 SC 2299; 1976 (2) SCR 347; 1975 Suppl. SCC 1; Civil Appeals Nos. 887 and 909 of 1975 (Date of decision 7-11-1975), available at https://ceodelhi.gov.in/WriteReadData/Landmark%20Judgments/LandmarkJudgementsVOLI.pdf., accessed on 27 August 2023.
[11] *Id.*, para 665.
[12] *Id.*, para 668.
[13] AIR1981 SC 344; 1981 SCR (2) 52.

> *"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… . Therefore, in every case where the question arises as to whether a particular feature of the Constitution is a part of its basic structure, it would have to be determined on consideration of various factors such as the place of the particular feature in the scheme of the Constitution, its object and purpose and the consequence of its denial on the integrity of the Constitution as a fundamental instrument of country's governance."*[14]

The Court further held that the fundamental rights occupy a unique place in the lives of civilised societies and have been variously described in our judgments as 'transcendental', 'inalienable' and 'primordial'.[15]

Chief Justice D. Y. Chandrachud said:

> *"the basic structure or the philosophy of our Constitution is premised on the supremacy of the Constitution, rule of law, separation of powers, judicial review, secularism, federalism, freedom and the dignity of the individual and the unity and integrity of the nation."*[16]

3. Growing Debate on Basic Structure

Since the Kesavananda *Bharati* case, the doctrine of basic structure has been invoked in so many cases to the extent that it "has lost all its meaning".[17] Basic structure has mainly been

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[14] AIR 1980 SC 1789.
[15] *Id.*
[16] "Defending Basic Structure Doctrine, CJI Says It Gives Direction in Convoluted Times", available at https://thewire.in/law/cji-chandrachud-basic-structure-north-star, accessed on 27 August 2023.
[17] R Jagannathan, "Time's come to draw new lines", August 22, 2023, available at https://timesofindia.indiatimes.com/blogs/toi-edit-page/times-come-to-draw-new-lines/, accessed on 27 August 2023.

defined in the inclusive manner or rather it cannot be defined exhaustively. Most of the judges defined or illustrated the doctrine of basic structure in their own ways. The matter of concern is that it is not sure to what extent the judiciary may stretch the meaning of 'basic structure' in the times to come? R. Jagannathan raises a question in this regard. He states that "Parliamentary democracy is our adopted form of government. But if this is defined as part of the basic structure, will it prevent a future polity from adopting the presidential form of government?" Looking at the present trend, the answer may be pondered upon.

While participating in the debate on the "Government of National Capital Territory of Delhi (Amendment) Bill, 2023", the former Chief Justice of India, Justice Ranjan Gogoi (now Rajya Sabha Member) expressed his views in Rajya Sabha on the doctrine of basic structure and stated:

> *"There is a book by (Tehmtan) Andhyarujina, the former Solicitor General of India on the Kesavananda Bharati (1973) case. Having read the book… my view is that the doctrine of the basic structure of the Constitution has a debatable, a very debatable jurisprudential basis."*

Some people argue that Justice Gogoi made this statement in the light of the aforesaid book; nevertheless, the views expressed by Justice Gogoi have to be attributed to him.[18] In response to Justice Gogoi's remarks on 'basic structure', Justice D.Y. Chandrachud, Chief Justice of India said that the statements of former judges are "just opinions and are not binding". Defending

[18] See "Express View: MP Gogoi v Justice Gogoi", available at https://indianexpress.com/article/opinion/editorials/delhi-services-bill-ranjan-gogoi-Parliament-debates-delhi-Constitutional-issues-8882910/, accessed on 31 August 2023; see also Snehashish Roy, "'Just opinions': Chief Justice on Ranjan Gogoi's Constitution's Basic Structure Remark", August 09, 2023, available at https://www.hindustantimes.com/india-news/-just-opinions-chief-justice-on-ranjan-gogois-remark-on-Constitutions-basic-structure-101691547062381.html, accessed on 27 August 2023.

the doctrine of Basic Structure, Justice Chandrachud went on to call it a "North Star". Justice Chandrachud stated:

> *"The basic structure of our Constitution, like a North Star, guides and gives a certain direction to the interpreters and implementers of the Constitution when the path ahead is convoluted".*[19]

It is quite interesting to note that two Chief Justices of India (one former and one sitting) expressed contradictory views on the much talked about doctrine of basic structure. It is noteworthy that while in Supreme Court as a Judge or the Chief Justice of India, Justice Gogoi never raised finger on the doctrine of basic structure, rather he supported the doctrine in at least three crucial cases. Further, in the "Third Ramnath Goenka Memorial Lecture" which he delivered as CJI designate on July 12, 2018, he referred the Supreme Court's development of the doctrine of basic structure as an example of "very sound jurisprudence which we continue to reap from."[20] Justice Gogoi, therefore, was not consistent in his views. His views changed when he became a Parliamentarian from a Judge. It, therefore, becomes imperative for the judiciary to come out with what exactly does it mean?

Earlier, the Vice President of India Sh. Jagdeep Dhankar also stated that *"the basis of any basic structure has to be the supremacy of Parliament in law making... which means supremacy of people".*[21] Earlier also, Sh. Dhankar, while

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[19] Srishti Ojha, "Basic Structure of Constitution Guides like North Star: CJI DY Chandrachud", 22 January 2023, available at https://www.indiatoday.in/law/story/cji-dy-chandrachud-says-basic-structure-of-Constitution-guides-judges-like-north-star-2324861-2023-01-22, accessed on 27 August 2023.

[20] See "Express View: MP Gogoi v Justice Gogoi", available at https://indianexpress.com/article/opinion/editorials/delhi-services-bill-ranjan-gogoi-Parliament-debates-delhi-Constitutional-issues-8882910/, accessed on 31 August 2023.

[21] See Speech of Vice President at the 2nd Dr. Rajendra Prasad Memorial Lecture at IIPA posted on 29 March 2023 at https://pib.gov.in/PressReleasePage.aspx?PRID=1911965, accessed on 20 August 2023.

inaugurating the 83rd Conference of All India Presiding Officers' in Jaipur on 11 January 2023, made similar comments.[22] He also stated that it is required that all the three constitutional institutions, viz. Legislature, Executive and Judiciary should remain *confined "to their respective domains and conform to the highest standard of propriety and decorum"*. Considering the Parliament to be supreme with respect to amending power, he further stated its amending power as well as the power to *"deal with legislation is not subject to any other authority"*. He called it the *"life line of democracy"*.

Sh. Dhankar also stated that since *Kesavananda Bharati* judgment, the Supreme Court invoked the doctrine of basic structure in several cases and in the process of doing so, it compromised "Parliamentary sovereignty". He made a specific reference to the National Judicial Appointments Commission (NJAC) Act, 2014 and 99th Constitution Amendment Act, 2014, which were held unconstitutional by the Supreme Court on the premise that they were in violation of the basic structure of the Constitution.

He further stated that enactment of NJAC was historical in the sense that there was complete unanimity in the Lok Sabha, without any dissenting voice. Regarding 99th Constitutional Amendment, he stated that Lok Sabha voted in unison in favour of the Amendment, and there was unanimity in Rajya Sabha with only one abstention. The Legislatures of 16 States also ratified it, and it got Presidential assent. However, it was undone by the Supreme Court. Criticising the judiciary, he said that judicial verdict could not run it down. He called this to be "*unparalleled in the democratic history of the world*". He was of the opinion that "*Parliamentary sovereignty and autonomy*"

[22] Full text of the Speech of Vice President is available on https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1890297#:~:text=Emphasizing%20the%20need%20for%20harmonious,the%20aspirations%20of%20the%20people, accessed on 20 August 2023.

could not be permitted to be qualified or compromised as "*the primacy and sovereignty of Parliament and legislature is inviolable*". The judiciary or Executive could not be permitted to dilute or compromise "Parliamentary sovereignty", as Parliament and Legislatures are under an obligation to protect sovereignty of the people.[23]

A pertinent question arises here is that if basic structure of the Constitution cannot be amended, can we replace the entire Constitution with a new one. Legally speaking, it will not amount to amendment of the Constitution? But, will it stand the scrutiny of the Court, is difficult to predict. Bibek Debroy, Chairman of the Economic Advisory Council to the Prime Minister (EAC-PM), suggested for a new Constitution.

> *"We no longer possess the one we inherited in 1950. It has been amended, not always for the better, though since 1973 we have been told its 'basic structure' cannot be altered, irrespective of what democracy desires through Parliament; whether there is a violation will be interpreted by courts. To the extent I understand it, the 1973 judgment applies to amendments to the existing Constitution, not a fresh one. … This is 2023, 73 years after 1950. Our current Constitution is largely based on the Government of India Act of 1935. In that sense, it is also a colonial legacy".*[24]

He referred to a "cross-country study of written Constitutions" conducted by the University of Chicago Law School, which found the average life-span of the Constitutions to be just seventeen years. It is not clear on what parameters, and in

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[23] See Speech of Vice President at the 2nd Dr. Rajendra Prasad Memorial Lecture at IIPA posted on 29 March 2023 at https://pib.gov.in/PressReleasePage.aspx?PRID=1911965, accessed on 20 August 2023.

[24] Bibek Debroy, "There's a case for 'we the people' to embrace a new Constitution", 14 August 2023, available at https://www.livemint.com/opinion/online-views/theres-a-case-for-we-the-people-to-embrace-a-new-Constitution-11692021963182.html, accessed on 27 August 2023.

which context that research was conducted. However, life span of 17 years for the written Constitution seems to be unrealistic.

Referring to the aspirational goal of India becoming a "developed country" by 2047, Debroy suggested for the adoption for a new Constitution. He wrote several reasons for doing so in his article. He posed a question as to "what Constitution does India need for 2047?" He further stated that "we should start with first principles, as in the Constituent Assembly debates".[25] Though Debroy expressed these views in his personal capacity, and not on behalf of Government or as Chairman of the Economic Advisory Council, he gave food for thought to "We the people".

4. Standpoint in Favour of Basic Structure

The basic structure doctrine puts "procedure established by law" below "due process" in the functioning of the legislative process. Its political profiling as "sacrosanct" puts it beyond the ken of politics. [26]

Subrata Mitra in his Article titled "Don't shut down the debate on the Basic Structure of the Constitution" wrote:

> *"As evident from the discussions in the Constituent Assembly, Article 21 of the Constitution prioritizes the "procedure established by law" over the American-style "due process" model, which is overseen by the Supreme Court, and where the court has the final say. Both Article 21 and Article 368 were created as a joint mechanism to ensure that the state and society remain aligned through appropriate and gradual changes to the Constitution. These articles are all-encompassing, with no areas deemed off-limits to their scope. An in-depth analysis of*

[25] *Id.*

[26] Subrata Mitra, "Don't shut down the debate on the Basic Structure of the Constitution" available athttps://indianexpress.com/article/opinion/columns/dont-shut-down-the-debate-on-the-basic-structure-of-the-Constitution-8912185/, accessed on 30 August 2023.

> *the discourse surrounding the political application of the Basic Structure Doctrine reveals that elevating it above politics benefits those who oppose specific legislative measures, as they utilize it to reinforce their interests. This underscores the need for an immediate reassessment of the entire doctrine and a return of it to the public arena for impartial examination."*

Quoting the eminent jurist Prof. Upendra Baxi as he wrote on the occasion of 50 years of Kesavananda Bharati judgment, "The basic structure doctrine is propelled by the judicial self-perception of its "vulnerability". Despite being a "formidable protector of individual liberty", the SC remains "a fragile bastion indeed" needing "protection" as "a very vulnerable" institution. This apprehension of the highest power as the very source and seat of vulnerability is crafted endlessly, from Kesavananda Bharati (1973) to Janhit Abhiyan (2023)".[27]

The expansion of judicial power in India is very much in synchronisation with the global emergence of juristocracy in the latter half of the 20th Century and beyond, even as Kesavananda is its strongest and most unique iteration. The basic structure must also be shown to be perceived by the officials as a common public standard of behaviour from an internal point of view. It is submitted that after the 42nd Constitutional Amendment Act, there has been no serious challenge to features which are held by the court to be part of the basic structure of the Constitution either by the Parliament while exercising constituent and legislative powers or by the government while exercising executive powers. Similarly, judges have also shown deference

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[27] Upendra Bakshi, "Safeguarding Constitution" available on https://indianexpress.com/article/opinion/columns/upendra-baxi-writes-on-50-years-of-kesavananda-bharati-judgment-it-prescribed-the-basic-structure-doctrine-set-limits-to-Parliamentary-sovereignty-8572132/, accessed on 30 August 2023.

to the wisdom of Parliament by not addressing the issue of merit of an amendment to the Constitution.

Furthermore, the Parliament was put on notice about the limits on its constituent powers by the Supreme Court in Golaknath[28], Kesavananda Bharati[29] and recently in the NJAC case[30]. The Supreme Court has however, showed great deference to the 101st amendment of the Constitution resulting in fundamental changes in the economic set up provided in the Constitution of India and particularly in the fiscal relationship between centre and the States.[31] It is therefore plausible to argue on the sociological plank that basic structure is an ultimate rule of recognition and has been accepted as a political practice shared by the judges and the officials together. The court observed on the strength of S.R. Bommai,

> *"the power of judicial review is a constituent power that cannot be abrogated by judicial process of interpretation. It is a cardinal principle of our Constitution that no one can claim to be the sole judge of the power given under the Constitution. It is the duty of this court to uphold the constitutional values and enforce constitutional limitations as the ultimate interpreter of the Constitution…"*[32]

Justice Gavai of Supreme Court of India recently underlined the importance of Kesavananda Bharati case when he said:

> *"it is a milestone in legal history wherein it was held that though the Parliament has power to take away the fundamental right but no power to amend the basic structure. The specific features which are laid down in the judgment as the basic structure are: supremacy of*

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[28] Golaknath v. State of Punjab, AIR 1967 SC 1643.
[29] Kesavananda Bharati Sripadagalvaru and Others v. State of Kerala and Another (1973) 4 SCC.
[30] National Judicial Appointments Commission v. Union of India (2016) 4 SCC 1.
[31] See Union of India v. Mohit Mineral Pvt Ltd AIR 2018 SC 5318.
[32] *Id.* at Para 40, M Nagraj.

> *Constitution, secular character, the republic and democratic form of the government, democracy, executive, legislature, judiciary, federal structure of the Constitution, securing the dignity of the individual while maintaining the unity and integrity of nation, duty to construct a welfare state in accordance with the mandate of the directive principles…".*[33]

He elaborated that prior to Kesavananda Bharati, the view taken by the Supreme Court in the cases were that when there is a dispute between Fundamental Rights and Directive Principles of State Policies (DPSP), it is the Fundamental Rights that will prevail over DPSP. It is for the first time in Kesavananda Bharati that we find almost all the judges have spoken for giving equal importance to DPSP and fundamental rights. It was observed that DPSP and Fundamental Rights together constitute the soul of the Constitution.[34]

Prashant Bhusan has deeply recorded in his book titled "The Case that Shook India", among many heated exchanges between the judges and Palkhivala; one of them was:

> *"Justice Murtaza Fazl Ali: Suppose the Kesavananda Bharati decision had gone against you, would you not have been entitled to come and ask for a review now. So, why should you object to the government asking for a review?*
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> *Palkhivala: Let me answer this without any flippancy, My Lord. If the Kesavananda Bharati decision had gone*

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[33] Aiman J Christie, Kesavananda Bharati Judgment Played a Pivotal Role in Developing Socio-Economic Justice, Independence of Judiciary : Justice BR Gavai, available on https://www.livelaw.in/top-stories/justice-br-gavai-lecture-50th-anniversary-kesavananda-bharati-judgment-232954 , accessed on 6 September 2023.

[34] *Id.*

against us, then there would be no Supreme Court today before which I could come for a review."[35]

There is a multifaceted view that underscores the doctrine's central role in preserving fundamental constitutional values, its acceptance among executive and the judiciary, and its continued relevance in shaping the country's legal landscape.

5. Conclusion

To conclude, it is appropriate to quote Justice Y. V. Chandrachud, who stated in Indira Nehru Gandhi v. Raj Narain,[36] that "the theory of basic structure has to be considered in each individual case, not in the abstract, but in the context of the concrete problem".[37] The only problem is that if Supreme Court goes too far to decide basic structure, it will certainly be an encroachment by judiciary on the legislature's power to amend Constitution and make laws.

It is pertinent to note that Vice President Jagdeep Dhankhar had recently criticised the Kesavananda Bharati judgment, saying it set a wrong precedent. However, Chief Justice of India Dr D. Y. Chandrachud has called the 'basic structure doctrine' a north star "which guides and gives a certain direction to the interpreters and implementers of the Constitution when the path ahead is convoluted."

Though there has not been a perfect understanding between the judges of Supreme Court in various cases about the meaning of basic structure, one thing was found to be agreeable amongst them to some extent; and that was the near acceptability that

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[35] Arvind Datar, "Democracy's Sentinal" available on https://indianexpress.com/article/opinion/columns/vellore-waste-management-community-how-a-city-cleans-up-5655425/ accessed on 30th August 2023.

[36] Civil Appeals Nos. 887 and 909 of 1975(Date of decision 7-11-1975), available at https://ceodelhi.gov.in/WriteReadData/Landmark%20Judgments/Landmark Judgments VOLI.pdf., accessed on 27 August 2023.

[37] *Id.*, para 668.

there is a "core content" in the Constitution which may be termed as sacrosanct and which is not amendable by the Parliament. Whether a particular feature forms part of the basic structure has to be necessarily determined on the basis of that provision of the Constitution. [38]

The doctrine of basic structure requires more discussion, may be for academic purposes. Since, the human behaviour keeps on changing, which ultimately change the society, what were acceptable practices in past may not be so in future. Taking a cue from the Indian history, one can very well argue that our society was dharma (duty) based society, and not right based society, as we have today.[39] The society has varnas system, according to which the entire society was divided in four varnas - Brahmin, kshatriya, vaishya, and shudra. Their duties were prescribed in the society. Their status was different and they were not equal. The women in the society were not having rights equal to men. The concept of equality, as we have today, was missing altogether in the earlier societies.

In the present society, everyone has equal rights, without any discrimination. Many practices which were allowed earlier, are prohibited today. Who knows how the society will shape in future? The Constitution may require lot of amendments, some of which may affect so called 'basic structure'. The theory of basic structure is based on the concept of constitutional identity. One cannot legally use the Constitution to destroy itself; the personality of the Constitution must remain unchanged.

The debate on the basic structure doctrine in India reflects the tensions between the principles of constitutionalism, Parliamentary sovereignty, and judicial oversight. It is a crucial

[38] (Retd.) Dr. Justice B S Chauhan, Judge, Supreme Court of India, "*Doctrine of Basic Structure: Contours"* published on 16 September 2016.
[39] V.K. Ahuja, *Krishna and Mediation* (National Law University, Assam, 2023), p. 21.

aspect of India's constitutional discourse and will continue to evolve as and when new legal challenges and societal changes emerge.

In the context of this intricate balance, the debate on the basic structure doctrine is not merely a theoretical or legal one; it has real-world implications for how India's democracy functions. The doctrine has been instrumental in protecting essential constitutional values, preventing potential abuse of power, and adapting the Constitution to changing societal needs. On the other hand, concerns about judicial overreach and the potential erosion of Parliamentary sovereignty highlight the need for ongoing discussion and evaluation of the doctrine's application.

In essence, the conclusion underscores the importance of continuing this debate to strike a delicate equilibrium between these enunciated principles. It suggests that, rather than viewing the debate as a binary choice between supporting or opposing the doctrine, there is merit in critically assessing and, if necessary, refining the Basic Structure Doctrine to ensure that it remains relevant and in harmony with the evolving needs and aspirations of India's democratic society. This process should ideally involve a dispassionate examination by the judiciary, legal experts, policymakers, and the public to maintain the integrity of India's constitutional framework.

The debate surrounding the basic structure doctrine is emblematic of the fundamental tensions within India's constitutional framework. As at its core, it reflects a delicate balancing act between several key principles.

Whether the basic structure poses as a hindrance to the growth of our nation or does it act like that of invisible force which lets the judiciary maintain its unwavering stance and enables it to uphold the values of our nation? Questions of a similar nature have been raised since the inception of the doctrine, and they remain pertinent for every generation and in every decade.

CHAPTER 31

PARLIAMENTARY COMPETENCE TO AMEND THE CONSTITUTION AND PRINCIPLE OF BASIC STRUCTURE: A LEGAL ANALYSIS

Mr. Nikunj Singh Yadav*
Dr. Ashwani Kumar Dwivedi**

1. Introduction

In this chapter efforts have been made to address any potential obstacles that the Constitution may face in its operation, procedures for modification within the Indian Constitution have been made. Nobody enjoys an exclusive hold on governance that meets their needs. It has been the character of the amending procedure itself under commonwealth which has caused political scientists to label the national Constitution as stiff, if there are no alternatives to additional constitutional technique to modify the Constitution.

The Indian Constitution's drafters were careful to prevent it from being overly restrictive. They were eager to create a document that could develop along with a rising country and mould itself to a rising the public's changing needs and situations. "Although we aim to create our Constitution as strong and long-lasting as possible, there cannot be finality in the Constitution", said Pt. Nehru. Flexibility ought to be allowed. You halt a country's development if you create something inflexible and irreversible.

However, the Indian Constitution's drafters were also conscious of the reality that if the document were too flexible, the government would be able to play to its desires and caprices.

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Thus, it becomes necessary to have devices, machinery, or some process by which the Constitution may be adopted from time to time as per the contemporary need of the nation. Such changes may be brought by way of Judicial Interpretation through decided cases that come before the court from time to time. The framers of the Indian Constitution instead of leaving this important task entirely to the Judiciary inserted Article 368 as a formal method to provide for amendment to the Constitution. Detailed analysis of the debate that took place at the Constituent Assembly on this issue clearly shows the intention of the framers for a flexible amendment procedure though it is contrary to federal principle.[1]

The amending authority of the Parliament is not expressly limited by anything in Article 368 of the Constitution, but after 20 years had passed, the country's highest court ruled in *Kesavananda Bharati v. State of Kerala*[2], that the legislature was not allowed to change the 'Basic Structure' of the Constitution. Despite the reality that Article 368 actually remains silent about the scope of the amending authority, this theory has remained the restriction on the legislature's capacity to change the Constitution since that time, until the Supreme Court's relatively recent ruling in *I. R. Coelho v. State of Tamil Nadu*.[3]

2. Analysis of the Amending Process

When a state's Constitution reduces to paper, its amending clause acquires a significant role since the purpose of establishing a Constitution itself relies upon it. A codified Constitution's ability to be amended is, in reality, what makes it fundamental. In the words of John Burgess, the initial of a

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[1] Chakraborty, Sanjit Kumar, https://www.researchgate.net/publication/228285906_Constitutional_Amendment_in_India_An_Analytical_Reconsideration_of_the_Doctrine_of_'Basic_Structure'

[2] (1973) 4 SCC 225; AIR 1973 SC 1461

[3] AIR 2007 SC 861.

Constitution's three vital elements, is the amendment process. The other two are the Constitution of freedom and the Constitution of governance, respectively.

A Complete Constitution may be said to consist of three fundamental parts. The first is the organisation of the state for the accomplishment of future changes in the Constitution. This is usually called the amending clause and the power which it describes and regulates is called the amending power. This is the most important part of a Constitution.

This chapter makes an effort to evaluate the procedure for amending the Indian Constitution. According to the evaluation of Article 368, it is preferable to refer to the topic of Article 368 as the 'process of amendment' instead of the 'procedure for amendment', as will be demonstrated below. Law uses the terms 'process' and 'procedure' collectively, although there is a little distinction. Generally, 'process' denotes 'a continuous or regular, action, or succession of actions, taking place or carried on in a definite manner'[4] , whereas 'procedure' denotes the 'mode of action'.[5] Therefore, 'process' is a sufficiently comprehensive word for denoting an action being done in a definite manner. In our analysis of Art 368, the comprehensiveness of the word 'process' is limited in respect of the formal provisions of the Constitution.[6]

The mechanism for modification of the legal framework is described in Article 368 of the Constitution, which also carries the following marginal note:

> *"An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House*

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[4] The Shorter Oxford Dictionary Third Edn., p 1590.
[5] *Id.* p1589.
[6] Livingston (W. S O thinks that the amending process includes a "complex of psychological and sociological habits and that makes men act they do." Federalism and Constitutional Change, 1958, p 303.

of Parliament, and when the Bill is passed in each House by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in

a) Article 54, Article 55, Article 75, Article 162 or Article 241, or
b) Chapter IV of part V, chapter V of part VI, or chapter I of part XI, or
c) any of the lists in the Seventh Schedule, or
d) the representation of states in Parliament, or
e) the provisions of this article, the amendment shall also require to be ratified by the Legislatures of not less than one-half of the states by resolutions to that effect passed by those legislatures before the Bill making provision for such amendment is presented to the President for assent."

The scheme of this Article was explained by the Chairman of the Drafting Committee, Dr. Ambedkar.[7] For the purposes of modification, this provision divides all of the Constitution's provisions into two groups. Provisions that can be amended within the substantive part of Article 368 fall under the 'first group'. Specifically, when a legislation is tabled in either House of Parliament and approved by both Houses with the consent of the president, with the concurrence of the lawmakers who are present and voting, as well as a majority of no fewer than two-thirds of those present and voting, the provisions that are looked for to be modified/stand amended. The provisions that are particularly named in the proviso to Article 368 under items (a) through (e) fall within the 'second group'. These provisions need

[7] C.A.D. Vol IX, pp 1660-1661.

to be approved by a minimum of fifty per cent of the legislatures in the states in addition to a special majority in Parliament, or a plurality of the 'total membership' and not fewer than two-thirds of the lawmakers of that Chamber attending and voting.

2.1 Meaning of 'Amendment':

In everyday speech, the term 'amendment' may imply 'improvement' or a minor modification to the primary document, but when applied to a Constitution, it may refer to any number of things, including the change, modification, eliminate, addition, variability, or deletion of any provision. It is now used in the broadest sense conceivable and has come to signify every type of alteration that occurred through the method of amending the Constitution. Herman Finer goes to the extent of saying that "to amend is to de-constitute and reconstitute"[8]. Some of the early written Constitutions contained no provision for their alteration.[9] The word 'amendment' has been applied quite broadly in Article 368. Mr. H. V. Y Kamath proposed a change to Article 368 during discussion of the clause in the Constituent Assembly, adding that any clause of the Constitution may be changed by way of modification, addition, or deletion in the manner specified in the clause. However, the change was rejected. The clarifying expressions 'by way of variation, addition, or repeal' were likely omitted from the Article because, by that time, the word 'amendment' as used in relation to the Constitution had acquired an all-inclusive concept of change, negating the need for any additional explanation.

2.2 Procedure of Amendment of the Indian Constitution

Legislatures in states cannot begin a constitutional modification; only a bill introduced in either the House of the people or the Council of states in Parliament may do so. Each

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[8] Herman Finer, The Theory and Practice of Modern Government Vol I, 1952, p 193.

[9] For example, the Constitution of States in the United States. Dodd (W.F). The Revision and amendment of State Constitutions. 1910, p 118.

House must adopt the measure by a special consensus, which is defined as a majority (*i.e.*, more than 50%) of the entire membership of the House and a majority of two-thirds of the people who are members of the House present and voting. Each House needs to enact the legislation on its own.

If both Houses don't agree, there isn't a mechanism for summoning a joint session of both Houses to discuss and enact the measure. A normal majority of the governments in half of the states, or a majority of the people attending and voting in the House, must approve a bill if it seeks to alter the federal aspects of the Constitution. Once the law has been properly approved by the two houses of Parliament and, if required, state legislatures, it is presented to the President for approval. The President has to sign the legislation. After the head of state approves the bill, it's deemed an Act (*i.e.*, a Constitutional Amendment Act), and the Constitution is changed in line with its text.

The Constitution can be amended by three ways:

a) Amendment by simple majority of the Parliament
b) Amendment by special majority of the Parliament and,
c) Amendment by special majority of the Parliament and the ratification of half of the state legislature.

a) Simple Majority: By using this technique, new states can be created, or legislative councils can be abolished. Therefore, amendments made at the behest of governments or by state legislatures fall under this category.

b) Special Majority: Only the Parliament as a whole has the authority to amend the Constitution through this process. The fact that a special majority is needed to alter the Constitution makes it a rigorous system, but the fact that a single Member of Parliament may pass any modification makes it a flexible one. The following provisions can be changed in this manner:

a. Fundamental Rights,
b. DPSPs, and
c. All other provision which are not covered by the 1st and 3rd category.

c) Amendment by Special Majority with Ratification by State: A special majority is inadequate for various provisions of the Constitution. When an amendment intends to modify a provision dealing with the division of powers among states and the central government, or provisions pertaining to representation, it is desirable to consult with the states and get their consent. First, the bill to amend must be approved by the two houses of the Parliament with a two-third majority of all members sitting and voting in every House and the concurrence of the overall membership. The amendment measure must next receive approval from a minimum of half of the various State Legislatures. The following provisions require such ratification by the states:

a. Election of President (Article 54 and Article 55);
b. Executive Power of Centre and State (Article 73 & Article 162);
c. Supreme Court (Article 124 and 227), High Courts (Article 214 to Article 231), and Judiciary for UT's (Article241);
d. Distribution of Legislative Power (Article 245 & 255);
e. Part XI, Chapter 1;
f. Lists in 7th Schedule;
g. Representation of States in Council of States (4th Schedule); and
h. Article 368 itself.

However, it might be dangerous to give Parliament total authority over constitutional changes. Instead of serving as the foundation of our democratic system, our Constitution would be turned to an instrument for establishing the dictatorship of Parliament. To guarantee that its authority is limitless, the

administration will amend a number of clauses. Though alarming, this idea is not wholly unfounded.

Through various changes, including the 39th Amendment and clause (2) of the 25th Amendment, government has tried to create a nation where the legislature is in charge. The judiciary developed the 'basic structure doctrine' of the Indian Constitution as a result of a number of significant historical events. The Supreme Court recognised this concept for the first time in the historic Kesavananda Bharati case in 1973.[10] Since that time, the highest court in the country has served as both the Constitution's translator and the final judge of all Parliamentary revisions.

3. Position Prior to Kesavananda Bharati Case

It was contested that Parliament had the right to change the Constitution, notably the provisions on the fundamental liberties of citizens, as early as in 1951. After the states gained their independence, various laws were passed in order to change the systems of property ownership and renting. This was in line with the socialistic objectives of the Constitution (found in Article 39(b) as well as 39(c) of the DPSP's), which called for a fair allocation of production resources between every citizen and an avoidance of wealth being concentrated in the control of a select few.

Landowners filed petitions after being harmed by these statutes. The courts invalidated the land reform measures on the ground that they violated the Constitution's basic protection of property rights. In response to the adverse rulings, Parliament passed both the 1st and 4th Amendments in 1951 and 1952, which essentially removed this legislation from the purview of judicial scrutiny by putting them in the Constitution's 9th Schedule. The main goal of the 9th Schedule was to stop the court, which had hitherto protected the citizens' right to property, from thwarting

[10] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225: AIR 1973 SC 1461.

the then government plans for a revolt against capitalism. Landowners brought another constitutional appeal before the Apex Court, claiming that the modifications breached Article 13(2)[11] of the Constitution and should not have included land reform regulations in the 9th Schedule.

The Apex Court dismissed both contentions in the cases of *Sankari Prasad Singh Deo v. Union of India*[12] and *Sajjan Singh v. State of Rajasthan*[13] in 1952 and 1955, respectively, and affirmed Parliament's freedom to change any provision of the Constitution, even those that impact people' basic rights. However, two judges who dissented from the majority opinion in the Sajjan Singh's case voiced concerns about whether peoples' basic rights would turn into a political football for the ruling party in Legislature.

3.1 Golaknath's Ruling

A top court panel of 11 judges changed its stance in 1967. Chief Justice Subba Rao on behalf of majority observed that Article 368, which included provisions linked to the alteration of the Constitution, just laid forth the amending method in the *Golaknath v. State of Punjab*[14] case, which was decided by a 6:5 majority. The Parliament was not given the authority to modify the Constitution under Article 368. The Constitution's additional provisions (Articles 245, 246, and 248) allowed legislature the ability to enact laws (plenary legislative power), which granted it the right to change the Constitution (constituent authority). As a result, the Supreme Court determined that Parliament's amending and enacting powers

[11] Article 13 (2) states- "The State shall not make any law which takes away or abridges 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 to Part III of the Constitution which lists the fundamental rights of the citizen.
[12] AIR 1951 SC 458.
[13] AIR 1965 SC 845.
[14] I. C. Golaknath v. State of Punjab, AIR 1967 SC 1643.

were basically equivalent. As a result, any change to the Constitution must be interpreted in accordance with Article 13 (2).

The majority judgment invoked the concept of implied limitations on Parliament's power to amend the Constitution. This majority view made it clear that the Constitution gives a place of permanence to the fundamental freedoms of the citizen. The judges stated that the fundamental rights were so sacrosanct and transcendental in importance that they could not be restricted even if such a move were to receive unanimous approval of both houses of Parliament. The phrase 'basic structure' was introduced for the first time by M. K. Nambiar and other counsels while arguing for the petitioners in the Golaknath case, but it was only in 1973 that the concept surfaced in the text of the apex court's verdict.[15]

4. The Kesavananda Case and the Basic Structure

The constitutionality of these alterations was unavoidably contested before the Supreme Court bench of 13 judges. Eleven distinct judgments contain their verdict.[16] The key judgments delivered by the 9 judges in the present case are summarised in a summary report that each judge approved. Granville Austin remarks out that there are a number of differences in the judges' individual verdicts and the submissions they made in the summary they signed.[17] However, the majority judgment recognised the fundamental idea of the Constitution's 'basic structure'.

All judges upheld the validity of the Twenty-fourth constitutional amendment saying that Parliament had the power to amend any or all provisions of the Constitution. All

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[15] Venkatesh Nayak, https://Constitutionnet.org/vl/item/basic-structure-indian-Constitution.

[16] His Holiness Kesavananda Bharati Sripadagalavaru v State of Kerala and Another 1973 (4) SCC 225ff.

[17] See Austin, Working a Democratic Constitution…, p.265.

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).[18]

It is vital to draw attention to the minute distinction between two categories of tasks carried out by the Indian Parliament:

a) It can make laws for the country by exercising its legislative power[19]; and
b) By using its component authority, it can change the Constitution.

Most importantly seven of the thirteen judges in the Kesavananda Bharati case, including Chief Justice Sikri who signed the summary statement, declared that Parliament's constituent power was subject to inherent limitations. Parliament could not use its amending powers under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution.[20]

The Judges in Kesavananda Bharati listed the following elements of basic structures:

According to Sikri, C.J. the basic structure of the Constitution consists of the following features: Supremacy of the Constitution, Republic and Democratic forms of the

[18] Venkatesh Nayak, https://Constitutionnet.org/vl/item/basic-structure-indian-Constitution.
[19]By virtue of the powers 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 (Council of States or the Upper House in Parliament) Parliament can also make laws in the national interest, relating to any of the 66 subjects contained in the State List.
[20] *Supra note* 18.

Governments, Secular character of the Constitution, Separation of powers and Federal Character of the Constitution.[21]

According to Shelat and Grover, JJ., the basic structure of the Constitution consists of the following features: Supremacy of the Constitution, Republican and Democratic form of the Government and sovereignty of the country, Secular and Federal character of the Constitution, Demarcation of power between the Legislature, the Executive and the Judiciary, Dignity of the individual secured by various freedoms and basic rights in Part III and the mandate to build a welfare State contained by Part V, Unity and integrity of the Nation.[22]

According to Hegde and Mukherjee, JJ., the basic structure of the Constitution consists of the following features: Sovereignty of India, the democratic character of our policy, The Unity of country, Essential features of Individual freedoms secured to the citizens, Mandate to build a welfare State. However, they said that these limitations are only illustrative and not exhaustive.[23]

According to Jagmohan Reddy, J., the basic structure of the Constitution consists of the following features: a sovereign democratic republic, and Parliamentary democracy certainly constitute the basic structure.[24]

J. Khanna concurred with the majority decision but delivered a separate judgment.

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[21] J. N. Pandey, The Constitutional Law of India, Published by Central Law Agency, 47th Edition.
[22]https://www.worldwidejournals.com/global-journal-for-research-analysis. GJRA/recent_issues_pdf/2015/August/August_2015_1438858219__14.pdf
[23] Nashik Jhabvala, The Constitution of India (C. Jamnadas and Co. 2017)
[24] *Supra note* 23.

The majority opinion, held by just 6 judges on the bench, was that Parliament couldn't change the basic framework since it included the citizen's fundamental rights.

Golaknath had been determined incorrectly, according to the minority opinion presented by Justice A. N. Ray (whose selection to the post of Chief Justice instead of a trio of senior judges, shortly after the pronouncement of the Kesavananda decision, was thought by many to be politically motivated), Justice M. H. Beg, Justice K. K. Mathew, and Justice S. N. Dwivedi all three of the alterations that were being contested in court were upheld as genuine. According to Ray, J., there is no difference among the Constitution's essential and non-essential components because all of its components are necessary. They all believed that by using its authority under Article 368, Parliament could alter the Constitution fundamentally.

In summary the majority verdict in Kesavananda Bharati recognised the power of Parliament to amend any or all provisions of the Constitution provided such an act did not destroy its basic structure. But there was no unanimity of opinion about what constitutes the basic structure. Though the Supreme Court very nearly returned to the position of Sankari Prasad (1952) by restoring the supremacy of Parliament's amending power, in effect it strengthened the power of judicial review much more.[25]

5. Evolution of the Basic Structure Doctrine: Indira Gandhi's Case

The Supreme Court in *Indra Nehru Gandhi v. Raj Narain*[26] served as an affirmation and foundation for the idea. In this particular case, the appellant had appealed against the Allahabad High

[25] The majority view declared certain parts of the Twenty-fifth amendment invalid especially those relating to Article 31 (c)and upheld the Twenty-ninth amendment- for a detailed account see Austin, Working of a Democratic Constitution..., pp.265ff.
[26] AIR 1975 SC 2299.

Court's ruling declaring the Prime Ministerial election of the appellant to be unconstitutional. The 39th Constitutional Amendment, which declared that no court had jurisdiction over the Prime Minister's election issues, was passed into law and placed into effect while the highest court's appeal was still underway.

In its ruling, the Supreme Court cited the Kesavananda Bharati case as support for its assertion that democracy is a fundamental feature of the Constitution**.** Rule of Law and judicial review authority were two additional criteria that the bench added to the list of the basic structure.

6. A Review Panel for Kesavananda

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 decide whether or not the basic structure doctrine restricted Parliament's power to amend the Constitution. The decision in the Bank Nationalisation case was also up for review.[27] While Addressing the Parliament, Prime Minister Indira Gandhi vehemently refuted the basic structural doctrine.[28]

The nation's focus was distracted from this problem by the proclamation of a National Emergency in June 1975 and the ensuing suspension of fundamental liberties, including the ability to petition the courts to prohibit preventive detention.

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[27] Nayak, Venkatesh: https://Constitutionnet.org/vl/item/basic-structure-indian-Constitution.

[28] Speech in Parliament- October 27, 1976: see Indira Gandhi: Selected Speeches and Writings, vol. 3, p.288.

7. Reaffirmation of the Basic Structure Doctrine: Minerva Mills and Waman Rao

Within less than two years of the restoration of Parliament's amending powers to near absolute terms, the Forty-second amendment was challenged before the Supreme Court by the owners of Minerva Mills[29] (Bangalore) a sick industrial firm which was nationalised by the government in 1974. The petitioners' advocate and famous constitutionalist, Mr. N.A. Palkhivala, decided not to contest the state's conduct only on the grounds that it violated the basic right to property. He presented the problem instead, as a matter of Parliament's ability to change the Constitution.

Mr. Palkhivala argued that Section 55 of the Amendment Act had placed unlimited amending power in the hands of Parliament. The attempt to immunise constitutional amendments against judicial review violated the doctrine of basic structure which had been recognised by the Supreme Court in the Kesavananda Bharati and Indira Gandhi Election Cases.[30] He further contended that the amended Article 31C was constitutionally bad as it violated the Preamble of the Constitution and the fundamental rights of citizens. It also took away the power of judicial review.[31]

Both claims were supported by Chief Justice Y. V. Chandrachud's majority ruling (4:1) in the case. The right of judicial scrutiny of constitutional changes was supported by the majority opinion. They argued that Article 368's clause (4) and (5) gave Parliament unrestricted power to change the Constitution. According to them, this prevents courts from challenging the alteration, even if it weakens or modifies the basic tenets of the Constitution.

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[29] Minerva Mills Ltd. v Union of India (1980) 3 SCC 625.
[30] *Supra note* 18.
[31] *Id.*

Judges who agreed with Chandrachud C. J. concluded that the Constitution's restricted ability to amend itself is a basic feature. The opposing judge, Bhagwati, J., concurred with this viewpoint and stated that no authority, no matter how exalted, could claim to be the exclusive judge of its power and deeds in accordance with the Constitution.[32] The majority held the amendment to Article 31C unconstitutional as it destroyed the harmony and balance between fundamental rights and directive principles which is an essential or basic feature of the Constitution.[33] Due to Parliament's failure to remove or eliminate the change to Article 31C, it still stands as a dead letter. However, matters governed by it are decided in accordance with its pre 42nd Amendment form.

In another case relating to a similar dispute involving agricultural property the apex court, held that all constitutional amendments made after the date of the Kesavananda Bharati judgment were open to judicial review.[34] After the Kesavananda Bharati ruling, all laws added to the 9th Schedule were likewise subject to judicial scrutiny. On the grounds that they are unconstitutional or have weakened the Constitution's fundamental principles, they may be contested. In essence, the Apex Court established an accord between the capacity of

[32] Such a stance appears to be at odds with India's system of government, which is based on the principle of the separation of powers. In order to prevent any possible misuse of power, the Constitution establishes a system of checks and balances between the legislative, executive, and judicial branches of the government. For instance, the Chief Justice of the Supreme Court and the Prime Minister both advise the President on appointing justices to the Supreme Court and the High Courts in the States. However, they may only be removed from office if they are charged by the legislature. With the assistance of this measure, the courts may operate without concern for the executive. In a similar vein, the executive is accountable to Parliament for how it runs on a daily basis.

[33] Its legitimacy was confirmed by Bhagwati, J., who also agreed that the government's seizure of the mill was legal.

[34] Waman Rao v. Union of India 1981 2 SCC 362. The Apex Court decided this case along with Minerva Mills. Bhagwati, J. who was in the minority again incorporated his opinions on both cases in a single judgment.

Parliament to modify the Constitution and its own authority to interpret it.

8. Conclusion

Although the Indian Constitution's Article 368 grants Parliament the authority to amend the document, however this power does not allow Parliament to alter the Constitution's basic structure since the Indian Constitution is a fundamental law of the nation. The doctrine's existence is not in question at the moment; the only issue that continues to crop up is its content. While certain items are currently being debated by the Courts, others have been repeatedly upheld by those same Courts. The fundamental structure concept provides the appropriate degree of flexibility and rigidity for any Constitution's amendment powers.

It is evident from our analysis that there is a separation between constituent law and ordinary law, and this difference relies on their separate natures rather than the way that each one of them is implemented, albeit certain differences in method are often discovered. Numerous important details have emerged from the research of Article 368. We have made an effort to address the question of whether Article 368 comprises the authority to alter or only the process for amending. Our investigation led us to the conclusion that it has both the authority and the method for change. The argument that there are no stated or implicit restrictions on the power of amendment conferred by Article 368 has also been taken into consideration.

If there is a restriction at all, it is merely that the process outlined in Article 368 must be followed. All legislation and constitutional changes must now pass the test of judicial review, and the Apex Court will very certainly strike down any measures that go against the core structure. The Supreme Court, which serves as the last judge and translator, must rule on any constitutional modifications because Parliament's ability to change the Constitution is essentially constrained.

CHAPTER 32

A LOOK BACK AT THE KESAVANANDA BHARATI DECISION AS A SHIELD OF THE BASIC STRUCTURE DOCTRINE

Dr. Mridula Sarmah*
Mr. Sajidur Rahman**

1. Introduction

> *"The basic structure doctrine is the North Star that guides and provides direction to the implementers of the Constitution."*
>
> – Chief Justice D.Y. Chandrachud

A living Constitution must outlast the waves of time and adapt to generations' demands.[1] However, certain inherent values form the basis of the Constitution. Originalism is the basis of the Constitution's legitimate system, and the courts aim to maintain it through their doctrines and pronouncements.[2] If the *volksgeist*[3] wants an additional structure by dismantling the old one, a different process is needed. Until then, some basic characteristics that keep a country together must be preserved against sudden and unrepresentative intrusion.

The Supreme Court promulgates the basic structure doctrine through its numerous landmark judgments. This doctrine endows the judiciary to limit the legislature and prevent it from

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[1] David A. Strauss, *Do we have a Living Constitution*, 59 DRAKE L. REV. 973, 973-984 (2011).
[2] Jack M. Balkin, *Framework Originalism and the Living Constitution* 103 NORTHWSTN. UNIV. LAW REV. 550 (2009).
[3] In the early 19th Century, the term Volksgeist was used by Friedrich Carl von Savigny in order to express the "popular" sense of justice.

misusing Article 368[4] of the Constitution of India. Thus, the evolution from implied limitations to its present form has been challenging.

2. Contrasting Constitutional Ideas of Other Nations

There has been much discussion and analysis regarding the basic structure doctrine. The relevance and ramifications of the basic structure doctrine may be better understood by contrasting it with comparable constitutional ideas from other nations. One such parallel has been drawn with implied restrictions in the US Constitution, which acknowledges some unspecified rights the government cannot violate. It is like the basic structure doctrine in that it restrains excessive governmental control.

It has also been compared to the doctrine of entrenchment in the Canadian Constitution, which prevents the federal government from changing explicit provisions of the Constitution without the approval of the provinces. Likewise, the basic structure doctrine prevents some parts of the Indian Constitution from being amended without the people's consent.

The doctrine of constitutional supremacy in the UK holds that its Parliament is the ultimate law-making power, and no statute may be ruled unconstitutional. Unlike the basic structure doctrine, which allows the courts to rescind unlawful legislation to protect the Constitution's underlying basic structure, this view does not limit judicial review to specific cases.

The fundamental rights of South Africa have been likened to the basic structure doctrine, both of which acknowledge certain rights and freedoms shielded from governmental interference.

Some have drawn parallels between the basic structure doctrine and the German notion of democratic constitutionalism, which

[4] Power of Parliament to amend the Constitution.

holds that the Constitution must represent the democratic will of the people and defend their fundamental rights and freedoms.

Finally, by contrasting the basic structure doctrine with other constitutional theories and conceptions worldwide, we can see how crucial it is to protect the rights, freedoms, and democratic principles guaranteed by the Constitution of India.

3. Evolution of the Basic Structure Doctrine

The concept of the basic structure doctrine started with whether the Parliament can amend the Constitution, including the fundamental rights. It was challenged in the year 1951, which added Article 31A[5], Article 31B[6], the Ninth Schedule[7] to the Constitution. The former provided that any land reforms and acquisition law cannot be challenged because it violates any fundamental rights, and the latter gave blanket protection to that legislation inserted in the ninth schedule, which cannot be questioned. Various laws were introduced after independence to change the tenancy and ownership system. The Congress party's election pledge was considered to accomplish the Constitution's Directive Principles of State Policy's[8] socialistic aims. These laws negatively impacted the property owners. In *Shankari Prasad v. Union of India,*[9] the amendment of the Constitution limiting the right to property by Article 31[10] was questioned. The contention contradicting the legitimacy was that Article 13[11] forbids enacting a law that arrogates fundamental rights. The amendment had the status of the law

[5] Saving of laws providing for acquisition of estates, etc.
[6] Validation of certain Acts and Regulations without prejudice to the generality of the provisions contained in Article 31A.
[7] The Schedule contains a list of central and state laws which cannot be challenged in courts and was added by the Constitution (First Amendment) Act, 1951.
[8] INDIA CONST. art. 39, cl. (b), & (c).
[9] Shankari Prasad v. Union of India, AIR 1951 SC 458.
[10] *Omitted by the Constitution (Forty-fourth Amendment) Act, 1978, s. 6 (w.e.f. 20-6-1979).*
[11] Laws inconsistent with or in derogation of the fundamental rights.

under Article 13(2).[12] The court held that the terminology of Art 368[13] is completely general and allows Parliament to amend the Constitution without any restriction.

After 13 years in *Sajjan Singh's* case[14], the authenticity of the Constitution (Seventeenth Amendment) Act 1964 was questioned. This amendment negatively impaired property rights in the ninth schedule, immunizing them from judicial review.

In this case, the Court had to decide whether the amendment took away the fundamental rights within the prohibition of Articles 13(2),[15] 31A[16] and 31B[17] which sought to change Articles 132,[18] 136[19] and 226[20]. The Court held that fundamental rights could be amended under Article 368.[21] Also, it contended that amendments do not fall within the term 'law' as used in Article 13[22]. But, Justice M. Hidayatullah, in his dissenting judgment in *Sajjan Singh*[23] case, gave rise to the arguments in future issues regarding the amendment of fundamental rights.[24]

In *I. C. Golaknath v. State of Punjab*,[25] the legitimacy of the seventeenth amendment was again challenged. This case has

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[12] The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
[13] *Supra* note. 4.
[14] AIR 1965 SC 845.
[15] *Supra* note 12.
[16] *Supra* note. 5.
[17] *Supra* note. 6.
[18] Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases.
[19] Special leave to appeal by the Supreme Court.
[20] Power of High Courts to issue certain writs.
[21] *Supra* note 4.
[22] *Supra* note. 11.
[23] *Supra* note. 14.
[24] A. R. Blackshield, Fundamental Rights and the Economic Viability of the Indian National, 10(1) ILI L., 1-120 (1968).
[25] AIR 1967 SC 1964.

overruled the earlier *Shankari Prasad*[26] case and *Sajjan Singh*[27] case. In its 6:5 majority decision in the *Golaknath*[28] case, Chief Justice Subba Rao argued that Article 368[29] laid out the procedure where Parliament was not allowed to amend the Constitution. Other constitutional provisions allowing Parliament to enact laws gave birth to Parliament's amending power.[30] Thus, it was ruled that Parliament's amending and legislative powers are alike.

Hence, any amendments must be read with Article 13(2).[31] The Court held that Parliament cannot amend the fundamental rights. While arguing on behalf of the petitioners in the Golaknath case, attorney M. K. Nambiar used the term basic structure. However, the term did not appear in a Supreme Court case text until 1973.[32]

After the Golaknath[33] case, the Supreme Court challenge the constitutionality of the twenty-fourth and twenty-fifth amendments through Article 32[34] in the celebrated *Kesavananda Bharati v. State of Kerala* case was challenged in the Supreme Court.[35] Kesavananda Bharati served as the head priest of the religious community known as Edneer Mutt. He has some land registered in his name with the Mutt. But the land was acquired by enacting the Land Reforms Amendment Act 1969. Kesavananda Bharati filed a suit against the State of Kerala's Land Reform Act 1969 under Article 32[36], 25[37], 14[38],

[26] *Supra* note 9.
[27] *Supra* note 14.
[28] *Supra* note 9.
[29] *Supra* note 4.
[30] INDIA CONST. art. 245, 246, & 248.
[31] *Supra* note 12.
[32] A. Sethi, Basic Structure Doctrine: Some Reflections SSRN L. (2005).
[33] *Supra* note 4.
[34] Remedies for enforcement of fundamental rights.
[35] AIR 1973 SC 1461
[36] *Supra* note 35.
[37] Freedom of conscience and free profession, practice, and propagation of religion.
[38] Right to equality.

21[39], 26[40], 19(1)(f)[41] of the Constitution. In the meantime, another amendment, the Land Reform Act 1971, was introduced. The said Act might get void under Article 13[42] and therefore obtained protection by putting it in the Ninth Schedule. The petitioner argued that Parliament's ability to amend the Constitution would violate citizens' fundamental rights. In addition, he proposed that the property be safeguarded under Article 19(1)(f)[43] of the Constitution.

The Supreme Court ruled by a 7:6 majority that Parliament has the power to change any provision of the Constitution, but the basic structure cannot be destroyed. The Supreme Court articulated a principle now often recognized as the "basic structure doctrine" of the Constitution. It also determined that the previous ruling in the *Golaknath*[44] case was wrong and that Article 368 provided the legal basis and procedure for amending the Constitution. In contrast, the Court made clear that an amendment to the Constitution is not the same as a law under Article 13(2) of the Constitution. Seven of the thirteen justices, including Chief Justice Sikri, signed the summary statement in the Kesavananda Bharati[45] case, stating that Parliament's constitutive power was limited has held:

> *"The basic structure or the vital framework of the Constitution should not be damaged, emasculated, destroyed, abrogated, modified, or altered due to the use of the amending powers granted to Parliament."*

In this ruling, it was left to the Court's discretion to determine the basic structure doctrine if a similar case ever arose. Article

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[39] Protection of life and personal liberty.
[40] Freedom to manage religious affairs.
[41] Right to acquire, hold and dispose of property (Repealed by the Constitutional Forty-Fourth Amendment Act 1978).
[42] *Supra* note 11.
[43] *Supra* note 41.
[44] *Supra* note 25.
[45] *Supra* note 35.

368 was also highlighted, outlining its power to change laws, not to violate the basic structure concept. The *Golaknath*[46] case challenging the constitutional amendment was overturned using the basic structure doctrine.

However, the judges provided an indicative but not full list of the features of basic structure. Justice Sikri's list contained concepts like constitutional supremacy and republican and democratic government systems. Justices Shelat and Grover expanded on this by mentioning the nation's sovereignty, unity, and integrity. Justices Hegde and Mukherjee noted that the fundamentals were there in the Preamble. The importance of Parliamentarians and the separation of powers were both highlighted by Justice Jaganmohan Reddy. The decisive judgment of Justice Khanna, which tilted the balance, said that judicial review, like democracy and secularism, was a component of the Constitution's core framework.

4. Basic Structure Doctrine: A Tool for Development

In the history of India's Constitution, the concept of basic structure marked a fresh start. It was a watershed moment in the development of the law. The basic structure doctrine evolved gradually after the landmark judgment in the Kesavananda Bharati[47] case.

In the case of *Raj Narain v. Indira Nehru*,[48] the Supreme Court was given a chance to ponder the doctrine. The Supreme Court's authority to rule on challenges to the results of elections for "President, Vice President, Prime Minister, and Speaker of the Lok Sabha" was in question because of an amendment in the Constitution's Thirty-Ninth Amendment Act. Despite upholding the thirty-ninth amendment's constitutionality, the Court struck down the provision that attempted to restrict judicial

[46] *Supra* note 25.
[47] *Supra* note 35.
[48] AIR 1975 SC 2299.

review.[49] The Court reaffirmed the importance of the doctrine and expanded its scope to include the following structural elements:

a) Democracy, including free and fair elections;
b) The power of judicial review;
c) Sovereign, democratic, republic;
d) Equality of status and opportunity; and
e) Secularism and freedom of conscience and religion.

The case of *Minerva Mills*[50] in 1980 was pivotal in shaping how the Constitution of India was interpreted, especially regarding the doctrine. The Constitution (Forty-Second Amendment) Act, 1976, passed under India's Emergency, was challenged in this important Supreme Court ruling. Several parts of the Forty-Second Amendment Act were found to violate the basic structure doctrine, so the court deemed it unconstitutional. The court in the *Kesavananda Bharati*[51] case stated that any effort to undermine or destroy the basic structure is unlawful. The court also ruled against a proposed modification to Article 368 that would have given Parliament more powers of amendment and the amendment to Article 19 that would have limited freedom of speech and expression.

In 1981, the Supreme Court passed a landmark decision in the *Waman Rao Case*.[52] Here the validity of parts of the Karnataka Land Reforms Act, 1961, which sought to change the land ownership and tenancy rules, was challenged. The main question was whether the Act violated Article 19(1)(f) of the Constitution's property right. The Waman Rao case reaffirms the state's capacity to regulate property rights for the public good and interprets the Constitution's right to property. It also

[49] The Supreme Court struck down Section 4 of the Thirty-Ninth Amendment Act, *i.e.,* Article 329A of the Constitution.
[50] Minerva Mills Ltd. and Anr. v. Union of India and Anr., AIR 1980 SC 1789.
[51] *Supra* note 35.
[52] Waman Rao v. Union of India, (1981) 2 SCC 362.

defined Parliament's constitutional amendment power and the judiciary's role in assessing it. The case has repercussions for land reform in other states and established a framework for land transfer policies to achieve social and economic fairness.

In the *S.R. Bommai*[53] case, the nine-judge Constitution Bench gave a ruling that brought attention to the vitality of federalism. This ruling occurred after President's Rule temporarily shut down lawful state governments by invoking Article 356.[54] However, such extreme measures are constitutionally permissible only in the event of a total collapse of constitutional machinery. In the instant case, the Supreme Court decided that "religion had no place in issues pertaining to the state and that the Constitution included a part stating that secularism was a key part of the basic structure doctrine."

The Supreme Court, in *I. R. Coelho v. State of Tamil Nadu*,[55] considered whether the Ninth Schedule shielded certain legislation from judicial review. The debate in the case started by detailing Justice Khanna's stance in the case of *Kesavananda Bharati*[56]. The Coelho case highlighted the significance of judicial review. It held that the court might strike down any act, whether it was an amendment to Part III or an addition to the Ninth Schedule since there were only 13 laws in the Schedule (later raised to 284). On the other hand, the Ninth Schedule was subject to widespread and unregulated alterations, which brought about the need for the court's involvement to exercise judicial review.

It restated the "rights test" (as used in the Indira Gandhi case[57]) and the "essence of the rights test" (as implemented in the M.

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[53] S. R. Bommai v. Union of India, AIR 1994 SC 1918.
[54] Provisions in case of failure of constitutional machinery in State.
[55] AIR 2007 SC 861.
[56] *Supra* note 35.
[57] Indira Gandhi v. Raj, AIR 1975 SC 2299.

Nagaraj case[58]) as necessary conditions for evaluating legislation included in the Ninth Schedule. The Act in issue would not qualify for Ninth Schedule protection if it did not pass these conditions in constitutional adjudication. The court ruled that unlawful Parliamentary expansions violated the basic structure doctrine. However, the ninth schedule promoted agricultural reforms and did not violate fundamental rights.

In 2015, the Supreme Court of India declared the National Judicial Appointments Commission unconstitutional, superseding the collegium system.[59] The ruling explained the scope of judicial independence, how it relates to judicial nominations, and why judges' input into the appointment process is fundamental to the system's stability. Therefore, the Court held that judicial nominations were essential to judicial independence. It was also mentioned that the collegium didn't get in the way of the executive's participation in the recruitment procedure. It went on to say that the NJAC's executive veto powers were unconstitutional.

A landmark decision was handed down in 2017 in the case of *Justice K. S. Puttaswamy v. Union of India*[60], which questioned the constitutionality of the Aadhaar Act, a biometric identity system for Indian citizens and permanent residents. In its ruling, the Supreme Court affirmed the basic structure doctrine and recognized privacy as a constitutionally guaranteed right. The Court also ruled that legislation violating people's right to privacy is unconstitutional.

The basic structure doctrine has received much attention recently, with much discussion from ex-Law Minister Kiren Rijiju and Vice President Jagdeep Dhankar. Some stem from the belief that Parliament is sovereign and may change the

[58] M. Nagaraj v. Union of India, AIR 2007 SC 71.
[59] Supreme Court Advocates-on-record Association & Anr. v. Union of India, AIR 2015 SC 5457.
[60] AIR 2017 SC 4161.

Constitution at a whim. The second apparent protest involves judicial review, or the apex court overturning a law or government action.

The Court doesn't intervene because it's superior. The court interprets and upholds the Constitution and acts only when constitutional restrictions are violated. But certainly, there is significant political commotion.

5. Conclusion

The basic structure doctrine has shaped the Constitution. The court has depended on it to protect the Constitution's major provisions and keep it a living, flexible instrument that meets society's evolving requirements. The notion has been argued and refined, and courts have used it to invalidate laws that violate the Constitution's essential qualities, guaranteeing that no legislation or action may impair its core concepts and values.

The court has recognized many constitutional provisions using the basic structure. These qualities are inviolable and non-negotiable. The basic structure doctrine prevents constitutional amendments that weaken the Constitution's core. If an amendment is seen to be incompatible with the Constitution's underlying principles, the courts might invalidate it. The *Kesavananda Bharati*[61] case is a prime example of this.

Although it has been heralded as a milestone verdict in Indian history, it has also been subjected to enough challenges and criticisms. The basic structure doctrine is criticized for its ambiguity. Noted scholar Upendra Baxi noted that "the basic structure doctrine has generated more heat than light". This doctrine has been criticized for being too unclear and allowing arbitrary judicial interpretation.

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[61] *Supra* note 35.

People have also claimed that the doctrine is a product of the judges' political and ideological leanings. The basic structure doctrine, as stated by legal historian Granville Austin, "is the product of a specific moment in India's history and reflects the values and beliefs of the judges who created it".

Even after all these critiques and arguments, the basic structure doctrine remains one of the most important pillars of Indian constitutional law. As constitutional expert H. M. Seervai noted, "the basic structure doctrine is an essential feature of the Indian Constitution and reflects the fundamental values and principles that underlie Indian democracy". Although there may be arguments and controversies about the specific extent and application of the concept, it continues to be an essential protection against the arbitrary and unconstitutional use of power.

CHAPTER 33

FREE AND FAIR ELECTIONS IN INDIA: ANALYZING THE CURRENT SITUATION IN VIEW OF BASIC STRUCTURE THEORY

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1. Introduction

Election is the process in which people vote to choose a person or group of people to hold an official position.[1] Elections in India have a totally different aspect. They are not just limited to the choosing their representative but also include the curbing of the pre-election activities and conduct by the candidates, the party members, the voters, observers and hence implying that conducting elections in the largest democratic country is a massive and enormous activity. Further, the stakeholders as said above are not limited to the candidates contesting elections and the voters. It is implicit, that larger the elections so organized, more are the chances of the corrupt activities during the same. It is hence, no surprise to know of various practices or offences to be called as deviant practices. Malpractices in electoral processes is not limited to the offences committed by the candidates or the members of the parties' contesting elections, but also include agents thereof, the media both print and electronic, etc. hence contributing to the disturbances in the smooth functioning of the elections.

Free and fair elections constitute an integral part of the functioning democracy and the same has been implied in *Kihoto*

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[1] Definition of Election, Collins Dictionary.

Hollohan v. Zachillhu[2]. Furthermore, Parliamentary democracy and fair elections go hand in hand and have been declared as a part of basic structure of the Constitution. Therefore, to comprehend as to how organizing fair and free electoral process lead to upholding of basic structure of the Constitution, it is essential to briefly trace back the history of basic structure doctrine and its increasing significance in safeguarding the democratic framework of our country. In addition to this, it is also vital to discuss various steps taken and various policies brought in force to curtail the malpractices adopted by different players/ agents to strike an imbalance in the electoral process of our country and consequently the Parliamentary democracy.

2. Basic Structure Theory and its Significance in Electoral System

The theory of 'basic structure' finds its roots in the landmark judgment of *Kesavananda Bharati v. State of Kerala*[3]. The doctrine was propounded as the outcome of several political, judicial and social factors; primary emphasis has been placed on the judicial factors and the chronology of judgments leading to development of this doctrine. The Constitution functions as a consequence of interplay of three pillars, *i.e.,* legislature, executive and the judiciary. However, initially India did not possess any sort of backend support for the purpose of adequate democratic functioning and as a result constitutional amendment was commonly used as an instrument for subversion of a democratic institution[4]. Article 368[5] of the Constitution provides for amendment of any provision provided

[3] (1973) 4 SCC 225; AIR 1973 SC 1461.
[4] Christopher J. Beshara, Basic Structure Doctrines and the Problem of Democratic Subversion: Notes from India, 48 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 99 (2015), https://www.jstor.org/stable/26160109 (last visited Jun 14, 2023).
[5] Article 368, Constitution of India, 1950.

in the framework without any kind of inhibitions and thus the notion of 'Parliamentary sovereignty' and 'rule by law' came into existence. The apex court has not laid down or provided an extensive or exhaustive list of elements constituting basic structure in the Constitution. However, through various judgments, the Apex Court has highlighted different aspects as basic features embedded in the constitutional framework constituting as un-amendable features.

2.1 Development of Basic Structure Doctrine

The first attempt at establishing Parliamentary sovereignty and supermajority was made through insertion of Article 31A and 31B vide First Constitutional (Amendment) Act, 1951[6] where the former provision aimed at precluding the courts from reviewing the expropriation laws and the latter provision brought through the amendment inserted IX Schedule in the Constitution and thereby preventing the courts to declare such laws provided in the aforesaid Schedule as unconstitutional. The constitutionality of First Amendment Act was challenged with the constitutional validity of Fourth[7] and Seventeenth Amendment Act[8] brought in force in 1955 and 1957 in *Shankari Prasad v. Union of India*[9] and in *Sajjan Singh v. State of Rajasthan*[10]. The Supreme Court upheld the constitutional validity of the First Amendment in Shankari Prasad's case[11] where the apex court held that Article 368 endowed Parliament power to amend any part of the Constitution including Part III consisting of fundamental rights. Additionally, 'law' as provided under Article 13 of the Constitution connote ordinary Acts and Rules but do not cover in its ambit the Constitutional Amendments. Furthermore, the constitutionality of Fourth and

[6] The Constitution (First Amendment) Act, 1951.
[7] The Constitution (Fourth Amendment) Act, 1955| National Portal of India.
[8] The Constitution (Seventeenth Amendment) Act, 1964.
[9] 1951 SCR 89: AIR 1951 SC .
[10] 1965 AIR 845.
[11] *Id.*

Seventeenth amendment was also upheld in Sajjan Singh's case[12].

The essential part of the development of the basic structure doctrine is found in the ruling laid down by the Supreme Court in *I. C. Golaknath v. State of Punjab*[13], where the constitutionality of laws inserted in IX Schedule vide First, Fourth and Seventeenth Amendment Act were also questioned on the basis of the fact that the legislations so added in IX Schedule were in violation of fundamental rights under Part III. However, the ruling laid down for prospective effect of the said judgment and hence did not affect the validity of the aforesaid amendments. Besides, the Apex Court also highlighted that Parliament has not been conferred with substantial power to amend every part of the Constitution under Article 368 instead the Article only lays down the procedure for amendment, however the Supreme Court also laid down that power to amend the Constitution is also provided as a power of legislature under Article 245 therefore, 'law' so provided in clause 2 of Article 13 also cover in its ambit the constitutional amendments. The ruling laid down in Golaknath's case[14] struck a disagreement between judicial power and Parliamentary supremacy.

Another step was taken to supersede the increasing in application of judicial review through Golaknath's case[15] and subsequently 24th Amendment Act[16] and 25th Amendment Act[17] were brought in force to cancel out the effects of the ruling. The 24th Amendment provided for exclusion of constitutional amendments from the purview of the term 'law' under Article 13(2) and also stated that such constitutional amendment shall not be brought into question on the ground of infringement of

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[12] Supra note 9.
[13] 1967 AIR 1643; 1967 SCR (2) 762.
[14] *Id.*
[15] *Id.*
[16] The Constitution (Twenty-fourth Amendment) Act, 1971.
[17] The Constitution (Twenty-fifth Amendment) Act, 1971.

fundamental rights. On the other hand, 25th Amendment inserted Article 31C which provided that law made under the Article 31C for the purpose of implementation of clause (b) and (c) under Article 39 cannot be brought into question on the ground of violation of fundamental rights. The aforesaid constitutional amendments enhanced the powers of the Parliament and invoked Parliamentary supremacy over constitutional supremacy. Finally, the constitutional validity of the 24th, 25th and 29th constitutional amendments was brought into question in Kesavananda Bharati case[18] and consequently, Article 31C was struck down and the validity of 24th and 29th Amendment was upheld. Hence, it was laid down that Article 368 of the Constitution comprises of both power and procedure to amend the Constitution and Article 13 (2) does not include constitutional amendments in its purview. The crucial issue dealt in this case was extent and scope of powers of Parliament to amend the provisions of the Constitution, the Apex Court through 7:6 majority held that Parliament has the power to amend the Constitution but the power so conferred does not extend to changing and amending the fundamental values or the very basic nature of the Constitution itself. It is however pertinent to note that the judgment was perplexing as it was indeed difficult to point out as to what constituted 'basic structure'.

On similar lines, the Supreme Court also held other aspects like sovereignty, secularism, equality in status and opportunity included as part of basic features of the Constitution in the case of *Indira Gandhi v Raj Narain*[19]. Subsequently, the Supreme Court also laid down conducting of free and fair elections as a basic feature of our Constitution, in *Kihoto Hollohan v Zachillhu*[20].

[18] Supra note 3
[19] 1975 Supp. SCC 1.
[20] AIR 1993 SC 412.

It is imperative to take into consideration that simply declaration of conducting elections in an impartial and fair manner is not enough to ensure the same. Therefore, several initiatives were taken to uphold and protect one of the crucial basic feature of the Constitution which is deeply connected and intertwined with functioning of democratic structure of our country and consequently, Parliamentary democracy. Therefore, it is also imperative to define and explain in detail the current framework, *i.e.* the electoral system in India, the existing malpractices and the reforms so suggested.

3. Indian Electoral System

India is the largest democratic country in the world and therefore, conducting elections in such country is a mammoth exercise. The elections represent the general will of the people expressed as their votes. The votes of the electors crystallize into the mandate of the people. Elections are held in our country every five years. The representative of the people so chosen is believed to alleviate the general public's economic and social conditions. The legitimacy of the entire democratic system of governance depends on the efficacy and effective working of the electoral mechanism. If the verdict of the people, which forms the basis of the propriety and legitimacy of the political system, is vitiated by unethical methods, the faith of the people in the electoral system gets eroded and ultimately destroys the very foundation of democracy.[21] Democracy and electoral system are not exclusive hence in order to have an effective working of this very country, the conduct of elections is of free and fair utmost importance.

Further, India has dual party system. Also, Indian Parliament has two houses – Lok Sabha and Rajya Sabha, the lower house and the upper house respectively. The conduct of elections is not just limited to the lower house or upper house but extends

[21] India Votes – The General Elections 2014, (February 3, 2019) https://eci.gov.in/files/file/5673-india-votes-the-general-elections-2014/.

to the bye elections, elections for council of states, the election of President and Vice-President. Conducting all these elections is not possible single handedly and hence the role of Election Commission arises.

3.1 Election Commission of India

Election commission is a constitutional body setup under Article 324 of the Constitution. Article 324 of the Constitution envisages setting up of an independent Election Commission for holding free and fair elections. The Election Commission of was set up in accordance with the provisions of the Constitution on 25 January, 1950.

It is the duty of the Commission under the Constitution to hold free and fair elections, to both the houses of the Parliament, State Legislatures and the Offices of the President and Vice-President of India. The Commission, an independent constitutional authority plays a fundamental and critical role in providing level-playing field to various political parties. The President appoints the Chief Election Commissioner and Election Commissioners. The Constitution provides the safeguard against altering their service conditions and removal from the office. The Commission is fiercely independent and has been acclaimed internationally for its role in strengthening Indian democracy.

The election machinery is headed by Chief Electoral Officer at the State/UT level, and by District Election Officer at the District level. Electoral Registration Officers and Returning Officers discharge their duties provided in the law at the constituency level. During elections, a large number of Central and State Government officials are deployed to work for election on duties related to polling/security/election observation etc. All such

persons are deemed to be on deputation to the Commission and are subject to its control, supervision and discipline.[22]

In brief, Commission prepares electoral rolls, the voters list, assigns the symbols, prepares election expenditure and also enforces Model Code of Conduct which not only condemns the 'corrupt practice' and 'electoral offences' but also signifies the penal provisions attracted to the violation of the provisions of model code of conduct. The Election Commission ensures the observance of the Model Code of Conduct by political parties, including ruling parties at the Centre and in the States and contesting candidates in the discharge of its constitutional duties for conducting the free, fair and peaceful elections to the Parliament and the State Legislatures.

4. Malpractices in Electoral Processes

Deviance as above explained is not just limited to the behaviour but has now turned into offences and the crimes. The factors that instigate the deviant behaviour are not different from the factors as explained but in case where such aberrant behaviour arises in electoral processes can be primarily stated as 'money and power'. These factors have led to the criminalization of electoral process. Hence, it is an acknowledged fact in the Indian politics today. The National Commission to Review the Working of the Constitution provides for certain practices as deviant. There have been constant references to 3 MPs – money power, muscle power and mafia power – and to 4 Cs – criminalization, communalism, corruption, and casteism.[23]

This is noteworthy that in spite of the stringent rules and laws there are many deviant practices which are considered as

[22] Electoral Statistics Pocket Book 2017, Chapter – 1 Election Commission (February 3, 2019) https://eci.gov.in/statistical-report/pocket-book-2017/.
[23] National Commission to Review the Working of the Constitution, Review of Election Law, Processes Advisory Panel on Electoral Reforms; Standards in Political Life – Review of Election Law, Processes and Reform Options, 2001 (February 3, 2019).

'corrupt practices' and as 'electoral offences' under the Representation of People's Act, 1951 and other election laws. Some of these practices lead to the disturbances and defaults in counting votes at the end leading to biased consequences. These types of practices can be categorized as rigging of polls. It started from the states of UP and Bihar where the politicians hired the criminals, the goons to win elections.[24] The goons and the criminals so hired rig the polls through various modes like personation of genuine voter, tampering with ballot boxes and ballot papers, booth capturing, violence against candidates and their supporters, etc. It is presumed that the first two general elections were fair, except some devoid practices and irregularities which are so rampant and prevalent today.

Rigging of polls can be done by any or all of the following malpractices:

4.1 Booth Capturing

Booth capturing in simple terms signify seizure of the polling booths through unlawful methods for the purpose of affecting the orderly counting of votes. The same has been accordingly defined under Section 135A of the Representation of People's Act, 1951.

> *"Booth capturing includes, among other things, all or any of the following activities, namely —*
>
> *(a) seizure of a polling station or a place fixed for the poll by any person or persons, making polling authorities surrender the ballot papers or voting machines and doing of any other act which affects the orderly conduct of elections;*
>
> *(b) taking possession of a polling station or a place fixed for the poll by any person or persons and allowing only his*

[24] Rajhans, G.S. National Resurgence through elections- Subhash Kashyap, Shipra publications (2002).

or their own supporters to exercise their right to vote and prevent others from free exercise of their right to vote;

(c) coercing or intimidating or threatening directly or indirectly any elector and preventing him from going to the polling station or a place fixed for the poll to cast his vote;

(d) seizure of a place for counting of votes by any person or persons, making the counting authorities surrender the ballot papers or voting machines and the doing of anything which affects the orderly counting of votes;

(e) doing by any person in the service of Government, of all or any of the aforesaid activities or aiding or conniving at, any such activity in the furtherance of the prospects of the election of a candidate."

This offence has, still numerous occurrences even when there's a strict penalty prescribed for the offence so committed. Nearly 66 re-polls were held in Fifth Lok Sabha election. Of these 66 cases, the largest number, namely, 52 occurred in Bihar, 3 in Haryana, 6 in Jammu & Kashmir, one in Nagaland, one in Orissa, and 3 in Uttar Pradesh. Thus, it is clear that in the matter of this vicious practice of removal of ballot boxes or snatching away of bundles of ballot papers and marking them by members of unruly and riotous mobs and then dropping them into the ballot boxes or in the matter breaking the seals of the ballot boxes etc., the State of Bihar comes first. About booth capturing in Bihar, it may be pointed out that it has been in vogue in Bihar for quite some time, at least since the second general election of 1957.[25]

The most cases of booth capturing have been held in Bihar. In 1977 Lok Sabha elections, there was a rapid increase of 5% in the incidents of booth capturing all over India. Booth capturing, in general, has come a long way. The induction of EVMs though,

[25] Report on Fifth General Elections in India 1971-72 (Narrative and Reflective Part).

have reduced the number of incidents of booth capturing, hitherto they have not stopped entirely.

In general elections of 2009 and 2014 the booth capturing of the polls was the dominant for conducting re-polls under Section 58 and Section 58A of the Representation of People's Act, 1951.[26]

4.2 Personation in Place of Genuine Voter

It also notes that in the first general elections of 1952, 1250 offences were recorded and in 42 cases polling was adjourned. In 1954, there were 6358 cases of impersonation. In 1964, there were 6358 such cases. In 1964 elections, in 256 cases repelling was ordered.[27] The urchins may personate. They may apply for ballot papers in the names of adult persons who have been correctly included in the electoral rolls or may even vote in some fictitious names. There are certain instances where the population is largely *purdanashin,* then the men impersonate as women in *burqa* for the rigging of polls.[28]

4.3 Tampering of Voting Methods (EVMs/Ballot Boxes/Ballot Papers)

The dimension of the problem that has been revealed so far, is that out of more than 3,80,000 ballot boxes belonging to the Election Commission in the State of Bihar, only 1387 of them have so far been found to have duplicate numbers. These are confined to 7 out of the 55 districts in Bihar.[29]

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26 Phase 1-3, Secretariat of the Election Commission of India (February 10, 2019) https://eci.gov.in/files/file/1048-list-of-re-polls/?do=download&csrfKey=de4e4292374b69451a1ff4acb642b9fc .

27 S. N. Sharma Criminalisation of Politics and Convictional Disqualification, Criminalization of Elections, C & MLJ, 5 (1996).

28 Fifth General Elections (1971-72), Election commission. (February 14, 2019) https://eci.gov.in/files/file/7446-fifth-general-elections-in-india-1971-72/?do=download&r=17161&confirm=1&t=1&csrfKey=81fac3dd6de7b9ea6880ac7a51aa6897

29 Ballot boxes in Bihar, 1999 (Press note) ELECTION COMMISSION OF INDIA-August 25, 1999. (February 14, 2019) https://eci.gov.in/files/file/1915-ballot-boxes-bihar/.

Further, ECI in its report of Fifth General Elections had laid down certain contingencies that contribute to tampering of ballot boxes which includes unlawful taking away of ballot papers or accidently or unintentionally destroyed if they are either on their way to the place where ballot boxes are supposed to be kept or if they are in the lawful custody of the returning officer; or destruction of the ballot boxes takes place after counting of the votes by ECI and the bundles have been mixed up. [30] After the induction of electronic voting machines from 1999 elections, the incidents of tampering were reduced.

4.4 Violence against Candidates and their Supporters and Preventing Supporters of Opponent Candidates from Voting Through Fear or Fraudulence

Intimidating the voters during the course of elections has been prevalent during elections even now. Such practice has been deemed to be a corrupt practice under Representation of People's Act, 1951[31]. However, even upon condemning and covering it under ambit of corrupt practices, it is still rampant at states like Bihar, Uttar Pradesh and West Bengal. The voters of selected targeted areas are also threatened so that they are forced to vote for a particular candidate. There are various ways of threatening the voters, like through the tone of threatening that the secret vote won't remain secret or maybe creating a psychological pressure so created by goons of the ruling party.[32]

4.5 Manipulating Counting of Votes, With or Without the Connivance of Presiding Officers

This way has been an ultimate weapon of the goons of the contesting candidates or parties in order to cause discrepancies in the counting of votes and hence rigging the polls. For instance; in Assembly elections held in 1991, there was keen

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[30] Supra note 19.
[31] S. 123(2).
[32] Sibranjan Chatterjee, Criminalization, role of money, muscle power and electoral practices – National resurgence through election, Subhash C. Kashyap.

contest between the candidates of the Left Front and the Indian National Congress (INC) from Ballygunge constituency. At the last round of counting the light of the counting hall was suddenly put off, the counting agents of INC were severely beaten up, driven out of counting hall with the help of police on duty and within half an hour the Returning officer declared the leader of Left Front victorious.[33]

5. The Need for Reforms

Elections have now been a subject and a prevalent way of obtaining both power and money and hence the election is not anymore, the pious way of helping or changing the detrimental conditions of the society. The above discussed deviant practices are now, in general, the casual scene during the elections, hence asking for reforms and changes to be brought, not if eliminate completely, but to reduce it for the purpose of successful future elections in the largest democratic country. The Parliament has provided us with the legislations like Representation of People's Act, IPC, Prevention of Corruption Act that provide for the punishments against the offenses by the contesting candidates.

Moreover, various committees and commissions had been set up which in its report recommended, reiterated and asserted the need to bring in reforms in electoral processes and the laws thereto. Certain judgments were also served by the Hon'ble Supreme Court in the course of reforming the electoral process. These decisions serve as an upper-hand to reduce such practices committed by the candidates standing for elections, party representatives, goons and gangs during the polls in order to rig the counting of votes with a view to obtain the biased results. Apart from the committees and the judicial decisions, the Election Commission also asserts that the model code of conduct is binding on the party representatives contesting for elections. All these elements contribute in reduction of the

[33] Supra note 25.

corrupt and electoral offenses during the polling against the opposition party's candidates and the voters.

5.1 Legislative Measures

Legislative measures provide for the conduct of elections of the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections.[30] Several legislations and provisions were brought forth to curb malpractices during elections. It is important to briefly highlight the Acts and the corresponding provision as well.

5.1.1 The Representation of People's Act, 1950: The Act provides for the manner of allocation of seats, delimitation of constituencies for election in House of People and State Legislatures, eligibility of voters at these elections, Manner of preparation of electoral rolls and the way of filling seats in Council of States etc. Also, the Act lays down disqualifications of voters and candidates from contesting in elections.

5.1.2 The Representation of People's Act, 1951: The Act highlights for way of conducting an election of Houses of Parliament and Legislature of each State, provisions for qualifications and disqualification of membership of those Houses. Furthermore, the Act also lays down provisions specifying as to what constitutes corrupt practices and electoral offences. The Act also provides for certain grounds for disqualification of members of Parliament and Legislatures of State. The Act also specifies provisions of the expenditure by the contesting parties during elections, advertising and role of media with respect to the elections, the corrupt practices leading to disqualifications and the manner in which the elections are to be conducted. Section 8 of the Act lays down disqualifications of membership of Parliament and State

Legislatures when the candidate contesting elections is convicted for certain specified offences.

5.1.3 Corrupt Practices: Section 123 of the Act provides for the corrupt practices leading to disqualification under section 8A read with Section 99 of the Act. Corrupt practices include the practices such as bribery in any form, undue influence in form of any direct or indirect; where appeal has been made by a particular candidate (or agent) on the basis of candidate's religion, race, caste, community or language; promoting any feelings of enmity or hatred between different classes of the citizens on basis of race, religion, caste, language or community; facilitating propagation of sati; publication of any statement which is with respect to personal character or conduct of any other contesting candidate; contravention of Section 77 and booth capturing.

5.1.4 Electoral offences: The electoral offences have been specified under Section 124 to Section 136 of the Act. The electoral offences primarily relates to attempt or act towards promotion of feelings of enmity or hatred on the basis of race, religion, caste, community or language[34], convening, or holding of any public meeting and further prohibits display of any matter with respect to elections by way of cinematograph, or any other medium like holding of musical concerts or theatrical performance[35]; conducting any exit poll followed by publishing or publicizing through print or electronic media or in any other manner[36], canvassing in or near polling station[37], Attempting to

[34] Section 125, Promoting enmity between classes in connection with election, Representation of People's Act, 1951

[35] Section 126, Prohibition of public meetings during period of forty-eight hours ending with hour fixed for conclusion of poll, Representation of People's Act, 1951.

[36] Section 126A, Restriction on publication and dissemination of result of exit polls, etc., Representation of People's Act, 1951.

[37] Section130, Prohibition of canvassing in or near polling station, Representation of People's Act, 1951.

take, a ballot paper out of a polling station; or capturing of booth with intention of rigging of polls.[38]

5.2 Steps Taken by the Election Commission

5.2.1 The Model Code of Conduct (MCC): The MCC for guidance of political parties and candidates did not find any place in the statutes. Historically, the credit of giving idea of a model code for political parties should go to State of Kerala, which adopted, for the first time, a code of conduct for observance for political parties during the election to the State Legislative Assembly in February 1960. A draft MCC was voluntarily approved by the representatives of the leading political parties of the State at a meeting specially convened for the purpose by the State Government. This Code covered, in detail, important aspects of electioneering, like meetings and processions, speeches and slogans, posters and placards.[39] The MCC is a set of norms for guidance of political parties and candidates during election period, evolved with the consensus of political parties. The Election Commission ensures its observance by political parties including the ruling parties and candidates during the period of elections so that nobody can disturb the level playing field for all political parties involved in the electoral process. The Election Commission has become more and more assertive to ensure observance of MCC in its true letter and spirit by all the stakeholders. Even the judiciary has recognized the fact that the Election Commission is well entitled to take necessary steps as per the provision of MCC to ensure conduct of a free and fair election."[40]

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[38] Section 135A, Offence of booth Capturing, Representation of People's Act, 1951.

[39] Manual of Model Code of conduct, Election Commission (https://eci.gov.in/files/file/9375-manual-on-model-code-of-conduct/?do=download&r=22186&confirm=1&t=1&csrfKey=bee33744d7c8810801d2f4836e0fe7b1)

[40] *Id.*

MCC for guidance of political parties and candidates is a small but unique document[41]. It comprises of 8 parts; part I of MCC emphasizes minimum standards of appropriate behavior and conduct of political parties, candidates and their workers and supporters during the election campaigns[42]; parts II and III specify the manner of conducting of public meetings and processions by political parties and candidates[43]; parts IV and V lays down the code of conduct for political parties and candidates at the polling booths[44]; part VI highlights how political parties and candidates can bring forth to the observers appointed by the Election Commission; part VII analogically holds the entire base of Model Code, it highlights several issues relating to Government in power and corresponding Ministers, for instance, visits of Ministers, utilizing Government transport and Government accommodation, etc.[45]; Lastly, part VIII is a newly included part which specifies that election manifestoes should not contain anything in violation of principles enshrined in the Constitution.

5.2.2 Induction of VVPAT: It was in initial time of 2017 when in the wake of Assembly Elections when a several political parties alleged that EVM were tampered and further Election Commission declared that subsequent assembly elections would be conducted through VVPAT.[46] VVPAT are the extensions to the EVMs. EVMs are no doubt considered a significant step up in enhancing the growth of democracy, but the introduction of VVPAT *i.e.* "Voter verifiable paper audit trail" provides for further transparency and verifiability in poll

[41] *Id.*
[42] Model code of conduct for the guidance of political parties and candidates, Election Commission of India (April 4, 2019) https://eci.gov.in/mcc/
[43] Supra note 39
[44] Id, Part IV – Polling Booth.
[45] Id, Part- VII Party in Power.
[46] Bhatnagar, Gaurav Vivek -EC Admits to Slight Delay in VVPAT Delivery for 2019 Poll, The Wire (April 10, 2019) https://thewire.in/government/ec-admits-to-slight-delay-in-vvpat-delivery-for-2019-polls.

process[47]. The VVPAT systems received assent for use on August 14, 2013 by the Government of India by way amendment in Conduct of Election Rules, 1961. "The Commission used VVPAT with EVMs first time in bye-elections from 51-Noksen (ST) Assembly Constituency of Nagaland. Thereafter, VVPATs have been used in selected constituencies in every election to Legislative Assemblies and 8 Parliamentary Constituencies in General Election to the House of People."[48]

5.3 Judicial Intervention

Criminalization of politics has always been a great threat and hindrance in the functioning of the democracy. Where the legislature is silent, the judiciary plays its activist role. Judiciary has played an important role in providing forth a series of certain judgments enunciating guidelines adopted as electoral forms and thus providing an upper hand in transparency and conducting of free and fair elections and thus inhibiting any corrupt practices. The motive of certain judgments includes but is not limited to, curbing of hate speech, disclosure of income and assets by contesting elections, disclosure of criminal antecedents. There are several instances where judiciary through its activism have tried to prevent sabotaging of the electoral process however, here the description of these instances are extended to the landmark judgments.

5.3.1 ***Common Cause v. Union of India***[49]: In this writ petition filed by the Common Cause, a registered society, as public interest litigation, it was alleged that the political parties were not submitting their accounts to the income tax authorities as required under Section 13A of the Income Tax Act, 1961. It was also alleged that crores of rupees were being spent on elections by candidates and political parties without indicating the source of the money so spent and far in excess of the limits of election

[47] EVM, VVPAT – Manual, Election Commission of India.
[48] *Id.*
[49] Common Cause, A Registered Society v. Union of India & Ors, AIR 1995.

expenses prescribed under Section 77 of the Representation of the Peoples' Act, 1951, and that political donations were being made by companies in violation of Section 293A of the Companies Act, 1956.[50] In this case the Court held:

- The political parties are under a statutory obligation to file return of income in respect of each assessment year in accordance with the provisions of the Income Tax Act. The political parties referred to by us in the judgment who have not been filing returns of income for several years have prima facie violated the statutory provisions of the Income Tax Act as indicated by us in the judgment.
- The expenditure, (including that for which the candidate is seeking protection under Explanation I to Section 77 of the Representation of Peoples' Act, 1951) in connection with the election of a candidate to the knowledge of the candidate or his election agent -shall be presumed to have been authorized by the candidate or his election agent. It shall, however, be open to the candidate to rebut the presumption in accordance with law and to show that part of the expenditure or whole of its was in fact incurred by the political party to which he belongs or by any other association or body of persons or by an individual (other than the candidate or his election agent). Only when the candidate discharges the burden and rebuts the presumption, he would be entitled to the benefit of Explanation 1 to Section 77 of the Act.

5.3.2 *Mohinder Singh Gill v. Chief Election Commissioner*[51]: At the 1977 general election to the House of the People, the poll in the Firozpur Parliamentary Constituency was taken on 16th March, 1977. According to the result sheet, Mohinder Singh

[50] *Id.*
[51] Mohinder Singh Gill and Another v. The Chief Election Commissioner, New Delhi and Others, AIR 1977.

Gill, the petitioner, was leading over his nearest rival by 1921 votes. Only 769 postal ballot papers then remained to be counted by the Returning Officer. He took up the counting of these postal ballot papers at his Headquarters at Firozpur on 21st March, 1977 at 3 pm, and rejected 248 out of the said 769 postal ballot papers. At that stage, there was some mob violence in the counting hall and the postal ballot papers remaining to be sorted out and counted candidate-wise were burnt.

The Election Commission within its ambit, ordered fresh polls and held earlier elections as void. The petitioner, Mohinder Singh Gill filed a writ petition before the Delhi High Court and the Court dismissed the petition. The petition was then filed before the Supreme Court. The Court dismissed the appeal, holding that the order of the Election Commission directing a re-poll was a step in the process of election and as the election process was not yet complete, the writ petition under Article 226 the challenging Commission's order was not maintainable in view of the bar under Article 329 (b) of the Constitution.

5.3.3 ***PUCL v. Union of India***[52]: In December 2002, in response to a judgment, the Parliament amended Representation of the People Act, 1951. The Amended Act required a candidate for office to provide information "as to whether he is accused [or convicted] of any offence punishable with imprisonment for two years or more in a pending case" (Section 33A). No candidate could be compelled to disclose any additional information, including educational qualifications and assets and liabilities, "notwithstanding anything contained in the judgment of any court or directions issued by the Election Commission" (Section 33B). The Supreme Court examining the constitutional validity of Section 33 held that democracy based on 'free and fair elections' is considered as basic feature of the Constitution as held in the Indira Gandhi's case. Lack of adequate legislative

[52] People's Union of Civil Liberites (P.U.C.L.) & Anr. v. Union of India & Anr. Landmark Judgments on Election Law, vol. 4, 237, (SC 2002).

will to fill the vacuum in law for reforming the election process in accordance with the law declared by this Court in the case of Association for Democratic Reforms, obligates this Court as an important organ in constitutional process to intervene. In my opinion, this Court is obliged by the Constitution to intervene because the legislative field, even after the passing of the Ordinance and the Amendment Act, leaves a vacuum. This Court in the case of Association for Democratic Reforms has determined the ambit of fundamental 'right of information' to a voter. The law, as it stands today after the amendment, is deficient in ensuring free and fair elections. This Court has, therefore, found it necessary to strike down Section 33B of the Amendment Act so as to revive the law declared by this Court in the case of Association for Democratic Reforms.

5.3.4 ***Lily Thomas v. Union of India***[53]: The background facts relevant for appreciating the challenge to sub-Section (4) of Section 8 of the Act are that the Constituent Assembly while drafting the Constitution intended to lay down some disqualifications for persons being chosen as, and for being, a member of either House of Parliament as well as a member of the Legislative Assembly or Legislative Council of the State. Accordingly, in the Constitution which was finally adopted by the Constituent Assembly, Article 102(1) laid down the disqualifications for membership of either House of Parliament and Article 191(1) laid down the disqualifications for membership of the Legislative Assembly or Legislative Council of the State. The Court held that the Parliament had no power to enact sub-Section (4) of Section 8 of the Act and accordingly sub-Section (4) of Section 8 of the Act is ultra vires the Constitution, it is not necessary for us to go into the other issue raised in these writ petitions that sub-Section (4) of Section 8 of the Act is violative of Article 14 of the Constitution. It would have been necessary for us to go into this question only if sub-Section (4)

[53] (Writ Petition (Civil)798 of 1995).

of Section 8 of the Act was held to be within the powers of the Parliament. In other words, as we can declare sub-Section (4) of Section 8 of the Act as ultra vires the Constitution without going into the question as to whether sub-Section (4) of Section 8 of the Act is violative of Article 14 of the Constitution, we do not think it is necessary to decide the question as to whether sub-Section (4) of Section 8 of the Act is violative of Article 14 of the Constitution.

5.3.5 ***Lok Prahari v. Union of India***[54]: The writ petition was filed for declaration of non-disclosure of assets and sources of income of self, spouse and dependents by a candidate would amount to undue influence and thereby, corruption and as such election of such a candidate can be declared null and void under Section 100(1)(b) of the Representation of the People Act, 1951. The basis of the Court's decision is that voter's right to know about their candidate is an extension of their freedom of expression; voters cannot be said to have freely expressed themselves (by voting) without having appropriate information about their candidate. This judgement also extends the Association for Democratic Reforms decision to include information about the candidate's 'associates'; relevant information for voters is no more limited to the candidate's personal information".[55]

6. Are the Reforms Effective?

By all the ways, the Judiciary, the legislature and even the constitutional setup the Election Commission, adopted, it seems, that in spite of the all the measures, there exists a void through which the deviant practices in the electoral processes are practiced. In the rural areas where the muscle power and the authority of money is prevalent and 'above' the law and

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[54] Lok Prahari, Through Its General Secy. S.N. Shukla v. Union of India AIR 2018 SC 1921.

[55] Sethiya, Aradhya- For cleaner, fairer elections, February 21, 2018 (April 7, 2019) https://www.thehindu.com/opinion/op-ed/for-cleaner-fairer-elections/article22809421.ece.

order, the practices relating to rigging of polls still take place. The practices are not just limited to the coercion but extend to and not limited to, violation of provisions of Model code of conduct, not adhering to the guidelines enunciated by the Courts and the law laid down by the legislature.

The Election Commission, for the purpose of enhanced transparent and democratic General election, 2019, provides for the online publication of the cases where the violation of Model code of conduct took place. A brief analysis of the complaints and the decisions by the Election commission has an expected outcome *i.e.* due to non-statutory function and mere advisory function of the Model Code of Conduct, there's violation of the provisions of the Code of conduct at large and that various members of different parties have adopted ignorant and adamant attitude towards the democratic conduct of elections.

For instance, it was ordered by the Election Commission via notification 437/6/INST/2019/MCC[56] that no pictures shall be used for the purpose of propagation during elections. Yet, the Present CM of Uttar Pradesh, Shri Yogi Adityanath, in spite of such statutory order, did not comply with the same. Another instance is, the SHO of Nishat has been alleged of taking part in electioneering. There are similar instances of such alleged breach, which are still at the stage of initial scrutiny.

Further, the Election Commission has been a watchdog and is diligently working towards the organizing a free and fair elections. It is noteworthy, that the Election Commission has restricted on release of certain movies namely, 'NTR Laxmi', 'PM Narendra Modi' and 'Udyama Simham', which claimed to either diminish or enhance the electoral prospect of the candidate or

[56] Commission Order, April 15, 2019 also available at https://eci.gov.in/files/file/9789-commissions-order-to-shri-yogi-adityanath-dated-05042019/?do=download&r=24327&confirm=1&t=1&csrfKey=11cb30d530503d4df045b52ec00b14c7.

the party in the garb of creative freedom.[57] The restriction so laid down shall, according to such order, be continued till the operation of MCC and ought not to be publicized or to be put to public display in electronic media in the area where MCC is in operation.

7. Conclusion

It has been 50 years since the 'basic structure doctrine' was highlighted by the Apex Court and the Court has been doing its best to conform it judgements to the same; consequently, the democratic will is also declared as an essential feature of the Indian Constitution which can simply not be eliminated by form of any amendment. Furthermore, it is undisputed that conducting of elections is a way of maintaining that essence of democracy. India is the largest democratic country in the world and soon shall be conducting the largest 'democratic' elections (General Assembly, 2024 – 18th Lok Sabha elections). Indeed, it is a high time to work on the reforms that are required to curb such practices. Let alone the conclusion herein is not going to work. The collective inference from all the reports, the law enacted and the intervention of our 'activist' judiciary is that the organs of our country possesses the requisite powers to bring in change in the present detrimental conditions of the 'fair and free' elections yet, due to certain constraints, the same is not possible.

The major constraint, in our opinion, is the inadequacy or perhaps, the lack of political will to bring certain uplifting developments in the laws. The Commissions set up, *suo moto* and on the recommendation by the Apex Court, have attempted and laid down recommendations sufficient to cleanse the 'dirty work' done during the course of elections. The withholding of

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[57] Commission order for CEO, April 10, 2019(No. 491/MM/2019/Comm.) (April 11, 2019) https://eci.gov.in/files/file/9873-commissions-order-on-film-titled-pm-narendra-modi-regarding/?do=download&r=25039&confirm=1&t=1&csrfKey=843351c730572a0884aa0224d9b89d83.

such recommendations, due to its 'consulting' nature only, couldn't be implemented.

Since the MCC doesn't hold any statutory obligations, hence, its effect is not as stringent as it ought to be. Had it been, compulsory to be complied with, the conditions of the pre-election days would be not so derogatory. The Election Commission, as a part of the transparent elections, provides for the certain violations of the MCC on its website[58]. However, the biggest problem here is inability of the Commission to penalize such actions or to reach its roots in order to prevent subsequent activities. Further, the inability of the Judiciary to administer the compliance of the orders laid down is another hurdle in the smooth functioning of the electoral processes

Since the law-making power, solely lies with the Parliament, it is the need of the hour that the Legislature realizes the necessity of the changes to be brought for the very purpose, to curb the offences during such period. The changes brought shall not be effective in an instance, but they shall be leading to de-criminalization of the politics eventually.

[58] Election Commission of India, Available at https://cvigil.eci.gov.in/mcc (April 11, 2019).

CHAPTER 34

DOCTRINE OF BASIC STRUCTURE: CONSTITUTIONALIST THEORY OF GOVERNMENTAL CONTROL

Dr. Aditi Sharma*

1. Introduction

The 'doctrine of basic structure' acts as a protective measure against potential abuses of amending power of the Parliament. It sets boundaries on Parliament's ability to amend legislation, ensuring that it does not tamper with the essential framework of the country's legal system. Consequently, this gives rise to additional inquiries such as; does Parliament have unrestricted authority to make amendments? If the response is negative, it implies that the architects of the Constitution did not have the intention to bestow such unrestrained powers. Consequently, it raises a subsequent query as to how far Parliament can amend the fundamental laws of the country? Without constraints on this power, there is a potential for Parliament's capability to modify laws disguised as constituent authority to be exploited. The resolution of these questions and the extent of this notion can be better elucidated through court judgements and a thorough analysis of the doctrine of basic structure.

2. Doctrine of Basic Structure

To embark on the exploration of constitutional law, it is essential to acknowledge that the Constitution lays the foundation for a self-governed nation. The Constitution finds its roots in principles of natural law. As articulated by Edmund Burke, a prominent figure in Conservatism, a Constitution is a living entity that adapts and develops with time, encapsulating the core values of the nation. It draws from the wisdom of the

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past to shape its current state and holds the potential for a future that surpasses the current prosperity.

Article 368 finds its place in Part XX of the Constitution and encompasses three distinct categories of amendments *viz*: amendments through a simple majority, amendments through a special majority, and amendments through a special majority requiring ratification by the States." In order to keep pace with the evolving nature of society, it is essential to regularly amend the Constitution. A Constitution that remains unchanged poses a major hindrance to the progress of the country.[1] The inclusion of a constitutional amendment provision acknowledges the need to adapt to the evolving dynamics of society. As 'We the People' encounter various challenges over time, the Constitution must remain responsive to the ever-changing political, economic, and social conditions.

If there were no provision for amending the Constitution, individuals might have turned to non-constitutional methods, such as resorting to warfare, in their attempts to modify it. The framers of our Constitution were highly concerned about preserving the unity of India. As a result, they established a mechanism that allows citizens to file grievances against the government, whether at the Central or State level, even for small sums like 100 rupees. These grievances would be addressed through a legally binding decision supported by the Consolidated Fund of India, and they would be regarded as obligations that must be fulfilled without the possibility of being challenged by any State Legislature or Parliament. Neither the courts nor the legislative body have provided a thorough or exclusive definition of the fundamental framework. Rather, the

[1]"The Scope and Limits of the Basic Structure Doctrine" (*Jus Corpus*, September 14, 2020), https://www.juscorpus.com/scope-and-limits-of-the-basic-structure-doctrine/, accessed May 29, 2023.

courts have employed a case-by-case methodology to demarcate the notion of the fundamental structure.

The creators of the Constitution had a profound understanding of India's cohesion and respect around 73 years back. Nevertheless, in the present era, the Parliament is exerting significant efforts to shield itself from the jurisdiction of the judiciary, which serves as the protector of the Constitution. "As it was defined in *Kesavananda Bharati v. State of Kerala*[2]," the objective of this concept is to tackle a legal problem that arises within written Constitutions due to the interplay between provisions safeguarding fundamental rights and granting Parliament the power to amend the Constitution.

In "*Minerva Mills case*[3], the judiciary's" interpretation of the fundamental structure has been broad, asserting that Parliament holds the power to modify the Constitution, meticulously crafted by the founding fathers, when deemed necessary for societal requirements. It is crucial to recognize that the Constitution embodies our cultural legacy, and ensuring its integrity and distinctiveness should not be open to uncertainty or inquiry.

2.1 Essential Features of Basic Structure of Indian Constitution

Over the course of several years, the judicial system has progressively broadened the interpretation of the fundamental framework, encompassing a range of scenarios. The subsequent elements outline key components:

1. In Kesavananda Bharati, the 'basic structure' was recognized and held that the same is comprised of the following:

[2] Supra note 1.
[3] Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789.

a) Chief Justice Sikri identified a set of fundamental components that form the foundational structure of the Constitution. These encompass: the supreme authority of the Constitution, the existence of republican and democratic forms of governance, the secular nature of the Constitution, the allocation of powers among the legislative, executive, and judicial branches, and the federal structure of the Constitution.

b) Justices Shelat and Grover emphasized two additional fundamental characteristics of the Constitution. Firstly, the directive to establish a welfare state as outlined in the Directive Principles of State Policy. Secondly, they underscored the importance of preserving the unity and integrity of the nation.

c) Justices Hegde and Mukherjea succinctly enumerated the following essential attributes of the Constitution as basic structure: the sovereignty of India, the democratic nature of the political system, the unity of the nation, the safeguarding of individual freedoms granted to citizens, and the necessity to establish a welfare state.

d) Justice Jaganmohan Reddy recognized that the Preamble of the Constitution and corresponding constitutional provisions encompass significant aspects of the fundamental features. These aspects include a sovereign democratic republic, Parliamentary democracy, and the presence of three branches of government."

2. In *"Indira Gandhi v. Raj Narain,*[4] Justice" K. K. Mathew highlighted the paramount importance of the judicial review. Likewise, Justice Y. V. Chandrachud

[4] 975 SCR (3) 333.

has elucidated four essential principles that are regarded as immutable. These principles are:

a) The recognition of our nation as a sovereign democratic republic,

b) Ensuring equal status and opportunities for every individual,

c) Upholding secularism and safeguarding the freedom of thought and religion, and

d) Upholding the rule of law (which was implicitly acknowledged as a fundamental attribute of the foundational framework by Justice Mudholkar in the Golak Nath case)[5].

3. In "*Minerva Mills* case,[6] the judges, concurring with the majority, reached the" consensus that the primary essence of the Constitution lies in limiting the authority of the Parliament to do amendments through judicial review.

4. In *Central Coal Fields case*, the Court held that it is crucial to guarantee significant access to legal remedies as a fundamental aspect of the basic structure.[7]

5. In *Kihoto Hollohan v. Zachillhu*, the Court emphasized the significance of democracy and a fair electoral process as integral elements of the basic structure.[8]

6. In *S. R. Bommai v. Union of India*, the court recognized democracy, federalism, and secularism as essential pillars of the basic structure.[9]

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[5] Golak Nath v. State of Punjab, (1967) 2 SCR 762.
[6] Supra note 4.
[7] Central Coal Fields Ltd. And Anr. v. Jaiswal Coal Co. And Ors., AIR 1980 SC 2125.
[8] Kihoto Hollohan v. Zachillhu and Others, 1992 SCR (1) 686.
[9] S. R. Bommai v. Union of India, AIR 1994 SC 1918.

7. In *M. Nagaraj v. Union of India* case, the court recognized the significance of the principle of equality as a crucial component of the basic structure.[10]

3. Natural Law and Basic Structure of Indian Constitution

The purpose of this part of chapter is to establish the connection between two separate concepts: natural law and the foundational structure of the Indian Constitution. Natural law is based on the belief that there exists an enduring and superior law that holds more authority than any ruler. It provides a comprehensive framework for all rights, encompassing a wide range of rights. The concept of human rights emerged from natural law, emphasizing the idea that individuals possess an inherent identity that is distinct from the State. Grotius later presented a non-theistic explanation of natural law. From this, we can conclude that human rights are an integral part of the broader natural law system."

In Part III of the Constitution, human rights are explicitly included, although only specific rights are protected as fundamental rights. A comparison between the Universal Declaration of Human Rights (UDHR) and Part III of the Indian Constitution reveals certain changes. For example, the right to life and liberty mentioned in Article 3 of the UDHR corresponds to Article 21 of the Indian Constitution. The right to a fair trial stated in Article 10 of the UDHR is reflected in Article 22 of Part III. Similarly, the right to property in Article 17 of the UDHR, formerly Article 31 of the Constitution, is now constitutionally safeguarded under Article 300A. Furthermore, the right to freedom of expression in Article 19 of the UDHR is adopted as Article 19 in the Constitution of India. This demonstrates that

[10] M. Nagaraj and Others v. Union of India & Others, (2006) 8 SCC 212.

fundamental rights are a subset of the broader human rights, forming the second connection in the chain of rights.[11]"

Let us now examine whether the fundamental principles of natural law, which go beyond the boundaries of basic rights, are included in the central framework. This matter has previously been discussed in segment 2.1. Based on that analysis, it can be inferred that the creation of the core framework was driven by the judiciary's aim to establish a more effective constitutional provision in order to prevent an excessively powerful executive branch. As a result, we can state that while many fundamental rights were appropriately safeguarded, the entirety of Part III did not receive the same level of protection. The Minerva Mills case emphasized the significance of maintaining a balance between Parts III and IV as the essence of the Constitution. The core structure encompasses much more than just fundamental rights; it also incorporates the fundamental principles of natural law as demonstrated through democratic institutions, the rule of law, and similar principles.

4. Scope of Amending the Basic Structure of Indian Constitution

Without a doubt, fundamental rights hold immense significance as the foundation of a civilized society. However, as the socioeconomic landscape undergoes transformations, society itself evolves. The boundaries of these rights may require constant redefinition, and the very core concepts might undergo significant changes. Many Constitutions, including the British Constitution, incorporate provisions for amendments to accommodate necessary adjustments in legal relationships and align them with the realities of society. The British Constitution serves as an excellent example of a flexible framework that enables easy implementation of changes, particularly in

[11] V. Nayak, "The Basic Structure of the Indian Constitution" (*Constitution Net*), https://Constitutionnet.org/vl/item/basic-structure-indian-Constitution, accessed May 29, 2023.

constitutional law. It is of utmost importance to highlight that having extensive power to modify and a simple procedure for making amendments does not undermine or endorse the eradication of essential rights. Instead, it offers a mechanism to protect these rights by adjusting them to changing social circumstances. The durability of fundamental rights stems from the support they receive from both the political and societal realms, rather than relying on the lack of legal provisions that could nullify them.

The authority and process of modifying the Constitution are delineated within Article 368 of the Constitution itself. This Article holds the highest authority for validating the legitimacy of constitutional amendments, as it possesses a distinct status as a constituent power. The Constitution acts as the fundamental reference point and starting position for any changes. To enact an amendment, the prescribed procedure outlined in the amendment bill must be followed. constitutional amendments require a special majority for approval. The process involves acquiring a majority of the Members who are present and casting their votes in both Houses. In the case of an amendment bill concerning State matters, as indicated in the instant Article, it must also gain approval from the Legislatures of at least half of the States before it is submitted to the President for his/her assent.[12]

Scholars in India have extensively deliberated on the degree to which Parliament can alter fundamental rights while remaining within the boundaries of explicit or implicit restrictions, while also following the prescribed procedure. The issue first arose in the Shankari Prasad case in 1951, where the constitutionality of the First Amendment was challenged. As a result, this legal challenge prompted numerous amendments to the fundamental

[12] "Scope of Amenability in the Indian Constitution" (*Unacademy*), https://unacademy.com/content/railway-exam/study-material/polity/scope-of-amenability-in-the-indian-Constitution/, accessed May 29, 2023.

rights.[13] The amendments under consideration were undergoing evaluation in relation to Article 13(2). There was a contention that the amendment infringes upon fundamental rights. However, the Supreme Court has reached a unanimous decision stating that the impugned amendment was in accordance with the law, as it does not fall within the purview of Article 13. The Court's conclusion is that the term 'law' mentioned in Article 13 specifically pertains to common law and does not encompass constitutional amendments. It is important to mention that the Constituent Assembly seamlessly transformed into the Provisional Parliament, consisting of the identical members who had originally supported the amendment.

In the second instance, *Sajjan Singh v. State of Punjab*,[14] the Seventeenth Amendment of 1964 encountered similar challenges. However, in a narrow 3:2 ruling, the Court determined that Article 368, which grants the authority to amend the Constitution, has a wide scope that encompasses the power to repeal the fundamental rights protected under Part III. Furthermore, it was concluded that Article 13 does not have jurisdiction over this authority. The landmark Golak Nath case marked a significant turning point as the Supreme Court expressed dissent with previous legal precedents, bringing attention to this issue once again. The majority, with a vote of six to five, established that the term 'law' mentioned in Article 13(2) includes constitutional Law. Consequently, this interpretation imposed restrictions and limitations on the power granted by Article 368 to enact changes. Specifically, it prohibited Parliament from modifying any provisions within Part III in a manner that would eliminate or reduce the rights guaranteed by those provisions.

[13] Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar, 1951 AIR 458.
[14] 1964 AIR 464.

The Court's ruling in the Kesavananda case, which occurred in April 1973, marked a significant milestone in the prolonged debate, ultimately providing a definitive resolution. Challenges were raised against the legitimacy of the Twenty-fourth, Twenty-fifth, and Twenty-ninth amendments, as some argued that Parliament lacked the authority to pass amendments that limited or eliminated fundamental rights. The 24th amendment introduced changes to Article 13 and Article 368, specifically stating that constitutional amendments do not fall within the definition of 'law' as mentioned in Article 13(2). Additionally, Article 368 explicitly established the power and procedure for modifying any provision of the Constitution through addition, alteration, or repeal, requiring the President's approval of a lawfully enacted amending Bill by both Houses. The petitioners argued that even if Parliament possessed the power to amend fundamental rights; there were inherent and implied limitations preventing alterations to the fundamental structure or core principles of the Constitution.

Responding to the first argument, the Court concluded that since Article 368 granted Parliament the authority to modify fundamental rights and Article 13's definition of 'law' did not include constitutional amendments, the amending power could not be restricted. Consequently, the Supreme Court upheld the 24th Amendment. However, there were differing opinions among the judges regarding the extent of the amending authority and its limitations. While disagreement persisted regarding the definition and content of the basic structure, a majority of 7 out of 13 judges maintained that the Constitution's fundamental structure could not be changed through the amending power.

The entire Constitution is considered the fundamental law, and objectively determining which parts are more fundamental than others present a challenge. The distinction relies on subjective preferences and choices, as there are no objective criteria for differentiation. It is not feasible to assert that essential features

are inherently eternal and unchangeable, even if it were possible to differentiate between essential and non-essential aspects.

The ruling of Kesavananda had significant implications in the following manners:

a) Previously, the judiciary had asserted that there were constitutional provisions of equal or greater significance than fundamental rights. However, Golak Nath limited this interpretation solely to fundamental rights. On the contrary, Kesavananda expanded the notion by recognizing supplementary components that form the fundamental framework of the Constitution, making them unchangeable through any constitutional amendment.

b) Golak Nath established the notion that all fundamental rights are incapable of being amended, which was viewed by various individuals, including the government, as an excessively rigid stance. In contrast, Kesavananda introduced a degree of flexibility and contended that not all fundamental rights are inherently indispensable to the Constitution's fundamental framework. According to Kesavananda, only those fundamental rights that are regarded as essential elements of the basic structure are considered unamendable.

5. What Constitutes the Basic Structure?

The *I. R. Coelho* case represents a crucial turning point in the development of the legal interpretation concerning the foundational structure of the Constitution.[15] In this case the Court built upon a previous ruling in the M. Nagaraj case, issued a few months prior. It addressed the dilemma that arises during the interpretation of the Constitution, where a conflict emerges between staying true to the original intent of the

[15] I. R .Coelho v. State of Tamil Nadu AIR 2007 SC 861

Constitution and the inherent vagueness of the constitutional text, which permits multiple understandings of its principles. The Court highlighted in the Nagaraj case that the essential structure need not be explicitly stated in the constitutional wording.

In Nagaraj, the Court restated that the principles of secularism, federalism, socialism, and reasonableness, which are vital to the overall consistency of the Constitution, are inherently incorporated in constitutional law, even if they are not expressly stated in the constitutional text. In IR Coelho Court expanded on this notion by highlighting that the fundamental structure encompasses both explicit provisions and these underlying principles. It differentiated between the 'essence of the rights test' and the 'rights test', denoting the disparity between the fundamental principle supporting an explicitly mentioned right and the actual right as expressed in the constitutional text."

In I. R. Coelho the Court stated that the Kesavananda Bharati case should not be interpreted to suggest that fundamental rights are excluded from the fundamental framework. Expanding on this understanding, the Court proceeded to develop its argument. Citing Nagaraj, the Court in I. R. Coelho wisely concluded that fundamental rights are not granted to the people by the government; rather, they inherently belong to the people themselves. Part III of the Constitution simply acknowledges their fundamental existence and ensures their protection. Thus, each fundamental right listed in Part III holds a 'foundational value' as expressed by the Court.

Subsequently, "the Court acknowledged Article 32 as an integral part of the fundamental framework and cited the Minerva Mills case to support its position. Moreover, it reiterated that Articles 14, 19, and 21, collectively as the 'golden triangle'," are also indispensable components of the Constitution's fundamental framework.

The Court faced the task of clarifying and distinguishing between the 'rights test' and the 'essence of rights' in the I. R. Coelho case, aiming to comprehend their significance concerning the rights outlined in part III and their role in safeguarding the fundamental structure. Although laws can be included in the Ninth Schedule, the Court asserted that when Article 32 is invoked, these laws must undergo a thorough assessment to ensure their alignment with fundamental rights. It is permissible to entirely remove Part III from the Ninth Schedule, with no limitations on the frequency of reviews. Consequently, any modification made "to the Ninth Schedule has implications for Article 32, which is a crucial element of the foundational structure and therefore subject to examination within the evaluation of the current fundamental rights outlined in Part III."

The Court's ruling in this specific case sets a precedent by introducing a test called the direct impact and effect test, also known as the rights test, to evaluate the constitutionality of legislation included in the Ninth Schedule. This test focuses on the practical consequences of the law rather than its formal characteristics. The court's role is to determine if such interference is justified and if it violates the fundamental structure. Hence, the Court concludes that the direct impact and effect test, or rights test, can be employed to assess the constitutional validity of provisions within the Ninth Schedule. This test emphasizes that the key factor should be the impact of the law, rather than its specific form. The court will examine whether this interference is appropriate and if it constitutes a violation of the fundamental framework.

Consequently, this stance effectively transfers the authority to decide the necessity of a law from Parliament to the judiciary. Moreover, it grants the courts the power to scrutinize the permissibility of such cases using both the rights test and its fundamental components. In both situations, the courts have the jurisdiction to determine the extent to which the

infringement has impacted various aspects. Ultimately, this factor could significantly influence the final decision reached by the court.

6. The Ninety-Ninth Constitutional Amendment and the Doctrine of Basic Structure

The Ninety-Ninth constitutional amendment was introduced to establish a constitutional body that would replace the current judge appointment system. Currently, the collegium is responsible for making decisions regarding Supreme Court appointments, while the executive has a limited consultative role. However, the Constitutionality of the Ninety-Ninth Amendment was questioned in the case of *Supreme Court Advocates-on-Record Association v. Union of India*. The primary concern in this case was whether the amendment was deemed invalid due to its alteration or undermining of the fundamental framework of the Constitution.[16]"

The petitioners claimed that, as per the Constitution, the judiciary possesses the highest power in the appointment of judges, ensuring its independence and separation from the Executive branch. Conversely, the respondents argued that the involvement of the Executive in the appointment process does not compromise the independence of the judiciary. They contended that the proposed system preserves the judiciary's prominence and independence while maintaining the essential framework of the Constitution. The amendment aims to enhance accountability, transparency, and necessary reforms.

However, "the Court rejected these arguments and delivered a 4:1 verdict, declaring that the new system violates the fundamental structure of the Constitution, which mandates the judiciary to have primary authority in appointing justices. The removal of this prevailing influence in the current proposal is

[16] Supreme Court Advocates-on-Record Assn. v. Union of India, AIR 2015 SC 5457.

deemed unacceptable. Consequently, the contested amendment cannot be upheld. Critics have expressed concerns regarding specific provisions of the 99th Amendment, namely Articles 124A, 124B, and 124C, as they undermine the separation of powers, the independence of the judiciary, and the rule of law.

7. Conclusion

The Constitution has experienced notable modifications since its enactment in the 1950, incorporating additional rights throughout the years. As a result, the current foundational framework reflects extensive judicial supervision of fundamental rights and the corresponding constitutional structure. It is wise and recommended for the basic structure doctrine to establish limitations on the adaptable nature of societal concerns, preventing its misuse to challenge regular laws. Neglecting to do so would carry severe consequences, as it would open the door to potential harm and undermine the very structure of the Constitution. In fact, one could argue that utilizing the basic structure theory to evaluate the Constitutionality of ordinary legislation would essentially dismantle and weaken the fundamental framework of the Constitution.

CHAPTER 35

UNEASY STANDOFF BETWEEN JUDICIARY AND EXECUTIVE: CASE OF JUDICIAL ACTIVISM

Mr. Harsh Kumar*
Ms. Sarita**

> *"There can be no liberty if the legislative and executive branches are combined in one person, one body of judges, or both. Furthermore, there is no room for freedom if the judicial power is combined with the legislative power; in such case, the judge would also serve as the legislator, putting the subject's life and liberty at risk of arbitrary control. The judiciary might act violently and oppressively where it cooperated with the executive power. Everything would come to an end if the same individual or someone else used these three powers."*[1]
>
> – Montesquieu

1. Introduction

The concept of *'the separation of powers'*, as it has become more widely known, was developed by Montesquieu, whose research into Locke's works and incomplete understanding of the English Constitution of the Eighteenth Century served as the foundation for his work.

The notion of separation of powers was developed by Montesquieu. He discovered that concentration of authority in one person or group of people led to tyranny. As a result, he believed that the government's authority should be divided

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[1] Durga Das Basu, Administrative Law 23 (Prentice – Hall of India 1985).

among three branches: the legislature, the executive, and the judiciary. The fundamental principle is as follows:

1. Every organ should be independent of the others; and
2. No organ should execute functions that belong to another.

Lock and Montesquieu derived the ideas of this philosophy from changes in British constitutional history at the beginning of the 18th Century. Following a protracted battle between Parliament and the King, Parliament won in 1688, granting it legislative authority that eventually led to the passage of the Bill of Rights.

As a result, the King gradually acknowledged the legislative, taxing, and judicial authority of Parliament. Although England eventually discarded this organisational categorization of responsibilities and embraced the Parliamentary form of government, the King conducted executive powers, Parliament handled legislative powers, and the courts carried out judicial powers at the time. For Montesquieu, protecting political liberty was crucial. “Political liberty can only be found if there is no misuse of power”, he adds. History has demonstrated, however, that any man given authority is likely to abuse it and push the boundaries of that authority. One power must be kept in check on another because of the very nature of things in order to prevent this misuse.

The separation theory still has value in that it emphasizes the necessity of creating sufficient checks and balances to stop administrative arbitrariness, even though it may not be possible to adhere to it strictly when faced off with diverse socioeconomic problems that demand an advanced welfare state’s solution.

The first Prime Minister of India and arguably the most important component of the Constituent Assembly which created the Indian Constitution, Jawaharlal Nehru, stated the following in a speech on September 10, 1949: “Within bounds, no judge and also no Supreme Court could declare itself a third

chamber". The sovereign will of Parliament may not be overruled by the Supreme Court or any other judicial authority. It can highlight our occasional errors, however when it pertains to the community's future, no judiciary should stand in the way. In case it is a hindrance, Parliament is also responsible for creating the complete Constitution.

2. Separation of Powers in India

The Indian government is divided into three branches: legislative, executive, and judicial. Article 50 of the Indian Constitution[2] provides for the separation of the judiciary and the executive. However, the Indian Constitution doesn't provide the notion of power division in a watertight compartment.

While Articles 53(1) and 154(1) of our Constitution give the President & the Governor, respectively, the executive power of the Central Government and State Government, the Indian Constitution does not have a provision that gives a single organ the legislative and judicial power. It has been decided that there is not a clear separation of powers as a result.

In *Indira Nehru Gandhi v. Raj Narain*[3], Ray, C.J. added that the Indian Constitution merely stipulates the separation of powers in a general sense. India's Constitution does not follow a precise division of powers like those in the American or Australian Constitutions.

Separation of powers is a fundamental element of the Constitution, Beg J. stated in the case of *Kesavananda Bharati v. State of Kerala*[4]. The distribution of powers is a fundamental element of the Constitution, according to Beg J. The three separate organs of the Republic cannot perform the duties of

[2] Art. 50 separation of judiciary from executive – The State must take action to keep the executive and judicial branches of state government apart.
[3] 1975 Supp SCC 1. para 136.
[4] AIR 1973 SC 1461.

one another. The structure of the Constitution won't change even if Article 368 is reinstated.

The division of powers principle is not strictly upheld by the Indian Constitution. One of the three branches of government is the executive, which answers to the legislative. All legislation requires the President's or Governor's assent in theory.[5] In addition, under Articles 123 and 212, the President or Governor has the authority to make ordinances when Houses of the legislature are not in recess. According to the case of *A. K. Roy v. Union of India*[6], this is a legislative authority, therefore an ordinance has exactly the same standing as a law of legislation.

The President possesses the authority to grant pardons under Article 72. The Governor has the authority to grant pardons as well.[7] The legislature performs judicial functions while punishing those who ignore its directives or violate privilege.[8] Thus, while the executive conducts some legislative tasks like subordinate legislation, the legislature, which controls and can even remove the executive, additionally carries out some executive functions such as those needed for maintaining order in the House.

Aside from that, it is obvious that the Supreme Court judges are chosen by the President in conjunction alongside the Chief Justice of India and such Supreme Court and High Court judges as he deems necessary for the purpose.[9] The apex court and High Court justices cannot be dismissed except for misbehaviour or incapacity, and only if an address supported

5 INDIA CONST. art. 111, art. 200 & art. 368.
6 A. K. Roy v. Union of India, AIR 1982 SC 710.
7 INDIA CONST. art. 61 - Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases. Any individual guilty of breaking any law related to an issue that the state's executive power extends to may request a pardon, reprieve, respite, or remission of penalty, or the Governor of the state may suspend, remit, or commute their sentence.
8 INDIA CONST. art. 105, cl. (3) & art. 194, cl. (3).
9 INDIA CONST. art. 124, cl. (2).

by two-thirds of the entire membership of the House has been approved in each House and presented to the President.[10]

However, in the matter of *K. Veeraswami v. Union of India*,[11] the impeachment concept was denied in Lok Sabha due to a lack of support from the 2/3 majority of members present and voting. The congress party won the election. As a consequence, there were 176 votes favourable of impeachment and none against. It is obvious from the above argument that there is no clearly defined separation of powers in India.

The salaries of judges are either provided for in the Constitution or can be set by a bill passed by Parliament.[12] Every judge is qualified to such privileges and allowances, as well as such rights in respect of leave of absence & pension, as may be set from time to time, as indicated in the second schedule.[13] The Governor of the state shall appoint, as well as post and promote, a district judge in any state after consultation with the High Court performing authority in relation to such state.[14]

In the case of *A. K. Gopalan v. Madras*,[15] the court declared that it has the authority to conduct judicial review of both the legislative and executive branches. The Apex Court has the authority to set regulations & employ administrative authority over its staff under Article 145. As a result, every organ of government is obliged to conduct all three types of tasks, namely legislative, executive, and judicial. Furthermore, each organ has a dependence on the other organ in some way to check & balance it.

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[10] INDIA CONST. art. 124, cl. (3).
[11] (1991) 3 SCC 655.
[12] INDIA CONST. art. 125, cl. (1) & art. 221, cl. (2).
[13] INDIA CONST. art. 125, cl. (2) & art. 221, cl. (2).
[14] INDIA CONST. art. 233, cl. (1).
[15] AIR 1950 SC 27.

3. Reasons of Uneasy Standoff Between Judiciary and Executive

Since the adoption of the Constitution in 1950, India has seen a constant struggle between the judiciary and the administration to rein in each other, with incidents culminating in heated turf wars that have resulted in the repression of democracy and the Constitution.

Within a few months after the Constitution's promulgation, the Nehru government encountered a wave of adverse court judgements challenging several of its initiatives, such as land reforms. In 1951, the government responded by enacting the 1st Constitutional Amendment. The goal was basic and obvious. The government wanted to protect its reform plan from court interference.

- Broad Range of Powers: The Indian Supreme Court's powers are equivalent to those of its counterpart in the United States, including extensive original and appellate jurisdiction including the authority to rule on the legality of laws enacted by the Parliament. However, in exercising its authority, the court has been at the centre of two significant conflicts involving India's constitutional and political order.
- Court's Fundamental Rights vs State's Directive Principles of State Policy: The efforts of the court to provide preference to the Fundamental Rights provisions in the Constitution in a situation where they fall into conflict with the Directive Principles, particularly the broad ideological and policy goals of the Indian state, to which the executive and legislature have frequently given priority.
- Authority of Judicial Review: The court's power of judicial review of laws enacted by Parliament, which has frequently resulted in stalemates pointing to a constitutional conflict between the principles of Parliamentary sovereignty and judicial review.

- The Collegium System: The collegium method of judicial appointment is often known as judges selecting judges. The Supreme Court invented collegium system. The collegium system is not mentioned in either the original Indian Constitution or subsequent revisions. From 1950 until 1973, the Chief Justice of India was appointed by the senior most judge on the Supreme Court. However, the nomination and transfer of Apex Court and High Court judges became a topic of contention between the judiciary and the state in 1973.
- The Collegium System vs the National Judicial Appointment Commission: Which Is Better? The NJAC was declared unlawful and void by the courts. The Supreme Court challenges to the NJAC's admission of politicians, particularly two distinguished members of society. These distinguished individuals will be nominated by a Selection Committee comprised of the Chief Justice, the Prime Minister, & the leader of the opposition in the Lok Sabha for a three-year term and will not be eligible for re-nomination. If politics are involved, what happens to judicial independence, according to the Court? Those opposed to the NJAC say that it would grant the executive excessive power over the selection of judges.
- The Collapse of Parliament: When the executive & legislature fail to give solutions to people' problems, citizens turn to the courts for redress. In the course of giving justice to citizens, the court occasionally oversteps its bounds, resulting in a clash with the government.

4. Consequences of Tussle Between Judiciary and Executive

- Generates a Distrustful Environment: The squabble generates a distrustful environment between the branches, resulting in decreased cooperation and stagnation in the reform process. Some blame games

and grandstanding are employed to either conceal or announce their supremacy.

- Power Struggle: Both sides appear to be involved in a tug of war over something vital, which is the authority of judicial nomination to the superior judiciary. But what is shocking and difficult to explain is that both the administration and the judiciary believe in making nominations to the higher court based on merit, which can help to the judiciary's accountability and efficiency, but there is no agreement between the two.
- Lack of Awareness of Separation of Powers: A lot of them are unaware of the Constitution's enshrined notion of separation of functions, a vital principle of the Constitution for preserving harmonic inter-institutional balance, along with the distinctions in their separate ecosystems.
- A Misalignment Between Expectations and Reality: Several laws, including contract laws, environmental laws, and even business laws, are out of step with the new objectives. The judiciary's interpretations of economic legislation remain unchanged. Even when they arrive late, they are not always in sync with the executive's preferred direction. As a result, there is dissatisfaction with the judiciary. While some might be genuine, many are the result of a misalignment between expectations and reality.

5. Way Forward

- Strike a Balance, Particularly as the Executive: Even with robust constitutional protections, inter-institutional balancing is a difficult endeavour. While all three branches of government (Legislature, Executive, and Judiciary) must work together to maintain that fragile balance, it is primarily the executive's obligation to work extra hard to achieve it. Because it is a governmental body for all practical purposes, the executive is possibly the most visible instrument of the state.
- Improving the Whole Governance System: There's also widespread dissatisfaction with the executive in many

elements of daily civic life. Furthermore, it is well acknowledged that the executive is the most prolific litigator, clogging the legal system. These are the results of poor governance on the part of the executive.

- Human Resource Management: Human resource management, as well as maintaining adequate financial resources & operational independence for all agencies, are all tasks of the government's executive branch.
- Respecting Each Other's Boundaries: To break free from this suboptimal governance trap and improve the efficiency and effectiveness of all wings and agencies, persons in positions of authority must take a moment to breathe, think aloud, and come up with appropriate solutions while knowing and respecting the limitations of the State's three wings. Institutional solutions to difficult issues such as inter-institutional balancing and efficiency improvement necessitate a balanced, institutionalized approach.

6. Conclusion

There is a middle ground where constitutional ideals can be most effectively upheld and applied between either extreme of supremacy of Parliament and the development of a '*Judiciocracy*', or all-powerful judiciary.

The region where the rule of law and the collective will of the populace coexist, is in democracies. A legitimate and impartial administration will put forth every effort to implement policies that are in line with public preferences, and it is the moral and legal responsibility of the court to review these policies.

In the case of *P. Kannadasan v. State of T. N.,*[16] the apex court of India ruled that laws established by state and federal legislatures that are in violation of the Constitution may be overturned by constitutional courts. The legislature cannot pass a law declaring the court's ruling void when an act of legislation

[16] P. Kannadasan & Ors. v. State of Tamil Nadu & Ors., (1996) 5 SCC 670.

is found to be illegal by the courts because of Parliamentary incompetence. It also cannot overturn or invalidate the court's ruling. This does not, however, prevent the legislature, whose members have the power to pass the law, from doing so. Similar to how a legislature may alter the decision's fundamentals. The argument that the new law or revised law aims to execute or circumvent the court's decision cannot be used to challenge it. This clarifies what 'check and balance' means in the context of an Indian government system based on the separation of powers.

In the case of *Indira Nehru Gandhi v. Raj Narain*,[17] The political usefulness of the concept of the division of powers has now become widely recognized according to Chandrachud, J. Without the deliberate implementation of its delicate checks and balances, no Constitution can exist. Like courts shouldn't become involved in 'political thicket' issues, Parliament must acknowledge the courts' jurisdiction. The separation of powers notion is a restraining principle founded on the innate self-preservation caution that liberty is the superior quality of bravery.

The scholar believes that the judiciary's role is to interpret the law as and when it becomes effective, not earlier. However, the judiciary also intervenes in the legislative process before the bill becomes law. In the current situation, the researcher believes that it is critical to implement the theory of checks & balances among the three organs of the state.

Confrontation between the legislative and the court is bad for democracy, and this is a period when we need effective checks and balances for running a good government. The 'tussle' that exists between the executive, legislature and the judiciary is

[17] (1975) 2 SCC 159.

fictitious. On the other side, a unified court and executive is devastating for constitutional government and human rights.

The issue is inherent in the institution. The executive must assure the judges that they will not be hampered in their independence. Also, the court should not be so sensitive that everything is a threat to their independence. This clash is the source of their strength.

CHAPTER 36

ANALYSING THE BASIC STRUCTURE OF THE CONSTITUTION THROUGH LANDMARK JUDGEMENTS

Ms. Rekha Goswami[*]
Ms. Sejal Jain[**]

1. Introduction

The spirit of the Constitution has been best captured by Dr. B.R. Ambedkar in his words as: *"Constitution is not a mere lawyer's document. It is a vehicle of life, and its spirit is always the spirit of age".* The study of the best form of governance or the system of the government has been carried out by many scholars but Aristotle gave the most apt analyses where he concluded that democracy is the best form of government. Chanakya, believed that if there is no order in the society then *matsya nyaya* meaning the strong and powerful will exploit the weak, will prevail and it is the duty of the state particularly the King to look after this aspect. Further, he presented his ideas of an ideal king in his treatise, Arthashatra, which included highest qualities of sharp intellect, strong memory, keen mind, bold, brave, promulgator of dharma, etc.

The set of written rules and regulations, called the Constitution originated with the American and French revolution. This idea was a shift from the traditions of the ancient norms where the whims and fancies of one person controlled the lives of many and fate of a nation. The Nineteenth Century witnessed a period of struggle for independence and change of world order with more and more nations breaking the shackles of the colonial past. With new countries, came the Constitution of these

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countries which promised freedom, equality and fraternity but the practicalities were a bit different.

The Constitution is our country's most important written document. It acts as the perfect basis for all other Indian legislation. More specifically, the Constitution is the fundamental law upon which all other laws are based. Unconstitutional laws are also frequently referred to the Parliament and when found to be unconstitutional are declared void. There have been several disputes in this area on the fundamental basis of the Indian Constitution. A constitutional amendment that eliminates or significantly changes the text's fundamental organization is invalid.

Basic structure, in its most basic form, denotes and explains the structure or elements without which the Constitution cannot exist. As a result, the essential structure includes components that are required for the existence of the Constitution. It connects everything. Ingredients that must be present at all times in the Constitution and cannot be eliminated. When taken as a whole, the basic structure provides a comprehensive picture of the Constitution's contents, which include the nature of polity, character, law of the land, and kind of government.

2. Doctrine of Basic Structure

The 'basic structure' is a living doctrine meaning that it is not exhaustive in nature and is evolving with the judgements of the apex court. It is not found anywhere in the Constitution. This is a concept/idea that has evolved over time as our Constitution and legislative system have matured, as well as through various incidents and judicial decisions that have affected the course of history. The modification to the paradigm reflects the legislating power of Parliament.

It contributes to the preservation of the character and spirit of the Indian Constitution, as well as peoples' rights and liberties,

all while protecting the nature of Indian democracy. Time and again the judiciary found certain legislations to be in conflict with the basic tenants of the Constitution and the courts had taken stand to preserve and conserve this doctrine upholding the principles of constitutional morality.

3. Amenability of the Constitution: Some Landmark Cases

The backbone of a Constitution is often referred to as the basic structure because the Constitution cannot stand alone. As a result, the basic structure's flexibility is beyond comprehension, and the Constitution is painted with the paint of rigidity. Amendments to constitutional clauses are permitted as long as the fundamental structure stays unchanged. Any modification that weakens the core framework is void and may be overturned. The original drafters of the Constitution and the keepers of the law are enthusiastic protectors of the fundamental structure.

3.1 *Shankari Prasad v. Union of India*

In this case, the petitioners contended that Article 31A and Article 31B are unconstitutional because they infringe crucial fundamental rights, because the term 'law' as defined in Article 13(2), includes constitutional amendments. In response to the assertion the Court ruled that, while changes are preferable over existing laws, Article 13(3) does not provide them with any protection. Although the term 'law' in Article 13(2) normally refers to constitutional reform, it must also be construed to refer to ordinary legislative power.[1]

The First Amendment Act's validity was established as a consequence, and it was also decided that modifications made as part of the constituent power of the Parliament, including changing basic rights, are exempt from Article 13(2). The

[1] We hold that, in the context of Article 13, law must be understood to mean rules and regulations made in the exercise of ordinary legislative power rather than constitutional amendments made in the exercise of constituent power. As a result, Article 13(2) does not apply to amendments made in accordance with Article 368.

Parliament approved and enacted 16 additional Amendment Acts to the Constitution in the subsequent 13 years. The insertion of the Ninth Schedule transformed the nature of the Constitution from a controlled Constitution into an unrestricted one. The Shankari Prasad case established Article 368's[2] superiority, and the Parliament began introducing amendments to the Constitution from the left, right, and centre.

In 1964, the Union Legislature enacted the 17th constitutional (Amendment) Act. To protect them from judicial scrutiny, this Act and 43 others were added to the Ninth Schedule. Additionally, substantial changes were made to Article 31A to secure the constitutional validity of estate transactions. The government's unregulated use of the Ninth Schedule, as well as the government's ongoing violation of a significant number of peoples' basic rights and liberties, prompted those who had been wronged to contest the extent of legislative revisions once more in the case of *Sajjan Singh v. State of Rajasthan*[3].

3.2 *Sajjan Singh v. State of Rajasthan*

In this case, a challenge to the enactment of the Seventeenth Constitution (Amendment) Act of 1964 was brought before the Supreme Court in this case. The petitioners said that it went against the power created by Article 226 and the method described in Article 368 of the Constitution. It was brought up already in the Shankari Prasad case whether or not fundamental rights may be altered to which the Court affirmed.

By a 3:2 majority, the Supreme Court decided that Parliament has the power to alter any provision of the Constitution and that Article 13 only applies to minor legislative changes rather than

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[2] Parliament has the authority to change the Constitution and procedures, so any provision of this Constitution may be amended by addition, change, or repeal by Parliament in the exercise of its constituent authority in accordance with the guidelines outlined in this article, regardless of what else is stated in the Constitution.

[3] [1965] 1 SCR 933.

significant ones. Further, the Court asserted that the Shankari Prasad case decision was accurate, and that Article 368 provided the Parliament the power to change any provision of the Constitution, including fundamental rights. However, this is case for the first time, the two opposing judges in this decision theorized the concept of the Constitution's basic structure. It is arguable, according to Justice Mudholkar, whether modifying a major part of the Constitution is the ability to make straightforward amendments in essence, rewrite the Constitution — and, if the latter, determine whether it falls inside Article 368's ambit.

There are numerous assurances in Part III of the Constitution, Justice Hidayatullah said,

> *"It would be hard to assume that they were the plaything of a particular majority. If this were to be held, it would first indicate that the most solemn provisions of our Constitution are on an equal footing with all other provisions and even based on a less stable basis than the ones included in the proviso."*[4]

3.3 *Golaknath v. State of Punjab*[5]

In the Seventeenth Constitutional (Amendment) Act of 1964, the government included the Punjab Security and Land Tenures Act, 1953, to the Ninth Schedule of the Constitution. According to the statute, brothers may only maintain 30 acres of land each, with the rest considered surplus. 500 acres belonged to the petitioner's family (two brothers), with the remaining acres being deemed surplus land by the State.

Disgusted, the petitioner filed a petition under Article 32 alleging violations of his right, protected by Articles 19(f) and (g), as well as Article 14, and that the change made by the public

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[4] Justice Hidayatullah, *supra* note 3 at 962.
[5] Golaknath v. State of Punjab AIR 1967 SC 1643.

authority was unconstitutional. The association's challenged governing body cannot deprive it of the primary privileges provided. Part III of the Constitution, which also determined that the word 'regulation' used in Article 13(3)(a) embraces a wide range of legal and protected regulation. The Seventeenth Amendment Act should be deemed void and unlawful as a result of the protected amendments to Article 13(2).

The judgement reversed the earlier ruling in Sajjan Singh and Shankari Prasad, which had backed Parliament's ability to change any provision of the Constitution, including Part III, which deals with basic rights. Because of this decision, the Parliament was unable to impose limitations on fundamental rights.

The Supreme Court in 6:5 majority ruled in favour of concluded that a constitutional amendment adopted under Article 368 of the Constitution is likewise an ordinary 'law' within the meaning of Article 13(3) of the Constitution. It was agreed that Article 368 should only enable techniques of modification, with the legislative residuary power retaining the ability to alter. Since the legislative authority was tied to the goals of this Constitution, Article 13(2) provided it impossible to modify or abolish fundamental rights.

The Golaknath judgement, which prohibited the Parliament from further violating individual's fundamental rights by adopting laws that essentially ended the Parliament's oppression, was significant for the development of Indian democracy. The decision seeks to defend those essential qualities that are analogous to the fundamental rights of mankind, which no government may renounce via legislation.

Regardless of its importance, the choice was erroneous. The ruling helped to strengthen the Constitution. Any changes to the Constitution must be approved by the Constituent Assembly. Furthermore, the court only shielded Fundamental

Rights from Parliament's authoritarianism, not all characteristics of the fundamental character.

3.4 *Kesavananda Bharati v. State of Kerala*[6]

In this case a constitutional bench of thirteen judges heard and decided the case. The majority, in the instant case has outlined five aspects of the Constitution as its basic feature. These are:

i. The supreme authority of the Constitution;
ii. Republic and democratic governance;
iii. The secular character of the Constitution;
iv. The federal character of the Constitution; and
v. The division of powers between the legislative, executive, and judicial branches of government.

Apart from these five features listed above, some other fundamental features of the Constitution also have been marked as its basic feature. The DPSP's idea of a welfare State, sovereignty, individual liberty, preamble.

3.5 *Minerva Mills v. Union of India*[7]

In this case the Supreme Court held that the limited amending power of the Parliament is a part of Constitution's basic framework. The Court found that the Parliament's limited amending jurisdiction was crucial to the structure of the law and that departing from it would be bad for the way cases were organized. The Court concluded after considering the arguments that having restricted modifying authority is a basic quality and that breaking the law is an action that invalidates the fundamental framework. The Court continued by stating that, in some circumstances, both judicial review and basic rights comprise essential structure. The Court further stressed

[6] (1973)4 SCC 225.
[7] AIR 1980 SC 1789

that the peaceful coexistence of fundamental rights and guiding principles of the State is also essential.

3.6 *Woman Rao and Others v. Union of India*[8]

In this case, Supreme Court held judicial review as a basic feature of the Constitution. The Court held that the legislations placed in the Ninth Schedule after April 24, 1973 are reviewable. On this day, the Kesavananda Bharati decision was made.

4. Conclusion

From the various judgements, the following have emerged as 'basic features' of the Constitution:

1. Supremacy of the Constitution;
2. Sovereign, democratic and republican nature of Indian polity;
3. Secular character of the Constitution;
4. Separation of powers between the legislature, executive and judiciary;
5. Federal character of the Constitution;
6. Judicial review;
7. Freedom and dignity of the individual;
8. Rule of law;
9. Harmony and balance between the Fundamental Rights and Directive Principles;
10. Free and fair elections;
11. Independence of judiciary;
12. Limited power of Parliament to amend the Constitution;
13. Powers of the Supreme Court under Article 32; and
14. Powers of the High Courts under Article 226.

The largest written Constitution in the world, the Constitution of India, lays up ideal foundation for the smooth administration of the State. The primary portions of the Constitution that are

[8] AIR 1981 SC 271.

unaltered by amendments are referred to as the 'basic structure'. They are boundaries that are impenetrable and immutable. The fundamental framework of the Constitution was designed to be flexible enough to accommodate future changes. The Courts have never been eager to jeopardize the core structure, no matter what the urgency or scenario. Always handled like a child, the basic framework is covered in the softest cotton.

CHAPTER 37

BASIC STRUCTURE DOCTRINE OF CONSTITUTION

Mr. Sankalp Mirani*

1. Introduction

A country's legal system is governed by its Constitution, which is a key document that lays forth its guiding ideals, beliefs, and traditions. The basic structure of a Constitution refers to the fundamental principles and values that form the foundation of a legal system. The concept of 'basic structure' is essential to preserving the integrity and stability of the constitutional framework. The basic structure doctrine provides a framework for interpreting and applying constitutional provisions, ensuring that they are not violated or undermined by the government or other entities. Although concept of basic structure has been a talk of the town since years but the final affirmation of the doctrine was affirmed in the famous case of *Kesavananda Bharati v. State of Kerala*[1] in 1973. Since then, the doctrine has been established in case to case to ensure that the Parliament does not misuse its power under Art. 368 to amend the Constitution in such a way that it erases the very basic feature of the Constitution. There are certain characteristics of a Constitution which are very basic to it and Parliament through its legislature cannot alter such basic features.

2. Background and Significance of the Basic Structure of Constitution

The concept of the basic structure of a Constitution originated in India in the 1960s. The Supreme Court of India, in the landmark case of *Kesavananda Bharati*[2], established the

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[1] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

[2] *Supra note* 1.

doctrine of the basic structure of the Constitution. The court determined that the operation of the Indian Constitution depends on several fundamental elements, including the supremacy of the Constitution, the separation of powers, and the protection of fundamental rights, such essential features are essential for the proper functioning of the democratic society and cannot be amended or altered by the government.

Since then, several constitutional systems have accepted and used the fundamental structure idea around the world, including the United States, South Africa, and Australia. The doctrine has become an essential tool for preserving the integrity and stability of constitutional frameworks, safeguarding against the government's arbitrary use of its power, and protecting fundamental rights.

3. Evolution of the Basic Structure Doctrine

3.1 Origin and Historical Background

The United States Constitution and the notion of implied powers serve as the foundation for the idea of the fundamental elements of a Constitution. According to the idea of implied powers, the federal government possesses some implied powers that are not expressly specified in the Constitution but are required to carry out its listed functions. Later, in the 1960s, the idea of a Constitution's fundamental components was created and used in India.

3.2 Kesavananda Bharati Case in India

In the famous decision of *Kesavananda Bharati*[3], the Indian Supreme Court developed the theory of the basic structure of the Constitution. The Court, in this case came up with the basic structure doctrine and held that there are certain basic features of the Indian Constitution, such as separation of powers, the

[3] *Id.*

supremacy of the Constitution, and the protection of fundamental rights, are essential to the functioning of a democratic society and thus they cannot be amended or altered by the government. The court was also of the opinion that the power conferred by the Constitution under Art. 368 is not unlimited and must be exercised within the framework of the basic structure of the Constitution.

3.3 Influence and Spread of the Doctrine

The basic structure doctrine of the Constitution has since been adopted and applied in various constitutional frameworks around the world, including the USA, UK, South Africa and Australia. The doctrine has become an essential tool for preserving the integrity and stability of constitutional frameworks, safeguarding against the unbridled exercise of power by the government, and thus the protection fundamental rights.

4. Understanding the Basic Structure Doctrine

4.1 Conceptual Framework

The basic structure doctrine is a conceptual framework that establishes the fundamental principles and values that form the foundation of a legal system. The doctrine holds that certain essential features of a Constitution, such as the separation of powers, fundamental rights, judicial independence, federalism, and the supremacy of the Constitution, are inviolable and cannot be amended or altered by the government.

4.2 Judicial Review and its Role

The basic structure doctrine is closely tied to the concept of judicial review, which is the power of the judiciary to review and strike down laws and actions that are *ultra virus* to the Constitution. The doctrine provides a framework for interpreting and applying constitutional provisions, ensuring that they are not violated or undermined by the government or other entities.

4.3 Balancing Constitutionalism and Democracy:

The basic structure doctrine is often seen as a tool for balancing Constitutionalism and democracy. The doctrine ensures that the government is not able to arbitrarily amend or alter the Constitution, which safeguards the integrity and stability of the constitutional framework.

5. Key Elements of Basic Structure of the Constitution

5.1 Separation of Powers

The separation of powers is a fundamental principle of the basic structure of a Constitution. According to this principle, executive, judicial, and legislative organs of government should not interfere in the working of one another. It makes sure that neither branch of the government has an excessive amount of authority and the government functions within the bounds of the Constitution.

5.2 Fundamental Rights

Fundamental rights are a key element of the basic structure of the Constitution. These are the rights that are inherent to all individuals and are protected by the Constitution. The rights to life, liberty, and property as well as the freedoms of speech and expression, equality before the law, and the right to a fair trial are all considered fundamental rights.

5.3 Judicial Independence and the Rule of Law

Independence of the judiciary and the rule of law are important elements of the basic structure of a Constitution. Judicial independence ensures that the judiciary is free from political influence and is able to make impartial decisions. The rule of law guarantees that government functions within the confines of the Constitution and that the rights of individuals are protected.

5.4 Federalism and Distribution of Powers

Federalism and the distribution of powers are key elements of the basic structure of a Constitution. Federalism is the principle that power is divided between the central government and the states or provinces. The division of powers guarantees that no branch of the government has an excessive amount of authority and that the government functions within the bounds of the Constitution.

5.5 Supremacy of the Constitution:

An essential component of a Constitution's core design is the supremacy of the Constitution. The idea behind this is that the Constitution is the supreme law of the land and that all laws and government operations must adhere to it. And those government functions or legislatures which are not in conformity with the Constitution are *ultra virus* to it.

6. Comparative Analysis of Constitutional Frameworks

6.1 United States Constitution

The Constitution of USA works on federal system that ensures separation of powers within different organs of the government, the legislature, the executive and the judiciary and that such power are not used arbitrarily by any organ. Their Constitution also includes a Bill of Rights that protects those rights which are very fundamental and basic, rights such as freedom of speech, religion, and the press. The Constitution also establishes the concept of judicial review, which gives the judiciary the authority to examine and overturn legislations that are unconstitutional.

6.2 Constitution of India

The Constitution of India, just like that of USA is a federal system that establishes a separation of powers between legislative, executive, and judicial branches of government. Indian Constitution also includes a Bill of Rights that protects fundamental rights, such as freedom of speech, expression,

religion, and press. The Constitution also establishes the principle of judicial review.

6.3 European Convention on Human Rights

In 1950, the Council of Europe approved the European Convention on Human Rights (ECHR), which is a global agreement. The Convention was adopted to insure and protect fundamental human rights and freedoms in Europe. The Agreement also includes a number of fundamental rights, such as the right to life, freedom of speech, and the right to a fair trial. The ECHR also establishes a special court for the enforcement of the Convention which is known as the European Court of Human Rights.

6.4 South African Constitution

The South African Constitution was adopted in 1996 and is one of the most progressive Constitutions in the world. The Constitution includes a Bill of Rights that protects fundamental rights, such as the right to life, freedom of speech and expression, and right to a fair trial. Just like the Constitution of India and the US, the Constitution of South Africa also establishes a separation of powers between the three organs of the government, the legislative, executive, and judiciary. The Constitution recognizes 11 official languages and establishes the principle of affirmative action to address past inequalities.

6.5 Australian Constitution

The Australian Constitution was adopted in 1901 and is a federal system like that in India and USA. The Australian Constitution also includes a Bill of Rights that protects fundamental rights. However, unlike many other Constitutions, the Australian Constitution does not include an explicit Bill of Rights in its Constitution. The Constitution also creates the idea of responsible governance, which states that the Parliament is the government's primary accountability body.

7. Implications and Criticism of Basic Structure Doctrine

7.1 Ensuring Constitutional Stability

The Basic Structure Doctrine is a legal principle that was established by the Supreme Court of India in the 1970s. The doctrine holds that certain provisions of the Indian Constitution are so fundamental that they cannot be amended, even by the Parliament. The basic structure doctrine ensures constitutional stability by preventing the Parliament from making changes to the Constitution that would undermine the basic structure of the Constitution.

7.2 Protection of Fundamental Rights

The basic structure doctrine also protects fundamental rights by ensuring that they cannot be easily amended or removed from the Constitution. The doctrine recognizes that certain fundamental rights, such as *'the right to equality, the right to freedom of speech and expression, and the right to life and liberty'*, are essential to the functioning of a democratic society. By protecting these rights, the Basic Structure Doctrine guarantees that the Indian Constitution continues to represent the ideals of the Indian people and remains a living text.

7.3 Judicial Activism and Judicial Restraint

The basic structure doctrine has been criticized for promoting judicial activism, which is the idea that the judiciary should play an active role in interpreting the Constitution and protecting fundamental rights. Some critics argue that the doctrine gives too much power to the judiciary and undermines the separation of powers between the legislative, the executive, and the judiciary. Others argue that the doctrine promotes judicial restraint, which is the idea that the judiciary should limit its role to interpreting the Constitution and enforcing the law.

7.4 Criticisms and Limitations

The basic structure doctrine has been criticized for being vague and open to interpretation. Some critics argue that the doctrine gives too much power to the judiciary and neglect the

democratic process by allowing those judged who are not democratically elected to make decisions that should be made by elected representatives of the people. Others contends that the doctrine is too rigid and prevents the Constitution from evolving to meet the changing needs of society.

8. Case Studies

8.1 *Marbury v. Madison*[4]

Marbury v. Madison was a famous and landmark case in the US that lead to the establishment of the principle of judicial review, which is the power of the judiciary to review and strike down those laws which are not in consistent with the Constitution as that are unconstitutional. The case involved a dispute over the appointment of judges by President John Adams. The Supreme Court affirmed that the law that provided the Court the authority to hear the case was unconstitutional, thereby establishing the principle of judicial review.

8.2 *Golaknath v. State of Punjab*[5]

Golaknath v. State of Punjab was a famous case in India that originated the basic structure doctrine. The case involved a dispute over the authority of the Parliament to alter the Constitution. The Supreme Court ruled that the Parliament did not have the authority to amend the Constitution in such that would infringe upon the fundamental rights of citizens. The Court held that the Constitution had a basic structure that could not be amended by the Parliament.

8.3 *Minerva Mills Ltd. v. Union of India*[6]

This is another landmark case in India that expanded upon the basic structure doctrine. This case involved a tussle over the power of the Parliament to amend the Constitution. Supreme

[4] 5 U.S. (1 Cranch) 137 (1803).
[5] AIR 1967 SC 1643.
[6] AIR 1980 SC 1789.

Court ruled that the Parliament did not have the power to amend the Constitution in a way that would alter the basic structure of the Constitution. The Court held that the basic structure of the Constitution included separation of powers, rule of law, and protection of fundamental rights.

8.4 *Republic of South Africa v. Grootboom*[7]

Republic of South Africa v. Grootboom was a landmark case in South Africa that established the right to housing as a fundamental right. The case involved a dispute over the government's failure to provide housing to poor and homeless citizens. The Apex Court ruled that the government had a duty to provide adequate housing to all citizens, and that the right to housing was a fundamental right protected by the Constitution.

8.5 *United States v. Lopez*[8]

It was a landmark case in US that limited the power of the federal government to regulate commerce. In the case, the validity of the Gun Free School Zones Act, which made it illegal for anybody to have a gun near a school, was in question. Supreme Court ruled that the law was unconstitutional because it excelled the power of the federal government to control commerce. The Court held that the regulation of firearms in school zones was a matter for the states, not the federal government.

9. Conclusion

In several nations throughout the world, including India, the basic structure doctrine has been established as a legal theory. According to this argument, the government or any other authority cannot change any essential aspects of a Constitution. These characteristics are thought of as the fundamental

[7] 2001 (1) SA 46 (CC).
[8] 514 U.S. 549 (1995).

framework of the Constitution and are crucial to preserving its reliability and stability.

In the famous case of *Golaknath v. State of Punjab*[9], the basic structure doctrine was first established in India. The Indian Supreme Court determined that the Parliament could not change the Constitution in a way that would violate citizens' basic rights. The Court further broadened this theory in the case of *Minerva Mills Ltd. v. Union of India*[10], holding that the Parliament could not change the Constitution in a way that would compromise the Constitution's fundamental design.

The doctrine has been applied in several other nations to safeguard individuals' fundamental rights and to make sure that their Constitutions are solid and long-lasting. It has been employed to invalidate laws that are held to be unconstitutional and to stop the government from abusing its power.

In conclusion, the basic structure doctrine is an important legal principle that has had a significant impact on constitutional law worldwide. It has helped to safeguard the fundamental rights of citizens and to warrant that the Constitution remains a stable and enduring document. It has been used in many countries to strike down laws that are deemed unconstitutional and to prevent the government from overreaching its authority.

In summary, this research has explored the basic structure doctrine and its significance in constitutional law. It has examined the origin of the doctrine in India and its subsequent expansion in other countries. The research has also explored the impact of the doctrine on constitutional law and its use in striking down unconstitutional laws.

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[9] AIR 1967 SC 1643.
[10] AIR 1980 SC 1789.

Overall, the basic structure doctrine is an important legal principle that has helped to safeguard the fundamental rights of citizens and to confirm that the Constitution remains a stable and enduring document. It has had a significant impact on constitutional law worldwide and will likely continue to be an important legal principle in the future.

CHAPTER 38

AMENDMENT OF CONSTITUTION IN UK AND INDIA: A COMPARATIVE ANALYSIS

Mr. Priyansh Shukla*

1. Introduction

The process of amending a Constitution is a crucial factor that contributes to the stability and continuation of a constitutional system. The Constitutions of UK and India are two of the most important and influential Constitutions in the world. While India has the longest and most comprehensive written Constitution in the world[1], UK has a distinct and unwritten Constitution. It is crucial to compare how the Constitutions of India and UK are approached when it comes to make changes in them.

The Constitution of India, which embodies the values and tenets of a democratic and inclusive society, is a symbol of social change. Granville Austin remarked that *"The Indian Constitution is not just a legal document but a vehicle of social revolution"*[2]. On the other hand, UK's Constitution is a representation of the nation's long standing democratic traditions and its transition to a modern democracy from a monarchy.

The purpose of this chapter is to compare the processes of amendments in the Constitutions of India and UK; consequently, adding to the increasing body of knowledge pertaining to the comparative constitutional law. By contrasting

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[1] "India's Constitution is 30 times longer than America's - and it's still growing", World Economic Forum (2019), https://www.weforum.org/agenda/2019/10/india-Constitution-over-30-times-long-us/ (last visited Apr. 24, 2023).

[2] Granville Austin, The Indian Constitution: Cornerstone of a Nation (Oxford University Press, 1999).

the two Constitutions' amending processes, we may determine their similarities, differences, strengths, and weaknesses, and we can also assess how well each process works for the two nations. The significance of comparing various constitutional frameworks in order to comprehend the constitutional norms, ideals, and practices pertaining to a nation's legal system is well acknowledged and an often carried out practice.[3] This chapter finally aims at presenting a thorough examination of how the amendment process in the two countries differ and further throws a light into the constitutional safeguards that these two nations have established to maintain the continuity and stability of their constitutional systems.

2. Overview of the Constitution of UK

2.1 Brief Analysis

As the Constitution of UK is not codified in a single document, it is often referred to as an unwritten Constitution. Rather, it is made up of a collection of laws, conventions, and practices that have evolved over time.[4] The UK's Constitution has uniqueness in its nature, as it is not entrenched and can be amended or repealed by an Act of Parliament. The UK's constitutional framework is based on the principle of Parliamentary sovereignty, meaning that Parliament is the ultimate legal authority in the UK and it can make or unmake any law.[5]

The constitutional framework of UK has undergone significant changes over the years, which reflects the evolution of the country from an absolute monarchy to a modern democracy. The Magna Carta of 1215 is one of the key documents that have

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[3] "Comparative Constitutional Law and its Applicability in International Law", Legal Service India, https://legalserviceindia.com/legal/article-6580-comparative-Constitutional-law-and-its-applicability-in-international-law.html (last visited Apr. 24, 2023).
[4] UCL, "What is the UK Constitution?," The Constitution Unit (2018), available at https://www.ucl.ac.uk/Constitution-unit/explainers/what-uk-Constitution (last visited May 29, 2023).
[5] *Id.*

contributed to the evolution of the Constitution of UK, which established the principle of the rule of law and limited the power of the monarch.[6] Another significant document is The Bill of Rights of 1689, which confirmed the rights of Parliament and the individual against the monarch's arbitrary power.[7]

Despite having an unwritten Constitution, there are still important constitutional principles that are well established in UK's legal system. The rule of law, the separation of powers, and the protection of individual rights are amongst such principles.[8] The rule of law is the principle that everyone, including the government, must abide by the law. The separation of powers refers to the division of powers between the three branches of government: the legislature, the executive, and the judiciary. The protection of individual rights is enshrined in the Human Rights Act 1998, which incorporates the European Convention on Human Rights into UK law.[9]

2.2 Role of Parliament in Amendment Process

In UK, the role of Parliament is central in the amendment process of the Constitution. Parliament is the ultimate legal authority in the country, and has the power to make or unmake any law, including constitutional amendments. Unlike some other countries, the UK's Constitution is not entrenched, which means that there is no special procedure for amending the Constitution. Any law passed by Parliament, including a

[6] Magna Carta | Definition, History, Summary, Dates, Rights, Significance, & Facts, Britannica, available at https://www.britannica.com/topic/Magna-Carta (last visited May 29, 2023).
[7] Sneha Mahawar, Bill of Rights, 1689, iPleaders (2022), available at https://blog.ipleaders.in/bill-of-rights/ (last visited May 29, 2023).
[8] A. W. Bradley & K. D. Ewing, Constitutional and Administrative Law (Pearson Education Limited, 2018).
[9] The Human Rights Act: Equality and Human Rights Commission, https://www.equalityhumanrights.com/en/human-rights/human-rights-act (last visited May 30, 2023).

constitutional amendment, can be repealed or amended by a subsequent act of Parliament.

The process of amending UK's Constitution begins with the introduction of a bill in either the House of Commons or the House of Lords. In order to become a law the bill must pass through several stages in each house. If the bill originates in the House of Commons, it is essential that it first pass through three readings, a committee stage, a report stage, and a third reading.[10] Whereas it the bill originates in the House of Lords, it must first pass through two readings, a committee stage, a report stage, and a third reading. After both the houses of Parliament have passed the bill, it must receive royal assent from the monarch before in order to become law.[11]

Although there is no special procedure for amending the UK's Constitution, certain constitutional conventions are there that govern the process of amendment. The principle of Parliamentary sovereignty is one of such conventions. This principle makes it clear that Parliament has the ultimate legal authority in UK, and no other body, including the courts, can question the validity of an act of Parliament. Another convention is the principle of the separation of power which states that Parliament has the power to make laws, while the judiciary has the power to interpret them.

The Parliament plays a significant role in the process of amendment as it ensures that the will of the people is reflected in the constitutional amendments. The Parliament's power to make or unmake any law, including a constitutional amendment, is a reflection of the country's democratic traditions and the principles of representative government. However, this power can also be a cause for concern, as it gives

[10] Knowledge Should Be Free, A Level Law: The main legislative process, A Level Law (2013), available at https://alevellaws.blogspot.com/2013/12/the-main-legislativeprocess-can-be.html (last visited May 30, 2023).
[11] *Id.*

the Parliament the ability to amend the Constitution without any significant checks and balances.

2.3 Limitations on Parliament's Power to Amend the Constitution

While the Parliament in UK possesses the power to amend the Constitution, some limitations on its powers are also there. These limitations are put in place with the intent to prevent abuse of power and to safeguard fundamental principles of democracy and the rule of law. This part will examine some of the limitations that are in place on the Parliament's power to amend the Constitution.

The principle of Parliamentary sovereignty is one of the primary limitations on the Parliament's power to amend the Constitution. Though Parliamentary sovereignty grants the Parliament ultimate legal authority, it also means that the Parliament cannot bind future Parliaments. This means that while the Parliament can alter the Constitution it cannot enact a clause that forbids amendments by subsequent Parliament. As noted by Lord Hope of Craighead in the case of *AXA General Insurance Ltd v. Lord Advocate*[12]: *"Parliament cannot bind its successors by stipulating in advance the conditions in which they may legislate"*. Accordingly, the power of the Parliament to amend the Constitution is not unqualified and can be overruled by subsequent Parliaments.

Human Rights Act, 1998 is another limitation on the Parliament's power to amend the Constitution. The European Convention on Human Rights is incorporated into the laws of UK through the Human Rights Act.[13] It requires the Parliament to interpret legislation in a way that is compatible with human

[12] AXA General Insurance Ltd v. Lord Advocate, [2012] UKSC 67.

[13] "The Human Rights Act", Liberty, available at https://www.libertyhumanrights.org.uk/your-rights/the-human-rights-act/ (last visited May 29, 2023).

rights. This means that any law or constitutional amendment passed by the Parliament that is incompatible with human rights can be challenged in the courts and struck down as invalid. This limitation is an important safeguard against potential abuses of power and ensures that fundamental human rights are protected.

Finally, the devolutions settlements with Scotland, Wales, and Northern Ireland also contribute in imposing limitations on the Parliament's power to amend the Constitution.[14] The said settlements create devolved legislatures having the power to enact legislation in particular areas, such as education and health care. Although the Parliament has the authority to enact laws on any subject, it is essential that where the matters fall within the purview of devolved legislatures, their consent is sought. Thus, this restriction makes sure that the devolved legislatures have a say in matters affecting their respective jurisdictions.

2.4 Role of Courts in Interpreting the Constitution

The courts, in addition to the Parliament play a crucial role in interpreting and applying the Constitution in UK. The courts are entrusted with the power of reviewing legislation and ensuring that it is compliant with the Constitution, including fundamental principles of democracy and the rule of law. The functions of courts in interpreting the Constitution will be discussed in this section.

It is one of the primary functions of the courts to interpret legislation and ensure that it is consistent with the Constitution. While doing the same, it is within the power of the court to strike down legislation that is found to not be compatible with the

[14] P. Leyland, The Multifaceted Constitutional Dynamics of U.K. Devolution, 9 Int'l J. Const. L. 251 (2011), available at https://academic.oup.com/icon/article-lookup/doi/10.1093/icon/mor021 (last visited May 29, 2023).

Constitution. In order to ensure that the government and the Parliament do not abuse their powers and that individual rights are protected, this power of judicial review is essential.

It is another important role of the courts to develop the common law, which is an important source of constitutional law in UK. It is through the interpretation and application of the legal principles that common law is developed by the judges, which plays a crucial role in shaping up the Constitution. For instance, the principle of the rule of law which is a fundamental principle of the Constitution has been developed by the courts through the common law.

The courts are also empowered to interpret the Constitution itself as well as the constitutional laws such as the Human Rights Act of 1998. The court's responsibility is to interpret the meaning of the constitutional provisions and apply them in specific cases. Thus, it is by doing this that they ensure the Constitution is applied consistently and individual rights are upheld.

The courts also, under the Human Rights Act 1998, have the power vested in them to make declarations of incompatibility. If it is found by a court that a particular law or a constitutional provision is incompatible with human rights, the court can issue such a declaration. The issuance of this declaration puts the government and the Parliament under the pressure to amend that particular law or provision. Though not legally binding, the declarations of incompatibility have a strong moral and political weight.

3. Overview of the Constitution of India

3.1 Brief Analysis

The Constitution of India is the longest-written Constitution in the world and it was adopted on January 26, 1950.[15] It comprises of a preamble, 26 parts, and 395 Articles along with Eight Schedules. The Constitution is federal in structure, with a division of powers between the Central Government and the State Governments.[16] It establishes a Parliamentary form of government, wherein the President is the head of the State and the Prime Minister is the head of the Government.[17]

Further, the Constitution also provided for a separation of powers between the executive, legislative, and the judicial branches of government.[18] The executive branch comprises of the President, the Vice-President, and the Council of Ministers which is headed by the Prime Minister. The legislative branch comprises of the Parliament, which is composed of the Rajya Sabha (Council of States) and the Lok Sabha (House of the People).[19] Whereas, the judicial branch consists of the Supreme Court, the highest court in the nation, and the various High Courts and subordinate courts established.

The inclusion of the Directive Principle of the State Policy is one of the unique features of the Indian Constitution.[20] Though these principles are not enforced by the courts, they are meant to guide the government in making laws and policies that are

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[15] VOXINDICA, available at https://www.voxindica.net/ (last visited May 29, 2023).
[16] "Federal Relations between the Centre and The State", Legal Service India, available at https://legalserviceindia.com/legal/article-6452-federal-relations-between-the-centre-and-the-state.html (last visited May 29, 2023).
[17] *Id.*
[18] S. Subramanian, Introduction to the Constitution of India (Thomson Reuters India Private Limited, 2015).
[19] *Id.*
[20] INSIGHTSIAS, "Directive Principles of State Policy", INSIGHTSIAS (2023), https://www.insightsonindia.com/polity/indian-Constitution/significant-provisions/dpsps/ (last visited May 30, 2023).

aimed at promoting the welfare of the people. The Constitution also guarantees a number of fundamental rights to its citizens, including the right to equality, freedom of speech and expression, freedom of religion, and the right to constitutional remedies.[21] These guaranteed rights are enforceable by the courts especially by the Supreme Court.

Furthermore, the Constitution also provides for a detailed procedure for its amendment. The amendments to the Constitution can be initiated by the Parliament, and it is required for its passage that it gets a two-thirds majority vote. However, certain amendments require ratification by at least half of the state legislatures in addition to the above-mentioned criteria.

3.2 Role of Parliament in Amendment Process

As discussed above, the Constitution provides for a detailed procedure for amending to the Constitution. Like UK's Constitution, the power to amend the Constitution of India primarily lies with the Parliament, comprising the Rajya Sabha and the Lok Sabha. Article 368 of the Constitution provides that amendments in the Constitution can be initiated in either house of the Parliament.[22] It is a requisite that once an amendment is introduced in the Parliament, it must be passed by a two-thirds majority of the Members present and voting in both the Houses of Parliament.

However to amend some provisions of the Constitution, the amendment bill must be ratified by at least half of the State legislatures after being passed by both the Houses of Parliament. The purpose of this requirement is to ensure that the amendments affecting the federal structure of the Constitution are supported by the States.

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[21] *Supra* note 19.
[22] Constitution of India, art. 368.

It is pertinent to note that the power of the Parliament to amend the Constitution is not unlimited. There is a doctrine of basic structure that the Constitution entails, which ensures that certain essential features of the Constitution cannot be amended. It was in the landmark case of *Kesavananda Bharati v. State of Kerala*[23], wherein the Supreme Court held that *"the power of the Parliament to amend the Constitution is subject to judicial review"*, and that *"the amendments violating the basic structure of the Constitution are invalid"*.

3.3 Limitations on the Amending Powers of Parliament

As discussed above, the doctrine of basic structure puts limitations on the power of the Parliament to amend the Constitution. Therefore, it is essential to explore this doctrine in detail along with the other limitations on the Parliament's power to amend the Constitution.

It was in the case of *Kesavananda Bharati v. State of Kerala* that the basic structure doctrine was first articulated, wherein it was held by the Supreme Court that there were certain essential features of the Constitution, such as the principle of separation of powers, federalism, and the fundamental rights guaranteed to the citizens, immune from the power of Parliament to amend. This doctrine has been upheld by the court in several subsequent cases.

Along with the basic structure doctrine, there are certain substantive and procedural limitations also on the power of the Parliament to amend what the Constitution places. The substantive limitations contain restrictions on the power to amend certain provisions, such as the provisions relating to the federal structure, the judiciary, and the fundamental rights guaranteed to citizens. Whereas, the procedural limitations include the requirement for the amendment to be passed by a

[23] AIR 1973 SC 1461.

two-thirds majority of each house of Parliament and ratified by at least half of the state legislatures.

Furthermore, there is also a limitation on the power of the Parliament to amend the Constitution that the amendment is required to be in line with the international obligations of India. Article 51 of the Constitution directs the State to foster respect for international law and treaty obligations. It is pertinent to note that the limitations imposed on the power of Parliament to amend the Constitution do not render the Constitution immutable. It rather ensures that any changes that are intended to be made in the Constitution are carefully considered and are in line with the fundamental principles of the same.

3.4 Role of Courts in Interpreting Constitution

It is the Supreme Court along with the High Courts that has the power of judicial review and can also interpret the Constitution.[24] The Constitution is considered to be the supreme law of the land. It is the responsibility of the Supreme Court and the High Courts to ensure that all the laws and actions of the government are in conformity with the Constitution.[25]

The role of the Supreme Court is crucial in ensuring that the fundamental principles of the Constitution are observed. While exercising its power of judicial review, the Supreme Court can strike down any law or action of the government that it deems to be unconstitutional. The concept of basic structure is one of the most significant contributions of the Supreme Court to the constitutional jurisprudence.[26] As discussed earlier, the basic structure doctrine holds that certain essential features of the Constitution, such as the principle of separation of powers,

[24] Pylee, M. V. India's Constitution (Vikas Publishing House, Pvt Ltd, 1999)
[25] *Id.*
[26] Singhvi, Abhishek, and Khagesh Gautam. The Law of Emergency Powers: Comparative Common Law Perspectives. Singapore: Springer, 2020.

federalism, and the fundamental rights guaranteed to the citizens, are immune from amendment. Several amendments that were deemed to violate the basic structure of the Constitution were struck down using this doctrine.[27]

A vital role has also been played by the Supreme Court in interpreting and expanding the scope of the fundamental rights guaranteed to the citizens under the Constitution. For instance, it was in the case of *Maneka Gandhi v. Union of India*[28] wherein the Supreme Court held that *"the right to life and personal liberty under Article 21 of the Constitution included the right to travel abroad"*, and in the case of *Vishaka v. State of Rajasthan*[29] it has been held that *"sexual harassment at the workplace is a violation of the right to gender equality guaranteed under Article 14 of the Constitution"*. Several other constitutional provisions, such as those relating to federalism, the powers of the executive and legislative branches of government, and the rights and duties of the citizens have also been interpreted and expanded by the Supreme Court.

4. Comparative Analysis of the Amendment Procedures in the Two Constitutions

4.1 As Regards the Roles of Parliament

The Constitutions of both the countries *i.e.* UK and India provides Parliament with the power to amend the same. However, the differences between the two Constitutions regarding the role of Parliament in amending it are significant. In UK, the Parliament holds the primary power to amend the Constitution. As discussed earlier, the Parliament can, by a simple majority vote, pass a law to amend any provision of the Constitution. Whereas, in India, the basic structure doctrine limits the power of the Parliament to amend the Constitution. It

[27] *Id.*
[28] AIR 1978 SC 597.
[29] AIR 1997 SC 3011.

is held by the Supreme Court that certain essential features of the Constitution are immune from the power of the Parliament to amend. This implies that the power of the Parliament to amend the Constitution is not absolute and is subject to judicial review.

In addition, the procedure in India for amending the Constitution is more complex than in the UK. In India, both the Houses of the Parliament must vote in favour of an amendment by a two-thirds majority. Additionally, some amendments, such as those that alter the federal character of the Constitution, need the support of at least half of the State Legislatures.

4.2 As regards to the Limitations on Parliament's Power to Amend

The two Constitutions also differ in the limitations imposed on the power of the Parliament to amend it in addition to the differences in the roles of Parliament in the process of amendment. It has already been discussed that there are hardly any limitations on the power of the Parliament to amend the Constitution in UK. As previously mentioned, a simple majority vote is required to amend any provision of the Constitution. This indicates that there are no external constraints on the Parliament's power to change the fundamental nature of the Constitution of UK. On the contrary, the doctrine of basic structure in India imposes substantial restrictions on the power of the Parliament to amend the Constitution as laid down in the landmark case of *Kesavananda Bharati v. State of Kerala*. As per the basic structure doctrine, it is beyond the powers of the Parliament to amend the Constitution in a manner that destroys its basic structure, which includes elements like federalism, the separation of powers, and the fundamental rights guaranteed to the citizens. Any attempt aimed at doing so would be regarded as void and unconstitutional.

A further restriction on the power of the Parliament to amend is provided by the Indian Constitution's more complicated

amendment procedure. As was previously mentioned, some amendments, such as those changing the federal structure of the Constitution need to be approved by at least half of the State Legislatures.

Overall, the disparity between India's and the UK's approaches to Constitutionalism is highlighted by the comparison of the restrictions on the Parliament's power to amend the two Constitutions. In contrast to India's rigid Constitution, which places significant external restrictions on the power of Parliament to amend it, the UK's flexible Constitution gives the Parliament virtually unlimited power to amend laws.

4.3 As Regards to Role of Courts in Interpreting Constitution

In addition to the differences in the Parliament's role in the amending of the Constitutions, the two Constitutions also differ when it comes to the role of the courts in interpreting them. In UK, courts have a limited role in constitutional interpretation and lack the authority to declare the Acts of the Parliament as unconstitutional. This approach to constitutional interpretation is based on the idea of Parliamentary sovereignty, which maintains that the Parliament is the supreme law-making body and that the courts have no authority to overturn any of its laws.

However, in the recent years, this principle has been subject to criticism and questioned. The UK Supreme Court ruled in the case of *Miller v. Secretary of State for Exiting the European Union*[30] that the courts do have the authority to examine the legality of the governmental actions, including those taken by the Parliament. This ruling expands the role of the courts in interpreting the UK Constitution and represents a shift from the conventional method of constitutional interpretation in the UK.

[30] (2017) UKSC 5.

On the contrary, the Constitution of India authorizes the courts with significant power to interpret and enforce the Constitution. The power of judicial review vests with the Supreme Court, it authorizes the Supreme Court to strike down any law, including a constitutional amendment, if it is found to be inconsistent with the Constitution. The power of judicial review is essential for protection of the fundamental rights guaranteed to the citizens. It is considered to be a key feature of the Indian Constitution.

Furthermore, the emphasis on fundamental rights in the Indian Constitution provides an essential role for the courts in interpreting the Constitution. The courts are vested with the responsibility of ensuring that the government and its agencies do not violate the fundamental rights of the citizens. The courts have given a number of landmark judgements in furtherance of this responsibility that have influenced how the fundamental rights are interpreted and upheld in India.

5. Analysis of the Effectiveness of the Amendment Procedures

5.1 Evaluation of the Amendment Procedure in UK

The flexible nature and lack of a rigid amendment procedure in the UK's Constitution have both advantages as well as disadvantages. Though is relatively easy to amend, it has often been criticized as lacking clarity, transparency, and accountability in the process of amendment. The strengths and weaknesses of the amendment procedures in the Constitution of UK will be discussed in this section.

Flexibility is one of the strengths of the UK Constitution's amendment procedure. It means that UK's Constitution can adapt to changing circumstances and reflect the evolving values and expectations of a society. The absence of a complex amendment procedure signifies that the Constitution can be amended in a timely manner without the requirement of a

lengthy process. It becomes crucial during the times of crisis, when immediate amendments may be required to be made at the earliest in order to ensure the smooth functioning of the government.

The UK Constitution's flexibility, meanwhile, also has certain drawbacks. Due to the absence of a codified Constitution, the basic principles of the Constitution are not clearly or unambiguously stated. This affects the comprehension and interpretation of the Constitution by the public and legal experts making it challenging for them. Due to this lack of transparency and clarity in the process of amendment, it has often been criticized as lacking accountability. Without adequate public consultation, the government can make amendments to the Constitution, which might erode public confidence in both the government and the Constitution.

The dominance of the government in the amendment procedure of the UK Constitution is another flaw in the system. A consensus with other political parties or civil society organizations is not required by the government for introducing amendments to the Constitution. Because of this concentration of power, decisions may be made that serve the interests of the ruling party rather than the general welfare. The European Union (Withdrawal) Act 2018, for instance, was criticized for giving the government sweeping authority to modify laws without Parliamentary scrutiny.[31]

In conclusion, there are both, strengths and weaknesses to the UK Constitutions amendment process. Although its flexibility and absence of a rigid amendment procedure enable timely amendments, they also make the Constitution challenging to comprehend and interpret. When there is dominance of the

[31] House of Commons Library, "Brexit: A Guide to EU Referendum and Subsequent Parliamentary Developments," Briefing Paper No. 7217 (Jan. 30, 2019).

government in the amendment process, amendments may be made to serve their interests rather than the interests of the general public. Nevertheless, the United Kingdom's amendment process has been successful in preserving the political stability and ensuring that the government runs smoothly. To promote more clarity, transparency, and accountability in the amendment process, it is imperative, that the flaws in the amendment procedure are addressed.

5.2 Evaluation of the Amendment Procedures in India

There have been a considerable number of amendments in the Constitution of India since its inception in 1950. While some of the amendments have been successful in strengthening the democratic fabric of the country, some have been criticized for undermining the principles of the Constitution. The evaluation of the strengths and weaknesses in the amendments procedure of the Indian Constitution will be provided herein.

5.2.1 Strengths:

a) Flexible: The Constitution can be amended by the Parliament there is no need of a separate constitutional convention or Constituent Assembly for the purpose. It is because of this fact, that the Constitution is considered to be one of the most flexible Constitutions in the world. The flexibility of the Constitution enables it to adapt to the varying requirements of the society and the emerging challenges.
b) Protection of Fundamental Rights: A robust system of fundamental rights that are guaranteed by the Constitution exists in India. Any amendment seeking to abrogate or curtail these fundamental rights is subject to judicial review. There is a lengthy history of the Indian judiciary protecting citizens' fundamental rights, in doing so it has overturned numerous unconstitutional amendments.
c) Federalism: The Constitution has a federal structure wherein the authority is divided between the central

government and the state governments. This structure cannot be amended without the ratification of at least half of the state legislatures. This guarantees that the Constitution's federal character is upheld and the states have a voice in the amendment procedure.

5.2.2 Weaknesses:

a) Difficulty in Amendment: The amendment process of the Constitution is difficult and complex despite its flexibility. A two-thirds majority in both the Houses of Parliament and approval of at least half of the State Legislature is required for any amendment. Due to this delayed and cumbersome amendment process, it is challenging to make necessary amendments on time.
b) Judicial Overreach: The Indian Judiciary has been subjected to criticism for abusing its authority by striking down constitutional amendments that the Parliament had rightfully enacted.[32] It is due to this reason that a perception of the judiciary interfering in the legislative process has been developed, and consequently, it has strained the relationship between the Parliament and the Judiciary.[33]
c) Lack of Public Consultation: There is no requirement of any public consultation in the amendment process of the Constitution. As a result, there have been many instances where significant amendments have been passed without enough public scrutiny, which has sparked protests and criticism.

Overall, the flexibility and protection of fundamental rights are among the strengths of the Constitution. However, the complicated amendment procedure and the judicial overreach are serious shortcomings that

[32] S.P. Sathe, Judicial Activism in India: Transgressing Borders and Enforcing Limits (Oxford University Press, 2002).
[33] Suhrith Parthasarathy, "The Court vs. Parliament: An Unnecessary Conflict," The Wire (May 8, 2018), https://thewire.in/law/court-vs-Parliament-conflict.

must be fixed to ensure a more effective and efficient amendment process.

5.3 Comparison of Effectiveness of the Amendment Procedures

It is now conceivable to evaluate the effectiveness of the amendment procedures of the Constitutions of the UK and India in achieving their intended purposes after examining their strengths and weaknesses. Since there is no formal written Constitution in UK, the amendments procedure is quite flexible and informal. This has led to a more practical approach to constitutional amendments, which the Parliament can pass with a simple majority of votes. However, this flexibility has also given rise to concerns about possible power abuse and inadequate scrutiny in the amending process. The UK Constitution can also be amended by an ordinary legislation, which may not require as much analysis and discussion as constitutional amendments in the other nations because there is no formal written Constitution in the UK.[34]

The Indian Constitution, on the other hand, has a more formal and rigid amendment mechanism that calls for approval by a majority of State Legislatures as well as a vote of two-thirds of Both Houses of Parliament. This guarantees that before being passed, every constitutional amendment receives necessary review and discussion. However, it has often been a criticism that this strict procedure makes it challenging to swiftly adopt critical reforms, which might obstruct development and progress.[35]

Therefore, it might be argued that, although if the flexible amending process in UK's Constitution makes it easier for

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[34] T. Daintith & A. Page, The Executive and the Constitution: Introduction, in The Executive and Public Law: Power and Accountability in Comparative Perspective pp 1-12 (T. Daintith & A. Page eds., Oxford University Press 2016).
[35] Upendra Baxi, Indian Constitutionalism Revisited, in The Politics and Ethics of the Indian Constitution pp 53-85 (H. Basu ed., Oxford University Press 2001).

lawmakers to implement important changes, it also might not have the necessary checks and balances to guard against abuse of power. On the other hand, the stringent amending process of the Indian Constitution might offer greater safeguards against arbitrary changes, but it might also impede necessary reforms in a timely manner. The efficiency of the amendments procedure ultimately depends upon the social and political context in which it is applied and the balance of power between the various branches of government in each nation.

In conclusion, there are significant distinctions between the amendment processes of UK and Indian Constitution's amendment processes in terms of their formality, flexibility, and degree of scrutiny. Both have their strengths and weaknesses and the effectiveness is determined by the specific situations in which they are applied. The contrast between the two amendment procedures demonstrates that there is no one-size-fits-all approach to amending a Constitution and that each nation must customize its amendment procedure to match its unique political and social environment.

6. Conclusion

The similarities, differences, strengths, and shortcomings of the two systems have been highlighted by this comparative analysis of the amendments processes in the Constitutions of UK and India. In order to ensure the stability and adaptability of their respective Constitutions, each has developed unique amendment procedures.

The flexible and largely Parliamentary-driven approach in the United Kingdom, grants the Parliament significant authority to amend the Constitution. However, this flexibility also presents certain problems, as evidenced by significant amendments like the European Union (Withdrawal) Act of 2018 and the Human Rights Act of 1998. The UK's reliance on the Parliamentary supremacy and the resulting restrictions brought about by EU

legislation and human rights issues underline the necessity for a careful balance between sovereignty and internal obligations.

Contrarily, India's strict stance on constitutional amendments, guided by the basic structure doctrine, demonstrates a dedication to upholding the core principles and the fundamental rights enshrined in the Constitution. The basic structure of the Constitution is interpreted and safeguarded by the courts, which adds an additional layer or scrutiny to amendments proposed by the Parliament. Although it has also been subject to debates and disputes surrounding significant amendments like the Forty-second Amendment Act, 1976 and the Ninety-ninth Amendment Act, 2014, this has contributed to the stability and longevity of the Indian Constitution.

In the amendment process, the roles of the Parliament and the courts vary greatly between the two nations. While the Indian Parliament's authority is constrained by the by the basic structure doctrine, UK's Parliament has greater power to amend the Constitution, subject to some restrictions. Both the systems rely on the judiciary to uphold constitutional integrity, but the courts' power of constitutional review in UK is limited as compared to the Indian Supreme Court's expansive jurisdiction.

It is essential for the policymakers in both nations to assess the strengths and weaknesses of their respective amendment processes in order to ensure the ongoing effectiveness and legitimacy of their constitutional frameworks. It is critical to strike the proper balance between flexibility and stability while safeguarding the rights and principles enshrined in the respective Constitutions. Furthermore, a nuanced understanding of the comparative experiences and challenges in the constitutional amendments might guide future reforms and strengthen the democratic governance of both nations.

The amendment processes of both the British and Indian Constitution's will continue to influence the direction of

constitutional development given the dynamic nature of governance and evolving societal needs. Both nations can develop their constitutional frameworks and contribute to the advancement of Constitutionalism globally, by critically examining and learning from each other's experiences.

CHAPTER 39

BASIC STRUCTURE DOCTRINE AND JUDICIAL REVIEW

Ms. Akanksha Vishwakarma*
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1. Introduction

The landmark *Kesavananda Bharati*[1] judgement continues to be an important decision in the jurisprudential history of India. It brought into the picture one of the most talked about doctrine that aims to protect the Constitution from gross misuse and ensure that justice prevails – the "basic structure doctrine". This judgement came on 24th April, 1973 after a series of other judgements that tussled with the question of whether the Parliament have the right to alter Part III of the Constitution, which guarantees the fundamental rights. Kesavananda Bharati judgement affirmed that all the provisions of the Constitution can be amended by Parliament including the fundamental rights. This power, however, was not unlimited and has to be evaluated in light of the basic structure doctrine.

There has been very little conversation around what exactly the basic structure doctrine contains. It has mostly evolved through different judgements of the courts. In layman's terms, the basic structure doctrine says that laws enacted through legislations including constitutional amendments cannot be against the intrinsic characteristic of the Constitution, *i.e.* its basic feature or framework.

The fundamental rights are believed to be the basic rights that the State cannot take away. Article 13 deals with the definition of law and provides for laws to be taken down when they infringe upon any of the fundamental rights. There have been debates on whether constitutional amendments fall under the purview of this Article. *Kesavananda Bharati* settled the question by saying that

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[1] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

constitutional amendments do not fall under the definition of law as per Article 13 and can therefore be allowed to amend Part III of the Constitution, while at the same time imposing the restriction that those amendments cannot violate the basic structure of the Constitution.

This raises the question of whether there is a difference between the fundamental rights and the fundamental principles of the Constitution. And if there exists a difference, what is it. Is it not possible to guard the Constitution against laws that violate its fundamental features by subjecting constitutional amendments to the same test as other laws under Article 13? Was it necessary that constitutional amendments be spared from the test of meeting the essentials of Article 13(2) which says that all those laws which takes away abridges fundamental rights shall be declared void? Why was it so important to allow the Parliament to change Part III of the Constitution? This chapter aims to analyse and elaborate on the aforementioned questions.

2. Need for Basic Structure Doctrine in 1950s - Events Which Led to Establishment of Basic Structure

Parliament and the state legislature are bestowed with the power to amend the Constitution and make/amend/alter any law within their jurisdiction. However, this power should not override their jurisdiction as it is not absolute in nature. The original Article 368[2] which provided for the procedure to amendment reads merely specified about the procedure for the amendment which led to further amendment in the original Article and the one which we read today is somewhat different from the original one.

The most crucial question that arise at the time was that if the power under Article 368 is held to be absolute then in that case there would be an immense power in the hands of the Parliament and State Legislature to simply change any portion of the Constitution even in a way that such amendment would lead removal of fundamentals rights from the Constitution. The concern was that, in most extreme cases

[2] INDIA CONST. art. 368.

this could even end up concerting Democratic India into a monarchy or dictatorship.

Shortly after the Constitution was enacted, the above question was perfectly answered by the Supreme Court in the case of Romesh Thapar v. State of Madras[3] where laws restricting freedom of expression on the grounds of 'public safety' were overturned by the Supreme Court.

In 1951, the Apex Court of India dealt with *Shankari Prasad v. Union of India*[4] where The Highest Court of India determines that all amendments to the Constitution, including those affecting the basic rights outlined in Part III, are permissible. In conclusion the Court in this case rules that amendments are out of the power of the judiciary to analyse the legislation.

The constitutional legitimacy of the 17th Amendment was contested in the Sajjan Singh case[5] of 1965. The majority view of the Shankari Prasad case was affirmed by the majority opinion in the instant case and it was maintained that Parliament do have the power to amend any part of the Constitution including amendment of fundamental rights as well.

In a later case, *Golak Nath v. State of Punjab*[6], the Apex Court declared that there are restrictions on the power to change the Constitution. The only restriction on the Parliament's ability to change any element of the Constitution is that it should not violate any of the fundamental rights outlined in Part III of the Constitution.

2.1 24th Constitutional Amendment Act and the Basic Structure

Golaknath judgement was a shock to Parliament which previously thought that it had immense to amend Constitution's any part including Part III of the Constitution. For nullifying Golaknath verdict, Parliament came up with 24th Constitutional (Amendment) Act 1971

[3] AIR 1950 SC 124.
[4] 1951 AIR 458.
[5] Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.
[6] 1967 AIR 1643.

which added a new clause to the Article 13, Clause (4)[7] where clause 4 reads as:

> *"Nothing in this Article shall apply to any amendment of this Constitution made under Article 368". Also, marginal heading of Article 368 was changed from "Procedure for the amendment of the Constitution" to "Power of Parliament to amend the Constitution and the Procedure therefore".*

That means Article 13 and 368 were made independent of each other and that both these Articles shall not apply to each other. In conclusion, 24th Amendment gave boundless power in the hands of Parliament to change the Constitution in any way, up to the point that it can even remove/alter fundamental rights because with the insertion of Clause 4 to Article 13 and Clause 3 to Article 368, the provision of Clause (2) to the Article 13 will also not apply to any such amendment and thus it limited the extent to which court can review Constitutionality of such laws.

24th Amendment restored unlimited power of the Parliament to amend the Constitution as it deems fit. In such a tussle between the judiciary and the legislature, a need was felt to make certain parts of the Constitution unamendable to the extent that with such an amendment, the basic motive behind including part III would vanish out.

2.2 Formation of Basic Structure Doctrine

The Constitutionality of the 24th Amendment Act was contested in *Kesavananda Bharati*[8]. In this case, it was decided that while no portion of the Constitution, including the fundamental rights in Part III, is outside the reach of the Parliament's ability to amend it, the fundamental provisions of the Constitution cannot be changed or nullified by any Constitutional Amendment.

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[7] INDIA CONST. art.13, cl.4.
[8] *Supra* note 1.

This case became a landmark judgement in the history of Indian law which established the principle of judicial review which gave power to the judiciary to strike down any amendment enacted by the Parliament which is in contradiction with the basic structure. Certain fundamental featured of the Constitution such as fundamental rights, sovereignty of India, separation of power, rule of law and federal structure of the Constitution form basic structure of the Constitution which cannot be abridged.

3. Applicability of Judicial Review

Judicial review as a concept was recognized by the US Supreme Court in *Marbury v. Madison*[9] where it was upheld that the judiciary had the power to review legislative actions. Judicial review, in simple words, can be defined as *"the ability of a country's courts to analyse the activities of the legislative, executive, and administrative branches of government and determine whether such actions are in accordance with the Constitution."*[10] Judicial review can be called into play primarily on three grounds: a competent authority did not enact the law, the law violates constitutional provisions, or the law abridges any of the Fundamental Rights guaranteed under the Constitution.

Article 13(2)[11] of our Constitution restricts the State from enacting any law which takes away or abridges the rights conferred by Part III of it. It further states that if any law is enacted which is inconsistent with or derogates fundamental rights, it shall be void to the extent of inconsistency. Thus, under the provision of this Article judiciary in India can relook into any law enacted by the Parliament and strike it down if it takes away or abridges the fundamental rights guaranteed. The Supreme Court and High Courts in India can exercise power of judicial review as laid down in Article 32[12] and 226[13] respectively.

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[9] 5 U.S. (1 Cranch) 137 (1803).
[10] C. Neal Tate, *Judicial Review,* ENCYCLOPEDIA BRITANNICA. (May. 28, 2023, 10:03 PM), https://www.britannica.com/topic/judicial-review.
[11] INDIA CONST. art.13.
[12] INDIA CONST. art. 32.
[13] INDIA CONST. art. 226.

The first question that arose with regard to judicial review under Article 13(2)[14] of the Constitution is what qualifies as a law for the purpose of this Article. In *Sankari Prasad*[15], the 1st Constitutional Amendment Act was challenged on the ground that it takes away the Fundamental Rights guaranteed under part III of the Constitution. The Supreme Court held that the word 'law' for the purpose of Article 13(2) includes only ordinary law made by the exercise of legislative powers and not constitutional amendments made by exercising the constituent power of the Parliament under Article 368.[16] This position was supported by the majority in *Sajjan Singh*[17] wherein it was also stated that amendment of the Constitution includes *"amendments to all parts of the Constitution"*. These judgements gave the Parliament unchecked powers for amending the Constitution. There was a scope for misuse of power by those in authority to bend the rules to their favour, when no checks and balance exists.

The position of the Court changed after the *Golaknath*[18] judgement where the Court by a close majority of 6:5 prospectively overruled the previous two cases. Thus, from that day forth the Parliament did not have the right to amend Part III of the Constitution so as to take away or abridge any of the fundamental rights. It was held that amendment is 'law' within the meaning of Article 13[19] of the Constitution and any law that takes away the fundamental right is void. So, amendments that take away the fundamental rights will also be void. This judgement, in essence, made the existing fundamental rights non extinguishable.

The 24th Constitutional (Amendment) Act of 1971 made several changes to the Constitution. It added *clause (4) to Article 13* which stated that *"nothing in this Article shall apply to any amendment of this Constitution made under Article 368"*[20]. It also changed the marginal heading of Article 368 from *"Procedure for the amendment of the*

[14] INDIA CONST. art. 13, cl. 2
[15] Sankari Prasad v. Union of India, 1951 AIR 458.
[16] INDIA CONST. art. 326.
[17] Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.
[18] I. C. Golaknath v. State of Punjab, 1967 AIR 1643.
[19] INDIA CONST. art. 13
[20] INDIA CONST. art. 13, cl. 4.

Constitution" to *"Power of Parliament to amend the Constitution and procedure thereof."*[21] Moreover, it inserted sub-Clause (1) to Article 368 giving Parliament the right to amend the Constitution in excise of its constituent power.[22] The amendment also mandated the President to give his assent to any bill passed for amendment.[23] Lastly, it made Article 13 inapplicable in case of any amendment made under Article 368.[24] Thus, this amendment tried to override the restriction imposed by the Golaknath case. It aimed to give Parliament the power to amend the Constitution as and how it deemed fit.

The challenge to 24th Amendment Act gave rise to the landmark case of *Kesavananda Bharati*[25]. The judgement in this case overruled the Golaknath decision and held that fundamental rights are not beyond the amending powers of the Parliament and the 24th Constitutional (Amendment) Act was valid. It went on to elaborate this amending power does not include the right to amend the basic structure of the Constitution. Thus, evolved the doctrine of basic structure. This doctrine puts a check on the Parliament's power so that the basic framework and identity of the Constitution remains intact despite amendments.

Thus, Judicial review under Article 13 do not extend to constitutional amendments as it does not fall under the ambit of 'law' as defined under Clause 3 of the said Article. However, an amendment can be challenged on the ground of violating fundamental rights. If it is found that the amendment is such that it is an attack to a fundamental feature of the Constitution such as supremacy of the Constitution, separation of power, etc. it can be declared invalid.

Another question with regard to judicial review is whether it extends to personal laws. It was held in *State of Bombay v. Narasu Appa Mali*[26] that the review process cannot be extended to personal laws, as they

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[21] INDIA CONST. art. 368.
[22] INDIA CONST. art. 368, cl. 1.
[23] INDIA CONST. art. 368, cl. 2.
[24] INDIA CONST. art. 368, cl. 3.
[25] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.
[26] AIR 1952 Bom 84.

do not come under the definition of 'law' for the purpose of Article 13.[27] The same position was reiterated by the Supreme Court in the case of *Ahmedabad Women's Action Group v. Union of India*[28]. In *Krishna Singh v. Mathura Ahir*[29] the Supreme Court held that personal laws are not subject to Part III of the Constitution of India. However, in *Re, Smt. Amina v. Unknown*[30], the Bombay Hight Court took a different view and declared that personal laws are within the scope of Article 13.

It is pertinent to note that, there have been cases where personal law statutes have had to undergo constitutional scrutiny and be tried on the anvil of Article 13. For example, in *Harvinder Kaur v. Harmander Singh*[31], Section 9 of the Hindu Marriage Act was challenged. In a prior judgement, the Andhra Pradesh High Court in *T. Sareetha v. T. Venkata Subbaiah*[32], declared Section 9 of the Hindu Marriage Act[33] illegal because it violates Articles 14[34] and 21[35] of the Constitution. Another important case in this regard is *Shayara Bano v. Union of India*[36] wherein the honourable Supreme Court held that the practice of *Triple Talaq* is unconstitutional, despite it being a subject matter of Muslim personal laws.

Thus, there is still no clarity as to the status of personal laws, vis-à-vis, Article 13 of the Constitution of India.[37] It is, however, increasingly noticed that although the courts have left the question of whether the personal laws fall under Article 13 unanswered, they have started playing an active role in ensuring that personal laws do not hamper the fundamental rights of a person.

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[27] *Supra note* 26.
[28] (1997) 3 SCC 573.
[29] AIR 1980 SC 707 (712).
[30] AIR 1992 Bom 214.
[31] AIR 1984 Del 66.
[32] AIR 1983 AP 356.
[33] Hindu Marriage Act, 1955, § 9, No. 25, Acts of Parliament, 1955 (India).
[34] INDIA CONST. art. 14.
[35] INDIA CONST. art. 21.
[36] (2017) 9 SCC 1.
[37] Denkelia Bhutiya, Personal Laws and Judicial Review - the conflicting judgments of the courts and their impact upon the personal laws, (Dec. 2018).

4. Judicial Review as a Part of the Basic Structure

Although no attempt was made by the constitutional bench in the Kesavananda Bharati case to include judicial review as a 'basic structure', the Supreme Court affirmed in *Indira Nehru Gandhi v. Shri Raj Narain & Anr*[38] that judicial review forms part of the basic structure. Further, in *S. P. Sampath Kumar v. Union of India*[39] the Supreme Court established that judicial review constitutes an important part in the basic structure to the Constitution. The independence of the Constitution would be compromised if the judiciary's ability to conduct judicial review were to be completely destroyed because in that case immense power would be handed over to the Parliament to make any law even if it is in derogation with the Constitution and such power would not have any check by any other organ. Thus, the principle of judicial review is important for the democratic character of the Constitution.

Subsequently, in L. Chandra Kumar v. Union of India[40], it was stated that "the power of judicial review over legislative action vested in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure".

In our take, the doctrine of basic structure and judicial review as guaranteed under Article 13 of the Constitution of India are not substitutes for one another but are complementary to each other. The scope of Judicial Review is in itself a part of the basic structure of the Constitution as held in *Minerva Mills v. Union of India*[41]. On the flip side, this doctrine was applied to test validity of laws that come under scrutiny because of the provision of Judicial Review.

The introduction of the doctrine of basic structure took away one of the most fundamental problems with the question of whether the Parliament can amend the Fundamental Rights. The problem that existed was that, on the one hand, not allowing the Parliament to

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[38] AIR 1975 SC 865.
[39] 1987 SCR (1) 435.
[40] AIR 1995 SC 1151.
[41] AIR 1980 SC 1789.

amend certain part of the Constitution might be a hindrance in giving shape to the will of the people. It might result in a rigid Constitution. On the other hand, allowing the Parliament to amend any part of the Constitution and putting them not being subject to Article 13 might result in abuse of power by the Parliament and defeat the purpose of the existence of the Constitution in the first place. If amendments are left unchecked, they might change the entire purpose of the Constitution and not give effect to the visions enshrined in it. This is where the basic structure doctrine comes to the rescue. It helps keep a balance between amending the Constitution as and when necessary while also not allowing the law makers to bend the Constitution to their will. It acts as a yardstick to measure whether a law stands up to the requirement of not defeating the basic spirit of the Constitution.

Furthermore, the loose definition of 'basic structure' allows the judiciary to interpret the same in the light of contemporary scenario. While this might invite the argument that it would result in too much power in the hands of the judiciary, it is important to note that courts have to take into account prior judgements, constitutional debates and the intention of the makers of the Constitution while deciding what falls under the basic structure of the Constitution. While nothing is immune from its share of shortcomings, the invention of the basic structure doctrine is preferable to its non-existence, simply because it took away the twin problem mentioned earlier, if nothing else.

The most important distinction between judicial review and basic structure doctrine is their width. The doctrine of basic structure is much wider in scope and can expand. While the judicial review under Article 13 only protects us from laws that violate the defined set of fundamental rights, the basic structure doctrine protects us from any and every law that might defeat the purpose of the Constitution and is against the interest of justice.

Thus, we conclude that the basic structure doctrine and judicial review cannot be substituted for one another and both hold important places in today's legal landscape.

5. Contemporary Issues and Application of Judicial Review

In the recent times, certain Laws have been challenged before the Supreme Court where in the constitutional validity of legislations and amendments on the contention that such legislations are violating basic structure to the Constitution was challenged.

One of the recent examples is the petition filled by Indian Union Muslim League. The petitioner raised issue on the validity of Citizenship Amendment Act, 2019. The 2019 Act extended the benefits of naturalization to migrants belonging to Sikhs, Hindus, Jain, Parsi, Christian, Buddhist, coming from Afghanistan, Bangladesh and Pakistan. The petitioners contended that with the exclusion of Muslims from the list, Centre is trying to create a classification based on religion and thus it is against right to equality which is considered as a basic feature to the Constitution.

Likewise, the validity of Transgender Persons (Protection of Rights) Act, 2019 was questioned in *Grace Banu v. Union of India*[42] challenging those certain provisions of the Act, discriminated the rights of transgender person. On such provision being maximum two years imprisonment for the offence of sexual abuse against transgender person, whereas the same offence being committed to other person is punishable.

The revocation of special status of Jammu and Kashmir was challenged on the grounds that the Presidential Proclamation of 19th August, 2019 is violative of Constitution as it suspends the proviso of Article 3 which is considered necessary for federalism and democracy.

Similarly, in *Nafisa Khan v. Union of India*[43], it was argued by the petitioner that the practice of polygamy and Nikah-Halala are illegal and unconstitutional as it violates Articles 14, 15, 21 and 25. As the basic structure recognizes equality of opportunity and status as an

[42] Writ Petition (Civil) No. 406/2020, Supreme Court of India.
[43] Writ Petition (Civil) No. 227/2018, Supreme Court of India.

essential feature to the doctrine thus these practices of polygamy and Nikah-Halala are violative of basic structure.

6. Conclusion

Basic structure doctrine was established as a necessary reaction to the events and concerns in 1950s, questioning the ability of Parliament and State Legislatures to amend the Constitution, especially, Part III which guarantees fundamental rights. Fearing that these powers would be misused, destroying basic liberties and the democratic fabric of India, the Supreme Court intervened and defined certain limits.

The Supreme Court's early decisions, in the *Romesh Thapar v. State of Madras*[44] case in 1950, highlighted the importance of protecting freedom of speech and set a precedent for judicial review of legislation. Subsequent cases like *Shankari Prasad v. Union of India*[45] and *Sajjan Singh v. State of Rajasthan*[46] held that power of the Parliament to amend the Constitution extends event to fundamental rights. *Golak Nath v. State of Punjab*[47] brought a shift in the Court's stance, declaring that there are limitations on the Parliament's ability to change the Constitution and that any amendment infringing upon fundamental rights would be deemed invalid. However, the landmark case of *Kesavananda Bharati v. State of Kerala*[48] in 1973 finally established the *doctrine of basic structure*. It recognized that while Parliament has the power to amend the Constitution, it does not have the authority to alter or nullify the basic provisions and fundamental features that form the bedrock of the Constitution.

It is important to note that the doctrine of basic structure and judicial review are not substitutes for each other but rather complementary concepts. Judicial review is explicitly provided for in the Constitution, while the doctrine of basic structure is a judicially created principle.

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[44] AIR 1950 SC 124.
[45] 1951 AIR 458.
[46] AIR 1965 SC 845.
[47] 1967 AIR 1643.
[48] AIR 1973 SC 1461.

Both serve to safeguard the Constitution's democratic character and prevent the abuse of power by any organ of the state.

The beauty of basic structure doctrine is that it allows for the Constitution to be a flexible document that embraces the changes that comes with time by allowing the Parliament to amend every part of it. At the same time, it protects the Constitution from collapsing and defeating its fundamental purpose. It helps in giving shape to the intention of the Constitution makers, in a far better way than the mere existence of judicial review could have. It is also more in tune with the concept of natural justice as the basic structure of the Constitution embraces everything that forms the soul and spirit of the Constitution. The basic structure doctrine is thus an important addition that would help ensure that the Constitution is a living breathing document that would stand the test of time.

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