
AN ANALYSIS OF THE BIRTH AND GROWTH OF BASIC STRUCTURE DOCTRINE

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ABSTRACT

The Indian Constitution is the supreme source of law, and all rights derive from it. Our country's legal, judicial, and political systems are fundamentally governed by our constitution. It is the basic and complete law of our land. The position of constitution is higher than that of legislation because the legality of our legislation based on the constitution. The idea of basic structure preserves the Indian Constitution's tenets, which serve as the norms that direct the parliament to act according to the constitution and prevent unlawful alteration and any modification. The basic structure doctrine is basically a legal innovation designed to prevent parliament from abusing its amendment power. The main concept of this doctrine is that the fundamental elements of the Indian Constitution shouldn't be changed to the point where its distinctiveness is compromised. Even though M. K. Nambyar attempted to get it approved for the first time in 1967 in the Golakh Nath case¹ under the justification on the basis of presentation in 1965 in the law faculty of Banaras Hindu University on "Implied limitations on Amending Power" by German professor Conrad his views served as the basis for Nambiar's position in this case. He asked questions like whether the Parliament may alter Article 1 to split the Union of India into Tamil Nadu and Hindustan proper through a legitimate modification under 368 of the Constitution. Could a constitutional amendment repeal article 21, or could a ruling party experiencing a loss of majority alter article 368 to vest complete authority in the President acting on the advice of the Prime Minister? Whether the parliament can alter the Constitution itself and lead to its abolition and the restoration of monarchy? ²Some of these concerns may appear simple to answer now, in light of basic structural doctrine, and even a layman with rudimentary expertise in this field could offer solutions; But unfortunately it took almost half decade for Indian judiciary to get over their resistance and rule in favor of it in

¹ Golaknath v. State Of Punjab (1967 AIR 1643, 1967 SCR (2) 762),

² A. G. Noorani, "Behind the Basic Structure Doctrine- On India's debt to a German Jurist, Professor Dietrich Conrad" 18 (9) Frontline (April 28- May 11, (2001)

the Keshavananda Bharati case³. All these questions were the beginning of birth of a new era in Indian legal system. . The Supreme Court's initial stance on constitutional amendments was that any part of the Constitution was amendable and that the Parliament might alter any provision of the Constitution, including the Fundamental Rights in compliance with the article 368, by passing a Constitution Amendment Act 1951.

According to Edmund Burke, a constitution "is a growing thing and is perpetually continuous as it embodies the spirit of the nation." ⁴ ie; The impact of the past enriches the future richer than the present. Similarly, The Constitution's amendment is covered in Part XX of the Constitution Article 368, enable three different types of amendments, including simple majority, amendment by special majority, and amendment by special majority with ratification by the state. After independence, multiple laws concerning land agrarian reforms were passed in several states with the goal of altering land ownership and tenancy of Zamindars. As a result various litigations were brought by landowners who had been negatively impacted by the aforementioned laws, the courts ruled that these statutes were unconstitutional. In response to court decisions, The Union Government passed the Constitution (First Amendment) Act, 1951 to address the problem. Articles 31(A) and 31(B) were added as part of the amendment to fully guarantee the constitutional legality of Zamindari abolition laws. Parliament placed these laws in the ninth schedule of the constitution, rendering them exempt from judicial review via the first and fourth constitutional amendments. The basic structure doctrine has been used by the Supreme Court in subsequent judgments to preserve the sanctity and basic character of the Constitution. As a result, various cases were brought before the Supreme Court of India against the Central and State Governments, culminating in several historic rulings. The doctrine has evolved through Supreme court judgments and is still expanding.

In the Sankari Prasad Case⁵ the validity of the Constitution (first Amendment) Act, 1951, which curtailed the right to property guaranteed by Article 31 was challenged. Initially our constitution has incorporated article 19(1)(f), Article 30, article 31 to ensure property right. In Kameshwar Prasad Singh vs. State of Bihar⁶ The Bihar Land Reform Act, 1950 was held unconstitutional.

³ Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr. AIR 1973 SC 1461

⁴ Aqua Raza 'The Doctrine of 'Basic Structure' of the Indian Constitution: A Critique' (June 2015 SSRN Electronic Journal) https://www.researchgate.net/publication/320930718_The_Doctrine_of_'Basic_Structure'_of_the_Indian_Constitution_A_Critique. accessed 20 April 2023.

⁵ Sankari Prasad Deo vs. Union of India (AIR 1951 SC 455)

⁶ Kameshwar Singh vs. State AIR 1951 Pat. 91.

Which resulted in conflicting views of the Courts due to variances in interpretation of statutes therefore the Parliament enacted The Constitution (First Amendment) Act, 1951 which introduced two new article to the constitution, Articles 31-A and 31-B. As per Article 31A any deeming for obligatory acquisition of property, focused towards the development of the state is not unconstitutional because it conflicts with Articles 14 and 19. Whereas Article 31-B introduced a new Schedule in the Constitution; the Ninth Schedule which laid down that any law included in this schedule would be immune from challenge by any court. This arbitrary amendment give full authority to parliament to amend any part of the constitution. But the amendments were challenged in the court of law and the court ruled that the government's power to modify and alter the Constitution was a part of the Constitution itself and was not subject to challenge under the fundamental rights article. Therefore the First Amendment's constitutionality was affirmed by the court, and Shankari Prasad's objection of infringement of citizen right was denied In other words, the SC argued that the ability of the Parliament to change the Constitution under Article 368 also encompassed the ability to alter the Fundamental Rights established in Part III.

Later in the Sajjan Singh case⁷, after the enactment of The Constitution (Seventeenth Amendment) Act 1964, introduced various significant modifications in the constitution and also placed a number of laws under the Ninth Schedule to shield them from judicial review was challenged in the court of law. On the same premise as in the Shankari Prasad case, the majority of the judges in this case decided that the law of amendment is higher law and is not subject to Article 13(2). Additionally, it stated that the Shankari Prasad case was correctly decided and, in accordance with Article 368, the Parliament may amend any provision of the Constitution, including the Fundamental Rights, and suggests that fundamental rights should be included under article 368 Constitution. In this instance, it is significant to note that two justices who dissented questioned whether citizens' fundamental rights would turn into a toy for the ruling party in parliament. But this situation has changed in the year 1967 in Golaknath case⁸ court decision in the prior cases against the Fundamental Rights have changed. It declared that Article 13's restriction on the power of the parliament does not apply to fundamental rights and that a new Constituent Assembly would be needed to change such rights. Furthermore, it was noted that while Article 368 lays out the process for amending the Constitution, it does not grant Parliament the authority to do so. The

⁷ Sajjan Singh vs State Of Rajasthan 1965 AIR 845, 1965 SCR (1) 933

⁸ Golaknath v. State Of Punjab (1967 AIR 1643, 1967 SCR (2) 762)

fundamental rights were given a "transcendental position" as a result of this case. The majority decision referred to the idea of implied restraints on the Parliament's ability to modify the Constitution. According to this viewpoint, the Constitution permanently secures the citizens' basic liberties. These rights were reserved for the people when they created the Constitution.

In the year 1972, The Constitution (Twenty-fifth Amendment) was enacted and added a new provision, Article 31C, under which the laws implementing the Directive Principles of the State Policy listed under Part IV of the Constitution were deemed automatically valid despite any inconsistency with the fundamental rights guaranteed by Articles 14, 19, 25, 26, and 31. This was challenged by Kesavananda Bharati and filed a petition under Article 32 of the Constitution of India to enforce his fundamental rights under Articles 14, 19(1)(f), 25, 26, and 31(1) and 31(2) enforced. This case served as a turning point in the Indian legal history. The Constitutional Bench in Kesavananda Bharati case⁹ ruled by a 7-6¹⁰ verdict that Parliament could amend any part of the Constitution as long as it did not alter the basic structure of the Constitution¹¹. But, the court did not define the term 'basic structure', and only listed a few principles such as federalism, secularism, democracy as being a part of it. The court observed that the ability to alter does not equal the ability to destroy. Therefore, the judge may invalidate any amendment made by Parliament that conflicts with the Constitution's fundamental principles on the basis of this principle in Indian law. This allows the judge to negate any parliamentary amendment that conflicts with the basic principles of the Constitution. Later in 1975 *Indira Nehru Gandhi v. Raj Narain* case¹² The Supreme Court used the basic structure theory to invalidate Clause (4) of Article 329-A, which was added by the 39th Amendment in 1975 on the grounds that it was outside the scope of the Parliament's amending power since it damaged the fundamental elements of the Constitution. During the Emergency Period, the Parliament approved the 39th Amendment Act. This Act exempted the election of the Prime Minister, the Speaker of the Lok Sabha, the President, the Vice President, and the Vice President from judicial review. The government took this action to block Indira Gandhi from being tried by the Allahabad High Court for engaging in unethical electoral

⁹Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr. (1973) 4 SCC 225; AIR 1973 SC 1461

¹⁰ Basic Structure of Constitution 27 Apr 2020 Indian-polity. <https://www.drishtiias.com/daily-updates/daily-news-analysis/basic-structure-of-constitution> accessed on 20 April 2023

¹¹Gourab Das Basic Structure Doctrine of Indian Constitution March 2023 SSRN Electronic Journal https://www.researchgate.net/publication/369092350_Basic_Structure_Doctrine_of_Indian_Constitution accessed on 22 April 2023

¹²Indira Nehru Gandhi v. Raj Narain AIR 1975 SC 2299

practices. The 42nd Amendment Act of 1976 introduced two new clauses. The important amendment among them is amendment of article 31C, it gave all directive principles precedence over the fundamental rights. The aforementioned clauses were questioned in the matter of *Minerva Mills*¹³ case, and the Supreme Court declared these provisions to be unconstitutional since they eliminated the basic structure of the constitution. Therefore The court struck down the new amendments in clauses and restored it to its original state as in 25th amendment in 1971. It is quite evident from the ruling that the Constitution, not the Parliament, is superior. The Court expanded the list of fundamental structural aspects in this instance by two features. They were the balance between fundamental rights and DPSP, as well as judicial review. The courts determined that the Constitution's ability to be limited in its amendment is a fundamental aspect of it. Furthermore the Supreme Court restated the Basic Structure concept in the *Shankrappa* case also known as *Waman Rao Case* ¹⁴in 1981. The case focused on the validity of specific parts of the Karnataka Land Reforms Act, 1961, which was aimed at modifying the state's laws governing land ownership and tenancy. The main issue was whether the Act violated the right to property protected under article 19(1)(f) of the Act. The Act placed restrictions on the sale and purchase of agricultural land and gave the state government the authority to purchase surplus land. Another amendment to the Act has been adopted by the Karnataka government in 1974, giving right of redemption to former landowners by the government. The High Court of Karnataka, however, declared this amendment to be unconstitutional. Additionally, it emphasized the extent and boundaries of Parliament's power to modify the Constitution and it is the judiciary's responsibility for examining such modifications. The case paved a way for land reform policies in other states and offered a framework for putting such policies into practice in order to advance social and economic justice. The Court also decided that the amendment did not violate the Constitution's fundamental principles. Because the right to property is not a fundamental right and could be altered by Parliament under article 368.

Later in 1992, The scope and application of Article 16(4), which mandates the reservation of jobs for members of underprivileged groups, were addressed by the Supreme Court in *Indra Sawhney* case (1992)¹⁵ also known as Mandal commission case the case was filed for challenging Mandal

¹³ *Minerva Mills v. Union of India* (AIR 1980 SC 1789).

¹⁴ *Waman Rao And Ors vs Union Of India (Uoi) And Ors.* 1980(1981) 2 SCC 362, 1981 2 SCR 1

¹⁵ AIR 1993 SC 477, 1992 Supp 2 SCR 454

Commission Report's 1980, recommendations for providing reservation of 27% quota for Other Backward Classes (OBCs) in government positions and educational institutions. The Constitution's basic structure include equality it also state that equals should be treated equally and unequal should be treated unequally. Therefore reservations is necessary to achieve social justice. The concept of rule of law was now included to the list of fundamental elements of the constitution. With its decision in the S. R. Bommai case (1994), which addresses the question of the abuse of Article 356 of the Indian Constitution, is a turning point in Indian constitutional history. The dismissal of Karataka Government was challenged by Patil. The case questioned the President's authority to oust a state government under Article 356 was justifiable or not. Under this case Supreme Court held that the President's power under Article 356 is not absolute and can be challenged in court. The Court also held that the federal character of the Constitution is an essential element and is open to judicial review. The Court also established specific standards for the President to adhere to certain guidelines when dismissing a state government under Article 356 of the Constitution. The Court's confirmation of the basic structure theory and limitations on Parliament's power to alter the Constitution all strengthened federal character, democracy, secularism, and rule of law of the Indian constitution. The judgment has also played a significant role in preventing abuse of Article 356, As was shown in the Emergence Era, the idea of the basic structure aids in the prevention of legislative excesses. This is necessary as a defense against an all-powerful parliament that would abuse Article 368 ¹⁶excessively. However, there is a different school of thought that claims that amendment is necessity to help a constitution survive, it must also make adjustments to what is considered to be its fundamental provisions. Anyway this case phase been relied on more than a hundred times during the Indian Constitution's history.

Although a constitutional amendment was not at issue in this instance, the idea of fundamental doctrine was nevertheless used. According to the Supreme Court, a state government's practices that are in opposition to a fundamental aspect of the Constitution constitute a legal basis for the use of Article 356's central power.

Significance of basic structure doctrine

- The basic structure concept is a testament to the notion of Constitutionalism in preventing

¹⁶ The constitution one hundred and fifth amendment act 2021

the ruling majority's brute majority from destroying the essence of Constitution of India

- The basic theory doctrine saved Indian democracy by limiting constituent power of the parliament; otherwise, unrestrained power in parliament would have turned India into a totalitarian state.
- It enables us to preserve the fundamental principles of our constitution, which were carefully designed by our founding ancestors.
- By clearly defining an actual distinction of powers between other organs helped judiciary to operates independently served as a supports for our democracy.
- By limiting the ability of legislative bodies to modify laws, it has also given the Supreme Court enormous, unrestricted power, making it the most powerful court in the world.
- By controlling the altering powers of legislative organ of State, it gave fundamental Rights to Citizens which no organ of State can overrule.
- Its dynamic and progressive in nature.
- Arguments related to Basic structure doctrine Critics of the doctrine have called it undemocratic¹⁷, since unelected judges can strike down a constitutional amendment. That means the doctrine gives the judiciary the authority to impose its philosophy on a democratically elected government. The idea of lacking a legal foundation in the language of the Constitution were also faced lot of criticism because. The doctrine lacks a written foundation. There is no clause stating that this Constitution has a basic structure and that this structure is beyond the scope of modifying power and also, There is no clear definition of what comprises basic structure, making the concept ambiguous. Even though The doctrine has recently been used in cases that have been viewed as instances of judicial overreach. Ex: The SC used this theory to declare the National judicial appointment commission bill null and void. It is used as a security valve against majoritarianism and dictatorship.

¹⁷Indian express News paper Explained: 47 years of a judgment that upheld basic structure of India's constitution April 25, 2020 18:26 IST <https://indianexpress.com/article/explained/explained-47-years-of-a-judgment-that-upheld-basic-structure-of-indias-constitution-6379081/>. accessd on 25april 2023

Basic structure doctrine in comparison with other Countries

The doctrine of basic structure was pronounced by Indian judiciary to make certain provisions of the constitution unamendable for keeping a basic structure for our constitution and for ensuring fundamental rights to the people. Various other countries¹⁸ also adopted our doctrine in their laws. Some of them are as follows, Germany is a good example of a country that adopted the basic structure philosophy that was developed in India and makes certain sections unamendable. This doctrine was adopted by many nations after World War II. A lengthy and reasonably comprehensive list of all unamendable provisions is included in the constitutions of Greece¹⁹ and Portugal²⁰. On the other hand, the Constitutions of a few nations, including France²¹ and Italy²², have made an effort to protect just one or two fundamental ideas, of our doctrine such as the Republican system of government. In the case of Iran²³ they made unamendable clauses in relation with social and economic objectives, as well as its Islamic and democratic goals.

In conclusion, the basic structure doctrine guides in Constitution's shaping and development. Though the concept of basic structure is not precisely defined, it provides an idea for defining the basic structure of the constitution through its contents. Constitution is growing according to the change in need of society. Even though the Supreme Court is yet to define the exact basic structure of the constitution. but through various verdicts by the judiciary gives an idea regarding the basic features of the constitution concepts such as democracy, rule of law constitutional supremacy, secularism, federalism, and the separation of powers etc. Since the basic structure of the constitution is upgraded with new elements, if any amendment by legislature tried to destroy the basic features of constitution then the judiciary has the authority to overthrow such legislation.

¹⁸ Sanskriti Sanghi The Basic Structure doctrine goes global 22 Jan 2017 Thelawblog <https://thelawblog.in/2017/01/22/the-basic-structure-doctrine-goes-global/>. accessed on 24 April 2023

¹⁹ Articles 2, 4-5, 13, 26, 110, Syntagma Constitution, The Constitution of Greece, 1975

²⁰ Article 288, The Constitution of Portugal, 1976.

²¹ Article 89, Constitution of France, 1958.

²² Article 139, Constitution of Italy, 1947.

²³ Article 177(5), Qanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran], 1980.