DOCTRINE OF BASIC STRUCTURE AND THE SPIRIT OF INDIAN CONSTITUTION: AN ANALYSIS

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INTRODUCTION

The Constitution makers gave the power to amend the Constitution in the hands of the Parliament by making it neither too rigid nor too flexible with a purpose that the Parliament will amend it as to cope up with the changing needs and demands of "we the people". Article 368 of the Indian Constitution grants the Parliament the ability to change any of the Constitution's provisions, including Article 368. The 'Concept of Fundamental or basic Structure' is a judge- created doctrine that limits Parliament's amending powers such that the "basic structure of the basic law of the nation" cannot be changed in the exercise of the Constitution's "constituent authority." Indian Constitution is a dynamic document that can be amended according to the needs of society whenever required. Constitution under Article 368 grants power to the Parliament to amend whenever there is a necessity. The Article also lays down the procedure for amendment in detail. The doctrine of basic structure is nothing but a judicial innovation to ensurethat 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.

According to the Indian Constitution, the Parliament and the State Legislatures can make laws within their jurisdictions. The power to amend the Constitution is only with the Parliament and not the state legislative assemblies. However, this power of the Parliament is not absolute. The Supreme Court has the power to declare any law that it finds unconstitutional void. As per the Basic Structure Doctrine of the Indian Constitution, any amendment that tries to change the basicstructure of the constitution is invalid.

There is no mention of the term "Basic Structure" anywhere in the Constitution of India. Theidea that the Parliament cannot introduce laws that would amend the basic structure of the constitution evolved gradually over time and many cases. The idea is to preserve the nature

of Indian democracy and protect the rights and liberties of people. This Basic Structure doctrine of the Indian Constitution helps to protect and preserve the spirit of the constitution document.

Indian Constitution upholds certain principles which are the governing rules for the Parliament, any amendment cannot change these principles and this is what the doctrine of basic structure

upholds. The doctrine as we have today was not present always but over the years it has been propounded and upheld by the judicial officers of this country.

So, the question is whether or not the Parliament's modifying powers are unrestricted another question arises: to what degree may the Parliament modify the fundamental law of the land? Thispaper seeks to answer these questions and its scope through judicial pronouncements.

Aims and Objectives of the Research

- To understand the judicial evolution of the Doctrine of Basic Structure.
- To understand how the Doctrine of Basic Structure qualifies with the spirit of the IndianConstitution.
- To find the amending powers of Parliament under Article 368.

Review of Literature:

1. In the book Jain, M. P. Outlines of Indian legal & constitutional history / by M.P. Jain Wadhwaand Co. Nagpur New Delhi 2006 brilliantly explain about the Basic Structure Doctrine and splendidly elaborate how single center authority administer the functions of legislative, executive and judiciary power and functions and barred them from going beyond limitand creating supremacy.
2. The Basu. DD, Commentary on the Constitution of India. By D. D. Basu. 3rd Edition, Vol. I is was also very much resourceful and helpful for us understanding the issue with Judicial Developments regarding excessive power and control and pondered the tug of war betweenlegislative and judiciary in splendid manner.

Hypotheses:

1. The doctrine of basic structure is a judicial innovation to ensure the power is not being misused by Parliament.

2. The basic structure of the Constitution of India should not be altered.

Citation:

Uniform mode of citation has been followed throughout the project.

Research Methodology

This research is based on information that has been already available and analyzed those facts to make an evolution of this research. This research is based on information that has been already available and analyzed those facts to make an evolution of this research. The doctrinal method will be adopted in the preparation of the project. Various reports, articles, legal provisions and case laws will be used to study and prepare the present work.

Limitations of the study:

Since the researcher is a student of law, he has access to a limited area. The present research confined to a limit of one month and this research contains doctrinal work, which are limited to books &internet sources. The research will be limited to specifically mentioned cases only.

Judicial Journey Of Basic Structure Doctrine From Shankari Prasad Case To Keshavnanda Bharti Case

(A) The Shankari Prasad Case[1]-

After coming into force, the Constitution of India, the problem of validity of the Constitutional amendments arose early essentially on the issue of "right to property"[2] The originally enacted Constitution included such provisions relating to property under Article 19 (1) (f)[3] The

[1] Shankari Prasad v. Union of India A.I.R. 1951 S.C. 2193.
[2] Where several State legislatures carried out certain agrarian reforms in Bihar, Uttar Pradesh and Madhya Pradesh by enacting legislation which may compendiously be referred to as Zamindari Abolition Acts.
[3] Right to acquire, hold and dispose of property which was deleted by the Constitution Forty-Fourth AmendmentAct in 1978 and a reasonable restriction was imposed in the interest of the general public.

Constitution further provided for the protection of the right to property under Article 31.[4] The Bihar Land Reform Act, 1950 was declared unconstitutional by the Patna High Court In **Kameshwar Prasad Singh vs. the State of Bihar[5].** The unconstitutionality of the Bihar Land Reforms Act, 1950 was related to the law being subject to Article 13(2)[6]. Different interpretations were made by some other High Courts. The Patna High Court held that the Act passed in Bihar was unconstitutional while the High Courts at Allahabad and Nagpur upheld the validity of the corresponding legislations in Uttar Pradesh and Madhya Pradesh respectively. Such conflicting views of the Courts led the Parliament to bring the Constitution (First Amendment) Act, 1951 which introduced new Articles in the Constitution by the saving clause i.e., Articles 31-A and 31-B. It was broadly declared in Article 31-A that any law providing for compulsory acquisition of property aimed at the development of the state will not be unconstitutional merely because it is in conflict with Articles 14 and 19.

Whereas Article 31-B introduced a new Schedule in the Constitution; the Ninth Schedule laid down that any law included in this schedule would be immune from challenge in any court. The First Constitutional Amendment was challenged before the Supreme Court in **Shankari Prasad vs. Union of India[7]** with the main issue of whether the Constitution (First Amendment) Act, 1951 passed bythe provisional Parliament is valid? The amendments were challenged on the ground that the word 'law' under article 13(2) also includes the "law of the amendment of the Constitution" and so the Articles 31-A and 31- B are invalid because they abridge the fundamental rights. To the issue that the definition of the word contained under Article 13 (3) (a)[8] did not expressly refer to the "Constitutions amendments", the Court held that although amendment is superior to an ordinary legislation andhence it will not be hit by article 13(2). As the word 'law' under article 13(2) ordinarily includes Constitutional amendment but it must be taken to mean the exercise of ordinary legislative power. Thus, amendments made in the exercise of the constituent power of the Parliament are not subject to Article 13(2) and such power includes the amendment of the fundamental rights as well. On this pointthe Court also observed- "We are of the opinion that in the context of Article 13

[4] No person shall be deprived of his property save by the authority of law.
[5] Kameshwar Singh v. State AIR 1951 Pat. 91.
[6] Constitution of India Act 1950 a. 13 (2) "The State shall not make any law which takes away or abridges the rightsconferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.".
[7] Shankari Prasad v. Union of India AIR 1951 S.C. 2193.
[8] Constitution of India Act 1950 a.13 (3) (a) "Law "includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

law must be taken to mean rules and regulations made in the exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constituent power with the result that Article 13(2) does not affect amendments made under Article 368." The Court using the literal interpretation resolved the conflict and upheld the validity of the First Amendment and also held that Article 368 empowers the Parliament to amend the Constitution without any exception that Fundamental Rights cannot be amended being the exception to Article 368. The Court also disagreed with the view that Fundamental Rights are inviolable. Thus, in this case, the Supreme Court kept the 'law of amendment' beyond the scope of Article 13(2) and thereby enabled the process of progress of the nation through the process of acquisition of property.

(B) Sajjan Singh v. State of Rajasthan[9]

After the Shankari Prasad case, the Constitution (Fourth Amendment) Act, 1955 was passed amending some Articles in Fundamental Rights Part, but its validity was never challenged. The Constitution (Seventeenth Amendment) Act, 1964[10] introduced a major change and put a number of laws in the Ninth Schedule, so as to keep them away from the judicial review and was challenged before the Court. The majority of the judges in this (Sajjan Singh) case on the same logic as held in the Shankari Prasad case held that the law of amendment is superior law and is not subject to Article 13(2). It also held that the Shankari Prasad case was rightly decided and affirmed that the Parliament under Article 368 can amend any of the provisions of the Constitution including the Fundamental Rights and make a suggestion to the Parliament that Fundamental rights should be included in the Proviso of the Article 368.

Justice Hidayatullah and Mudholkar dissented from the majority view and Hidayatullah J. expressed his concern as- "The Constitution gives so many assurances inPart III that it would be difficult to think that they were the plaything 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 part and even on the less firm ground than one on which the articles mentioned in

[9] Sajjan Singh v. State of Rajasthan [1965] 1 SCR 933,AIR 845 (1) 933.
[10] The amendment inserted 44 Acts in the Schedule. It was noted that Articles 31A and 31B were added to the Constitution realizing the State Legislative measures adopted by certain States giving effect to the policy of agrarianreforms have to face serious challenge in the in the Courts of law on the ground that they contravene the Fundamental Rights guaranteed under the Constitution.

the proviso stand. As at present advised, I can only say that the powerto make amendment ought not ordinarily to be a means of escape from absolute Constitutional restrictions."

One of the arguments, in this case, was the scope of judicial review which was reduced to a great extent, so the amendment should be struck down. The Court rejected this argument and held by the majority that the 'pith and substance' of the amendment was to amend the Fundamental Rights and not to restrict the scope of Article 226.

The minority view on this point was very different,

Justice Hidayatullah observed- "I would require stronger reasons than those given in Shankari Prasad to make me accept the view that Fundamental Rights were not reallyfundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without the concurrence of the states".

Justice Mudholkar observed that the Constitutional amendment be excluded from the definition of law under Article 13 and he also gave an argument that every Constitution has certain basic principles which could not be changed. Justice Mudholkar concurred with the opinion of the Chief Justice Gajendragadkar and questioned "it is also a matter for consideration whether making a change in the basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of the Article 368?

(C) I. C. Golakhnath and Ors. V. State of Punjab[11]

The strong reservations of the minority in the Sajjan Singh case prompted Chief Justice Subba Rao toconstitute a larger Bench (eleven judges) to reconsider the Constitutional validity of the First, Fourth and Seventeenth Constitutional Amendments in view of the doubts expressed by Hidayatullah and Mudholkar JJ. The Seventeenth Constitutional Amendment was challenged in the I. C. Golakhnath case. By a majority of 6:5, it was held that "the Parliament had no power to amend the fundamental right". Chief Justice Subba Rao supported his judgement by stating the following reasons: -

1) He rejected the argument that power to amend the Constitution was a sovereign power

[11] I. C. Golakhnath and Ors. v. State of Punjab [1967] 2 SCR 762, 1967 AIR SC 1643.

and it was supreme to legislative power and it did not permit an implied limitation.

2) The power of Parliament to amend the Constitution is derived from Article 245 read with Entry 97of List 1 of the Constitution and not from Article 368 as it only lays down the procedure of amendment and does not give the power to amend. (prior to 1971, Art 368 had a marginal note "procedure to amend only")

3) The Supreme Court held that Parliament could not amend Fundamental Rights, & an amendment under Article 368 is law within the meaning of Article 13 of the constitution therefore if an amendment takes away or abridges a Fundamental Right conferred by part III, It is void.

Therefore to save the democracy from autocratic actions of the fundamental right enshrined under part III of the constitution of India.

The majority said that fundamental rights are the same as natural rights, these rights are important for the growth and development of human being.

The Chief Justice said that the Fundamental Rights are given a transcendental place under our Constitution and hence they are kept beyond the reach of the Parliament. In this case, the Court applied the Doctrine of "Prospective Overruling" and held that the decision will not have any retrospective effect and therefore the 1st, 4th and 17th Amendments will continue to be valid. The Court while struck down the three amendments and evolved the doctrine of "Prospective Overruling" under which the decisions would only have a prospective operation and not retrospective and alsoheld that from the date of the judgment of this case, the Parliament shall have no power to take away or abridge the fundamental rights.

While some dissenting judges like Justice Wanchoo expressed his view that no limitation should be implied on the amending power of the Parliament under Article 368. He gave the argument that"basic feature would lead to the position that any amendment made to any Article of the Constitution would be subject to the challenge before the Courts on the ground that it amounts to the amendmentof the basic structure". Justice Ramaswami held that the Constitution makers had not expressly provided any such limitation on the amending power of Parliament and hence there was no inviolability attached to the fundamental rights through the amending process.

(D) The Keshavananda Bharati Sripadagalvaru Case[12]

The tussle between the Judiciary and the Legislature took totally a different shape after the decision in the Golakhnath case. The Constitution (Twenty-fourth Amendment) Act was passed to nullify the Golakhnath decision. Four clauses were added in the Article to blanket the Parliament with an omnibus constituent power. The Constitution (Twenty-fifth Amendment) introduced a new provision Article 31C in the Constitution under which law giving effect to the Directive Principles of the State Policy enumerated under Part IV of the Constitution were deemed automatically be valid despite any inconsistency with the fundamental rights granted under Articles 14, 19 and 31.

His holiness Kesavananda Bharati Sripadagalavaru, in this case the validity of Kerala Land Reforms Act, 1963 was challenged by the Petitioner. This Act was amended in the year 1971 and also it was added in Ninth Schedule by the 29th Amendment. The Petitioners were allowed to challenge the validity of 24th, 25th & 29th Amendment of the Constitution. The issue was related to the extent to which the Parliament can amend the Constitution under Article 368 of the Constitution. This matter was heard and decided by the largest constituted bench of 13 Judges, this bench reviewed the decision given by the Court in Golak Nath's case. By a majority of 7:6 on 24th April 1973 the Court, in this case, held that the Basic Structure of the Constitution cannot be amended. As regards the scope of amending power under Article 368, majority Judges (Sikri CJ, Shelat, Grover, Hegde, Reddy, & MukherjeeJJ.) held that there is an inherent or implied limitation on the Parliament's amending power and Article 368 does not give the power to the Parliament to abrogate or destroy the basic features of the Constitution. Khanna J. held that though Article 368 does not have any implied limitation on the amending power but the power to amend does not include thepower to damage the foundation of the Constitution. He said that the word 'amendment', postulated that the old Constitution must survive without loss of indemnity and must be retained through the amended form; therefore the power does not include the power todestroy the basic structure or the framework of the Constitution. The Court also held that the amendments must be made in such a manner that it does not destroy the essence or spirit of the Constitution. The Court further held that the constituent power of the Parliament cannot be equated to the constituent power of the Constituent Assembly as the Parliament has not created the Constitution rather it is the creation of the Constitution therefore the Parliament cannot raise

[12] Keshavananda Bharati Sripadagalvaru v. State of Kerala AIR. 1973 SC 1461.

itself above the Constitution. While reviewing the decision in Golak Nath's case the Court held that the Fundamental Rights can be amended but the Basic Structure cannot beamended. The remaining six Judges (A.N. Ray, Chandrachud, Beg, Mathew, Dwivedi, & Palekar JJ.) held that there are no limitations, express or implied on the amending power. Thus, the Court by majority held that the Parliament has wide powers of amending the Constitution and it extends to all the Articles but the power is not unlimited and does not include the power to damage or alter the framework or basic feature of the Constitution. There are implied limitations on the power of amendment under Article 368. The Parliament can amend every Article of the Constitution provided it is within the limit of the Doctrine of Basic Structure. A question arose whether the Doctrine of Basic Structure is vague and unsatisfactory? The Sikri CJ stated that any amendment within the boundaries of the Preamble and of the Constitution cannot be considered as a vague and unsatisfactory idea that cannot be understood by the Parliament and the public. He also said, the argument that if something cannot be defined, weighed or measured it ceases to exist is misleading. There are many concepts of law which are not capable of exact definition but it does not mean that theydo not exist. It was argued that every provision in the Constitution is essential otherwise it would not have been put in the Constitution. The Chief Justice further said, but this does not place every provision of the Constitution in the same position. The accurate position is that every provision under the Constitution can be amended provided that such should not resultin any change in the basic foundation and structure of the Constitution. So, what is Basic Structure can be explained by testing that, any provision of the Constitution which if taken away from it would result in loss of its identity, object and unity & integrity of the Country and dignity of the people would be considered as a part of the Basic Structure of theConstitution. In this case, the Judges enumerated certain essentials of Basic Structure as follows

Chief Justice Sikri:

i) Supremacy of the Constitution

ii) Republican and democratic form of government

iii) Secular character of the Constitution

iv) Separation of powers between the legislature, executive, & judiciary

v) Federal character of the Constitution

Shelat J. and Grover J.;

i) Unity and integrity of the nation

ii) Sovereignty of the country

Hegde, J. and Mukherjee, J.:

i) Democratic character of the polity

ii) Unity of the country

iii) Essential features of the individual freedoms secured to the citizens

iv) Mandate to build a welfare state

v) Unity and integrity of the nation

Jaganmohan Reddy, J.:

i) Equality of status and the opportunity

ii) Sovereign democratic republic

iii) Justice - social, economic and Political

iv) Liberty of thought, expression,

v) belief, faith and worship

Hence in this historic case, the Doctrine of Basic Structure was evolved, which acted as an implied limitation on the unlimited amending powers of the Parliament. Though no exhaustive list of what constituted the Basic Structure was given by the Court all the majority Judges commonly said that the Judicial Review is a part of the Basic Structure.

(E) Judicial activism on new challenges with the spirit of the constitutionafter Keshavnanda Bharti Case In 1975.

The Supreme Court again had the opportunity to pronounce on the basic structure of the Constitution. A challenge to Prime Minister Indira Gandhi's election victory was upheld by the Allahabad High Court on grounds of electoral malpractice in 1975. Pending appeal, the vacation judge Justice Krishna Iyer, granted a stay that allowed Smt. Indira Gandhi tofunction as Prime Minister on the condition that she should not draw a salary and speak or vote in Parliament until the case was decided. Meanwhile, Parliament passed the Thirty-ninth amendment to the Constitution which removed the authority of the Supreme Court to adjudicate petitions regarding elections of the President, Vice President, Prime Minister and Speaker of the Lok Sabha. Instead, a body constituted by Parliament would be vested with the power to resolve such election disputes. Section 4 of the Amendment Bill effectively thwarted any attempt to challenge the election of an incumbent, occupying any of the above offices in a court of law. This was clearly a pre-emptive action designed to benefit Smt. Indira Gandhi whose election was the object of the ongoing dispute.

Amendments were also made to the Representation of Peoples Acts of 1951 and 1974 andplaced in the Ninth Schedule along with the Election Laws Amendment Act, 1975 in order to save the Prime Minister from embarrassment if the apex court delivered an unfavorable verdict. The mala fide intention of the government was proved by the haste in which the Thirty-ninth amendment was passed. The bill was introduced on August 7, 1975 and passed by the Lok Sabhathe same day. The Rajya Sabha (Upper House or House of Elders) passed it the next day and the President gave his assent two days later. The amendment was ratified by the state legislatures in special Saturday sessions. It was gazetted on August 10. When the Supreme Court opened the case for hearing the next day, the Attorney General asked the Court to throw out the case in the light of the new amendment.

(F) Basic Structure Concept Reaffirmed- The Indira Gandhi Election Case[13]

In this case, Four out of five judges on the bench upheld the Thirty-ninth amendment, but only after striking down that part which sought to curb the power of the judiciary to adjudicate in the current election dispute. One judge, Beg, J. upheld the amendment in its entirety. Mrs.

[13] Indira Gandhi vs. Raj Narain AIR 1975 SC 2299

Gandhi's election was declared valid on the basis of the amended election laws. The judges grudgingly accepted Parliament's power to pass laws that have a retrospective effect.

(G) Sardar Swaran Singh Committee and The Forty-Second Amendment

Soon after the declaration of National Emergency, the Congress party constituted a committee under the Chairmanship of Sardar Swaran Singh to study the question of amending the Constitution in the light of past experiences. Based on its recommendations, the government incorporated several changes to the Constitution including the Preamble, through the Fortysecond amendment (passed in 1976 and came into effect on January 3, 1977). Among other things the amendment: a) gave the Directive Principles of State Policy precedence over the Fundamental Rights contained in Article 14 (right to equality before the law and equal protection of the laws), Article 19 (various freedoms like freedom of speech and expression, right to assemble peacefully, right to form associations and unions,right to move about and reside freely in any part of the country and the right to pursue any trade or profession) and Article 21 (right to life and personal liberty). Article 31C was amended to prohibit any challenge to laws made under any of the Directive Principles of State Policy; b) laid down those amendments to the Constitution made in the past or those likely to be made in future could not be questioned in any court on any ground; c) removed all amendments to fundamental rights from the scope of judicial review and d) removed all limits on Parliament's power to amend the Constitution under Article.

(H) The Minerva Mills Case[14]

This case again strengthens the Basic Structure doctrine. The Judgment struck down 2 changes made to the Constitution by the 42nd Amendment Act 1976, declaring them to be violative of the basic structure. Chief Justice Y.V. Chandrachud, delivering the majority judgement (4:1), upheld both contentions. The majority view upheld the power of judicial review of constitutional amendments. They maintained that clauses (4) and (5) of Article 368 conferred unlimited power on Parliament to amend the Constitution. They said that this deprived courts of the ability to question the amendment even if it damaged or destroyed the Constitution's basic structure. The judges, who concurred with Chandrachud, C.J. ruled that a limited amending power itself is a basic feature of the Constitution. **Bhagwati, J.** the dissenting

[14] Minerva Mills Ltd. and Ors. v. Union Of India and Ors. AIR 1980 SC 1789.

judge also agreed with this view stating that no authority howsoeverlofty, could claim to be the sole judge of its power and actions under the Constitution. 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. The amendment to Article 31C remains a dead letter as it has not been repealed or deleted by Parliament. Nevertheless, cases under it are decided as it existed prior to the Forty-second amendment.

(I) The Waman Rao Case[15]

The SC again reiterated the Basic Structure doctrine. It also drew a line of demarcation as April 24th,1973 i.e., the date of the Kesavananda Bharati judgement, and held that it should not be applied retrospectively to reopen the validity of any amendment to the Constitution which took place prior to that date. In the Kesavananda Bharati case, the petitioner had challenged the Constitution (29th Amendment) Act, 1972, which placed the Kerala Land Reforms Act, 1963 and its amending Act into the Ninth Schedule of the Constitution. The 9th Schedule was added to the Constitution by the First Amendment in 1951 along with Article 31-B to provide a "protective umbrella" to land reforms laws. This was done in order to prevent them from being challenged in court. Article 13(2) says that the state shall not make any law inconsistent with fundamental rights and any law made in contravention of fundamental rights shall be void. Now, Article 31-B protects laws from the above scrutiny. Laws enacted under it and placed in the Ninth Schedule are immune to challenge in a court, even if they go against fundamental rights. The Waman Rao case held that amendments made to the Ninth Schedule until the Kesavananda judgment are valid, and those passed after that date can be subject to scrutiny.

Further, in **S.R. Bommai case**[16] 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. Later in case of **L. Chandra Kumar v. Union of India**[17] a seven members bench of the Hon'ble Supreme Court declared clause 2 (d) of Article 323A and clause 3 (d) of Article 323- B as Unconstitutional because these clauses barred the Jurisdiction of the High Court & the Supreme Court under Article 226 and

[15] The Waman Rao Case (1981) 2 SCC 362.
[16] S.R. Bommai case 994 2 SCR 644.
[17] L. Chandra Kumar v. Union of India, AIR. 1997 SC 1125.

Article 32 respectively. The Court held that these provisions damage the power of Judicial Review which is an essential part of the Basic Structure of the Constitution.

Doctrine of "Basic Structure"- The Concept

Basic structure came as a savior to the Indian judiciary to save the sanctity of the Constitution from the ever-encroaching executive and legislature. The judiciary had very loosely defined basic structure in a negative manner as, "Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But the Constitution is a precious heritage; therefore, you cannot destroy its identity[18] Thus the legislature is barred from any act which may damage, emasculate, destroy, abrogate, change or alter such provision, which destroys the identity of the constitution. Although over the years, the judiciary has put certain provision of the constitution in this exalted club[19]. it has mostly reserved the membership to abstract ideas like sovereignty, democracy, federalism, judicial independence, judicial review etc., and has rarely movedinto the mundane world of specific provisions. The framers of the Constitution, with due diligent havetaken lot of care and concern to provide a best Constitution to the citizen. But they did not addexpress clause under Article 368 to impose limitations upon the amendment power exercised by the Parliament. Consequently, Parliament by exercising its constituent power added tricky Ninth Schedule. to accommodate agrarian reforms by excluding judicial review. Gradually, Ninth Schedulemade controlled Constitution into uncontrolled one.

As a result, **in Kesavananda Bharathi's[20] case in 1973**,

The Supreme Court made uncontrolled Constitution into controlled one through inventing the new doctrine called "Basic Structure" which imposes implied limitations upon the amendment power of the Parliament. But Supreme court has failed to lay down the yardstick for what constitutes basic structure. Power to make an implied amendment to Indian Constitution was given even to individual judge, which is really unfair under the scheme of theory of separation of power which is also one of the basic structures of the Indian

[18] Minerva Mills v. Union of India, AIR 1980 SC 1789.
[19] In Kesavananda case the following ideals were accepted as 'basic structure', Sikri, C.J. explained that the concept of basic structure included supremacy of the Constitution, republican and democratic form of government, secular character of the Constitution, separation of powers between the legislature, executive and the judiciary, federal character of the Constitution.
[20] AIR 1973 SC 1473.

Constitution. The Judiciary even did not say the subject matters of basic structure should be decided by the Constitutional Bench. Therefore, from evolution of Basic structure we may conclude that basic structure was a product of Judiciary's attempt to find something superior in the constitutional framework whereby an all assuming executive could be stopped. Basic structure as stated by the judiciary in Kesavananda Bharti protected the supremacy of the Constitution, a republican and democratic form of government; the secular character of the Constitution; maintenance of the separation of powers and the federal character of the Constitution.

The Test of "Basic Structure":

The test of 'basic structure' as derived in Kesavananda Bharati's was far from concrete, except for those features enunciated by various judges[21]. the rule of basic feature or tests of basic structure was nebulous and confusing. Noted jurist H.M Seervai has lamented that, "a precise formulation of the basic features would be a task of greatest difficulty and would add to the uncertainty of interpreting the scope of Art 368. the first judgment where a conscious attempt was made to lay down the tests of basic structure is Minerva Mills.[22]

At the very outset the majority reiterated that as per theme of Kesavananda, the concept of basic structure can be adduced as, "amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore, you cannot destroy its identity"

One may comment that this test is as vague as the constitutional identity of Kesavananda Bharti butan in-depth analysis of these points would prove otherwise. First let us consider the condition on 'nature of right', one needs to understand what kind of rights have been violated whether it is a Fundamental Right or a legal right or a constitutional right, as is clear from the analysis given in the rights chain basic structure comprises of rights both Fundamental Rights guaranteed under Part IIIlike Right to life, and rights which are ingrained in the spirit of constitution like the notion of democracy, rule of law etc. Thus, merely because a right is

[21] In Minerva Mills v. Union of India, AIR 1980 SC 1789 the majority judgment concisely discussed the ratio of Kesavananda and jotted down the Basic features regarding the limited amenability of constitution and the balance between Part III and Part IV as pointed out by Sikri, C.J., Shelat and Grover, JJ, Hegde and Mukherjee, JJ, Jaganmohan Ready J and Khanna, J. For a detailed analysis of various features of constitution categorized as 'Basic structure' in Kesavananda one can refer to V.N. Shukla, Constitution of India at 887-889.
[22] Minerva Mills Ltd. and Ors. v. Union of India (UOI) and Ors., AIR 1980 SC 1789.

a fundamental right does not accord it anyprotection it must be an absolute essential or the basic or core natural rights.

The second test is the question of extent and depth of infringement while it may seem superfluous after the first test; one must understand that all these tests are to be simultaneously applied rather than in a hierarchical way. The present set of tests is a post violation test where the judges are supposed to check whether the provision is part of Basic structure after it has been amended. Under Indian constitutional framework the courts cannot take Suo motto action on an amendment and hence the courts cannot look into an amendment unless it has been brought before it. Thus, the test devised by Indian courts always tries to counter a situation where the damage is already done. The second test is very intricately linked with the third one as while analyzing the extent of infringement one needs to understand the purpose and impact of the infringement. Thus, if we are to implement the three- pronged test as per Bhagwati, J., we find that by nature the primacy of Fundamental Rights, as in the present case, is not basic structure, especially so when the curtailment is for greater common good as per the purpose and impact test of the infringement. In I. R. Coelho case, it was further held by the Court that if the triangle of Article 21 read with Article 14 and Article 19 is sought to be eliminated not only the "essence of right test" but also the rights test has to apply. Therefore, if we are to restate the test given in the Minerva Mills, we may come up with the following points "whether the nature of the right is such that it is a fundamental right or a core, condition of natural right of a human being." The extent and depth of the infringement, purpose for which the infringement is made, overall impact on the basic value or identity of the Constitution.

Amending Power Of The Parliament And The Ninth Schedule Of The Constitution

The Ninth Schedule has been steadily enlarged since 1951, to the point that it now contains 284 Acts.13 statutes were added to the Ninth Schedule by the First Constitution (Amendment) Act of 1951. The Fourth Constitutional (Amendment) Act changed it once again, and six additional Acts were added. The 17th Amendment Act included 44 new legislations. The Constitution 29th (Amendment) Act, 1972 added 20 more laws. In 1975, the Constitution 39th (Amendment) Act added 38 more laws.In 1976, the Constitution 42nd (amendment) Act further added 64 laws to the Ninth Schedule. The 47th Constitutional Amendment, 1984 added more laws and the number of Acts in the Ninth Schedule rose to 202. Parliament

approved the Constitutional 76th (Amendment) Acts 1994 to place the Tamil Nadu Government's legislation in the Ninth Schedule, removing it from the scope ofjudicial scrutiny. The measure offered 69 percent quota for backward classes. The Constitutional 78th (Amendment) Act of 1995 adds 27 Land Reform Laws to the Ninth Schedule, bringing the total number of Acts to 284. **In I.R. Coelho v. State of Tamil Nadu** The Constitution bench of 5 judges referred the case to higher bench to decide two questions:

These questions which the 5 Judge Constitutional Bench referred to higher bench to decide were asfollows:

- Whether an Act or Regulation which, or a part of which, is or has been found by the Supreme Courtto be violative of any of the Articles 14, 19 and 21 can be included in the Ninth Schedule or not?

- Whether it is only a Constitutional Amendment amending the Ninth Schedule that damages ordestroys the basic structure of the Constitution that can be struck down or not?

The Supreme Court's 9-judge Constitutional Bench held on The Supreme Court's 9-judge Constitutional Bench held on January 11, 2007, that all amendments to the Constitution made on or after April 24, 1973, which amend the Ninth Schedule by including various laws therein, must be tested against the touchstone of the Constitution's basic or essential features as reflected in Article 21 read with Article 14, Article 19, and the principle underlying them. To put it another way, even if a Constitutional Amendment places an Act in the Ninth Schedule, its provisions may be challenged on the grounds that they undermine or harm the basic structure if the fundamental right or rights taken away or abrogated belongs or pertains to the basic structure. The Supreme Court went on to say that if the legality of a legislation in the Ninth Schedule has already been established by this Court, it would be impossible to challenge it again based on the criteria set forth in this decision. However, if a law found to be in violation of any rights in Part III of the Constitution is later incorporated in the Ninth Schedule after April 24, 1973, such a violation / infraction may be challenged on the grounds that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19, andthe principles underlying therein. The Court will first determine if there is violation of rights in Part III by impugned Amendment, its impact on the basic structure of the Constitution and the consequence of invalidation of such Amendment. In respect of the

constituent power, the Bench went further saying that: "If constituent power under Article 368, the other name of amending powercannot be made unlimited; it follows that Article 31B cannot be used so as to confer unlimited power.Article 31B cannot go beyond the limited amending power contained in Article 368. The power to amend Ninth Schedule flows from Article 368. This power of amendment has to be compatible with limits on the power of the amendment. The limit came with the Kesavananda Bharati case. Therefore,Article 31B after April 24, 1973, despite its wide language, cannot confer unregulated or unlimited immunity." Now after the landmark judgment of Supreme Court in I.R. Coelho which was delivered on January 11, 2007 it is now well settled principle that any law placed under Ninth Schedule after April 23, 1973 are subject to scrutiny of Court's if they violated fundamental rights and thus put the check on the misuse of the provision of the Ninth Schedule by the legislative.

Conclusion, Criticism and Suggestions:

A Constitution is a living document which needs to adopt necessary changes to endure the tides of times. The moment it stops growing it loses its essence for which it was created. In order to keep its strength alive, the framers of the Constitution provided the power to amend the Constitution to the Parliament. Thus, we find that basic structure as a concept has evolved over years since its inceptionin 1970s, with every passing year there has been more and more rights being included into the basic structure of the Constitution. Basic structure as we see today is thus a culmination of years of judicial supervision of Fundamental Rights and related constitutional structure. The purpose behind providing such power was to prevent the Constitution from becoming dormant. Willis in his book on the Constitutional Law of the United States says: “If no provisions for amendment were provided, there would be the danger of revolution”. So, to avoid any revolution to change the Constitution it was necessary to provide the provision to amend the Constitution. The Parliament drifted away from the right path and started abusing the amending power given to it. The Constitution of India is a priceless gift given to “We the People” but the Parliament used it to fulfil its desires and discarded the desires of the people. By the virtue of the amending powers given under Article 368 the Parliament introduced several undesirable amendments, the very first amendment the Parliament introduced a new schedule (Ninth Schedule) which provided that the laws which will be added in this schedulewill be immune from being challenged in the Court of law and after this amendment the Parliament added many Lands Reforms Act in this schedule which aimed at compulsory land acquisition. The intention of the Parliament behind this amendment

was to deliberately exclude the power of Judicial Review in order to exercise the supremacy on the amendment of the Constitution. In the dark phase ofConstitutional history where the rights guaranteed to the people were violated because of the dirty games of the Parliament, the Indian Judiciary acted as a saviour and protected the sanctity of the Constitution. The Hon'ble Supreme Court in the case of Keshavananda Bharti Sripadagalvaru v. Stateof Kerala, introduced an antidote to the unlimited amending powers of the Parliament in the form of the 'Doctrine of Basic Structure'. This doctrine worked as an implied limitation on the amending powers of the Parliament, thereby preventing the Parliament to work as per its whims and fancies. This doctrine provides that the Parliament can amend anything and everything but not the Basic Structure of the Constitution. The Parliament is the creation of the Constitution and not the master so the Parliament cannot alter the object, identity, values and foundation on which the whole Constitution rests. The Judiciary did not only evolve the doctrine but also affirmed and applied the same in many cases and secured the spirit of the Constitution from being harmed despite of the countless efforts made by the Parliament. The Author is of the view that evolution of the doctrine of Basic Structure was the need of an hour as the Parliament was taking undue advantage of no expressed limitation under Article 368, quoting B. R. Ambedkar- "However good a constitution may be, if those who are implementing it are not good, it will prove to be bad. However bad a constitution may be, if those implementing it are good, it will prove to be good." A Constitution and its success depend upon how well it is implemented, even a good Constitution turns bad when it is implemented badly. So was the situation with our Constitution when the Parliament tried to attack the identity ofthe Constitution. The people in India can't thank our Judiciary enough which controlled the Parliament then and now from destroying and destructing the basic foundation of our Constitution. If no step would have been taken by the Judiciary the Parliament would have taken away all the Fundamental Rights and would have raised itself above the Constitution; the present India that breathes for its citizens and fights for protecting their Rights would have remained only as an imagination of the framers and would have never been achieved in the practicality. Lastly, I would like to say that the doctrine of Basic Structure ensures that the spirit of the Constitution remains untouched and the supremacy of the Constitution prevails over everyone and everything.

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