
THE BASIC STRUCTURE DOCTRINE: KEEPER OR HALTER

Prof. Juli Jha, KLE Society's College of Law

ABSTRACT

In *Keshavananda Bharati v. State of Kerala*, a 13-judge Constitutional Bench declared in 1973 that Article 368 of the Constitution did not provide Parliament the authority to change the fundamental structure of the instrument. In order to ensure that there was some level of rigidity in the Constitution, the Indian Constitution's framers created a written version of it. Additionally, under Article 368, the Parliament was given the authority to change to get around any future issues that might arise with the Constitution's operation. To maintain a constitution's normative status as a higher law that restricts temporary legislative majorities of the country, the degree of flexibility it embraces must be balanced. Although, the Constitution's Article 368 does not explicitly forbid the parliament from amending the document, the Supreme Court ruled in *Keshavananda Bharati v. State of Kerala* (1973) that the legislature was not permitted to change the "Basic Structure or Framework" of the Constitution. The idea has been the subject of heated dispute ever since it was introduced, and it has remained a key element of contemporary institutional conflicts over the identity and evolution of the Constitution. The foundation for judicial scrutiny of constitutional changes is the main concept, which has changed over time in numerous ways. As it is not present in the Constitution's text, the legitimacy of the term "basic structure" and the theory that underpins its doctrinal formulation are still viewed as abstract concept even after 50 years of its pronouncement. This paper discusses the evolution and use of the notion of basic structure as a constitutional safeguard and also highlights the power tussle around this theory.

Introduction

The Indian Constitution is particularly significant in our democratic society since it unites all individuals and regulates their lives in accordance with the values of our ancestors. It was written many years ago, and since then, our environment has undergone a number of socio-economic changes. Therefore, it was critical for us to stay up with new developments and make constitutional revisions. However, it is also crucial to highlight that during this process, we needed to ensure that the fundamental ideals of our legal system were safeguarded. Our jurists created a new doctrine called "The Doctrine of Basic Structure of Indian Constitution" in order to achieve a balance between the power to modify the constitution and the preservation of our legal system's identity. Any amendment in constitution or new law that contradicts the core elements of the constitution will be ruled invalid. This doctrine is not mentioned in our constitution but after the *Keshvananda Bharti* judgement it was developed by the judiciary. Some of the fundamental features of the Constitution mentioned in the judgement as inalienable were a secular and federal character, a democratic and republican government, the rule of law, and the independence of the judiciary, as well as the maintenance of harmony and balance between fundamental rights and directive principles.¹

This doctrine is always playing the role of protector by putting constitutional restrictions on parliament but it also gives an immense power in the hand of judiciary to enter into the arena of legislative power.

Origin and Development of Basic Structure Doctrine:

This very doctrine is not invented by the Indian judiciary system but this idea came from the lecture given by Professor Dietrich Conrad, who was working in law department of a German university. He raised many questions relating to the amending power of Indian parliament and its limitations. His questions started a debate on the constitution supremacy vs parliament power. The competence of Parliament to modify the Constitution, particularly the fundamental rights of individuals, was challenged firstly in 1951. Following independence, various legislation was enacted to alter the property ownership and tenancy arrangements.² Property owners who were harmed by these laws took their cases to court. The courts declared the land

¹ KK Paul, "Roots of Constitution's basic structure doctrine", The Tribune, 23 April, 2023

² Ishita Chandra, 'Evolution of Basic Structure', November 18, 2022 available at <https://timesofindia.indiatimes.com/readersblog/legal-paradigm/evolution-of-basic-structure-doctrine-in-india-46758/>

reform unconstitutional because it infringed the Fundamental Right to Property. In response to the unfavourable decisions, Parliament enlisted these laws in the Ninth Schedule of the Constitution via the First³ and Fourth Amendments (1951 and 1952, respectively), effectively removing them from the scope of judicial review, and any laws enlisted in this Schedule could not be declared unconstitutional.⁴ Property owners claimed that Article 13 (2) of the Constitution, which safeguards people's fundamental rights, was infringed by constitutional modifications that moved land reform regulations to the Ninth Schedule. The Parliament and state legislatures are not allowed to pass laws that would rescind the fundamental rights that are guaranteed to every person, they claimed, because any modification to the Constitution has the status of a law as defined by Article 13(2).⁵ In the case of *Shankari Prasad and Sajjan Singh* the Supreme Court of India upheld the parliament's power to change or alter any article related to constitution even the Part III which contains Fundamental Rights of the individuals. However, a greater counterattack in 1967's *I.C. Golaknath v. State of Punjab* invalidated some of the modifications prospectively by comparing them to the very fundamental rights that these amendments sought to amend.⁶ Article 368, which contained provisions relating to Constitutional Amendment, merely outlined the Amendment Process. Article 368 did not grant Parliament the power to alter the Constitution. In the majority verdict, the idea of implied limitations on Parliament's capacity to amend the Constitution was used. This viewpoint contends that a citizen's fundamental liberties are indefinitely protected by the Constitution. When advocating for the petitioners in the *Golaknath* case, M.K. Nambiar and other attorneys used the phrase "basic structure" for the first time. The phrase did not, however, make an appearance in the ruling's text until 1973.⁷ The 24th, 25th, and 29th amendments to the Constitution completely changed the dynamics of relationship between Parliament and the court. The amendments were brought up in the Supreme Court in the *Kesavananda Bharati* case, often known as the "Fundamental Rights case." And this case coined a new concept of procuring the old principles that is Basic Structure Doctrine. Over the years, the Supreme Court has used the notion of basic structure to strike down common laws sometimes straight away, sometimes inadvertently. In *Indira Sawhney v. Union of India*,⁸ the Kerela State Backward Classes (Reservation of Appointments or Posts in the Services Under the State) Act, 1995 on

³ The Constitution (First Amendment) Act, 1951 (India), <https://legislative.gov.in/constitution-first-amendment-act-1951>

⁴ See supra note 2

⁵ See supra note 2

⁶ See supra note 2

⁷ See supra note 2

⁸ (2000) 1 SCC 168 at 202, para 65

the creamy layer was found to be a violation of the Constitution's basic framework. In *L. Chandra Kumar v Union of India*⁹ the Supreme Court held that the writ jurisdiction of High Court under 226 and Supreme Court under 32 is part of our inviolable basic structure¹⁰. This doctrine was again restored in the case of *SR Bommai*.¹¹ The "basic structure" idea was used for the first time in the 1975 case *Indira Gandhi v. Raj Narain*. Following a challenge by competitor Raj Narain, the Allahabad High Court decided against Indira Gandhi and convicted her of electoral malpractices in the Lok Sabha election. The state of emergency was declared, and Parliament passed the 39th Amendment, which made any challenge to the election of the President, Vice-President, Speaker, or Prime Minister, regardless of electoral malfeasance, illegal. The five-judge Bench classed the impartial administration of elections as a "basic structure" and declared that Parliament could not amend the Constitution if changes had an impact on basic matters like fundamental rights.¹²

Later, in the *Minerva Mills*¹³ case it was held that our Constitution's fundamental principle of judicial review cannot be changed without impairing the Constitution's framework. If, as a result of a constitutional amendment, the right to judicial review is eliminated and it is stated that laws passed by the legislature cannot be challenged on any grounds, including those that fall outside of their purview or that violate fundamental rights, this would amount to nothing less than a subversion of the Constitution because it would undermine the division of legislative authority between the Union and the states.¹⁴

Protector or Prohibitor

Since the term "basic structure" is absent from the text of the Constitution, some people still see its legality and the philosophy that underpins it doctrinally almost 50 years after it was first proposed. The diversity of perspectives expressed in the *Kesavananda* decision provided no clarity, making it a murky power for restricting Parliament's amending powers. There is an absence of clarity regarding the essence and substance of the Constitution's fundamental features. the Fundamental Framework Doctrine is anti-democratic because it ultimately

⁹ (1997) 3 SCC 261

¹⁰ Setu Gupta, 'Vicissitudes and limitations of doctrine of basic structure', 2016, ILI Law Review

¹¹ (1994) 3 SCC 1

¹² Sumeda, 'Explained | Understanding the 'basic structure' of the Constitution and Jagdeep Dhankar's criticism of it', 25 Jan, 2023 available at: <https://www.thehindu.com/news/national/explainer-basic-structure-constitution-jagdeep-dhankar-criticism-kesavananda-bharati-supreme-court/article66379371.ece>

¹³ *Minerva mills Ltd v Union of India*, AIR 1980 SC 1789

¹⁴ See supra note 12

becomes the primary check on the exercise of judicial power by the court's own opinion of its own competence and effectiveness. Finally, unelected judges have usurped political power that was not granted to them by the Constitution.¹⁵ Recent comments made by India's vice president, Jagdeep Dhankar, about the Kesavananda Bharati case prompted an analysis of the 50-year-old ruling. He said "The Parliament's authority to change the constitution and pass laws is unaffected by any other authority. This is democracy's safety net. I have no doubt that this will merit your careful study. The Supreme Court initially established the ability of courts to invalidate constitutional modifications that breached the "basic structure," or the core design of the Constitution, in the Kesavananda Bharati case in 1973. The highest court made key decisions on issues that it believed were crucial to this "basic structure" in the years that followed, compromising parliamentary sovereignty in the process". The supremacy of the people's will must be "the basic" of any "basic structure" in a democratic society. Consequently, Parliament's and the legislature's supremacy and authority are unchallengeable.¹⁶ The significance of Dhankar's remark is highlighted by the continuing dispute between the government and the judiciary over the collegium system for selecting judges for the Supreme Court and higher courts. Kesavananda Bharati did in reality create judicial supremacy. The judiciary was given unrestricted authority to examine executive actions. There is no question that the Supreme Court's decision was unclear, and as Granville Austin notes in his seminal book *Working a Democratic Constitution: A History of the Indian Experience*, "unusual happenings" occurred in the period leading up to the decision, casting a pall over the entire procedure. The judiciary was exerting itself against a government and a leader who showed little regard for the constitution, the judiciary, or the democratic process, this is another significant aspect of this case that cannot be overlooked. ¹⁷According to Political Jurist Upendra Baxi Keshvanada Bharti judgement creates lot of paradoxes and raised many questions as the judgement is too lengthy to read therefore, it is very hard for anyone to go through the entire judgement and understand each judge's opinion. Justice VR Krishna Iyer also present his views on Keshavananda Bharti Judgement and stated, "While infallibility is no attribute of a constitution, its fundamental character and basic structure cannot be overlooked. Otherwise, the power to amend may include the power to repeal. This is a *reductio ad*

¹⁵ Dasharath, Walekar. "Changing Equation Between Indian Parliament & Judiciary." The Indian Journal of Political Science, vol. 71, no. 1, 2010, pp. 165. JSTOR, (27 Oct. 2022) <http://www.jstor.org/stable/42748377>

¹⁶ See supra note 12

¹⁷ Shishir Tripathi, "Basic Structure doctrine: Defensive wall against totalitarian trends or attempt to establish judicial supremacy", 14 Jan, 2023 available at: <https://www.firstpost.com/opinion/basic-structure-doctrine-defensive-wall-against-totalitarian-trends-or-attempt-to-establish-judicial-supremacy-11987102.html>

absurdum. By a stroke of judicial creativity, the provision of Article 368 was justly handcuffed in *Kesavananda Bharati*.¹⁸ The ruling made significant contributions to constitutional law and scholarship. It helped us resolve a number of disputes and provided us with a path forward, but most importantly, it gave us the idea of the Basic Structure of Doctrine, which is today the protector of the entire constitution. People's confidence in the judiciary has been restored as a result of ending the lengthy dispute that had been going on between the Parliament and the judiciary. Bentham also had an intense distrust of judge crafted law, according to him judges are not elected by people, therefore decision given by them is an undemocratic process, the function of law making should left with legislative, and judiciary should not put its shoes in the area of parliament.

Conclusion

A constitution must be a living document in order to withstand the passage of time and accommodate the shifting needs of successive generations. However, there are also some inherent ideals that serve as a fundamental foundation for the entire content of the constitution. If the *volksgeist* requires the demolition of the old structure in order to build a new one, it would be a whole different situation that would call for a different process. Until then, certain fundamental elements that keep a country united in a predetermined shape must be maintained against any intrusion that is premature and does not accurately reflect the will of the people as a whole. Because this doctrine stands alone in empowering the judiciary to keep a check on the legislature and prevent it from abusing article 368 of the Indian Constitution to enter the perilous realm of arbitrariness. The idea was initially solely applicable when amending the Constitution. However, as times have changed, the doctrine's scopes have broadened and it is now being used in contexts that previously wouldn't have been possible. It was held in *Advocates on Record Case*¹⁹ "The Constitution gives unelected judges a power called judicial review under which they may nullify unconstitutional acts of the Executive and of elected representatives of the people assembled in the Parliament and State Legislatures. This conclusion does not suppose that the Judiciary is superior to the legislature. It only supposes that the power of the people

¹⁸ *id*

¹⁹ *Supreme Court Advocates on Record Association v. Union of India*, (1998) 4 SCC 409

embodied in the Constitution is superior to both".²⁰ Recently while delivering a lecture Chief Justice of India DY Chandrachud stated that basic structure is a North Star of Indian Constitution which gives the direction to the law makers and implementers.

²⁰ A. Lakshmikanth, *Basic Structure and Constitutional Amendments: Limitations and Justiciability*, p. 266.(2002); Sayan Mukherjee, "The unconventional dimensions of basic structure of doctrine:An Insight",