
TRACING THE EVOLUTION OF THE BASIC STRUCTURE DOCTRINE POST KESAVANANDA BHARATI JUDGMENT: AN ANALYSIS

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ABSTRACT

A country may have a constitution but not essentially constitutionalism. Constitutionalism comes with certain principles so as to provide a better understanding of the Constitutional text. In a broader sense it can be defined as a legal limitation on the government. Our Country India, not only has a constitution but ensures it is bounded by the principles of constitutionalism. Upholding constitutionalism in a country like ours, has come a long way. The parliament in the past has tried to gain the ultimate control of the state, by including certain provisions that could come handy to express their wills rather than the framework within which the Constitution should operate. The concept of Constitutionalism though not new, had to rise up amidst the arbitrary provisions in the constitution which levied excessive powers on the parliament. Initially the Judiciary construed and interpreted the provisions of constitution in a straight way. Later on, it was deduced by the Judiciary that constitutionalism cannot be extracted from the constitution, if this is done then the purpose of constitution would collapse. Such an awakening did not occur naturally, through numerous cases that were filed during those times and through conscious expansion of judicial minds, finally it was affirmed that the power of the parliament was not expansive, it came with certain limitations.

At the first instance in Golaknath case the SC concluded that all fundamental rights were non- amendable by the parliament, thus adopted a very rigid approach, later in *Kesavananda* case it was decided that only certain elements characterised as basic structure could not be amendable, thus flexibility was induced. At this juncture the SC upheld the 'basic structure doctrine' which possessed the elements of constitutionalism. Such foundations of constitutionalism was, what marked to be 'unamendable' and not the remaining features. This paper attempts to interpret the effects of post basic structure doctrine. It also analyses certain landmark cases that has helped in strengthening the doctrine. It also throws insights on the amending power of the Constitution, as to how an amendment cannot be permitted to completely renovate the existing constitutional framework through a tag of appropriate adaptations.

INTRODUCTION

In India, there was a serious and contentious conflict between the judiciary and the legislature between 1967 and 1973. The judiciary imposed significant restrictions on the power of Parliament. The Legislature had difficulties operating within the bounds of the constitution, which slowed down the development of the nation. It was clear there was a power struggle between the two branches. There were attempts to establish the supremacy of Parliament, including a Private Members Bill by Nath Pai, but these failed due to political unrest. Later Indira Gandhi nationalised the banks and privy purses were eliminated, and justified it by all means on the grounds of implementing the Directive principles of state. Indira Gandhi insisted on carrying out changes, as a result the 24th and 25th amendments were introduced. They curtailed the power of judiciary, and offered an extensive interpretation to the powers of legislature which was secluded from judicial scrutiny.¹

Kesavananda Bharati, one of the most celebrated judgements of the country was decided during this tussle. It introduced the concept of 'basic structure' and thereby established limits on the legislative power of the parliament. The narrow 7:6 judgement dictated the fundamental characteristics of the Indian constitution and held them sacrosanct to preserve supremacy of the constitution. It is pertinent to note that this concept was earlier brought before the court in case of *Golaknath*. But it gained significance in the *Kesavananda*, where it was finally asserted that the basic elements existing within the constitution cannot be repealed or altered.² This ruling established the legislative branch's authority and affirmed judicial system's independence. Though this is one of the most landmark judgements in the Legal history of our country. Yet the primary impact of the judgement had several criticisms. Some acclaim that the doctrine is anti-democratic due to its counter majoritarian character, and that judges who are not elected have taken significant political authority that is not permitted by the constitution. The doctrine was condemned for not having been backed by the constitution, it criticised the judges as they amended the constitution under the pretext of interpretation.³ According to the noted constitutional scholar Seervai, the basic structure reflected the opinions of the court over the constitution, thus replacing the Court's judgment for that of the Constituent Assembly.

¹ Anushree Somnath Tadge & Pranit Tanaji Bhagat, *The Doctrine of Basic Structure: Origin and Legitimation*, 17 *Supremo Amicus* 61 (2020), <https://articles.manupatra.com/article-details/The-Docctrine-of-Basic-Structure>

² Muskan Sharma & Pushkar Bhandarkar, *The Doctrine of Basic Structure: A Safeguard to the Constitutional Spirit*, 4 *INT'L J.L. MGMT. & HUMAN.* 2391 (2021).

³ SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA : A STUDY OF BASIC STRUCTURE DOCTRINE*, 168 (Oxford 2009)

Upendra Baxi has remarked that this doctrine has produced little light and enormous heat in the country. Others have marked that this doctrine might allow the judiciary to supersede other organs of the state, also legal luminary Noorani has strongly viewed basic structure as a tool for law making, another notable scholar SP Sathe has quoted that this doctrine might provide an opportunity to the judges to rule over the will and consent of the people.⁴ However, despite its criticisms the doctrine has strongly developed and occupied the important place in the constitutional jurisprudence. This paper seeks to address the impact of basic structure on the later judgements.

THE IMPACT OF KESHAVANDA

The successive judgements upholding the doctrine

The Kesavananda judgement was decided on April 1973, it aggravated the existing tensions between the judiciary and Parliament. Within a few days, AN Ray J, the judge who strongly dissented the basic structure was appointed as the CJI, surpassing three most senior judges in the SC. This was severely criticised by the entire country. Political tensions between Prime Minister Indira Gandhi and Jayprakash Narain grew in this period. An important turning point was the declaration of a state of emergency in 1975, by the Prime minister which was a result of accusations that Mrs Gandhi had engaged in electoral fraud and consequently was dismissed from contesting elections by the Bombay High court. Thereafter the 39th Constitutional Amendment Act, 1975, was passed intending to limit judicial review of electoral procedures at the supreme level.⁵

The court in the *Indira Gandhi v. Raj Narain*⁶ case decided in Indira's favor but invalidated that part of the amendment which curbed judicial scrutiny in matters of election dispute, it also highlighted the crucial interdependence of the three organs in a democracy and the importance courts played in protecting democracy and the Constitution.⁷ As a result, the court in this instance firmly affirmed the fundamental framework.

⁴ Gourab Das, The Role of the Judiciary in Interpreting and Safeguarding the Doctrine of Basic Structure in India, 5 INDIAN J.L. & LEGAL Rsch. 1 (2023).

⁵ Prashant Saurabh & Ankita Rani, Doctrine of Basic Structure and the Spirit of Indian Constitution: An Analysis, 5 INT'L J.L. MGMT. & HUMAN. 644 (2022), <https://www.ijlmh.com/paper/doctrine-of-basic-structure-and-the-spirit-of-indian-constitution-an-analysis/>

⁶ Indira Gandhi v. Raj Narain, AIR 1975 SC 2299

⁷ Supra note 1

Within a week following the initial ruling, Chief Justice Ray made a "final move," deciding to revisit the Kesavananda Bharti case. However, Nani Palkhivala, who had earlier argued the matter, was able to convincingly contest against the need for reconsideration. Though the others were convinced, Ray J was not willing to let go of the review. However, he unofficially terminated the review.⁸

Soon the government came up with other means to curb the powers of judiciary. Thereafter the Swaran Singh Committee was constituted in the year 1976, at the time when national emergency was in force. The committee was formed to look upon the issues of amendment. There after the 42nd amendment was introduced, it gave primacy to DPSP over the fundamental rights, Art 31 C restricted judicial review over laws made in furtherance of DPSP, and bestowed complete autonomy to the Parliament to carry out changes in the Constitution.⁹

In *Minerva Mills case*¹⁰ the court declared the 42nd Amendment Act of 1976 to be in violation of the fundamental structure. The Article 368 (4),(5) gave Parliament unrestricted authority to change the Constitution, shielding those amendments from judicial review even if they imperilled the core principles of constitution. Moreover, an amendment to Article 31C violates a fundamental rule of the Constitution since it imbalances the harmony existing between fundamental rights and guiding principles. Thus, basic structure was upheld in this case.

The *Waman Rao case*¹¹ upheld the legality of amendments in Ninth Schedule made up until the Kesavananda ruling, however it was ruled in this case that any new amendments brought within the ambit of the schedule shall be subject to judicial supervision. Thus, it gave the doctrine a prospective interpretation after Kesavananda.

In *Chandra Kumar v. Union of India*,¹² the Hon'ble SC ruled art 323A clause 2(d) , art 323-B 3(d) constitutionally invalid because they prevented the High Court and the Supreme Court from using their respective Articles 226 and 32 jurisdictions. The Court determined that these provisions hinder judicial review, a crucial component of the Constitution's Basic Structure.¹³

⁸ Id

⁹ Amlan Panigrahi, Interpretation of Basic Structure of the Constitution, 4 INDIAN J.L. & LEGAL Rsch. 1 (2022), https://heinonline.org/HOL/Page?public=true&handle=hein.journals/injlolw7&div=186&start_page=1&collection=journals&set_as_cursor=0&men_tab=srchresults

¹⁰ *Minerva mills v. UOI*, AIR 1980 SC 1789

¹¹ *Waman Rao v. UOI*, (1981) 2 SCC 362

¹² *L. Chandra Kumar v. Union of India*, AIR. 1997 SC 1125

¹³ Prashant Saurabh & Ankita Rani, Doctrine of Basic Structure and the Spirit of Indian Constitution: An Analysis, 5 INT'L J.L. MGMT. & HUMAN. 644 (2022).

Ninth schedule and its impact on basic structure

With regard to the Ninth Schedule, the continuous dispute between the Judiciary and the legislature continued. The original intent was to protect land reform acts within the purview of judicial review. But later on the ninth schedule was used to guard the laws declared as unconstitutional and thereby avoiding judicial review. The idea of ninth schedule was incorporated from the Irish constitution. As in Ireland there was perpetuating unequal distribution of land and lack of judicial unanimity.

Even after 30 years after the Kesavananda judgement, there was constant conflict between the executive and the judiciary. This paved a way to 2 of the important judgements Coelho and Nagaraj. In the Coelho case, the constitutional validity of IX schedule was contested on grounds of basic structure concept. On the other hand, Nagaraj raised question on the reservation in public employment that were brought as a result of amendments.¹⁴

The key question in the *Coelho case*¹⁵ was whether Article 31B was used to shield laws from judicial purview by including them in the Ninth Schedule.¹⁶ The Coelho ruling made it clear that any changes to the Constitution made after April 24, 1973 must be consistent with the fundamental provisions of the document, including those in Articles 14, 19, and 21. Ninth Schedule amendments are not exempt from review if they contradict the fundamental framework. To evaluate violations and effects, the court established tests such the "rights test," and "impact test."¹⁷ The test states that the impact of an amendment would determine whether the fundamental structure is disturbed.¹⁸

In *M. Nagaraj v. UOI*, the court tried to establish a clear standard for deciding whether a constitutional reform interferes with the fundamental goal of the constitution, the Court introduced "width test" and "test of identity" as two important standards for this evaluation. According to the Kesavananda case ruling, the focus is not just on how a particular article will be impacted, but also on how this will negatively damage essential ideas like democracy, secularism, equality. Therefore, amendments that alter the basic ideology of Constitution are

¹⁴ Satya Prateek, Today's promise, Tomorrow's Constitution: 'Basic structure', Constitutional Transformations and the future of Political progress, 1 NUJS L. Rev. (2008)

¹⁵ I. R Coelho v. State of Tamil Nadu, A.I.R. 2007 S.C. 8617

¹⁶ Aqu Raza, The Doctrine of Basic structure in the Indian Constitution: A critique

¹⁷ Id

¹⁸ Supra note 15

prohibited.¹⁹

The Apex Court said in *Ashok Kumar Thakur v. Union of India*²⁰ that to determine whether an element is a part of the fundamental structure or not, the case will be evaluated in light of the constitution's goals, purposes. To determine if any element is a component of the fundamental structure or not, the two-step "Effect Test" laid down in *LR. Coelho* would be applied.²¹

The Ninety-Ninth Constitutional Amendment

In *Advocates on Record v. UOI*,²² 99th Amendment was contested. The main issue was whether changing the appointment procedure violated the Constitution's basic principles. The petitioners stated that judicial independence and the separation of powers can be upheld only if judiciary is given priority in appointments, free from executive intervention. However, the respondents insisted on amendments to ensure much more transparency and accountability. By a 4:1 majority, the Court decided that because the amendment eliminated the sovereignty of the court in appointments, it had an impact on the fundamental structure.²³

Other Significant judgments and their nexus to the basic structure

The *Pramati Educational and Cultural Trust Case*²⁴, In this case the constitutional validity of Articles 15(5) and 21A were to be addressed. The question was if the addition of Articles 15 clause (5) and 21A changed the basic framework of the Constitution. The Court affirmed that RTE Act²⁵ did not apply to institutions run by minorities and determined that sponsored and unsponsored minority educational establishments were not covered within the domain of art 15(5) and the same was not detrimental to the secular nature as stated in the Preamble. They also upheld the right to education as fundamental right consistent with Articles 19(1)(g) and 30(1). However, this case did not address the question of whether the harmony between Part III and Part IV had been interrupted by Article 15(5).²⁶

¹⁹ M Nagraj v. UOI, (2006) 8 SCC 212.

²⁰ Ashok Kumar Thakur v. UOI, AIR (2008) 6 SCC 1

²¹ Sachin Yadav, Constitutional Interpretation of Amending Powers of Parliament: Evolution of Basic Structure Doctrine, 4 INDIAN J.L. & LEGAL Rsch. 1 (2022).

²² Supreme Court Advocates on Record Association v. Union of India, (2016) 5 S.C.C. 1.

²³ Supra note 17

²⁴ Pramati Educational and Cultural Trust (Registered) and Others v. Union of India and Others, (2014) 8 SCC 1.

²⁵ The Right of Children to Free and Compulsory Education Act, 2009

²⁶ Supra note 17

The Supreme Court preserved the basic theory in the *Madras Bar Association case*²⁷ where the National Tax Tribunal Act, 2005 was challenged as it created a national tribunal for taxation disputes, violating the Constitution's fundamental principles. The Petitioners contended that by shifting the authority from the High Courts to a national tribunal and establishing an unaccountable judicial system, the Act undermined the independence of the court. Also, it interfered with the States' ability to create their tribunals, thus violating federalism. The SC considered these arguments and held that the act had certain constitutional deformities. The *Madras Bar Association case* enhanced the fundamental structure, highlighting the importance of federalism and the judiciary's independence within India's constitutional framework. Thus, any legislation or amendment which challenges the fundamental design of the Constitution will be pronounced invalid.²⁸

A major decision in Indian constitutional law was made in the 2017,²⁹ which determined the legitimacy of Aadhaar Act. The main issue was whether the Act infringed the fundamental rights of the people. In its ruling, the SC upheld the privacy rights as fundamental freedoms safeguarded within Constitution. The court determined that any law violating someone's right to privacy would be illegal, unconstitutional as privacy is an inherent part of fundamental rights available to persons. This case emphasizes the importance of India's basic structure concept in safeguarding constitutional values and protecting fundamental rights.³⁰

The court made sure that the Parliament couldn't change the constitution's fundamental structure. The court echoed that "the personality of the Constitution must remain unchanged" and that "one cannot legally use the Constitution to destroy itself."³¹ The post-Kesavananda led to judicial constitutionalism. Today there are several principles of constitutionalism evolved by the courts alone that have been successful in preserving the essence of the constitution, some of which are: Constitutional primacy,³² adherence to rule of law,³³ division

²⁷ *Madras Bar Association v. UOI*, 2014 10 SCC 1

²⁸ Gourab Das, *The Role of the Judiciary in Interpreting and Safeguarding the Doctrine of Basic Structure in India*, 5 INDIAN J.L. & LEGAL Rsch. 1 (2023).

²⁹ *K S Puttuswamy v. UOI*, 2017 10 SCC 1

³⁰ Alakananda Rajawat, *A study on right to privacy in light of KS Puttuswamy v. UOI*, 5 IJLMH 1319 (2021), <https://www.ijlmh.com/paper/a-study-on-right-to-privacy-in-light-of-k-s-puttaswamy-v-union-of-india/>

³¹ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

³² *Id*

³³ *Indira Nehru Gandhi v. Rajnarain*, AIR 1975 SC 2299.

of powers,³⁴ coherence between fundamental rights and DPSP,³⁵ judicial review,³⁶ federalism,³⁷ secularism,³⁸ independent judiciary,³⁹ and parliamentary democracy.^{40 41}

CONCLUSION

Though the basic structure faced a lot of criticisms such as judicial overreach, vagueness and subjectiveness, lack of clarity yet it came to be a part and parcel of constitutionalism in India. Seervai comments that irrespective of the negative opinions associated with the doctrine, the doctrine plays a crucial role in imparting the essentials of constitutionalism and stops the legislature from using its authority in an arbitrary manner.⁴² This doctrine is what makes the constitution living, it is through this basic design the values and purposes of the constitution are capable of being accomplished. Had this doctrine not found its place in the Indian Jurisprudence, then the constitution would probably not have survived by now as the will of the legislature would dominate, and they could make laws abridging the essential rights of the people.

Thus, the basic structure should be protected, so as to preserve the vision of the makers of the constitution.⁴³ That constitution which was drafted after a multiplicity of conflicts, riots, movements, chaos and disorderliness cannot be left behind due to the unscrupulous laws made by the legislature. This was clearly evident in the past where Emergency was declared for a period of two years, and it was nearly a dark age with no progress. It is therefore a binding duty on the judiciary to protect the constitution, this has been successfully achieved so far in this country through the basic structure doctrine, though there were initial moments of instability. It can be inferred from the numerous cases above that irrespective of the stability of the doctrine the elements that comprise the basic structure are evolving and definitely not exhaustive. With the changing times there is all scope that newer elements can be added with the scope of this doctrine.

³⁴ Supreme Court Advocates-on-Records Assn. v. Union of India, (2016) 5 SCC 1

³⁵ Minerva Mills v. Union of India, AIR 1980 SC 1789.

³⁶ I. R Coelho v. State of Tamil Nadu, AIR 2007 SC 8617

³⁷ Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461

³⁸ S.R. Bommai v. Union of India, AIR 1994 SC 1918

³⁹ Shri Kumar Padma Prasad v. Union of India, 2 SCC 428 (1992)

⁴⁰ Kuldeep Nayar v. Union of India, 2006 7 SCC 1

⁴¹ Paul T Babie and Arvind P Bhanu, The Form and Formation of Constitutionalism in India, MDPI 1 (2022) <https://doi.org/10.3390/laws11020033>

⁴² Gourab Das, The Role of the Judiciary in Interpreting and Safeguarding the Doctrine of Basic Structure in India, 5 INDIAN J.L. & LEGAL Rsch. 1 (2023).

⁴³ Supra note 1