
THE BASIC STRUCTURE DOCTRINE: SCOPE AND APPLICABILITY

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ABSTRACT

The Basic Structure Doctrine, established in the landmark case of *Kesavananda Bharati* in 1973, acts as a tool for the judiciary to maintain a balance of power between itself and the legislature, to ensure the certain fundamental factors envisaged in the Constitution is not lost. It has been 47 years since the inception of the doctrine, and yet it continues to evolve and grow. This paper, therefore, will attempt to highlight the ever-expanding scope of the doctrine. Through an analysis of various judgments pronounced on the matter, this paper will delineate not just what features form the basic structure of the Constitution, but also analyse the arguments of its applicability to legislation and to the judiciary. Subsequently, this paper attempts to provide some recommendations to ensure the clarity of the scope and applicability of the doctrine.

I. Introduction

The Constitution of India, although first adopted in 1949, continues to be highest in the hierarchal order of the legal system. Societies governed by such legal systems are ever-changing, and continue to grow over time as various factors change in the society, making it pertinent that a document as important to the structure as a Constitution, continue to change with society. Consequently, a significant problem is trying to find the balance between maintaining the basic framework of fundamental values, and changing to the requirements of society. Because of this, the essential characteristics of the legal system require protection from encroachment, to preserve the rule of law and to safeguard it from actions of arbitrariness by the legislature. The judiciary is tasked with the role of upholding the values of the Constitution, and do so through the implementation of doctrines and judgements pronounced by them. The Basic Structure Doctrine is one such doctrine that emerged from a dispute between the judiciary and the legislature regarding the legislatures right to amend any provision of the Constitution, and helped safeguard the sanctity of the Constitution from the ever-extending arm of the executive and the legislature.

The Basic Structure Doctrine found its roots in the theory of implied limitations introduced by a German jurist¹, and then brought up in India the case of *Golaknath v. State of Punjab*.² This theory simply stated that an amending body should not be able to change the Constitution and its provisions that gave it the power of amendments, and there were some implied limitation on this amending power.³ Although the theory itself was not accepted in the case when introduced, it was held to have substantial force. The Supreme Court (SC), in the *Golaknath* case, held that the under Article 368 of the Constitution, a constitutional amendment fell under the spectrum of Article 13(3) because there was no difference between the legislative power to create laws and constituent power of the parliament to amend the constitution. Since, under Article 13(2), the Constitution prohibits any law to be passed that violates the fundamental rights, any amendment passed by the parliament would also fall under this ambit.

¹ 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).

² (1967) 2 SCR 762

³ Yaniv Roznai, "*Dietrich Conrad, Limitation of Amendment Procedures and the Constituent Power*" *Indian Y. Int'l Aff.* 15 (1970).

The Basic Structure Doctrine

Although the theory of implied limitations was not fully accepted in the Golaknath case, the argument was brought back to the court in the case of *Kesavananda Bharati v. State of Kerala*,⁴ by constitutional lawyer Nani Palkhivala. The case was tried in front of a constitutional bench of 13 judges at the SC, where the question of whether the Parliament had the power to amend the Constitution without any restriction, even to the extent of taking away all the fundamental rights, arose. It was held that the power of the Parliament to amend the Constitution came from Article 368 of the Constitution itself,⁵ and the usage of the word “amend” was used in a very narrow and constricted sense in the Constitution. Although the power under Article 368 would apply to all the provisions of the Constitution, the Parliament did not have the powers to amend certain matters in the Constitution, even if the correct procedure was followed. The judges said these features of the Constitution, which could not be altered through the Parliament exercising its amending power, were the basic “structures,” “elements” and “principles” of the Constitution.⁶ The Basic Structure Doctrine entailed that the Parliament cannot introduce laws that would amend the basic structure of the Constitution. The essential understanding of the doctrine was constitutional amendments would be reviewed by the judiciary, and any amendment that was against the basic structure would be deemed unconstitutional. The doctrine started off as being applicable only to the amendment of the Constitution, but has now been widened to beyond the scope of amendment. This paper, through the analysis of judicial reasoning of the courts surrounding this doctrine, aims to identify and establish the scope and limits of the applicability of this doctrine.

II. Elements of the Basic Structure

Although the court in the *Kesavananda* case agreed on the idea of the basic structure of the Constitution, they failed to adequately outline what the features of this basic structure were. Through time, however, the elements of the basic structure were decided through judicial proclamations, and the scope of the doctrine started to be defined. In *Kesavananda*, according to CJ Sikri, the scope included the supremacy of the Constitution, the republic and democratic form of the government, the secular character of the Constitution, the separation of powers

⁴ (1973) 4 SCC 225

⁵ Sikri, C.J. at pp. 386-387, *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225

⁶ Shelat and Grover, JJ. 453-454 and Hegde and Mukharjea, JJ. 485-486 and Shelat and Grover, JJ. at p. 472, , *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225

between the legislature, executive and the judiciary, and the federal character of the Constitution.⁷ J. Shelat and J. Grover added two more to the list, stating that unity and integrity of the nation as well as the mandate to build a welfare state (as listed in the Directive Principles of State Policy) were also part of the basic structure.⁸ J. Hegde and J. Mukherjea disagreed with the above list and opined that the sovereignty and democratic character of India, the unity of the country, the individual freedoms of citizens and the mandate to build a welfare state were the essential basic structures of the Constitution.⁹ J. Reddy believed that the basic features were only limited to the preamble, and hence constituted only of India being a sovereign democratic republic, parliamentary democracy and the three organs of the State being vital to the Constitution.¹⁰

The applicability and scope of the doctrine came up further in the case of *Indira Gandhi v. Raj Narain*.¹¹ The court was made to rule on whether Article 329A, which was incorporated into the Constitution through an Amendment, was valid. The Amendment was alleged to be violative of the principles of democracy, rule of law, separation of power and judicial review, which the petitioner argued should be basic structures of the Constitution. Consequently, the court held that democracy was an ingredient of basic structure of the Constitution, and any amendment violating this, would be considered automatically invalid. The court also held that democracy in itself was based on the equality of people, not just in equal representation in the government, but also in holding rights. This concept was born through the doctrine of Rule of Law, and since it was a precondition for democracy to exist, it was also considered to be a basic structure of the Constitution. Until this case, the doctrine of basic structure had its foundation but there was no clarity between the judges as to what the contents of the basic structure actually were. The court, through this decision, helped confirm the doctrine and explore the contents of what would qualify as a basic structure of the Constitution.

Further down the line, in the case of *Minerva Mills v. Union of India*,¹² the issue of the basic structure doctrine resurfaced. The question in the case was the validity of the 42nd Constitutional Amendment, out of which the court struck down Article 368(4) and (5), based on the fact that these clauses violated the basic structure of the Constitution. The court ruled

⁷ *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ (1975) AIR 865

¹² AIR 1980 SC 1789

that limited amending power itself was a feature of the basic structure, and unlimited power to amend the Constitution, as was proposed in the Amendment, could not be allowed for this reason. Another issue the court opined on was regarding the balance between the fundamental rights and the directive principles guaranteed under the Constitution. The proposed Amendment aimed to give the state the power to legislate directives that could lead to the severe violation of the fundamental rights. The court, on this matter, held that the balance between Parts III and IV was also a necessary feature of the basic structure.

Various subsequent cases have added further scope to the doctrine, by widening its ambit to various other factors as well. According to *Central Coal Fields Ltd. v. Jaiswal Coal Co*¹³, effective access to justice is also considered a basic structure. In *Bhim Singhji v. Union of India*¹⁴, it was held that the building a welfare state, based on the concept of justice, is also part of the basic structure. Under the decision in *Delhi Judicial Service Assn. vs. State of Gujarat*¹⁵, the powers of the SC under Article 32, 136, 141 and 142 were also considered to be part of the basic structure. The Doctrine of equality under Article 14 was also added to the scope of the basic structure, in the case of *M. Nagraj v. Union of India*.¹⁶ The SC also ruled that as for the applicability of the doctrine, it could only be prospectively applied and not retrospectively. The court opined in *Waman Rao v. Union of India*¹⁷, that this was so that previous decisions and settled claims would not be uprooted. Thus, the scope of the doctrine was initially obscure, the judiciary helped expand and formulate some of the elements of the basic structure through its judgements.

III. Scope of Doctrine in Law-Making

While the applicability of the doctrine to impugn a constitutional amendment if it is violative of the basic structure has been established, the scope of the doctrine in respect to legislation is still ambiguous. The laws in the Constitution aren't the only ones that govern the people of the country, the state and Union legislature also create statutes based on the framework required by the Constitution. The initial discussion around the issue of whether the doctrine applied to these legislations also began in the Indira Gandhi case. The SC opined that the law-making power of the Parliament was not subject to the basic structure and would not come under its

¹³ AIR 1980 SC 2125

¹⁴ 1981 1 SCC 166

¹⁵ 1991 AIR 2176

¹⁶ 2006 (8) SCC 212

¹⁷ (1981) 2 SCC 362

ambit.¹⁸ This was further affirmed by CJ Beg and Justice Untwalia in the case of *State of Karnataka v. Union of India*¹⁹ in 1977.

This decision, however, can be said to be later reversed in the case of *S.R Bommai vs. Union of India*.²⁰ Justice Ahmadi, in his judgement, professed that no State government can function on a program that is destructive of the Constitutional philosophy as it can then never be in accordance with the provisions of the Constitution. While this case primarily dealt with the doctrine in respect to executive actions, it has subsequently been expanded to also include legislative actions and enactments. This was done through cases like *G.C. Kanungo vs State Of Orissa*²¹, where the SC quashed an amendment to law by the Orissa government, holding that the state legislature had encroached on the judicial authorities' powers and had violated a basic structure of the Constitution based on the rule of law. The court in the case of *Ismail Faruqui v Union of India*²², also invalidated a legislation with regards to the demolition of the Babri Masjid, stating that it violated the basic structure doctrine.

The expanse of the doctrine to legislations was still not set here, however. The court in *Kuldip Nayar vs Union of India*²³, had a lengthy discussion on whether the basic structure doctrine was available to determine the validity of the statute. CJ Sabharwal, in his judgement, upheld the decision in the *Indira Gandhi* case, and reaffirmed that there were only two tests that would apply to determine the validity of legislations. The first was that the law must be within the legislative competence of the legislature, and the second was that it must not violate Article 13(1) or (2) of the Constitution. He therefore ruled that "The challenge to a law made, within its legislative competence, by Parliament on the ground of violation of the basic structure of the Constitution is thus not available to the petitioner."²⁴ Logically, this may not be sound, as it could allow for the Parliament to pass laws that may meet the conditions of the test, but still be violative of the basic structure.

The most recent opinion, which could negate the judgement in the *Kuldip* case, is from the case of *I.R. Coelho v State of Tamil Nadu*.²⁵ The judgement in this case did not just uphold the basic

¹⁸ *Indira Gandhi v. Raj Narain* (1975) AIR 865

¹⁹ 1980 SC 714 (19)

²⁰ AIR 1994 SC 1918

²¹ 1995 AIR 1655

²² AIR 1995 SC 605 A

²³ AIR 2006 SC 3127

²⁴ Paragraph 107, *Kuldip Nayar vs Union of India* AIR 2006 SC 3127

²⁵ AIR 1999 SC 3197

structure doctrine, but also gave the judiciary the power to review any law which it believed could destroy the basic structure. The question arose when the Bench had to decide if the Parliament was allowed to insert laws into the Ninth Schedule, in order to circumvent judicial review based on the basic structure doctrine. The Bench held that it should not be permissible for the legislature to escape the scrutiny of the doctrine. The court believed that this power it had would allow it to keep a check on the State if and when they attempted to chip away at the fundamental rights guaranteed to citizens under the Constitution.

Ordinary legislation and the power to create it is granted by the Constitution and needs to function within its scope. If an ordinary law is passed that attempts to change this scope of the Constitution, that automatically contravenes the very essence of the Constitution itself. This would provide the Parliament a back gate to amend the Constitution through its law-making ability. The courts continue to find it hard to apply the doctrine to the law, considering its widened ambit post the contrary decisions by previous benches. However, as the scope of the ambit is ever-widening it could be expected that future benches take inspiration from the Coehlo case. This could ensure that the scope of the basic structure doctrine find new horizons in evaluating legislation. This could also imply that the court has recognized the fact that the doctrine doesn't just function within the scope of the Constitution, but also pervades the entire legal system.

IV. Ambit of Doctrine for the Judiciary

Although the role of the doctrine in the realm of legislature continues to be ambiguous, its scope in the judiciary is a little more crystallized. The SC has, in various instances, laid down the applicability and the scope of the doctrine to the judiciary. In the case of Supreme Court Advocates on Record Association v. Union of India²⁶, the court determined whether a collegium system was needed in the appointment of SC and HC judges. In its decision, the court held that the independence of the judiciary within the scope of the Constitution was an integral part of the basic structure. The judiciary was very important as it played a significant role in the maintenance of rule of a law and democracy, and although the separation of powers and judicial review were already part of the basic structure, the court deemed it necessary to include the independence of the judiciary. In the case of Kumar Padma Prasad v. Union of

²⁶ (2016) 5 SCC 1

India²⁷, the court further held that the independence of the judiciary itself was also an inherent feature of the basic structure. These decisions not just expanded the scope of the doctrine itself, but also evolved a new application of the doctrine, as it did not just apply to constitutional amendments anymore, but also to constitutional construction.

A secondary question that was looked into the court regarding the doctrines ambit in the judiciary in the case *Minerva Mills* case was regarding whether judicial review could be abolished through an amendment of the Constitution. To decide on this, the court had to first opine on whether judicial review formed an integral part of the basic structure or not, as the abolishment of judicial review could lead to an imbalance of powers in the Constitution, which could further harm the sustenance of the fundamental rights through the lack of judicial scrutiny. The Court therefore submitted that judicial review was also a part of the basic structure. However, J Bhagwanti further said that although judicial review could not be repealed, it could be partially excluded if an effective alternative solution was found.²⁸

The feasibility of such a recommendation, however, is questionable. Arguably, the substitution of an alternative in place of a factor considered a basic structure could simply mean the replacement of that factor, and hence the destruction of it. A similar argument was stated in the case of *L. Chandra Kumar v. Union of India*²⁹, wherein the court held that the jurisdiction of the SC under Article 32 and the HC under Articles 226 and 227 also formed part of the basic structure of the Constitution, meaning that judicial review could not at all be substituted. Another aspect of the judiciary that was brought under the scope of the doctrine through this case was the power of the HC to exercise Judicial Superintendence, specifically over the courts in their respective jurisdiction. Thus, the ambit of the doctrine has widened to include key aspects of the judiciary and its power under its scope, and to ensure the key aspect of judicial review was not hampered by the legislatures attempt to amend the Constitution.

V. Recommendations

In terms of the conflicting opinions regarding the application of the doctrine to evaluating legislation, it would have made sense to restrict the same had there been a difference in who had constitutive and legislative power. However, since both are held by the legislature, it would

²⁷ 1992 AIR 1213

²⁸ *Minerva Mills Ltd. vs Union Of India* 1980 AIR 1789

²⁹ AIR 1997 SC 1125

make sense that they are subjected to the doctrine, and hence conform to the values of the Constitution that define it. It would not make sense for the legislature to disregard the basic structure doctrine while drafting ordinary laws for its citizen, but have to comply with the same when it came to constitutional amendments. Therefore, although the specific contours of the doctrine are still undefined, this paper recommends that the doctrine be revisited by the SC, to ensure aspects such as the applicability, inherent features and the scope of the doctrine are elucidated in defined terms. With the doctrine further becoming a norm, a further recommendation would be to allow the doctrine to be applied retrospectively, meaning to amendments and laws prior to the Kesavnanda judgment itself. To effectively do so, the court could have held the doctrine applicable to all laws, but to ensure ease in application, could have elucidated that amendments and laws prior to Kesavnanda could only be held to be void post Kesavnanda.

VI. Conclusion

In conclusion, based on the study of the judicial journey of the doctrine, it can be seen that from its very establishment, the doctrine has had a chequered past. It has swung between an ever-widening use to a very narrow use. However, the doctrine, as developed and conceived by the court, was not meant to be a closed concept. The very judgements by the court reveal how the doctrine has been expanded to include more elements and features into it. There has been interesting creativity exhibited by the Judiciary, leading the doctrine to gain an indisputable place in the legal system of the country. Through its judgements, the judiciary has ensure that the doctrine has evolved with the modern requirements of the legal system, and to further ensure there is balance in the battle between the judiciary and legislature. In the words of Upendra Baxi, 'If you do not apply brakes, the engine of amending power would soon overrun the Constitution,'³⁰ and the doctrine of basic structure rightly functions as the brakes in an ever running power tussle between judiciary and legislature.

³⁰ Baxi U, *Courage, Craft And Contention* (Tripathi 1985)