

THE EVOLUTION AND DEVELOPMENT OF DOCTRINE OF BASIC STRUCTURE

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ABSTRACT

Constitution is a living document. It is involved in continuous process of evaluation, reformation and recreating the existing system of governance by eminent scholar, experts and judges etc. No constitution can remain static forever as it is important to respond to new challenge and take into account unanticipated and unforeseen events which were not within the contemplation of the framers of the constitution. Constitution requires amendments from time to time according to changing circumstances.

Now bringing amendment to the constitutional provisions was an easy process before Keshavnanda Bharati's case because there was no implied or express limitation on its amending power exercised under the constitution. But in Keshavnanda Bharati's case uncontrolled power of the parliament has been controlled and curtailed by the doctrine of basic structure. The basic structure doctrine is merely a legal innovation designed to prevent Parliament from abusing its amendment power.

Through this basic principle the Supreme Court changed the course of Constitutional history by denying the assertion of supremacy of Parliament in the matter of amending the Constitution at solely on the basis of requisite voting strength, quite unmindful of the basic or fundamental rights of citizens.

The basic structure doctrine is one of the fundamental judicial principles connected with Indian constitution. The doctrine of basic structure holds that there is a basic structure to Indian Constitution and Parliament of India cannot amend the basic features. The idea is that 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.

The common criticism of the doctrine is that the doctrine has no basis in the Constitution's language. The doctrine does not have a textual basis. There is no provision stipulating that this Constitution has a basic structure and that this structure is beyond the competence of amending power. This article focusses on the evolution and development of the doctrine of basic structure and provides insights into the applicability of the doctrine in contemporary world.

KEYWORDS-Doctrine of basic structure, Keshavnanda Bharti's case, Constitution of India

INTRODUCTION

Soon after the Constitution entered into force, agrarian land reform legislation was enacted in Bihar, Uttar Pradesh and Madhya Pradesh. Land owners were adversely affected by such laws. They challenged the laws in Court because the initiation of agrarian reforms was directly violating fundamental rights such as Article 14¹, 19² and 31 especially right to property which was a fundamental right in original constitution. Bihar Land Reforms Act was the first enactment on agrarian reform which was challenged in Patna High Court. To nullify the judgement of High Court and to immunize this law from fundamental rights, Article 31-B and 9th schedule were introduced in the Constitution by the Constitution First Amendment Act 1951.

Now the question whether Fundamental Rights can be amended under Art.368 was raised again in the Supreme Court in *Shankari*

Article 31-B: Validation of certain Acts and Regulations- *Without prejudice to the generality of the provisions contained in Article 31-A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.*

The **Ninth Schedule** when inserted under Constitution contained 13 Items, all relating to land reform laws immunizing them from challenge on the grounds of Contravention of Article 13 of the Constitution.

¹ "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

²All citizens shall have the right

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

(f) omitted

(g) to practise any profession, or to carry on any occupation, trade or business

Prasad case. In this case validity of Constitution (First Amendment) Act, 1951 which inserted inter alia, Arts.31-A and 31-B of the Constitution were also challenged. The amendment was challenged on the ground that it abridges the rights conferred under Art.13¹ of Part III and hence was void. The Supreme Court however rejected the above argument and brought out the distinction between legislative power and constituent power and held that “law” in Art.13 did not include an amendment of the Constitution made in the exercise of constituent power and Fundamental Rights were not outside the scope of amending power. The same view was also expressed by the court in *Sajjan Singh*² case. The majority verdict held that the Parliament possesses the power to amend the fundamental rights of the citizens.³ But for the first time in the concurring opinion by Hidayatullah and Mudholkar JJ doubts were raised on the unfettered power of Parliament to amend the Constitution and curtail the fundamental rights of the citizens. The question whether parliament could amend the fundamental rights again raised in *Golak Nath*⁴ case. The petitioners—again, landowners deprived of their surplus landholdings under state land reform legislation—challenged the validity of the First, Fourth and Seventeenth Amendments⁵. The Supreme Court ruled that the Parliament had no power to amend Part III of the Constitution and overruled its earlier decision in *Shankari Prasad* and *Sajjan Singh case*. In order to remove difficulties created by the decision of Supreme Court in *Golak Nath*'s case the Parliament enacted the 24th Amendment Act and inserted Article 13(4) to expressly exclude constitutional amendments from the ambit of Article 13⁶. Now the Parliament got absolute power to amend any part of the Constitution including Part III (fundamental rights). Further the Act provided that when a Constitution Amendment Bill passed by both Houses of Parliament is presented to the President for his assent, he should give his assent. The president was made duty bound to give assent to a Constitution Amendment Bill when presented to him.

The Kerala Land Reforms Act, 1963 had affected the property of a religious institution, leading His Holiness Swami Kesavananda Bharati Sripadagalvaru, the head of Edneer math, in Kerala, to challenge state land reform legislation in Kerala in 1970. In *Keshavanandha Bharathi Case*⁷ an attempt was made to question the plenary power of the Parliament to abridge or take away the Fundamental Rights, if it was necessary by the way of amendment under Art.368 of the Constitution. Seven out of the thirteen judges Bench held that the Parliament's constituent power under Art.368 was constrained by the inviolability of the Basic Structure of the Constitution, which was one of the Basic features of the Constitution. The Basic Structure of the Constitution could not be destroyed or altered beyond recognition by a constitutional amendment. The Supreme Court declared that Art.368 did not enable the Parliament to alter the basic structure or framework of the Constitution and Parliament could not use its amending power under Art.368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution. This is how the evolution of this Basic Structure Doctrine happened because of some controversy was found in the laws included in the Ninth Schedule.

KESHAVNANDA BHARATI'S CASE AND BASIC STRUCTURE DOCTRINE

The ruling of the Apex Court of India in *Kesavananda Bharti v. State of Kerala* [(1973) 4 SCC 225] is possibly its most significant. According to the ruling, there are some restrictions on the Parliament's ability to alter, add to amend, repeal, or otherwise change any part of the Constitution. The Constitution's fundamental elements cannot be changed by the Parliament when it is modifying it. The Basic Structure Doctrine (the "Doctrine") is what the court used to refer to this idea. Famous German scholar Prof. Dietrich Conrad, whose idea of implied limitation was accepted in India, created the Basic Structure Doctrine

The South Asia Institute at the University of Heidelberg in Germany, Conrad held the position of Professor. Conrad had been greatly impacted by how Adolf Hitler exploited the Weimar Constitution (the law that governed Germany from 1919 to 1949) during the reign of Nazi Germany. To further build his idea of implied constraints, he drew on Germany's experience during this time.

The Weimar Constitution's Article 76 states that the Legislature may alter the Constitution with the consent of two-thirds of the Parliament. In other words, the Legislature may change any part of the Constitution as long as 2/3 of the members voted in favour. Hitler, who was appointed Chancellor of Germany in 1933, utilised this clause to rewrite the whole Constitution and arbitrarily revoke peoples' rights.

Hitler declared a state of emergency and repealed the constitution's safeguards for civil liberties, including as the freedoms of speech and association, assembly, habitation, and habeas corpus, within a month of entering office. Later, the Enabling Act was approved by the legislature, granting the government and the executive branch the power to pass laws in addition to the legislative. The Act stated that while the government was not required to pass laws in accordance with the Constitution's

Article 13: Laws inconsistent with or in derogation of the fundamental rights-

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law, which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,-

(a) “law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) “laws in force” includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed,

² *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845.

³ S. C. Kashyap. (2014). basic structure doctrine: A Comparative Analysis. International Journal of Humanities and Social Science Research, 4(2), 77-87.

⁴ *Golak Nath v. State of Punjab*, (1967) 2 SCR 762: AIR 1967 SC

⁵ Mody, ZIA, “10 JUDGEMENTS THAT CHANGED INDIA”, Penguin books India 2013

⁶ Ibid pg-4

⁷ *Kesavananda Bharti v. Kerala* AIR 1973, SC 1461

procedural requirements, the Legislature was. According to the opening lines of the Act, this law was approved after passing the requirements for a constitutional amendment.

The Enabling Act rendered the Constitution a dead letter even though it did not formally alter it. Hitler then utilised the Enabling Act to create legislation that gave him the power to rule alone and v The Germans learned from this experience that merely limiting the amending power's procedural options was insufficient protection against forces opposed to the constitution because bad might still be imposed through the use of those options. As a result, when the Federal Republic of Germany was developing its new constitution, known as the Basic Law, it specifically identified several provisions as not being subject to alteration by the Parliament. The Basic Law's Article 79(3) expressly forbade any changes to the provisions relating to the fundamental values outlined in Articles 1 through 20.9, among them the values of federalism, democracy, the rule of law, and the separation of powers. The 'Eternity Clause' was the name given to this clause, violated many people's human rights, acted as though it were the de facto constitution.

Doctrine of Implied Limitation Doctrine and Its Application in India-

Prof. Conrad was asked to give a lecture on the subject of "Implied Limitation of the Amending Power" at the Banaras Hindu University in India in February 1965. He used the Nazis' destruction of the Weimar Constitution as an example of how easily amendable constitutions may lead to abuse of power. No matter how strong it is, an amending body cannot alter the foundation that underpins its constitutional authority, according to Conrad. In other words, the Constitution itself and the clauses within it that granted the legislature the authority to amend it in the first place cannot be changed by an amending body (i.e., the legislature). There are several implied restrictions on an amending body that state that some sections or principles of the Constitution are outside of their purview.

Conrad continued by discussing Article 368 of the Indian Constitution, which grants the Parliament the power to amend the Constitution provided that a majority of the members of each House present and voting approve the Amendment Bill. Questions like "Is it possible for the Parliament to amend Article 1 and divide the Union of India into Tamil Nadu and Hindustan proper through the lawful exercise of Article 368?" were among those he posed. Whether it could take away the Article 21 Right to Life and Liberty? Is it possible for a ruling party to amend Article 368 such that Taking the Prime Minister's advice, the President, has all authority? Could the ability to change the Constitution lead to its own abolition and the restoration of monarchy?

A paper on the lecture's topic was written, and constitutional lawyer Mr. M.K. Nambiar found it. Mr. Nambiar was so moved by the idea and the possible problems it raised that he used it as support for his position before the Supreme Court in the case of *Golak Nath v. State of Punjab* (AIR 1967 SC 1643). The Court rejected the idea, despite the fact that the majority thought it had validity and might be raised once more if the Parliament ever attempted to undermine the Constitution's framework.

When the 24th Constitutional Amendment was argued before the Supreme Court of India in the matter of *Kesavananda Bharti v. State of Kerala*, such a circumstance occurred. As long as it was approved with the required majority, the Amendment effectively permitted the Parliament to add, change, or remove any provision of the Constitution. Shri Nani Palkhivala used Conrad as support for his argument in favour of Implied Limitations on the Parliament's ability to modify the Constitution. He was successful in persuading the Court that the Parliament cannot change some fundamental aspects of the Constitution. The Conrad's Implied Limitations theory was given the label "doctrine of Basic Structure" by the court.

Justice Nariman shared a remarkable anecdote about the *Kesavananda* case hearing at a lecture. He thought back to how Shri Palkhivala had made his case for implicit constraints in court without any supporting precedents or rulings. The only source of assistance for Mr. Palkhivala was the paper that Professor Conrad wrote. This shows both the genius of Prof. Conrad and the intelligence of Mr. Palkhivala, who by his advocacy alone was able to convince 7 out of 13 Judges. Judges S.M. Sikri CJ, J.M. Shelat, A.M. Grover. K.S. Hegde, A.K. Mukherjea, P.Jaganmohan Reddi accepted the argument of Palkhiwala and held: (entire) fundamental rights (as such) were essential features of the Constitution and therefore there was implied limitation to abrogate or repeal them (though they could be abridged). Khanna, J. rejected argument on 'essential features' and 'implied limitation' & proceeded on 'basic structure doctrine' alone. He held that power of amendment extends to all Articles including fundamental rights but only restriction is that the basic structure of the Constitution should not be changed.

DEVELOPMENT OF THE DOCTRINE AFTER KESAVANANDA BHARATI CASE

The development of the basic structure doctrine of the Indian Constitution was a gradual process that took place after the landmark *Kesavananda Bharati* case judgement in 1973. The following are the key events that contributed to the evolution of this doctrine

In ***Indira Nehru Gandhi v. Raj Narain case (1975)*** the Supreme Court applied the theory of basic structure and struck down Clause(4) of Article 329-A, which was inserted by the 39th Amendment in 1975 on the grounds that it was beyond the Parliament's amending power as it destroyed the Constitution's basic features. The 39th Amendment Act was passed by the Parliament during the Emergency Period. This Act placed the election of the President, the Vice President, the Prime Minister and the Speaker of the Lok Sabha beyond the scrutiny of the judiciary. This was done by the government in order to suppress Indira Gandhi's prosecution by the Allahabad High Court for corrupt electoral practices.

In ***Minerva Mills case (1980)*** This case again strengthens the Basic Structure doctrine. The judgement struck down 2 changes made to the Constitution by the 42nd Amendment Act 1976, declaring them to be violative of the basic structure. The judgement makes it clear that the Constitution, and not the Parliament is supreme. In this case, the Court added two features to the list of basic structure features. They were: judicial review and balance between Fundamental Rights and DPSP. The judges ruled that a **limited amending power** itself is a basic feature of the Constitution.

In Waman Rao Case (1981) 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. The Waman Rao case held that amendments made to the 9th Schedule until the Kesavananda judgement are valid, and those passed after that date can be subject to scrutiny.

Indra Sawhney and Union of India (1992) SC examined the scope and extent of Article 16(4), which provides for the reservation of jobs in favour of backward classes. It upheld the constitutional validity of 27% reservation for the OBCs with certain conditions (like creamy layer exclusion, no reservation in promotion, total reserved quota should not exceed 50%, etc.). Here, 'Rule of Law' was added to the list of basic features of the constitution.

S.R. Bommai case (1994) In this judgement, the SC tried to curb the blatant misuse of Article 356 (regarding the imposition of President's Rule on states). In this case, there was no question of constitutional amendment but even so, the concept of basic doctrine was applied. 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.

The doctrine of the basic structure helps to prevent legislative excesses. This is required as a shield against an all-powerful parliament, which can resort to overuse of Article 368.

Thus the basic structure doctrine serves as a crucial safeguard against arbitrary amendments and helps to preserve the essence of the Constitution. In Kesavananda Bharati case the Supreme Court judgement listed some basic structures of the constitution as:

1. Supremacy of the Constitution
2. Unity and sovereignty of India
3. Democratic and republican form of government
4. Federal character of the Constitution
5. Secular character of the Constitution
6. Separation of power
7. Individual freedom

Over time, many other features have also been added to this list of basic structural features. Some of them are:

- Rule of law
- Judicial review
- Parliamentary system
- Rule of equality
- Harmony and balance between the Fundamental Rights and DPSP
- Free and fair elections
- Limited power of the parliament to amend the Constitution
- Power of the Supreme Court of India under Articles 32, 136, 142 and 147
- Power of the High Court under Articles 226 and 227
- Limited power of parliament to amend the constitution.
- Welfare state.
- Freedom and dignity of an individual.

Any law or amendment that violates these principles can be struck down by the Supreme Court on the grounds that they distort the basic structure of the Constitution.

CONCLUSION

The Basic Structure Doctrine is a legal principle in India that holds that there are certain fundamental features of the Indian Constitution that cannot be altered or destroyed by any constitutional amendment. These features are considered essential to the Constitution and are therefore referred to as the "basic structure." The Basic Structure Doctrine was first introduced by the Indian Supreme Court in the landmark case of Kesavananda Bharati v. State of Kerala in 1973. In this case, the Supreme Court held that the power of the Indian Parliament to amend the Constitution is not unlimited and that certain essential features of the Constitution cannot be amended. The Basic Structure Doctrine has been used by the Indian Supreme Court to strike down several constitutional amendments that were deemed to be in violation of the basic structure of the Constitution. This doctrine has been instrumental in maintaining the integrity and stability of the Indian Constitution over the years. The significance of the Basic Structure Doctrine in India is – Firstly Protecting fundamental rights: The Basic Structure Doctrine ensures that

fundamental rights guaranteed by the Constitution cannot be taken away by the Parliament through the amendment process. Secondly preventing abuse of power- The doctrine acts as a check on the powers of the Parliament and prevents it from abusing its power to amend the Constitution for its own interest. Thirdly ensuring constitutional stability-- The Basic Structure Doctrine provides stability to the Constitution by preventing the Parliament from making any amendments that would fundamentally alter its character. Fourthly Upholding constitutional supremacy: The doctrine upholds the supremacy of the Constitution by establishing that the Constitution is the highest law of the land and that no authority, including the Parliament, can tamper with its basic structure. Fifthly, Judicial activism-- The Basic Structure Doctrine has given the judiciary a more active role in interpreting and safeguarding the Constitution, thereby strengthening the rule of law and democracy in India. Overall, the Basic Structure Doctrine has played a significant role in shaping the constitutional landscape of India and upholding its democratic values.