

THE DOCTRINE OF BASIC STRUCTURE OF CONSTITUTION AND INTERPETATION BY INDIAN JUDICIARY

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Abstract: Though our Constitution is flexible in nature, but certain basic principles of the Constitution cannot be altered or destroyed through amendments by the parliament. Those basic structure is the true essence of the Constitution. This doctrine thus forms the basis of a power of the Supreme Court to review and strike down constitutional amendments and acts enacted by the Parliament which conflict with or seek to alter the "basic structure" of the Constitution. The basic features of the Constitution have not been explicitly defined by the Judiciary, and the claim of any particular feature of the Constitution to be a "basic" feature is determined by the Court in each case that comes before it. The answer to the question what contains basic structure are interpreted by our judiciary in various case laws. The most prominent landmark judgement regarding this is Keshavananda Bharti case. Thus it gives extra power to court to review and strike down any constitutional amendments and act enacted by the Parliament.

Keywords: Basic Structure, Doctrine, Legislation, Supreme Court.

INTRODUCTION

The discussion on the 'basic structure' of the Constitution, lying drowsy in the documents of India's protected history amid the most recent decade of the 20th century, has returned in the open domain. While setting up the National Commission to Review the Working of the Constitution (the Commission), the National Democratic Alliance government (shaped by an alliance of 24 national and regional level parties) expressed that the basic structure of the Constitution would not be altered. Justice M.N. Venkatachalaiah Chairman of the Commission, has stressed on a few events that an investigation into the fundamental structure of the Constitution lay past the extent of the Commission's work.¹

Few political parties i.e. the congress and the two Communist parties (Opposition parties) have made it very clear that the review exercise was the government's move to seek legitimacy for its design to adopt radical constitutional reforms therefore demolishing the basic structure of the document.²

Partial amnesia has been a part of most of the public debates as even literate circles of urban India are not sure of the ramifications of this concept, which used to be debated during the 1970s and 1980s. The following discussion is an attempt to chart the waters of that period rendered turbulent by the power struggle between the legislative and the legal arms of the State.³

According to the Constitution, State legislature and Parliament in India have the authority to make laws within their respective jurisdictions. This power is not absolute in nature. The power to adjudicate upon the constitutional validity of all laws has been vested by the constitution in the judiciary. The Supreme Court has the power to declare any law invalid or ultra vires made by Parliament or the state legislature if it violates any provisions of the Constitution. This check notwithstanding, the founding fathers wanted the Constitution to be an adaptable deed rather than a rigid framework for governance. Thus Parliament has the power to amend the Constitution. Article 368 of the Constitution indicates that Parliament's amending powers are absolute and envelop all parts of the document. But the Supreme Court has acted as a brake to the legislative enthusiasm of Parliament ever since independence. With the motive of conserving the real ideals imagined by the constitution-makers, the apex court declared that Parliament could not misrepresent, damage or change the basic features of the Constitution under the pretext of amending it. In Constitution the expression 'basic structure' can't be found itself. Supreme Court first recognised this concept in the historic *Kesavananda Bharati* case in 1973⁴. Till then The Supreme Court has been the interpreter of the Constitution and the authority of all amendments made by Parliament.⁵

¹ <http://constitutionnet.org/vl/item/basic-structure-indian-constitution> (Visited on 20 march 2018)

² ibid

³ ibid

⁴ (1973) 4 SCC 225: AIR 1973 SC 1461.

⁵ Supra note 1

The pre-Keshvananda case position

As soon as in 1951 Parliament's power to amend the Constitution, basically the chapter on the fundamental rights of citizens, was challenged. Few laws were enacted in the states after independence with the motive of reforming land ownership and tenancy structures. This was made because of the ruling Congress party's electoral promise of implementing the socialistic goals of the Constitution [mentioned in Article 39 (b) and (c) of the Directive Principles of State Policy] that required equal circulation of resources of production among all natives and anticipation of convergence of wealth in the hands of few. It was petitioned in the courts by the Property proprietors who were badly affected by these laws. The courts struck down the land reforms because they transgressed the fundamental right to property guaranteed by the Constitution. Galvanized by the unfavourable judgements, Parliament placed these laws in the Ninth Schedule of the Constitution through the First and Fourth amendments (1951 and 1952 respectively), thereby effectively detaching them from the scope of judicial review.

[The Ninth Schedule was added by the Parliament in the Constitution through the very first amendment in 1951 as a means of immunising certain laws against judicial review. Under the provisions of Article 31, which themselves were amended several times later, laws placed in the Ninth Schedule -- pertaining to *acquisition of private property and compensation payable for such acquisition -- cannot be challenged* in a court of law on the ground that they violated the fundamental rights of citizens. This protective umbrella covers more than 250 laws passed by state legislatures with the aim of regulating the size of land holdings and abolishing various tenancy systems. The Ninth Schedule was created with the primary objective of preventing the judiciary - which upheld the citizens' right to property on several occasions - from derailing the Congress party led government's agenda for a social revolution.]⁷

The land reforms laws in the Ninth Schedule was again challenged in the constitutional amendments before the Supreme Court, saying that they violated Article 13 (2) of the Constitution.

Protection of the fundamental rights of the citizen in provided in Article 13 (2)⁸. Parliament and the state legislatures are clearly preventing from making laws that may carry away or abridge the fundamental rights guaranteed to the citizen. They argued that any amendment to the Constitution had the status of a law as understood by Article 13 (2). In 1952 (*Sankari Prasad Singh Deo v. Union of India*⁹) and 1955 (*Sajjan Singh v. Rajasthan*¹⁰), the Supreme Court rejected both arguments and upheld the power of Parliament to amend any part of the Constitution including that which affects the fundamental rights of citizens. Significantly though, two dissenting judges in *Sajjan Singh v. Rajasthan* case raised doubts whether the fundamental rights of citizens could become a plaything of the majority party in Parliament.

Basic Features of the Constitution according to the Keshavanada case diagnosis are as follows:

Each judge opined his view regarding what he thought were the basic structure of constitution. There was no unanimity of opinion within the majority view either.

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.

⁶ 2 Originally, the Constitution guaranteed a citizen, the fundamental right to acquire hold and dispose of property under Article 19f. Under Article 31 he could not be deprived of his property unless it was acquired by the State, under a law that determined the amount of compensation he ought to receive against such an acquisition. Property owned by an individual or a firm could be acquired by the State only for public purposes and upon payment of compensation determined by the law. Article 31 has been modified six times -- beginning with the First amendment in 1951 -- progressively curtailing this fundamental right. Finally in 1978, Article 19f was omitted and Article 31 repealed by the Forty fourth amendment. Instead Article 300A was introduced in Part XII making the right to property only a legal right. This provision implies that the executive arm of the government (civil servants and the police) could not interfere with the citizen's right to property. However, Parliament and state legislatures had the power to make laws affecting the citizens' right to property.]

⁷ Later on, laws relating to the nationalisation of certain sick industrial undertakings, the regulation of monopolies and restrictive trade practices, transactions in foreign exchange, abolition of bonded labour, ceiling on urban land holdings, the supply and distribution of essential commodities and reservation benefits provided for Scheduled Castes and Tribes in Tamil Nadu were added to the Ninth Schedule through various constitutional amendments.

⁸ Article 13 (2) states- "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." The term Part refers to Part III of the Constitution which lists the fundamental rights of the citizen.

⁹ AIR 1951 SC 458.

¹⁰ AIR 1965 SC 845.

Hegde, J. and Mukherjea, J. also identified a separate and shorter list of basic features:

- Sovereignty of India
- Democratic character of the polity
- Unity of the country
- Essential features of the individual freedoms secured to the citizens
- Mandate to build a welfare state

Shelat, J. and Grover, J. added two more basic features to this list:

- The mandate to build a welfare state contained in the Directive Principles of State Policy
- Unity and integrity of the nation

Jaganmohan Reddy, J. stated that elements of the basic features were to be found in the Preamble of the Constitution and they are as follows:

- Sovereign democratic republic
- Parliamentary democracy
- Three organs of the State¹¹

The minority opinion in relation to basic structure of Constitution

The minority opinion was given by Justice A.N. Ray (whose appointment to the position of Chief Justice over and above the heads of three senior judges, soon after the pronouncement of the Kesavananda verdict, was widely considered to be politically motivated), Justice M.H. Beg, Justice K.K. Mathew and Justice S.N. Dwivedi also agreed that Golaknath had been pronounced wrongly. Validity of all three amendments were challenged before the court by them. Ray, J. held that all parts of the Constitution were essential and no distinction could be made between its essential and non-essential parts. All of them agreed that Parliament could make fundamental changes in the Constitution by exercising its power under Article 368. In summary the majority verdict in Kesavananda Bharati recognised the power of Parliament to amend any or all provisions of the Constitution provided such an act did not destroy its basic structure. But there was no unanimity of opinion about what appoints to that basic structure. Though the Supreme Court very nearly returned to the position of Sankari Prasad (1952) by restoring the supremacy of Parliament's amending power, in effect it strengthened the power of judicial review much more.¹²

Basic Structure conception reaffirmed- The Indira Gandhi Election 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 to function 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 and placed 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 unfavourable 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 Sabha the 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.

¹¹ <http://www.legalserviceindia.com/articles/thyg.htm> (visited on 23 march 2019)

¹² The majority view declared certain parts of the Twenty-fifth amendment invalid especially those relating to Article 31 (c) and upheld the Twenty-ninth amendment- for a detailed account see Austin, Working of a Democratic Constitution.

Counsel for Raj Narain, the political opponent challenging Mrs. Gandhi's election argued that the amendment was against the basic structure of the Constitution as it affected the conduct of free and fair elections and the power of judicial review. Counsel also argued that Parliament was not competent to use its constituent power for validating an election that was declared void by the High Court.

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 dispute¹³. One judge, Beg, J. upheld the amendment in its entirety. Mrs. 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.¹⁴

Conclusion

There is no certain list which can be referred for the basic structure of the Constitution. The absolute power is given to our judiciary in regard to ascertain the basic structure of the Constitution. Basic structure is the true essence of the Constitution, and no amendment can alter or destroy the true essence of the Constitution. While the idea that there is such a thing as a basic structure to the Constitution is well established its contents cannot be completely determined with any measure of finality until a judgement of the Supreme Court spells it out. Nevertheless the sovereign, democratic and secular character of the polity, rule of law, independence of the judiciary, fundamental rights of citizens etc. are some of the essential features of the Constitution that have appeared time and again in the apex court's pronouncements. One certainty that emerged out of this tussle between Parliament and the judiciary is that all laws and constitutional amendments are now subject to judicial review and laws that transgress the basic structure are likely to be struck down by the Supreme Court.



¹³ The Supreme Court struck down Section 4 of the Thirty-ninth amendment Act, i.e. Article 329A of the Constitution as it existed in 1975.

¹⁴ Supra note 1