

NOTES AND COMMENTS

REVISITING THE BASIC STRUCTURE DOCTRINE- CHALLENGES AHEAD

Abstract

Constitution is the supreme law of a nation. It is not envisaged as a static document but as a dynamic instrument which can be amended to meet the challenges of changing times and needs of the society. Indian Constitution is not an exception to the above principle. Article 368 of the Constitution provides the power and procedure to amend the Constitution but it is not the only source of either such power or limitations thereon. Originally, considered as distinct from ordinary law as defined under article 12 of the Constitution for the purpose of judicial review, the judgment in *Golaknath v. State of Punjab* changed the position by making it amenable to judicial review for violation of fundamental rights which led to the 24th Constitutional Amendment that sought to dilute *Golaknath*. In *Kesavananda Bharati v. State of Kerala*, majority of the judges recognized the basic structure doctrine as a limitation on the otherwise plenary power of the Parliament to amend the Constitution. This paper examines the evolution of the basic structure doctrine, its scope and expansion post 1973, the need to revisit the doctrine in the light of recent developments.

I Introduction

ON APRIL 24, 1973, a historic event took place that holds great significance in Indian constitutional law history and in the development of constitutional law in various countries. The Supreme Court of India, in the widely celebrated case of *Kesavananda Bharati v. State of Kerala*,¹ declared that article 368 did not confer the power on the Parliament to amend the 'basic features of the Constitution'. As the Golden Jubilee Anniversary of this occasion approaches, it is crucial to revisit the basic structure doctrine and examine its origin, evolution, and contemporary implications.

On January 26, 1950, when the Constitution of India was unveiled, the Parliament was granted constituent power to bring in constitutional amendments through the procedure outlined in article 368. The Constitution empowered the Parliament with two significant powers. First, the power to legislate also known as ordinary power to legislate. Second, to amend the Constitution, which has been a topic of controversy and is commonly referred to as 'constituent power'. Though in its original, unamended form, article 368 did not explicitly refer to 'constituent power.' But the court has previously observed the distinction between the original power known as 'constituent power' to make the Constitution, the type of 'constituent power' vested in Parliament under article 368 inserted by mode of 24th Amendment Act. This discussion focused

1 (1973) 4 SCC 225.

on the power to amend granted by addition of the word 'constituent power' (see for example Emmanuel Joseph Sieyes's, Yaniv and recently Rubinelli) under article 368.

The first case to examine the ambit of the term 'constituent power' came before the Supreme Court was in the *Shankari Prasad*.² The main issue before the court was whether amendments rendered under article 368 to the Constitution were accountable to be examined under article 13(2); the court unanimously held that a distinct line exists between ordinary legislative power, also known as constituted power and constituent power. Therefore, when referring to "law" under article 13, it must be understood to refer to regulations and laws established by the legislative branch, rather than amendments to the Constitution carried out using the constituent power. It was furthermore, determined that constituent power is unlimited and through the exercise of sovereign constituent power, Parliament is authorized to amend the Constitution without any limitations.

On June 29, 1964, the Parliament approved the Constitution (Seventeenth Amendment) Act, 1964. This act brought about changes to the constitution, and came to be challenged in *Sajjan Singh* case.³ The majority view with a 3:2 decision, supported the decision of the *Shankari Prasad* case and further retained that the power to amend includes the power to curtail or take away all the fundamental rights stipulated under part III of the constitution. However, Justices Hidayatullah and Mudholkar expressed reservations as to whether fundamental rights could be curtailed by amending the Constitution under article 368 and the Parliament, though using its sovereign constituent power in article 368, has the power to change the 'basic features of the constitution'.

Furthermore, The *Golaknath*⁴ case raised doubts about the previous rulings of the Supreme Court in *Shankari Prasad* and the majority verdict in *Sajjan Singh*. In response, the court took a new approach using the doctrine of prospective overruling, speaking for the majority, Chief Justice K. Subba Rao, held that the Parliaments amending powers does not derive from the sovereign 'constituent power' under article 368, Rather, it is derived from other articles. *i.e.*, article 245, 246, and 248, or with residuary entry item number 97 in List I. Therefore, constitutional amendments, whether made in article 368 or under any other articles, can only be made by Parliament using its ordinary powers to legislate, rather than through the exercise of 'constituent power'. Hence, the court recognised these amendments as "law" under article 13(2) of the Constitution. Consequently, it has been concluded that Parliament, being a constituted body rather than a constituent body, does not possess the authority to curtail or violate all the fundamental rights. As a result, The Parliament introduced 24th Amendment Act of 1971 to overcome the decision and shifted the authority to amend the Constitution back to article 368.

2 *Shankari Prasad v. Union of India*, AIR 1951 SC 458.

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

4 *Golaknath v. State of Punjab*, AIR 1967 SC 1643.

to review the correctness of the majority verdict in the *Golaknath* case, the court, In the case of *Keshavananda Bharati*, a bench comprising thirteen judges was constituted which was an unprecedented event, doubts were raised regarding the constitutional legitimacy of the 24th Amendment Act. The Supreme Court was tasked with determining whether the term “law” under article 13(2) included constitutional amendments, and if so, how to distinguish between legislative power and constituent power. Additionally, the court was required to assess both the extent and limitations, if any, of the amending power as laid out in the Constitution. This examination included an analysis of any implicit or inherent constraints that may apply to the amending power.

The court, Firstly, with a majority of 10 out of 13 judges, held that the prior decision in *Golaknath*, which stated that the expression “law” in article 13(2) encompasses constitutional amendments, and that article 368 is subject to limitations on the amending power, is incorrect and has been overturned. There is uncertainty still persists about the ratio of the judgment different jurist gave different interpretation. According to our analysis the *Kesavanada* judgment was not delivered with a majority of 7:6, but rather by a ratio of 6:6:1. Six judges opined that Parliament’s authority to amend was restricted because the Constitution had implicit limitations. while an equal number of judges believed that the Constitution did not contain such limitations.

However, it was Justice H.R. Khanna, who took a different stance all together, maintaining that Parliament possessed complete constitutional power to amend the Constitution, but Khanna J., observed a limitation by interpreting the term amendment used in article 368. Justice Khanna opined that the use of the words “amendments to the Constitution” and “the Constitution shall stand amended” in article 368 indicates that the amended version is not a new or different Constitution, but rather the existing one. The only inherent or implied constraints were those inferred in the word “Amendment” used in article 368. Despite Khanna’s J., rejection of the implied limitation in the Constitution, the combined implied limitations of all seven judges who favoured implicit limitation under the Constitution and Khanna’s constraints in the word “Amendment” in article 368 allowed the court to establish a majority of 7:6.

Consequently, the court recognized that the constituent power of Parliament under article 368 was subject to limitations it is significant to know that the court determined that while Parliament had the power to amend the Constitution but it was incompetent to alter an essential aspect of the Constitution known as the basic structure. The court further determined that the addition of the phrase “constituent power” under article 368 of the Indian Constitution did not transform the amending body, *i.e.*, Parliament, into the original constituent assembly. Instead, Parliament remained a body under a controlled Constitution, and therefore, it could exercise its amending powers only within the procedural and substantive limitations specified in the Constitution.

This perspective was not endorsed by the view of the majority, but this simplified and generalized conclusion was based on Khanna’s J., view and was signed by nine

judges, four refused to support it in a paper authored by Sikri CJ, titled 'View of the Majority,' This conclusion became a part of our constitutional law, despite lacking numerical support and common reasoning. The basic structure doctrine although may be considered a fictitious concept, the concept is a result of particular moments aimed at protecting against the government's unconstitutional and arbitrary actions. It is crucial to uphold this concept to prevent any constitutional amendments that may weaken the Constitution's fundamental characteristics.

In the Indian context, with the landmark *Kesavananda Bharati* case the Supreme Court by limiting the constituent power, has established the concept of making unconstitutional the constitutional amendment. Therefore, the theory of 'basic structure' is the only standard used to evaluate the constitutionality of any disputed amendment to the Constitution. This stance is unprecedented as no other court in the world has taken such a courageous position. The first application of this doctrine followed in the *Raj Narain* case,⁵ where the Supreme Court ruled that the question of constitution's constitutionality cannot be tested, but the application of its constituent powers can be. Subsequently in the *Minerva Mills* case,⁶ the court recognized that, following the *Kesavananda* ruling, there could be no uncertainty regarding the constraints on the Parliament's constituent power to amend the Constitution. As a result, the limitation on the Parliament's power to amend itself acknowledges as a basic feature and an integral part of its Basic Structure of the Constitution

The doctrine, as recognised in the *Kesavananda*, had a definite objective and specific function. It intended to differentiate the constitutional provisions that could be altered by Parliament from those that were sacrosanct. Though its application to constitutional amendments was limited. Over time, the doctrine mentioned has become an essential aspect in cases where violations of constitutional rights are challenged this is evident in various Supreme Court rulings such as *Waman Rao*,⁷ and in *S.R. Bommai's* case,⁸ where the court expanded the doctrine to test the exercise of emergency powers by the president under article 352 and 356 of the Constitution respectively and also reaffirmed secularism as a basic feature of the Constitution. Additionally, the court applied this feature in the *Ismail Faruqui* case⁹ and refused to answer the special reference made by the president under article 143(1) of the Constitution.

And then, the court in the *I.R. Coelho* case¹⁰ decided that any changes to the constitution adopted on or after April 24, 1973, by which the ninth schedule is amended by the

5 *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299.

6 *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789.

7 *Waman Rao v. Union of India*, (1981) 2 SCC 362.

8 *S.R. Bommai v. Union of India* AIR 1994 SC 1918.

9 *M. Ismail Faruqui v. Union of India* AIR 1995 SC 605 A.

10 *I.R. Coelho (dead) by L.Rs. v. State of Tamil Nadu*, AIR 2007 SC 861.

addition of frequent laws within, must be assessed retrospectively on the touchstone of the basic features of the constitution. Furthermore, the court recognised that articles 14, 15, 19, and 21 are essential features of the constitution and are part of its fundamental features.

The *Kesavananda* verdict elevated the Supreme Court's supremacy and superintendence over Parliament and executives, and the court has effectively used the interpretation of the doctrine to preserve its primacy and independence, preventing any attempts by Parliament to interfere. The court in the, *P.Sambamurthi*,¹¹ and in *L. Chandra Kumar*¹² by retaining its primacy held that judicial review is a basic feature of Indian constitution. Similarly, In the *Delhi Judicial Service Association* case,¹³ the court recognized that article 32, 136, 141, and 142 of the Constitution form part of the basic features of the Constitution. Further, the *Kiboto Holloban*¹⁴ case was focused on the constitutional validity of the tenth schedule on both substantive and procedural grounds, given that paragraph 7 of the tenth schedule barred the jurisdiction of all courts, and the Tenth Schedule not having been ratified by the states. The majority judgment delivered by Venkatachaliah J., struck down the offending paragraph 7 of the Tenth Schedule and held that it could be so severed and that the rest of the Tenth Schedule would therefore operative. According to the minority viewpoint, the Tenth Schedule cannot be severable, and paragraph 7 cannot be separated from the rest of it. It is significant to note that Verma J., in his minority opinion highlighted the fact that the speaker's role as an impartial adjudicator in this purpose runs counter to the basic feature of the Constitution. Verma J., went to an extent of saying that not only the violation of required appropriate ratification in article 368 but also making the speaker's decision final and unchallengeable in any court amounts to a violation of the basic structure of the Constitution.

Moreover, in the NJAC case of 2015,¹⁵ the National Judicial Appointment Commission Act 2014, which aimed to regulate the process of appointing judges to constitutional courts, was deemed violative of the primacy and independence of the judiciary and acknowledged as basic feature of the Constitution and struck down. However, it is equally important for the judiciary to recognize that the law-making power of Parliament or state legislatures, as well as the executive power of both the Union and state governments, are also form a part of basic structures of a democracy. Therefore, the doctrine of basic features applies equally to the primacy and independence of the legislative and executive branches also.

11 AIR 1987 SC 663.

12 AIR 1997 SC 1125.

13 AIR 1991 SC 2176.

14 1992 SCC Supl. (2) 65.1

15 (2016) 5 SCC 1.

There is a clear distinction between amending the Constitution and interpreting it, the former requiring adherence to the constitutionally prescribed process and the latter involving the judge's selection of interpretation based on the recognised canons of interpretation associates with the constitutional history, text, structure and purpose. The concept of basic structure doctrine was not initially included in these canons. If the judiciary employs this doctrine in its interpretation, it is essentially leading to judicial amendment. Furthermore, the *Keasavanada* judgment serves as an example of the problem of recognizing basic features not as per the basis of the Constitution, but rather on the basis of individual perceptions of judges. It is essential for the court to exercise utmost care and caution when applying the doctrine as a tool of interpretation. The lack of unanimity among judges and the persistence of this issue indicate that the real structure of the Constitution and harmonious relations between its organs could be led into peril. If this trend continues, it may potentially result in the violation of the very basis of the basic structure of the constitution.

The original purpose of the doctrine was to use test the constitutionality of any dubious amendment to the Constitution not the legislation. The court also reiterated the same in *Kuldip Nayar v. Union of India*,¹⁶ the five- judge bench ruled that the “doctrine of basic feature” does not apply to ordinary legislation. In contrast, the court In *the Madras Bar Association*¹⁷ and *the Supreme Court Advocate on Record Association*¹⁸ cases held that if an ordinary legislation violates a basic feature of the Constitution, it may still be considered valid, even if it diverges from the original purpose. Subsequently, *In the Aruna Roy* case,¹⁹ the inclusion of Hindu religious values in the school curriculum was challenged for violating the principle of secularism in the Constitution. The court instead solely relied on article 28 for testing the curriculum and policy, used the doctrine as an interpretative tool to make its decision. Moreover, In the *Puttaswamy* case the court acknowledged privacy as a fundamental right and declared that any violation of this right would amount to a breach of the Constitution's basic structure. This highlights the unruly nature of the doctrine, which has been applied to both enumerated and implied unenumerated rights in the Constitution. It is important to acknowledge that if the essential features of the Constitution cannot be amended by Parliament, then equally the judiciary also lacking the power to apply the doctrine to general executive and legislative actions, or to interpret the Constitution.

The basic structure doctrine has been drawn global attention as a novel strategy for defending a constitutional identity and its core values. The doctrine has been cited as

16 (2006) 7 SCC 1.

17 *Madras Bar Association v. Union of India* , decided by the Supreme Court on July 14, 2021.

18 *Supra* note 15.

19 AIR 2002 SC 3176.

an inspiration in other constitutional nations including Pakistan, Bangladesh, Nepal, Malaysia, South Africa, Singapore, Indonesia, and Kenya *etc.* but did not receive a unanimous reception outside of India. The Bangladesh and Kenya's appeared to be the only supreme courts have found support of the doctrine, other courts have been cautious to accept it due to differences in their constitutional structure and the lack of inclusion of a preamble.

If we apply the Kenyan Supreme Court's ruling and interpret it within the framework of the Indian Constitution, the Indian Supreme Court has been using the terms "basic structure" and "basic features" interchangeably, but there is a distinction between these two. It is observed that the Constitution outlines three distinct layers of constituent powers, and it is important to differentiate between the basic structure and features of the Constitution. The former refers to the foundation upon which the existing Constitution is based, while the latter is a component of the basic structure. The basic structure can only be altered through the exercise of an absolute constituent power, while the features can be changed through the exercise of limited constituent power, unless the boundaries are defined. For instance, socialism was initially considered a basic feature of the Constitution by the court, but it is no longer regarded as such. This demonstrates that features can be altered according to the context of the Constitution.

Therefore, three distinct layers of constituent powers laid down below;

- i. *Absolute Constituent power* - primarily, is a superior, extraordinary, unlimited and unrestricted constituent power to enact a Constitution. thus, it should not be confine within any legal regulations and restrictions of the positive law of the nation, this power does not require people to rely on any provisions in the existing Constitution. This power can only be exercised through non-constitutional method, such as a revolution to change the structure such as democracy, rule of law, sovereignty, republic
- ii. *Limited Constituent power* - secondary, is an inferior, limited and restricted constituent power derived from, and administer according to the substantive (subject to changes in structure only), procedural limitation outlined in the constitution. the basic feature can be amended till the boundaries of features are not defined by the parliaments. (See for *i.e.*, Article 79(3) of Basic Law for the federal Republic of Germany, 7B of the Bangladesh Constitution) by the procedure covered in the latter half of Article 368(2) by way of ratification at least half of the number of states *i.e.* at least 15 states at present.
- iii. *Constituted power*- is an ordinary, limited and restricted constituted powers derived from, and administer according to the constitution. it should be confine

within any legal regulations and restriction of the positive law of the nation. *i.e.*, ordinary legislative powers.

Therefore, the doctrine of basic structure was established as a means to safeguard constitutional democracy in the country, and it has played a significant role in achieving this objective. However, if the bulwarks of these feature rise so high without the imposing limits on the doctrine by the Parliament there is a risk of endangering constitutional democracy.

Furthermore, when interpreting the Constitution, the court should not blindly apply the principles and values of the constituent powers of parliament. Instead, it should consider the changing socio-historical circumstances and closely associate them with the objectives of the framers' intentions. On the other hand, the legislature and executive, while exercising their constituent power, must not attempt to control the judiciary. Failure to do so may result in a constitutional revolution similar to the one currently being experiencing by the state of Israel. Therefore, all three branches of government must maintain their independence and operate as part of a recognized structure of checks and balances.

To sum-up, in the *Kesavananda* case, Khanna J., issued a cautionary note on judicial interpretation. His judgment, which became the law of the land, emphasized the need to carefully interpret the Constitution in order to avoid diluting its intended meaning. He argued that judicial interpretation can either breathe life into a Constitution and advance a nation's progress or diminish the intended effectiveness of certain provisions. If there were no means to amend the Constitution, people would have no option but to resort to non-constitutional methods to adapt it to changing circumstances. While such methods may sometimes be non-violent, they often result in loss of life and leave behind feelings of bitterness.

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