EVOLUTION AND GROWTH OF BASIC STRUCTURE DOCTRINE: FROM FUNDAMENTAL RIGHTS TO THE CONSTITUTIONAL EXPANSE

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Abstract

In the earlier days after adopting the Constitution, the country had to face a lot of litigation on the socio-economic laws enacted for the upliftment of the people. For this, Constitutional amendments became necessary. Then arose a situation where the Supreme Court held that fundamental rights could not be amended. To overcome this crisis, an exhaustive amendment of the Constitution ensued. They were challenged in the *Kesavananda Bharti* case in which the Supreme Court formulated the doctrine of basic structure, namely, that an amendment will be valid if it does not affect the basic features of the Constitution. The doctrine was applied beyond the domain of fundamental rights to the wider dimensions of other provisions of the Constitution. This paper explores the origin of the basic structure, the various instances where doctrine has been pleaded over the years and the outcome of its application or non-application.

I Introduction

THE DOCTRINE of basic structure of the Constitution of India had its birth in the *Kesavananda Bharati*[1] case in 1973 after a long period of gestation. The period passed through multiple crises with quite a few ground breaking decisions of courts on property rights followed by constitutional amendments to counterbalance the adverse impact. The extraordinary step of deleting property rights from the group of fundamental rights in the Constitution of India was the culmination of the frantic attempts to clear the pitch for more social reforms free from the ubiquitous review by courts. The concept of basic structure which had its origin in the cases for the protection of property rights, is found to be pleaded for protecting other fundamental rights. In due course, the concept has gone beyond the wider dimensions of other rights and obligations under the Constitution.

Beginning of the story

The right to possess and dispose of property had been a fundamental right regulated and controlled in the 'interests of the general public'[2] when the Constitution of India came into being. No person could be deprived of his property except by authority of

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1 *Kesavananda Bharati* v. *State of Kerala,* AIR 1973 SC 1590.

2 The Constitution of India, art. 19 (1) (f) and 19 (5).

law; compulsory acquisition or requisitioning of property was forbidden except for a public purpose providing compensation.[3]

Close on the heels of implementing the Constitution, the High Court of Bihar held in *Kameswar Singh* v. *State of Bihar*[4] that state law abolishing the zamindari system and acquisitioning zamindari lands violated, among other things, the fundamental rights to equality under article 14 of the Constitution. Without waiting for the result of the appeal made by the Bihar Government before the Supreme Court, the Central Government hurriedly went for damage control. By the Constitution 1st Amendment, they placed the laws of acquiring property for agricultural reforms beyond the court's scrutiny on the ground of violation of fundamental rights.[5] For abundant caution, the government added the 9th Schedule to the Constitution as a safety measure to protect Acts and Regulations specified in the schedule from the intervention of courts on the grounds of infringement of fundamental rights.[6]

In *State of West Bengal* v. *Bela Banerji,*[7] the Supreme Court held that the expression 'compensation' meant 'just equivalent' of the value prevalent at the time of acquiring the property, not one that had prevailed at an earlier date. Soon the executive stepped in and initiated the Constitution 4th Amendment in 1955 immunizing certain specific laws[8]from judicial scrutiny under articles 14, 19 and 31. For acquiring any land coming under private cultivation and within the limit of ceiling, the 17th Amendment in 1964 urged on market value as compensation.[9] Further, in the early seventies, the Central Government went for a law nationalizing 14 private banks. The apex court frowned upon this move on the base that, among other things, the goodwill of the banks or

3 *Id.*, art. 31.

4 1962 AIR 1166.

5 The Constitution (First Amendment) Act 1951. Art. 31A was inserted to the following effect that "notwithstanding anything in the preceding provisions of this part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this part."

6 *Ibid.* It is also provided that notwithstanding any judgment or other judicial orders they shall continue in force. The Bihar Land Reforms Act of 1950 is the 1st legislation occupying the 9th Schedule.

7 AIR 1954 SC 558. Immigrants, due to communal disturbances in East Bengal, were to be settled. The Constitution gave the legislature the discretionary power of laying down the principles on which compensation payable must be determined. The Supreme Court held that the law for acquisition on the value based an anterior date offended art. 31 (2) of the Constitution. For similar decisions, see *Vajravelu Mudaliar* v. *Special Deputy Collector, Madras,* AIR 1965 SC 1017; *State of Gujarat* v. *Shantilal Mangaldas* (1969) 1 SCC 248.

8 The Constitution of India, Art. 31A. They included laws on acquiring agricultural lands, amalgamating corporations, extinguishing, or modifying rights of corporate power and laws for control on winning mineral wealth.

9 *Id.,* second proviso to art. 31A.

their assets was not given due regard in assessing compensation and that allowing other banks, including foreign banks, to continue violated the equality clause.[10] The executive had to meet more problems in bringing the economy to a level playing field.[11] As the judicial interpretation of 'compensation' as just equivalent value was found to be a hindrance to levelling down, the Constitution 25th Amendment in 1971 substituted the concept of 'compensation' with the expression 'amount', hoping that its adequacy would be beyond judicial scrutiny. There are two significant directive principles of state policy in the Constitution. One is that ownership rights and control of the material resources of the community are so allocated as best to promotethe common good.[12] The other is that the functioning of the economic system does not end in the concentration of wealth and means of production to the common detriment.[13] The 25th Amendment placed the laws giving effect to these principles beyond judicial challenge on the ground of fundamental rights.Within a period of six years, the 42nd Amendment extended this protection to laws implementing 'all or any directive principles.' Obviously, these efforts were to speed up socio-economic reforms, to guard them against the adverse impact of the judicial decisions and thus to clear the path for affirmative action.[14] Tired of unfavourable verdicts, the Union Government went for an extraordinary move in 1979. The 44th Amendment removed the right to property from Part III, Fundamental Rights, and located it as a legal right in a new provision, article 300A, in the Constitution.[15]

In short, the history of the Indian Constitution in almost three decades since its inception has been thus booming with lively debates on the relationship between the executive and the judiciary. The executive was initiating laws with intent to strike at the concentration of wealth and material resources in a few hands and to do away

10 *RC Cooper* v. *UOI,* AIR 1970 SC 530, 614. Allowing other banks, including foreign banks, to continue, 14 chosen banks were restrained from doing in the future business. The court held the attempt as a clear violation of the equality clause.

11 For example, the Supreme Court struck down the executive initiative in abolishing privy purse to the former rulers as violative of art. 19 (1) (f), 21 and 31 in *H. H. Maharajadhiraja Madhav Rao* v. *Union of India,* AIR 1971 SC 530. Interestingly, more than two decades after, the 26th Amendment removing privy purse by enacting a law was held valid in *Reghunath Rao Ganapat Rao* v. *UOI,*1994 Supp (1) SCC 191.

12 The Constitution of India*,* 1950, art. 39 (b).

13 *Id.,*art. 39 (c).

14 Hundreds of highly rich and feudal elites like lords, princes, and kings were holding immense assets and properties by succession from generation to generation when India became an independent democratic republic. When they took measures towards bringing social and economic equality, the government did not want to pay them compensation proportionate to the price of the lands prevalent at the time of acquisition.

15 However, the deletion would not deprive the minorities of the right to establish and administer educational institutions of their choice, nor the right of persons possessing the land for private cultivation and within the limit of the ceiling to avail compensation at market value. See, Constitution of India, art. 30 (1A) and 2nd proviso to art. 31A.

with the social and economic disparities while the judiciary was constantly inspecting the *vires* of those laws and clarifying the values entrenched in the Constitution. The action and reaction of the legislature and judiciary had presented a fascinating scenario in India's constitutional development as property rights of the old vintage were fading away, and as an off shoot, new vital interrogations on the power to amend the Constitution were emerging.[16]

II Constitutional amendments: Growing dimensions

Parallel to the developments that led to the deletion of fundamental rights to property, another significant doctrinal revolution was emerging with the struggle of the executive for affirmative action dashing into several processes within the Constitution. Article 13 of the Constitution elucidates that the term 'law' includes "any bye-law, rule, regulation, ordinance, order, custom or usage having in the territory of India the force of law."[17] Should a constitutional amendment brought under article 368 of the Constitution come under the inclusive definition of 'law' to test its validity on the ground of fundamental rights? The earlier views in *Sankari Prasad* v. *Union of India*[18] *and Sajjan Singh* v. *State of Rajasthan*[19] were that the definition of 'law' includes only ordinary laws and that an amendment made in the exercise of the constituent power was outside the scope of challenge. According to them, the Parliament has exclusive power to amend the Constitution, including the fundamental rights, with a view to bring socio-economic reforms.

In *IC Golak Nath* v. *State of Punjab,*[20] the apex court overruled both *Sankari Prasad and Sajjan Singh* and held that the inclusive definition of 'law' under article 13(2) does not exclude a constitutional amendment. Speaking for himself and four other judges, Chief Justice Subba Rao found that article 368 only deals with 'procedure for amendment of the Constitution' and does not contain the power to amend. The amending power lies with legislative powers read with residuary powers and not in article 368.[21] Being a product of legislative process, an amendment is 'law' within the definition of article 13 and shall be void if it takes away or abridges the fundamental rights conferred by Part III of the Constitution. It was impermissible for Parliament to abridge or remove any of the fundamental rights by an amendment to the

16 M.P. Jain, II *Indian Constitutional Law*, Ch.XXX1,1875 (LexisNexis, 7th edn., 2017).

17 The Constitution of India, art. 13(3) (a).

18 AIR 1951 SC 548. The Constitution (1stAmendment) Act, 1951 that inserted, *inter alia*, arts. 31-A and 31-B to the Constitution were questioned.

19 AIR 1965 SC 845.The Constitution's 1st, 4th and 17th Amendments were challenged.

20 AIR 1967 SC 1643, (1967) SSC Online 14.

21 (1967) SSC OnLine 14, at 36. Art. 245 speaks about the extent of laws by Parliament and State Legislatures, art. 246 deals with the distribution of powers among them for making laws, and art. 248 says that the residuary powers rest with Parliament. Amendment is a legislative power which resides in entry 97 in List I of the Constitution.

Constitution, Chief Justice Subba Rao held that the impugned amendments[22] already held valid in past decisions were all void. However, foreseeing the widespread social and economic impact likely to emerge with a sudden withdrawal of these amendments, he refrained from giving retroactivity to this invalidity. Instead, Chief Justice Subba Rao applied the doctrine of prospective overruling to maintain the validity of the amendments and held Parliament should have no power to amend any of the provisions under Part III of the Constitution from February 27, 1967, the date of the decision.[23] In the view of Justice Hidayatullah, the power of amendment, if it can be called a power at all, is a legislative power but it is *sui generis* and exists outside the three Lists in Schedule VII of the Constitution.[24] He did not rely on the doctrine of prospective overruling but held that the impugned amendments were valid as part of the Constitution by acquiescence for a long time.[25]

The plea that an amendment should not destroy the fundamental structure or basic features of the Constitution was raised in *Golaknath* by M. K. Nambyar,[26]whose words resonated with the work of Professor Dietrich Conrad, who is often given credence for bringing in the theory of "implied limitations" in India's constitutional practice.[27] Although he found it to be of considerable force, Chief Justice Subba Rao did not pursue the plea, observing that the question would arise only if Parliament sought to destroy the basic structure of the Constitution embodied in other provisions than Part III of the Constitution.[28] Justice Wanchoo, the dissenting judge, apprehended that acceptance of the plea would lead to a harvest of legal wrangles on which provision could be amended and which provision could not be amended.[29] Justice

22 The Constitution (1stAmendment) Act, 1951, Constitution (4thAmendment) Act, 1955, and the Constitution (17thAmendment) Act, 1964 dilute the scope of the fundamental rights.

23 *IC Golak Nath* v. *State of Punjab* (1967) SSC OnLine 14 at. 36, para 53. Applying the doctrine of prospective overruling for the first time, the court stated that it can be applied only by the highest court of the country in matters arising under our Constitution. Invoking the doctrine, the court declared that this decision would not affect the validity of the 17th Amendment Act 1964, or other amendments to the Constitution taking away or abridging the fundamental rights.

24 *Id.* at 116,para 191.

25 *Id.* at 117, para 193.

26 Sorabjee, Soli J. "*Gopalan* to *Golaknath* and Beyond: A Tribute to M. K. Nambyar" 1 *Indian Journal of Constitutional Law* 22 (2007).

27 Professor Dietrich Conrad delivered a talk on "Implied Limitations of the Amending Power" at the Faculty of Law in the Banaras Hindu University in 1965 at a time when the constitutional validity of the 17th Constitutional Amendment was being vigorously contested. Professor Conrad relied on the works of the 20th Century French and German constitutional lawyers and theorists Maurice Hauriou and Carl Schmitt, who relied on two distinct theoretical approaches to endorse their idea of implied limitation on the amending power and its application to the Indian Constitution.

28 *IC Golak Nath* v. *State of Punjab* (1967) SSC OnLine 14, at 27, para 40.

29 *Id.* at 117, para 193.

Bachawat, another dissenter, ignored it as no catalogue of basic features was before him.[30] It was commented that the judicial creativity and policy-oriented approach of the judges was to make fundamental rights inviolable and avoid the emergence of a totalitarian state.[31]

Birth of the basic structure doctrine

The "basic features" principle was mentioned by Justice J.R. Mudholkarin 1965 in his dissent in the *Sajjan Singh* case while referring to a 1963 decision delivered by the Chief Justice of Pakistan, Justice Alvin R. Cornelius, who held that the President of Pakistan could not alter the fundamental features of their Constitution.[32] The arguments raised by M K Nambyar in *Golaknath*'s case in 1967 that the amending power under article 368 of the Constitution is not absolute but is subject to certain implied limitations significantly contributed to the field of constitutional law[33] and the subsequent birth of the basic structure doctrine.

The questions raised in *Golak Nath* led to more riddles. To solve them, the Union of India went for another statute change. The Constitution 24th amendment in 1971 made explicitly clear that the definition of 'law' in article 13 does not cover any amendment of the Constitution[34] and that article 368 contains the 'constituent' power of Parliament to amend any provision in the Constitution by way of addition, variation, or repeal.[35]The Constitution 25th amendment, which had substituted the concept of 'compensation' with 'amount' and which gave judicial immunity to the laws giving effect to the policy contained in two directive principles in articles 39(b) and 39(c), was also challenged. A bench of thirteen judges of the Supreme Court in *Kesavananda Bharti* v. *State of Kerala,*[36] found the changes valid. However, one has to note that the significance of Kesavanada goes further to the enormous efforts made by the judges in articulating, as well as disagreeing with, the new doctrine of basic structure that

30 *Id.* at 131, para 232.

31 *Supra* note 16 at, 2412.

32 Chief Justice of Pakistan Alvin Cornelius first used the term "basic structure" in *Fazulal Quader Chawdry* v. *Mohd. Abdul Haque*, 1963 PLD 486(SC).

33 Sorabjee, Soli J. "*Gopalan* to *Golaknath* and Beyond: A Tribute to M. K. Nambyar" 1 *Indian Journal of Constitutional Law* 22 (2007). According to him, M K Nambyar had an almost prophetic vision of the Supreme Court judgment in 1973 in *Kesavananda Bharati.*

34 The Constitution of India 24th Amendment, cl. 4 of art. 13. It says that 'nothing in this Article shall apply to amendment of this Constitution made under art. 368.'

35 *Ibid.* Renumbering the original cl. (1) as cl. (2), the new cl. (1) of art. 368 was changed to confirm the constituent power of Parliament to amend the Constitution.

36 *Kesavananda Bharti* v. *State of Kerala*(1973) 4 SCC 225.Along with the Constitution 24th Amendment Act 1971, the petitioner challenged the *vires* of the Kerala Land Reforms (Amendment) Act, 1969 and the Kerala Land Reforms (Amendment) Act, 1971. Other constitutional amendments abolishing the privy purse and adding the impugned Kerala laws to the 9th Schedule were also questioned.

puts limits on the power to amend. The deliberations on the basic structure doctrine in the *Kesavananda Bharti* case were significantly influenced by Professor Dietrich Conrad's lecture on the "Implied limitation on the amending power", delivered at the Faculty of Law in Banaras Hindu University in 1965.[37] His article, "Limitations of Amendment Procedures and the Constituent Power", which was published in 1970 in the Indian Yearbook of International Affairs, has been cited by the Supreme Court in the *Kesavanada Bharati* case.[38]

The doctrine was adopted by a very narrow margin of seven out of thirteen judges. Chief Justice Sikri held that under article 368 of the Constitution, Parliament can amend any provision if the structure and foundation of the Constitution continue to remain the same, citing the supremacy of the Constitution, its federal, republican, democratic and secular character and separation of powers as the basic structures.[39] Justices Shelat and Grover added the dignity of the individual and the unity and integrity of the nation to the list.[40] To Justices Hegde and Mukherjee, the whole scheme and structure of the Constitution are based on permanent features like the sovereignty of India, unity of the country, democratic character of polity, essential individual freedoms, the welfare state and egalitarian society.[41] The judges hastened to add that these are illustrative, not exhaustive. Following the same line, Justice Jaganmohan Reddy said that an amendment should not alter the basic structures such as the sovereign democratic republic, parliamentary democracy, the three organs of the state, fundamental rights and directive principles.[42] Justice Khanna held that subject to the retention of the basic structure or framework of the Constitution, the

37 Professor Dietrich Conrad, formerly Head of the Department of Law, South Asia Institute of the University of Heidelberg, in his speech observed that "any amending body organized within the statutory scheme, howsoever verbally unlimited its power, cannot by its very structure change the fundamental pillars of supporting its Constitutional authority". See "Sanctity of the Constitution Dieter Conrad – The man behind the 'basic structure' doctrine" in A.G. Noorani, *Constitutional Questions and Citizens' Rights* xi-xvi (2006). Also see Sudarshan, "'Stateness' and Democracy" in Zoya Hasan, E. Sridharan *et.al.* (eds.), *India's Constitution in India's Living Constitution: Ideas, practices, controversies* 166 (New Delhi, Permanent Black, 2002); Saya Prateek, "Today's Promise, Tomorrow's Constitution: Basic Structure, Constitutional Transformations and the Future of Political Progress in India" 1 *NUJS Law Review* 445 (2008).

38 D. Conrad, "Limitation of Amendment Procedures and the Constituent Power", *The Indian Yearbook of International Affairs* 1966–67, Madras, 375–430 (1970); *Kesavanada Bharati* v. *State of Kerala* AIR 1973 SC 1461 paras, 979, 982, 1485, 2069 and 2151. Also see generally Sudhir Krishnaswamy, *Democracy and Constitutionalism in India a Study of the Basic Structure Doctrine*, (Oxford University Press, 2009).

39 *Kesavananda Bharti* v. *State of Kerala* (1973) 4 SCC 366.

40 *Id.* at 454.

41 *Id.* at 486.

42 *Id.* at 633.

power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights.[43]

Other judges differed. Justice Ray wondered who is to judge what the essential features are.[44] Justice Palekar feared whether the distinction between essential and non-essential features may not open a Pandora's box of endless litigation[45] as Justice Wanchoo had suspected in *Golaknath*.[46]

Justice Mathew found no reason to reflect that the word 'amendment' was used in a narrow sense and in a limited way.[47] If Parliament decides to amend a fundamental right to give priority to directive principles, the court cannot adjudge the Constitutional amendment as bad.[48] Justice Beg held that the Constitution can make changes in the very features considered basic today to suit the needs of each age and generation.[49] Justice Dwivedi thought that the nature of the power under article 368 to amend is so unlimited that 'it may amputate any part of the Constitution if and when it becomes necessary to do so for the good health and survival of the Constitution'.[50] Article 368 is the master, not the slave of other provisions and it places no express limits to the amending power.[51] Justice Chandrachud found no objective standard to determine what would constitute the core and the peripheral layer of the essential principles of the Constitution.[52]

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43 *Id.,* per Justice Khanna at 769, 806 and 824. The learned judge said earlier that the amendment of the Constitution helps the people and the nation adapt themselves to the changing needs of times; no generation has a right to place fetters on future generations to mould their machinery of government and the laws according to their requirements at 755. For an insight into the grounds on which *Golak Nath* was overruled; See H.M Seervai, III *Constitutional Law of India* 3113 (4th edn., 2006)

44 Justice Ray asks, "On what touchstone are the essential features to be measured? Is there any yardstick by which it can be gauged? How much is essential and how much is not essential? How can the essential features or the core of the essential features be determined?" at 553.

45 *Ibid.* The distinction will create uncertainty about the Constitutional provisions intended to be clear and certain while the amendment is part of the Constitution having equal status with the rest of the provisions of the Constitution at 718.

46 *I C Golak Nath* v. *State of Punjab* (1967) SSC OnLine 14,131, para 232.

47 *Ibid.* Renumbering the original clause (1) as cl. (2), the new cl. (1) of art. 368 was changed to confirm the constituent power

48 *Kesavananda Bharti* v. *State of Kerala,* (1973) 4 SCC 225 at 863. If there is power the fact that it might be abused is no ground for cutting down its width.

49 *Id.* at 882. Art. 368, as it stood before the Amendment, conferred plenary power to amend all the provisions of the Constitution. The 24th Amendment made the assent of the President compulsory character and reiterated the constituent power of the Parliament to amend the fundamental rights.

50 *Id.* at 909.

51 *Id.* at 933. The judge said, "Article 368 permits Parliament to apply not only the physician's needle but also the surgeon's saw."

52 *Id.* at 941, 942.

Most of the judges did not approve that the amending power is limited by natural law rights. There is no higher law above the Constitution.[53] It is not conceivable that the framers left this important power to the realm of implied powers.[54] Natural rights have no legal sanction and enforceability without their incorporation into the Constitution.[55] They are precisely those rights which the State identifies and no more; to say that one has rights that the State ought to recognize is a vain effort.[56] The natural law theory defeats the plain meaning of article 368.[57] Fundamental rights are not reserved by the people to themselves but are called fundamental as they are indestructible by legislative laws and executive action.[58] They are rights 'conferred' by Part III of the Constitution.[59]

The court held the 24th and 29th Amendments valid. The 25th Amendment was also valid but for the declaratory part to the new article 31C.[60] However, the hurdles put on the road to affirmative action were worrisome. In the final analysis, the Supreme Court, by a majority of seven to six, held that constitutional amendments damaging the basic structure of the Constitution would be void while most of them ruled out natural law limitations. A few illustrations of the basic structure were alluded to. However, the court left most of them for future occasions to evolve. Since then, various facets of the basic structure doctrine have evolved through a series of Supreme Court judgments.

The 42nd Amendment to avoid the hurdles

Inspired by the ideals behind the directive principles of state policy, the executive took several measures to bring in socio-economic revolution in the country. Undoubtedly, in a democracy, this was a huge and untiring battle; the executive should act within the limits of the rule of law and boundaries earmarked by the judicial pronouncements. The path declared by the *Kesavananda* case was not safe and full of hurdles. Obviously, the Constitution's 42nd Amendment brought drastic provisions into the Constitution with the intent to clean the pitch for taking up further progressive reforms. The amendment goes on to say that "no amendment of the Constitution (including the provisions of Part III) made or purporting to have been made under

53 *Id.* at 990, 991.

54 *Ibid.*, *per* Ray, J. Fundamental rights are social rights conferred by the Constitution, not inherent rights, at 555

55 *Id.* at 776 *per* Khanna J.

56 *Id.* at 781.

57 *Id.* at 718 *per* Justice Mathew. No single right, natural or not, is absolute as they may be subject to morality, public order, and the general welfare in a democratic society.

58 *Id.* at 913, 916 *per* Justice Beg. Use of natural law theory for construing art. 368 will defeat the objectives of the Constitution as stated in the preamble and directive principles.

59 *Id.* at 939 *per* Justice SN Dwivedi.

60 *Id.* at. 988 *per* Justice Chandrachud.

this article [whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976] shall be called in question in any court on any ground",[61] followed by a declaration that there should be no limitation on the constituent power of Parliament.[62] The judicial immunity introduced by the 25th Amendment to securing 'the directive principles specified in clauses (b) and (c) of article 39' was extended to laws regarding 'all or any of principles laid down in Part IV' of the Constitution.[63] Noticeably, these attempts echo the executive eagerness to clear all roadblocks in the path towards social and economic revolution.

Judicial balancing emerges

In *Minerva Mills Ltd* v *Union of India,*[64] Chief Justice Chandrachud did not accept either the protection of any amendment from judicial scrutiny or the declaration that there is no limitation upon the constituent power to amend the Constitution.[65]The no-limitation clause goes to empower Parliament to repeal or abrogate the Constitution or to destroy its basic and essential features. The limited amending power cannot enlarge itself into absolute power. There cannot be judicial immunity of a law securing directive principles even if it violates articles 14 and 19.[66] Despite these observations, the Chief Justice clarified that the harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution and that anything that destroys the balance will be invalid.[67] Articles 14 and 19 21 constitute a golden triangle assuring the people of an egalitarian era through the discipline of fundamental rights without emasculation of the rights to liberty and

61 The declaratory part says that 'no law containing a declaration that it is for giving effect to such policy [securing directive principles in cl. (a) and (b) of art. 39] shall be called in question in any court on the ground that it does not give effect such policy.'

62 Cl. 4 of art. 368, The Constitution 42nd Amendment.

63 Cl. 5 of art. 368. "For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article." The effect of the declaration is to grant protection to a law even though such a law can be shown as not enacted for the object of art. 31C.

64 This immunity had been introduced by the 25th amendment which barred challenge on the ground of violation of the rights to equality under art. 14, personal freedoms under art. 19 or property rights under art. 31. Later, the 44th Amendment deleted the right to property under art. 31.

65 *Minerva Mills Ltd* v. *Union of India* (1980) 3 SCC 628.

66 *Id.* at 643. According to art. 32(4), the fundamental right to move the Supreme Court against violation of fundamental rights 'shall not be suspended except as otherwise provided for by the Constitution.' In the view of the Chief Justice, this guarantee is practically removed by conferring limitless constituent power *vide* Cl. 5 of art. 368 to amend by way of addition, variation, or repeal.

66 Such a situation transforms the fundamental rights into mere adornment and drains the lifeblood of art. 32, *Id.* at 644.

67 *Id.* at 654.

equality, which alone can help preserve the dignity of the individual. Chief Justice Chandrachud sums up by saying that article 31C has removed two sides of this golden triangle.[68]

Justice Bhagwati agreed with the Chief Justice that clauses (4) and (5) of the 42nd amendment are unconstitutional and void[69] and that there ought to be a balance between fundamental rights and directive principles.[70] He had a distinct vision of the judicial immunity to the laws, realizing directive principles from violation of fundamental rights of articles 14 and 19.[71] In his view, agrarian reform laws realizing directive principles augment the constitutional goal of social and economic justice and strengthen the basic structure of the Constitution instead of violating the concept.[72] Real democracy lives in the directive principles that stimulate the static provisions of fundamental rights. The State's obligations to take positive action for creating an egalitarian social order with social and economic justice for all would be effectively performed with individual liberty becoming a living reality, not only for a few privileged persons but for the entire people of the country.[73] He went to the extent of saying that non-compliance with the directive principles would be unconstitutional as there is a breach of faith on the State to respond to the constitutional obligations rendering a vital part of the Constitution meaningless and futile.[74]

Justice Bhagwati went ahead saying that "the dynamic principle of egalitarianism fertilises the concept of social and economic justice."[75] There can be no tangible social and economic justice when egalitarian principles are breached. Assigning greater importance to fundamental rights would be to weaken the constitutional command that the directive principles shall be fundamental in the governance of the country for making laws.[76] The Parliament adopted the reading that the constitutional obligation

68 *Id.* at 660

69 They convert the controlled power into an uncontrolled power violating essential features and the basic structure of the Constitution, *Id.* at 679.

70 *Minerva Mills Ltd.* v *Union of India* (1980) 3 SCC 628, 687. The last part of art. 31C provided that no law with a declaration that it is to give effect to the fundamental rights concerned will not be questioned. This part was already declared unconstitutional by *Keshavananda Bharti's* decision and must consequently be treated as non-est.

71 Later, art. 31 was dropped, consequent to the deletion of the right to property.

72 *Ibid.* Distribution of the ownership and means of production to sub serve the common good [art. 39(b)] and operation of the economic system not resulting in the concentration of wealth to the common detriment [art. 39(c)] were the socialistic ambitions that caught the conscience of constitution-makers who placed them as two significant directive principles in art. 39 of the Constitution at 680.

73 *Supra* note 70 at 705.

74 *Id.* at 708

75 *Ibid.*

76 *Supra* note 70 at 710.

with respect to Directive Principles should have precedence over the constitutional obligation in regard to the fundamental rights in articles 14 and 19.[77] The positive constitutional command to enact laws for realizing the Directive Principles shall prevail over the negative constitutional obligation not to encroach on the fundamental rights.[78] The constitutional mandate in regard to directive principles prevails over the one with respect to the fundamental rights. Instead of damaging, the amendment in article 31C strengthens the basic structure of the Constitution. It gives primary import to the rights of the community as against the rights of a few individuals and promotes the irrelevant constitutional goal to build an egalitarian social order.[79] In Justice Bhagwati's view, the court would have to determine whether a particular law for claiming protection under the amended article 31C was passed to give effect to a directive principle by applying the real and substantial connection test.[80] On the interpretation placed by him, Justice Bhagwati held that the amended article 31C neither caused damage nor destroyed the basic structure of the Constitution.

Basic structure review and the ninth schedule

The 9th Schedule added in the very first Constitution amendment reflects the perpetual executive concern to keep the socio-economic reforms away from challenge by the courts at any cost. Validating the Constitution 29th Amendment that placed two land laws in the 9th Schedule in *Keshavananda Bharati* was tantamount to holding all similar constitutional amendments in existence over the past several years as valid till April 24, 1973 when the judgment was delivered.

In *Minerva Mills,*[81] Justice Bhagwati had his view that every post-*Keshavananda* amendment with its statute or statutes in the 9thSchedule could be examined and declared invalid to the extent to which it damages or destroys the basic structure of the Constitution. Within a year, Chief Justice YV Chandrachud held in *Wamana Rao*

77 *Id.* at 712. Fundamental rights become irrelevant for the poor, oppressed and economically backward classes of people. The key by which fundamental rights can be made meaningful for them is by implementing the directive principles aimed at socio-economic revolution.

78 *Ibid.*

79 *Supra* note 70 at 713. If the Directive Principles in clauses (b) and (c) of art. 39 could be given weightage over the fundamental rights under art. 14 and 19, there is no reason why similar preferences cannot be attributed to other directive principles standing on the same footing, *id.* at 714.

80 *Id.* at 715, 716. Justice Bhagwati did not endorse the view that if the amendment in art. 31C were held valid, it would result in protecting every possible legislation beneath the sun and thereby wipe out art. 14 and 19 in effect and substance from the Constitution. Based on his observation and understanding, Justice Bhagwati held that the amended art. 31C does not vitiate or destroy the basic structure of the Constitution.

81 *Minerva Mills Ltd.* v. *Union of India,* (1980) 3 SCC 628, 685. He found that induction into the Schedule of statutes with no relationship with agrarian or socio-economic reforms is a disturbing phenomenon.

v. *UOI* [82] that although all laws and regulations included in the 9th Schedule prior to April 24, 1973, would receive full protection of article 31B, those made after the date would be valid only if the amendments by which they are inserted do not damage or destroy the basic structure of the Constitution.[83] Article 31A safeguarding socio-economic reforms could be valid on its own merits. Logically, the unamended article 31C, is also valid, perhaps with greater force[84] as it aims to implement two directive principles under clauses (b) and (c) of article 39, namely, 'the distribution of ownership and control of material resources' and 'elimination of concentration of wealth and means of production.' Far from damaging, those laws will fortify the basic structure of the Constitution. Chief Justice YV Chandrachud hastened to add that the laws included in the 9th Schedule on or after April 24, 1973, 'the day of judgement' in *Kesavanand Bharti*, will not *ipso facto* receive the protection of article 31B. They shall have to be examined separately to determine whether the constitutional amendments that placed them in the 9th Schedule impair or destroy the basic structure of the Constitution in any manner.[85]In a later decision, *I.R. Coelho (Dead)* v. *State of Tamil Nadu*,[86] the apex court went ahead and held that every insertion to the 9th Schedule must answer to the complete test of fundamental rights. Article 31B, being based on fictional immunity, the power to grant immunity, at will, on a fictional basis, without judicial review, will nullify the entire basic structure doctrine.[87] Every amendment to the Constitution whether in the form of amendment of any article or amendment by insertion of an Act in the 9th Schedule after April 24, 1973, has to be tested by reference to the doctrine of basic structure as reflected in article 21 read with article 14, article 19, and the principles underlying them.

On perusal of these decisions, one should say that the extra protection to the laws by the 9th Schedule is reduced to zero by employing the basic structure theory. Obviously, the 9th Schedule protection to the socio-economic reforms was born out of the executive diffidence on the future attitude of the judiciary, but the judicial position that balancing fundamental rights with directive principles as basic structure dispels the fear! The stand clears the pitch for, though restrictively, socio-economic reforms.

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82 (1981) 2 SCC 362. Acts lowering the ceiling already fixed by a Maharashtra Agricultural Lands Act were challenged under art. 31A, 31B and the unamended art. 31C of the Constitution. Art. 31A(1)(a) is challenged as damaging the basic structure because no law can be made abrogating the guarantees afforded by art. 14, 19 and 31.

83 *Id.* at 397, 398.

84 *Id.* at 398.

85 *Id.* at 399. Such an exercise, the court said, is futile if the laws included in the Schedule on or after Apr.24, 1973 fall within the scope and purview of art. 31A or the unamended art. 31C. The laws saved by these art. need not receive the protection of art. 31B read with the 9th Schedule.

86 AIR 2007 SC 86.

87 *Id.* at 892.

Beyond the sphere of fundamental rights

As days went by, basic structure spreads its wings into still wider zones. *Indira Gandhi* v. *Raj Narain,*[88] decided within a couple of years of *Kesavananda Bharati*, and *S. R.Bommai* v. *UOI,*[89] decided two decades thereafter, seen as the most admirable products[90] of the basic structure doctrine, dealt with neither property rights nor even any other fundamental right.

The *Indira Gandhi* case give interesting facts. Soon after the High Court of Allahabad found the election of the then Prime Minister invalid, the Central Government brought the 39th Constitution amendment inserting article 329A[91] and placed in the 9th Schedule the Representation of Peoples Act, 1951 with two consequential amendments to make the election of the Prime Minister beyond challenge.[92] The case provides also notable pronouncements on the basic structure. Chief Justice Ray held that depriving the high court of its jurisdiction to decide the election dispute without prescribing an alternative forum is subversive of the principle of free and fair election in a democracy.[93] Justice Khanna struck down the constitutional amendment in its entirety.[94] Justice Mathew said that the new norms for adjudging the validity of the election dispute and equipping the legislature to exercise judicial power damage free and fair elections and the democratic structure of the Constitution.[95] To Justice Beg, the Executive, the Legislature, and the Judiciary constitute the basic structure but none can take over the function assigned to the other.[96] According to Justice Y V

88 AIR 1975 SC 2299.

89 AIR 1994 SC 1918: (1994) 3 SCC 1

90 V R Jayadevan, "Heracles Cleansing the Augean Stables: A Saga of Judicial Supervision over the Democratic Process in India" 64 *Journal of Indian Law Institute* 51,55 (2022).

91 The 39th amendment says that no election to either House of Parliament of a person who holds the office of Prime Minister or is appointed as Prime Minister after such election shall be called in question, except by such authority or body and in such manner prescribed by or under any law made by the Parliament.

92 While Indira Gandhi appealed against the order of the high court, the respondent Raj Narain challenged the constitutional amendment.

93 *Indira Gandhi* v. *Raj Narain,* 1995 SC 1, 89 and 90. The effect of impugned clause is to take away both the right and the remedy to challenge the election of the appellant; such extinguishment of the right and remedy is incompatible with the process of free and fair elections at 91.

94 *Id.* at 93. However, he also heard the appeal against the judgment of the high court, discussed the arguments of the respondent in detail and allowed the appeal filed by the petitioner.

95 *Id.* at 128,129. The basic structure concept is too vague and indefinite to provide a yardstick to determine the validity of an ordinary law. Justice Mathew applied the Election Laws (Amendments) Act, 1975 and set aside the high court findings against the appellant and allowed her appeal, at 147.

96 *Id.* at 210. According to him, art. 329A (4) does not stand in the way of considering the appeals on merits. He sets aside the judgment and orders of the High Court of Allahabad, para 636, at. 241.

Chandrachud, article 329A amendment cannot be held unconstitutional simply on the ground that the election of the Prime Minister was placed beyond the purview of the courts as the basis of the finding of the high court against the successful candidate was removed retrospectively by the 1975 election law amendment Act.[97]

It is said that the *Indira Gandhi* case opened the scope of article 368 and brought into question certain assumptions about the need for unlimited amending power.[98] The judges spoke elaborately on the basic structure but did not apply the doctrine to decide the case; instead, they found that the amended election laws placed under the 9th Schedule were valid and suitable in dealing with the facts.[99] Undoubtedly, it is always prudent not to depend upon the basic structure doctrine when alternative strategies for deciding a case are available.

SR Bommai v. *UOI*[100] dealt with the dissolution of four state legislative assemblies under article 356 of the Constitution. In the case of Karnataka, disagreeing with the high court, the Supreme Court rightly held that loss of the confidence of the House is not a matter to be determined anywhere else except on the floor of the House. The legislature is the place where democracy is in action.[101] This is a clear, straightforward recognition of an essential basic feature for a democratic Constitution.

Other findings of the court justifying the dissolution of state assemblies merit consideration. The Madhya Pradesh, Rajasthan, and Himachal Pradesh assemblies were dissolved on an extraordinary cause of potential communal riots and blood-shed after 'demolishing the disputed structure on December 6, 1992.' Each judge went into diverse illustrations of the basic structure. Justice Sawant held democracy and federalism as parts of the basic structure.[102] Justice K Ramaswamy attributed

97 *Id.* at 262. Justice Chandrachud was of the view that "preambles of written Constitutions are intended to reflect primarily the hopes and aspirations of people and that the concept of political justice in the preamble is the too vague and nebulous yardstick for invalidation of a constitutional amendment."The contention that 'democracy' is an essential feature of the Constitution also is unassailable, p 252 and 254.

98 HM Seervai,II Constitutional Law of India, para 30.43., at 2660 (3rd edn.1984)

99 *Indira Gandhi* v. *Raj Narain* (1975) Supp SCC 1 at 117. Justice Khanna said, "Looking to all the circumstances, more particularly the fact that the election petition filed by the respondent (*Raj Narain*) is being dismissed *because of the changes made in law during the pendency of the appeal,* the parties are directed to bear their own costs throughout" (Italics is mine). In fact, Justice Khanna summarized similar views held by all the other judges.

100 *SR Bommai* v. *Union of India*, AIR 1994 SC 1918. The gist of art. 356 relevant to the case is that when the President on receipt of a report submitted by the Governor of a State or otherwise, is convinced that a situation has ensued where the Government of the State cannot be carried on in accordance, the President can assume to himself all any of the powers of the Government of the State.

101 *SR Bommai* v. *Union of India*, AIR 1994 SC 1918, 2097 *per* BP Jeevan Reddy, J.

102 *Id.* at 1976.

secularism as basic to the Indian political system to secure socio-economic needs essential for man's excellence and moral wellbeing, fulfilment of material prosperity and the attainment of political justice.[103] To Justice Jeevan Reddy, any government pursuing un secular policies or unsecular course of action acts contrary to the constitutional mandate and endangers itself for action under article 356 dissolution.[104] Undoubtedly, the *Bommai* decision marks the peak in the growth of basic structure doctrine. The unanimous view on secularism as the basic structure was the main thrust on deciding the issue of dissolution of the three state assemblies.[105]

SR Bommai,[106] went out of the sphere of constitutional amendments over to the causes and consequences of the dissolution of State legislative assemblies. *Indira Gandhi and Bommai* presents new settings for the growthof the doctrine of basic structure and point to its ability totravel to new destinations and unpredictable zones.

Judicial independence as basic structure

The Constitution provides that the President shall consult a few constitutional functionaries before appointing a judge to the Supreme Court[107] or the high court[108] or transferring[109] a judge from one high court to another high court. The Chief Justice of India is the most important dignitary among the consultees. Does the basic structure of judicial independence endow the judiciary with primacy in the process of 'consultation'?

On this problem, one may have to go to the oft-quoted words highlighted by Justice Krishna Iyer seizing the scope and extent of consultation between the President and the Chief Justice of India. "They may discuss but may disagree; they may confer but

103 *Id.* at 2020.

104 *Id.* at 2113. He emphasized that politics and religion cannot be mixed.

105 However, separate illustrations given by each judge for the basic features, such as social pluralism and pluralistic democracy, socialism and social justice, religious tolerance, and fraternity appear to be irrelevant to the main cause of dissolutions. Soli J. Sorabjee, "*S.R.Bommai* v. *Union of India*: A Critique" (1994) 3 SCC (journal section) 1, 30 - 31.

106 AIR 1975 SC 2299.

107 The Constitution of India, 1950 art. 124 (2) provides that "every judge of the Supreme Court shall be appointed by the President after consultation with such Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose." The proviso says that "in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted."

108 *Id.,* art. 217 (1). The President consults with the Chief Justice of India, the Governor of the State, and in the case of a judge other than the Chief Justice, the Chief Justice of the High Court.

109 *Id.*, art. 222 (1). President may, after consultation with the Chief Justice of India, transfer a judge of the high court to any other the high court.

may not concur."[110] In a later decision, *SP Gupta* v. *Union of India,*[111] Justice Bhagwati did not agree with the contention that the opinion of the Chief Justice should be final in the process of appointment and transfer of judges. The fact that the Chief Justice of India is the head of the Judiciary does not mean that his opinion should have primacy. All the constitutional functionaries are on the same pedestal so far as the process of consultation is concerned, the Central Government may override the opinion given in consultation and arrive at its own decision.[112] It was also noted that despite the provision for consultation with more judges, only the opinion of the Chief Justice is usually obtained before final consultation. To ensure consultation with wider interests, a collegiums of judges to deliberate for making recommendations to the President was suggested.[113] The collegium that makes the consultation full and effective was accepted as an essential norm. Nevertheless, the primacy of the opinion of the judiciary as part of judicial independence went through extensive deliberations.

In the *Supreme Court Advocates-on-Record Association* case, called the *Second Judges* case, where a larger bench of nine judges approved the concept of collegium and laid down that the chief justice shall take a decision on appointment only with the help of a collegium of senior most judges. The majority[114] went against *SP Gupta* on the primacy of opinion in the consultation between the President of India and the Chief Justice. The reasons why such a stand was taken were as follows. If a final say is given to the Central Government, the selectee would bow to their diktat, jeopardizing the independence of the judiciary.[115] The context in which the expression 'consultation' is used in the Constitution, the opinion of the Chief Justice of India should have primacy. Persons of unimpeachable integrity alone are to be appointed to these high offices; any interpretation which conflicts with this purpose is opposed to the spirit of the Constitution.[116] Primacy means comparatively greater weight to opinion and should go to the one who has the best knowledge to assess the candidate's suitability.[117] Presidential discretion in aid and advice of his ministers is circumscribed by his mandatory consultation with the Chief Justice of India. The roles of both the judiciary

110 *Union of India* v. *Sankalchand* (1977) 4 SCC 193, 268. "The President must communicate all the material to the Chief Justice who, in turn, must deliberate on the information he possesses and proceed to give the President such counsel of action as he thinks will further the public interest, especially the cause of the justice system."

111 1981 Supp (1) SCC 87.

112 *Id.* at 231,232.If primacy were to be given to the opinion of the Chief Justice of India, it would, in effect and substance, result in concurrence.

113 *Id.* at 233.

114 *Ibid.*, Justices SR Pandian, Kuldeep Singh, and JS Verma wrote separate judgments for the majority. Justices Y Dayal, GN Ray, KS Anand and SP Bharucha agreed with the majority.

115 *Supra* note 110 at 315 *per* Justice Pandian.

116 *Id.* at 245 *per* Justice Verma.

117 *Id.* at 429, 430.

and the executive in the integrated process will be best served if a participatory consultative process reaches a consensus.[118] The true intent of consulting the judiciary is to enable the appointments of those persons not merely qualified to be Judges, but also those who would be the most appropriate to be appointed. This purpose would fail if the appointing authority is left free to take its "own final" decision by ignoring the advice of the judiciary.[119]

Justice Ahmadi did not agree with the majority and held that *SP Gupta's* case requires no re-consideration.[120] Since the expression of opinion regarding appointments to the superior judiciary is a non-judicial opinion, it is a function in aid of the executive function of the President.[121]

A unanimous opinion of a nine-judge bench of the Supreme Court in *Re the Presidential reference*[122] put the question at rest in 1998. Rejecting the *SP Gupta* view, they upheld the primacy of the Chief Justice of India. The Chief Justice of India and the senior most puisne judges are the most competent team to assess the comparative worth of possible appointees and select the best talent for appointment to the Supreme Court.[123]

National judicial appointments commission

Obviously, the executive did not welcome the primacy of the judiciary. To get out of the uncomfortable situation, they went for the Constitution 99th amendment, which provided for the National Judicial Appointments Commission (NJAC) for the appointment and transfer of judges and brought consequent changes to the Constitution.[124] Different from the consultative process so far carried out, NJAC will give recommendations to the President for appointments and transfers. NJAC will consist of the Chief Justice of India as chairman, two senior-most judges, the Minister of Law and Justice and two eminent persons. The concept of 'consultation' eloquently identified and nurtured is narrowed down to the deliberations of the NJAC that formulates a 'recommendation.'

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118 *Id.* at 431 -433.

119 *Id.* at 411 *per* Justice Kuldeep Singh.

120 *Id.* at 386, 387

121 *Id.* at 381. Justice Punchhi also dissented and concluded, "I agree to the disposal of the reference leaving however a note of scepticism – Was it worth it?" at 454.

122 *In Re: Presidential Reference,* AIR 1999 SC 1 6. Opinion was sought on the extent, scope, and nature of consultation before appointment, justiciability of transfer, the legitimate expectation of senior judges for appointment, claim of the government to get opinions in writing and obligation of the Chief Justice of India to comply with the norms and the question whether the recommendations of the Chief Justice are binding or not.

123 *Id.* at 16.

124 Changes in art. 124 adding 124A, 124B and 124C, in art. 127, 128, 217, 222, 224 adding 224A and in art. 231.Parliament also enacted the National Judicial Appointments Commission (NJAC) Act 2014.

Again, in *Supreme Court Advocates-on-record Association* v. *UOI*,[125] called the third judges' case, the Supreme Court examined the constitutional amendment on the touchstone of judicial independence as the basic structure. Justice JK Khehar explains a possible undesirable scenario under the NJAC scheme. Even if the Chief Justice of India, the two other senior most judges of the collegium and the Minister of law consider a nominee to be worthy of appointment to the higher judiciary, the concerned individual may still not be appointed if the two eminent persons oppose. Such a provision affecting the primacy of the judiciary is out-rightly obnoxious and unsustainable in the scheme of independence of the judiciary. Moreover, the major stake of the executive in most of the cases dealt with by the higher judiciary makes the membership of the Union Minister in charge of law in the NJAC questionable.[126] Setting aside the impugned amendment, Justice Khehar concluded that the pre-amendment provisions would automatically revive.

Three other judges agreed with Justice Khehar in holding the Amendment and the law invalid. To Justice Lokur, the law takes away freedom of consultation from the President and diminishes his constitutional significance with no option but to consider only the recommendation of the NJAC. It reduces the Chief Justice of India to an individual figure-head and reverses the process of rendering the opinion of the collegium to the President.[127] Justice Kurian Joseph observed that the collegium system is a curable system with open consultation and restructuring.[128] Justice AK Goel found the impact of appointments under the influence of the executive will be destructive of the public confidence and impartiality of the judiciary.[129]

In his dissent judgment, Justice Chelameswar observed that the primacy of the opinion of the judiciary is not a normative or constitutional fundamental for the establishment of an independent and efficient judiciary.[130] The basic feature is not one that confers the primacy of the Chief Justice with the Collegium but one that eliminates the absolute executive power to choose and appoint judges of the constitutional courts.[131]

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125 (2016) 5 SCC 1.

126 *Ibid.* A judge approved with the Minister's support may find it difficult to resist the views of the executive. The NJAC amendment would breach the concepts of separation of powers and the independence of the judiciary, the essential components of the basic structure, at 460.

127 *Id.* at 680, 681.

128 *Id.* at 689.

129 *Id.* at.733

130 *Id.* at 789. Civil society representation in NJAC will bring about critically desirable transparency.

131 Under the NJAC scheme, the Executive cannot push through an 'underserving candidate' if the two members representing the judicial branch point out the disability. Even one eminent person and a single judicial member could effectively stall the entry of an unworthy appointment. Similarly, judicial members also cannot push through persons of their choice unless at least one other member belonging to the non-judicial block supports the candidate., *id*, at 790.

The assumption that the judiciary alone is concerned with the preservation of liberties is dogmatic, bereft of evidentiary basis and historically disproved. NJAC guarantees transparency while proceedings of collegium had been blamed as opaque.[132]

Exclusion decisions of administrative tribunals from judicial review by high courts

While other cases flash several illustrations of basic features, the doctrine had its direct and real impact when administrative tribunals were established[133] excluding the jurisdiction of all courts except that of the Supreme Court under article 136 of the Constitution.[134] The tribunals were designed for expert adjudication of disputes and complaints regarding recruitment and conditions of civil service and for reduction of the workload of high courts in these areas under articles 226 and 227 of the Constitution. It was recognized[135] that the service tribunals, the final arbiter of controversies relating to service matters, might save the courts from an avalanche of writ petitions. Nonetheless, the question arose. Should the exclusion[136] of all constitutional courts other than the Supreme Court from reviewing civil service matters infringe the basic structure of judicial review? In 1987 in *S.P. Sampath Kumar* v. *Union of India*,[137] the Supreme Court held this efficacious alternative mechanism to reduce the pressure of work in the high court does not affect the basic structure of judicial review. Within a decade in *L. Chandra Kumar* v. *Union of India*,[138] a Constitutional Bench of the apex court, led by Chief Justice A.M. Ahmadi, expressed doubts on the efficiency of the administrative tribunal as an alternative forum to the high courts and held that the provisions in the amendment to the extent they exclude the jurisdiction of courts under articles 226, 227 and 32 of the Constitution are unconstitutional as they offend judicial review as the basic structure of the Constitution.[139] Thus, remained unfulfilled the earnest intention of reducing the work load of the high courts and of modelling an efficient alternative adjudication system.

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132 *Id.* at 792.

133 Constitution 42nd Amendment, 1976. Art. 323A relates to Administrative Tribunal. Art. 323B refers to the Tribunals relating to such as taxation, levy of customs, industrial and labour disputes, land reforms, urban property ceiling, distribution of food and tenancy issues.

134 *Id.*, art. 323A, clause (d).

135 *Kamal Kanti Dutta* v. *Union of India* (1980) 4 SCC 38,39. *per* Chief Justice Chandrachud.

136 Art. 323A (2) (d) provides that a law passed for the purpose may exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under art. 136, with respect to the disputes and complaints in recruitment and conditions of public service.

137 (1987) 1 SCC 130, per Justice Bhagwati, at 130, 131.

138 *L. Chandra Kumar* v *Union of India*, (1997) 3 SCC 261, at 309 – 311.

139 *Id.* at 311.

Uplifting the economically backward classes

In the recent decision, *Janhit Abhiyan* v. *Union of India,*[140] the Composition 103rd Amendment[141] was challenged on the grounds that the reservation for economically weaker sections (EWS) to the exclusion of others and the neglect to the equality code (consisting of articles 14 to 17) violates the basic structure.

Justice Maheshwari, speaking for the majority found no settled formula to determine the basic structure, which is too flexible to be readily applied and is applied only against hostile amendments that strike at the very identity of the Constitution.[142] When the EWS deprived of education and social status in the past are brought into the mainstream of the socio-economic system, exclusion of the classes already availing benefits is not a blanket ban on reservation for economically disadvantaged sections.[143] Classes availing the benefit of reservation cannot make a claim to intrude into another compensatory discrimination in favour of another deserving group.[144]The reservation is an enabling provision only and not an essential feature; its modulation for the sake of other valid affirmative action would not damage the basic structure of the Constitution.[145]In his supporting judgment, Justice Pardiwala highlighted the new evolving yardsticks from caste centric interpretation of backwardness to the recognition of third gender [146] and the application of the creamy layer concept.[147] The amending power cannot be construed in a narrow and pedantic manner so as to deprive article 46 of the Constitution of its wider mandate to include economic backwardness for reservation.[148] Thus, reservation being not an end but a means to secure social and economic justice, the amendment in no manner alters the basic structure of the Constitution.

Justice S. Ravindra Bhat,[149] spoke for Chief Justice Lalit and himself. The concept of adequate representation of a backward class of citizens in the services under the

140 *Janhit Abhiyan* v. *Union of India* (2023) 5 SSC 1.

141 The impugned amendment provided for 10% exclusive reservation for the progress of any economically weaker sections (EWS) of citizens. The new clause (6) in art. 15 allows any special provision for the advancement of EWS other than the classes mentioned in clauses (4) and (5) and makes it possible for them to get admission to educational institutions in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category. The new clause (6) in art. 16 enables similar reservation of appointments or posts.

142 *Supra* note 140 at 129. Justice Trivedi and Justice Padriwala concurred with Justice Maheswari.

143 *Id.* at 155-157.

144 *Id.* at 164.

145 *Id.* at 177, 178.

146 *Id.* at 225, 226.

147 *Id.* at 231.

148 *Id.* at 233.

149 Justice Bhat wrote the judgement for Lalit, C.J. and himself.

state does not extend to the additional reservation for persons who are not socially backward but whose communities are represented in public employment. Such a move violates the guarantee of equality of opportunity read in article 16(4).[150] The equality code promotes inclusiveness; exclusion of people based on their backwardness destroys the constitutional ethos of fraternity, non-discrimination, and non-exclusion.[151] Though the provision based on objective economic criteria for the purpose of article 15 is not violative, the framework of the amendment excluding SCs/STs/OBCs (SCBCs) is violative of the basic structure. Equally or desperately poor but otherwise beneficiaries of reservation of a different kind, SCBCs would not get the new benefits. Economic status is based for the new reservation; social status and deprivation of the castes are based for excluding SCBCs from the new reservation benefits. This dichotomy is entirely offensive to the equality code. The exclusion is to heap fresh injustice based on past disability and operate in an utterly arbitrary manner on them. This total and absolute exclusion is nothing but discrimination destroying the equality code, and particularly the principle of non-discrimination.[152]

Going to the judgments, one may come to a more viable solution. Instead of excluding socially backward classes, the limit of all reservations put together could have been raised. Essentially, there should be safeguards for inter-class mobility among them in case a student or a job-seeker could not be found within a particular quota thus giving both socially backward and economically backward classes their due without disturbing the equality code under the Constitution.

III Concluding comments

The frontline leaders of the independence struggle, people of immense scholarship and social commitment, drafted the Constitution and structured a scheme of increasing empowerment of the citizenry with certain rights already granted and certain other rights to be evolved by amendments. Incredibly, with the evolution of the concept of basic structure and with the imperceptible and self-claimed power to apply the doctrine and interpret the Constitution, the judiciary had become the authority to determine how the Constitution should be amended. To get rid of this strange situation, there are opinions for are view of the basic structure doctrine by a larger bench or, if not, even for a Constituent Assembly convened to eliminate the application of the doctrine.[153] One remembers that in the *Golaknath* case, Justice Subba Rao, too, had a

150 Art. 16 (4) runs as this. "Nothing in this article shall prevent the State from making any provision for reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State."

151 *Id.* at 347, 348

152 *Id.* at 348. For these reasons, art. 15(6) and 16(6) are struck down as violative of the equality code, mainly the principle of non-discrimination and non-exclusion, which forms an inseparable component part of the basic structure of the Constitution.

153 For a philosophical and theoretical analysis, see Jayasankaran Nambiar A.K., "Re-Imagining Constitutional Interpretation in India" 64 *Journal of Indian Law Institute* 178,179 (2022).

dream for the new Constituent Assembly to amend fundamental rights. Such ideas are acceptable while the Constitution has been in the process of a slow but dynamic revolution from the old *laissez-faire* perspective to a spectacular march towards a new welfare state, from the old dictatorship to new ideals of liberalism and from old feudalism to the new socialist republic. In this socio-economic interaction among the populace, new ideas and doctrines are inevitable either to welcome the changes or to look at them with a critical eye.

The balancing of fundamental rights with directive principles, better working of federalism, the ideals of secularism, non-arbitrariness in government and the independence of the judiciary attracted the focus of the basic structure doctrine. Nevertheless, one may doubt whether the primacy concept in the appointment of judges should necessarily come within the ambit of basic structure. Does it mean that the person or authority vested with primacy has the last word? Should nobody express a different view however reasonable it may be? An important person expresses his view in a rational group, the view gets recognition from others. Suppose one among others does express a different view. Should it be said that the person who made the principal suggestion loses his primacy and significance? As Justice Verma states in the *Second Judges* case,[154] primacy means *comparatively greater weight to opinion*. It does not mean that the opinion expressed should always be accepted or concurred but only means that it is of prime importance among all valid and reasonable opinions. Primacy need not always command concurrence with the predominant opinion, there may remain a grey area where the predominant opinion may be different. The checks and balances inherent in its formation and working would have shown how efficiently NJAC will work. No doubt, the President with the paraphernalia of information about the aspirants has a crucial role to play even when primacy is given to the judiciary. There should always be relentless efforts to have a consensus of the consultees in the higher echelons of the consultative process, no matter whether the traditional consultative structure is followed or the NJAC scheme is revived. As Justice Khehar[155] has pointed out in the NJAC case, in actual practice, absolutely all judges except (one case) appointed since 1950, were appointed on the advice of the Chief Justice of India.

If it is already settled that 'law' in article 13 includes a constitutional amendment. One wonders whether in *Indira Gandhi* v. *Raj Narain,* even without elaborating on the basic structure, the court could have found article 329A, an emergency product, as

154 *Ibid.*

155 *Supreme Court Advocates-on-record Association* v. *UOI* (2016) 5 SCC 1. In actual practice, absolutely all judges except (one case) appointed since 1950, were appointed on the advice of the Chief Justice of India. Justice JK Khehar has noted this point. The Attorney General had admitted that the rare mass transfer and supersessions in the past were executive aberrations, see also at 419.

mala fide and arbitrary exercise of executive and legislative power and prima facie violative of article 14. This becomes only a speculation. Arbitrariness is anathema to a land of constitutional democracy based on equality before law. However, despite all the learned lectures on basic features, the case was finally decided not basing on basic structure but applying the amended election laws. Tributes are showered on the *Bommai* view of secularism as a basic structure. There is a direct conflict between democracy and secularism while the apex court dealt with two factual situations for dissolution of state assemblies, one without a floor test and the other, an apprehension of brewing a chaotic situation in the states concerned.

More instances of basic structure are likely to be pleaded in future. To prevent such floods, it is desirable that the doctrine is used sparingly when other strategies and concepts are found to be absolutely unworkable. The judiciary, responsible for its genetic makeup, needs to control its overgrowth. While commenting on the *Bommai* case, an eminent lawyer said that in the absence of a permanent catalogue of essential features, the matter had to be decided on a case-to-case basis in the days to come. He desired for consensus to conduce certainty and obviate the wasteful expenditure of time and energy.[156]As Justice Pardiwala mentioned in *Janhit Abhiyan*, "the repeated use of the doctrine of basic structure may impair the doctrine itself and it is likely that the idea of constitutional essentialism might not get the respect it deserves from the political institutions."[157]As done in *Indira Gandhi* v. *Raj Narain ,*it also requires application of mind when the basic structure doctrine is to be used and used sparingly and not when other ways of deciding a case are available.

156 Soli J. Sorabjee, 'Decision of the Supreme Court in *SR Bommai* v. *Union of India*, (1994) 3 SCC *(Journal),* 1. He observed "March of events, political, economic, and social developments and new trends in public and juristic thinking may lead to a different perception and formulation of essential features but that 'any change or qualification in this regard should be reached after full debate and deep deliberation by all the judges and there should be enunciation of law on this all-important issue so as to conduce certainty and obviate the wasteful expenditure of time and energy in determining the status and effect of these observations and their binding effect or otherwise on the High Courts.' at 30, 31.

157 *Janhit Abhiyan* v. *Union of India* (2023) 5 SCC 1. The Basic Structure Doctrine was meant to be used as a special tool in times when constitutional amendments threatened the fundamental structure of the Constitution. Vital as the doctrine was, even more important was to exercise some restraint and to ensure its meaningful use. The doctrine has been taken recourse to repeatedly with little concern about its restrained use, at 248.