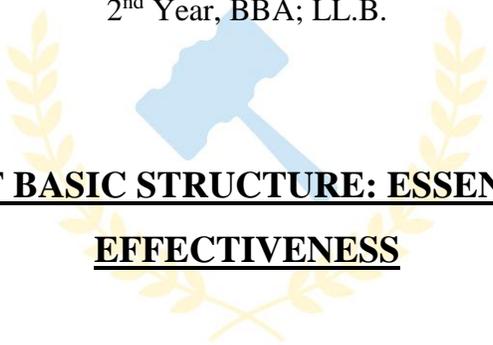


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2nd Year, BBA; LL.B.**DOCTRINE OF BASIC STRUCTURE: ESSENTIALITY AND
EFFECTIVENESS****ABSTARCT**

The scope and degree of Legislative power to amend the Constitution have long been a matter of debate. The framers of the Constitution have worked diligently to deliver the fairest Constitution possible to the citizens. However, they did not include an express clause in Article 368 to limit the Parliament's ability to modify the Constitution. As a result, Parliament used its constituent power to add the controversial Ninth Schedule to the Constitution to facilitate agrarian reforms by barring judicial review. The Ninth Schedule¹ gradually turned a controlled Constitution into an unrestrained one. After many appeals against such amendments legislated by the parliament in various cases, the concept of Basic Structure was established in the Keshavananda Bharati case. Because when there is a vacuum in the Constitutional legislation to keep a check on the government's illegitimate activities, the judiciary can evolve or adopt a doctrine to protect constitutional supremacy.

Moreover, there is no valid text that gives a fitting definition of this Doctrine of Basic Structure. This makes the doctrine and the cases related to it even more controversial. This article attempts

¹ Ninth Schedule was inserted in the 1st Amendment of Indian Constitution

to discuss the reasons that constituted the evolution of the doctrine. It also discusses the history and origin of the doctrine and how the doctrine is essential to maintain a fine balance between flexibility and rigidity of the amending powers of the Parliament. The doctrine maintains that by amending the constitution, you could only change but not rewrite or destroy. The article further talks about how the doctrine has been effective from time to time to save the democratic essence and nature of the constitution and finally, what constitutes the basic structure of the constitution.

INTRODUCTION

The term “BASIC STRUCTURE” has no mention in the Indian Constitution or any other statute. This is a concept/idea that has evolved over time as our constitution and parliament system have matured, as well as through numerous instances and judicial pronouncements that have altered the paradigm of amendments and legislative power of the parliament.

In our preamble, we state that India is a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC. These are not mere words; they are ideas that are enshrined within our constitution. Altering such principles or enacting laws that undermine such ideas would be a betrayal of our founding principles and would render the very purpose meaningless for which our lawmakers had drafted it.

This is where the doctrine of the basic structure becomes essential. It aids in the protection and preservation of the very nature and spirit of the Indian Constitution as well as ensures people’s rights and liberties while preserving the nature of Indian democracy.

ORIGIN OF THE BASIC STRUCTURE DOCTRINE

The Basic Structure Doctrine has a vast history with its origin in the years of 1950-51 when India was a newly independent nation free of British colonialism.

The Zamindari Abolition Act² was passed by the GOI as part of agrarian land reforms that deprived the then zamindars of their respective landholdings. Aggrieved by this, the zamindars moved to the court for breach of their Fundamental Right to Property, i.e. Article 31³(no more a fundamental right). In order to resolve the issue, the Union Government passed the Constitution (First Amendment) Act, 1951. The amendment inserted Article 31(A) and 31(B) for thoroughly warranting the constitutional validity of zamindari abolition laws.

Article 31(A)⁴ gave the government wide discretion over the acquisition of lands and the control of any property in the public interest. Schedule IX was introduced by Art 31(B), and any law passed by the legislature that was placed in Schedule IX would be exempted from Judicial Review. The provision was a sheer violation of Article 13(2) of the Constitution, which states that any law enacted by the government that infringes on an individual's fundamental rights shall be declared unconstitutional to the degree of the violation.⁵

The zamindars appealed the amendment by filing a writ petition under Article 32⁶, claiming that Articles 31A and 31B infringe and abridge the Fundamental Rights guaranteed by Part III of the Constitution, as well as the constraints imposed by Article 13(2).

In the light of the above facts, this highly contested issue of the scope and extent of Parliament to amend the Constitution was heaved for the very first time in the Shankari Prasad case (1951).⁷

Shankari Prasad v Union of India (1951)

The petitioners challenged the amendments on the ground that the term 'law', as defined by Article 13(2), includes the law of constitutional amendment, and so Articles 31-A and 31-B are unconstitutional since they limit basic fundamental rights. In response to the claim, the

² The Zamindari Abolition Act, 1950, was one of the first major agrarian reforms of the Government of India after the independence in 1947.

³ Article 31 of Indian Constitution states that no person can be deprived of his property without the consent of a proper authority

⁴ The government can acquire the property of the people and by doing so, the fundamental rights mentioned in Article 14 and 19 of Indian Constitution shall not be violated.

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

⁶ Remedies for enforcement of rights conferred by this part (1)The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed

⁷ Shankari Prasad v Union of India, AIR 1951 SC 458.

defendants contended that the definition of the word included in Article 13 (3) (a) did not specifically refer to constitutional amendments.

The Court decided that, while amendments are superior to regular legislation, they are not covered by Article 13 (3) (a) (2). Although the term "law" in article 13(2) usually refers to constitutional modification, it must also be understood to refer to the exercise of ordinary legislative power.⁸

Thus, the validity of the First Amendment Act was upheld and it was also concluded that amendments made in the exercise of the Parliament's constituent power, which also includes amending the fundamental rights, are not subject to Article 13(2).

The Shankari Prasad Case upheld the superiority of Article 368⁹ and the Parliament then started bringing amendments to the constitution left, right and center. In the next 13 years, the parliament had passed and enforced another 16 amendment acts to the constitution and the addition of the ninth schedule gradually made the controlled constitution into an uncontrolled one.

In the year 1964, the Union Legislature passed the 17th Constitutional (Amendment) Act, 1964. A major change was brought in Article 31(A) to secure the constitutional validity of acquisition of Estates and it also inserted this law along with 43 other Acts in the ninth schedule to immune them from the clutches of judicial review. This unchecked use of the ninth schedule by the government and the relentless breach of basic rights and liberties of a large number of individuals made, those aggrieved, challenge the scope of amendments by the legislature once again in the case of Sajjan Singh V State of Rajasthan¹⁰.

⁸ "We are of the opinion that in the context of Article 13 law must be taken to mean rules and regulations made in the exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constituent power with the result that Article 13(2) does not affect amendments made under Article 368."

⁹ Power of Parliament to amend the Constitution and procedure therefore

Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

¹⁰ Sajjan Singh v. State of Rajasthan[1965] 1 SCR 933

Sajjan Singh V State of Rajasthan (1965)

In this case, the Seventeenth Constitution (Amendment) Act, 1964 was challenged before the Apex Court. It was claimed by the petitioners that it infringed the authority conferred under Article 226 of the Indian Constitution and did not follow the specific procedure outlined in Article 368 of the Indian Constitution. The issue of the Shankari Prasad case was posed again that whether fundamental rights can be amended or not.

With a majority of 3:2, Supreme Court once again held that Article 368 of the Indian Constitution authorizes the Parliament to amend any article of the Constitution and that Article 13 is only limited to ordinary legislation and not constitutional amendments. It also stated that the Shankari Prasad case was correctly decided and that the Parliament can change any part of the Constitution, including the Fundamental Rights, under Article 368, and expressed a suggestion to the Parliament that Fundamental Rights be included in the Proviso of Article 368.

However, for the very first time, the concept of the Basic Structure of the Constitution of India was theorized by the two dissenting judges in this case. Justice JR Mudholkar stated that it is debatable whether amending a basic feature of the Indian Constitution can be considered merely an amendment or, in effect, rewriting a portion of the Constitution; and, if the latter, whether it falls under the ambit of Article 368.

Justice Hidaytullah stated that *“The Constitution gives so many assurances in Part III that it would be difficult to think that they were the plaything of a special majority. To hold this would mean prima facie that the most solemn parts of our Constitution stand on the same footing as any other part and even on a less firm ground than one on which the articles mentioned in the proviso stand.”*

Golaknath V State of Punjab (1967)¹¹

The government in the Seventeenth Constitutional (Amendment) Act, 1964 placed the Punjab Security and Land Tenures Act, 1953 under the ninth schedule of the constitution. The act had a provision that stated that the brothers in a family could only keep 30 acres each of land, and the

¹¹ 1967 AIR 1643; 1967 SCR (2) 762

rest would be declared surplus. The petitioner's family (2 brothers) held some 500 acres of land and the rest of the land was declared by the State government as Surplus.

Aggrieved by this, the petitioner filed a writ petition under Article 32 alleging that his Fundamental Right guaranteed by Article 19 (f) and (g) and Article 14 have been breached and the amendment passed by the government is ultra vires. It was contended that the union legislature cannot strip away the fundamental rights guaranteed in Part III of the constitution and also argued that the word 'law' mentioned in Article 13(3)(a) includes all types of law- statutory as well as constitutional. So, the constitutional amendments are subject to Article 13(2), hence Seventeenth Amendment Act should be declared void and unconstitutional.

The ruling overturned the previous Sajjan Singh and Shankari Prasad decision that supported Parliament's jurisdiction to change all elements of the Constitution, including Part III, which deals with fundamental rights. After this ruling, the Parliament was stripped of its power to limit Fundamental Rights.

By a majority of 6:5, the Supreme Court held that an ordinary 'law' within the meaning of Article 13(3) of the Constitution also includes a constitutional amendment made under Article 368 of the Constitution. It was decided that Article 368 simply contained procedures for amendment, with the ability to change resting with the legislative residuary power. Article 13(2) made an amendment abridging or taking away fundamental rights impossible since legislative power was subject to the principles of this Constitution.

The Golaknath judgment became very crucial for the Indian democracy as it prohibited the Parliament from further infringing on citizens' fundamental rights by enacting legislation that would effectively abolish the Parliament's dictatorship. The ruling aims to maintain those essential provisions that are analogous to humanity's natural rights, which no government can abolish by legislation.

Though very significant, the judgment had its own flaws. The judgment gave rigidity to the constitution. Any amendment in the Constitution has to be through Constituent Assembly. Furthermore, the court only protected Fundamental Rights from Parliament's authoritarianism and not all the features that are of the fundamental nature.

Two years after the Golak Nath judgment, the Indira Gandhi government nationalized 14 major banks and the pitfall compensation was paid out in 10-year-old bonds. The Supreme Court overturned this, though it supported Parliament's right to nationalize banks and other businesses. A year later, in 1970, the Indira Gandhi government abolished all the privy purses. The Supreme Court overturned this as well.

The Keshavananda Bharati Sripadagalvaru Case¹²

After these consecutive adverse rulings, Indira Gandhi was keen to shrink the Supreme Court and the High Courts, so she enacted a series of constitutional amendments intended to bolster the power of Parliament and the Prime Minister's office by weakening the judiciary. She came up with the 24th Constitutional Amendment Act, 1971.

The 24th Amendment Act, 1971 amended Article 13 of the Constitution to make it inapplicable to any amendment made under Article 368. It restored Parliament's unfettered authority to amend any portion of the Constitution, including Part III. Article 13 (4) was added that said, "Nothing in this article shall apply to any amendment of this Constitution made under article 368." Also, the amendment act made the president duty-bound to give his assent to any bill passed by the parliament.

The very next year, in 1972, 25th Constitutional (Amendment) Act, 1972 was enacted that subtracted 'The right to property' as a fundamental right.

Kerala's state government passed the Land Reforms Amendment Act in 1969. The government had the right under the statute to take away a portion of the sect's territory, of which Keshvananda Bharti was the head.

On March 21, 1970, Keshvananda Bharti filed a petition before the Supreme Court under Section 32 of the Indian Constitution to have his rights guaranteed under Article 25, 26, 14, 19(1)(f) and 31.¹³

¹² Keshavananda Bharati Sripadagalvaru v. State of Kerala[A.I.R. 1973 S.C. 1461] was a consolidated case name of the following cases-Raghunath Rao Ganpati Rao N. H. Nawab Mohammed Iftekhar Ali Khan v. Union of India, Shethia Mining and Manufacturing Corporation Limited v. Union of IndiaandOriental Coal Co. Ltd. v. Union of India.

¹³ Article 25: Freedom of Conscience and free profession, practice and propagation of religion
Article 26: Freedom to manage religious affairs

He requested that the provisions of the Kerala Land Reforms Act, 1963, as revised in 1969 and later in 1971, be declared ultra vires to the Constitution. Under Article 19(1) (f) of the Indian Constitution, the petitioner pleaded for the protection of his property. He stated that the 24th and 25th Constitutional Amendments infringed on Article 19(1)(f) of the Indian Constitution, which guarantees fundamental rights.

The Supreme Court ruled by a 7:6 majority that Parliament can amend any section of the Constitution to meet its socio-economic obligations to citizens promised by the Preamble, provided that such amendments do not alter the Indian Constitution's core structure. CJ Sikri observed, “The expression amendment of this Constitution does not enable Parliament to abrogate or take away fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits Parliament can amend every article.”

WHAT IS THE DOCTRINE OF BASIC STRUCTURE?

After many years of conflicting opinions in various cases, the doctrine was finally established in the Keshavananda Bharati case. The doctrine can be called a judicial innovation with the intention that the basic characteristics of the Indian Constitution should not be changed to the point where the essence of the Constitution is lost.

It is hard to list all of the pieces that would make up the Constitution's basic structure. It needs to be articulated on a case-by-case basis and the facts of each case have to be judiciously scrutinized to come to a conclusion.

To understand the Basic Structure Doctrine, we need to first understand the Doctrine of Implied limitation. A plain reading of Article 368 gives an impression that the legislature has the absolute power to amend any laws of the document. But the Supreme Court by applying the doctrine of implied limitation has put a brake on the unlimited legislative power of the parliament. Though there is no express limitation provided under Article 368 on the power of parliament to amend

Article 14: Protection of life and liberty and equal protection before law

Article 19(1)(f): right to acquire, hold and dispose of property

Article 31: No person shall be deprived of his/her property, except by authority of law.

the laws, there is an implied limitation that the amendment can't do violence to its basic structure. The jurisdiction of Parliament to modify the Constitution is subject to some inherent constraints predicated on the Constitution's higher principles.

The number of judgments decided on this doctrine has given a plain outline as to what can be called the basic structure of the constitution. They are:

- the supremacy of the Constitution,
- the republican and democratic form of Government,
- separation of powers, and
- the secular and federal character of the Constitution.

Any new law brought by the legislature or amendment made to any existing law, if inconsistent with these basic ideas of the constitution, would then invite the interference of the judiciary to adjudicate upon the constitutional validity of such laws. But as per the doctrine of separation of powers, the judiciary wing should not interfere with the law-making power of the parliament. This is where the basic structure doctrine has its significance. The doctrine supersedes the doctrine of separation of powers if required for protecting and preserving the democratic essence of the Constitution. The foundations on which our forefathers have drafted the Constitution, in no way, can be compromised.

Test to check whether it is a basic structure

The ultimate goal of the Constitution is to protect the nation's utility and integrity, as well as the dignity of individuals. Only by encouraging fraternity can this be ensured. Any legal principle that, if removed from the Constitution, would result in a loss of national brotherhood, unity, and integrity, as well as individual dignity, would be regarded as an essential aspect of the Basic Structure. The test to determine is not universal and is fact-based. It would depend on the facts of the particular case.

Any change in the particular article/law is essential for the country to survive in this dynamic environment and therefore, is permissible. But any change in the idea of the law/article would then jeopardise the very purpose for which the law was drafted, and hence, impermissible. To check this, it is important to determine the impact of such laws.

It is to be noted that the test to determine is based on facts and is not universal. It would be evaluated by the facts of the particular case.

CONCLUSION

Since the Constitution's inception in the 1950s, the theory has been an integral issue of the Charter. Despite the fact that the theory was formally recognized in the Keshavananda Bharati verdict, issues about its contents continue to be raised. And no doubt, this will continue to be the case because there is no provision or statute that fittingly defines it. Nevertheless, the theory of basic structure cannot be regarded to be ambiguous or vague just because it cannot be precisely defined or because all of its elements have not been specified.

Time and again, it has been seen that the legislature has misused the authority of regulating laws for their personal benefits. Be it the pre-Keshavananda Bharati period or during the 1975 internal emergency situation or the 42nd Constitutional (Amendment) Act, 1976 that amended Article 368 in such a way that it took away the power of Judicial Review of the courts¹⁴. Such amendments and moves by the government in power were made at the cost of the Constitution itself. And this doctrine has been of significant importance, as time and again it has stopped the parliament from abusing its majoritarian powers and has saved the Indian democracy from being jeopardized.

However, only in extraordinary circumstances should the concept or principle of the basic structure be applied to settle a constitutional crisis. If the judiciary continues to develop rules and doctrines for all matters as a general principle, democratic ideals will be jeopardized, and the theory of separation of powers will be violated.

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