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Basic Structure Doctrine and its entrenchment in the Indian Constitution a Juridical Analysis

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The Supreme Court declared in *Kesavananda Bharati V. State of Kerala* that Article 368 did not enable Parliament to alter the basic structure or framework of the Constitution. This decision is not just a landmark in the evolution of Constitutional law, but a turning point in Constitutional history. No other court in the world had taken this position. Subsequently, the Supreme Court of Bangladesh adopted the doctrine of basic structure relying on *Kesavananda Bharati*. In Pakistan the Lahore High Court and Baluchistan High Court took the same view but not the Supreme Court. The new Constitution of Nepal (1990) contains some provisions which cannot be amended at all. The power of amendment is subject to the restriction that its exercise shall not cause prejudice to the spirit of the preamble of the Constitution. The preamble refers to basic human rights of every citizen of Nepal, adult franchise, Parliamentary system of Government, Constitutional monarchy, multi-party democracy, etc. It also speaks of an independent and competent system of justice and the rule of law.

The theory of basic structure has a background rooted in the right to property. The Congress Party was committed to land reforms long before independence. The Constitution makers in their enthusiasm to guarantee fundamental rights to the people incorporated provisions similar to Section 299 of the Government of India Act, 1935, in Article 31 conferring the right to property in an unqualified manner. After the dawn of Independence, the State Legislatures lost no time in enacting land reforms. The Patna High Court struck the first blow when it declared the Bihar Land Reforms Act, 1950 arbitrary and violative of Article 14. The slab system of compensation provided for the affected zamindars was found to be discriminatory. It came as a rude shock to the framers of the Constitution whose mindset was different. Speaking on the Draft Constitution, Jawaharlal Nehru had said in the Constituent Assembly on September 10, 1949: "The policy of the abolition of big estates is not a new policy but one that was laid down by the National Congress years ago. So far as we are concerned, we, who are connected with the Congress, shall, naturally, give effect to that pledge completely-one hundred per cent and no legal subtlety, no change, is going to come in our way. That is quite clear. We will honor our pledges. Within limits,



no judge and no Supreme Court will be allowed to constitute themselves into a third chamber. No Supreme Court and no judiciary will sit in judgment over the sovereign will of Parliament which represents the will of the entire community. If they go wrong here and there, they can point it out; but, in the ultimate analysis, where the future of the community is concerned, no judiciary must come in the way. Ultimately, the whole Constitution is a creature of Parliament." Parliament could not remain complacent after the judgment of the Patna High Court. The Constitution (First Amendment) Act, 1951 was the legislative response to the legalistic interpretation of Fundamental Rights by the Judiciary. Moving the amendment, Jawaharlal Nehru said: "Even in the last three years or so, some very important measures passed by the State Assemblies have been held up. No doubt, as I said, the interpretation of the courts must be accepted as right but in the meantime you, I and the country have to face social and economic upheavals. How are we to meet this challenge of the time?"

Therefore, we have to think in terms of big changes and that is why we thought of amending Article 31." The Fourth Amendment Act, 1955 and the Seventeenth Amendment Act, 1964 were likewise necessitated by the interpretation of the right to property by the Supreme Court. Successive amendments not only made changes in the provisions relating to the right to property, but also enlarged the Ninth Schedule by including a large number of Acts. The Seventeenth Amendment was challenged in *I.C. Golaknath v. State of Punjab* on the ground that the impugned Amendment was 'law' within the meaning of Article 13 and it violated the right to property conferred by Article 31. Two Constitution Benches of the Court had already repelled a similar contention, first in *Sri Sankari Prasad Singh Deo v. Union of India* and then in *Sajjan Singh v. State of Rajasthan*. While the decision in *Sankari Prasad* was unanimous, in *Sajjan Singh* it was by a majority of 3:2. M. Hidayatullah and J.R. Mudholkar, JJ. doubted the correctness of the law declared in *Sankari Prasad*. It was Mudholkar, J. who raised the question: "whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and in the latter, would it be within the purview of Art. 368? In *Golaknath*, a Bench of 11 Judges by a slender majority of 6:5 declared that an Amendment of the Constitution was "law" within the meaning of Article 13(2) and was therefore subject to Part III of the Constitution. The Court overruled the decisions in *Sankari Prasad* and *Sajjan Singh*. Chief Justice Subba Rao invoked the doctrine of prospective overruling in order to save the Amendments already made including, strangely, the impugned Amendment as well. In effect, *Golaknath* amounted to a warning to Parliament not to amend the Constitution in future so as to abridge or take away any of the fundamental rights enshrined in Part III as interpreted by the Court. The ruling placed so as to abridge or take away any of the fundamental rights serious fetter on the amending power of Parliament which Parliament was not prepared to accept. By the 24th Amendment, Article 368 was amended to get over *Golaknath's* case. The amended

Article 368 enabled Parliament, in exercise of its constituent power, to amend by way of addition, variation or repeal any provision of the Constitution in accordance with the procedure laid down therein. Further, it declared that nothing in Article 13 shall apply to any amendment made under Article 368. Parliament asserted itself once again by enacting the Constitution (Twenty-fifth) Amendment Act, 1971 substituting the word 'amount' for the word 'compensation' in Article 31(2) in order to avoid judicial review of 'compensation'. Clause (2B) was inserted in- Article 31 declaring that nothing in Article 19 (1)(f) shall affect any such law as was referred to in Article 31(2) as amended. Article 31-C was added to protect laws giving effect to the directive principles specified in Article 399(b) or (c) from challenge on the ground of violation of Articles 14, 19 and 31. It also provided that no law containing a declaration that it is for giving effect to these directive principles shall be called in question in any Court on the ground that it does not give effect to these directive principles. The 29th Amendment included in Schedule IX the Kerala Land Reforms (Amendment) Acts, 1969 and 1971 making them immune from attack on the ground of violation of fundamental rights.

What is the basic structure of the Indian Constitution? Nowhere the Constitution makes a mention of the concept of basic structure as such. But then how this new concept has come into being? What is its significance? Is it an exhaustive one? All these interesting questions are discussed in the present article.

In *Kesavananda Bharati v. State of Kerala* the Supreme Court held that while Parliament has the power to amend any provision of the Constitution in accordance with the procedure for amendment laid down by the Constitution itself, this power cannot be so exercised as to alter or destroy the basic structure or framework of the Constitution. Thus, the amending power of Parliament is not plenary or absolute but is limited in scope. This was a new theory propounded by the Supreme Court for 'judicial review' of constitutional amendments.

Going by the judgment in *Kesavananda Bharati* it is clear that the concept of basic structure had not been defined exhaustively by the Supreme Court. Although the judges enumerated certain essentials of the basic structure of the Constitution, but they also made it clear that they are only illustrative and not exhaustive and that they will be determined on the basis of the facts in each case. The following are the examples of the basic structure of the Constitution according to the Supreme Court as laid down in the above case:

(1) Supremacy of the Constitution, (2) republican and democratic form of government, (3) secular character of the Constitution, (4) federal character of the Constitution. (5) separation of powers between the legislature, the executive and the judiciary, (6) sovereignty of the country, (7) dignity of the individual secured by various freedoms and basic rights in part-III and the mandate to build a welfare state contained in part-IV, (8) unity and integrity of the nation. (9) parliamentary democracy; and (10) judicial review under article 13.

Of the several unofficial attempts to specify the contents of the basic structure of the Indian Constitution, the views of N.A. Palkhivala, a leading constitutional authority, are worth-mentioning. While generally agreeing with the majority of the basic features outlined by the judges in *Kesavananda Bharati* as cited, he mentioned the following additional features as basic features, namely, the Indian Constitution is wide open to include more and more other features, though not unimportant but secondary in their nature. Therefore, the concept of basic structure as propounded by the court is not exhaustive. The following features may also be added to the list of basic features on a hypothetical basis, viz.,

(1) Article 32 which guarantees constitutional remedy; (2) fundamental duties in chapter IV-A (3) socialist ideal or socialism; (4) adult suffrage; (5) quasi-federal character of the Constitution with strong centralising tendency or unitary feature; (7) single citizenship of the subjects with dual structure of the union and the states; (8) reasonable restrictions on fundamental rights; (9) bicameral system of Parliament; (10) parliamentary system of government with an elected President; (11) governor as the executive head of a state government; (12) emergency provisions under the Constitution; (13) doctrine of limited government; (14) precedence of fundamental rights over directive principles; (15) Justifiability of fundamental rights and non-justifiability of the directives; (16) Supreme Court as the guardian of and final authority to interpret the Constitution, etc., etc.

On the same analogy, many more may be added to the list of basic features. Thus, the concept of basic structure as propounded by the Supreme Court could not lead to a decisive conclusion as to what constitutes the basic structure of the Indian Constitution. It is against this background a new approach is made to ascertain and lay down the subtle principle of basic structure.

(1) The democratic way of life as distinct from mere adult franchise; (2) A free and independent judiciary. Without it, all rights would be writ in water; (3) The dual structure of the Union and the States. It permits centralisation and decentralisation to co-exist; (4) The balance between the legislature, executive and the judicial wings of the government. None of the three organs can use its powers to destroy the powers of the other two, nor can any one of them abdicate its power in favour of another; and (5) The amendability of the Constitution according to



the basic scheme of Article 368. The Constitution must continue to be amendable without being alterable in its essentials.

Subsequently, in *Indira Nehru Gandhi v. Raj Narain* the Supreme Court applied the theory of basic structure and added the following to the list of basic features laid down in *Kesavananda Bharati*, viz.,

(1) Rule of law ; (2) equality before law ; (3) free and fair election, which is a basic postulate of democracy.

Further, in *Minerva Mills v. Union of India* the Supreme Court upheld the basic structure theory and restored supremacy of the fundamental rights stating that the precedence of fundamental rights over directive principles of state policy is an essential feature of Indian Constitution. Clauses (4) and (5) of Article 368 have been declared to be invalid as they destroy the basic structure of the Constitution. The Constitution (42nd Amendment) Act, 1976. Clause (4) provides that no amendment of the Constitution (including the provisions of Part III) made or purporting to have been made under Article 368 (whether before or after the commencement of Section 55 of the Constitution (42nd Amendment) Act, 1976 shall be called in question in any court on any ground. Clause (5) provides 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 Article 368. The Supreme Court has declared the aforesaid clause (4) of Article 368 as unconstitutional on the ground that it took away the judicial review which is a part of the basic structure of the Constitution. Clause (5) of Article 368 has been declared as unconstitutional on the ground that limited amending power of Parliament is one of the basic features of the Constitution and clause (5) destroys this feature by conferring unlimited power of amendment on Parliament.

In *M. Nagaraj v. Union of India* the Court has held that the basic structure are systematic principles underlying and connecting provisions of the Constitution. They give coherence and durability to the Constitution. These principles are part of the Constitutional law even if not expressly stated. The theory of the basic structure is based on the principle that a change in a thing does not involve its destruction of a thing is a matter of substance and not of form.

In *M. Nagaraj v. Union of India* the Supreme Court has made it clear that the theory of basic structure is the only theory to judge validity of the constitutional amendments.

In the case of *I.R. Coelho* the Court has made it clear that use of the expression 'constituent power should not be taken' to mean that Parliament is original Constituent Assembly. Limitation of the basic structure theory will continue to apply. The power to amend in Constitution cannot be equated with the power to frame the Constitutions.

In *S.P. Sampat Kumar v. Union of India*, the Supreme Court upheld the validity of Article 323-A and the Administrative Tribunals Act, 1985. The Court held that the Act has no doubt excluded the jurisdiction of the High Court in service-matters under Articles 226 and 227 but it has not excluded the jurisdiction of the Supreme Court under Article 136. However, in *L. Chandra Kumar v. Union of India*, the Constitutional Bench of the Supreme Court consisting of seven Judges has unanimously held that Clause 2(d) of Article 323-A and Clause 3(d) of Article 323-B which excludes the jurisdiction of the Supreme Court under Article 32 and of the High Court under Articles 226 and 227 are unconstitutional as they damage the jurisdiction under the said Articles which are part of the basic structure of the Constitution.

The Basic Structure Doctrine stands as the cornerstone of Indian constitutional jurisprudence, ensuring that the core identity and democratic spirit of the Constitution remain inviolable. Established in the landmark *Kesavananda Bharati* case (1973), it establishes a vital system of checks and balances by affirming that Parliament's power to amend the Constitution under Article 368 is limited and cannot be used to destroy its foundational pillars. By permanently safeguarding essential values such as judicial independence, secularism, federalism, the rule of law, and fundamental rights from temporary political majorities, the doctrine strikes a delicate

harmony between constitutional flexibility and structural stability. Ultimately, it preserves constitutional supremacy, guaranteeing that the Indian state remains governed by democratic principles rather than legislative dominance.

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Reference-

1. Kesavananda Bharati v. State of Kerala AIR 1973 SC1461
2. The Government of India Act 1935 was a major legal document passed by the British Parliament. It created a system of provincial autonomy, proposed an all-India federation, and divided powers between central and local governments. It served as the primary model and legal source for much of the modern Indian Constitution
3. The First Amendment of the Constitution of India, enacted on June 18, 1951 by Prime Minister Jawaharlal Nehru, modified fundamental rights, enabled agrarian land reforms, and introduced the Ninth Schedule to protect specific laws from judicial review
4. I.C. Golaknath v. State of Punjab AIR 1967 SC 1643
5. Article 31 of the Indian Constitution originally guaranteed the Right to Property as a fundamental right. It stated that no person could be deprived of their property except by law and mandated compensation for state-acquired private property. It was repealed and moved to Article 300A as a legal right by the 44th Amendment in 1978.
6. Sri Sankari Prasad Singh Deo v. Union of India AIR 1951SC 458
7. The term 24th Amendment primarily refers to the Twenty-fourth Amendment to the United States Constitution, which banned poll taxes in federal elections in 1964, or the Twenty-fourth Amendment of the Constitution of India, which gave Parliament the power to amend Fundamental Rights in 1971
8. Kesavananda Bharati v. State of Kerala AIR 1973 SC1461
9. AIR 1975 SC 2299
10. The rule of law is a legal and political principle stating that all people, groups, and government leaders are subject to the same publicly made, clear, and fair laws. It means no single person or leader is above the law
11. Equality before the law is the core legal principle that all people are treated the same by the legal system. No person, rich or poor, high or low, is above the law. In India, this principle is a fundamental right guaranteed by Article 14 of the Constitution.
12. AIR 1980 SC 1789
13. AIR 2007 SC 71
14. AIR 2007 SC 71
15. AIR 2007 SC 861
16. A constituent assembly is a special body of people chosen to write or change a country's constitution. Unlike a regular law-making parliament, it is a temporary group created for the sole purpose of designing a nation's foundational rules and governance system before dissolving
17. AIR 1987 SC 386
18. AIR 1997 SC 1125
19. Articles 226 and 227 of the Constitution of India empower High Courts. Article 226 allows High Courts to issue writs or orders to any person or authority for fundamental rights or other purposes. Article 227 gives High Courts administrative and judicial superintendence over all subordinate courts and tribunals within their jurisdiction.

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