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Doctrine of Basic Structure as a Constitutional Safeguard in India: Reflection in the Jurisprudence of Other Countries

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ABSTRACT

A representative government is always understood as a limited government for the reason that the representatives are mere delegates under special orders. The Sovereignty in such forms of government lies with the people and is expressed in a Constitution, written or unwritten. India has adopted a representative form of government under a written Constitution operating as a limitation on governmental action. The framers of Indian Constitution came up with a written Constitution in order to ensure that there was some sort of rigidity in the Constitution. Also the power to amend was given to the Parliament under Article 368 in order to overcome the difficulties which may encounter in future in the working of the Constitution. However, the extent of flexibility embraced by a Constitution has to be balanced by a need to preserve its normative character as a higher law that restrains temporary parliamentary majorities of the nation. Article 368 of the Constitution does not prescribe any express limitation upon the parliament's amending power, however the Supreme Court in *Keshavananda Bharati v. State of Kerala* (1973) declared that Article 368 did not enable parliament to alter the 'Basic Structure or Framework' of the Constitution. With the intention to preserve the original ideals of the Constitution, the Supreme Court pronounced that the Parliament could not distort, disfigure and mutilate the basic features of the Constitution which are sacrosanct to the ideals of the Indian society. The doctrine of Basic Structure is an expression of a much deeper notion of democracy where the sovereignty of the people in a republic is retained by the people even against its own representatives. Vigorously debated since its inception, the doctrine continues to be a central feature of recent institutional contests over Constitutional identity and change. This paper examines the development and the scope of the doctrine of basic structure as a Constitutional safeguard and its reflection in the jurisprudence of some other countries.

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Introduction

The Constitution of a country represents the Grundnorm – the basic norm – comprising of fundamental principles, laying down the foundation of a civil society. While on the face of it, it appears that the Constitution of India 1950 is neither too flexible nor too rigid in practice; it has been amended almost 100 times in 62 years. The flexibility of the Indian Constitution has often been criticized as being the bane of our Constitutional system. Academic and political commentators often lament the incapacity of the government and the political class to govern in accordance with the Constitution as being the primary motive for the frequency of amendment. The attachment to an unchanging Constitution appears to be a romantic, but essentially unfounded, aspiration that no enduring Constitution is likely to satisfy. Moreover, the Indian experience suggests that political struggles find expression in the formal Constitution amending process more readily than in the informal modes through which a Constitution may be changed. However, the extent of flexibility embraced by a Constitution has to be balanced by a need to preserve its normative character as a higher law that restrains temporary parliamentary majorities of the nation. The evolution and practice of the basic structure doctrine in India responds to this normative concern to preserve the sanctity of the Constitution as a higher law. The Supreme

Court with intentions to protect the basic and original ideals of the makers has acted as a check over the legislative enthusiasm of Parliament ever since independence. The apex court has pronounced that Parliament could not distort damage or alter the basic features of the Constitution under the pretext of amending it. The phrase 'basic structure' itself cannot be found in the Constitution. The Supreme Court recognized this concept for the first time in the historic *Keshavanad Bharti v. State of Kerala*¹ in 1973.

Historical Background

A careful look at Indian history shows that there were many competing visions for the future of India in the lead-up to independence. Subhas Chandra Bose, a leader in the pre-independence Congress Party, favored a stronger, more authoritarian state, modeled on the fascist governments of the 1930s and 1940s.² On the other extreme, Mahatma Gandhi advocated a more decentralized and self-sufficient society.³ Neither Bose's nor Gandhi's vision would gain much traction during the Constitution's drafting. Instead, one of the most

¹ (1973) 4 SCC 225: AIR 1973 SC 1461.

² Lloyd, I. R. & Susanne, H. R.: *In Pursuit of Lakshmi*, (University of Chicago Press, 1987) at 69.

³ *ibid* at 69–70.

entrenched debates at the Constituent Assembly—and one that would provide the historical seeds of the basic structure doctrine—was between the similar, but competing ideologies of Jawaharlal Nehru and Sardar Vallabhbhai Patel.⁴ Nehru and Patel were the two most powerful political leaders of the Congress Party at the end of British rule.⁵ Indeed, Nehru became the country's first Prime Minister only upon Gandhi's request that Patel step aside (Patel had been supported by more members of Congress to lead the party at independence).⁶ Patel was a proponent of many of the principles of laissez-faire economics.⁷ Nehru, on the other hand, believed in large-scale property redistribution and nationalization to correct past social injustices and lay the groundwork for a prosperous economy.⁸ This position was popular amongst the poverty-stricken electorate, and even today polls indicate that the overwhelming majority of Indians believe that there should be a limit on possessing a certain amount of land and property.⁹

According to Dr. Ambedkar this difference in economic perspective came to a head in the drafters' debates over property rights.¹⁰ Nehru wanted no compensation for property seized by the government, while Patel demanded full compensation.¹¹ The right to property in the final version of the Constitution was a compromise between the two, with ambiguity surrounding both when property could be taken and what compensation would be paid.¹² Patel's early death in 1950 ensured not only that Nehru would never again be seriously challenged for the post of Prime Minister, but also that he could more easily push his original vision of the right to property. When early judicial decisions signaled that the courts would limit the government's ability to expropriate property, Nehru's government acted swiftly. In 1951, it passed the first amendment to the Constitution which created articles 31A and 31B.¹³ These articles would provide the origin of the dispute that would ultimately create the basic structure doctrine. Article 31A stated that any acquisition of property by the state through law could not be called into question under the rights to property, equality, freedom of speech, or freedom to practice one's profession.¹⁴ Article 31B created the Ninth Schedule, a list of laws inserted in the back of the Constitution.¹⁵ Laws that were placed into this schedule through Constitutional amendment could not be found invalid by

the judiciary on the basis of any of the fundamental rights.¹⁶ In the First Amendment, thirteen land reform laws were placed into this protected schedule. Although the First Amendment only protected land reform laws, the Ninth Schedule could, on its face, be used to protect any law placed into it from fundamental rights review.

After the passage of these two Articles, a showdown between Parliament and the judiciary became almost inevitable. Parliament had amended the Constitution to shield not only expropriation laws, but potentially any law from fundamental rights review. With the very idea of meaningful judicial review under attack, the Court's potential responses were limited. It could acquiesce to the amendment, admitting that it could be stripped of its power of judicial review, and hope a later Parliament would remove the offending articles, or, alternatively, it could search for a way to defend judicial review.

Property owners challenged the Constitutional amendments which placed land reforms laws in the Ninth Schedule before the Supreme Court, saying that they violated Article 13 (2) of the Constitution. Article 13 (2) provides for the protection of the fundamental rights of the citizen.¹⁷ Parliament and the state legislatures are clearly prohibited from making laws that may take away or abridge the fundamental rights guaranteed to the citizen. They argued that any amendment to the Constitution had the status of a law as understood by Article 13 (2). In 1952 (*Sankari Prasad case*)¹⁸ and 1955 (*Sajjan Singh's case*)¹⁹ the Supreme Court rejected both arguments and upheld the power of Parliament to amend any part of the Constitution including that which affects the fundamental rights of citizens. Significantly though, two dissenting judges in *Sajjan Singh's case* raised doubts whether the fundamental rights of citizens could become a plaything of the majority party in Parliament.

The first attempt by the Court to salvage its review power came in 1967 in *Golak Nath v. State of Punjab*, which challenged articles 31A and 31B.²⁰ An eleven-judge bench of the Supreme Court reversed its position. Delivering its 6:5 majority judgement Chief Justice Subba Rao put forth the curious position that Article 368, that contained provisions related to the amendment of the Constitution, merely laid down the amending procedure. Article 368 did not confer upon Parliament the power to amend the Constitution. The amending power (constituent power) of Parliament arose from other provisions contained in the Constitution (Articles 245, 246, 248) which gave it the power to make laws (plenary legislative power). Thus, the apex court held that the amending power and legislative powers of Parliament were essentially the same. Therefore, any amendment of the Constitution must be deemed law as understood in Article 13 (2). The majority judgment invoked the concept of implied limitations on Parliament's power to amend the Constitution. This view held that the

⁴ *ibid* at 69.

⁵ *ibid* at 68–74.

⁶ *ibid* at 71–72.

⁷ *ibid* at 71.

⁸ *ibid* at 70–72; See also Sudipta Kaviraj: *A Critique of the Passive Revolution*, in *State and Politics in India*, (Partha Chatterjee ed., 1997) at 43, 57–58.

⁹ In a survey done around the 2004 national elections, almost sixty-eight percent of people somewhat or fully agreed that there should be a ban on possessing land and property above a certain limit. Centre for the Study of Developing Societies, Nat'l Elections Studies (NES) 2004, Marginals for All Questions, Results to Question 30A, available at: <http://www.csdshdelhi.org/nest2004/ques.htm>

¹⁰ Ambedkar, B.R.: *Rajya Sabha Debates* (Mar. 19, 1951) in *Parliamentary Debates*, 1950–52.

¹¹ *ibid*

¹² *ibid*

¹³ The Constitution of India 1950, at Articles 31A–B.

¹⁴ *ibid*

¹⁵ *ibid*

¹⁶ *ibid*

¹⁷ Article 13 (2) states: "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void." The term Part refers to Part III of the Constitution which lists the fundamental rights of the citizen.

¹⁸ *Sankari Prasad Singh Deo v. Union of India*, AIR 1951 SC 458.

¹⁹ *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845.

²⁰ *I.C. Golak Nath v. State of Punjab*, (1967) 2 S.C.R. 762, 819.

Constitution gives a place of permanence to the fundamental freedoms of the citizen. In giving the Constitution to themselves, the people had reserved the fundamental rights for themselves. Article 13, according to the majority view, expressed this limitation on the powers of Parliament. Parliament could not modify, restrict or impair fundamental freedoms due to this very scheme of the Constitution and the nature of the freedoms granted under it. The judges stated that the fundamental rights were so sacrosanct and transcendental in importance that they could not be restricted even if such a move were to receive unanimous approval of both houses of Parliament. They observed that a Constituent Assembly might be summoned by Parliament for the purpose of amending the fundamental rights if necessary. In other words, the apex court held that some features of the Constitution lay at its core and required much more than the usual procedures to change them.

The verdict in *Golaknath's case* led to direct conflict of power between the parliament and judiciary. The ruling government suffered heavy losses of votes in parliamentary elections as it failed to fulfill its promises. The power conflict led the government to introduce a bill seeking to restore supremacy of parliament which was later not pressed because of some political compulsions.¹³ But hungry to prove it supreme, parliament again, under the pretext of ensuring equitable distribution of wealth and resources, introduced two major lines of laws, one related to nationalization of banks and other related to de-recognition of Privy Purses. The Supreme Court struck down both the moves of the parliament.²¹ Now the basic question had shifted as to the relative position of directive principles and the fundamental rights. This led to a political situation which the Indian history had never witnessed. Judiciary and Parliament were at loggerhead in proving their supremacy. For the first time, the Constitution itself became the electoral issue in India. In 1971 and 1972 many amendments were carried on that directly challenged the Court's declaration that the fundamental rights could not be amended and further shielded laws from fundamental rights review.²² These amendments being over-ambitious were inevitably challenged in *Keshavanand's case*.

Emergence of the Basic Structure Concept-- the Kesavananda Milestone

This Constitutional showdown came to a head in *Kesavananda Bharati v. State of Kerala*.²³ Decided in 1973 by an unprecedented thirteen justices, it is widely considered one of the most important Indian Constitutional law cases. In the face

of parliamentary and public pressure, the Court overruled *Golak Nath*.²⁴ All judges held that 24th amendment is valid as Article 368 confers power to amend all or any of the provisions of Constitution. Majority of judges held that judgment in *Golaknath's case* was wrong and that the power to amend was very much there under Article 368. Seven judges took the view that although the fundamental rights could be amended, a certain "basic structure" to the Constitution could not.²⁵ The phrase 'basic structure' was introduced for the first time by M.K. Nambiar and other counsels while arguing for the petitioners in the *Golaknath case*, but it was only in *Kesavananda Bharati case* that the concept surfaced in the text of the apex court's verdict.

The basic structure doctrine was defined and it was held that the power to amend is channelized and limited. Khanna J. along with other six judges agreed with this theory. Rest of the six judges held that it is an absolute power in hands of the parliament. So Supreme Court with a majority of 7:6 decided that some parts of the Constitution which gives it a meaning cannot be changed or amended. However, only six out of the seven majority judges, with Khanna J. dissenting, held that fundamental rights form the basic structure of the Constitution and hence are un-amendable. So, again Supreme Court with a majority of 7:6 held that in the fundamental rights per se are amendable.

The basic philosophy underlying the doctrine of non amendability of the basic features of the Constitution, evolved by the majority in *Kesavananda* has been beautifully explained by Hedge and Mukherjee, JJ., as follows:

*Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy and every social philosophy like every religion has two main features, namely, basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed.*²⁶

So far as the issue of amendability of the Constitution is concerned, it was held that Constitution is amendable to the extent it does not affects the basic structure of the Constitution. However this judgment was not specific as to what forms the basic structure of the Constitution. Judges gave their own examples of basic structure and enumerated few of them but that list was not held to be exhaustive. There was no unanimity of opinion within the majority view either. Sikri, C.J. explained that the concept of basic structure included:

- Supremacy of the Constitution

²¹ *Bank Nationalization Case* (1970) 3 S.C.R. 530 nullified 4th amendment and *Privy Purses case* (*Madhav Rao Scindhia v. Union of India* (1971) 3 S.C.R. 9) held that the justiciable right to property to the rulers of India had been granted clearly under Article 291 and parliament cannot take that away.

²² Under the urge to prove its supremacy, parliament came up with many Constitutional amendments. The 24th amendment brought in some changes in art 368 and 13 expressly displacing the reasons on which *Golaknath's* judgment was based. 25th amendment amended Article 31 and introduced Article 31 C for giving higher sanctity to Directive Principles of State policy than fundamental rights. 26th amendment abolished privy purses and thus rendered *Madhav Rao Scindhia's case* ineffective. 29th amendment further added two Kerala acts to 9th schedule.

²³ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225: AIR 1973 SC 1461.

²⁴ *ibid* at 1565.

²⁵ *ibid* (The Court limited its directions to striking down only part of article 31C, which had been added to the Constitution in 1971. This article protected laws from judicial scrutiny that the legislature declared furthered directive principles under the rights to property, equality, or freedom of expression/freedom to practice one's own profession. It further held that the Court could not question the legislature's finding that the law in question furthered a Directive Principle. Although the judgment was severely fractured, the Court struck down the article's language that the judiciary could not judge whether the law in question furthered a Directive Principle). See *ibid* at 1566.

²⁶ *ibid* at Para 1171.

- Republican and democratic form of government
- Secular character of the Constitution
- Separation of powers between the legislature, executive and the judiciary

- Federal character of the Constitution

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

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

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

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

Jaganmohan Reddy, J. stated that elements of the basic features were to be found in the Preamble of the Constitution and the provisions into which they translated such as:

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

He said that the Constitution would not be itself without the fundamental freedoms and the directive principles.²⁷

Keshavanad's case proved that the Parliament is not sovereign in Indian context and its power is not absolute but channelized and controlled.

Post Kesavananda Verdict

The matter of the Doctrine of basic Structure again came up in the Supreme Court in *Indira Nehru Gandhi v. Raj Narain*²⁸, popularly known as Election Case. In this case for the 1st time a Constitutional amendment was challenged not in respect of rights of property or social welfare but with reference to an electoral law designed to ensure free and fair elections which lie at the basis of a democratic parliamentary form of government. The Constitutional (39th amendment) Act, 1975 inserted Article 329A. According to clause (4) of the amendment election of a candidate cannot be challenged in court of law. This amendment was passed when an appeal against Allahabad High Court's judgment dismissing the election of Mrs. Indira Gandhi as Prime minister was pending in the Supreme Court. In this case the 39th Constitutional Amendment was challenged. Counsel for Raj Narain, the political opponent challenging Mrs. Gandhi's election, argued that the amendment was against the basic structure of the Constitution as it affected the conduct of free and fair elections and the power of judicial review. Counsel also argued that Parliament was not competent to use its constituent power for validating an election that was declared void by the High Court.

This case introduced new dimensions to the judgment given in *Keshavanad's* case. Although the amendment was upheld but the provision curbing judiciary's right to keep a check on elections was struck down as violating the separation of powers and judicial review, both core principles of the Indian Constitution.²⁹ The doctrine of basic structure was widened and it was held that free and fair election being a part of basic

structure cannot be amended. However, in a politically pragmatic maneuver that also followed an existing line of precedent, the Court found Indira Gandhi's election valid by upholding legislation that had retroactively removed the legal basis for her original conviction.³⁰

In *Election Case* again each judge expressed views about what amounts to the basic structure of the Constitution:

According to Justice H.R. Khanna, democracy was a basic feature of the Constitution and included free and fair elections.

Justice K.K. Thomas held that the power of judicial review is an essential feature.

Justice Y.V. Chandrachud listed four basic features which he considered unamendable:

- Sovereign democratic republic status
- Equality of status and opportunity of an individual
- Secularism and freedom of conscience and religion
- Government of laws and not of men *i.e.* the rule of law

According to Chief Justice A.N. Ray, the constituent power of Parliament was above the Constitution itself and therefore not bound by the principle of separation of powers. Parliament could therefore exclude laws relating election disputes from judicial review. He opined, strangely, that democracy was a basic feature but not free and fair elections. Ray, C.J. held that ordinary legislation was not within the scope of basic features.

Justice K.K. Mathew agreed with Ray, C.J. that ordinary laws did not fall within the purview of basic structure. But he held that democracy was an essential feature and that election disputes must be decided on the basis of law and facts by the judiciary.

Justice M.H. Beg disagreed with Ray, C.J. on the grounds that it would be unnecessary to have a Constitution if Parliament's constituent power were said to be above it.³¹ Judicial powers were vested in the Supreme Court and the High Courts and Parliament could not perform them. He contended that supremacy of the Constitution and separation of powers were basic features as understood by the majority in the *Kesavananda Bharati* case. Beg, J. emphasised that the doctrine of basic structure included within its scope ordinary legislation also.

Despite the disagreement between the judges on what constituted the basic structure of the Constitution, the idea that the Constitution had a core content which was sacrosanct was upheld by the majority view.

Basic Structure Doctrine Reaffirmed

In response to the decision in *Election Case* the government passed an amendment shortly thereafter declaring that there is no limit to Parliament's constituent power, foreshadowing what

³⁰ *ibid* at 2321–24.

³¹ A comparison with the Westminster model would bring out the subtleties involved in this matter more clearly. The United Kingdom does not have a written Constitution like India or the USA. The British Parliament is a sovereign body and there is very little difference between Constitutional law and ordinary law in that country. The Indian Parliament owes its existence to a written Constitution that was put together by another sovereign body, namely, the Constituent Assembly. Parliament's powers (including the power to amend) are not *sui juris* but essentially derived from this Constitution. Therefore it cannot be said to occupy a position superior to the Constitution.

²⁷ *ibid* at 637–38.

²⁸ *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SCC 2299.

²⁹ *ibid* at 2355, 2385, 2469.

could have become another Constitutional standoff.³² In 1978, the new government stripped the right to property of its fundamental rights status in the Constitution and moved it to another section.³³ The Court did not challenge this development, thereby eliminating one of the primary points of perpetual conflict between the judiciary and Parliament.

Since *Election Case* the Supreme Court has decided several cases involving the basic structure doctrine. In *Minerva Mills Ltd. v. Union of India*³⁴ the validity of 42nd Constitutional amendment was challenged. The Supreme Court by majority by 4 to 1 majority struck down clauses (4) and (5) of the Article 368 inserted by 42nd Amendment, on the ground that these clauses destroyed the essential feature of the basic structure of the Constitution. It was ruled by court that a limited amending power itself is a basic feature of the Constitution. In *Waman Rao v. Union of India*³⁵ the Supreme Court upheld *Minerva mill's* judgment that amendments to Article 368 introducing Clauses 4 and 5 are void. It was further held in this case that all laws placed in 9th Schedule after *Keshavanand Bharti* judgment are also available for judicial review. In *S. P. Sampath Kumar v. Union of India*³⁶ and *P. Sambamurthy v. State of A.P.*³⁷ the judges laid down that the rule of law and judicial review were integral part to the Constitution and therefore constitute the Basic Structure. Effective access to justice is part of the 'Basic Structure' according to the decision in *Central Coal Fields Ltd. v. Jaiswal Coal Co.*³⁸ In *Bhim Singhji v. Union of India*³⁹, Krishna Iyer and Sen, JJ., asserted that the concept of social and economic justice – to build a welfare state forms a part of the of Basic Structure. Article 32, 136, 141 and 142 of the Constitution conferring power on the Supreme Court were held as a Basic Structure in *Delhi Judicial Service Assn. v. State of Gujarat*.⁴⁰ The independence of judiciary within the limits of the Constitution,⁴¹ judicial review under Article 32, 226 and 227 of the Constitution,⁴² Preamble,⁴³ Independence of Judiciary,⁴⁴ Secularism,⁴⁵ federalism,⁴⁶ Separation of powers,⁴⁷ free, fair and

periodic election⁴⁸ are all declared to be the Basic Structure of the Constitution. The power of the High Court to exercised Judicial Superintendence over the decision of al courts within their respective jurisdiction is also part of Basic Structure.⁴⁹ In the *Mandal case*⁵⁰ it was held that the failure to exclude the creamy layer or the inclusion of forward castes in the list of backward class would violate the provisions of Article 14 and 16 which form the Basic Structure of the Constitution.

The fact that the judiciary has a say in the matter of amendment of the Constitution is the most notable aspect of the doctrine of Basic Structure.⁵¹ In *M. Nagraj v. Union of India*⁵² the court observed that the amendment should not destroy Constitutional identity and it is the theory of Basic Structure only to judge the validity of Constitutional amendment. Doctrine of equality is the essence of democracy accordingly it was held as a Basic Structure of the Constitution.⁵³ In *I.R. Coelho v. State of Tamil Nadu*⁵⁴ further developed its interpretation of article 31B, which created the Ninth Schedule to protect particular laws from fundamental rights review. Although originally only thirteen land reform laws were placed in the Ninth Schedule, more than 280 laws have now been added to it through Constitutional amendment.⁵⁵ Most of these laws concern land reform, but many do not, including some laws that relate to caste-based reservations and security laws from Indira Gandhi's era. In a unanimous decision (a signal of the current health of the basic structure doctrine) the Court reasserted in *Coelho* that many, if not all, of the current fundamental rights were part of the basic structure of the Constitution, and that the laws in the Ninth Schedule would have to be tested by them.

The above pronouncements of the Indian judiciary have given a firm establishment to the doctrine of Basic Structure in our Constitutional law.

Doctrine of Basic Structure: Judicial Justification and Criticism

The missteps and weaknesses of Parliament and the executive have allowed the Supreme Court to successfully assert that India's Constitution should be interpreted to have an unamendable basic structure. This victory was made possible by such factors as Parliament's routine use of amendatory power, the miscalculations of power-hungry Politicians, and the weaknesses of a politically fractured Parliament. Further, the Constitution contained so many political and historical compromises that an attempt to rewrite the whole document would be dangerous for any parliament. Yet the basic structure doctrine's current triumph is not just a result of the judiciary's evolving political fortunes, but also of the Court's justifications for the doctrine. The Court taps into an understanding that Constitutional rule based solely on "we the people," and certainly "we the Constitutional amendment," may present great danger to a liberal democratic view of good governance, and can

³² The Constitution (Forty Second Amendment) Act, 1976 introduced two sub clauses in Article 368. According to clause (4) no Constitutional amendment can be challenged in courts and clause (5) was for clarifying the doubt that no limitation can be imposed on the constituent power of the legislature.

³³ Article 31 was removed and article 300-A was inserted under the Constitution (Forty-fourth Amendment) Act, 1978.

³⁴ (1980) 3 SCC.

³⁵ AIR 1981 SC 271.

³⁶ AIR 1987, SC 368.

³⁷ AIR 1987, SC 663.

³⁸ 1980 Supp. SCC 471.

³⁹ (1981) 1 SCC 166; AIR 1981 SC 234, Para 81 & 82.

⁴⁰ 1991) 4 SCC 406 at 452.

⁴¹ *Supreme Court Advocates on Record Association v. Union of India*, (1993) 4 SCC 441; AIR 1994 SC 268; *S.P Gupta. v. Union of India*, AIR 1982 SC 149, *State of Bihar v. Bal Mukund Sah* (2000) 4 SCC 640.

⁴² *L. Chandrakumar v. Union of India*, AIR 1997 SC 1125.

⁴³ *State of U.P. v. Dina Nath Shukla*, AIR 1997 SC 1095.

⁴⁴ *Kumar Padma Prasad v. Union of India*, AIR 1992 SC 1213; *State of Bihar v. Bal Mukund Sah*, AIR 2000 SC 1296.

⁴⁵ *Valsamma Paul v. Cochin University*, AIR 1996 SC 1011; *Aruna Roy v. Union of India*, AIR 2002 SC 3176.

⁴⁶ *S.R Bommai v. Union of India*, AIR 1994 SC 1918.

⁴⁷ *State of Bihar v. Bal Mukund Sah*, AIR 2000 sc 1296.

⁴⁸ *In the matter of Special Ref. No. 1 of 2002* (Gujarat Assembly Election Matter), AIR 2003 SC 87; *Kihoto Hollohan v. Zachilhu*, AIR 1993 SC 412.

⁴⁹ *L. Chandrakumar v. Union of India*, AIR 1997 SC 1125.

⁵⁰ *Indira Sawhney II v. Union of India*, AIR 2000 SC 498.

⁵¹ Baxi, U.: *Courage, Craft and Contention*, (1985), cited in V.N.Shukla, *Constitution of India*, (Reprint July, 06) at 897.

⁵² AIR 2007 SC 71.

⁵³ *ibid* at Para 25 & 33.

⁵⁴ (2007) 1 S.C.R. 706.

⁵⁵ The Constitution of India, at Article 31B.

even be viewed as illegitimate. The Supreme Court asserts two justifications for this argument. First, it maintains that the Constitution, and the history out of which it was created, implicitly control Parliament's amendatory power.⁵⁶ Second, it claims that Parliament's amendatory power is trumped by removed and almost metaphysical civilizational norms that form the necessary skeleton of good governance.⁵⁷

The Court in *Kesavananda Bharati* used the founding's unique place in Indian political history to make a series of intentionalist arguments in support of the basic structure doctrine.⁵⁸ Justices argued that the word "amendment" could not possibly have been intended by the founders to mean the ability to destroy the fundamental features of the Constitution.⁵⁹

The Supreme Court grounded the basic structure doctrine in the tangible historical moment of the creation of the Constitution. As Gary Jeffrey Jacobsohn has pointed out,⁶⁰ there is something rather Burkean about this claim that rights, judicial review, democracy, and other elements of the basic structure doctrine are part of the story of the nation that should not be changed quickly, and that this Constitutional narrative should instead be safeguarded by the nation's justices. The Court justifies the basic structure doctrine not only with the historical moment of the founding, but also with a conception of what a properly ordered society should be. It, therefore, makes a good governance argument. Even if the Court does not acknowledge it explicitly, this second justification allows the Court to potentially take into account the changing needs of the country in the future. It also provides a justification for the doctrine that is decidedly different from the reasoning one would find in the American liberal tradition—that is, the idea that a constituent body's enactments must not merely conform to the will of the people, but also to the norms of good governance. The Court roots its conception of such a correctly structured society in the Constitution, the practices of democratic and civilized nations as documented through history, and the requirements of bringing order to a country like India.⁶¹

The doctrine of basic structure was based on the limitations implied in the Preamble which aims at justice—social, economic and political. In *Kesavananda Bharti* case, the Preamble was held to be a part of the Constitution and though not a source of powers it was considered to be a source of limitations to be imposed on the powers of the Constitutional authorities.⁶² As Sudhir Krishnaswamy points out,⁶³ the doctrine of implied limits which has previously been applied in diverse Constitutional cases in several other jurisdictions came to be strenuously argued as the basis on which amending power was restricted.

The doctrine of basic structure was advocated primarily for three reasons. Firstly, the doctrine has been invoked to prevent the entrenchment of the fundamental rights against Constitutional amendments as evidenced by historical instances.⁶⁴ The majority of the judges argued that unless there are restrictions on the power of amendment the danger is that the Indian Constitution may also meet the same fate as did the Weimar Republic at the hands of Hitler.⁶⁵ Hence the importance of the doctrine of basic structure under the Indian Constitution was feasible in order to check the Parliament's amending power becoming unlimited. Secondly, the doctrine of basic structure was invoked to overcome the exclusion of express limits on the amending power of Parliament. The Supreme Court replaced explicit limits on amending power with implied limits whereby the plenary amending power of Parliament could be exercised so long as it did not damage or destroy the basic features of the Constitution.⁶⁶ Thirdly, the doctrine of basic structure was invoked to justify the harmonious existence of Article 368 along with the other provisions of the Constitution and with the Preamble in particular. The implied limits on amending power emerge when one reads Article 368 together with the other provisions of the Constitution.⁶⁷

Whether invoking natural, moral, historical, or utilitarian grounds, the Court justifies the principles of the basic structure doctrine by appealing to core elements of what it argues is needed for good governance. Modern democratic civilization, and its mandates, are made a bar to Parliament's constituent powers.

The doctrine of basic structure has received both support and criticism. The criticisms of the doctrine can largely be divided into accountability and capacity concerns. Some argue that the doctrine is inherently undemocratic because the Supreme Court (an unelected institution) blocks amendments that a super-majority of the people's representatives support.⁶⁸ Some other critics argue that the basic structure doctrine undermines the Constitution itself by weakening the stature of Parliament.⁶⁹ By taking power out of the hands of the people, it

⁵⁶ *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461.

⁵⁷ *ibid*

⁵⁸ *ibid* at 1499–1535.

⁵⁹ *ibid* at 1498–99.

⁶⁰ Jacobsohn, Gary J.: *An UnConstitutional Constitution? A Comparative Perspective*, International Journal of Constitutional Law, Vol 4, 2006, at 460, 483.

⁶¹ Robinson, N.: *Expanding Judiciaries: India and the Rise of the Good Governance Court*, Washington University Global Studies Law Review, VOL. 8 No. 1 2009, at 35.

⁶² AIR 1973 SC 1461 at Para 102, at 1504.

⁶³ Krishnaswamy, S.: *Democracy and Constitutionalism in India—A Study of the Basic Structure Doctrine*, (New Delhi, Oxford University Press, 2009) at 25.

⁶⁴ Sudarshan R., *Stateness in the Indian Constitution*, quoted by Sudhir Krishnaswamy, *Ibid*, at 22. The doctrine of basic structure had been invoked under the Weimar (German) Constitution. The German Constitution, 1949 sets out that certain portions of law are immune from amendment in order to overcome the defects of the Weimar Constitution exploited during the Hitler years. The Constitution of 1949 describes itself as the 'Basic Law' only to be a Constitution adopted by a free decision of the German people (Article 146 of the West German Constitution, 1949).

⁶⁵ Basu, Durga D.: *Comparative Constitutional Law*, (2nd ed. (revised), (Nagpur, Wadhwa and Company, 2008), at 119.

⁶⁶ See Krishnaswamy, *Supra* note 63, at 39.

⁶⁷ *ibid* at 28.

⁶⁸ See, e.g., Raju Ramachandran: The Supreme Court and the Basic Structure Doctrine, in *Supreme But Not Infallible: Essays in the Honour of the Supreme Court of India*, (B.N. Kirpal et al. eds., 2000); Subhash Kashyap: The 'Doctrine' Versus the Sovereignty of the People, in *The Supreme Court Versus the Constitution*, (Pran Chopra ed., 2006), at 99.

⁶⁹ Chopra, P.: *The Supreme Court Versus the Constitution: An Introduction in Ten Questions*, in *The Supreme Court Versus the Constitution*, *ibid* at 22, 36.

is more likely someone else will do the same.⁷⁰ Durga Das Basu criticizes the doctrine by questioning whether there is any juristic foundation for assuming that some parts of the Constitution or the core of it or its framework is excluded from the amending power through an inherent limitation.⁷¹

Proponents of the basic structure doctrine, though, argue that the doctrine is necessary to protect the requirements of a democratic order.⁷² For people who fear the abuses of an unchecked Parliament, the doctrine helps create confidence in the democratic process. It may therefore help prevent the rise of a non-democratic order that promises stability and the protection of certain basic rights. According to V. N. Shukla⁷³ the fact that the judiciary has a say in the matter of amendment of the Constitution is the most notable aspect of the doctrine of basic structure. Similar views are shared by Upendra Baxi.⁷⁴ Soli J. Sorabjee finds that in the Indian context there are tangible and substantial gains resulting from the basic structure doctrine and stands as a bulwark against further erosion of basic fundamental rights.⁷⁵

The doctrine of basic structure gains strength by understanding the Constitution as a document of values containing the most general guidance to community expectations. These values which reflect the aspirations of a continuing majority should be preserved, protected and fostered from generation to generation and not abrogated. A Constitution, it needs to be emphasized, is not a document for fastidious dialectics but the means of ordering the life of a people. It had its roots in the past, its continuity is reflected in the present and it is intended for an unknown future.⁷⁶

The basic structure doctrine was born of perceived necessity. Without it the Court might have suffered a continuing erosion of its power of judicial review. Certainly, other democracies have had no judicial review, but if there is a benefit to a judicial Constitutional check, then the doctrine has helped ensure that this benefit continues to be felt. The various criticisms leveled against the basic structure doctrine seek in substance to establish a principle of parliamentary supremacy which was neither contemplated by the framers, nor provided for by the Constitution. If Parliament has the power to destroy the fundamental principle of our polity, it would cease to be a creature of the Constitution, the Constitution would cease to be controlled and Parliament would become supreme over the

Constitution.⁷⁷ So far, the basic structure doctrine's opponents have not had enough support to seriously threaten it.

Reflection in the Jurisprudence of Other Countries

In India, the basic structure doctrine serves a purpose similar to unamendable provisions or principles in a Constitution. After World War II, several Constitutions were created with un-amendable provisions. Germany is the most prominent example,⁷⁸ but there are others as well. These countries adopted varying approaches. The Constitutions of Greece and Portugal provide a relatively long list of un-amendable provisions.⁷⁹ Others protect only one or two key principles. The Constitutions of Italy and France, for example, simply safeguard their republican form of government against amendment.⁸⁰ Perhaps not surprisingly, Pakistan is the country that has most closely flirted with an approach that looks most similar to the Indian basic structure doctrine. Even after the *Kesavananda Bharati* decision in India, the judiciary in Pakistan rejected the idea of there being any substantive limits on amendments to the Constitution.⁸¹ However, in 1997, the Pakistani Supreme Court reopened this question when deciding whether an amendment that allowed the President to dissolve the National Assembly was valid.⁸² Although it did not strike down the amendment, the seven justice bench, speaking through Chief Justice Ali Shah, found that the salient features of the preamble of the Constitution (which had been the preamble of all four of Pakistan's Constitutions) must be retained and not altered.⁸³ These unchangeable features were "federalism; parliamentary democracy and Islamic provisions including independence of judiciary."⁸⁴ Suddenly, Pakistan seemed to have a basic structure doctrine as well. Yet, the very next year, another seven-justice bench found that there was no basic structure doctrine, apparently overruling this new precedent.⁸⁵ Since then, the Court has leaned both ways, at times professing a basic structure doctrine while at other times eschewing it.⁸⁶ It has yet to be seen whether the Court will ultimately solidify or discard this doctrine. Through a judge-made basic structure doctrine or un-amendable Constitutional provisions, courts are being given a new structural role, acting as a review body, not only for laws, but also Constitutional amendments. This role is part of a larger

⁷⁰ *ibid* at 53.

⁷¹ See Basu, *Supra* note 65, at 108.

⁷² Nariman, F.: *The 'Doctrine' Versus 'Majoritarianism,'* in *The Supreme Court Versus the Constitution*, *Supra* note 68, at 79, 81–89.

⁷³ Shukla, V. N.: *Constitution of India*, 10th edition, (Lucknow, East Book Company, 2009) at 897.

⁷⁴ See Baxi, *Supra* note 51, at 897.

⁷⁵ Sorbjee, Soli J.: *Evolution of the Basic Structure Doctrine: Its Implications and Impact on Constitutional Amendments*, excerpt from lecture delivered at Oslo University, Norway on 6th October, 2008, at 6, available at: <http://docsgoogle.com/Doc?ibid=dct39c8c101f38gp3cf>

⁷⁶ Keshavamutthy, C. V.: *Amending Power under the Indian Constitution—Basic Structure Limitations*, (New Delhi, Deep & Deep Publications, 1982) at 79.

⁷⁷ Khanna, H. R.: *Judicial review or confrontation?* (Macmillan Co. of India, 1977) at 13.

⁷⁸ The German Constitution famously bars amendments to Article One (human dignity) and its democratic and federal form of government. See Grundgesetz für die Bundesrepublik Deutschland [GG] [*Federal Constitution*], at Articles 1, 20, 79.

⁷⁹ 1975 Syntagma Constitution, at Articles 110, 2, 4–5, 13, 26 (Greece); Constitution of Portugal, at Article 288.

⁸⁰ Constitution of France, at Article 89; Constitution of Italy, at Article 139.

⁸¹ Karim, F.: *Judicial Review of Public Actions: A Treatise on Judicial Review*, (Karachi, Pakistan Law House 2006) at 1254–76.

⁸² *Mahmood Khan Achakzai v. Federation of Pakistan* PLD 1997 SC 426.

⁸³ *ibid* at 56.

⁸⁴ *ibid*

⁸⁵ *Wukala-Muhaz v. Federation of Pakistan* PLD 1998 SC 1263.

⁸⁶ For a discussion of this case law as well as an analysis of the current state of the basic structure doctrine in Pakistan at present, see Karim, *Supra* note 82.

trend of creating new structural checks on representative bodies through courts more generally.

In Thailand, the 2007 Constitution, which was drafted by a military junta and passed by democratic referendum, prohibits amendments that “chang[e] the democratic regime of government with the King as Head of State or chang[e] the form of State.”⁸⁷ This passage is a typical unamendable Constitutional provision, but the Constitution goes even further by giving the judiciary new powers to control representative bodies. The upper judiciary has an almost controlling hand in appointing half of the Senate.⁸⁸ The Senate, along with the King, in turn approves the heads of quasi-independent bodies, such as the ombudsman, public prosecutor, and state audit commission.⁸⁹ The Senate and these quasi-independent bodies all act to check the power of the House of Representatives and executive.

In Iran, the Constitution makes both its Islamic and democratic character un-amendable, as well as the objectives of the Republic (which include many social and economic goals), but here, too, the Constitution goes even further.⁹⁰ The Guardian Council in Iran must approve all laws passed by Parliament and can veto them if they violate either Islamic law or the Constitution.⁹¹ The Council also supervises elections and has the power to ban candidates from running.⁹² In this way, the Council acts like a mixture of a Constitutional court, an upper chamber or Parliament, and an election commission. The latter two are new roles that this judicial institution was given to check Iran’s representative institutions. This judicial setup helps maintain the power of the Supreme Leader, as half of the Council is appointed by the Supreme Leader, while the other half is appointed by the head of the judiciary (who is also appointed by the Supreme Leader).⁹³

In Bangladesh, where the two principal political parties are viciously distrustful of each other, the Constitution directs a retired Chief Justice or another retired member of the higher judiciary to head a caretaker government during elections.⁹⁴ This

function marks a new institutional role for the judiciary, or more accurately the retired judiciary, to check the representative branches.

These new institutional arrangements in Thailand, Iran and Bangladesh vividly illustrate how courts have risen in power, often out of an anxiety surrounding, or distrust of, representative institutions. Iran and arguably Thailand are also clear examples of how the broad role judiciaries now play can be used by elites to maintain power, or at least to ensure that representative institutions do not run too far afield of their interests. At the same time the basic structure doctrine in India, and its fledgling arrival in Pakistan, can more easily be seen as cases of courts interfering to ensure the survival and operation of democratic institutions.

Conclusion

As a conclusion it may be said that the doctrine of basic structure of the Constitution is a great Constitutional concept that has been formally engrafted upon the Constitution by the judiciary through the interpretative processes. The doctrine is well formulated and it has maintained a balance between the rigidity and the flexibility of the Constitution. The basic structure doctrine is the single most important factor that has made the survival of our Constitution possible in its pristine form. It has served us well by effectively foreclosing the possibilities of uncalled for tampering of the Constitution, abrogation of the primordial rights necessary for the development of human personality, weakening the hold of Rule of Law and maintaining balance between different organs of the State. It prevents the parliament from having unconditional power and becoming the master of law itself. It has till date proved to be a very effective tool in deciding the validity of the Constitutional amendments. But whether this doctrine is sufficient to accommodate the change that may be required in future needs to be further debated. Nevertheless, there is no scope in denying the fact that this doctrine has served the country very well during turbulent times when parliament was in a mood to resort to Article 368 recklessly. The Supreme Court has done a great service to the nation by declaring that there are certain basic features of the Constitution which cannot be amended. It has necessarily pointed out to the parliament that Constitution is not any party’s manifesto which can be changed at their own will but is a national heritage which can be amended only when a national consensus demands for it. Thus, the doctrine of basic structure may be allowed to operate as the very watchdog of Constitutional governance. There can still be debates about what constitutes basic structure. There is nothing wrong in such debates. We must remember that politics in a democracy is necessarily full of debates and differences. That is a sign of diversity, liveliness and openness.

⁸⁷ Somdet Phra Paramintharamaha Bhumibol Adulyadej [Interim Constitution of Thailand], 2006, B.E., at Ch. 15.

⁸⁸ *ibid* at § 113.

⁸⁹ Noi. C.: *From People’s Charter to Judge’s Charter*, THE NATION, Apr. 30, 2007, available at: <http://www.nationmultimedia.com/search/page.arcview.php?clibid=11&ibid=30033003>. ; CONSTITUTION OF THE KINGDOM OF THAILAND., Ch. 113 (also providing for extensive directive principles to guide Parliament’s lawmaking). The quasi-independent bodies include the Ombudsman, *Ibid*. Article 242; Election Commission, Article 229; National Counter Corruption Commission, Article 246; State Audit Commission Article 252; Public Prosecutor, Article 255; National Human Rights Commission, Article 256.

⁹⁰ Qanuni Assassi Jumhuri’i Isla’mai Iran [The Constitution of the Islamic Republic of Iran], 1980, at 177(5).

⁹¹ *ibid* at Article 94.

⁹² *ibid* at Article 99.

⁹³ *ibid* at Articles 91, 157.

⁹⁴ If no retired member of the higher judiciary is available or willing, an impartial citizen is appointed. Constitution of Bangladesh, at Article 58 B–C. In 2006, the primary opposition party in Bangladesh protested that the former Chief Justice who was to oversee the caretaker government was not impartial. After the Chief Justice refused to take on the position, the President was eventually sworn in to head the caretaker

government. Amidst violent protests in 2007, the President declared a state of emergency, which led to the military backing of a caretaker government. This may signal an end to the retired judiciary’s role in caretaker governments in the future. See *Bangladesh President to Lead Caretaker Government*, PEOPLE’S DAILY ONLINE, Oct. 30, 2006, available at: http://english.people.com.cn/200610/30/eng20061030_316328html ;