

# The Constitutional Interpretation of the 'Basic Structure' Doctrine by the Indian Judiciary: A Study

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**Abstract:** The doctrine of the "basic structure" is considered the most powerful instrument in the hands of the Indian judicial power to keep up the balance of power, controls and balances required for a good functioning of a democracy. This doctrine has altered the itinerary of India's Constitutional jurisprudence. The article will pay a mark of respect to its origins and its efforts protect it and preserve it throughout history. Furthermore, it is considered that the basic structure doctrine is applicable only to constitutional amendments; however, many judges of the Supreme Court have seen this aspect in a different way and there have been opposing opinions on this area under discussion. Since this does not seem to be a simple concept already with the applicability of the doctrine under discussion, this article will try to track down what numerous Supreme Court judges have affirmed in their rulings on the applicability of the basic structure doctrine to ordinary legislations and finally wrap up with some observations.

**Keywords:** basic structure, doctrine, legislation, Supreme Court

## Introduction

The missteps in addition to the weaknesses of the Parliament and the executive have permitted the Supreme Court to affirm fruitfully that the Indian Constitution must be interpreted as a non-modifiable basic structure. This triumph was possible thanks to factors such as the habitual use of the parliament of power modifier, the loss of the founding voice of Nehru, the errors of calculation of Indira Gandhi and the weaknesses of a politician Fractured parliament. Furthermore, the Constitution contained so many political and historical commitments that an attempt to rewrite the whole document would be dangerous for any parliament. The Court's success did not come immediately, but rather with false departures such as Golak Nath, when it misjudged the political relevance of the agrarian reform laws.<sup>1</sup>

However, the current triumph of the basic structure doctrine is not only the result of the evolution of the political fortunes of the judiciary, but also of the Court's justifications for the doctrine. The Court comes to the conclusion that the constitutional regulation based solely on "us the people" and certainly "we the constitutional amendment" can represent a serious danger to a liberal democratic vision of good governance and can even be considered illegitimate. The Supreme Court states two justifications for this topic. First, he claims that the Constitution and the history from which it was created implicitly control the power to amend

<sup>1</sup> Nick Robinson, "Expanding Judiciaries: India and the Rise of the Good Governance" (January 2009) in Court Washington University Global Studies Law Review; Volume 8 issue 1.

Parliament. Secondly, he affirms that Parliament's power to amend is superseded by the rules of civilizations eliminated and almost metaphysical that constitutes the necessary skeleton of good governance

The court in *Kesavananda Bharati*<sup>2</sup> used the unique place of foundation in the political history of India to make a series of intentional arguments in support of the basic structure doctrine. The judges argued that the term "amendment" could not be thought of by the founders as the ability to destroy the fundamental characteristics of the Constitution. They also argued that the preamble intended to express the history of India at that point in history and the true will of the people. Therefore, the principles contained in the preamble were intended to be beyond the amendment. Finally, the judges question the ability of successive constitutional amendments to communicate the will of the people, since the amendment in India is easier than in most other countries.<sup>3</sup>

## Present status of the Basic Structure

### Views of the Various Judges

#### Basic Features of the Constitution according to the *Kesavananda* verdict<sup>4</sup>

Each judge presented separately what they thought were the fundamental or essential characteristics of the Constitution. Not even the unanimity of opinion was in line with the majority opinion.<sup>5</sup>

Sikri, C.J.<sup>6</sup> He explained that the concept of basic structure included:

- The supremacy of the Constitution
- Form of republican and democratic government
- The secular nature of the Constitution
- Separation of powers between legislator, executive and judiciary
- Federal character of the Constitution

Shelat, J. and Grover, J.<sup>7</sup> have added two more basic features to this list:

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

Hegde, J. and Mukherjea, J.<sup>8</sup> have identified a separate and shorter list of basic features:

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<sup>2</sup> A.I.R. 1973 S.C. 1461.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Keshavananda Bharati Sripadagalvaru v. State of Kerala*, [A.I.R. 1973 S.C. 1461; (1973) 4 SCC 225.].

<sup>5</sup> *Venkatesh Nayak* "The Basic Structure of the Indian Constitution" available at <http://www.constitutionnet.org/vl/item/basic-structure-indian-constitution> (last visited 14/04/2018).

<sup>6</sup> *Kesavananda Bharti Sripadagalvaru v. State of Kerala*, [A.I.R. 1973 S.C. 1461; (1973) 4 SCC 225.].

<sup>7</sup> *Kesavananda Bharti Sripadagalvaru v. State of Kerala*, [A.I.R. 1973 S.C. 1461; (1973) 4 SCC 225.].

- Sovereignty of India
- Democratic character of politics
- Unity of the country
- Essential characteristics of individual freedoms guaranteed to citizens
- Mandate to build a social state

Jaganmohan Reddy, J.<sup>9</sup> stated that the elements of the basic characteristics are found in the preamble of the Constitution and in the provisions in which they were translated, such as:

- Sovereign, democratic, republic
- Parliamentary democracy
- Three bodies of state

He said that the Constitution would not be in itself without fundamental freedoms and guiding principles.

Only six judges on the bench (therefore a minority view) agreed that the fundamental rights of the citizen belonged to the basic structure and Parliament could not amend it.

### **The Minority vision<sup>10</sup>**

The minority expressed by the justice A.N. Ray (whose appointment as President of the Supreme Court on the heads of the three senior judges shortly after the verdict of Kesavananda was widely considered politically motivated), Justice M.H. Beg, Justice K.K. Mathew and Justice S.N. Dwivedi also agreed that Golaknath had been wrongly decided. They confirmed the validity of the three amendments challenged before the court. Ray, J. argued that all parts of the Constitution were essential and that no distinction could be made between its essential and non-essential parts. Everyone agreed that Parliament could make fundamental changes to the Constitution by exercising its power in accordance with Article 368.<sup>11</sup>

In short, the majority verdict in Kesavananda Bharati<sup>12</sup> recognizes the power of Parliament to change one or all of the provisions of the Constitution, provided that this act does not destroy its basic structure. But there was no unanimous opinion on what designates that basic structure. Although the Supreme Court almost returned to the position of Sankari Prasad (1952) restoring the supremacy of Parliament's power of amendment, it actually further strengthened the power of judicial control<sup>13</sup>

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<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> The majority opinion declared some parts of amendment 25 invalid, especially those relating to Article 31 (c), and confirmed the twenty-ninth amendment, for a detailed account, cf. Austin, Work of a democratic constitution ..., pp. 265ff.

<sup>12</sup> *Ibid.*

<sup>13</sup> Venkatesh Nayak "The Basic Structure of the Indian Constitution" available at <http://www.constitutionnet.org/vl/item/basic-structure-indian-constitution> (last visited 14/04/2018).

## Fundamental characteristics of the Constitution according to the verdict of the electoral case<sup>14</sup>

Once again, each judge expressed opinions about what is equivalent to the basic structure of the Constitution:

According to the judge H.R. Khanna,<sup>15</sup> democracy is a fundamental characteristic of the Constitution and includes free and fair elections

Justice K.K. Thomas<sup>16</sup> argued that the power of judicial review is an essential feature.

Justice Y.V. Chandrachud<sup>17</sup> enumerates four fundamental characteristics that he considers immutable:

- Sovereign state of the democratic republic
- Equality of status and opportunities 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 the Chief Justice of the Apex Court A.N. Ray<sup>18</sup>, the constituent power of the Parliament was above the Constitution itself and, therefore, was not subject to the principle of separation of powers.

Therefore, Parliament could exclude laws relating to electoral disputes from judicial control. It is interesting to note that democracy was a fundamental characteristic, but not free and fair elections.

Ray, C.J.<sup>19</sup>

He argued that ordinary legislation did not fall within the basic characteristics.

Justice K.K. Matthew<sup>20</sup> agreed with Ray, C.J. that ordinary laws did not fall within the basic structure. But he argued that democracy was an essential feature and that electoral disputes had to be decided by the judiciary on the basis of laws and facts.

Justice M.H. Beg<sup>21</sup> disagree with Ray, C.J., on the grounds that it would not be necessary to have a Constitution if the constituent power of Parliament were to be above it.<sup>22</sup> The judicial powers fell to the

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<sup>14</sup> 1975 Supp.S.C.C.1.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> A comparison with the Westminster model would reveal the subtleties involved in this matter more clearly. The United Kingdom does not have a written Constitution such as India or the United States. UU. The British parliament is a sovereign body and there is very little difference between the constitutional law and the common law in that country. The Indian Parliament owes its existence to a written Constitution that was created by another sovereign body, namely the Constituent Assembly. The powers

Supreme Court and the upper courts and the Parliament could not exercise them. He stated that the supremacy of the Constitution and the separation of powers were fundamental characteristics as understood by the majority in the case of Kesavananda Bharati.

Beg, J.<sup>23</sup> stressed that the basic structure doctrine also included ordinary legislation within its scope. Despite the disagreement between the judges on what constituted the fundamental structure of the Constitution, the idea that the Constitution had a central content that was sacrosanct was confirmed by the majority opinion.

### **The Basic Structure Doctrine been reaffirmed again in: the cases of Minerva Mills<sup>24</sup> and Waman Rao<sup>25</sup>**

In less than two years since the reinstatement of the Parliament's powers of amendment to almost absolute conditions, the owners of Minerva Mills (Bangalore), a sick industrial society nationalized by the government in 1974, contested the 42nd amendment before the Supreme Court.

Mr. N.A. Palkhivala, a recognized constitutional lawyer and defender of signatories, chose not to challenge the government's actions simply in terms of violating the fundamental right to property. Instead, he defined the challenge in terms of Parliament's power to change the Constitution.

Mr Palkhivala claimed that Article 55 of the amendment had placed unlimited power of amendment in the hands of Parliament. The attempt to immunize the constitutional amendments against the judicial review violated the basic structure doctrine that had been recognized by the Supreme Court in the electoral cases of Kesavananda Bharati and Indira Gandhi. He also claimed that the amended Article 31c was constitutionally bad, as it violated the preamble to the Constitution and the fundamental rights of citizens. He also eliminated the power of judicial control.

President of the Court Y.V. Chandrachud, by pronouncing the majority judgment (4: 1), confirmed both competitions. The majority opinion confirmed the power of judicial review of the constitutional amendments. They argued that clauses (4) and (5) of Article 368 confer unlimited power on the Parliament to amend the Constitution. They said that this deprived the courts of the possibility of challenging the amendment, even if it damaged or destroyed the basic structure of the Constitution.<sup>26</sup>

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of Parliament (including the power to change) are not on the juris, but derive essentially from this Constitution. Therefore, it cannot be said that it occupies a position superior to the Constitution.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Minerva Mills v. Union of India* AIR 1980 SC 1789;

<sup>25</sup> *Waman Rao v. Union of India*, AIR 1981, SC 271; AIR 1980, SC 1789.

<sup>26</sup> *Ibid.*

The judges, who have agreed with Chandrachud, C.J., have established that a power of amendment limited in itself is a fundamental characteristic of the Constitution.

Bhagwati, J. the dissident judge also agreed with this viewpoint stating that no authority, however high, could claim to be the sole judge of its power and actions under the Constitution.

The majority believe that the amendment to Article 31C is unconstitutional because it has destroyed the harmony and balance between fundamental rights and management principles, which is an essential or fundamental feature of the Constitution. The amendment to Article 31c remains a dead letter, as it has not been repealed or deleted by Parliament. However, the cases in question are decided as they existed before the forty-two amendments.<sup>27</sup>

In another case relating to a similar dispute concerning agricultural property, the Supreme Court declared that all constitutional amendments made after the date of the Kesavananda Bharati ruling were open to judicial review. All the laws included in the Ninth Calendar after the date of the Kesavananda Bharati ruling were also open for review in the courts. They can be challenged on the grounds that they are beyond the constituent power of the Parliament or that they have damaged the basic structure of the Constitution. In essence, the Supreme Court has reached a balance between its authority to interpret the Constitution and the power of Parliament to amend it.

Prof. Upendra Baxi believes that the constitutional consent has been repeated in the Keshavananda case imposes basic structural limits on the power to amend of the legislature, the subsequent ruling by the Supreme Court does not fully explain what these limits are precisely. According to him, the decision taken so far indicates only the following limitations, viz.

- The total repeal of the Constitution would violate the basic structure,
- Any expansion of art. 388 to achieve the consequence of the total repeal would also be in violation of the basic structure,
- Any attempt to deprive the Court of its power of judicial control over constitutional amendments would also be transgressive of the basic structure,
- The freedoms guaranteed by articles 14, 19 and 21 constitute limits on the power to change,
- Any attempt to repeal Part IV of the Constitution may violate the basic structure, and
- The democratic nature of the Constitution cannot be validly transformed through the use of Article 368.<sup>28</sup>

<sup>27</sup> *Ibid.*

<sup>28</sup> "Basic Structure in Post Keshavananda's Case" available at <http://shodhganga.inflibnet.ac.in/bitstream/10603/39853/9/chapter%205.pdf> visited on 10/04/2018.

## LIMITATIONS OF THE DOCTRINE OF BASIC STRUCTURE

### Attempt to reverse the doctrine of basic structure

The verdict in the Kesavananda Bharati case<sup>29</sup> was subjected to a solemn endeavor to invalidate it by a court review of 13 judges for two days on 10 November 1975 and 11 November 1975. On the third day, the review was unexpectedly and inexplicably abandoned while the bank it was melted. There is no official record or report of this attempt to examine the case of Kesavananda Bharati.<sup>30</sup> This effort was made during emergency heights when even the detail of court judgments was restricted. To everyone's surprise A.N. Ray J has been named President of the Supreme Court of India, which replaces the aging of Shelat, Grover and Hegde JJ, apparently because, in his rulings in the Kesavananda Bharati case,<sup>31</sup> they had signed the limits of Parliament's power to amend. These three judges have resigned from the bench immediately, so that the judgment of Kesavananda Bharati has been very controversial. On June 12, 1975, the Supreme Court Sinha J Allahabad convicted Indira Gandhi two corrupt election practices under Article 123 (7) of the law on behalf of 1951 persons and disqualified for six years in a petition of choice presented by Raj Narain. . The judge, however, suspended the trial for 15 days to allow him to appeal to the Supreme Court. This decision came during the Supreme Court holidays. Krishna Iyer J was the holiday judge before whom urgent requests had to be made. Krishna Iyer, J., was contacted by the Minister of Union Law, H.R. Gokhale, who tried to meet him in his residence. Since this was in contrast to the protocol, Iyer J did not want to meet him and asked him to tell Mrs. Gandhi's attorney to present the apelación.<sup>20</sup> In a one-day hearing on June 23, 1975, he asked for a Palkhivala moratorium immediate and unconditional disqualification of Indira Gandhi. in the national interest, while Shanti Bhushan, appearing on behalf of Raj Narain, opposites. However, Iyer J rejected the request for total suspension from a conditional order, allowed him to attend Parliament as a member and as prime minister to participate in his work without voting rights, pending final decision in the electoral appeal. H.M. Seervai believes that this is the "best hour" of the Supreme Court.<sup>32</sup>

During the slope of this appeal to the Supreme Court on August 10, 1975, the Parliament passed the 39th Amendment of 1975 with the introduction of Article 329A of the Constitution retrospectively removing the jurisdiction of the courts in a relative dispute with the election of the prime minister. The Parliament also adopted the Elections Act (Amendment) Act of 1975 that the electoral crimes for which Indira Gandhi was disqualified were retrospectively canceled by changing the law itself. These amendments were challenged in

<sup>29</sup> *Kesavananda Bharti Sripadagalvaru v. State of Kerala* [A.I.R. 1973 S.C. 1461; (1973) 4 SCC 225.].

<sup>30</sup> T.R. Andhyarujina, "The untold story of how Kesavananda Bharati and the basic structure doctrine survived an attempt to reverse them by the Supreme Court" in Sanjay S. Jain and Sathya Narayan (eds.), *Basic Structure Constitutionalism – Revisiting Kesavanada Bharati* 133 (Eastern Book Company, 1st edn., 2011).

<sup>31</sup> *Kesavananda Bharti Sripadagalvaru v. State of Kerala* [A.I.R. 1973 S.C. 1461; (1973) 4 SCC 225.].

<sup>32</sup> *Setu Gupta* (LL.M. scholar at the Indian Law Institute): "Vicissitudes And Limitations Of The Doctrine Of Basic Structure" in *Ili Law Review Winter Issue 2016*.

court because they were destructive on the basic structure of the Constitution and there was confidence in Kesavananda Bharati. The five judges were bound by the decision of 13 judges in Kesavananda Bharati.

On 1 September 1975, while the appeal was heard, Niren In conjunction with the Attorney General of Tamil Nadu presented an oral request to Ray CJ for an early hearing of some petitions in cases of land borders involving the structure of basis of the doctrine. Prior to the delivery of the ruling in the event, October 20, 1975, Ray, CJ issued a written statement that the Supreme Court would hear arguments on November 10, 1975, two questions, namely the order, if the basic structure of the doctrine has not limited either the power of the Parliament to amend the Constitution and whether Nationalización Bank case<sup>33</sup> had decided correctly or not. To this end, a bank of 13 judges would be established. On 7 November 1975, he upheld the appeal of Indira Gandhi and the decision of the Allahabad High Court was excluded, however, amendment 39 ° was considered unconstitutional.

Palkhivala strongly opposed to the revision of Kesavananda Bharati and 9 November 1975 wrote a letter written for Indira Gandhi pleading in the interest of the nation to prevent the Supreme Court from revising the basic structure doctrine and claiming that, if unlimited power is granted change, democracy, unity and integrity of India would disappear and there would be no one to hold the whole country together, after Indira Gandhi. If Indira Gandhi considered this letter or not somehow is still a matter of speculation. The hearing began on 10 November 1975 and in a first Palkhivala raised objections to the revision of the Kesavananda Bharati and the consequences of unbridled powers of Parliament's amendment. On November 11, 1975, the attorney general responded to Palkhivala's arguments by stating that because of the basic structure doctrine, the constitutional situation in the country had become chaotic and that every constitutional amendment was challenged in several higher jurisdictions. the whole country and nobody, including the Supreme Court, was sure of what the fundamental structure of the Constitution really was. When asked by the judge, if the attorney general could point to a pending lawsuit in which the judge found it difficult to apply the concept of basic structure, the attorney general could not, because unless a request, all were linked to the right to property that had been clearly declared as not part of the basic structure. On November 12, 1975, when the Bank met, to everyone's surprise, the President of the Supreme Court declared that the Bank had been dissolved and observed that the arguments "to go on air" were found for two days. Later in 2005, in an article in The Hindu, Krishna Iyer J said he expressed his appreciation for the arguments Palkhivala Mathew J and perhaps misunderstood, said Ray CJ., Who Iyer J had "unbalanced" a number of judges in the bank for his favorable vision - Palkhivala. But, it is clear that the president of the court was uncomfortable with the doubts expressed by some of his colleagues and the way he ordered the review. Therefore, the basic

<sup>33</sup> *R.C. Cooper v. Union of India*, (1970) 1 SCC 248.



structure doctrine has survived a revision and a possible overthrow. Since then, there has been no suggestion on his review.<sup>34</sup>

## Conclusion

The basic structure of the constitution is an unclear and flexible concept. There was no harmony among the judges with respect to the components of the basic structure of the constitution. The basic distinctiveness illustrated in the five judgments by the majority of the judges of Kesavananda do not Tally, if we take the common denominator, very few of them can be considered as acceptable basic characteristics for the seven judges. To a certain extent, they overlap. Each of them is vague in itself. The task of identifying basic features is difficult and time-consuming. Nor is the court able to identify once and for all the components of the basic framework of neither the Constitution nor the Parliament has any clear idea of the extent of its power of change. As a result of this situation, the judiciary has become the most powerful wing of the "State" with respect to the legislature and the executive branch.<sup>35</sup>

The 'basic structure' doctrine served the realm during periods of turbulence in which Parliament was in the mood to resort to Article 368 in a reckless manner, as it did in promulgating amendment 39 to save Indira Gandhi's election. Although the Supreme Court has succeeded in underlining the lasting nature of the foundations of the Constitution, the validity of the doctrine will remain an open question. The adoption of the doctrine sometimes leads to inconsistencies and Kesavananda Bharati, in which the Court, stating that the separation of powers is a fundamental characteristic of the Constitution, has disturbed the checks and balances provided by the Constitution between the executive, the legislator and the Court.

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<sup>34</sup> *Setu Gupta* (LL.M. scholar at the Indian Law Institute): "Vicissitudes And Limitations Of The Doctrine Of Basic Structure" in *Ili Law Review Winter Issue 2016*.

<sup>35</sup> P.P. Rao, "Basic Features of the Constitution", in *The Practical Lawyer*, (2000) 2 SCC (Jour) 1.