



META-CONSTITUTIONAL CONCEPTS AND THEIR IMPORTANCE

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ABSTRACT:

The NJAC judgment delivered by the apex court was a huge sensation in which the independence of the judiciary was upheld. Judiciary set its foot down on letting the executive interfere in its functioning. Independent judiciary is a part of the 'Basic structure of the Constitution'. So, the court prima facie upheld the doctrine of basic structure. The Doctrine of Basic Structure was not a part of the bare text of our Constitution when it came into force nor was it added to the constitution by way of an amendment. Yet, it is given sovereign importance to an extent that even fundamental rights can be amended or declared ultra vires, if it transgresses any element of the basic structure of the Constitution. To this extent even the recent Puttaswamy v. Union of India judgement guarantees a new fundamental i.e., right to privacy though it is not a part of the Constitution. Such kind of rights that evolve by application of judicial mind can be called as meta-constitutional concepts. They help in the progression of the law and the society. This research paper will delve into how some of the meta-constitutional concepts evolved and why they are so essential.

CHAPTER 1: INTRODUCTION

India being a democratic country has a constitution, according to which it carries out its operations. Constitution contains rules or principles governing the conduct of a nation or a state, and establishing the concept, character, and structure of the nation. It lays down the basic structure of the government under which its people are to be governed. If these laws, legal theories, norms, customs which constitute the basic law of the land are inscribed on a document it is known as a written constitution.

Generally, two sets of principles make up the rules of constitutional law. One set of rules is contained in the written constitution of a country and other includes the constitutional interpretations made by the courts in order to fill up the constitutional gaps. These unwritten parts of this written constitution are called as meta-constitutional concepts and they are part of the architecture of the constitution just as written principles. They can come from historical context, court interpretations or conventions which evolve and become deeply rooted.

India has a written constitution and is known as the longest constitution. However, the written constitutions cannot provide for every eventuality¹. It must evolve with time and respond to unanticipated demands. The constitution lays down the inner boundaries and the unwritten parts extend those inner boundaries. These meta-constitutional principles have never been enacted in the form of laws. Hence, it can be said that a

¹Supreme Court Advocates-on-Record Assn v. Union of India, (1993) 4 SCC 441.



'Meta Constitution' lays down the outer boundaries of a constitution.

This is a way of developing the constitution without undergoing the conventional process of making changes in the law. These concepts are developed on the basis of the principles of written constitution. However, these concepts enable a immutable structure and are vital to keep up with the varying social and political needs and requirements. It is also imperative to the functioning of the democracy. Each of these principles have a meaning as it basis itself on need of the hour and it helps to evolve the society and does not keep it stagnant.

Sir Ivor Jennings² developed criteria for deciding whether or not a particular Constitutional Convention should exist, namely: a) What are the precedents? b) Did the actors(judges) believe they were bound by a rule? c) Is there a reason for the rule? Similarly, even in case of meta-constitutional concepts it has to be seen if, the concepts interpreted by the judges were based on the constitutional principles and how relevant they are.

But, if the law diverges from its written and generally worded constitution, it can sometimes be radically incomplete for the understanding of a layman or an ordinary citizen. Though it is of paramount importance, he might not know about the existence of the concept. It is an obligation on

the court to implement these concepts. Meta constitution as a concept is widely accepted in countries like Ireland, Cannada, U.S.A. In India, certain principles like rule of law, natural justice, basic structure doctrine, judicial review, federalism, separation of powers, some of the parliamentary privileges have found their way into the system based on the meta-constitutional concept.

CHAPTER 2: RULE OF LAW “AN UNRULY HORSE”.

2.1. Evolution of the concept

Rule of law is a manifestation of moral thought and has been asseverated by many democracies in the world inherent to good governance.

Rule of law has been defined as “the absence of arbitrary power on the part of the government (also termed as supremacy of law)”³ but still it has a very broad meaning attached to it and A.V.Dicey who is considered as a profounder of modern rule of law, in his writings on the British Constitution included three distinct but kindred ideas to the concept of Rule of Law⁴: (i) Absence of arbitrary power (ii) Equality before law (iii) Individual liberties.

In India, Supremacy of the Constitution is given importance and our constitutional framers did not believe in giving arbitrary

² *Ibid*; See also, Jennings, 'The Law and the Constitution', Chapter III, <http://www.nadr.co.uk/articles/published/ConstitutionalLaw/Chapter005Conventions.pdf>, (last visited on 7th December 2017).

³ Bryan A. Garner, Blacks Law Dictionary, 1827, 10th Edition, 2014, Thomson Reuters, U.S.A.

⁴ See M.P. Jain Indian, constitutional law, Pg-7, 7th edition, 2014, Lexis Nexis ; See also, A.V. Dicey, Introduction to the study of the law of the Constitution, part II, Chapter 4, page 110-115, http://files.libertyfund.org/files/1714/0125_Bk.pdf, (last visited on 9th December 2017).



powers to any organ or any authority which implies that they deemed Constitution to be the supreme law of the land.⁵ But, this is expressly not stated anywhere in the Constitution and is a convention which is strictly followed over years. Judiciary is considered to be the custodian of the same⁶. In 1973 supremacy of the Constitution was termed as a part of the doctrine of basic structure and has been acknowledged⁷.

⁵See generally, Constituent Assemble Debate, **Monday, the 23rd May 1949, Sardar Hukam Singh**: “This is so evident that I might be met with the reply that in all constitutional head always acts on the advice of his Council of Ministers and in other constitutions it is never put down expressly that he should do so. With that consciousness I have moved this amendment, because I feel that we are framing a written constitution wherein we are giving every detail, with the result that it is so cumbersome and bulky. Under such circumstances I feel that a matter of such importance and which is so apparent must be expressly put down. It may be said that conventions would grow automatically and the President shall have to take the advice of his Ministers. My submission is that here conventions have yet to grow. We are making our President the constitutional head and we are investing him with powers which appear dictatorial. Conventions would grow slowly and as this constitution is written and every detail is being considered, why should we leave this fact to caprice or whim of any individual, however high he may be? If we clearly put down that he is to act on the advice of his Ministers, it is not derogatory to his position” <http://parliamentofindia.nic.in/ls/debates/debates.htm>, (last visited on 13th December 2017, 6:30 P.M); See also Constituent Assembly Debate, Tuesday, the 15th November 1949, **Pandit Thakur Das Bhargava**: “We will come to the same situation in the case of article 257 also, because these words occur there in article 257 also, and they are very extensive, very vague, and very general, Sir, I do not visualise that our Central Government as at present constituted will ever exercise such absolute or arbitrary powers. But I should think that no Government of the day should exercise powers in an arbitrary manner. I know that, if he were to do so in every case then the carrying on of

Where supremacy of law enforces checks and balances over the administrative and executive acts and proclaims Constitution to be supreme, the principle of equality before law makes sure that this law is enforced equally on all citizens without any apathy. This is codified concept in our Constitution under Art.14⁸. Supreme Court in *Jaisinghani case*⁹, held that, “the rule of law from one point of view means that decisions should be

the Government of India would be impossible. But what does it mean? It means that every provincial government shall be constantly trembling before the Prime Minister. The Prime Minister of India will become not only the Grand Moghul, but he will be like a lion and the Provincial Governments will be like lambs. The provincial government will be in constant fear and will constantly tremble before him. Such a provision invests the Central Government with absolutely arbitrary power and I maintain that arbitrary powers should not be given to any person. Ministeries and Provincial Governors will have no security or stability and will change at the whim or caprice of the Prime Minister”, <http://parliamentofindia.nic.in/ls/debates/debates.htm>, (last visited on 13th December 2017, 6:30 P.M); See also, Constituent Assemble Debates, 20th August 1949, **Shri H. V. Kamath**: “The other day the Prime Minister, I believe while addressing some public meeting, referred to the frequent conflict between the liberty of the individual and the security of the State. Yes, I agree that the State should be secure so that the individual may have life, liberty and happiness. But the liberty of the individual is not a thing to be trifled with at the mere behest or arbitrary fiat of the executive”,

<http://parliamentofindia.nic.in/ls/debates/vol9p14b.htm>, (last visited on 13th December 2017, 4:30 P.M).

⁶*Indra Sawhney v. Union of India*, AIR 1993 SC 477, Para 623.

⁷*Keshavanand Bharti v. State of Kerala*, AIR 1973 SC 1461.

⁸ Art.14 The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

⁹*Jaisinghani v. Union of India*, [1967] 2 SCR 703.



made by the application of known principles and rules, and, in general, such decisions should be predictable” and in *KeshvanandaBharati*, Rule of law was said to be a part of basic structure and it was said that “The Rule of Law has been ensured by providing for judicial review”¹⁰.

But, in including absence of arbitrariness as an ingredient of rule of law it means that the laws imposed should not be arbitrarily. It was in *Indira Gandhi v. Rajnarain*¹¹, ‘Rule of law’ as an unwritten concept was for the first time explicitly used to declare an amendment void on the basis of arbitrariness. Clause 4 of Article 329-A which was inserted by the thirty-ninth Constitutional Amendment Act 1975 to immunize the dispute with regard to the office of the Prime Minister from any kind of judicial review, was declared to be void by the apex court by stating that “It follows that Clauses (4) and (5) of Article 329-A are arbitrary and are calculated to damage or destroy the Rule of Law”¹²

In, *A.D.M Jabalpur v. Shivkanth Shukla*¹³; *the case was filed in the context of suspension of Art.14, 21 and 22 during the emergency-period and the question raised was ‘whether there was any rule of law in India apart from Art.21?’ Though the majority’s answer was*

in negative, Justice H.R.Khanna opined that, “Even in absence of Article 21 in the Constitution, the state has got no power to deprive a person of his life and liberty without the authority of law” Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning...Rule of Law is now the accepted norm of all civilized societies”. In *Maneka Gandhi v. Union of India*¹⁴, which was a landmark case, the court held that ‘procedure established by law’, must satisfy certain requisites in the sense of being fair and reasonable. The procedure cannot be arbitrary, unfair or unreasonable¹⁵. This definitely made it comprehensible that any law enacted should not be arbitrary. This way comprehensive meaning of rule of law can be said to be a conventional principle.

2.2. Significance of ‘Rule of Law’ based on judicial decisions

The essential characteristic of ‘rule of law’ is equality and absence of arbitrariness but, in India there exist certain privileges like no criminal proceedings whatsoever can be instituted or continued against the President,

Equality, no one shall be exposed to the arbitrary will of the Government”, Para 682.

¹³*A.D.M Jabalpur v. Shivkanth Shukla, AIR 1967 SC 1207.*

¹⁴*Maneka Gandhi v. Union of India, AIR 1978 SC 597.*

¹⁵*Ibid* J. Bhagawati said that, “The principle of reasonableness which is legally as well as philosophically an essential element of equality or non-arbitrariness pervades article 14 like a brooding omnipresence. Thus procedure in article 21 must be ‘right and just and fair’ and not arbitrary, fanciful or oppressive, otherwise it would be no procedure of law at all”.

¹⁰*Supra* note 9, Para 504.

¹¹AIR 1975 SC 2292.

¹²*Ibid* “Imperfections of language hinder a precise definition of the Rule of Law. A. V. Dicey, the great expounder of the rule of law, delivered his lectures as Vinerian Professor of English Law at Oxford, which were published in 1855 under the title, ‘Introduction to the Study of the Law of the Constitution’. But so much, I suppose, can be said with reasonable certainty that the rule of law means that the exercise of powers of government shall be conditioned by law and that subject to the exceptions to the doctrine of



or the Governor of a state, the special privileges enjoyed by the parliamentarians. Though these exceptions are based on reasoning it can be said that the concept of rule of law does not exist in concrete sense. However, complete absence of disparity or inequality is not possible because of certain valid grounds and reasoning. But, it can be said that there has been a constant endeavor to uphold the concept of rule of law and great significance is being attached to it.

Commitment to the 'rule of law' is the heart of parliamentary democracy¹⁶. The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in the favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice¹⁷. Democracy ensures the most favourable conditions for the rule of law. It contains essential safeguards against arbitrariness and provides effective machinery for redress of grievances¹⁸. Dr. Ambedkar also believed in rule of law and democracy. He always insisted that rules of democracy must be based on fair play¹⁹ i.e., democracy cannot exist if there is arbitrariness. Every action of the State authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the

public authority, it should meet the test of Art. 14 of the Constitution and rule of law. Rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens. Even if the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination.²⁰ Rule of law constitutes the core of our constitution and it is the essence of the rule of law that the exercise of the power by the state whether it be the legislature or the executive or any other authority should be within the constitutional limits²¹. Rule of law requires that any abuse of power by public officers should be subject to the control of courts²² and even accountability by police personnel while dealing with anti-national elements is one of the facets of rule of law and it cannot be countenanced in the name of maintaining discipline²³.

Rule of law is not merely for public it ensures social justice based on public order. The law exists to ensure proper social life. Social life, however, is not a goal in itself but a means to

¹⁶Reliance Energy Ltd. v. MSRDC Ltd. (2007) 8 SCC 1, Para 36; *see also*, M/s. GVPR-DARA JV v. State of Rajasthan & Ors, 2016 SCC OnLine Raj 93, Para 79.

¹⁷Kranti Associates Private Limited v. Masood Ahmed Khan, (2010) 9 SCC 496, Para 47.

¹⁸H.R Khanna, *Rule of Law and Democracy - Friends or Foes?*, (1990) 1 SCC J-7.

¹⁹T.K Tope, *Dr Ambedkar and Article 356 of the Constitution*, (1993) 4 SCC J-1.

²⁰Mahabir Auto Stores v. Indian Oil Corporation, AIR 1990 SC 1031

²¹D.C. Wadhwa v. State of Bihar, AIR 1987 SC 579

²²State of Punjab v. Khan Chand, AIR 1974 SC 543.

²³State of Maharashtra v. Saeed Sohail Sheikh, AIR 2013 SC 168.



allow the individual to life in dignity and development himself. This is the rule of law that strikes a balance between society's need for political independence, social equality, economic development, and internal order, on the one hand, and the needs of the individual, his personal liberty, and his human dignity on the other²⁴ and the absence of arbitrary power is the primary postulate of Rule of Law upon which the whole constitutional edifice is dependant²⁵.

It is also said that fundamental rights, subject to social control, has been incorporated in the rule of law²⁶ and certain constitutional provisions including fundamental rights, make it clear that rule of law seeps into the entire fabric of the constitution and indeed forms one of its basic features²⁷. Even with regard to criminal justice system, it mandates that any investigation into the crime should be fair, in accordance with the law and should not be tainted. It should not be influenced or misdirected so as to throttle a fair investigation resulting in the reprobate escaping the punitive course of law.²⁸

The rule of law is an idea about, justice and non-arbitrariness. Democracy and rule of law are interdependent as rule of law aids in better

functioning of democracy. As judiciary is considered the guardian of the rule of law²⁹, it has a duty to ensure that authority is used in a manner which is consistent with rule of law, as it is fundamental principle of good administration³⁰ and has constantly strived to reinforce the mechanisms or facets of rule of law as, rule of law is imperative for existence of democracy. Thus, it can be said that, rule of law is not a far-fetched concept but is not a concept which is concrete as well.

CHAPTER 3: CHRONICLE OF 'BASIC STRUCTURE DOCTRINE'.

3.1.EVOLUTION:

Indian Constitution gives the Parliament the power to make laws subject to the provisions of the Constitution³¹ and Art.368³² invests the power to amend the constitution. One such amendment made, led to the evolution of the doctrine which laid down an express provision that, any amendments made cannot disturb the original integrity of the constitution. In 1951 by way of the first constitutional amendment, Art. 31A and Art.31B were added to the Constitution. Art.31A stated that acquisition of the property by the state could not be questioned

whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

³²See Art.368.(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent

power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

²⁴National Legal Services Authority v. Union of India, AIR 2014 SC 1863, Para 131.

²⁵Som Raj v. State of Haryana, AIR 1990 SC 1176

²⁶Golaknath v. State of Punjab, AIR 1967 SC 1643,

²⁷Bachan Singh v. State of Punjab, AIR 1982 SC 1325.

²⁸Subramanian Swamy v. CBI, AIR 2014 SC 2140

²⁹T.N.Godavarman v. Ashok Khot, AIR 2006 SC 2007, Para 5.

³⁰EpuruSudhakar v. Govt. of A.P, AIR 2006 SC 3385, Para 65-68.

³¹ Art.245.(1) Subject to the provisions of this Constitution, Parliament may make laws for the



even if it transgressed any of the fundamental rights including right to equality³³, property³⁴, speech³⁵ or occupation³⁶. Article 31B created the Ninth Schedule, which was a protected schedule, that is, laws inserted in this schedule by way of amendments, could not be invalidated. This amendment attacked Art.13(2)³⁷, which prohibited legislature from making any laws which will abridge the fundamental rights of the citizens.

By, first amendment only land reform laws were brought under this schedule and in *Sankari Prasad v. Union of India*³⁸, this was challenged by the property owners under Art.13³⁹, and the question whether fundamental rights can be amended by means of Art.368 came up for consideration. The Court held that, the word amendment does not come under the scope of law under Art.13⁴⁰ and hence, strengthened the power of the parliament to amend the constitution. Same stance was taken by the apex court in *Sajjan Singh case*.⁴¹

In *Golak Nath case*⁴², when the question on validity of Art.31A and 31B popped up again, an eleven judge bench reversed the position and opined that 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). By way of this judgment, judiciary revived back its muscle to review the parliamentary actions. This led to loggerheads between judiciary and legislature. Legislature then inserted Art.13(4)⁴³ and Art.368(3)⁴⁴ by 24th amendment Act, to quench its thirst for power. This over ambitious act of legislature was questioned in *Keshavanandha Bharathi Case*⁴⁵. Even out of the thirteen judge bench decided that, Parliament's inherent power under Art.368 was restricted by the impregnable nature of the Basic features of the Constitution or the Basic Structure of the Constitution⁴⁶. It was firmly said that basic

³³See Art.14-The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

³⁴See generally Originally, the Constitution guaranteed a citizen, right to acquire hold and dispose of property under Art.19(f) and Art.31 as a fundamental right. This right was repealed in the year 1978 by way of 44th constitutional amendment and Art.300A was introduced in Part XII making the right to property only a constitutional right.

³⁵See Art.19 (1)(a) All citizens shall have the right to freedom of speech and expression.

³⁶See Art.19 (g) All citizens shall have the right to freedom to practise any profession, or to carry on any occupation, trade or business.

³⁷See Art.13(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

³⁸*Sankari Prasad Singh v. Union of India*, AIR 1951 SC 458.

³⁹*Supra* note 34.

⁴⁰See Art.13(3) (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

⁴¹*Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845.

⁴²*Supra* note 28.

⁴³ Art.13(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.

⁴⁴ Art.368(3) Nothing in article 13 shall apply to any amendment made under this article.

⁴⁵ *Supra* note 9.

⁴⁶See *The minority consisting of Justices Ray, Mathew, Beg, Dwivedi, Palekar and Chandrachud* held that Parliament had unlimited power of constitutional amendment.

See *Navajyoti Samanta & Sumitava Basu*, TEST OF



structure or Basic features of the constitution cannot be destroyed⁴⁷.

3.2.EFFECTIVENESS:

Though the Court in KeshavnandhaBharathi held that, the power of Parliament to amend was impliedly limited by the doctrine of basic structure, it did not clearly define or explain what exactly constituted the basic structure⁴⁸. In *I.R. Coelho*⁴⁹ the court made an attempt to define what was basic structure and held that, “*the actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact*

test would determine the validity of the challenge.”

Various features have been brought under the umbrella of Basic structure Doctrine ever since KeshavanandhaBharathi Case and some of them are Supremacy of the constitution⁵⁰; democratic form of government and secularism⁵¹; the principle of separation of powers⁵²; Federal character of the constitution⁵³; Unity and Integrity of the

BASIC STRUCTURE: AN ANALYSIS, NUJS Law review(2008), http://nujslawreview.org/wp-content/uploads/2015/02/navajyoti_samanta_and_su_mitava_basu.pdf, (last visited 19th December 2017, 4:30 P.M); See also S.P.Sathe, “Judicial Review in India: Limits and Policy”, Ohio State Law Journal, 870-899, vol. 35, no. 4 (1974), https://kb.osu.edu/dspace/bitstream/handle/1811/69416/OSLJ_V35N4_0870.pdf, (last visited 18th December 2017, 4:00 P.M).

⁴⁷*Supra* note 9, **Sikri, C.J.** explained that the concept of basic structure included: Supremacy of the Constitution, 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.

⁴⁸THE DOCTRINE OF BASIC STRUCTURE IN PRE AND POST KESHAVANANDA’S CASE, <http://shodhganga.inflibnet.ac.in:8080/jspui/bitstream/10603/39853/9/chapter%205.pdf>, (last visited on 18th December 2017, 5:10 PM).

⁴⁹*I.R. Coelho v. State of Tamil Nadu*, AIR 2007 SC 861.

⁵⁰*Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461; *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SCC 2299; *Raja Ram Pal v. Speaker, Lok Sabha* AIR 1965SC 745; *Kuldip Nayyar v. Union Of India*, AIR 2006 SC 312; *I.R. Coelho v. State of T.N.*, AIR 2007 SC 861;

⁵¹ *S.R. Bommai v. Union of India*. AIR 1994 SC 1918; *Poudyal v. Union of India*, AIR 1993 SC 1804; *State of Karnataka v. Praveen Bhai Thogadia*, AIR 2004 SC 2081; *M.Nagaraj v. Union of India*, (2006) 8 SCC 212; *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1.

⁵²*Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461; *I.R. Coelho v. State of T.N.*, AIR 2007 SC 861; *Ashoka Kumar Thakur v. UOI*, (2008) 6 SCC 1; *Bhim Singh v. Union of India*, (2010) 5 SCC 538; *State of T.N v. State of Kerala*, AIR 2014 SC 2407;

⁵³*Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461; *S.R.Bommai v. UOI*, (1994) 3 SCC 1; *State of Karnataka v. Union of India*, AIR 1977 SC 1361; *I.R. Coelho v. State of T.N.*, AIR 2007 SC 861; *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1.



nation⁵⁴; Rule of Law⁵⁵; Judicial review⁵⁶; Independence of judiciary⁵⁷. Basic structure as a theory has evolved since its inception. Once labeled as a basic feature, these rights have *ad nauseam* been upheld in plethora of judicial decisions because of the fact that they part a of the basic structure.

The framers of the constitution entrusted the legislature with complete supremacy to amend the constitution and there was no provision in the constitution which could safeguard its core ideals and essential rights, which made the constitution sacrosanct. So, with the intention to preserve these foundational ideas of the Constitution, the Supreme Court pronounced that the parliament could not deface the basic features of the Constitution which are sacred to the ideals of the Indian society. This effectually put a brake on the authority of the Parliament to mutilate the Constitution under the pretext of amending it. Thus, 'basic structure doctrine' is a judicial innovation and is an unwritten concept or rather a meta-constitutional concept and its evolution is celebrated because it helped to preserve the originality of the constitution.

CHAPTER 4: A NARRATIVE-INDEPENDENCE OF JUDICIARY

4.1.EVOLUTION

Importance of the independence of the judiciary was long ago realized by the framers of the constitution but an explicit provision was not incorporated in the constitution. It was inferred by the judiciary from constitutional gaps, from the letters of various provisions of the Constitution thereby, making it a meta-constitutional concept. By further judicial pronouncements it started attaching importance to the concept and was marked as a basic feature.

4.1.1. Constitutional assembly debates

To secure independence of the judiciary a motion was introduced in one of the constituent assembly debates that, under Chapter IV of part V : "102-A, Subject to this constitution the Judiciary in India shall be completely separate from and wholly independent of the Executive or the Legislature". It was initiated by Prof. K. T. Shah as he considered that, judiciary, which is the main bulwark of civil liberties, should be completely separate from and independent of the Executive, whether by direct or by indirect influence as there possibility of the translation, that has frequently occurred in

⁵⁴KesavanandaBharatv. State of Kerala,, AIR 1973 SC 1461; Raghunath Rao v. Union of India, AIR 1993 SC 1267; KuldipNayarv. Union Of India,AIR 2006 SC 312; Vishal N. Kalsariav. Bank of India, 2016 SCC Online SC 64.

⁵⁵ Indira Nehru Gandhi, Smtv.Rajnarain, AIR 1975 SC 2292; *I.R. Coelho v. State of T.N*, AIR 2007 SC 861; Sub-committee on Judicial Accountability v. UOI, (1991) 4 SCC 699; Madras Bar Assn. v. UOI, (2014) 10 SCC 1.

⁵⁶KesavanandaBharatv. State of Kerala,,AIR 1973 SC 1461; Minerva Mills v. Union of India, AIR 1980 SC 1789; A.K.Behrav.UOI, (2010) 11 SCC 322; Parkash Singh Badalv. UOI, AIR 2007 SC 1274;

⁵⁷ Union of India v.Sankal Chand, HimmatlalSheth, AIR 1977 SC 2328 ; S.P Gupta v. Union of India, AIR 1982 SC 149; Supreme Court Advocates-records- Association v. Union of India, AIR 1994 SC268; State of Bihar v. Bal Mukund Shah, AIR 2000 SC 1296;



the past, of high judicial officers being available for promotion or transfer to equally high or even higher executive offices and he opines that judges should be barred from translation, as it will unconsciously influence the judges and judgments, in the hope of proper appreciation being shown at suitable moments by vesting the powers. He also stated that, as a sound principle of administration of justice, judiciary must not be influenced by legislative acts and must confine itself to the final Act of the legislature as it has been worded and remain the supreme authority for interpreting that law. Hence, he considered this amendment will enunciate a very important proposition in making of constitution and for securing the independence of the Judiciary.⁵⁸ Some of the members thought the independence of the judiciary can be secured, by having a proper method of the appointment of the judges, by providing that there shall be no interference by the executive in the judicial functions of the judicature, by making the judges not easily removable and if the judiciary is not separated from the influence of the Executive there will be intellectual corruption⁵⁹ but, some thought that separation and independence of the judiciary is not

practicable at this stage.⁶⁰ So, the motion was negated .

Though the motion for rigid independence of judiciary was set aside certain provisions were included in the constitution which indirectly set the tone for judicial independence in our country.

4.1.2. Constitutional Provisions and judicial Pronouncements

Every Judge of the Supreme Court is appointed by the President after consultation with such of the Judges of the Supreme Court and the High Courts in the States, the Chief Justice of India⁶¹ and the power of appointment of Judges of High Courts is exercisable only after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court.⁶² Earlier, in the first judges transfer case, it was held that consultation by the president while appointing the judges was a mere Suggestion, not concurrence and was not binding on the president⁶³. But, in *Supreme Court Advocates on record v. Union of India*⁶⁴, which is known as second judges transfer case, it was held that chief justice

⁵⁸Prof.K.T.Shah, Constituent assemble debates, Monday, the 23rd May 1949, <http://parliamentofindia.nic.in/ls/debates/vol8p6.htm>, (last visited on 20thDecember 2017).

⁵⁹*Ibid* Mr. Naziruddin Ahmad.

⁶⁰*Ibid* Mr. Munshi.

⁶¹ Art.124(2), Constitution of India, 1950-every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years.

⁶² Art.217(1), Constitution of India, 1950-every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and 1[shall hold office, in the case of an additional or acting Judge, as provided in article 224, and in any other case, until he attains the age of sixty two years.

⁶³ S.P Gupta v. Union of India, AIR 1982 SC 149.

⁶⁴ (1993) 4 SCC 441.



should have primacy and the opinion of the Chief Justice shall be binding on the President as he is more competent than other constitutional machineries to accrue the merit of a candidate. This made it clear that, the central government does not have unfettered power and have to act after effective consultation⁶⁵. In third-judges case⁶⁶, in 1998, it was held that even the advice given by Chief Justice should be with proper consultation with four other senior-most judges, otherwise it is not binding. This set the base for collegium system and was one of the prominent ways to ensure independence of judiciary. Judges are not employees of the State holding office during the pleasure of President/Governor of the State, as the case may be.⁶⁷ Their tenure is secured⁶⁸ and no discussion can take place in Parliament with respect to the conduct of the judge of Supreme Court or High Court in the discharge of his duties except upon a motion for presenting an address to the President for the removal of the judge⁶⁹. This shields the Supreme Court and the High Courts from political influence, and thus ensures their independence from political pressures and authority. Even the process of removal is intricate in the sense that, he cannot be impeached except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by

a majority of not less than two-thirds of the members of that House present and voting.⁷⁰ Further, the only grounds for his removal can be proved misbehavior or incapacity⁷¹.

The allowances of the judges is also an aspect which makes the judges independent. They are charged on the Consolidated Fund of India in case of Supreme Court judges and the Consolidated Fund of state in the case of High Court judges. Though the Parliament is authorized to prescribe the privileges, allowance and pension of the Judges of the Supreme Court, it is subject to the safeguard that these cannot be varied or altered during the course of the tenure to their disadvantage⁷².

Even under Art.50 of the Constitution it is given that, State shall take steps to separate the judiciary from the executive in the public services of the State. But, separation is directed only in public services of the state and it is a non-justiciable provision. These provisions in a circumlocutory way indicate that judiciary should be independent but, independence of judiciary was expressly given prominence after, it was brought under the umbrella of basic structure doctrine by stating that, it is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity⁷³ and was

⁶⁵ *But see* Constituent assembly debate, Tuesday, 24th May, 1949, Prof. Shibban Lal Saksen, during constituent assembly debates had suggested that the appointment of Judges should be confirmed by 2/3rd majority of the houses of parliament but, this was rejected by the house, <http://parliamentofindia.nic.in/ls/debates/vol8p7b.htm>, (last visited on 20th December 2017).

⁶⁶ In Re-Special Reference, AIR 1999 SC 1.

⁶⁷ All India Judges Association v. Union of India, AIR 1993 SC 2493

⁶⁸ *Supra* note 62 and 63.

⁶⁹ Art.121, Constitution of India, 1950.

⁷⁰ Art.124(4) and (5), Constitution of India, 1950

⁷¹ *Ibid.*

⁷² Art.125(2), Constitution of India, 1950.

⁷³ *Supra* note 64.



further reaffirmed by other judgments⁷⁴. Even in the NJAC judgment, Supreme Court declared the 99th Constitutional Amendment Act as unconstitutional and void, on the ground that it violated, 'Independence of the judiciary' which is a basic feature of the constitution⁷⁵.

4.2.NECESSITY

The doctrine of Separation of Powers exists to draw limits for the working of all the three organs of the state: Legislature, Executive and the Judiciary. It accommodates an obligation to the judiciary to act as a watchdog and to check whether the executive and the legislature are working within their points of confinement under the constitution and not meddling in each other's working. This errand given to the judiciary to direct the doctrine of separation of powers. It can't be carried on effectively if the judiciary is not free in itself.

Availability of an independent judiciary and an atmosphere wherein judges may act independently and fearlessly.⁷⁶ The efficient functioning of the Rule of law under the aegis, of which our democratic society can flourish, requires an efficient, strong and enlightened judiciary⁷⁷. Judiciary is the guardian of rule of law. Hence, judiciary is not only the third pillar but also the central pillar of democratic state. If the judiciary is to perform its duties and functions effectively

and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of courts have to be respected and protected at all costs. Otherwise, the very concentration of our constitution scheme will give way and with it will disappear the rule of law and the civilized life in the society.⁷⁸

An effective and autonomous judiciary is a fundamental necessity for a reasonable, reliable and unbiased administration of justice. The freedom of the judiciary holds an outstanding position. It is clear from the historical outline that judicial independence has faced numerous impediments in the past mainly in relation to the appointment of judges but courts have attempted to maintain the freedom of judiciary constantly and in light of the fact that the independence of judiciary is the pre-essential for the effectual implementation of the Constitution.

CHAPTER 5: CONCLUSION

India's commitment to law is created in the Constitution. Our Constitution is primarily a written one but, this text is based on vital unstated principles. Framers intended to keep our Constitution dynamic in nature so that, it could survive contingencies and these constitutional principles have either evolved or become patent in this process. Courts have used structural interpretive methods to uncover these unwritten principles which were in rudimentary form which is evident in

⁷⁴Supra note 58.

⁷⁵KrishnadasRajgopal, *SC Bench strikes down NJAC Act as 'unconstitutional and void*, October 17, 2015<http://www.thehindu.com/news/national/supreme-court-verdict-on-njac-and-collegium-system/article7769266.ece>, (last visited on 21stDecember 2017).

⁷⁶ Om Prakash Jaiswal v.D.K. Mittal ,AIR 2000 SC 1136

⁷⁷ All India Judges Association v. Union of India, AIR 1992 SC 165.

⁷⁸Supra note 31.



the early jurisprudence of the Supreme Court of India. Supreme Court was amongst that part of the society which believed in the supremacy of Parliament⁷⁹. But, Court began to flex its muscles and interpreted the constitutional texts profoundly to protect the principles which the Indian framers saw as *sine qua non* of the Constitution but, which the Parliament was trying to destroy by way of amendments. Interpreting constitutional texts intensely paved way to development of unwritten constitutional jurisprudence in India.

Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations which constitute substantive limitations upon government action⁸⁰. Rule of law is one such principle. When rule of law was an unsophisticated principle, the power used by the government could be arbitrary, yet justifiable. But, now the expression rule of law is clearly manifested and is a strictly accepted norm. It is used to curb the actions of the executive which are not in accordance with the law. Rule of law is the antithesis of arbitrariness. It seeks to maintain a balance between the opposing notions of individual liberty and public order⁸¹ and ‘judicial review’ is an essential derivative of rule of law. Judicial review involves determination of the constitutionality of the law and also the validity of administrative action which will ensure that there is no arbitrariness and maintain rule of law. Judicial review is a facet of judicial functions. Separation of powers is also indirectly guaranteed by rule of law, as rule of law is essential for good governance

of the country, which can be secured through unbiased judiciary. Independent judiciary is viewed as a fundamental safeguard against arbitrary exercise of powers. Basic structure doctrine also acts as a barrier against parliamentary autocracy. The doctrine of basic structure provides a touchstone on which the validity of the Constitutional Amendment Act could be judged. Basic structure doctrine is, in effect, a constitutional limitation against parliamentary autocracy or state action. It ensures that any action by the state does not ‘damage or destroy’ the ‘basic features on which Constitution rests. Any restraint on independence of judiciary, rights and liberties will be at risk. So, independence of the judiciary is the basic requisite for ensuring a free and fair society under the rule of law and basic structure doctrine aids the same.

Indian courts always have relied on these unwritten constitutional concepts, in addition to constitutional text not just for metaphorical purpose, but in lieu of deciding historical cases. These unwritten concepts help to flesh out the written principles. Upholding these fundamental principles, even those principles which are not in written form, is an innate and legitimate characteristic of the judge’s role, which he can carry out efficiently devoid of any interference. Courts assume this role to develop and defend certain fundamental or deep principles which are essential for the growth of democracy. In the absence of

⁷⁹Ram Jawayav. State of Punjab, AIR 1955 SC 549.

⁸⁰ See Quebec Secession Reference, [1998] 2 S.C.R. 217.

⁸¹A.D.M Jabalpur v. Shivkanth Shukla, AIR 1967 SC 1207



independent judiciary, democracy cannot flourish.

Thus, it can be said that, the power to check if any law is violating the Constitutional provisions especially basic features of the Constitution rests with the judiciary, which is known as judicial review and it is the exercise of judicial review by the judiciary which will see to it that there is no arbitrary exercise of authority which is nothing but rule of law. Rule of law is the essence of democracy. However, judiciary can function efficiently if it is independent from external influence and efficient functioning of the judiciary will help to protect constitutional mandates both written and unwritten. Thus, Indian Constitution is not a series of fully integrated texts, but rather a combination of written text and unwritten principles, both of which have binding legal force. They are interlinked and co-exist. It would be impossible to conceive our constitutional structure without them. Thus, significance of these principles cannot per se be underestimated as, they are now a part of what can be called as constitutional morality and serve as a root for the constitutional text to sustain.

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