



A FICTITIOUS MILIEU: THE LEGISLATURE, JUDICIARY & THE INDIAN CONSTITUTION WITH A CODIFIED THE BASIC STRUCTURE

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Introduction

The most wonderful conundrum a Constitutional Law scholar would ever come across is the question: what if we have a codified basic structure doctrine? However, it is insuperable to answer such chimeric enigma through a single line exhaustive sequitur. This paper editorialize the idea that the codification of the basic structure doctrine (hereinafter referred as the 'doctrine') may lead to a double-edged sword consequence. In one hand, Codification may trammel the aborning grounds for judicial overreach but; on the other side it may also act as the cul-de-sacs for the legislature to circumvent the doctrine and annihilate the basic structure of the Constitution, since a codified doctrine will cease to persevere as an undefined gamut. However, a deep cogitation would coax one to reckon that the entire narrative set regarding the unbridled power the doctrine delves on the judiciary by virtue of which it encroaches upon the law-making power of the *populus electus*, should be looked from a different standpoint, which if done would lead to the sequitur whether the codification is desirable or not. Nevertheless, at the end, an undefined doctrine susceptible to kaleidoscopic interpretation versus a defined version of it providing grounds for

flimflamming the doctrine, both are radical evils and thus it is an arduous endeavour to espouse the lesser one.

A Codified Basic Structure Doctrine

At this incipient juncture, firstly it is ineluctable to catechize the scenario where the basic structure of the Constitution is a codified one along with understanding how such codification will be undertaken. Convincingly, the most probable path which would be adopted to effectuate codification is a Constitutional amendment under Article 368 of the Constitution¹ thus would be under basic structure scrutiny; but, even if such codification is conducted without any Constitutional amendment still it has meagre chances of survival since the judiciary would strike it down at the first glimpse, by exercising the power of 'judicial review' which itself stands as the basic structure.²

However, to extrapolate the nuances, it becomes imperative to point out the flaws in the perspective through which the doctrine is perceived. The doctrine is seen as some impediment restraining the law making powers of the legislatures. But, one of the majority judges in *Keshavnanda Bharti*³, Justice Palekar himself asserted that the Parliament has an 'indefinite' power to amend.⁴ However, this power to amend gets startlingly effected when the doctrine gets codified. It needs to be understood that, the doctrine does not create an *ad infinitum* space for the judiciary rather it fosters a leeway for the legislatures itself. It is established by the fact that if, in future, the Parliamentary form of government which is efficacious today

¹ The Constitution of India, 1950, Art. 368

² *Minerva Mills Ltd. & Ors vs Union Of India & Ors* citation, AIR 1980 SC 1789

³ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225

⁴ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, ¶ 1120, (as per Palekar J.)



turns anachronistic and unworkable where a Presidential form of government would be the need of the hour, then a rigid codified basic structure doctrine may not prescribe for such shift even if the new form of government encase all the basic features such as democracy, the supremacy of the Constitution, independence of judiciary etc. The most cogent reason for the codified one not to embrace such shift is the fact that the codification if endeavoured would be done by present Parliamentary form of government and thus they would be the last one to codify the basic structure in such a way which would be susceptible to such change. However, within the same framework, an un-codified doctrine provides enough amplitude for such change which needs to be adopted with the passage of time keeping a single check that the basic features perseveres in the new form too. Hence, the legislatures with an undefined and un-codified basic structure turn to be in a more commodious state than with a codified one, as the former gives them the plenary power of interpreting and formulating any law barring the fact that it does not violates the basic structure of the Constitution. Thus it is established that the undefined doctrine no way binds the legislature's power of law making but just to upheld the checks and balances notion of our Constitution the judiciary is delved with the task of ensuring that the laws and amendments does not destroy the foundation or the basic structure of the Constitution.

Moreover, the rhetoric that the basic structure of the Constitution is stalemated and immune to change is suffering from an ample amount of fallacy too. The verdict of *Keshavnanda Bharti*⁶ never contemplated an exhaustive list citing all the ingredients that consists the basic structure since an element which *ad tempus* does not make the basic structure may in future it be the need of the hour to accrue the same element the tag of the basic structure.⁷ The same is pertinent from the fact that the draftsmen of our Constitution never contemplated that 60 years down the line privacy of an individual may be of utmost importance but since the basic structure was not a codified one with no exhaustive list thus when circumstances entailed, the right to privacy was considered as the part of the basic structure of the Constitution.⁸ Hence a codified basic structure with an exhaustive list would destroy the ground required for the Constitution to rejigger itself over the changed time and circumstances.

Catechizing the *status quo*

Let us now delve *in praesenti* where the doctrine is undefined. But, before investigating into this we must succinctly look at the political imbroglio which resulted into the formulation of the basic structure doctrine. In 1973, Mrs Gandhi's hegemony was turning megalomaniac and it was such that the two *ad hoc* judges in *Kesavananda Bharati*⁹ were handpicked as deemed to be pro-government since back then no collegium system persisted. Thus the

⁵ Gautam Bhatia, *Basic Structure – V: Why are the Basic Features Abstract and Illustrative?*, Feb 17, 2014, available at <https://indconlawphil.wordpress.com/2013/11/12/basic-structure-v-why-are-the-basic-features-abstract-and-illustrative/> (Last Visited on October 18, 2019)

⁶ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225

⁷ Bhatia, supra note 4

⁸ *Justice K.S Puttaswamy (Retd.) and Anr. v. Union of India and Ors*, (2018) 1 SCC 809

⁹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225



doctrine was the need of the hour to stop Mrs Gandhi's rampant voyage which if at that point of time left to perdue could overthrow the institution of the judiciary itself and such foreboding is not void of evidence since the very next day of pronouncement of the judgment, 3 senior-most judges of the SC were superseded and Hon'ble A.N Ray J. was appointed the CJI.¹⁰ Along with that Mrs Gandhi kept no stone unturned to overrule *Kesavananda Bharati*¹¹ through *Minerva Mills v. Union of India*¹² but it was an otiose venture on her part due to some changes in political climate. Hence, it must be understood that the doctrine was born as a result of a tug-war between the legislature and the judiciary.

Professor Conrad's daunting didactic speech

The 'unbridled' power which was accrued to the judiciary by formulating the doctrine of basic structure was thus *sine qua non* during that political imbroglio. However, it can never be concluded that culmination of Mrs Gandhi's regime has made the doctrine supererogatory since what Professor Dietrich Conrad was daunting way back in 1965 while delivering a lecture at Banaras Hindu University was the fact that with no checks if

amending power of the Parliament is considered to be unlimited and unfettered, whether it would even be legit that it amends Article 1 and divides the nation? Or if the whole Constitution is repealed and Moghul rule re-introduced?¹³ Such a scenario may seem outlandish today but the only reason for its improbability is due to the fact that we have the 'basic structure' doctrine bulwarking the Constitution.

Moreover, Prof. Dietrich Conrad and other Constitutions such as that of Germany evidence the fact that there are certain 'implied limitation of the Amending power'.¹⁴ Accordingly, the majority in *Keshavnanda Bharti*¹⁵ too agreed to the fact that the amending power under Article 368¹⁶ is subject to some implied and inherent limitations¹⁷ along with the fact that the word 'amendment' itself purports the limitation,¹⁸ which many scholars perceive as 'a limiting ingredient to the power of legislature'. However, rather than limiting the power, it facilitates the legislatures to freely amend the Constitution including the fundamental rights but only puts a check of the basic structure which is established by the fact that the basic structure is not any particular 'Article' or 'clause' in the Constitution which the judiciary is averting to amend rather it is a

¹⁰ The Economic Times, *Two hours given to Justice A N Ray to decide on CJI post?*, July 16, 2018, available at <https://economictimes.indiatimes.com/news/politics-and-nation/two-hours-given-to-justice-a-n-ray-to-decide-on-cji-post/articleshow/65007659.cms> , (Last Visited on October 18, 2019)

¹¹ *Ibid.*

¹² *Minerva Mills v. Union of India*, AIR 1980 SC 1789

¹³ A. G. Noorani , *Behind the 'basic structure' doctrine*, May 11, 2001, available at <https://frontline.thehindu.com/static/html/fl1809/18090950.htm>_(Last Visited on October 18, 2019)

¹⁴ Article 79(3), Basic Law of the Federal Republic of Germany, 1949 (Germany) ; A. G. Noorani , *Behind the 'basic structure' doctrine*, May 11, 2001, available at <https://frontline.thehindu.com/static/html/fl1809/18090950.htm>_(Last Visited on October 18, 2019)

¹⁵ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225

¹⁶ The Constitution of India, 1950, Art. 368

¹⁷ MAHENDRA PAL SINGH, V. N. SHUKLA'S CONSTITUTION OF INDIA, 1088 (13th ed., 2017)

¹⁸ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, ¶ 499, (as per J.M. Shelat J. and A. N. Grover J.)



doctrine, thus the word 'limitation' can only be used when the judiciary is precluding the legislature to amend a specific clause or article of the Constitution but when such bar is absent, as it is in the case of the basic structure doctrine, it cannot be termed as a limiting agent encroaching on the law making powers of the legislatures. Furthermore, the contention that judiciary attributed some 'Article' of the Constitution the status of the basic structure cannot be accepted as to limit legislatures since only those amendments which if passed would put the Constitution itself at peril are struck down. Moreover, the argument that the 'basic structure' doctrine has no basis within the Constitution itself is suffering from an ample amount of fallacy, since the power to amend comes with 'implied limitations' and this doctrine of basic structure falls within the connotation of this implied limitation's foursquare.

Judiciary: Faith Fetters & Flaws

Regarding the fact that such wide powers delved on the judiciary is susceptible to abuse, the words of former CJI Hon'ble Justice Bhuvneshwar Prasad in one of his most reasoned verdict where he elucidated the thought that "The fact that a power is capable of being abused has never been in law a reason for denying its existence" seems to be applicable.¹⁹ Furthermore, the judge's oath reading as 'bear true faith and

*allegiance to the Constitution of India as by law established... and that I will uphold the Constitution and the laws'*²⁰ precludes them to abuse the power delved on them and makes them to upheld the basic structure in its true essence. There may be decisions such as *Indra Sawhney v. Union of India*²¹ or *S.R. Bommai v. Union of India*²² where ordinary legislations were struck down taking the shield of the basic structure doctrine but even such decisions cannot be a cogent ground to codify the doctrine since it was done in pursuance of 'power to do complete justice under Article 142 of the Constitution' which itself is the part of the basic structure as held in *Union Carbide Corporation v. Union of India*²³. However, in *Kuldip Nayar v. Union of India*²⁴ and *Ashoka Kumar Thakur v. Union of India*²⁵ the previous position set by *Indira Nehru Gandhi v. Raj Narain*²⁶ was reiterated by the Constitutional bench that the doctrine of basic structure can only be used to scrutinize Constitutional amendments.

Conceding to all such facts above regarding oaths and pledges that judges take, it is also a bitter truth that the judiciary exercising the doctrine of basic structure circumvented all such fetters and gradually tilted the points of checks and balances in the Constitution in such a way that made the judiciary least susceptible to scrutiny. Usually, the judiciary is said to be under the checks of the executive mainly vide provision such as Article 124²⁷ where the President appoints the judges of

¹⁹ State of West Bengal v. Union of India, (1964) 1 SCR 371, ¶36 (as per Bhuvneshwar Prasad CJ.).

²⁰ The Constitution of India, 1950, Schedule III, Part B, Item 4, 7.

²¹ Indra Sawhney v. Union of India, AIR 1993 SC 477

²² S. R. Bommai v. Union of India, (1994) 2 SCR 644

²³ Union Carbide Corporation v. Union Of India and Ors., (1989) 3 SCC 38

²⁴ Kuldip Nayar v. Union of India, (2006) 7 SCC 1

²⁵ Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1

²⁶ Indira Nehru Gandhi v. Raj Narain, (1975) Supp SCC 1

²⁷ The Constitution of India, 1950, Art. 124



the Supreme Court and reserves the authority to remove such judges. However, a panoramic review would reflect that the President is just left as a nominal piece in appointment of judges of the Supreme Court. This position was brought about by using the doctrine of basic structure in a very specious manner which is discovered by reading the dissenting judgement of Hon'ble Justice Jasti Chelameswar in the case of Supreme Court Advocates-on-Record Assn v. Union of India²⁸ where he vehemently articulated the notion that the primacy to the opinion of the CJI in the appointment of judges of SC is not the basic feature, rather to preclude the concentration of power regarding appointment of judges solely in the hands of the President or the CJI is the venture which should be inhibited. It was elucidated that the 99th Constitutional Amendment²⁹ forming the NJAC³⁰ had no such impediments within it which embraced such concentration of power and the Law Minister to some extent could be the sole mouth-piece of the Executive however the other five members which included the CJI itself could easily outnumber the Law Ministry's suggestion.³¹ However, it is pertinent that the zeal of granting exclusive and absolute power in the hands of the judiciary regarding its appointment led to the struck down of the NJAC leaving the President to persevere only his 'hands and seal'³² to put it in the suggestion by the collegium and thus defying

him of all other powers which could act as a check on the judiciary. It is established by the fact that the recommendation of the collegium initiated by the CJI, even if rejected by the President at the first instance citing specific reasons, the next time it is forwarded by the collegium after re-consideration, it becomes compulsorily binding on the President.³³ Hence, what the Constitution assembly feared and as a result of which they used the word 'consultation' in Article 124³⁴ and purposely deterred from using the word 'concurrence' so as to preclude the vesting of any absolute power solely in the hands of a single body, the judiciary by using the basic structure doctrine as a ladder, successfully provided the ultimate and absolute primacy to itself.

Article 124³⁵ along with appointments, also vests another check on the judiciary which is the power of the President to remove judges of the SC on the grounds of misbehaviour or incapacity.³⁶ However, an extensive write-up and research is not necessary at this point to arrive at the conclusion that how difficult it is to remove a judge by way of Article 124³⁷ since till date no judges has been successfully impeached, though the process was initiated against one of the SC judge and two HC

²⁸ Supreme Court Advocates-on-Record Assn v. Union of India (2016) 5 SCC 1

²⁹ The Constitution (Ninety Ninth Amendment) Act, 2014

³⁰ National Judicial Appointments Commission Act, 2014

³¹ Supreme Court Advocates-on-Record Assn v. Union of India (2016) 5 SCC 1, ¶1213 (per Chelameswar J.)

³² The Constitution of India, 1950, Art. 124(2)

³³ MAHENDRA PAL SINGH, V. N. SHUKLA'S CONSTITUTION OF INDIA, 509 (13th ed., 2017); Supreme Court Advocates-on-Record Assn v. Union of India (1993) 4 SCC 441

³⁴ Supreme Court Advocates-on-Record Assn v. Union of India (2016) 5 SCC 1, ¶1176-1177 (per Chelameswar J.)

³⁵ The Constitution of India, 1950, Art. 124

³⁶ The Constitution of India, 1950, Art. 124(4)

³⁷ The Constitution of India, 1950, Art. 124(4).

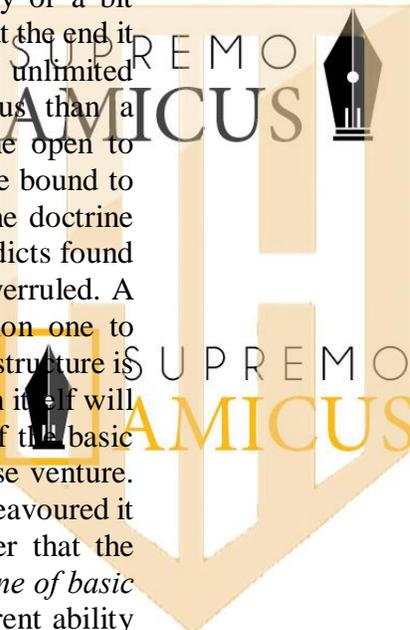


judges.³⁸ Hence, at praesenti if the basic structure doctrine lets us to express the thought that it protects the Constitution from the hegemony of the legislatures at the same time we should also concede to the fact that it transposed the points of checks and balances imbedded in our Constitution which itself may one day be attributed as one of the basic features but the judiciary will be the last person to accrue it such status.

basic structure is the lesser and necessary evil than the codified one.

Conclusion

Thus analysing the nuances of the doctrine it can be concluded that it may to some extent give some liberty to the judiciary or a bit leverage over the legislatures but at the end it is to be understood that an unlimited amending power is more heinous than a judiciary reserved with a doctrine open to interpretation where the judges are bound to reason their verdicts as to why the doctrine comes into play is and if such verdicts found untenable it is capable of being overruled. A cost-benefit analysis would suasion one to hold that codification of the basic structure is not desirable since the codification itself will be struck down on the grounds of the basic structure thus resulting in an otiose venture. Despite, if codification is ever endeavoured it should be drafted in such manner that the basic characteristics of the 'doctrine of basic structure' itself, which is its inherent ability of 'open to interpretation and adaptation to changed circumstances' is endured in the codified one too. However, the possibility of such arrangements are meagre and hence as of now, following the options which this paper provides in the introduction section of choosing between two evils, it is held that an undefined, in-exhaustive and un-codified



³⁸ MAHENDRA PAL SINGH, V. N. SHUKLA'S CONSTITUTION OF INDIA, 512,513 (13th ed., 2017)