



THE DOCTRINE OF BASIC STRUCTURE: ORIGIN AND LEGITIMISATION

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“The constitution just not protect those whose views we share, it also protects those with whose views we disagree.”

-Edward
Kennedy

ABSTRACT

The Indian Constitution is considered to be the most comprehensive document of its kind but at the same time, ‘glitches’ are what run the business of law. This paper aims at addressing the question of how important is the ‘basic structure’ to remain extremely ‘fundamental’ in the Constitutional law so as the Parliament does not grow into a tyrant. This topic has been chosen because it is the most discussed issue in the Constitutional law not only because it has been the forever roadblock in the Parliament’s journey to enable a control over judiciary but also because such an ‘indefinite possibility’ term requires a better understanding. Numerous deliberations are required to understand this concept and the paper attempts to be one. The course of this paper will be the introduction to the supreme law of our land, a deeper understanding of how amendments work followed by emphasizing on the origin of this doctrine eventually leading to its grand commencement in the Indian Judiciary.

INTRODUCTION TO THE INDIAN CONSTITUTION

The ‘Constitution’ is a written instrument embodying the rules of governing a polity and guaranteeing the most basic rights ‘fundamental rights’ to the citizens.¹ The Indian Constitution is a beautiful framework of political code, it is the longest handwritten constitution, which when came into existence had a total of 117,369 words in containing 444 articles in 22 parts, 12 schedules, it took nearly three years (2 years, 11 months, 18 days) for the constituent assembly to reach its final draft, and then it became the ‘Supreme Law of the Land.’²

Our Constitution is decorated with various ideas from constitutions all over the globe for the government as well as the citizens. The ideas of bicameralism and single citizenship were taken from the British Constitution. Judicial review and Impeachment of The President were procedures borrowed by The Constitution of United States. The Irish Constitution lay out the systematic structure of DPSP’s (The Directive Principles of State Policy) This was carefully observed and borrowed by our constituent assembly. The feature of suspension of Fundamental Rights during Emergency was stated in the Weimar Constitution (of Germany). The Soviet and French Constitution gave landmark principles to our Constitution, ideas like Fundamental Duties, economic, social and political justice along with ideas of liberty, equality and fraternity. South African, Canadian, Australian and Japanese Constitutions principles, structures and procedures were also borrowed. This is an important criterion to be kept in mind because amalgamation of so many different ideologies, not all in depth contribute to a

¹ <https://www.merriam-webster.com/dictionary/constitution>

² <https://www.livemint.com/news/india/the-indian-constitution-in-numbers-11579444816636.html>



larger understanding of the basic idea that is behind the Constitution of India.

The Idea Behind Amendments

The Indian Constitution as much as carefully designed, is important to note - it has been more than 70 years to the birth of this document and hence like every other thing in this world, it is 'aging'. It is aging because it was made in an era in a country trying to establish its existence, since then generations have witnessed the evolution of our motherland and it is important to observe how radically this transformation has taken place. And simultaneously while the country continuously tried to establish, reform, adjust and alter its original form, the welfare state also found it essential for the Constitution to amend itself in order to accommodate the needs of the people. Now it needs to be understood that these needs are in existence as long as the like-minded people's perspective continues to persist, as long as there is a shift in perspective, again the idea supporting the features will have to be amended. So it's an organic process, it's an ever evolving process of adapting to the changes in the requirements followed by the amendments supporting the same. As noted by *Alexander Hamilton*, "*the ability to remedy defects and unintended consequences of a constitutional text can make constitutions more enduring. As political practices change over time, adjustments to the constitutional text keep it aligned with current practices and help ensure its continued relevance*". Our constitutional makers made this process easy, there is a feature already embedded in the document making amending very flexible for the

Parliament, in spite of that, making changes to the constitution involves more procedure, more actors and higher vote thresholds, something that is not essentially required in an ordinary legislation. Hence, constitutional amendments go through a more intense test. The idea behind constitutional essence cannot be compromised or ignored. This is where the idea of 'Basic Structure of Constitution' comes in.

THE FIRST AMENDMENT

"It is impossible to hand up urgent social changes because the Constitution comes in the way," Prime Minister Jawaharlal Nehru wrote to his chief ministers in early 1951. "We shall have to find a remedy, even though this might involve a change in the Constitution."³ And this marked the beginning of amendments journey in India. Part XX of the Constitution⁴ under Article 368⁵ deals with the amendment of the Constitution. It provides for three kinds of amendment i.e., amendment by simple majority; amendment by special majority; and amendment by special majority and ratification by the States. The first ever amendment to the constitution was passed within one and a half years of its adoption. After some really fierce parliamentary discussions, The First Amendment successfully placed restriction on freedom of speech along with introducing caste-based reservation and finally circumscribed the right to property, formalised and legalised the complete abolition of the zamindari system; it also inscribed a new schedule of the so 'contradicting' constitutional laws immune to judicial reviews. This amendment was a highly debated topic back in its time and was

³<https://www.theweek.in/review/books/2020/02/22/sixteen-stormy-days-when-nehru-decided-to-amend-constitution.html>

⁴ <https://mea.gov.in/Images/pdf1/Part20.pdf>

⁵ <https://www.prsindia.org/tags/article-368>



criticised heavily. In the case of *Shankar Prasad Singh Deo v UOI* it was ruled that, as the newly inserted articles 31A and 31B⁶ seek to make changes in articles 132 and 136⁷ in Chapter IV of Part V and article 226 in Chapter V of Part VI, they require ratification⁸, and not having been so ratified, they are void and unconstitutional.

BEGINNING OF THE JOURNEY:

The Case of Shankari Prasad Deo v UOI & Sajjan Singh v State of Rajasthan

The problem of validity of the Constitutional amendments came up for the first time on the issue of right to property. The Bihar Land Reform Act, 1950 was declared unconstitutional by the Patna High Court but after being challenged in the apex court there came up conflicting views on the matter leading to intense deliberation on the 'point of law'. This led to the passing of 'First Amendment' explained in the aforementioned paragraph. This was religiously challenged in *Shankari Prasad vs. Union of India*⁹ questioning its validity.) Applying the principle that Art. 13 (3)¹⁰ did not acclaim explicitly the 'law of constitutional amendments' it rather stated that the ambit of Art 13(2)¹¹ could not include any law made by constituent power and it was

argued that it was only restricted by laws formed by the virtue of legislative power. This constituent power was stated to have no exception as amendments (except the fundamental rights). So, in the landmark cases of *Shankari Prasad Deo v. UOI* and *Sajjan Singh v Rajasthan*¹², both, the power of parliament to amend any part of the constitution including the part of fundamental rights were upheld. Although the two dissenting judges expressed their concerns over such bombarding of laws shielded by the factor of their addition in the IX schedule. The Constitution has "basic features" was first thrown light upon in 1964, by Justice J.R. Mudholkar¹³ in his dissent, within the case of *Sajjan Singh v. State of Rajasthan*. He put forth a very curious proposition of whether the entire scope of Article 368 included the power to alter a basic feature or rewrite a part of the Constitution. He quoted, "It is additionally a matter for consideration whether making a change in an exceedingly basic feature of the Constitution are often regarded merely as an amendment or would it be, in effect, rewriting a section of the Constitution; and if the latter, wouldn't it be within the purview of Article 368?"

⁶ <http://www.legalserviceindia.com/legal/article-781-ninth-schedule-article-31a-31b-of-the-constitution-through-the-kaleidoscope-of-the-principles-it-stands-on.html>

⁷

<http://www.legalservicesindia.com/article/1409/appellate-jurisdiction-of-supreme-court-kailas-&-ors-v-s-state-of-maharashtra-and-taluka-p-s.html>

⁸ Only Constitution amendments which affect the Centre-State relations or division of powers in a federal structure require subsequent ratification by the States

⁹ *Shankari Prasad v. Union of India* A.I.R. 1951 S.C. 2193

¹⁰ https://en.wikisource.org/wiki/Constitution_of_India/Part_III

¹¹ *ibid*

¹² 38 *Sajjan Singh v. State of Rajasthan*[1965] 1 SCR 933.

¹³ *Sajjan Singh v. State of Rajasthan*[1965] 1 SCR 933. 39The amendment inserted 44 Acts in the Schedule. It was noted that Articles 31A and 31B were added to the Constitution realizing the State Legislative measures adopted by certain States giving effect to the policy of agrarian reforms have to face serious challenge in the in the Courts of law on the ground that they contravene the Fundamental Rights guaranteed under the Constitution



Since the ruling passed in the case of Sajjan Singh relied heavily on the judgement of Shankari Prasad, the second judge, *Justice Hidayatullah* observed “I would require stronger reasons than those given in Shankari Prasad to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with other parts of the Constitution and without concurrence of the states”.

EVOLUTION OF THE IDEA OF BASIC STRUCTURE

Prof. Conrad's view on the 'Doctrine of Implied Limitations'

Constitution is a very adaptable document. Parliament and state legislatures have been given power by the constitution to formulate laws within their territorial jurisdiction as laid out in the Article 246¹⁴. Now although this power is not restricted explicitly, it has certain limits which cannot be crossed. The Constitution vests in the judiciary. The judiciary is responsible for protection of all the constitutional rights and authorities given to the citizens and governments respectively. *Prof. M.P. Jain* so beautifully summarizes: “It has been fashionable for politicians in India to say that Indian Parliament is sovereign, meaning it can do whatever it desires. Such an assertion is not realistic. (...) Indian Parliament is not sovereign if it

means that it has uncontrolled power to do what it likes. Since Parliament functions under a written Constitution, it has to observe the restrictions imposed on it by the Constitution. It can do what the Constitution permits it to do but cannot do what the Constitution prohibits.”¹⁵ Therefore, even if article 368 allows the government to add, vary or repeal any provision, the parliament cannot damage or tamper with the ‘essence of Constitution’ behind the process of amending it. This essence or say the ‘original idea’ is intrigued in the provisions and not defined, it is understood as the Basic Structure of The Indian Constitution. The Constitution was first amended in 1951, but the dangers inherent in granting such wide scope of power to the legislature was perhaps best called out in a lecture delivered by a *German professor, Dietrich Conrad*. His talk “*Implied Limitations of the Amending Power*”¹⁶, delivered in February 1965 to the law department of the Banaras Hindu University. Conrad expressed his concerns¹⁷ that Parliament’s power to alter the Constitution was unconditional. Parliament, he argued, was, aftermath, a creature of the Constitution. It could therefore not make any changes that had the effect of overthrowing or vanquish the Constitution itself.

A.G. Noorani has pointed out, Conrad had analysed his own’s country’s historical fate.¹⁸ In Germany, the destructing end brought to the Weimar Republic by Nazism had been

¹⁴ <https://mhrd.gov.in/article-246>

¹⁵ M.P. Singh, V.N. Shukla’s Constitution of India, Eleventh Edition, 2008, p. A-61.

¹⁶ <https://www.cambridge.org/core/books/dimensions-of-dignity/doctrinal-dimension/5F37F0FBA500A07FB4EE23A258BFFD/BF/core-reader>

¹⁷ <http://shodhganga.inflibnet.ac.in/bitstream/10603/56928/1/rabindra%20kr.%20pathak,%20ph.d.%20thes%20is.pdf>

¹⁸ https://books.google.co.in/books?id=BIAYDwAAQBAJ&pg=PT12&lpg=PT12&dq=A.G.+Noorani+has+pointed+out,+Conrad&source=bl&ots=D1srM_-n9Y&sig=ACfU3U1UwDhYtxdJwhSFy0wrKYRjUtTIpg&hl=en&sa=X&ved=2ahUKEwjBtprsyszoAhWkxjgGHRZKCGcQ6AEwAXoECAwQKA



followed by the fact that when the country adopted its Basic Law in 1949, it notably placed checks on the unfettered powers of the Legislature. This comprehended a restriction on the lawmakers from amending those provisions of the Basic Law that damaged the country's federal structure, made human rights inviolable etc. This German connection was acknowledged by the Supreme Court in *M Nagaraj v. Union of India*¹⁹. Thus, it is clear that this doctrine was not an 'invention of the Indian judiciary' as is believed by some, but was rather a necessary inspiration from a civil law system. In his lecture, Conrad said India hadn't yet been confronted with any extreme constitutional amendment. During his lecture he pointed out that India was not affected by any extreme Constitutional amendment yet, but the judiciary, he berated, had to be extremely cautious of the fallout by granting Legislature limitless power to change the Constitution. He seldom used extreme examples of potential consequences like: what if the Parliament were to amend Article 1, by dividing India into two parts. "Could a constitutional amendment," he asked, "abolish Article 21," removing the guarantee of a right to life? Or could Parliament use its power "to abolish the Constitution and reintroduce... the rule of a Moghul emperor or of the Crown of England?"

The term 'basic structure' cannot be found in constitution itself, it is the brainchild of our judiciary, introduced so as to protect the original ideas of our founding fathers against the unfettered ability of Parliament to amend the supreme law.

THE CASE OF IC GOLAKNATH V THE STATE OF PUNJAB, 1967

Finally, in the landmark judgement of *Golaknath v. State of Punjab*²⁰ fundamental rights were given a 'transcendental and sacrosanct' position. In the given case, 'the doctrine of implied limitations' owed to the idea of Professor Conrad, was brought forth by M.K. Nambiar, a constitutional lawyer, but was not accepted by the Supreme Court. So, the apex court had finally reversed its position in the previous cases and held that no amendment of any kind could contribute to the progress of country at the stake of fundamental rights of the citizens. Pointed out in the same judgement, the debates in the Constituent Assembly, particularly the speech of Nehru (the then Prime Minister) and the reply of Dr. B R Ambedkar, who piloted the bill disclose clearly that it was never the intention of makers of Constitution by putting Art. 368 to enable the Parliament to repeal fundamental rights. Amendment of Part III is entirely outside the ambit of Art. 368. Chief Justice Subba Rao also gave a very interesting point of law in her ruling- It is understood that the 'power to amend' is provided by Art 368, and we say so because we acknowledge it as an 'implied power', this 'implied power' is derived by the virtue of existence of Art. 368 and the procedure drawn out is the same. It can also be inferred

¹⁹ (2006) 8 SCC 212

²⁰ I. C. Golakh Nath and Ors. V. State of Punjab[1967] 2 SCR 762



by Art 245²¹, 246²² and 248²³ that Parliament is given ‘legislative power’, the scope of the same is also laid out clearly. This ‘legislative power’ is the only broad concept under which ‘power to amend or amending power’ can be studied. Legislative power can be regarded as the umbrella term. By the understanding of this terminology it can be inferred that the restrictions placed by Art 13 (2) on formulating ‘laws’ would also be applicable on ‘amendments’. Conclusively it was stated that the reasonable barriers placed the founders of Constitution worked on both the legislative as well as amending power of the Parliament which was- absolute no formulation of laws which would hinder, alter or even destruct the fundamental freedoms of citizens. But, at the same time Chief Justice Subba Rao ruled that there are no basic or non-basic ‘features’ to the Constitution, everything is basic and can be amended as and when required for the progress of our country. The Supreme Court in this case, also put forth the doctrine of “Prospective Overruling” under which the decisions would only have prospective operation and not retrospective and also stated the Parliament shall have no power to

abridge the fundamental rights. While some dissenting judges like *Justice Wanchoo*, expressed his view that “no limitation should be implied on the amending power of the Parliament under Article 368. He gave the argument that “basic feature would lead to the position that any amendment made to any Article of the Constitution would be subject to the challenge before the Courts on the ground that it amounts to the amendment of the basic structure”. Therefore, finally it was held by the SC that some features lay at the core of the Constitution and cannot be amended under regular circumstances. Although even this landmark judgement did not pronounce yet the ‘basic structure doctrine’.

The Period Of Tussle

The period between 1967 and 1973 witnessed a very bitter confrontation as well as tussle between the Judiciary and the Legislature. The problems very transparent and becoming more and more with each passing day as Judiciary had ruled absolute restriction on the constituent power of the Parliament whereas the Legislature i.e. the Parliament found it

²¹ Article 245: Extent of laws made by Parliament and by the Legislatures of States.- (1) Subject to the provisions of this Constitution, Parliament may make laws for the 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.

²² Article 246: Subject-matter of laws made by Parliament and by the Legislatures of States.- (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the —Union List). (2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws

with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the —Concurrent List). (3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the —State List). (4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included 2[in a State] notwithstanding that such matter is a matter enumerated in the State List

²³ Article 248: Residuary powers of legislation.- (1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.



extremely difficult continuing its functioning while being stuck to the values of constitutional provisions. The Constitutional restrictions came as roadblocks in the path of Country's progress. The struggle for supremacy between Legislature and Judiciary was very evident through this phase. Even a Private Members Bill was introduced by Nath Pai seeking to give effect to the supremacy of Parliament. But it failed due to the political disturbances in its time. Nationalisation of Banks, Abolition of Privy Purses by Indira Gandhi were forced upon under the reasoning of Directive Principles of State Policy,²⁴ Constitution becoming electoral issues were all the star marked moves of the government as well as the contenders. Finally Congress regained power by emphasizing more on socialist agendas and DPSP's. Indira Gandhi said in 1967 "Change is inevitable but it is in us to control its content and directions." Subsequently, momentous changes were sought to be effected the Constitutional 24th and 25th Amendments. Both the amendments, introduced, hindered the below mentioned features of the Constitution-

- (i) The rights and liberties of citizen of India;
- (ii) The extent of the judicial power that can go so as to help the citizens in the assertion of their basic and fundamental rights as against State action;
- (iii) The supreme sovereignty of the Constitution of India over the three limbs of

Government, the legislature, the Judiciary and the Executive;

(iv) The extent of legislative power observed in the Constitution of India.

LEGITIMISATION OF 'BASIC STRUCTURE'

*The case of Kesavananda Bharti v State of Kerala*²⁵

His Holiness Kesavananda Bharti filed a petition under Art 32 of the Indian Constitution for the proper and procedural enforcement of Fundamental Rights. The petition was filed mainly to question the validity of Kerala Land Reforms Act along with the 24th and 25th constitutional amendments. It was for the Supreme Court to decide with the largest ever Constitutional Bench of judges – which would be thirteen in number – whether these legislations/amendments were *ultra vires*/unconstitutional in the eyes of law, for the same the Bench issued eleven separate judgements which altogether reach a volume of approximately thousand pages. It is considered as one of the most important cases in Indian history and is often referred to as "the case that saved Indian democracy".²⁶ The agenda was also to judicially review The Golaknath judgement. Although, Chief Justice Sikri states, that "the core issue of the Kesavananda case is the extent of the amending power conferred by Article 368 of

²⁴ <http://constitutionnet.org/vl/item/basic-structure-indian-constitution>

²⁵ Keshavananda Bharati Sripadagalvaru v. State of Kerala [A.I.R. 1973 S.C. 1461; (1973) 4 SCC 225.] was a consolidated case name of the following cases- Raghunath Rao Ganpati Rao N. H. Nawab

Mohammed Iftexhar Ali Khan vs. Union of India, Shethia Mining and Manufacturing Corporation Limited vs. Union of India and Oriental Coal Co. Ltd. vs. Union of India

²⁶ See Arvind P. Datar, The case that saved Indian democracy, The Hindu, 24 April 2013



the Constitution and not the decision about overruling Golak Nath case.”²⁷

The issues, first of their kind, were a beautiful complexity. Even the most basic questions moved along with a wide scope of controversy. The issues aimed for addressal were-

- 1) What should be the rule of interpretation?
- 2) What is the meaning of ‘amendment’?
- 3) What is the source of ‘amending power’ in the Indian Constitution?
- 4) Can people of India be authorised solely for the purpose of amendment?
- 5) By declaring constituent power has Parliament acquired for itself a position above Constitution?
- 6) Does Art.13(2) control Art.368?
- 7) Are the Fundamental Rights subject to amendment?
- 8) Does the ‘Doctrine Of Implied Limitation’ apply upon Indian Constitution
- 9) What is the scope of Judicial Review?
- 10) What is the scope and extent of amending power with respect to Art 368?
- 11) Is not the Doctrine Of Basic Structure a vague doctrine?

The size of the bench in Kesavananda Bharti (13 judges) was the largest ever bench and this fact is of great importance because while deliberating on such issues which do not have any inherent authority, various perspectives are absolutely incremental. It is the most

cited case in constitutional law. It holds high importance. It was also decided beforehand that if any ambiguity related to interpretation is met with Hyden’s rule would be followed. Hyden’s rule can be used to interpret a statute and strictly only when the statute was passed to remedy a defect in common law.²⁸

All the issues were addressed and summarised-

The amendments are essentially to be followed within the limits of constitution. These ‘limits’ are to be followed by the principles. Before anything debatable arose ever, the Constitution was and has to be considered ‘Social Document’. The freedom struggle went through with a promise of ‘revolution’- socio economic revolution. So any amendment should relate to these principles. The ‘Constitution’ is a remarkable entity in it’s own and it definitely does not come with a mechanism that could steal away this identity. Art. 368 is the only source of amending power, it cannot be considered as a green signal to the law makers to go ahead with distortion/ destruction of it’s essential identity. In a representative democracy like ours, it is not possible for the people to directly amend it, it has to be done by the Parliament. While dealing with the 5th issue , the Court held the ‘constituent power’ of Parliament is not similar to that of the Constituent Assembly.

Moreover, yet again it was emphasized that Parliament is creation of the Constitution and hence all the powers it has are a derivation

²⁷ Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, (para 10).

²⁸ 58 (1584) 76 ER 637. which implies to examine what is the mischief that has been aimed at by the provisions and the Constitution, a purposive interpretation has to be followed and the purpose of that provision in light of the overall purpose of the

Constitution shall be examined and that interpretation has to be applied which serves that purpose the best. The Constituent Assembly Debates, the examination of all the provisions of the Constitution and the larger purpose of the society shall be examined for that purpose.



from Constitution. Therefore, The Parliament even while using constituent power or any other power has to strictly move within the limits of the ‘Supreme Law’

Chief Justices Hedge and Mukherjea JJ suggested a need for co-ordinated understanding between Art. 13(2) and Art. 368. Art 13(2) is ordinary legislative power and Art.368 is constituent power and is definitely above the limitation of Art. 13 but at the same time it is subject to the ‘Doctrine of Basic Structure’. Part III of the Constitution is basic, it includes the ‘fundamental rights’ and these are vital to the citizens living in a democracy, especially. The words used in articles of these ‘rights’ are amendable as decided by the Court but they cannot be amended at the cost of bruising the ‘basic structure’. Only 6 judges assented that ‘fundamental rights’ could not be amended. Hence it was a ‘minority view’. And the amendment of Art. 368 was also held to be on similar grounds. On the last issue, it was held that a few legal principles like Natural justice, divine law cannot be rigidly defined, still they continue to be essential and binding.²⁹

Chief Justice Sikri pointed out in his view that the respondents claim that Parliament can abrogate fundamental rights such as freedom of speech and expression, freedom to form associations or unions, and freedom of religion. They claim that democracy can even be replaced and one-party rule established. Indeed, short of repeal of the Constitution, any form of Government with no freedom to

*the citizens can be set up by Parliament by exercising its powers under Article 368.*³⁰

Nani Palkhivala put forth a curious argument while the proceedings of the case continued that even if the Article 368 were examined broadly, the preamble was not amendable and Article 368 could not be read as “expressing the death wish of the Constitution or as a provision for its legal suicide.”³¹

Whereas all the judges confabulated their opinions over the ‘Doctrine of Basic Structure’ they interpreted it with the same essence but different literary, *Justice Khanna* delivered the majority view and is forever unforgettable in the books of law for being the profounder for legitimising the concept of ‘basic structure’.

The Court ruled the test in this regard- “Any principle of law abridged from the Constitution would potentially give rise to a loss of the very principle of unity and integrity of the nation, the basis on which we revolutionised our freedom struggle, and the dignity of the individual would be considered to be an essential feature of the Basic Structure. It also held that the amending power of the legislature shall be subject to a doctrine called the doctrine of ‘basic structure’ and therefore the parliament cannot use its constituent power under Article 368 so as to ‘damage’, ‘emasculate’, ‘destroy’, ‘abrogate’, ‘change’ or ‘alter’ the ‘basic structure’ or framework of the Constitution.”³²

²⁹ (1973) 4 SCC 225, 462, Para 608

³⁰ (1973) 4 SCC 225, 405

³¹ Palkhivala’s propositions submitted to the Court are reproduced in the 91973) 4 SCC 1.

³²According to the court in this case the word —amend enjoys a very restrictive connotation and the court can look into the validity if it threatens to nullify or destroy any fundamental feature of the Constitution. Kesavananda also answered an important question



Justice Sikri observed that the phrase ‘amending the Constitution’ does not give the Parliament the authority to destroy its very identity or take away fundamental rights or even damage/ change the very features of its acknowledged existence.

Justices Reddy, Mukherjee and Hedge explained the basic features to be a broad category term under which sovereignty, democratic character, unity and essential freedoms were secured to citizens.³³ Justice Grover and Justice Shelat also believed that there were implied limitations on amending power of Parliament³⁴ and there were certain basic elements to the Constitution.³⁵

On the other hand, Justice Ray observed that ‘power to amend’ has a broad scope and no limitations³⁶. Justice Palekar also stated that in his view, taking away fundamental rights can’t be declared as illegitimate.³⁷

which was left open by Golak Nath, as to whether Parliament has the power to rewrite the entire Constitution and bring in a new Constitution. The court answered this by saying that Parliament can only do that which does not modify the basic features of the Constitution.

³³ (1973) 4 SCC 225, 405

³⁴ (1973) 4 SCC 225, 512, Para 744(3).

³⁵ though the power to amend cannot be narrowly construed and extends to all the Articles it is not unlimited so as to include the power to abrogate or change the identity of the Constitution or its basic features; even if the amending power includes the power to amend Article 13(2), a question not decided in Golak Nath case, the power is not so wide so as to include the power to abrogate or take away the fundamental freedoms; See (1973) 4 SCC 225, 462, Para 608 (b) and (c).

³⁶ Ibid, 637, Para 1159.

³⁷ (1973) 4 SCC 225, 593, Para 1064.

³⁸ See supra n

³⁹ T. R. Andhyarujina, The Keshavananda Baharti Case: The Untold Story of Struggle For Supremacy By

The term ‘basic structure’ was used only by *Justice Khanna*, which was lifted by Chief Justice Sikri and adopted in his view of the majority.³⁸ T. R. Andhyarujina in his book wrote that the ‘view of the majority’ cannot be the ratio of the Keshavananda Case.³⁹

POST-KESAVANANDA

A strategic aftermath

The Kesavananda case aggravated the serious conflict between the judiciary and the Parliament. On the 24 April 1973, the Kesavananda judgement was delivered. Definitely there was a rush for the judgement and the judges gave the both the views by a wafer thin ratio of 7:6 in less than 3 months, the judgement, one of its kind 703 paged came in a day before Chief Justice Sikri’s retirement. Surprisingly on April 26th, Justice A.N. Ray, the loudest among the dissenters, was appointed as the new Chief

Supreme Court And Parliament, Edition 2011, P.56. He wrote, —If a ratio had to be extracted from the eleven judgments in the Kesavananda case it could not have been done in the manner of asking judges to merely subscribe to —The View of Majority| paper on the day of pronouncement of the judgments in Court. Deriving a ratio from the 11 judgments could have been done only after a full hearing by a later Constitution Bench to which the Petitions were remanded for disposal according to the unanimous Order of the Court. No later Constitution Bench to dispose of the petitions was convened to dispose off the petitions. Alternatively, the ratio could have been extracted by any later bench from the differing judgments as had been done in other cases. He further remarks, —Look whatever way, there was no majority view, no decision and no ratio in Kesavananda case that Parliament could not amend the basic structure or framework of the Constitution. This was only the conclusion of Justice Khanna. By a strategic roping in of his view in with six other judges —The View of the Majority| a majority of 7 Judges to 6 was created and approved by nine judges.



Justice of India, it was a very politically motivated move, because the judges namely Shela (Sikri's recommendation) Grover and Hegde were left behind. They also resigned as a sign of protest. This gave the Government a golden opportunity to appoint different judges. Between 1973 and 1975 political disturbances between the Prime Minister Indira Gandhi and Jayprakash Narain (who went to the extreme of calling out slogans like 'Sampoorna Kranti') are observed. From being an adored woman raising slogans like "Garibi hatao" till trying to stake all the unconstitutional moves for power, the phase is remarked as the actual test of 'Doctrine of Basic Structure' in this young country.

Finally due to 'internal disturbances' on 25th June 1975, the then President, Mr. Ali declared nation wide 'Emergency', it was again a very well read move because Gandhi was accused of electoral malpractices and the petition by *Raj Narain*, her opponent from the same constituency. As soon as the emergency was imposed, the government decided to ban RSS and in less than two weeks all the star leaders were put under preventive detention.⁴⁰ The political tensions discussions of the time are not a subject matter of this paper and detailed deliberation on them would consume a lot of space and time. But all the happenings and the pressure of judgement increased on Gandhi and that led to the arrival of 39th Constitutional Amendment ⁴¹Act, 1975. The said amendment prevented judicial review of

electoral practices against Prime Minister, President etc. So focusing on the judgement in *Indira Gandhi vs Raj Narain*,⁴² it was held that Indira was not guilty of maliciously winning the elections but the 39th amendment was struck down on the basis of 'Doctrine of Basic Structure', because it is very fundamental to the concept of democracy that all the three branches, Executive, Judiciary and Legislature are expected to be coordinated rather than overpowering one over the other. It was a landmark case because once again the Court had kept its promise bravely, protected the essence of democracy and most importantly reassured the citizens that the judiciary is to sole protector of the Constitution and will continue to be.

The 'final move' and A 'lost review'

Within a week of Gandhi's judgement, *Chief Justice Ray* suo moto decided to review the iconic *Kesavananda Bharti case*. And this was followed by the most surprising turn of events, *Palkhivala* (who had argued the same matter previously) with his team again deliberated on how the reconsideration of the case was invalid. By the third day of the proceedings, all the judges were impressed and persuaded except for Ray and the bench got dissolved on his discretion. The review is not officially observed anywhere but it is important for the readers to know about the facts because 'transparency' is one of the essential features of 'Democracy'. And as a writer I feel obliged to share the same with you.⁴³

⁴⁰ KN Govindacharya's article on livemint.com on 22 June 2015.

⁴¹ <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-thirty-ninth-amendment-act-1975>

⁴² (1975 AIR 865, 1975 SCR (3) 333)

⁴³ 69 Adil Rustomjee, The review that wasn't: Forty years after Kesavananda Bharati vs the State of Kerala, Firstpost, 22.12.2015, <<http://www.firstpost.com/india/the-review-that-wasnt-forty-years>



Conclusion

The space of this paper will not be sufficient to provide a detailed analysis of the events followed by the ‘emergency’ but nevertheless the origin and legitimisation of this absolutely marvellous doctrine and its emergence in Indian Judiciary has been tried to explain with absolute devotion. The Legislature continued to negate the judgement in *Kesavananda Bharti* and these attempts can be noted in *Waman Rao*, *Minerva Hills* but all the deciding justices have upheld the fact that ‘Judiciary can only protect the Constitution’ and this will continue to be the same way till India continues to regard Constitution as the ‘Supreme Law’. The ‘basic structure’ has to be protected so that it continues to protect the fundamental ideologies of our country left by the Constituent Assembly.

