

FUTURE OF BASIC STRUCTURE & ESSENTIAL FEATURES OF INDIAN CONSTITUTION

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ABSTRACT

Basic Structure doctrine stands for preserving the democratic liberal state features and establishes the supremacy, independence, and interdependence of powers of the state. It gives strength to India and its citizens to break the walls of arbitrariness that exist. Thus, it becomes necessary to discuss and ponder upon the future of basic structure and essential features doctrine. In this article the author has discussed the context of the basic structure doctrine, from where did the idea of the basic structure began, the important cases relating to it and how did the doctrine evolve in these cases. The author has further discussed a sense of constitutional theology that can be felt in the Keshvananda Bharti decision, child-like jurisprudence, and the open structure of the essential features of the constitution. The basic structure is a tussle between Article 368 and Article 32 of the constitution and after all these landmark decisions which article has adhered to its originality the most? Is one of the essential questions. The difference between basic structure and essential features is that essential features may vary whereas, the basic structure of the constitution essentially can never be changed. However, the Supreme Court is yet to define or clarify as to what constitutes the 'basic structure' of the Constitution.

Keywords- Basic Structure, Essential Features, Constitution, Parliament, Supreme Court, Article 365, Article 32.

Future of Basic Structure and Essential Features of the Indian Constitution

An Italian philosopher Giorgio Agamben recently wrote a short book on how to read a book that is not written, which is the riddle of the future. In this book, he explains that there are certain things about the future that we already know, but we do not know the future entirely no one can. Potentiality is an essential aspect of the future, and therefore the author is trying to speculate what the future might be. The critical part of reading and understanding a

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judgment is to not look at what the judges say but at what they do. When talking about Basic Structure, the main question that comes up is what the context of Basic Structure Doctrine was? The context of basic structure was precisely the context of the “*24th Amendment*”¹³³¹ Of the Indian Constitution, which said Parliament of India has the power to change every aspect of the Indian Constitution. In many cases, it has been argued by the Attorney General's before the court that Parliaments' power cannot be restricted. When asked by the judges, what can Parliament do? They answered that it might convert a federal structure into a unitary structure, a republican structure into a monarchy, and a secular India into a theocratic and so on. Changes in the constitution are provided by article 368. Following the procedure and substance of article 368, the amending article can change the constitution, but *the change of constitution repealing or replacing it does this power lie with anybody?* That is the central question of Basic Structure

The interpretation of constitutional provisions and the interpretation of constitutional spirit is where the idea of the basic structure began the first case in this discussion was “*Shankari Prasad v. Union of India*”¹³³². In this case, the 1st Constitutional Amendment Act was challenged. The act was widely known for abolishment of the zamindari system there were specific which were curtailing the Right to Property and to protect these laws Article 31A and 31B were inserted in the constitution, therefore people started looking at 31A and 31B as an attack on their Right to Property. The question here was whether the parliamentarians could amend the fundamental rights? The decision was that in article 13(2) which is the protector of the fundamental rights the word "law" only means law in ordinary sets that is when the law is made exercising the legislative power and not constituent authority hence, Article 368 includes the power to amend the fundamental rights. The next case was “*Sajjan Singh v. State of Rajasthan*”¹³³³ in this case, the “*17th Amendment Act*”¹³³⁴, was challenged because it was restricting the powers of the High Court. In this case, the view of the Shankari Prasad case was followed, and it was said that the meaning of the words "Amendment of this constitution" under article 368 meant amendment of any part of the constitution including the fundamental rights and even if article 368 did not have the power to amend the fundamental rights the parliamentarians can at any part of time do a suitable amendment and include those

¹³³¹ The Constitution (Twenty- Fourth amendment) Act 1971.

¹³³² AIR 1951 SC 458.

¹³³³ AIR 1965 SC 845.

¹³³⁴ The Constitution (Seventeen amendment) Act.

powers, therefore, in this case, it was settled that the whole of the constitution including the fundamental rights can be amended. Another case in which again the 17th Amendment was challenged was “*Golaknath v. State of Punjab*”¹³³⁵. The question, in this case, was whether the power to amend the fundamental rights is unlimited or limited? It is a significant judgment as for the first time a large bench of 11 judges was constituted. In this case everything was reversed the Supreme Court said that the power to amend the constitution including the fundamental right is not an unlimited power it is subject to limitations of judicial review. Until now it was settled that article 368 had an unlimited power even article 13 could not stop article 368 but, this position was reversed in this case and, it was decided that article 368 is subject to limitations of judicial review and Parliament does not have any power to amend or abridge the fundamental rights in the way of amendments. Further, the ambit of article 13(2) was discussed it was said that the word "law" used under 13(2) includes amendment and if any amendment violates fundamental right it would be void. The parliamentarians could not digest what happened in this case, so they came up with the 24th Amendment Act. The following changes were made in Article 13 and 368 firstly, in article 13 they included 13(4) which said that in nothing in article 13 would apply to 368, Secondly, in article 368 they changed the marginal heading earlier it was the procedure for amending the constitution now it reads the power of the parliament to amend the constitution and procedure thereof and they added 368 d (3) which said nothing in article 13 should apply to 368. The motive of the 24th amendment was to exclude the applicability of article 13 onto article 368 which meant that whatever was held in the Golaknath case holds no value after the 24th Amendment Act this made it clear that the parliament can dilute the constitution including the fundamental rights. The 24th Amendment Act was challenged in the “*Keshvananda Bharti v. State of Kerala*”¹³³⁶. The question that came up was what is the scope of the amendment that the parliament reserves? The Supreme Court, in this case, gave a very balanced judgment it said that the power to amend the constitution was already implicit in the constitution. The 24th Amendment Act, merely made it explicit or declaratory the judgment contained that the basic features cannot be amended. The crux of this case is the entire constitution can be amended to form a new constitution provided that it survives through its basic features which means that there are certain implied restrictions for amending

¹³³⁵ AIR 1967 SC 1643.

¹³³⁶ AIR 1973 SC 1461.

the constitution and the basic features cannot be amended. The Supreme Court also said that it was not the intention of the constitutional makers to use the word in its broadest sense they believed that fundamental rights along with fundamental features will always survive through in a welfare state. The other question that came up was how far can the provisions of Article 368 be amended? The Supreme Court said that the increase in the power of 368 should be such that it should not lead to the destruction of the powers and the decrease should be such that it should not mean free from all restrictions. Certain features were qualified as basic features in the case of “*Indira Gandhi v. Raj Narain*”¹³³⁷. In this case clauses 4 and 5 were added to Article 368. They said that even if part 3 of the constitution was amended, it could not be questioned in any court and that there is no limitation on the power of the parliament to amend the constitution. It was said that The Parliament represents the will of the people and, if people want to amend the constitution, they can exercise their power through the Parliament and, there should be no restrictions on that. The Supreme Court, in this case, also said that the theory of basic structure is very ambiguous and vague an addition of clause 4 and 5 in Article 368 rectifies the situation. The validity of clause 4 and 5 inserted by the “*42nd Amendment*”¹³³⁸ and, the validity of the 42nd Amendment was challenged in “*Minerva Mills v. Union of India*”¹³³⁹ the Supreme Court said that these two clauses were attacking the basic features of the constitution; therefore, it held it unconstitutional.

Jurist Carl Smith in 1930's raised a point and wrote several books one of which was called constitutional theology which means worshipping the constitution as it is and treating juristic events as theological events for example In “*Union of India v. State of Rajasthan*”¹³⁴⁰ Justice Goswami said “the constitution is the last resort of the builder and the unpressed”, Justice Trivedi in *Keshvananda Bharti*, said “constitution is not meant for men with purses who fumble about the meaning of words. The constitution is meant for reverence by the people.” and Justice Chandrachud, dissented and gave preliminary powers to parliament in 1973 in *Keshvananda Bharti* he taught that Parliament should have full power to amend every aspect of the constitution and that this power cannot be curtailed by anything he said that we cannot go against them in whom the country has put such a massive faith this proves that that there was some theology in the course of the *Keshvananda* case. In *Minerva Mills*, Chief

¹³³⁷ 1975 AIR 1590.

¹³³⁸ The constitution (Forty- second amendment) Act, 1976.

¹³³⁹ (1980) 3 SCC 625.

¹³⁴⁰ 1984 AIR 1675.

Justice Chandrachud thought that everything in the constitution cannot be amended and that the basic structure must be followed. He said that there is one more essential feature in addition to Keshvananda which, is harmony and balance between fundamental rights and directive principles of the constitution, which he derived after interpreting the Keshvananda decision. In the “*State of Uttar Pradesh v. Raj Narain*”¹³⁴¹, It was said that secularism is a feature of the constitution. According to the author, this is what can be called as Child-like jurisprudence. In “*S.R. Bommai v. Union of India*”¹³⁴² there were six features of secularism cited that shows that there is an open structure of essential features and, the court can keep on adding essential features, and they are subject to judicial interpretation. It was clearly stated by the Court in Keshvananda, that only the Supreme Court can apply the basic structure and essential features and that basic structure can be applied only to constitutional amendments. What happened subsequently is that the court extended it widely to all constitutional provisions and not just amendments. In Bommai, the basic structure was applied not only to constitutional amendments but also to the governor's report and discussion in recommending precedents and to precedents in action imposing constitutional roots. This explains that precedents in action can be called basic structure according to Bommai but not according to the Keshvananda decision. This meant basic structure can be violated in various ways and, a precedent decision could also violate basic; therefore, executive acts are subject to the basic structure and not just provisions of article 368. Chief Justice Chandrachud in Minerva Mills expressed that articles 14, 19, and 21 constitute a golden triangle, and the Parliament of India cannot amend it as it will alter the balance fundamental rights and directive principles guaranteed by this golden triangle and directive principles must remain subordinate to fundamental rights. He added that there are three articles of our constitution and only three which stand between the “*heaven of freedom that Tagore wanted his country to awake*”¹³⁴³ And this heaven of freedom is important but not on the abyss of uncertain power and judges are there to balance unrestrained legislated powers under article 32 of the constitution to avoid this experience of an abyss, and the basic structure is one such effort to avoid such abyss.


¹³⁴¹ 1975 AIR 865.

¹³⁴² 1994 AIR 191.

¹³⁴³ “Where the mind is led forward by thee into ever widening thought and action.

In to that heaven of freedom, my father, Let my country awake!” Where the Mind is Without Fear, Rabindranath Tagore.

The author will like to conclude with one of the essential points that is *what the difference between basic structure and essential features is?* To understand this, we can see Keshvananda Decision as a box of constitutional secrets, and one by one the secrets were disclosed except one last secret, and that last secret that the court chose not to disclose or refused to disclose is the basic structure that is the power of the court to perform Judicial Review. They will not part with the power of interpretation. Parliament has all the prudent powers to amend the constitution but not the power to out the jurisdiction interpretative task of the judges, and therefore, the basic structure of the constitution essentially can never be changed whereas, essential features may vary.

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