DEMYSTIFYING THE DOCTRINE OF BASIC STRUCTURE

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Abstract

The doctrine of Basic Structure is a constitutional principle which asserts that certain fundamental features of the Indian Constitution cannot be amended by the Indian Parliament, even if the amendment process provided in the Constitution is followed. This principle has been a subject of much debate and controversy in the legal and political circles of India.

This paper seeks to demystify the doctrine of Basic Structure by providing a comprehensive overview of the judgment delivered in Kesavananda Bharati v. State of Kerala. The paper examines the various elements that constitute the Basic Structure of the Indian Constitution, including the supremacy of the Constitution, the rule of law, democracy, secularism, federalism, and the protection of fundamental rights.

Furthermore, the paper highlights that there was no common ground on the grounds for limitation on the power of amendment between on one hand Chief Justice Sikri, Justices Shelat, Grover, Hegde, Mukherjea and Reddy and on the other Justice Khanna and that the question "what is the ratio of the Kesavananda judgment?" has never been answered.

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Introduction

The decision in the Kesavananda Bharati [1] case has always been the fulcrum for many constitutional debates. The case is significant for a number of reasons viz. the significance of the Preamble, relevance of the Indian Independence Act, relevance of speeches delivered during the Constituent Assembly debates, principles of constitutional interpretation, etc. But the most important aspect of the case is the doctrine of inviolable "basic structure" of the Constitution, which limits the amending power of the Parliament. The case also holds relevance in our constitutional history because by coining the basic structure doctrine the independence of the judiciary was asserted, especially during a period of excessive interference by the executive.

The doctrine of basic structure invented by the narrow majority in this case means that certain features of the constitution are so integral to its existence that they cannot be altered by the Legislature by way of amendments. In other words, the amending power is subject to certain inherent limitations flowing from the basic structure of the Constitution. However, there were inconsistencies in identifying the provisions that constituted basic structure. It was a "hard case", as Ronald Dworkin would describe it.

Basic Structure: Opinion of the Bench

- **Chief Justice S.M. Sikri**

Sikri CJ., focused on the limitations of the amending power, including those implied in the language of Article 368 and the Preamble to the Constitution.[1] He argued that the amending power should be exercised in furtherance of the principles drawn from the Preamble and not otherwise. The learned Chief Justice, enunciated the following features which might consist of the basic structure[2]:

(1) Supremacy of the Constitution;

(2) Republican and Democratic form of Government.

(3) Secular character of the Constitution;

(4) Separation of powers between the Legislature, the executive and the judiciary;

(5) Federal character of the Constitution

He justified the existence of the basic structure from the whole scheme of the constitution, which was built on the basic foundation of the dignity and freedom of the individual that cannot be destroyed by any form of amendment.[3]

- **Justices J.M. Shelat and A.N. Grover**

  According to them, the Constitution has six essential elements:

  1. Supremacy of the Constitution
  2. Republican and democratic form of government and sovereignty of the country

[1] AIR 1973 SC 1461.
[2] *Id,* para 292.
[3] *Supra* note 2, paras 293-294.

3. Secular and federal character of the Constitution
4. Demarcation of power between the legislature, the executive, and the judiciary
5. Dignity of the individual, secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.
6. Unity and the integrity of the nation.

They explained that the Constitution is an organic document that must take into account the vast socio-economic problems of the country, particularly the improvement of the common man's lot consistent with his dignity and the unity of the nation. The Constitution is federal in its structure, but it provides a system modelled on the British parliamentary system. They also explained that the meaning of the words "amendment of this Constitution" as used in Article 368 must be such which accords with the true intention of the Constitution makers as ascertainable from the historical background, the Preamble, the entire scheme of the Constitution, its structure and framework and the intrinsic evidence in various Articles including Article 368.[4]

- **Justices K.S. Hegde and A.K. Mukherjea**

  Justices Hegde and Mukherjea agreed with Chief Justice Sikri's reasoning on Article 368. They believed that the power to amend the Constitution covers all provisions, but there are implied limitations. The President's power to give assent to bills for amendments implies

[4] *Id*, para 550

limitations on the amending power, as certain basic features of the Constitution are expected to be permanent.[5] These basic features include the sovereignty of India, the democratic character of the polity, the unity of the country, individual freedoms, and the mandate to build a welfare state and egalitarian society.[6] The judges concluded that the power to amend the Constitution does not include the power to destroy or emasculate these basic features. However, they noted that these limitations are illustrative, not exhaustive.

- **Justice A.N. Ray**

  Justice A.N. Ray expressed the minority view in the case and firmly rejected the idea of limiting the power of Parliament to amend the Constitution through any theory of implied limitations. He argued in favour of the principle of parliamentary supremacy in relation to amending powers. He traced the history of Article 368 and pointed out that there was more evidence in the debates of the constituent assembly to suggest that all provisions, including fundamental rights, are within the scope of amendment.[7] The judge believed that the term "amendment" should not be unduly restricted by implying limitations that are not explicitly stated in the text. He examined various dictionaries to show that the meaning of "amend" or "amendment" broadly includes alteration, change, addition, deletion,

[5] *Id,* para 663.
[6] *Supra* note 2, para 666.
[7] *Id,* para 866.

or modification.[8] He stated that adding a provision on a new and independent subject or making changes to a specific article or clause falls within the scope of amendment.

The judge also believed that each generation has the right to establish its own laws and make changes to political institutions and principles. He argued that the people, who gave themselves the Constitution through the Preamble, have conceded the amending power to the bodies mentioned in Article 368 as they represent the people. Therefore, he concluded that it is not permissible to impose any restrictions on the amending power beyond what is stated in Article 368.

- **Justice H.R. Khanna**

Justice Khanna adopted a mono-provisional model of inherent limitations which distinguished him from Chief Justice Sikri, whose conception of implied limitations was multi-provisional in the sense that the latter derived implied limitations on amending powers of Parliament not only from Article 368 but also from other provisions of the Constitution as well. Justice Khanna proceeded with the assumption that the question of determination of the scope, ambit and width of amending powers under Article 368 post the 24th Amendment, is dependent on the meaning of the term "amendment" as it stood prior to the 24th Amendment. He proceeded on the assumption that the amending power is not subject to any implied limitations, however, it is subject to certain inherent limitations

[8] *Id*, para 838

flowing from basic structure of the Constitution.[9]

He categorically held that the conception of the term amendment itself inheres and implicates certain inherent limitations.[10] He stated that such limitations flow from the word amendment and are closely related to its interpretation and meaning.[11]

According to him, the context in which the word "amendment" is used in the Constitution determines its meaning. Justice Khanna proceeded to articulate this context by pointing out that amending power of Parliament under Article 368 does not include the power to completely abrogate the Constitution.[12] He further added that it is not permissible to touch the foundation or to alter the basic institutional pattern, though it is permissible to effect changes and to adapt the system to the requirements of changing conditions.[13]

The most crucial part of his judgment is the Paragraph 1461 in which he wrote that:

"The word amendment postulates that the old constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old constitution cannot be destroyed or done away with; it is retained though in the amended form."

In the same para, he has explained that what is meant by the retention

[9] *Supra* note 2, para 1445.
[10] *Ibid.*
[11] *Ibid.*
[12] *Id,* para 1426.
[13] *Ibid.*

of the old Constitution. He was of the opinion that a mere retention of some provisions of the old Constitution even though the basic structure or framework of the Constitution has been destroyed would not amount to the retention of the old Constitution. He further explained that the words "amendment of the Constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution.

He exemplified some provisions as features of basic framework of the Constitution. He has written that "it would not be competent under the garb of amendment, for instance, to change the democratic form into dictatorship or hereditary monarchy nor would it be permissible to abolish the Lok Sabha and the Rajya Sabha".[14] According to him, the secular character of the State cannot likewise be done away with.[15] As regards judicial review, he was of the opinion that judicial review has become an integral part our constitutional system. In order to highlight the importance of judicial review, he referred to the speech of Dr. Ambedkar when the Constituent Assembly was dealing with the draft Article 25 (corresponding to present Article 32 of the constitution). Dr. Ambedkar observed:

"If I was asked to name any particular article in this Constitution as the most important an article without which this Constitution would be a nullity- I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it, and I am

[14] *Supra* note 12.
[15] *Ibid*

glad that the House has realized its importance."[16]

Thus, Justice Khanna held that the vesting of power of exclusion of judicial review in a legislature, including State Legislature, strikes at the basic structure of the Constitution.[17]

As regards the Fundamental Rights, initial understanding of the public was that he didn't consider Fundamental Rights to be a part of basic structure because in his conclusion (vii) he said that-

"The power of amendment is plenary and includes within itself the power to amend the various Articles of the Constitution including those relating to fundamental rights…."

He himself clarified his position on the Fundamental Rights in the subsequent case of Indira Gandhi v. Raj Narain[18]. He stated that –

"It has been stated by me in the judgment that the secular character of the state, according to which the State shall not discriminate against any citizen on the ground of religion only cannot likewise be done away with. The above observation shows that, the secular character of the nation and the rights guaranteed by Article 15 pertain to the basic structure of the constitution. I also dealt with the matter at length to show that the right to property was not a part of the basic structure of the Constitution. This would have been wholly unnecessary if none of the fundamental rights was a part of the basic structure of the Constitution."

[16] VII, *Constituent Assembly Debates*, 953.
[17] *Supra* note 2, para 1529.
[18] AIR 1975 SC 2299.

Lastly, as regards the Preamble, Justice Khanna held that it is the part of our Constitution and in his conclusion (x) he has written that apart from the part of the Preamble which relates to the basic structure of, the preamble does not restrict the power of amendment.

- **Justice M.H. Beg**

Justice M.H. Beg opened his judgment by opining that reference was made to the largest ever bench of thirteen judges so that the correctness of the view in Golak Nath v. State of Punjab[19] could be determined.[20] Beg's, J. view was that in Golaknath, the limitations on constitutional amendments with respect to infringement of fundamental rights on an equal footing with any other law made by the parliament was in respect of the unamended Article 368. The question about the consequence in case Article 368 is itself amended by the express power of such amendment recognized by clause (e) of the proviso to Article 368(2) of the Constitution.[21]

He was of the view that the constitution itself contained in various places a distinction between the Constitution and the law. It mentions both the "Constitution and the law". Thus, he opined that constitutional amendments cannot be restricted under Article 13 as it applies to laws and not to constitutional amendments.[22]

With reference to the judicial check on the amending powers of the parliament, he observed:

[19] (1967) 2 SCR 762.
[20] *Supra* note 2, para 1791.
[21] *Ibid.*
[22] *Supra* note 20, paras 1829-1834

"No doubt the judicial organ has to decide the question of the limits of a sovereign authority as well as that of other authorities in cases of dispute. But, when these authorities act within these limits, it cannot interfere."[23]

Discarding the view that judiciary should keep a check on the amending powers of the constitution; he believed that the only check on such powers was of the public opinion. He observed:

"The pressure of public opinion, and the fear of revolt due to misuse of such powers of amendment are the only practically possible checks which can operate if and when such contingencies arise. These checks lie only in the political fields of operation."

The only implied limitation in the word "amendment" that Justice Beg was convinced of was what Wanchoo, J., in Golak Nath's case which was the limitation to completely abrogate the constitution at one stroke. However, he observed that the power of amendment was wide enough to erode the constitution completely step by step so as to replace it by another.[24]

Thus, it can be concluded by saying that Justice Beg completely refuted the concept of basic structure and opined that anything and everything in the constitution was capable of being amended provided that the process as provided under Article 368 is followed.

- **Justice Y.V. Chandrachud**

[23] *Id,* para 1816.

[24] *Supra* note 2, para 1835.

Chandrachud J. expressed the view that he wanted to avoid writing a separate judgment and thought that after a free and frank exchange of thoughts, he would be able to share views of someone or the other of the judges, but it was not possible because of paucity of time. He nevertheless expressed that he found his opinion fairly close to Ray and Palekar JJ and he was not in agreement with some of the views expressed by Sikri CJ and Hegde and Mukherjea JJ. Therefore, he proceeded to write a separate judgment.

Examining the nature and scope of Article 368 prior to the 24th Amendment, Chandrachud J concurred with the minority judges in Golak Nath v. State of Punjab and observed that "The word "amendment" in Article 368 has a clear and definite import and it connotes a power of the widest amplitude to make additions, alterations or variations."[25] The learned judge took the view that that the proviso to Article 368 furnishes evidence of the fact that the term "amendment" is not used in a narrow and insular sense, rather in a wide and broader sense. He concluded by saying that the power of the parliament to amend the Constitution is wide and unfettered, and it encompasses every provision of the Constitution.[26]

After examining cases cited before him dealing with the doctrine of implied or inherent limitations in major jurisdictions of the world[27], he found that the theory of implied or inherent limitations does not enjoy a wide recognition anywhere. He also rejected the contention

[25] *Id,* para 2059.
[26] *Id,* para 2142.
[27] *Id,* paras 2095-2108

of the petitioners that the Preamble, not being a part of the Constitution, is a limitation on the amending powers of Parliament. Rejecting the basic structure doctrine, he observed:

"I see formidable difficulties in evolving an objective standard to determine what would constitute the core and what the peripheral layer of the essential principles of the Constitution. I consider the two to be inseparable."

Conclusion

The Kesavananda judgment held that Parliament cannot amend the basic structure of the Constitution. However, deriving a clear conclusion from the eleven judgments delivered in the case on 24th April 1973 is challenging. Three different terms, such as basic elements, basic features, and basic structure, were used, and there was no common ground on the limitation of the power of amendment between the judges. Although six judges favored citizens, and six favored the state, Justice Khanna agreed with none and decided the case midway.

Furthermore, a common ground could not arise because no discussions took place in Court at any time, nor could they possibly have taken place in the chambers of the Judges on what was "The View by the Majority" arising from the eleven different judgments. Justice Chandrachud wrote in his judgment that because of serious constraints of time due to the retirement of CJ Sikri on 25th April 1973:

"There has not been enough time after the conclusion of the arguments for an exchange of draft judgments amongst all of us and I have had the benefit

of knowing fully the views of only four of us"

All this shows that deriving a ratio that a certain portion of the constitution consists of the basic structure which is beyond the amending powers of the parliament would be a hurried conclusion.

However, the question whether Kesavananda Bharati case had truly decided that Constitutional amendment could not violate the basic structure could not be avoided. It came up for consideration in Minerva Mills v. Union of India,[28] C.J. Chandrachud observed:

"The summary of the various judgments in Kesavananda Bharati was signed by nine out of the thirteen Judges. Paragraph 2 of the summary reads to say that according to the majority, "Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution". Whether or not the summary is a legitimate part of the judgment or is per incuriam part of the judgment or is per incuriam for the scholarly reasons cited by authors, it is undeniable that it correctly reflects the majority view".

In his separate judgment Justice Bhagwati said that finding out the ratio in Kesavananda case was "a difficult and troublesome question". Further he relieved himself of deciding this "difficult and troublesome question" by saying that in the earlier case of Indira Gandhi v. Raj Narain[29] five judges had accepted the "View by the majority" in the Kesavananda case. As a matter of fact, the Indira Gandhi case had not considered this troublesome question at all.

[28] AIR 1980 SC 1789.
[29] AIR 1975 SC 2299

Today this "difficult and troublesome question" that what is the ratio of the Kesavananda judgment is easily answered by a statement that "the ratio of the Kesavananda judgment is that parliament cannot amend the basic structure of the constitution". But was this the ratio? This is the million-dollar question that the Honorable Supreme Court of India has never actually answered directly.