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JUDICIAL REVIEW AS THE BASIC STRUCTURE OF THE CONSTITUTION: A NEW CONSTITUTIONALISM IN INDIA

- Harshit Upadhyay[1] & Dr Sheeba Khalid[2]

- **An Overview**

Though fundamental to the legal system, constitution also is subject to changes. In the case of an unwritten constitution such changes occur involuntarily while written constitutions are subject to changes through deliberation, known as amendments.' Amendability of the constitution is a sine qua non, as absence of possibility to make changes through amendments may lead to its changes through extra constitutional methods including revolution.' Moreover, non-amendability of the fundamental law implies monopoly of a generation over the future, which is an unacceptable proposition." In short, to live up to the needs of the changing times as well as to assume self-existence a constitution should be capable of adjusting to changes, how-ever protecting itself against self eradication.'

In the absence of appropriate provisions for schematic amendment the changes in the Constitution may run riot, damage its identity and leave the very existence of the constitution doubtful. Therefore, provision for amendment to bring about an orderly change is usually incorporated in constitutions.

The Constitution makers gave the power to amend the Constitution in the hands of the Parliament by making it neither too rigid nor too flexible with a purpose that the Parliament will amend it as to cope up with the changing needs and demands of “we the people”. The Parliament in exercise of its constituent power under Article 368 of the Indian Constitution can amend any of the provisions of the Constitution and this power

[1] Student at Amity University Lucknow Campus
[2] Assistant Professor at Amity University Lucknow Campus

empowers the Parliament to amend even Article 368 itself. On its plain terms Art.368 is plenary and is not subject to any limitations or exceptions. The Constituent Assembly debates indicate that the founding fathers did not envisage any limitation on the amending power. Bringing alteration to the Constitution provisions by the Parliament was very easy process before Keshavananda Bharathi's Case,because there was no implied or express limitation on its amending power exercised under theConstitution. But in the keshavanandha's case, uncontrolled power of the Parliament has been controlled and curtailed by the Doctrine of basic structure. We did not have this doctrine at the commencement of the Constitution of India.

The 'Doctrine of Basic Structure' is a judge- made doctrine to put a limitation on the amending powers of the Parliament so that the basic structure of the basic law of "the land" cannot be amended in exercise of its constituent power under the Constitution.

- **Constituent Power and Ordinary Legislative Power**

Unlike the British Parliament which is a sovereign body, in the absence of a written constitution, the powers and functions of the Indian Parliament and State legislatures are subject to limitations laid down in the Constitution. The Constitution does not contain all the laws that govern the country. Parliament and the state legislatures make laws from time to time on various subjects, within their respective jurisdictions. The general framework for making these laws is provided by the Constitution. Parliament alone is given the power to make changes to this framework under Article 368. Unlike ordinary laws, amendments to constitutional provisions require a special majority vote in Parliament.

Another illustration is useful to demonstrate the difference between Parliament's constituent power and law making powers. According to Article 21 of the Constitution, no person in the country may be deprived of his life or personal liberty except according to procedure established by law[3].

[3]AIR 1973 SC1461

The Constitution does not lay down the details of the procedure as that responsibility is vested with the legislatures and the executive. Parliament and the state legislatures make the necessary laws identifying offensive activities for which a person may be imprisoned or sentenced to death. The executive lays down the procedure of implementing these laws and the accused person is tried in a court of law. Changes to these laws may be incorporated by a simple majority vote in the concerned state legislature. There is no need to amend the Constitution in order to incorporate changes to these laws. However, if there is a demand to convert Article 21 into the fundamental right to life by abolishingdeath penalty, the Constitution may have to be suitably amended by Parliament using its constituent power.

Most importantly seven of the thirteen judges in the Kesavananda Bharati case, including Chief Justice Sikriwho signed the summary statement, declared that Parliament's constituentpower was subject to inherentlimitations. Parliament could not use its amending powers under Constitution that would profoundly change its character, whether by changing institutional structures or altering its basic principles. under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution. Thus, the decision has strengthened our democracy, and that Parliament's authority and legitimacy are not diminished if it lacks the power to make radical changes in the Constitution.

- **Evolution of the Concept of Basic Structure: The Keshavananda Case a Milestone**

After independence, the Government of India started to implement agrarian reforms scheme, but unfortunately, this action of the government was attacked and challenged in many High Courts, because the initiation of agrarian reforms were directly violating the Fundamental Right such as Arts.14, 19 and 31, especially right to property which was a fundamental right in the original constitution. Bihar Land Reforms Act, 1950 was the first enactment on agrarian reform which was challenged in the Patna High Court. To nullify the judgment of High Court and to immunise this law from Fundamental Rights, Article

31-B and the Ninth Schedule were introduced in the Constitution by the Constitution First Amendment Act 1951.

The question whether Fundamental Rights can be amended under Article 368 came for consideration in the Supreme Court in Shankari Prasad case. In this case validity of Constitution (First Amendment) Act, 1951 which inserted inter alia, Articles.31-A and 31-B of the Constitution were also challenged. The amendment was challenged on the ground that it abridges the rights conferred under Article 131 of Part III and hence was void. The Supreme Court however rejected the above argument and brought out the distinction between legislative power and constituent power and held that "law" in Article 13 did not include an amendment of the Constitution made in the exercise of constituent power and Fundamental Rights were not outside the scope of amending power.

The Constitution (Seventeenth Amendment) Act, 1964 introduced a major change and put a number of laws in the Ninth Schedule, so as to keep them away from the judicial review and was challenged before the Court. The majority of the judges in Sajjan Singh case[14] on the same logic as held in the Shankari Prasad case[4] held that the law of amendment is superior law and is not subject to Article 13(2). It also held that the Shankari Prasad case was rightly decided and affirmed that the Parliament under Article 368 can amend any of the provision of the Constitution including the Fundamental Rights and make a suggestion to the Parliament that Fundamental rights should be included in the Proviso of the Article 368.

One of the arguments in this case was the scope of judicial review which was reduced to a great extent, so the amendment should be struck down. The Court rejected this argument and held by majority that the pith and substance of the amendment was to amend the Fundamental Rights and not to restrict the scope of Article 226. They minority view on

[4]AIR 1965 SC 84

this point was very different, they are of the view that every Constitution has certain basic principles which could not be changed.

In Golak Nath case, the validity of 17th Amendment which inserted certain Acts in Ninth Schedule was once again challenged. The Supreme Court ruled that the Parliament had no power to amend Part III of the Constitution and overruled its earlier decision in Shankari Prasad12and Sajjan Singh case. In order to remove difficulties created by the decision of Supreme Court in Golak Nath's case the Parliament enacted the 24th Amendment Act. In 1973, in Keshavananda Bharati vs State of Kerala, the Supreme Court reviewed the decision in the Golak Nath case. Ten of the 13 judges held that Article 368 itself contained the power to amend the Constitution and that law' in Article 13(2) did not take in a constitutional amendment under Article 368. The law declared in the Golak Nath case was accordingly overruled. On the question whether the amending power under Article 368 is absolute and unlimited, seven judges, constituting a majority, held that the power was subject to an implied limitation; a limitation that arose by necessary implication from its being a power to 'amend the Constitution'. By a majority of 7:6 the Court ruled that Article 368 does not enable Parliament to alter the "basic structure" or framework of the Constitution'. Three different terms, 'basic elements', 'basic features' and 'basic structure', were used. What constituted the basic elements, features or structure was, however, not clearly made out by the majority and remained an open question.In Keshavanandha Bharati Case an attempt was made to question the plenary power of the Parliament to abridge or take away the Fundamental Rights, if it was necessary by the way of amendment under Art.368 of the Constitution. Seven out of the thirteen judges Bench held that the Parliament's constituent power under Art.368 was constrained by the inviolability of the Basic Structure of the Constitution, which was one of the Basic features of the Constitution. The Basic Structure of the Constitution could not be destroyed or altered beyond recognition by a constitutional amendment.

Each judge laid out separately, what he thought were the basic or essential features of the Constitution. There was no unanimity of opinion within the majority view either.

Justice Sikri, C.J., had tabulated the 'basic features' of the Constitution as follows:

- Supremacy of the Constitution.
- Republican and democratic form of government
- Secular character of the Constitution
- Separation of powers
- Federal character of the Constitution

In the same case, Justice Hegde and Justice Mukherjee included the sovereignty and unity of India, the democratic character of our polity and individual freedom in the elements of the basic structure of the Constitution. They believed that Parliament had no power to revoke the mandate to build a welfare state and an egalitarian society. Justice Khanna also said that Parliament could not change our democratic government into a dictatorship or a hereditary monarchy, nor would it be permissible to abolish the Lok Sabha and Rajya Sabha. The secular character of the state could not, likewise, be done away with.

In summary the majority verdict in Kesavananda Bharati recognised the power of Parliament to amend any or all provisions of the Constitution provided such an act did not destroy its basic structure. But there was no unanimity of opinion about what appoints to that basic structure. Though the Supreme Court very nearly returned to the position of Sankari Prasad by restoring the supremacy of Parliament's amending power, in effect it strengthened the power of judicial review much more.

- **Basic Structure Concept Reaffirmed: The Indira Gandhi Election Case**

In 1975, The Supreme Court again had the opportunity to pronounce on the basic structure of the Constitution. A challenge to Prime Minister Indira Gandhi's election victory was upheld by the Allahabad High Court on grounds of electoral malpractice in 1975. Pending appeal, the vacation judge- Justice Krishna Iyer, granted a stay that allowed Smt. Indira Gandhi to function as Prime Minister on the condition that she should not draw a salary and speak or vote in Parliament until the case was decided. Meanwhile, Parliament passed the Thirty-ninth amendment to the Constitution which removed the authority of the

Supreme Court to adjudicate petitions regarding elections of the President, Vice President, Prime Minister and Speaker of the Lok Sabha. Instead, a body constituted by Parliament would be vested with the power to resolve such election disputes. Section 4 of the Amendment Bill effectively thwarted any attempt to challenge the election of an incumbent, occupying any of the above offices in a court of law. This was clearly a pre- emptive action designed to benefit Smt. Indira Gandhi whose election was the object of the ongoing dispute.

Amendments were also made to the Representation of Peoples Acts of 1951 and 1974 and placed in the Ninth Schedule along with the Election Laws Amendment Act, 1975 in order to save the Prime Minister from embarassment if the apex court delivered an unfavourable verdict. The mala fideintention of the government was proved by the haste in which the Thirty-ninth amendment waspassed. The bill was introduced on August 7, 1975 and passed by the Lok Sabha the same day. The Rajya Sabha passed it the next day and the President gave his assent two days later. The amendment was ratified by the state legislatures in special Saturday sessions. It was gazetted on August 10. When the Supreme Court opened the case for hearing the next day, the Attorney General asked the Court to throw out the case in the light of the new amendment.

Counsel for Raj Narain who was the political opponent challenging Mrs. Gandhi's election argued that the amendment was against the basic structure of the Constitution as it affected the conduct of free and fair elections and the power of judicial review. Counsel also argued that Parliament was not competent to use its constituent power for validating an election that was declared void by the High Court.

Four out of five judges on the bench upheld the Thirty-ninth amendment, but only after striking down that part which sought to curb the power of the judiciary to adjudicate in the current election dispute. One judge, Beg, J. upheld the amendment in its entirety. Mrs. Gandhi's election was declared valid on the basis of the amended election laws. The judges grudgingly accepted Parliament's power to pass laws that have a retrospective effect. Again, each judge expressed views about what amounts to the basic structure of the Constitution. According to Justice H.R. Khanna, democracy is a basic feature of the Constitution and includes

free and fair elections. Justice K.K. Thomasheld that the power of judicial review is an essential feature.

Justice Y.V. Chandrachud listed four basic features which he considered unamendable: Sovereign democratic republic status

Equality of status and opportunity of an individual Secularism and freedom of conscience and religion. Government of laws and not of men i.e. the rule of law

According to Chief Justice A.N. Ray, the constituent power of Parliament was above the Constitution itself and therefore not bound by the principle of separation of powers. Parliament could therefore exclude laws relating election disputes from judicial review. He opined, strangely, that democracy was a basic feature but not free and fair elections. Ray, C.J. held that ordinary legislation was not within the scope of basic features.

Justice K.K. Mathewagreed with Ray, C.J.that ordinary laws did not fall within the purview of basic structure. But he held that democracy was an essential feature and that election disputes must be decided on the basis of law and facts by the judiciary.

- **Forty Second Amendment: Efforts to Nullify the Effect of Kesavananda during the Period of Emergency**

Soon after the declaration of National Emergency, the Congress party constituted a committee under the Chairmanship of Sardar Swaran Singh to study the question of amending the Constitution in the light of past experiences. Based on its recommendations, the government incorporated several changes to the Constitution including the Preamble, through the Forty-second amendment (passed in 1976 and came into effect on January 3, 1977). Among other things the amendment:

Gave the Directive Principles of State Policy precedence over the Fundamental Rights contained in Article 14 (right to equality before the law and equal protection of the laws), Article 19 (various freedoms like freedom of speech and expression, right to assemble peacefully, right to form associations and unions, right to move about and reside freely inany part of the country and the right to pursue any trade or profession) and Article 21

(right to life and personal liberty). Article 31C was amended to prohibit any challenge to laws made under any of the Directive Principles of State Policy;

Laid down that amendments to the Constitution made in the past or those likely to be made in future could not be questioned in any court on any ground;

Removed all amendments to fundamental rights from the scope of judicial review.

- **The Consolidation of the Basic Structure Doctrine in the Post- Emergency Phase**

Though Article 31-C did come under scrutiny, in this case, the Basic Structure Doctrine was not overruled.

Woman Rao v Union of India, following close on the heels of Minerva Mills, is noteworthy for two reasons. First, as a logical extension of the basic structuredoctrine, it held that any amendment of the Constitution after 24th April 1973, which included laws in the Ninth Schedule would have to be tested by reference to the basic structure doctrine. The Court did not disturb the pre- Kesavananda insertions in the Ninth Schedule. This was also necessary to prevent a fraud on the Constitution, because laws which had nothing to do with agrarian reform or Directive Principles were included in the Ninth Schedule merely to protect them from constitutional challenge.

Secondly, Woman Rao applied the basic structure doctrine to uphold the validity of Article 31A and 31C instead of holding them valid on the basis of stare decisis. The majority took the view that in none of the earlier decisions, namely Sankari Prasad, Sajjan Singh, Golak Nath, and Kesavananda was the validity of the First Amendment put in issue and that it could only be said that the validity of Article 31A was recognized in those decisions. It then proceeded to hold that the Directive Principles contained in Article 39(b) and (c) were part of the Constitution as originally enacted, and that it was in order to effectuate the purpose of these Directive Principles that the First and Fourth Amendments were passed.

It held that the First and Fourth Amendments strengthened, rather than weakened the basic structure of the Constitution. A portion of Article 31C, though already upheld in Kesavananda, was again upheld by applying the basic structure test, holding that laws passed truly and bona fide for giving effect to Directive Principles contained in Article 39(b) and (c)

would, far from damaging the basic structure, only fortify it. with an enumeration of basic features in the article itself fell through as the Janata Party did not have the requisite majority in the Upper House. Minerva Mills and Woman Rao gave the Court the opportunity to regain the role of 'sentinel' which had suffered significant erosion during the Emergency particularly in the light of the ruling in ADM Jabalpur v Shivkant Shukla.

Though it had in the Indira Nehru Gandhi case struck down a constitutional perversion, it had failed to protect the citizen's liberty. The innovative and nascent basic structure doctrine gave the Court an opportunity to show in Minerva Mills and Woman Rao that it was willing to stand up against Parliamentary might, and public opinion, happy and relieved that the Court was standing up again, preferred not to worry about the sovereignty of Parliament.

In Kihoto Hollohan vs Zachillhu the Supreme Court held that para 7 of the 10th Schedule to the Constitution, which excluded judicial review of the decision of the Speaker/Chairman of the House on the question of disqualification of MLAs/MPs offended the basic structure of the Constitution. As a result, the decisions given by the presiding officers of the legislature are subject to judicial review. This again is a salutary decision considering the inability of many presiding officers to decide the questions of disqualification dispassionately, uninfluenced by the party in power.

These decisions illustrate that the theory of basic structure has served us well. It helps protect the core of the Constitution from the onslaughts of Parliament. However, there is no way out of judicial errors. In L. Chandra Kumar v Union of India the Supreme Court declared that the power of judicial review over legislativ action vested in High Courts by Articles 226 and 227 and in the Supreme Court by Article 32 is an integral and essential feature of the Constitution and part of its basic structure. Consequently, clause (2)(d) of Article 323-A and clause (3)(d) of Article 323-B, to the extent they excluded jurisdiction of the High Courts and the Supreme Court under Articles 226, 227 and 32 with respect to matters falling within the jurisdiction of tribunals constituted under Articles 323-A and 323-B, were found to be violative of the basic feature of judicial review,

and struck down. However, the Supreme Court, instead of restoring status quo ante and thereby reviving the jurisdiction of the High Courts under Articles 226 and 227 to entertain petitions directly in matters over which the tribunals had jurisdiction, placed a fetter on the resurrected jurisdiction of the High Courts by laying down that:

The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned.

This postscript raises a serious question for consideration. While striking down a part of the Constitution (42nd Amendment) Act, passed by Parliament as violative of the basic structure of the Constitution, how could the Supreme Court itself restrict the revived jurisdiction of the High Courts under Articles 226 and 227 by creating a bar to their entertaining writ petitions directly in matters falling under the jurisdiction of the tribunals? What Parliament cannot do under Article 368 can the judiciary do with respect to the basic structure of the Constitution? In other words, can the Supreme Court restructure the basic structure? In fact, there was no need for the earlier mentioned postscript at all, because it is a settled principle of law that if there is an adequate and equally efficacious alternative remedy, High Courts will not ordinarily entertain a writ petition and instead relegate the petitioner to the alternative remedy.

Therefore, the question to be considered is, in the rare event of the judiciary committing a serious error in striking down an amendment of the Constitution applying the doctrine of basic structure in a given case, who can correct it, when and how? The basic structure is what the Supreme Court says it is. Parliament is bound by the law declared by the Supreme Court. Therefore, Parliament cannot overcome a decision of the Supreme Court declaring a constitutional amendment ultra viresthe basic structure of the Constitution. The Court alone has the power to correct its errors. Correction of judicial errors requires constitution of larger Benches. Experience shows that it takes a long time for the Court to appreciate itserror and correct it. There is a feeling in some quarters that

Parliament can get over the theory of basic structure by convoking another Constituent Assembly by law. In the Golak Nath case76, Justice Hidayatullah had observed:

Parliament must amend Art. 368 to convoke another Constituent Assembly, pass a law under item 97 of the First List of Schedule VII to call a Constituent Assembly and then that assembly may be able to abridge or take away the Fundamental Rights if desired. It cannot be done otherwise.

There is no provision in the Constitution that permits creation of a Constituent Assembly to revise it or to redraft its provisions constituting the basic structure. Entry 97 of the Union List confers residuary power of legislation with respect to matters not enumerated in any of the three lists in Schedule VII. The power of legislation for facilitating amendment of the Constitution so as to abridge its basic structure cannot be located in Entry 97 at all. What an amendment of the Constitution made under Article 368 cannot do, obviously a law made under Entry 97 cannot accomplish. Parliament's assertion of its unlimited right to amend any provision of the Constitution in exercise of its constitutional power through the Constitution (24th Amendment) Act, 1971, as the present wording of Article 368 reads, stands frustrated by the theory of basic structure in Keshavananda Bharati and the categorical declaration in Minerva Mills. What cannot be done directly cannot be achieved indirectly is a well-known proposition of law.

It follows that error, if any, committed by the Supreme Court while applying the theory of basic structure can be corrected only by the Supreme Court. But self- correction takes a long time. No one can be sure that it will be corrected at all. By propounding the theory of basic structure, the Court has assumed a larger role as sole guardian of the Constitution and taken upon its shoulders enormous responsibility for discharging which statesmen like judges with vision, exceptional ability and integrity are needed.

The judiciary has secured for itself a decisive voice in the appointment of judges by its controversial decision in Supreme Court Advocates-on-Record v Union of India. It is now fairly clear what a difficult task it is for the Chief Justice of India and the few seniormost judges of the Supreme Court constituting the collegium to select the most

suitable candidates for elevation to the highest court. In the absence of transparency about the selection process, doubts are expressed about some of the selections made. Past experience does not show that the hope expressed by the president of the Constituent Assembly has Home fruit. The apprehensions voiced by Dr B.R. Ambedkar on the floor of the Constituent Assembly in 1949 are today entertained by many more citizens who are somewhat disillusioned and are seriously concerned about the future of parliamentary democracy in the country.

Present-day political groupings do not permit Parliament to function regularly, much less effectively. For example, allowing the budget to be passed without any debate is a serious matter. If Members of Parliament are mainly interested in settling political scores with their rivals in the two Houses of Parliament and outside, and are not much concerned about the problems of the people that warrant concerted action on the part of all constitutional authorities, if the electoral process continues to be dominated by money power, muscle power, caste and communal factors, if criminalization of politics has already crossed limits of tolerance, and if the checks and balances provided in the Constitution have by and large collapsed or ceased to be effective, it would be difficult to work the Constitution in the manner visualized by the founding fathers. The situation calls for serious introspection and decisive action to save the institutions that are out of shape and to make the Constitution work better.

REFERENCE

- *Agrawal, Anoop; Shankar, Jay (4 May 2010). "Prosecutors Demand Death Sentence for Mumbai Gunman". Businessweek.*
- J.N PANDEY
- PUCL History
- *"A Short History of PUCL". People's Union for Civil Liberties. Retrieved 27 June2010.*
- Your World: The Nowhere Man, *Rupa Jha, October 21, 2012, BBC (retr 2012 10 20) (Program link:The Nowhere Man)*

- *"Dr Binayak Sen found guilty of treason, gets life imprisonment". The Times of India(India). 25 December 2010. Retrieved 25 December 2010.*
- *"Times Now: SC grants bail to Binayak Sen – 15 Apr 2011". Timesnow.tv. 15 April 2011. Retrieved 18 October 2011.*