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Relevance of Theory of Basic Structure of Constitution as an Unfailing Guide

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INTRODUCTION

Indian Constitution is popularly known as the lengthiest, bulkiest and the most detailed of all the Constitutions of the world. It is rightly pointed out in the case of **Saurabh Chandri vs. Union of India**¹ that Indian Constitution is a living and organic document which is ongoing, changing and expanding with the passage of time. Indian Constitution has evolved over time through amendments, judicial interpretations, and societal changes. It serves as the cornerstone of India's democratic and diverse society, providing a framework for governance and protecting the rights and freedoms of its citizens.

Change is the law of nature and it being a universal principle it is applicable on the Constitution itself, in the same manner as the statutes are amended. But because it is the fundamental law, it cannot be changed by the ordinary procedure for amending ordinary laws.² With the changing requirements of the populace, the constitution also requires amendments to accommodate and manage the strain between the political system and constitutional ideals. Article 368 of the Indian Constitution deals with the amending power of the Parliament in regard to the Constitution in context of new difficulties, challenges and

¹ AIR 2004 SC 361

² D.D.Basu, *Comparative Constitutional Law*, 303 (Lexis Nexis, Gurgaon, 2008).

likewise in consideration of the unexpected and unanticipated conditions which were not in thought by the Constitution creators. Judicial Review is a potent weapon in the hands of Indian judiciary to thoroughly examine, analyse and check the validity of any amendment made by the Parliament. In the early years of independence of India, this amending power of the Parliament acted as a ground of constant tiff between the apex court and Parliament of India.³ This led to the evolution of the historic doctrine i.e. Theory of Basic Structure to protect the sovereign characteristics of India and for ensuring that the Indian Parliament does not misuse its power of amendment. According to this doctrine, certain features of the Constitution of India are considered essential and cannot be altered or amended by the Parliament through its amending power under Article 368, if such amendments fundamentally alter the Constitution's basic structure. The basic structure doctrine emerged as a means to safeguard the core principles of the Constitution, ensuring its stability and continuity despite amendments.

JURISPRUDENTIAL ASPECT OF BASIC STRUCTURE IN REFERENCE TO KELSEN PURE THEORY OF LAW

Kelsen defines law as an order of human behavior. The particular idea of this order comprises in its being coercive and in the way that this coercive power is gotten exclusively from the authorizations appended to the law itself. The most distinguished feature of Kelsen's theory is the idea of norms. To Kelsen jurisprudence is a knowledge of a hierarchy of norms. At the core of Kelsen's theory is the concept of the "grundnorm," or basic norm, which is a hypothetical norm that serves as the foundation for the entire legal system. Legal norms are

³ Ishita Chandra, Evolution of Basic Structure Doctrine in India, *available at*:

<http://www.timesofindia.indiatimes.com>

understood as commands or prescriptions addressed to individuals, backed by sanctions. Kelsen argues that legal norms form a hierarchical structure, with higher norms providing the basis for the validity of lower norms. According to Kelsen, legal norms cannot be derived from conflicting authorities. A judgment, for example, derives its authority from an Act of Parliament, the Act of Parliament from the Constitution and so on. Between these sources of legal authority, there is relation of subordination. Ultimately every legal norm in a given legal order deduces its validity from a basic norm i.e. “Grundnorm”.⁴ The Indian Constitution is regarded as the fundamental law of the country. This is based on the fact that it enjoys widespread societal acceptance and recognition. Due to their compliance with the Constitution, the other statutes are presumed to be valid. The organisations created by the Constitution—the Legislature, the Executive Branch, and the Judiciary—are actually deferential to it and are required to act in accordance with its provisions. There are some restrictions on both the State Legislature's and Parliament's ability to pass laws. The ability to enact laws derives from Articles 245 and 246 of the Constitution and it must be used within the confines of the restrictions enumerated in Article 13. The grundnorm principle is applied here once more because the legislative, judicial, and executive branches of government are sub-norms of the fundamental rule, the Constitution.⁵

Accepting the Indian Constitution as Grundnorm it was held in the case of **Jai Kumar Jain vs. The Chairman cum M.D., Delhi Transport Corporation & Another**⁶, that “ It is trite to say that as per Kelsen Hierarchy of Legal Norms, the

⁴ Nomita Aggarwal, *Jurisprudence (Legal Theory)*, 310(Central Law Publications, Allahabad, 2016).

⁵ Zainab Arif Khan, Application of Grundnorm in India, *available at*:<http://blog.ipleaders.in>

⁶ W.P.(C)- 5649/ 2017.

Grundnorm, being the Constitution of India, the applicable hierarchy would be as under:

- a) The Constitution of India
- b) Statutory Law
- c) Delegated Legislation
- d) Administrative instructions”

Similarly there are many more cases the list cannot be enumerated here but to name a few which are as follows:

The apex Court of India in the case of **Government of Andhra Pradesh & Ors vs. Smt. P. Laxmi Devi**⁷, observed, “*According to Kelsen, in every country there is a hierarchy of legal norms, headed by what he calls as the ‘Grundnorm’. If a legal norm in a higher layer of this hierarchy conflicts with a legal norm in a lower layer the former will prevail. In India, the Grund norm is the Indian Constitution.*”

This version of the apex court has been accepted and followed by various High Courts in India, considering the Indian Constitution as the Grundnorm. In the case of **Squadron Leader H. S. Kulshrestha vs. Union of India**⁸, the Allahabad High Court held that “According to the theory of the eminent jurist Kelsen, in every country there is a hierarchy of laws, and the highest law is known as the Grundnorm of law. In our country the Grund norm is the Constitution.” In another case of **Om Prakash Gupta vs. Hindustan Petroleum Corporation Ltd. & Anr.**⁹, it was again held by the Rajasthan High Court that “Since the limits have been defined by the Constitution, they are, in jurisprudential term, ‘the Grundnorm.’”

Recently in the year 2022, in the case of **Sunil vs. State of M. P. & Another**¹⁰, it was again mentioned by the Madhya Pradesh High Court that, “The Constitution of India is the Grundnorm –

⁷ Civil Appeal no. 8270 of 2001.

⁸ 1999 (1) ACW 668.

⁹ RLW 2007 (4) Raj 3059.

¹⁰ CRA No.2316 of 2014.

the paramount law of the country. All other laws derive their origin and are supplementary and incidental to the principles laid down in the Constitution.”

GERMAN APPROACH TOWARDS CONSTITUTION AMENDMENT

The fact that the Indian basic-structure doctrine was purportedly influenced by Dietrich Conrad's German scholarship makes it all the more interesting for a German constitutional lawyer in the case of *Kesavananda Bharati v. Kerala*. In Mark Schmitt and Maurice Hauriou's approach to implied constitutional limits on constitutional amendment, both tried to tackle the issue in the first half of the 20th century albeit from differing angles. Schmitt's theory of implied limits on constitutional amendment was based on some mystical notion of constituent power. Hauriou picked up notions from his fellow French Emmanuel Joseph Sieyès and advanced on the idea that the constituent power was to be exercised by a constituent assembly on the procedural grounds that some fundamental principles were above (natural) law and thus restricted the ability to amend (and perhaps even frame) a constitution.¹¹

The German scholar Carl Schmitt claimed that the Constitution contains a 'core' made up of such principles like 'democracy, human rights, rule of law,' which is critical for the functioning of the constitutional machinery. And it was the duty of the judiciary to, by means of interpretation, defend this core from all attacks designed to cripple it. With regard to the “formalist approach,” it was believed that the Constitution contained within itself the guarantees against any form of excess and as such, the role of the judiciary was merely to authenticate and implement what was inscribed therein. With regard to the

¹¹ Monika Polzin, “The Basic Structure Doctrine and Its German and French Origins: A Tale Of Migration, Integration, Intervention and Forgetting”, 5:1, *Indian Law Review*, (2021).

“substantive approach,” it was claimed that the Constitution drew from some values and principles, therefore, the judiciary could not be confined to systematically literal reading of the constitutional text. Brining life to those values, the judiciary was empowered to interpret the constitution enforcing those ideals instead of being a mute puppet at the behest of parliament. German constitutional scholar Dieter Conrad supported the substantive approach and in 1965 argued that amending power rests within the parliament was in essence limitless. He further argued that the doctrine of basic structure could be used only as a last resort when legislative authority has done extreme transgression.¹²

ORIGIN OF DOCTRINE OF BASIC STRUCTURE IN INDIA

While evaluating the basic structure doctrine Austin observed “With the basic structure doctrine, a balance, if an uneasy one, has been reached between the responsibilities of Parliament and the Supreme Court for protecting the integrity of the seamless web.”¹³ Now lets delve into the historical aspect of Doctrine of basic structure.

The term “Basic Structure” has no where been defined in the Constitution of India. This concept owes its origin to the efforts and vision of judiciary to safeguard the rights of its citizens and also to upkeep the cherished ideals and philosophy of our constituent makers. This judicial innovation has articulated a strong principle that there are few basic features in the Constitution which can never be amended or taken away by the Parliament. The intention of the judiciary is to protect the

¹² Harshita Gupta, “Emergence of Basic Structure Doctrine in India and its Connection With Germany”,
available at: <https://ssrr.com/abstract/>.

¹³ Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of Basic Structure Doctrine*, (Oxford University Press, New Delhi, 2011).

identity of the Indian Constitution and to keep the amending power of the Parliament within such parameters so as it cannot touch the basic structure of the Constitution.

Shankari Prasad Singh vs. Union of India (AIR 1951 SC 458)

– This case relates to the constitutional validity of the First Amendment which was challenged on the pretext that under Article 13 the state is prohibited from making any law which takes away or bridges the fundamental rights and an amendment under Article 368 is a law. The court upholding the constitutionality of the 1st Amendment observed that Law in Article 13 did not include an amendment enacted under Article 368. The Supreme Court laid down that Article 368 gives the power to the Parliament to amend every provision of the Indian Constitution including the Fundamental Rights. This decision was upheld by the Supreme Court of India in the case of **Sajjan Singh vs. State of Rajasthan** (AIR 1965 SC 845) where the court held that the constituent power conferred by Article 368 on the Parliament, included even power to take away fundamental rights under Part III of the Constitution.

Golak Nath vs. State of Punjab (AIR 1967 SC 1643) – In this landmark judgment of the Supreme Court of India with a majority of 6:5, the apex court overruled its earlier decision in the Shankari Prasad and Sajjan Singh Case and held that Parliament had no power to amend the fundamental rights or to take away or abridge any of the fundamental rights enshrined in Part III of the Indian Constitution. The court was of the view that the fundamental rights are so inviolable and ethereal in significance that they couldn't be confined regardless of whether such a move were to get consistent endorsement of the two houses of Parliament. At the end of the day, the top court held that a few elements of the Constitution lay at its center and expected significantly more than the standard techniques to transform them.

It wasn't until 1973 that the idea appeared in the text of the Supreme Court's decision that M.K. Nambiar and other solicitors use

d the term "basic structure" during the petitioners' argument in the Golaknath case.

The milestone of the basic structure doctrine was finally achieved in the landmark case of Kesavananda Bharti where the Supreme Court held that an amendment to the Constitution cannot be treated at par with the term law as understood by Article 13(2). The court further held that there are certain inherent limitations in the constituent power of the Parliament. Parliament could not use its amending powers under Article 368 to damage, emasculate, destroy, abrogate, change or alter the basic structure or contour of the Constitution.

BASIC STRUCTURE DOCTRINE AND ITS ESSENTIAL FEATURES

Now let's have a look at what is included in the basic structure doctrine as per the verdicts of the Supreme Court of India in various historical cases. But it must not be forgotten that the basic features could only be illustrative and could not be catalogued. Following points were illustrated as the basic structure of the Constitution by Sikri, C.J., Shelat, J., Grover, J., Hegde, J., Mukherjea, J., and Jagmohan Reddy, J., in the case of Kesavananda Bharti Case:

- Constitution being the supreme law of land
- Republican and Democratic forms of Democracy
- Secular nature of the Constitution
- Separation of powers between legislature, executive and judiciary
- Federalism under the Constitution
- Demarcation of power between the three wings of the government
- Unity and Integrity of the country
- Sovereign character of India
- Democratic character of our polity
- Mandate to establish welfare state and egalitarian society

In 1975, the Supreme Court again had the opportunity to pronounce on the basic structure of the Constitution in the case of Indira Nehru Gnadhi vs. Raj Narain popularly known as Election Case. In this case the court got an occasion to elaborate the meaning of the expression basic structure of the Constitution. The majority of the Supreme Court, declared the following features as constituting to basic structure of the Constitution:

- Judicial Review
- Free and Fair Elections
- Rule of Law
- Right to Equality

In Minerva Mills case, Central Coal Fields case, Kihoto Hollohon case, S.R.Bomma case and M.Nagaraj case following doctrines were considered as the essential features of the basic structure.

- Limiting the amending power
- Access to justice
- Democracy
- Fair electoral process
- Federalism
- Secularism
- Equality

It can be well concluded here that the concept of basic structure has evolved over time and its horizon is ever widening as it is incorporating more and more rights into its ambit.

LANDMARK CASES OF BASIC STRUCTURE DOCTRINE: A METICULOUSE APPROACH

Shankari Prasad- Golaknath Case- Kesavananda Bharati- Minerva Mills- Indira Nehru Gandhi- Waman Rao-I.R. Coelho

1. Sankari Prasad Singh Deo vs. Union of India and State of Bihar

A constitutional conundrum came across soon after the Independence in 1951 between agrarian reforms and fundamental rights guaranteed in the Constitution of India. Parliament introduced various agrarian reforms also known as the Zamindari Abolition Act in order to boost socio-economic development post-independence however these agrarian reforms were in contradiction with the fundamental right, 'right to property'. Agrarian reforms were then challenged in the court of law and thereafter, albeit Patna High Court declared the Bihar Land Reforms Act 1950 as unconstitutional and violative of Article 13(2) of the Indian Constitution, High Courts of Allahabad (Uttar Pradesh) and Nagpur (Madhya Pradesh) validated the Act. Parliament and the then Prime Minister was infuriated by the decision of High Court and therefore presented a bill to amend the constitution. Subsequently, by means of this bill, amendment was made to the constitution and Article 31A and 31B was inserted. With these amendments, the State had the competence to appropriate property. The legislative potential of amending the fundamental right thus gave rise to dissension which was then presented before the Honourable Supreme Court in the case of Sankari Prasad vs. Union of India on the grounds that, whether the first amendment passed by the parliament valid in regard with fundamental rights? And whether the word 'law' used under Article 13(2) also incorporates 'law of amendment of the Constitution of India'? The argument presented by the petitioners before the court were that the amendment made in by the parliament purports to take away or abridge any of the fundamental rights, falls within the prohibition of Article 13(2) on the other hand parliament called the argument a misconception and postulated it to be essential for the socio-economic growth of the country. The Court however upheld the validity of the amendment by applying the doctrine of harmonious construction and delimit the term 'law' in Article 13(2). The Court further held that "the terms of Article 368 are perfectly general and empower Parliament to amend the

Constitution, without any exception whatever. Had it been intended to save the fundamental rights from the operation of that provision, it would have been perfectly easy to make that intention clear by adding a proviso to that effect.”

Thus, the decision in *Sankari Prasad vs. union of India* further affirmed the exclusive power of parliament to amend the constitution including the fundamental rights.

2. Sajjan Singh vs. State of Rajasthan

The questions raised in *Sankari Prasad* case surfaced again in the case of *Sajjan Singh vs. State of Rajasthan*, where validity of the seventeenth amendment of Constitution was challenged in the court of law. The petition in the said case once again raised the question about whether a fundamental right provided in part III comes under the ambit of power of parliament to amend the constitution under article 368? The courts considered the test of pith and substance relevant in determining the issue at hand, the court even so influenced its decision on the case of *Sankari Prasad* and held that the plea made by the petitioners for reconsidering *Sankari Prasad's* case is wholly unjustified and must be rejected. Henceforth the term ‘amend’ was one more time given an extensive connotation and the amendments made by the parliament were considered to be made in pursuance of socio-economic development of the nation.

3. I.C. Golaknath & Ors vs. State of Punjab & Anrs Case

The shielding capabilities of the seventh schedule was challenged yet again in the case of *I.C. Golaknath*. The case was heard by eleven-judge bench of Supreme Court. Primarily, the validity of the Punjab Security of Land Tenure Act, 1953 (Act 10 of 1953) and of the Mysore Land Reforms Act (Act 10 of 1962) as amended by Act 14 of 1965 was challenged. This was the first time when the courts realised the mistake they made in the case of *Sankari Prasad*. The Supreme Court substantiated that While-ordinarily a Court will be reluctant to reverse its previous decisions it is its duty in the constitutional field to correct itself as early as possible, for otherwise the future progress of the

country and happiness of the people will be at stake (ref. judgement). Accordingly, the courts applied doctrine of 'prospective overruling' ergo the First, Fourth and Seventh Amendments being part of the Constitution by acquiescence for a long haul, couldn't be challenged. Nevertheless, majority of the bench asserted in purview of Article 13(2) that a law made under the constitutional provisions would, be tested on the anvil of Part III and if it takes away or abridges rights conferred by Part III it would be void to the extent of the contraventions. Furthermore, the court quoted the words of Justice Holmes that "we, must think- things and not words". The true principle is that if there are two provisions in the Constitution which seem to be hostile, judicial hermeneutics requires the Court to interpret them by combining them and not by destroying one with the aid of the other. Thereby, it was held in the persistence of the spirit of democracy by majority of six-judges that, the fundamental rights are outside the ambit of amendatory process thus cannot be abridged or taken away by the exercise of Article 36. Amending power under Article 368 is limited expressly by article 13(2) and impliedly by the language of Article 368 and other articles of preamble.

4. Kesavananda Bharati vs. State of Kerala

"Were the States not interested in the fundamental rights of their citizen?"

A doctrine which liberated the citizens of India in the decade of darkest days. A case presided over by the largest constitutional bench of that era, which has kept its distinguishable status till the date, became a rescuer of democracy by delimiting the legislative officialdom. The landmark judgement was a sequential of Constitution's (Twenty-fifth Amendment) Act and the Constitution's (Twenty-ninth Amendment) Act of November 5, 1971. The issue at hand needed direct interpretation of the parliament's power of amendment.

The courts postulated that despite the permeation of the entire Constitution by the aim of national renaissance, the core of the

commitment to the social revolution lies in Parts III and IV, in the Fundamental Rights and in the Directive Principle of State Policies, these are the conscience of the Constitution. The agrarian reforms enigma with the fundamental rights resulted in this landmark judgement. The bench kept its focus to avoid the parliamentary supremacy and ascertained as of when an amendment is successfully passed, it becomes part of the Constitution having equal status with the rest of the provisions of the Constitution albeit if such an amendment is liable to be struck down on the ground that it damages or destroys an essential feature, the power so claimed should, a fortiori, operate on the Constitution as it stands. Courts scrutinized the arguments presented and compared various constitutions of the world in order to comprehend the nature of Article 368 and thus came to the conclusion that so far as the wording of [Article 368](#) itself is concerned, there is nothing in it which limits the power of amendment expressly or by necessary implication on the contrary amendments shall not dismantle the foundation of Constitution. It's admitted as a large power. Whether one likes it or not, it is not the function of the court to invent limitations where there are none. Conclusively by majority of 7:6, the court pronounced that Basic Structure of Constitution cannot be amended, for the purpose of saving democratic India from the abuse of power by parliament.

5. Minerva Mills Ltd. & Ors vs. Union Of India

The Basic structure doctrine was yet again validated in the case of Minerva mills vs. union of India. By the majority of 4:1, Justice Chandrachud on the behalf of Justice A.C. Gupta, N.L. Untwalia and P.S. Kailasam maintained the decision of Kesavanada Bharati vs. Union of India. The courts reaffirmed that the parliament has the power to amend the Constitution nevertheless it should be within its basic framework. The theory of unlimited power to amend the Constitution would alienate democracy and create a totalitarian State. Hence, this case became a further proclamation of the doctrine of basic structure.

6. I.R. Coelho vs. State Of Tamil Nadu

I. R. Coelho challenged the ninth schedule of Constitution in regard with the basic structure doctrine. The case decided on 2007 further envisages and strengthen the basic structure doctrine. Courts in their decision intensified the power of judicial review among the doctrine of basic structure. It was thereby held that any statue, rule and regulation shall be dealt with the test of effect and impact. In addition, with any statute included in the 9th Schedule that abridges the rights provided in Part III of the Constitution would be invalidated by judicial review.

The basic structure doctrine serves as evidence for the constitutionalist idea that majority rule by force cannot damage the core of the Constitution of India because it serves as a check on constituent power, the fundamental doctrine preserved Indian democracy; otherwise, unrestricted parliamentary power might have transformed India into a totalitarian state. Retaining the fundamental principles of our Constitution, which our founding ancestors so painstakingly crafted, is beneficial. By clearly defining a real division of powers in which the judiciary is independent of the other two institutions, it strengthens our democracy. By limiting the ability of legislative bodies to amend laws, it has also given the Supreme Court enormous, unchecked power, making it the most powerful court in the world.

RECENT CONTROVERSY REGARDING BASIC STRUCTURE DOCTRINE

Jagdeep Dhankar, vice president and chairman of the Rajya Sabha, recently criticised the judiciary in public and said that courts cannot weaken "parliamentary sovereignty," which sparked a discussion about the separation of powers and brought attention back to the "basic structure" doctrine of the Constitution.

The Vice-President brought up the Supreme Court decision that invalidated the National Judicial Appointments Commission (NJAC) and the 99th Amendment in 2015 in the context of the ongoing dispute between the government and the judiciary over the collegium system of appointing judges. During his opening remarks at the 83rd All India Presiding Officers Conference, Mr.Dhankar stated that he disagreed with the historic *Kesavananda Bharati* case ruling, which held that Parliament could amend the Constitution but not its fundamental structure. The Vice President argues that law passed by the legislature should not be invalidated by the judiciary on the grounds that it violates the basic structure of the Indian Constitution."¹⁴

In the words of Vice President Jagdeep Dhankar “In a democratic society, ‘the basic’ of any ‘basic structure’ has to be the supremacy of mandate of people. Thus the primacy and sovereignty of Parliament and legislature is inviolable.” he said, adding that he does not subscribe to the *Kesavananda Bharati* case ruling. The views of Hon’ble Vice President do not go well with many persons and they have taken strong exception to his comments. The authors of the present research paper here would like to highlight the statement of Hon’ble **CJI D Y Chandrachud** who defended the doctrine of basic structure by comparing it with “North Star” which always guides the judges while interpreting the Constitution.

CONCLUSION

The doctrine of basic structure has reiterated the idea that none of the three pillars of the state i.e. legislature, executive and judiciary is above the Constitution. Constitution was, is and will forever remain supreme and superior. Its origin has led Parliament’s amending power to stop assaulting on the fundamental and indispensable principles of the Indian

¹⁴ Sumeda, Understanding the Basic Structure of the Constitution and Jagdeep Dhankar’s Criticism of it, *available at*:<http://www.thehindu.com>.

Constitution. This theory is acting as a means to save the Constitution from majoritarian rampage. This doctrine is so deeply embedded in the roots of our Constitution that it outshines every time and acts as a guiding star to strengthen the democracy by keeping a strong check on the amending power of the government. We owe a lot to this doctrine of the Constitution as it has saved the Constitution from being sabotaged through the misuse of power of the Parliament. The theory of basic structure has led to a strong tussle between the Parliament and the judiciary but it can be rightly concluded that Parliament's power to amend the Constitution is not absolute and the apex court of India is acting as anchor sheet to protect the basic provisions of the Constitution by reviewing the constitutional amendments on the parameters of basic structure doctrine. Evolution of this doctrine perhaps is an unparalleled act of the judiciary in the democratic history.