

# CRITICAL ANALYSIS OF BASIC STRUCTURE DOCTRINE

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## 1. Abstract

On 25<sup>th</sup> April, India marks the 50<sup>th</sup> anniversary of the Basic Structure Doctrine, delivered in 1973 by the Supreme court in the <sup>1</sup>Kesavananda Bharati decision. 'Doctrine of Basic Structure' is a landmark judge-made doctrine in Keshavananda Bharti vs State of Kerala. It was propounded by the Indian Judiciary on 24<sup>th</sup> April 1973 in Keshavananda Bharati Sripadagalvaru case to put a limitation on the <sup>2</sup>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. The basic structure doctrine is a highly controversial pluralist judicial creation that has been accepted by all branches of the government and the people of India. In this case the Supreme court overruled its judgment in the <sup>3</sup>Golak Nath case in which it is given that parliament cannot amend Fundamental rights. Before 1967 Golak Nath case there came another case in 1951&1965 in which SC held that Parliament has the absolute power to amend the Constitution under Article 368. Then came Kesavananda case in 1973 which basic structure doctrine was made which limits the political power. It recognized the basic identity of the Constitution, which may not be destroyed by any amendment. Different elements are given under Basic structure doctrine.

## 2. Index terms

Keshavananda Bharti case, Basic structure doctrine

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<sup>1</sup> Kesavananda Bharati v. State of Kerala  
Citation(s) (1973) 4 SCC 225; AIR 1973 SC 1461

*deepak yadav education.* (2023, april 25). Retrieved from the hindu newspaper analysis:  
<https://youtu.be/iz2sg9rA5NA>

<sup>2</sup> Article 368 Part 20 Clause (1) and Clause (2)

<sup>3</sup> Golak nath v. State of Punjab (1967 AIR 1643, 1967 SCR (2) 762)

## 1.Introduction

According to the Constitution, Parliament and the state legislatures in India have the power to make laws within their respective jurisdictions. This power is not absolute in nature. The Constitution vests in the judiciary, the power to adjudicate upon the constitutional validity of all laws. If a law made by Parliament or the state legislatures violates any provision of the Constitution, the Supreme Court has the power to declare such a law invalid or <sup>4</sup>ultra vires. This check notwithstanding, the founding fathers wanted the Constitution to be an adaptable document rather than a rigid framework for governance. Hence Parliament was invested with the power to amend the Constitution. Article 368 of the Constitution gives the impression that Parliament's amending powers are absolute and encompass all parts of the document. But the Supreme Court has acted as a brake to the legislative enthusiasm of Parliament ever since independence. With the intention of preserving the original ideals envisioned by the constitution-makers, the apex court pronounced that Parliament could not distort, damage or alter the basic features of the Constitution under the pretext of amending it. Justice Khanna used the term “basic structure” in his judgement and said the judiciary has the power to review and strike down constitutional amendments and acts that are not in the conformity with the doctrine.

Kesavananda Bharati was the chief pontiff of the Ender Mutt, a monastic religious institution located in Kasaragod district, Kerala. Bharati had some land in the Mutt which he owned. The Kerala state government passed the Land Reforms Amendment Act in 1969. As per this Act, the government could acquire some of the lands that belonged to the Mutt. In March 1970, Bharati moved the <sup>5</sup>Supreme Court to enforce the rights that were guaranteed to him under:

Article 25: Right to practice & propagate religion

Article 26: Right to manage religious affairs

Article 14: Right to equality

Article 19(1)(f): Freedom to acquire property

<sup>6</sup>Article 31: Compulsory acquisition of property constitution.

<sup>4</sup> Acting or done beyond one's legal power or authority.

<sup>5</sup> under Section 32 of the Constitution

<sup>6</sup> Rep. by the constitution (Forty Fourth Amendment) Act, sec.6 (w.e.f. 20-6-1979)

## 2. What is basic structure doctrine of Indian constitution?

The basic structure doctrine which is also known as “fundamental right case” is common law legal doctrine that the constitution of a sovereign state has certain characteristics that cannot be erased by its legislature. Constitution under article 368 grants power to parliament to amend whenever there is a necessity. In *Kesavananda Bharti vs state of Kerala* case, the Constitutional bench of the Supreme court ruled by a 7-6 verdict that parliament could amend any part of the Constitution so long as it did not alter or amend the basic structure or essential feature of the constitution. The idea behind this is that the basic features of the constitution of India should not be altered to an extent that identity of constitution is lost in process.

There is no mention of the term “Basic Structure” anywhere in the [Constitution of India](#). The idea that the Parliament cannot introduce laws that would amend the basic structure of the constitution evolved gradually over time and many cases. The idea is to preserve the nature of Indian democracy and protect the rights and liberties of people. This Basic Structure doctrine of the Indian Constitution helps to protect and preserve the spirit of the constitution document.

It was the **Kesavananda Bharati case** that brought this doctrine into the limelight. It held that the “basic structure of the Indian Constitution could not be abrogated even by a constitutional amendment”. The judgement listed some basic structures of the constitution as:

1. Democratic and republican form of government
2. Secular character of the Constitution
3. Individual freedom

## 3. Element of basic structure doctrine

The doctrine of basic structure through is not exactly defined but through its contents which have been provided by the judicature clarifies a scope defining the frame or structure of constitution.

- **Supremacy of the constitution**
- **Rule of law**
- **Sovereignty, liberty and republic nature of Indian polity**

- <sup>7</sup>Judicial review
- Harmony and balance between <sup>8</sup>fundamental rights and <sup>9</sup>directive principles
- Separation of power
- Federal character
- Parliamentary system
- Rule of equality
- Unity and integrity of the nature
- Free and fair election
- Limited power of parliament to amend the constitution
- Welfare state
- Freedom and dignity of an individual

#### 4. Evolution of basic structure with important cases

In this case, there was no question of constitutional amendment but even so, the concept of basic doctrine was applied.

The Supreme Court held that policies of a state government directed the concept of the basic structure of the constitution evolved over time. In this section, we shall discuss this evolution with the help of some landmark judgement related to this doctrine.

##### <sup>10</sup>Shankari Prasad Case (1951)

- In this case, the SC contended that the Parliament's power of amending the Constitution under Article 368 included the power to amend the Fundamental Rights guaranteed in Part III as well

##### <sup>11</sup>Sajjan Singh case (1965)

- In this case also, the SC held that the Parliament can amend any part of the Constitution including the [Fundamental Rights](#).
- It is noteworthy to point out that two dissenting judges, in this case, remarked whether the fundamental rights of citizens could become a plaything of the majority party in Parliament

<sup>7</sup> power of the courts of a country to examine the actions of the legislative, executive, and administrative arms of the government and to determine whether such actions are consistent with the constitution. Actions judged inconsistent are declared unconstitutional and therefore null and void.

<sup>8</sup> Given in Constitution of India in part 3

<sup>9</sup> Given in Constitution of India in part 4

<sup>10</sup> Shankari Prasad v. Union of India, MANU/SC/0013/1951.

<sup>11</sup> 1965 AIR 845, 1965 SCR (1) 933

## Golak nath case (1967)

- In this case, the court reversed its earlier stance that the Fundamental Rights can be amended.
- It said that Fundamental Rights are not amenable to the Parliamentary restriction as stated in Article 13 and that to amend the Fundamental rights a new Constituent Assembly would be required.
- Also stated that Article 368 gives the procedure to amend the Constitution but does not confer on Parliament the power to amend the Constitution. This case conferred upon Fundamental Rights a ‘transcendental position’.
- The majority judgement called upon the concept of implied limitations on the power of the Parliament to amend the Constitution. As per this view, the Constitution gives a place of permanence to the fundamental freedoms of the citizens.
- In giving to themselves the Constitution, the people had reserved these rights for themselves

## Kesavananda Bharati case (1973)

- This was a landmark case in defining the concept of the basic structure doctrine.
- The SC held that although no part of the Constitution, including Fundamental Rights, was beyond the Parliament’s amending power, the “basic structure of the Constitution could not be abrogated even by a constitutional amendment.”
- The judgement implied that the parliament can only amend the constitution and not rewrite it. The power to amend is not a power to destroy.
- This is the basis in Indian law in which the judiciary can strike down any amendment passed by Parliament that is in conflict with the basic structure of the Constitution.

## <sup>12</sup>Indira Nehru Gandhi v. Raj Narain case (1975)

- Here, the SC applied the theory of basic structure and struck down Clause(4) of Article 329-A, which was inserted by the 39th Amendment in 1975 on the grounds that it was beyond the Parliament’s amending power as it destroyed the Constitution’s basic features.

<sup>12</sup> 1975 AIR 1590, 1975 SCC (2) 159

- The 39th Amendment Act was passed by the Parliament during the Emergency Period. This Act placed the election of the President, the Vice President, the Prime Minister and the Speaker of [the Lok Sabha](#) beyond the scrutiny of the judiciary.
- This was done by the government in order to suppress Indira Gandhi's prosecution by the Allahabad High Court for corrupt electoral practices.

### <sup>13</sup>Minerva Mills case (1980)

- This case again strengthens the Basic Structure doctrine. The judgement struck down 2 changes made to the Constitution by the [42nd Amendment Act 1976](#), declaring them to be violative of the basic structure.
- The judgement makes it clear that the Constitution, and not the Parliament is supreme.
- In this case, the Court added two features to the list of basic structure features. They were: judicial review and balance between Fundamental Rights and DPSP.
- The judges ruled that a **limited amending power** itself is a basic feature of the Constitution.

### <sup>14</sup>Waman Rao Case (1981)

- The SC again reiterated the Basic Structure doctrine.
- It also drew a line of demarcation as April 24th, 1973 i.e., the date of the Kesavananda Bharati judgement, and held that it should not be applied retrospectively to reopen the validity of any amendment to the Constitution which took place prior to that date.
- In the Kesavananda Bharati case, the petitioner had challenged the Constitution (29th Amendment) Act, 1972, which placed the Kerala Land Reforms Act, 1963 and its amending Act into the 9th Schedule of the Constitution.
  - The 9th Schedule was added to the Constitution by the First Amendment in 1951 along with Article 31-B to provide a “protective umbrella” to land reforms laws.
  - This was done in order to prevent them from being challenged in court.

<sup>13</sup> AIR 1980 SC 1789)

<sup>14</sup>(1981) 2 SCC 362, 1981 2 SCR 1

- Article 13(2) says that the state shall not make any law inconsistent with fundamental rights and any law made in contravention of fundamental rights shall be void.
- Now, Article 31-B protects laws from the above scrutiny. Laws enacted under it and placed in the 9th Schedule are immune to challenge in a court, even if they go against fundamental rights.
- The Waman Rao case held that amendments made to the 9th Schedule until the Kesavananda judgement are valid, and those passed after that date can be subject to scrutiny.

### <sup>15</sup>Indra Sawhney and Union of India (1992)

- SC examined the scope and extent of Article 16(4), which provides for the reservation of jobs in favour of backward classes. It upheld the constitutional validity of 27% reservation for the OBCs with certain conditions (like creamy layer exclusion, no reservation in promotion, total reserved quota should not exceed 50%, etc.)
- Here, 'Rule of Law' was added to the list of basic features of the constitution.

### <sup>16</sup>S.R. Bommai case (1994)

- In this judgement, the SC tried to curb the blatant misuse of Article 356 (regarding the imposition of President's Rule on states).
- against an element of the basic structure of the Constitution would be a valid ground for the exercise of the central power under Article 356.

### 5. <sup>17</sup>Criticism of basic structure of doctrine

- The most common issue of the basic structure doctrine is that there has been no basis for the doctrine in the language of the constitution.
- There is absence of a provision that can stipulate that the constitution has a basic structure beyond the competence of amending power.

<sup>15</sup> 1992 (Suppl) 3, SCC 217).

<sup>16</sup> 1994 AIR 1918, 1994 SCC (3) 1

<sup>17</sup> *deepak yadav education*. (2023, april 25). Retrieved from the hindu newspaper analysis: <https://youtu.be/iz2sg9rA5NA>

## SUBJECTIVE MATTER:

- It is seen that basic structure doctrine is defined by different judges on their subjective satisfaction.
- This leaves the decision to decide the validity or invalidity of constitutional amendments influenced by the personal preferences of judges who then acquire the power to amend the constitution.

## NO CLEAR DEFINATION:

- The lack of definite examination as to what constitution the basic structure, thereby leaving the doctrine ambiguous.
- It is up to the court to decide what constitution basic structure.

## LEADS TO JUDICIAL OVEREACH:

- National Judicial Appointment Commission (NIAC) was unanimously enacted as an amendment to the constitution by the parliament and passed by the legislature of twenty [out of twenty- eight] States in India.

However, the basic structure doctrine in cases regarded as incidents of judicial overreach like the NIAC bill.

**6. Reference**

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