

**“The Basic Structure of The Constitution of India: An Overview”**

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**ABSTRACT**

The Constitution of India is the paramount parchment of our nation. It is the impeccable edifice of every other law in India. To be more precise all other laws are born from, nurtured by and grab strength from the Constitution. It is also an accepted position that a law inconsistent with the Parliament shall be liable to be struck down. In this regard a lot of arguments have peeked in, revolving around the basic structure of the Constitution of India. An Amendment which takes away or abridges the basic structure of the Constitution is null and void. Hence, in this paper, the author attempts to elucidate what exactly is the basic structure of the Constitution of India. Basic structure is that structure without which the survival of the Constitution becomes a mirage. The author feels that the basic structure is a concept that was knitted by the Indian Judiciary and is embedded in certain decisions which as time passed by were called as the ‘*landmark decisions of the Supreme Court of India*’. The author analyses the multifaceted dimensions of the concept of basic structure starting from the *Berubari* case and ending in a glimpse at the recent decisions. This is followed by the author’s view point on the subject and concluding remarks which winds up the paper.

**INTRODUCTION**

A spider can be easily distinguished from other insects by the very existence of eight legs. An octopus can be easily identified with the help of its tentacles. The existence of three angles proves that a given figure is a triangle. Petals and green leaves are inevitable parts of a flower. A tree basically has a trunk, roots and leaves. Likewise, every living and non-living being has its own characteristics which are not amenable and are owed to none. Our Indian Constitution, the paramount parchment of the land too has a certain features or rudimentary elements which form the edifice and vitiates the entire constitution if ousted from it. These essential and mandatory characteristics are together named ‘Basic Structure of the Indian Constitution’.

The answer is always in the affirmative for the question whether the Indian Constitution embraces a basic structure. But however, it still remains a tedious task to explain in concrete terms as to what and what not constitutes the parameters of basic structure. It can be reasonably inferred that there is no hard and fast rule to explain the said concept. This is something which derives from interpretation.

To put in the simplest form, basic structure implicates and explicates that structure or elements without which it is impossible for the constitution to survive. Basic structure thus encompasses the facets which are inevitable for the existence of the Constitution. It knits the essential ingredients which are necessary and cannot be ousted from the Constitution at any point of time. Basic structure is also something when viewed gives a depiction of the entire summary of the contents of the Constitution which covers the nature of polity, character, law of the land and the type of Government.

If a man is blind, he can survive. Even if a man is deaf, he can survive. Dumbness does not make survival impossible. Absence of all five sense organs is not a hindrance for survival. But however, a man cannot survive without his head or heart. Basic structure is the heart of the Indian Constitution. It is the head or rather the brain of the Indian Constitution. Basic structure is also the backbone without which the Constitution cannot stand straight.

### **AMENABILITY OF THE BASIC STRUCTURE AND THE LANDMARK CASES**

Basic structure is often termed as the back bone of a constitution because, it is impossible for the constitution to stand straight without a backbone. Hence, amenability of the basic structure is beyond the stretch of imagination and it tints the Constitution with the paint of rigidity. Constitutional provisions are indeed amenable subject to the condition that the basic structure remains untouched. Any amendment that whittles down the basic structure is void and is liable to be struck down. The sanctity of the basic structure is preserved with utmost passion and respect by the framers of the constitution and the protectors of the law of the land.

### **BASIC STRUCTURE: A CONCEPT DECIPHERED FROM VERDICTS**

Exploring the contours of the term ‘Basic Structure’ it is evincible that the entire concept has taken its shape through various decisions of the Indian Supreme Court. As Fuller rightly pointed out in his reply to Prof. H. L. A. Hart (1958) law can only exclude what it is not and it is more like building a wall around a village wherein the goal is to protect the village without knowing what it may invade.<sup>1</sup> As on date, our Constitution has undergone one hundred amendments. Every time an amendment has been challenged, the Judiciary has unraveled the challenges by making an attempt to figure out the concept of basic structure.

The Supreme Court in different cases upheld various facets as the basic structure of Constitution. In this regard, there are about twelve landmark cases of which law person should mandatorily know. Let us now have a glance at those dozen of cases.

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<sup>1</sup> Lon L. Fuller, ‘*Positivism and Fidelity to Law – A Reply to Professor Hart*’ 71 Harvard Law Review 630 (1958)

## **PREAMBLE - THE KEY TO THE FRAMERS' MIND**

Every study on the basic structure of the Indian Constitution should commence from the Berubari case.<sup>2</sup> In the aforesaid this case, the Court held that the Preamble is the key to open the mind of the framers of the Constitution. However, the Court declined to accept preamble as the basic structure and held that Preamble is not a part of the Constitution.

## **SHANKARI PRASAD AND PARLIAMENTARY SUPREMACY**

The very first amendment to the India Constitution i.e. The Constitution of India (First Amendment) Act 1951<sup>3</sup> was challenged in Sri Sankari Prasad Singh Deo v. Union of India and Another<sup>4</sup>. Though the Court on account its' reasoning and justifications upheld the validity of the First Amendment, all through the judgment, the term preamble can be seen nowhere. In a nutshell, the outcome of this case was upholding of parliamentary supremacy.

## **SAJJAN SINGH AND PREAMBLE**

Shankari Prasad's case was trailed by Sajjan Singh v. State of Rajasthan.<sup>5</sup> The decision in this case lies in the same track of its fore runner. This verdict was also on the same line. The Apex Court observed in the case that the preamble plays an equally vital role with regard to our body politic. It was also emphasized in the case that Preamble is the epitome of the basic features of the Constitution. The entire Constitution is the amplification and concretization of what is there is set out in the preamble. Indirectly the Court ruled that preamble is within the purview of basic structure of the Constitution.

## **M. K. NAMBIAR'S BASIC STRUCTURE ARGUMENT**

Shankari Prasad's case and Sajjan Singh's case were overruled in the succeeding case of I. C. Golak Nath and Others v. State of Punjab and Another<sup>6</sup>. Though the case is known and is popular for prospective overruling and for holding amendment as a law, the interesting aspect and attractive element in this case is that, it was in this case wherein the phrase 'basic structure' was introduced for the first time. It was in the argument put forth by Mr. M. K. Nambiyar and other counsels for the petitioners the term 'basic structure' came to the forefront for the very first time.

Apart from this, the Golak Nath case also stated that the Preamble of Indian Constitution sets out the main objectives that the legislators intended. While delivering the Majority Opinion which

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<sup>2</sup> (1960)3 SCR 250

<sup>3</sup> W.E.F. 18.06.1951

<sup>4</sup> AIR 1951 SC 458

<sup>5</sup> AIR 1964 SC 845

<sup>6</sup> AIR 1967 SC 1643

forms the 'Judgement', Chief Justice K. Subha Rao wrote that anything can be amended and there is no such thing as essential features or non-essential features.

### **KESAVANANDA BHARATI'S CASE – THE BIBLE OF BASIC STRUCTURE**

The case, His Holiness Kesavananda Bharati v. Union of India<sup>7</sup> is the landmark case in the Indian history which fully fits into the description 'the Bible of Basic Structure' or 'the Encyclopedia of Basic Structure.' The case was heard and decided by a Constitutional Bench of thirteen Judges and there are eleven opinions on record. The case earmarked six facets as the basic structure of the Constitution. This was encompassed of

- i. The Supremacy of the Constitution
- ii. The Republic & Democratic form of Government
- iii. The Secular and Federal Character
- iv. The Separation of Powers between the three organs of the State – Legislature, Executive and Judiciary
- v. The dignity of the Individual and Unity and integrity of the Nation.

These points are evident in the majority decision delivered by the then Chief Justice of India, Sikiri. Supremacy of the Constitution indicates that the final word and the highest authority lie in the Constitution. It is from the Constitution that every other law of the land derives its power. Each law made is to pay heed to the Constitution.

In India we have a republic and democratic form of government. A republic government is a government encompassed of an elected head of the state unlike a hereditary ruler like the British Monarch. In India, we have the President as the head of the state and he is indirectly elected. A democratic Government is nothing but a Government of the people, by the people and for the people. As the Constitution itself gains momentum from the 'people' the Government is accountable to the people.

India is neither religious, nor irreligious nor anti-religious.<sup>8</sup> This implies that India will be devoid of a 'State religion'. Further, the country will not support any religion out of the public fund. Thus the secular nature of the Constitution confers two rights on its citizens. Firstly, every individual can choose a religion of his/her choice or practice any religion of his/her choice. Secondly, the State shall not discriminate its' citizens on the basis of religion. In India, the governing system is federal in nature with dual government polity and bicameral legislature.

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<sup>7</sup> (1973)4 SCC 225

<sup>8</sup> V. Jagannathan, 'Division of Powers in Indian Constitution' Indian Journal of Political Science, Vol.8, No.3. (Jan-March 1947) pp.742-751

Right from the Constituent Assembly Debates of 10<sup>th</sup> December 1948, the importance of the doctrine of separation of powers is evincible.<sup>9</sup> Independence of Judiciary from the other two organs is of great importance. Submissions of Prof. K. T. Shah during the said date in the Constituent Assembly of India incline towards the said concept. In India, we have a federal structure wherein law making powers lie in the Parliament, Executive powers in the President acting on the aid and advice of ministers and Supreme Court with judicial powers.

Apart from the above six features, there are other components added to basic structure by the other Judges in the Coram. Justice Shelat and Justice Grover underlined the importance of building a welfare state as depicted in the Directive Principles of State Policy. The facets of unity and integrity were also accentuated.

Apart from this Justice Hedge and Justice Mukherjea stressed on Sovereignty. This is because sovereignty is the foremost element of any independent State. This indicates absolute independence of the State. Sovereignty simply denotes that the Government is neither controlled by any external power nor by any internal power. Further, it is also impossible to have a Constitution in the absence of sovereignty. The essential feature of Individual freedoms was also equally noted down by the said two Justices.

Preamble was praised as basic structure by Justice Jagmohan Reddy. He stated that the basic features of the Indian Constitution are to be found in the preamble. It is the preamble which enlists the five cardinal features of the Indian State which includes, 'sovereignty', 'socialism', 'secularism', 'democracy' and 'republic'. The four pivotal objectives of the Constitution are also embedded in the preamble. It seeks to secure to its citizens, justice, liberty, equality and fraternity.

The core of the minority opinion of this decision lies in that the fundamental rights of the citizens belonged to the basic structure and hence the Parliament is not entitled to amend the same. Justice A.N.Ray delivered the minority opinion. He had also noted down that there is no such thing as essential and non-essential elements. Everything can be amended.

## **THE ELECTION CASE AND THE BASIC STRUCTURE**

The doctrine of basic structure was reaffirmed in *Indira Nehru Gandhi v. Raj Narain*<sup>10</sup> popularly known as the election case which later led to the resignation of three Judges in the light appointment of Justice A. N. Ray as the Chief Justice of India. The amendment on Supreme Court's jurisdiction over election dispute was struck down as it destroyed the basic structure of the Constitution.

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<sup>9</sup> <http://parliamentofindia.nic.in>

<sup>10</sup> AIR 1975 SC 2299

A reference to the Election case is incomplete without a mention of certain opinions that popped up in the verdict. Justice H. R. Khanna held that democracy is a basic feature of the Constitution and this feature indeed includes the free and fair elections. Power of judicial review was underlined as an essential feature by Justice K. K. Thomas. A couple of other aspects were earmarked as the basic structure by Justice Y. V. Chandrachud. The first among them is the Sovereign Democratic and Republic status. Equality of status and opportunity of an individual was the next point. This was followed by secularism and freedom of conscience and religion. The final element was government of laws and not of men i.e. rule of law. Justice M. H. Beg gave the dissenting opinion in the verdict. He upheld the entire Amendment.

### **LIMITED AMENDING POWER OF PARLIAMENT – A BASIC STRUCTURE**

Limited amending power of the Parliament itself was held to be part of basic structure by the Supreme Court in *Minerva Mills v. Union of India*.<sup>11</sup> What makes this case noteworthy is the beauty and the tactics in the argument framed and advanced by the Constitutional master brain Nani Palkhiwala. Unlike the usual argument that an amendment is liable to be struck down as it abridges fundamental rights, Palkhiwala presented the same from a different angle. In the advanced arguments of this case, Palkhiwala, the great Constitutional law pundit, deviated from the traditional and common style argument. The argument Palkhiwala put forth was two- fold. His first contention was that in making such an amendment, the Parliament acted *ultra vires*. He further submitted that by virtue of the impugned amendment, Judicial Review itself has been taken away by the Parliament and judicial review falls within the ambit of the notion ‘basic structure’.<sup>12</sup>

Meticulously reading the judgment, it can be inferred that the Coram was impressed and convinced by Palkhiwala’s argument which brought a ratio of 4:1. Impressiveness, receptiveness and convincingness of this argument of Palkhiwala is evident in the verdict of this case, wherein Court held that limited amending power of the Parliament itself amounts to basic structure and exceeding the scope this limited amending power destroys the case structure. Accepting the arguments the Court held that limited amending power itself is a basic feature and if the Parliament acts *ultra vires*, that itself is an act of vitiating the basic structure.

The Court also noted down that fundamental rights constitute basic structure in certain cases and so does Judicial review in certain cases be tagged as basic structure. Harmony between the fundamental rights and the directive principles of state policy is also an essentiality.<sup>13</sup>

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<sup>11</sup> AIR 1980 SC 1789

<sup>12</sup> *Id*

<sup>13</sup> *Id*

## **REITERATING THE BASIC STRUCTURE CONCEPT IN WAMAN RAO**

A mix reflection of the previous decisions is evident in *Waman Rao and Others v. Union of India and Others*<sup>14</sup> As per the decision in this case, all laws in the Ninth Schedule after 24<sup>th</sup> April 1973 are amenable. The said date is the day on which the judgment in *Kesavananda Bharati* was delivered. In this case, the Supreme Court struck balance between its authority to interpret the Constitution and the Parliament's power to amend the Constitution.

## **AN OPINION TRANSMOGRIFIES AS A JUDGMENT**

Scrutinizing the *Minerva Mill's* judgment a separate opinion by Justice P. N. Bhagawati occupies a prominent place in it. Justice P. N. Bhagawati became the Chief Justice of India when the case of *S. P. Sampath Kumar and Others v. Union of India and Others*<sup>15</sup> came before the Supreme Court. The verdict of the *S. P. Sampath Kumar's* case delivered by Chief Justice P. N. Bhagawati is nothing but an elaboration of the aforementioned opinion in *Minerva Mills'* case. This case draws attention in the spectrum of basic structure because, in this case, the Apex Court struck down Clause 2(d) inserted by the amendment in question as it fettered the jurisdiction of the Courts which in effect was taking away the sanctity of Judicial Review which is time and again held as the basic feature of our constitution.

## **FEDERAL CHARACTER AND SECULARISM AS THE BASIC STRUCTURE**

In the matter of *S. R. Bommai and Others v. Union of India*<sup>16</sup> the Apex Court held the federal feature to be part of the basic structure of Indian Constitution. The Supreme Court also held in this case that the facet of secularism is a basic feature of the Constitution which is thus beyond amending power. Further, preamble is the basic structure of the Indian Constitution. It was also noted in the decision that a proclamation under Article 356(1) is also subject to judicial review.

Though a couple of ingredients were added with Federalism as basic structure, the case is popular for holding federal feature of the Constitution of India as a basic feature. Federalism is composed of seven components. Firstly, let us look into the Supremacy of the Constitution. This aspect has already been explained. In short, the Constitution is the supreme authority. All laws of the land derive its validity when the same is in conformity with the Constitution. Any law which derogates from the Constitution is liable to be struck down.

Secondly, written Constitution occupies a prominent role in Federalism. A written and codified constitution is inevitable as far as a federal structure is concerned. This is followed by rigidity.

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<sup>14</sup> AIR 1981 SC 271

<sup>15</sup> AIR 1987 SC 271

<sup>16</sup> AIR 1994 SC 1918

Rigidity takes away the process of amendment from the hands of easiness. This adds stability to the Constitution.

Next is division of power. Separation of powers was first propounded by Aristotle,<sup>17</sup> was revived by John Locke<sup>18</sup> and was molded into its current form by Montesquieu.<sup>19</sup> Lord Acton's words, 'Power corrupts and absolute power corrupts absolutely' paved way for doctrine of separation of powers. The advocates of the doctrine of separation of powers felt that if the powers are concentrated in the same person or body of persons that may result in tyranny. Hence, it was necessary to divide it among three organs viz. the Legislature, the Executive and the Judiciary. The Legislature makes the law, the Executive enacts or enforces the law and the Judiciary interprets the law and adjudicates. Though the three organs are independent the system of separation of powers work on mutual restraints i.e. checks and balances. This means that every organ is also bestowed with certain powers by which it can legitimately interfere in the functioning of the other two to sustain the smooth functioning of law and order in the state. In India, we have the legislative powers vested in the Parliament, executive powers in the President and Council of Ministers, and Judicial powers in the Supreme Court of India.

Authority of Court is the next element of federalism. In India, we have the Supreme Court, which is apex in the Court hierarchy. The segment below the Supreme Court is the seat of High Courts. Every State has a High Court which is the highest Court of the respective state.

Bicameral Legislature is another important component of federalism which is evincible in India. Bicameral legislature simply indicates a legislature with two houses. In the Indian Parliament we have two houses which is Lok Sabha and Rajya Sabha. One of them is the lower house and the other is the upper house. Lok Sabha encompasses of the elected members and Rajya Sabha has the members.

The last and the final feature of federalism is dual government polity. In a way this indicated the decentralization of Government. This means the Government at the Centre delegates the function to the State Government. In India we have Central Government and State Governments. We have the Parliament at the Centre and State Legislatures in each State. We have the President at the Centre and Governor for each state. Thus in India we follow a system of decentralization.

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<sup>17</sup> *Division of the organs and the concept of Mixed Government*

<sup>18</sup> *Division of the three Organs into 1) Continuous Executive Power, 2) Discontinuous Legislative Power and 3) Federative Powers*

<sup>19</sup> Baron De Montesquieu, 'The Spirit of the Laws' (*Espirit de Lois*)

## **JUDICIAL REVIEW OVER LEGISLATIVE POWER**

The Larger Bench of Seven Judges in *L. Chandra Kumar v. Union of India*<sup>20</sup> unequivocally held that the power of Judicial review over legislative action vested in the High Courts under Article 226 and the Supreme Court under Article 32 is an integral and essential feature which constitutes basic structure of the constitution. Judicial review is of utmost importance in most of the countries and so is it in the Indian soil.

## **NINTH SCHEDULE AND BASIC STRUCTURE**

The case of *I. R. Coelho v. State of Tamil Nadu*<sup>21</sup> is often referred to as the 11<sup>th</sup> January judgment or the Ninth Schedule case and plays a crucial role in determining basic structure in the light of the Ninth Schedule. It was held in this case that any Act included in the Ninth Schedule is liable to be struck down if it violates the basic structure of Indian Constitution. The Court observed in the verdict of this case that an Act in the Ninth Schedule may violate the fundamental structure or may not. If the former is the result, then the same is liable to be struck down if the said violation whittles down the basic structure of the Constitution of India. This was basically an elaboration of the decision in *Waman Rao's* case. This case is cutting edge on the sanctity of Ninth Schedule laws. This is because till the advent of the cases of *Waman Rao* and *I. R. Coelho*, the Ninth Schedule was prone to abuse. A law struck down by the Judiciary was easily validated by the Parliament by adding the said law or enactment into Ninth Schedule. Once a legislation is added to the Ninth Schedule it automatically nullifies the judicial decision and the Act becomes valid from the date of its inception into the Ninth Schedule. Ninth Schedule which was inserted with the sole objective of protecting agrarian reforms thus saw the insertion of draconian laws into it. This was put to an end by the case at hand.

## **A GLIMPSE AT THE RECENT DECISIONS**

An analysis of the basic structure of the Indian Constitution would remain incomplete in the absence of a mention of the case of *Supreme Court Advocates on Record Association v. Union of India*<sup>22</sup> which is germane to the point. The Constitution (Ninety-Ninth Amendment) Act, 2014 and the National Judicial Appointment Act 2014 were struck down by the Supreme Court as the same were unconstitutional. Though the N.J.A.C. Act, 2014 tried to seek protection under the umbrella of Ninth Schedule, the same was ousted by the Supreme Court of India.

At this juncture, it would also be pertinent to make a quick glance at the recent Supreme Court decision in *Nabam Rebis and Others v. Deputy Speaker and Others*<sup>23</sup>. The case was decided on

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<sup>20</sup> (1997)3 SCC 261

<sup>21</sup> AIR 2007 SC 861

<sup>22</sup> (2016)5 SCC 1

<sup>23</sup> MANU/SC/0768/2016

the thirteenth of July 2016. The case stemmed against the Order of the Governor of the State of A.P. which summoned 16<sup>th</sup> Session of Assembly and advancing the date. Whether the power exercised by the Governor under Article 163(2) of the Constitution was a question to be answered here. One argument that came up was that the said provision was already a part of the Constitution when it was framed and that the basic structure doctrine is not applicable to the provisions of the original constitution. The rationale for stating so was that the original provision by virtue of its very presence from the birth of the Constitution itself forms basic structure. The Constituent Assembly debates were also referred in the matter. Pandit Jawaharlal Nehru described the function of the Governor under Article 174 as an indirect duty and added that the same thereby amounts to an executive function as the same is under the aid and advice of the Council of Ministers. The Supreme Court set aside the Order of the Governor of A.P. accentuating that the said function is not a discretionary power of the Governor and the same is an executive function which should be mandatorily performed or can only be performed under the aid and advice of the Council of Ministers.

### **MY VIEWPOINT**

Exploring the contours of the Indian Constitution from the starting the point of Berubari case to the recent decisions, it can be reasonably inferred that the basic structure is not a mere abstract concept. In various decisions, various facets are upheld by the Court as part of the basic structure. This undoubtedly and unerringly includes the Preamble, judicial review, separation of powers, federal structure, sovereignty, socialism, democracy, secularism and republic. It is still a mooted point if Part III of the Constitution<sup>24</sup> forms part and parcel of the concept of basic structure. This in view of the various decisions depends on the factual matrix of every case. Not in every case it amounts to basic structure. In that context, sometimes fundamental rights constitute the basic structure and sometimes it does not. Though there can be difference of opinions in many cases, 'Judicial review' is never ruled out from the concept of basic structure by any Court at any point of time. Even in cases where Parliamentary supremacy is upheld the result is magnification of the parameters of judicial review.

### **CONCLUSION**

The Constitution of India is the largest written constitution which clearly outlines the impeccable framework for the smooth functioning of the nation. The very concept of basic structure implies those core elements of the Indian Constitution which is beyond the reach of any amendments. They are impassible and unalterable frontiers. This is made so because the dynamicity of the present scenario is never a threat to the India Constitution.

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<sup>24</sup> Fundamental Rights

The makers of the Constitution have made sure that the basic structure is elastic enough to cover any future changes. The Courts have always been cautious that the basic structure is not vitiated under any circumstances and under any pressure. The basic structure is always wrapped in the finest cotton and it is taken care of just as how a mother cares her baby. This is because the quintessence of the Indian Constitution lies in its basic structure.