

## CONSTITUTIONAL BASIS FOR BASIC STRUCTURE DOCTRINE IN INDIA: EFFECTS AND APPLICABILITY

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### 1. Introduction

The Constitution of India is a supreme, special, legal document which gives clear road map to all three organs of the government in Centre and State to perform their duties and functions within its sphere. No organ of the government is supreme. All three organs of the government should work within the boundary of the Constitution. There must be an express provision under the Constitution to consider, the validity of the actions of the individual organ as well as to justify their orders. But, when there is a gap in Constitutional law to check the unjustified actions of the government, then judiciary can evolve or invent some doctrine to uphold the constitutional supremacy. The Apex Court laid down the doctrine or principle should be only at exceptional circumstances to resolve the constitutional crisis. If Judiciary continues in preparing guidelines and evolving doctrines for all cases as general rule, it will be a great threat to the democratic principles and also contradictory to the theory of separation of power.

The framers of the Constitution, with due diligent have taken lot of care and concern to provide a best Constitution to the citizen. But, they did not add express clause under Article 368 to impose limitations upon the amendment power exercised by the Parliament. Consequently, Parliament by exercising its constituent power added tricky Ninth Schedule<sup>1</sup> to accommodate agrarian reforms by excluding judicial review. Gradually, Ninth Schedule made controlled Constitution into uncontrolled one. As a result, in *Keshavanada Bharathi's*<sup>2</sup> case in 1973, the Supreme Court made uncontrolled Constitution into controlled one through inventing the new doctrine called “Basic Structure” which imposes implied limitations upon the amendment power of the Parliament. But, Supreme

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<sup>1</sup> Ninth Schedule was inserted in the 1<sup>st</sup> Amendment of Indian Constitution.

<sup>2</sup> AIR 1973 SC1473.

Court has failed to lay down the yardstick for what constitutes basic structure. Power to make an implied amendment to Indian Constitution was given even to individual judge, which is really unfair under the scheme of theory of separation of power which is also one of the basic structure of the Indian Constitution. The Judiciary even did not say the subject matters of basic structure should be decided by the Constitutional Bench.

The doctrine of “basic structure of the Constitution”<sup>3</sup> has become very controversial principle and ambiguous one. This doctrine does not have a textual basis. There is no provision stipulating that the Constitution has a basic structure and this structure is beyond the competence of amending power. Therefore, the limitation of the amending power through the basic structure of the Constitution is deprived of positive legal validity. Moreover, not having its origin in the text of the Constitution, the concept of the “basic structure of the Constitution” cannot be defined.

In this context, an attempt has been made in this paper to examine the reasons for evolving this doctrine by the Apex Court and to know what constitutes the basic structure of the Constitution. Further, paper addresses, whether this doctrine violates the theory of separation of power which is also one of the basic features of Indian Constitution? Do we need to add this doctrine expressly by bringing an amendment to Article 368? If single judge says some subject matters are basic structure, would it not curtail the power of Parliament?

## **2. Evolution of Basic Structure Theory in India**

Generally academicians always argue that the basic structure theory is the product of long struggle and conflict between the Parliament and Judiciary. But, the author opines that this doctrine came into existence not because of confront between Judiciary and Parliament, but, because of framers passive approach, where they did not give any scope and place for agrarian reforms under the provisions of the original Constitution. Further, incorporating the right to property under the list

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<sup>3</sup>The doctrine of “basic structure” is introduced into India by a German scholar, Dietrich Conrad. See Dietrich Conrad, *Limitation of Amendment Procedures and the Constituent Power*, 15-16 Indian Year book of International Affaris 375 (1970). For the D. Conrad’s influence on the Indian Supreme Court, see A. G. Noorani, “Behind the Basic Structure Doctrine: On India’s Debt to a German Jurist, Professor Dietrich Conrad”, 18 FRONTLINE (April 28 - May 11, 2001), available at <http://www.hinduonnet.com/fline/fl1809/18090950.htm>.

of fundamental rights was also one of the factors responsible for giving birth to this doctrine by the Apex Court in 1973.

If framers had not brought right to property under Part-III of Indian Constitution, we would have not seen the case of *Kameshwar Singh v. State of Bihar*<sup>4</sup>. Because of this case, the then Prime Minister Jawaharlal Nehru brought Ninth Schedule<sup>5</sup> read with Article 31-B<sup>6</sup> of the Indian Constitution in the first amendment in order to give much importance to agrarian reforms which was one of the manifest of Indian Congress before independence. If we would have not had this 1<sup>st</sup> amendment, *Shankari Prasad's*<sup>7</sup> case would have not come into the picture. After *Shankari Prasad's* case, basic structure doctrine was conceived first time in *Sajjan Singh*<sup>8</sup> case. In these two cases, Supreme Court in fact respected and upheld the decision of Parliament for giving scope for agrarian reforms through Ninth Schedule.

Thereafter, Supreme Court in *Golak Nath's*<sup>9</sup> case said that amendment will also come under the definition of 'Law'. When 'law' has limitations under Article 245 of the Constitution (subject to the Provisions of the Constitution), 'amendment' will also have limitations. Till date, there is no single express provision under the Indian Constitution to limit the amendment power of the Parliament. But, for the first time, Supreme Court in this case, imposed implied limitation upon the amending power of the Parliament by adding the word 'amendment' under the definition of 'law' according to Article 13(3)(a). The petitioner Golak Nath spent money in this case for no relief but for evolving the 'doctrine of prospective over ruling.'

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<sup>4</sup> AIR 1951 Pat.91, SB.

<sup>5</sup> Ninth Schedule was introduced in the Constitution by the Constitution First Amendment Act 1951.

<sup>6</sup> Article 31-B: Validation of certain Acts and Regulations- *Without prejudice to the generality of the provisions contained in Article 31-A*, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

<sup>7</sup> *Sankari Prasad Singh v. Union of India*, AIR 1951SC 458.

<sup>8</sup> *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845.

<sup>9</sup> *Golak Nath v. State of Punjab*, (1967) 2 SCR 762; AIR 1967 SC.

As a result, to nullify the verdict, Parliament brought 24<sup>th</sup> amendment<sup>10</sup> and added clearly clause 3 under Article 368 and clause 4 under Article 13 stating that Parliament is having power to amend the Constitution is not a law making power but it is a constituent power. Thereafter, constitutional validity of 24<sup>th</sup> Amendment was challenged in the case of *Keshavananda Bahrathi*.<sup>11</sup> Supreme Court constitutional bench consisting of 13 judges<sup>12</sup> (6:1:6) upheld the 24<sup>th</sup> Amendment and said that Parliament under Article - 368 can bring an amendment to any provisions of the Indian Constitution including fundamental rights but not for the basic structure. This is how; the Supreme Court gave real birth to this basic structure doctrine to check the uncontrolled power of the Parliament.

Therefore, the author strongly observes that because of the framers of the Constitution attempt to include right to property in the list of fundamental rights in the original Constitution. The doctrine of basic structure came into existence in the *Keshavananda Bahrathi's* case. Hence, right to property is the main cause and responsible right for evolving this doctrine.

### 3. What constitutes Basic Structure?

People in India seem to have accepted, the basic structure doctrine in the same manner as the Americans accepted judicial review of legislation claimed by the Supreme Courts of the United States in *Marbury v. Madison*.<sup>13</sup> In determining what basic structure is, the Court will have to keep national consensus about such basic structure in mind. It is impossible to articulate exhaustively the elements which would constitute the basic structure of the Constitution. It will have to be articulated from case to case. During last few years the Supreme Court has

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<sup>10</sup> Article 13(4) and 368(3) were inserted through 24<sup>th</sup> Amendment. [13 (4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.]

<sup>11</sup> *Supra* Note 2.

<sup>12</sup> These Seven Judges were, Chief Justice Sikri, Justices Shelat, Hegde, Grover, Mukherjea, Jaganmohan Reddy, and Khanna. The minority consisting of Justices Ray, Mathew, Beg, Dwivedi, Palekar and Chandrachud held that Parliament had unlimited power of constitutional amendment. See S.P.Sathe, "Judicial Review in India: Limits and Policy". H.M. Seervai, in his analysis of the case in his magnum opus, "Constitution of India" states that six out of the seven majority judges held that there were implied and inherent limitations on the amending power of the Parliament, which precluded Parliament from amending the Basic Structure of the Constitution. However Khanna J. rejected this theory of implied limitations but held that the Basic Structure could not be amended away. All Seven judges gave illustrations of what they considered Basic Structure comprised of.

<sup>13</sup> I. Cranch 137 : 2 L.Ed. 60.

intervened with constitutional amendments on the ground of basic structure initially only in five cases.<sup>14</sup>

In *Kesavananda Bharati's* case, the majority of judges who admitted the existence of “basic structure of the Constitution” did not agree with the list of the principles included in this concept. Each judge drew a different list. Each judge is able to define the basic structure concept according to his own subjective satisfaction. This leads to the fact that the validity or invalidity of the Constitution Amendment lies on the personal preference of each judge. In the event of this, the judges will acquire the power to amend the Constitution, not specifically conferred to them under the Constitution but given to the Parliament under Art.368 of the Constitution. For that reason, as noted by Anuranjan Sethi, the basic structure doctrine can be shown as a “*vulgar display of usurpation of constitutional power by the Supreme Court of India.*”<sup>15</sup> As illustrated in the case-law of the Indian Supreme Court, when there is no explicit substantive limitation on the amending power, the attempt by a constitutional court to review the substance of the constitutional amendments would be dangerous for a democratic system in which the amending power belongs to the people or its representatives, not to judges.

#### 4. Subject matter of Basic Structure Theory

Supreme Court in series of cases considered following are the subject matters of basic structure and same cannot be altered or amended by the Parliament under Article 368 of the Indian Constitution. They are:

- Supremacy of the Constitution- republican and democratic form of government- Secular character of the Constitution- Separation of powers between the legislature, executive and the judiciary-Federal character of the Constitution<sup>16</sup>.

<sup>14</sup>*Kesavananda Bharti v. Kerala*, AIR 1973, SC 1461; *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299; *Minerva Mills v. Union of India*, AIR 1980 SC 1789; S.P. *Sampat Kumar v. India*, AIR 1987 SC 386; *Sambamurthy v. A.P.*, AIR 1987 SC 663.

<sup>15</sup>Anuranjan Sethi, *Basic Structure Doctrine: Some Reflections*, <http://ssrn.com/abstract=835165>, p. 6-8, 26-27 Similarly, S. P. Sathe concluded that “the Court has clearly transcended the limits of the judicial function and has undertaken functions which really belong to... the legislature” (S. P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J. L. AND POL'Y 29-108, at 88 (2001) Available at [http://law.wustl.edu/journal/6/p\\_29\\_Sathe.pdf](http://law.wustl.edu/journal/6/p_29_Sathe.pdf). Likewise, T. R. Andhyarujina said that the “exercise of such power by the judiciary is not only anti-majoritarian but inconsistent with constitutional democracy” (T. R. Andhyarujina, *Judicial Activism and Constitutional Democracy in India* '10 (1992), quoted in Sathe, at 70.

<sup>16</sup>*Keshavananda Bahrathi Case Sikri, C.J.* explained the concept of basic structure.

- The mandate to build a welfare state contained in the Directive Principles of State Policy- Unity and Integrity of the nation-Sovereignty of the country<sup>17</sup>.
- Democratic character of the polity-Unity of the country- Essential features of the individual freedoms secured to the citizens- Mandate to build a welfare state.
- Unity and integrity of the nation<sup>18</sup> -Equality of status and the opportunity -Sovereign democratic republic-Justice - social, economic and political- Liberty of thought, expression, belief, faith and worship. Democratic character of the polity-Unity of the country- Essential features of the individual freedoms secured to the citizens-Mandate to build a welfare state.
- Democracy and the Preamble to the Indian Constitution guarantees equality of status and of opportunity and that the Rule of law is the basic structure of the Constitution<sup>19</sup>.
- The doctrine of equality enshrined in Art.14 of the Constitution, which is the basis of the Rule of Law, is the basic feature of the Constitution.<sup>20</sup>
- Independence of judiciary is a basic feature of the Constitution as it is the sine qua non of democracy.<sup>21</sup>
- Secularism and Democracy and Federalism are essential features of our Constitution and are part of its basic structure.<sup>22</sup>
- Judicial review is a part of the basic constitutional structure and one of the basic features of the essential Indian Constitutional Policy. Several

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<sup>17</sup> *Shelat, J. and Grover, J.* added three more basic features to the list

<sup>18</sup> *Hegde, J. and Mukherjea, J.* identified a separate and shorter list of basic features

<sup>19</sup> *Indira Gandhi v. Rajnarain* AIR 1975 SC, 2299 (1975) 3 SCC 34; *Kihoto Hollohon* AIR, 1993, SC 412

<sup>20</sup> *Nachane, Ashwini Shivram v. State of Maharashtra*, AIR 1998 Bom 1; *Raghunath Rao v. Union of India*, AIR 1993 SC 1267

<sup>21</sup> *Bhagwati, J. Union of India v. Sankal Chand, Himmatlal Sheth*, AIR 1977 SC 2328 : (1977) 4 SCC 193. and *The Gupta Case*, AIR 1982 SC 149 at 197, 198, *Kumar Padma Prasad v. Union of India*, AIR 1992 SC 1213 : (2000) 4 SC 640, *State of Bihar v. Bal Mukund Shah*, AIR 2000 SC 1296, *Supreme Court Advocates-records-Association v. Union of India*, (1993) 4 SCC 441; AIR 1994 SC 268.

<sup>22</sup> *S.R. Bommai v. Union of India*, AIR 1994 SC 1918, at 1976; *Poudyal v. Union of India*, (1994) Supp.1 SCC 324.

Articles in the Constitution, such as Arts.32, 136, 226 and 227, guarantee judicial review of legislation and administrative action<sup>23</sup>

- The unity and integrity of the nation<sup>24</sup> and Parliamentary system.<sup>25</sup>

Adding many subject matters to the Basic structure box, Judiciary has completely tightened the hands of Parliament. As a general rule, Judiciary has been adding many aspects as basic structure and directed the parliamentarian not to change or alter above mentioned subject matters.

### 5. Effects of Basic Structure Theory on Amendment Power of the Parliament

The “Basic Structure” doctrine is the judge-made doctrine whereby certain features of the Constitution of India are beyond the limits of the amending powers of the Parliament. Though the Court held that the power of Parliament to amend the Constitution was impliedly limited by the doctrine of basic structure, it did not clearly define or explain what constitutes the basic structure.<sup>26</sup>

According to Prof. Upendra Baxi,<sup>27</sup> the effect of the decision in *Keshavananda Bharathi's* case on amendment power of the Parliament rendered so far indicate the following limitations alone, viz.,

- Total repeal of the Constitution would be violative of the basic structure,
- Any expansion of Art.368 to achieve consequence of total repeal would similarly be violative of the basic structure,
- Any attempt to deprive the Court of its power of judicial review of Constitutional amendment would also be transgressive of basic structure,
- Freedoms guaranteed by Arts.14, 19 and 21 constitutes to limit the power of amendment,
- Any attempt to abrogate Part IV of the Constitution may violate basic structure and

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<sup>23</sup> *L.Chandrakumar v. Union of India*, AIR 1997 SC 1125; *Waman Rao v. Union of India*, AIR 1981 SC 271

<sup>24</sup> *Raghunath Rao v. Union of India*, AIR 1993 SC 1267

<sup>25</sup> *In Raghunath Rao v. Union of India case*, AIR 1973 SC at 1535, 1603, 1628 and 1860.

<sup>26</sup> Article on “Basic Structure Doctrine and its Widening Horizons” by V.R. Jayadevan, published in CULR, Vol. 27, March 2003 p.333

<sup>27</sup> See article on ‘Amendment of the Constitution in Constitutional Law of India,’ VOL.II, (Bar Council of India Trust).

- The democratic nature of the Constitution may not be validly transformed by the use of Art.368.

## 6. Insertion of Clause 4 and 5 of Article 368 (42<sup>nd</sup> Amendment)

After the decisions of the Supreme Court in *Keshavnand Bharati and Indira Gandhi*<sup>28</sup> cases, the Constitution (42<sup>nd</sup> Amendment) Act, 1976, was passed which added two new clauses of 4 and 5 to Article 368<sup>29</sup> of the Constitution expressly prohibiting the review of the Constitutional amendments. The 42<sup>nd</sup> Amendment tried to overreach the implication of *Kesavananda Bharathi's* case.

But in *Minerva Mills Ltd. v. Union of India*,<sup>30</sup> question arose that, whether the amendments introduced by Sections 4 and 55 of the Constitution (42<sup>nd</sup> Amendment) Act, 1976 damage the basic structure of the Constitution by destroying any of its basic features or essential elements? The Supreme Court in its answer considered clause (4) and (5) of Art. 368 that were inserted by the 42<sup>nd</sup> Amendment and held them to be unconstitutional since they damage and destroy the basic structure of the Constitution. On the whole, *Minerva Mills*<sup>31</sup> is a comprehensive decision bringing clarity to the doctrine of basic structure. The holding enables the Indian Constitution and the Indian legal system to retain their identity even when attempts have been made to alter them for bringing about social revolution through legislation.<sup>32</sup>

After this case, Supreme Court in *Waman Rao v. Union of India*<sup>33</sup> once again reiterated and applied the doctrine of basic features of the Constitution. In *I.R.Coelho case*,<sup>34</sup> the Constitution Bench observed that, according to *Waman Rao*

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<sup>28</sup> AIR 1975 SC 2299.

<sup>29</sup> Clause (4) Art. 368 stipulated that “No constitutional amendment (including the provision of Part III) or purporting to have been made under Art.368 whether before or after the commencement of the Constitution (42<sup>nd</sup> Amendment) Act, 1976 shall be called in any court on any ground.” Therefore in India, as of 1976, the Supreme Court was precluded from reviewing constitutionality of Constitutional amendments. There is no doubt on this issue because clause (4) of Art.368 explicitly prohibits the judicial review of constitutional amendments. Moreover, clause 5 of the same Article states that “there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal of the provisions of the Constitution under this Article.” This clause also provides that constitutional amendments cannot be judicially reviewed because Indian Constitution does not impose any limitations on the power of Indian Parliament to amend the Constitution.

<sup>30</sup> (1981) 1 SCR 206, (AIR 1980 SC 1789)

<sup>31</sup> *Ibid*

<sup>32</sup> V.R. Jayadevan's 'Basic Structure Doctrine and its Widening Horizons', published in CULR (2003) p.349.

<sup>33</sup> AIR 1981 SC 271.

<sup>34</sup> AIR 2007 SC 137.

*and Ors. v. Union of India and Ors*<sup>35</sup> amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule was amended from time to time by inclusion of various Acts, regulations therein were open to challenge on the ground that they, or any one or more of them, are beyond the constituent power of Parliament since they damage the basic or essential features of the Constitution or its basic structure.

### **7. The Constitution Forty-Fifth Amendment Bill, 1978.**

It is really not possible to exhaustively enumerate the aspects of the basic structure of the Constitution. Such an attempt was made by the Constitution (Forty-Fifth) Amendment Bill, 1978 (CB 45),<sup>36</sup> which was undertaken during the short period of rule of the Janatha Government. In this, the following features were mentioned as features requiring special process of referendum for their amendment. They are: (i) The secular or democratic character of the Constitution; (ii) Rights of citizens under Part III; (iii) Free and fair elections to the House of the People or the Legislative Assemblies of states on the basis of adult suffrage; (iv) The independence of the Judiciary and (v) Amendment of the provision for the entrenchment of the above basic features and the requirement for the referendum. If an amendment of the Constitution was to be made for the amendment of any of the above matters, such an amendment had to be approved by the people at a referendum. The referendum for the purpose of seeking the approval of the people of India for any amendment of the nature referred to in the above provision was to be through a poll and all persons eligible for voting in the elections to the Lok Sabha were to vote in such a poll. Not less than fifty one percent of the total number of eligible voters must actually vote in the poll and the amendment was deemed to be approved at the poll, if it was supported by a majority of the votes actually polled. The opposition to the amendment was a tacit admission of the basic structure doctrine. The opposition to the amendment was not because it had entrenched the basic structure but because it provided for even the destruction of such basic structure through a referendum. Whether such matters could be left to popular will was also doubted. Seervai observed.<sup>37</sup>

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<sup>35</sup>*Supra* Note 33.

<sup>36</sup> CB 45 is the abbreviation used in the text for the Constitution (Forty-Fifth Amendment) Bill, which later became the Constitution (Forty-Fourth Amendment) Act.

<sup>37</sup>H.M. Seervai, 2 Constitutional Law, p. 2702.

The adoption of a referendum under the conditions prevailing in India was ill-advised and ill-conceived. Amendments to the Constitution are not capable of being formulated in such a manner as to ask for a simple 'yes' or 'no.' As against this, Professor Baxi had strongly recommended such legislative enumeration of the basic structure limitations much before it was mooted by the amendment Bill. He had recommended referendum for the amendment of any such basic features.<sup>38</sup>

The basic structure doctrine has been legitimated due to gross abuse of constituent power by the ruling elite and subsequent acceptance of it by all major political participants.<sup>39</sup> Unfortunately, the Rajya Sabha where the Congress Party had a majority did not approve these proposals although the Lok Sabha had passed the same by the requisite majority.<sup>40</sup>

## 8. Basic Structure Doctrine and Theory of Separation of Power

Lord Montesquieu in 1748, propounded the theory of separation of power. According to him, one organ of the government should not interfere with another organ of the government. Keeping this in mind, Hon'ble Apex Court said that separation of power is also one of the basic structure of the Indian Constitution. The Constitution of India also provided clear cut separation of powers among three organs of the government.

The Supreme Court for the first time has imposed implied limitations on amendment power (which was considered as law making power) in *Golaknath's* case. Later, Supreme Court by inventing the doctrine of basic structure, they completely curtail the amendment power of the Parliament. Many academicians argue that *Golaknath's* case decision was overruled by the Court in *Keshavananda Bahrathi's* case. But, the author strongly opines that the decisions in both the cases are similar when it comes to the matter of imposing limitations upon the amending power of the Parliament. But, the Supreme Court in *Keshavananda's* case has overruled the part of the decision of *Golaknath* with respect to the non acceptance

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<sup>38</sup> Upendra Baxi "Some Reflections on the Nature of Constituent Power" in *Trends and Issues*, p. 142 (Indian Law Institute, 1978).

<sup>39</sup> S.P. Sathe, "Limitation on Constitutional Amendment: Basic Structure Principle Reexamined" in *Trends and Issues*, p. 179 (Indian Law Institute, 1978).

<sup>40</sup> M.P.Jain 'Indian Constitution Law' Fifth Edition, 2003 p.1926.

of the constitutional amendment as law and upholding the constitutional validity of 24<sup>th</sup> Amendment. Otherwise, it makes no difference between both the decisions.

R Dhavan and A Shourie have observed that the Court is accused of widening the scope of judicial review beyond the constitutional boundaries,<sup>41</sup> usurping the powers of the executive and legislature.<sup>42</sup> One of the important critique is that, if the basic structure theory was upheld, “every amendment made by the Parliament would be subject to judicial approval on the question whether it damages the core of an essential feature or not... and it is up to the Supreme Court and High Courts either to validate or invalidate the amendment. It is a step towards the ‘Government of Judges’ as the final say rests with the judges of the Supreme Court not with the Parliament.”<sup>43</sup>

The criticism of *P.K.Tripathi* was also in the same view when he wrote “the people and the Parliament will never have to worry about what the Constitution ought to be. The Court will do it for them... The Court will not only play the role of the opposition in criticizing all proposed legislations concerning socio-economic policies, but it will be above to wipe out legislation which does not favour. In fact it will govern the country in regard to routine matters which might be left to the Parliament and the Cabinet.”<sup>44</sup>

## 9. Application of Basic Structure theory in Appointment of Judges of Higher Courts

When it comes to the matter pertaining to the appointment of Supreme Court judges under NJAC, it is really an interesting part to discuss how all three organs of the Government have taken decisions without any rationality. When the basic structure doctrine was evolved by majority of the judges in *Keshavanada Bahrathi's* case, Judges who were in the Majority group had to face situations

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<sup>41</sup> R. Dhavan, *Supreme Court and Parliamentary Sovereignty* New Delhi Sterling Publisher, 1976 cited in Sudhir Krishnaswamy ‘Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine, Oxford University Press, p. xvi.

<sup>42</sup> A. Shourie, *Courts and their judgments; Promises, Prerequisites, Consequences*, New Delhi: Rupa &Co., 2011, pp 399-421 cited in Sudhir Krishnaswamy ‘Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine, Oxford University Press, p. xvi .

<sup>43</sup> *Idid* at 440.

<sup>44</sup> Cited by Prasad Anirudh, “*Dynamic of the Basic Structure Theory*”, *Law* 1978, Vol.10, No.10. 199 (October, 1978).

of humiliation and while appointing as chief justice of India after Justice S.M. Sikri's retirement (Former CJ of Supreme Court). Justices J.M. Shelat, K.S. Hegde, A.N. Grover, though they possess seniority, government was not appointing any one among the three as chief justice of India, because these three judges were also responsible for upholding the doctrine of basic structure. The three superseded judges were a party to the majority opinion of the historic *Keshavananda Bharti* case which held that the Parliament's right to amend the Constitution did not include the right to amend, abrogate or destroy the basic structure of the Constitution. This judgement was delivered on the eve of superseding of judges. Needless to say, Justice A.N. Ray agreed with the minority view which upheld Parliament's supremacy to amend the Constitution. Finally, Executive appointed A.N. Ray as Chief Justice of India in 1973, violating the Constitutional conventions i.e., seniority in case of appointing CJI was considered as darkest day in the history of the Constitution.

In another incident, proclamation of Emergency on June 26, 1975 was an attempt to destroy Indian democracy. While a large section of the Indian judiciary decided to resist the onslaught on democratic institutions like the press and judiciary, a section of the Supreme Court surrendered. The unanimous verdict of nine High Courts relating to Habeas Corpus-that Article 21 is not the sole repository of life and liberty and that a detainee has a right of *Habeas Corpus* during the emergency- was reversed by a 4:1 verdict of the Supreme Court. The High Courts displayed courage whether it was on the matter of a detainee's right of medical treatment or his interviews with his relatives, or the right of a lawyers' association to organise a meeting, or to stay a High Court Judge's arbitrary transfer. The Supreme Court, however, showed subservience in the *Habeas Corpus* case<sup>45</sup>. Justice Khanna and

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<sup>45</sup> Chief Justice A.N. Ray said, "There is no record of any life of an individual being taken away either in our country during Emergency or in England or America during the emergency in their countries. It can never be reasonably assumed that such a thing will happen. Some instances from different countries were referred to by some counsel for the respondents as to what happened there when people were murdered in gas chambers or people were otherwise murdered. Such instances are intended to produce a kind of terror and horror and are abortive in character. People who have faith in themselves and in their country will not paint pictures of diabolic distortion and mendacious malignment of the governance of the country."

Justice Y.V. Chandrachud expressed his optimism by writing that "counsel after counsel expressed the fear that during the Emergency, the executive may whip and strip and starve the detainee and if this be one's judgement even shoot him down. Such misdeeds have not tarnished the record of free India and I have a diamond bright, diamond hard hope that such things will never come to pass."

Justice M.H. Beg said in his judgement. "I do not think that it is either responsible advocacy or the performance of any patriotic or public duty to suggest that powers of detention are being misused in the current emergency".

other judges of various high courts who displayed courage were punished for their independent views. Fourteen judges of high courts who were party to various judgements, who were against the government, were transferred from one high court to another without their consent. Executive prepared a list of 52 inconvenient judges. Proposals were mooted for the establishment of a superior council over the judges. Upon the retirement of Justice A.N. Ray, the next senior most judge, Justice H.R. Khanna, was denied his right to become the Chief Justice of India. Justice R.N. Aggarwal and Justice U.R. Lalit, who were additional judges of the Delhi and Bombay High Courts respectively, were not confirmed.<sup>46</sup>

Thereafter, issue pertaining to primacy with respect to appointment of judges of Supreme Court was discussed in *S.P. Gupta v. Union of India*<sup>47</sup>, *S.C. Advocates on Record Association v. Union of India*<sup>48</sup> and *In re: Presidential Reference*.<sup>49</sup> Finally, in *S.C. Advocates on Record Association v. Union of India*<sup>50</sup>, the Supreme Court declared that the Constitution (Ninety-ninth Amendment) Act, 2014 is unconstitutional. On the basis of the conclusions given by Hon'ble judges in

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Justice Chandrachud expressed his optimism by writing that “counsel after counsel expressed the fear that during the Emergency, the executive may whip and strip and starve the detainee and if this be one’s judgement even shoot him down. Such misdeeds have not tarnished the record of free India and I have a diamond bright, diamond hard hope that such things will never come to pass.”

Justice P.N. Bhagwati agreed with the majority and said, “The apprehensions and fears voiced on behalf of the detainees may not altogether be ruled out. It is possible that when vast powers are vested in the executive, the exercise of which is immune from judicial scrutiny, they may sometimes be abused and innocent persons may be consigned to temporary detentions. But merely because a power may sometimes be abused is no ground for denying the existence of the power. All power is likely to be abused I have always leaned in favour of upholding personal liberty, for I believe it is one of the most cherished values of mankind. Without it life would not be worth living. It is one of the pillars of free democratic society. Men have laid down their lives at its altar in order to secure it, protect it and preserve it. But I do not think that it would be right for me to allow my love for personal liberty to cloud my vision or to persuade me to place on relevant provision of the Constitution a construction which its language cannot reasonably bear.”

<sup>46</sup> <http://www.pucl.org/from-archives/81july/judiciary.htm>.

<sup>47</sup> AIR 1982 SC 149, the first judge’s case (*S.P. Gupta v. Union of India* AIR 1982 SC 149) gave the primacy to the executive in appointments to the higher judiciary, declaring that the advice of the CJI’s recommendation on judicial appointments and transfers can be refused for “cogent reasons.”

<sup>48</sup> AIR 1994 SC 268, the majority verdict gave back CJI’s power over judicial appointments and transfers. It says the CJI only need to consult two senior-most judges. Court held that the role of the CJI is primal in nature because this being a topic within the judicial family, the Executive cannot have an equal say in the matter, the verdict reasoned. However, confusion prevails as the CJIs start taking unilateral decisions without consulting two colleagues. The President is reduced to only an approver.

<sup>49</sup> Special Reference No.1 of 1998 AIR 1999 SC1, To clarify the position the then President K.R. Narayanan sought a reference from the SC in the third judge’s case (Special Reference No.1 of 1998 AIR 1999 SC 1), the Supreme Court laid down that the CJI should consult with a plurality of four senior-most Supreme Court judges to form his opinion on judicial appointments and transfers. The crux of the second and third judges’ case, is that the Judiciary should have primacy.

<sup>50</sup> *Supreme Court Advocates-on-Record Association v. Union of India* (Writ Petition (C) No.83 of 2015).

their respective judgments it can be said that the 2014 amendment is being struck down as it is against the principles of ‘separation of powers’ and ‘independence of judiciary’ and thus violative of the basic structure of the Constitution.

Let us examine the role of legislature, executive and judiciary with respect to appointment of judges of the Supreme Court. Because, Constitution gave the primacy to the executive in appointments to the higher judiciary, they violated constitutional conventions in appointing chief justice of India twice in 1973 and 1977. As a result, after 1993, Judiciary adopted the method of Collegium system which does not have any constitutional basis or mandate from 1993 to 2014; even the Parliament did not make any attempt to constitutionalise the Collegium system. Finally, in 2014, the NDA government introduced the Constitutional (121st Amendment) Bill, which was subsequently passed by both houses of the Parliament, ratified by 16 state legislatures and assented by the President; NJAC, Act 2014 and the Constitutional Amendment Act came into force from 13 April 2015. By this NJAC case The Constitution (Ninety-ninth Amendment) Act, 2014 and The National Judicial Appointments Commission Act, 2014 have been declared null and void by the court which is the issue in hand.<sup>51</sup>

Judiciary nullified the Act of NJAC which is against the principles of ‘separation of powers’ and violative of the basic structure of the constitution. But, Judiciary instead of declaring the serious attempt of the Parliament as unconstitutional, they could have amended in the composition of NJAC itself while pronouncing judgement. Further, If NDA government had incorporated the recommendations of Venkatachaliah Commission,<sup>52</sup> judiciary might not have declared NJAC Act, is unconstitutional. At present, the Executive is not showing their interest in filling vacancies of post in higher judiciary which is really a great threat to the democracy. Conflict between judiciary and executive with respect to appointment of judges

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<sup>51</sup><http://www.legallyindia.com/views/entry/njac-or-collegium-the-need-of-an-ideal-system-for-appointments-to-the-higher-judiciary>.

<sup>52</sup> In 2000, the Venkatachaliah Commission was set up by NDA government to review the working of the constitution. In its report the commission recommended the formulation of a judicial commission comprising of:

- (1) The Chief Justice of India: Chairman
- (2) Two senior most judges of the Supreme Court: Member
- (3) The Union Minister for Law and Justice: Member
- (4) One eminent person nominated by the President after consulting the Chief Justice of India: Member.

has made democracy in danger. In action of the Executive with respect to Non-appointment of judges in lower and higher judiciary within stipulated time leads, not only to violation of basic rights of an individual but it also affects to ensure Centre- State relations.

## 10. Conclusion

Finally, the author opines that if framers had inserted express clause under Constitution of India regarding limitation of amending power of the Parliament under Art.368 itself and provisions for agrarian reforms and had not incorporated right to property in the list of fundamental right in the original constitution itself, there would not have been a situation of introducing this basic structure doctrine and very importantly, if the Parliament had exercised its amending power without disturbing the Supremacy of the Constitution in the case of Ninth Schedule, judiciary would not have made any attempt to propound the doctrine of basic structure. Violating constitutional conventions regarding appointment of the chief justice of India by the Executive and applying application of basic structure doctrine for all cases as a general rule including appointment of judges by judges are against the theory of separation of power. Therefore, author suggests that:

- All three organs of the government should work within the frameworks of the Constitution to uphold constitutional supremacy.
- There is a need to incorporate some important features expressly by amending Article 368 of the Constitution.
- Recognition of subject matters as basic structure should be decided by constitutional bench consisting more than 10 judges in an exceptional cases.