THE BASIC STRUCTURE DOTRINE POST-GLOBALIZATION: A CRITIQUE

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1. Introduction

The "Basic Structure Doctrine" is a judge-made doctrine where certain features of the Constitution of India are beyond the limit of the amending powers of the Parliament of India. On Feb 27, 1967, a Special Bench of 11 Judges had held in the case of *Golaknath* v. *State of Punjab*[1], that "Parliament has no power to amend Part III of the Constitution so as to take away or abridge the fundamental rights". On April 24, 1973, a Special Bench comprising 13 Judges of the Supreme Court of India held that Article 368 of the Constitution "does not enable Parliament to alter the basic structure or framework of the Constitution". Though the court overruled the decision in *Golaknath* and held that even fundamental rights may be amended, it also held that certain elements of the constitution cannot be amended. It then propounded what has come to be known as "the basic structure doctrine". The doctrine was introduced in India for the first time by Justice Mudholkar in the case of *Sajjan Singh,*[2] when he used the phrase, "*basic feature of the Constitution*" to argue that there are certain features of the Constitution that cannot be amended by the Parliament through its amending powers under Art. 368 of the Constitution. Justice Mudholkar drew upon the Pakistan Supreme Court's decision in *Fazlul Quader Chowdhry* v. *Mohd Abdul Haque*,[3] which had used the basic structure doctrine previously. The political context for the rise of the basic structure was an attempt by the government to shield certain land laws from judicial scrutiny. After the death of Pt. Jawaharlal Nehru, the Congress party, under the guidance of Mrs. Indira Nehru Gandhi, was committed to bring about land reforms in the country which caused widespread social inequities in the country. The government through

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[1] 1967 SCR (2) 762.

[2] AIR 1965 SC 845.

[3] *Fazlul Quader Chowdhry* v. *Mohd Abdul Haque*, 1963 PLC 486.

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Art. 31, placed these laws in the Ninth Schedule which could not be challenged in a court of law on the ground that they violated the fundamental rights of citizens.[4] The most aggrieved among various classes were the propertied class who felt that the Parliament is acting *ultra virus* Indian constitution and subsequently, property owners challenged the constitutional amendments which placed land reform laws in the Ninth Schedule before the Supreme Court, saying that they violated Article 13(2) of the Constitution

2. Golaknath and Keshawananda Bharati verdict

In 1967, an eleven-judge bench of the Supreme Court headed by Chief Justice Koka Subba Rao, put forth the curious position that, Art.368 did not confer upon the Parliament the power to amend the Constitution. Thus, the apex court held that the amending power and legislative powers of the Parliament were essentially the same. Therefore, any amendment of the Constitution must be deemed law as understood in Article 13 (2). In 1973, the largest Constitutional Bench of 13 Judges, heard arguments in *Kesavananda Bharati* v. *State of Kerala*.[5] The Supreme Court reviewed the decision in *Golaknath* v. *State of Punjab*[6], and considered the validity of the 24th, 25th, 26th and 29th Amendments. The Court held that although no part of the constitution, including fundamental rights, was beyond the amending power of Parliament, the "basic structure of the Constitution could not be abrogated even by a constitutional amendment".[7]

Nine judges signed a statement of summary for the judgment that reads:

1) Golaknath's case is over-ruled.

2) Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution.

3) The Constitution (Twenty-fourth Amendment Act, Twenty-fifth Amendment) Act, 1971 is valid.

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[4] *Ibid*

[5] *Kesavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461.

[6] *Supra* Note 1.

[7] *Ibid,* Bhandari, M.K., *Basic Structure of the Indian Constitution: A critical reconsideration* (Deep and Deep Publications 1993); Bhagwati, P.N., "Judicial activism and public interest litigation," 23 *Colum. J. Transnat'l L* 561 (1984).

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4) The Constitution (Twenty-ninth Amendment) Act, 1971 is valid.

The court held that Parliament could not use its amending powers under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution. Basic Features of the Constitution according to the Keshavanada verdict were laid out separately by each judge based on what he thought were the basic or essential features of the Constitution.

Sikri, C.J. explained that the concept of basic structure included:

1. Supremacy of the Constitution.
2. Republican and democratic form of government.
3. Secular character of the Constitution.
4. Separation of powers between the legislature, executive and the judiciary.
5. Federal character of the Constitution.

Shelat, J. and Grover, J. added three more basic features to this list:

1. The mandate to build a welfare state contained in the Directive Principles of State Policy.
2. Unity and integrity of the nation.
3. Sovereignty of the country.

Hegde, J. and Mukherjea, J. identified a separate and shorter list of basic features:

1. Sovereignty of India.
2. Democratic character of the polity.
3. Unity of the country.
4. Essential features of the individual freedoms secured to the citizens.
5. Mandate to build a welfare state.

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Jaganmohan Reddy, J. stated that elements of the basic features were to be found in the Preamble of the Constitution and the provisions into which they translated such as:

1. Sovereign democratic republic.
2. Justice - social, economic and political.
3. Liberty of thought, expression, belief, faith and worship.
4. Equality of status and the opportunity.
5. Basic Features of the Constitution according to the *Keshavanada,* case verdict of each judge laid out separately, what he thought were the basic or essential features of the Constitution.

Khanna J. whose decision was the deciding factor as far as the existence of the basic structure and amendability of the constitution was concerned, saw the following as parts of the basic structure.

1. Implied restrictions on amending power.
2. Supremacy of fundamental rights above all.
3. Justice Khanna, held that the word “amendment’ meant to change or alter.
4. Amendment could not mean completely defacing or abrogating a particular document.
5. This rationale in turn became the backbone on which the basic structure doctrine was formulated.

Nani Palkhivala, the counsel for the mutt (Keshavananda Bharti) argued that, the Parliament having unfettered power to amend the constitution would render the document null and void.[8] There must be some restraint on the amending power of the parliament. Certain principles of the constitution like rule of law and fundamental rights were sacrosanct and could not be touched. Ray, C.J. convened a 13-judge bench to review the Kesavanada verdict on the pretext of hearing a number of

[8] Shukla, V.N. and Singh, D.K., *V.N. Shukla’s Constitution of India* (Eastern Book Company 1982); Krishnaswamy, S., *Democracy and constitutionalism in India: a study of the basic structure doctrine* (Oxford University Press 2011); Bhandari, M.K., *Basic Structure of the Indian Constitution: A critical reconsideration* (Deep and Deep Publications 1993); Neuborne, B., “The Supreme Court of India”, 1 *Int’l J. Const. L.*, 476 (2003).

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petitions relating to land ceiling laws. The petitions contended that the application of land ceiling laws violated the basic structure of the Constitution. Meanwhile, Prime Minister Indira Gandhi refused to accept the dogma of basic structure, N.N. Palkhivala, appearing on behalf of a coal mining company, argued against the move to review the Kesavananda decision.[9] Ultimately, Ray, C.J. dissolved the bench after 2 days of hearing. The declaration of a National Emergency in June 1975 and the consequent suspension of fundamental freedoms, including the right to move courts against preventive detention, diverted the attention of the country from this issue. One certainty that emerged out of this tussle between the parliament and the judiciary is that all laws and constitutional amendments are now subject to judicial review and laws that transgress, the basic structure are to be struck down by the Supreme Court.

3. Economic libralization and effect of the New Economic Policy of 1991

The process of economic liberalization in India includes the ongoing economic reforms in the country that began in the year 1991. This process can be traced back to the late 1970s, continued in the 1980s through fresh ideological influences, and partly through the observation of faster growth in many East Asian economies. Such observations prompted India's economic policy makers began to seriously attempt, some changes in the overall approach to the role of government in the country's economic development, introducing some liberalization in the trade regime, loosening of domestic industrial controls, and promotion of investment in modern technologies for areas such as telecommunications and information technology, automobiles etc., In 1991, India faced a severe balance of payments crisis, and this circumstance became the occasion for a substantial advance in the pace and nature of economic reforms that were being attempted. In particular, the major steps taken was further trade liberalization, in the form of reductions in tariffs and conversion of quantitative restrictions to tariffs, and sweeping away a large segment of restrictions on domestic industrial investment. These two changes in the early 1990s have come to symbolize or coin the term 'economic reform' in India. It was only in 1991, the Government signalled a systemic shift

[9]Mehta, P.B., "India's judiciary: The promise of uncertainty," *The Supreme Court Versus the Constitution: A Challenge to Federalism*, 155-177(2006); Bhagwati, P.N., "Judicial activism and public interest litigation" 23 *Colum. J. Transnat'l L.*, 561(1984).

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to a more open economy by changing its economic policies due to financial crisis and pressure from international organizations, like the World Bank and IMF. There was greater reliance upon market forces, a larger role for the private sector including foreign investment, and a restructuring of the role of Government.[10] During this period, while growth accelerated past five per cent (5%) it came at the cost of macroeconomic imbalances which worsened at the beginning of the 1990s. The policy changes can be reviewed in five major areas covered by the reform programme: fiscal deficit reduction, industrial and trade policy, agricultural policy, infrastructure development and social sector development. It is however, pertinent to note that since the economic reforms of 1991, the liberalisation of the Indian economy has continued in the same manner, barring a few questions that have been constantly raised regarding the control over exercise of power by the government. These questions however become extremely relevant when considering the balance that must be maintained between government control and rights of the citizens. Thus, the economic reforms initiated in 1991 introduced far-reaching measures, which changed the working and machinery of the economy. These changes were pertinent to the following:

- Dominance of the public sector in the industrial activity.
- Discretionary controls on industrial investment and capacity expansion.
- Trade and exchange controls.
- Limited access to foreign investment.
- Public ownership and regulation of the financial sector.

One could say that these reforms have unlocked India's enormous growth potential and unleashed powerful entrepreneurial forces. Since 1991, successive governments, across political parties, have successfully carried forward the country's economic reform agenda.

The most visible and important component of the reforms so far has been the relaxation of various internal and external controls on private economic activity, the "license-permit-quota raj". A significant objective of this liberalization has been

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[10] Aghion, P., Burgess, R., Redding, S.J. and Zilibotti, F., "The unequal effects of liberalization: Evidence from dismantling the License Raj in India", 98(4) *The American Economic Review*, 1397-1412(2008).

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achieving greater efficiency in resource allocation, and re-integration of India's economy with that of the rest of the world. The economic reforms introduced in India in the year 1991 focused on trade policy/external sector; industrial policy; infrastructural sector policies; divestment/privatization policies; the financial sector; and on policies for attracting foreign direct investment. However, due to the political economic dimensions of the reforms, there was less percolation of reforms to the state level. After the adoption of the new economic policy in 1991, there were problems faced by the importers in the country mainly due to the Liberalization of trade and foreign investment. It is interesting to note the approach of the Supreme Court of India while interpreting the economic policy of the Government of India. The most celebrated case in this context is *Balco Employees Union* v. *Union of India and others*[11] the relevant extract is quoted hereafter:

"*Process of disinvestment is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognised that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the courts would decline to interfere. In matters relating to economic issues, the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within limits of authority. There is no case made out by the petitioner that the decision to disinvest in BALCO is in any way capricious, arbitrary, illegal or uninformed*." This in turn indicates that the judiciary's adherence to elements likes socialist economy and welfare state both elements of the basic structure.

4. Collective Interest – Power and right relationship

The courts observed, that in order for the policy to be adopted and enacted successfully, it should be designed in a way such that, it results in the collective good of the citizens rather than focusing on the individual interests of a particular section of people in the country, for example, decreasing the custom duty such

[11] *Balco Employees Union* v. *Union of India and others* 2002 (2) SCC 333, Cassels, J., "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?", 37(3) *The American Journal of Comparative Law*, 495-519 (1989) ; Baxi, U., "Taking suffering seriously: Social action litigation in the Supreme Court of India". *Third World Legal Stud* 107 (1985).

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that it benefits the companies who largely import their products. The result of such legislation would be such that people would prefer to buy the imported products and the local companies would start incurring losses. This would eventually result in the local companies accusing the government of restricting their right to carry on trade. Therefore, it is necessary that the legislations are passed keeping the rights and collective good of the people in mind. The courts also criticised the purported change in the economic policy which provided short term advantages to the indigenous industry/business, as well as globalised the Indian economy. It was against the policy of the Government especially in the context of the then economic reforms. It was a contradiction that Government was succumbing to the pressure of vested interests. In the case of *Shri Hari Exports* v. *Director General of Foreign Trade*,[12] the petitioner challenged the validity of the two notifications dated 25-1-1994 and 29-1-1994, effect of which was to transform Polypropylene Moulding powder/granules as goods in the sensitive test for the purpose of its importation, though, when the value based license issued to the petitioner, no such restriction was imposed. Petitioner was issued with the value based license on 6-7-1993. As per this license, if the petitioner exports the particular goods (cassettes), he was entitled to import the goods described in the license without any restriction as to their quantity. It was contended that the change in import policy had affected the public interest. Prior to change in the policy, the exporter was issued with value based license to import the goods, mentioned in the license, with no restriction in respect of the quantity to be exported but due to change in policy, the goods in question were shifted to sensitive list. It was held that the two notifications are invalid to the extent they operate as an unreasonable restriction on the rights of a citizen and that the courts cannot at all exercise judicial control over it. It was further observed that the source for the exercise of power requires that it has to be exercised in the public interest by itself does not confer any immunity to the said exercise; the power shall have to be exercised in a reasonable way. The reasonableness has to be tested in the light of the Constitutional provisions. Further, reasonableness of any particular action could be gathered only by considering the circumstances under which it is exercised, the evil sought to be eradicated by the action in question or the public purpose sought to be projected by it. Thus, the

[12] *Shri Hari Exports* v. *Director General of Foreign Trade*, (1994 (73) ELT 794).

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exercise of power is considered to be reasonable when it does not infringe upon the legal rights of any citizen. Legal rights are essentially interests recognized and administered by law and belong to science of law rather than to law and are a complete idea. It may mean the legally recognized and defined human wants, demands, or some conceptions by which the recognized interests are given form in order to be secured by a legal order. If the power is exercised in such a way that the legal rights of citizens are being violated, then the government is held to be acting out of the collective interest. Therefore, it can be said that the economic policies of the government are valid till the time they do not infringe upon the rights of the citizens. Rights correspond to attaining four goals of legislation; subsistence, abundance, equality and security for the citizen. By security, it is meant that a man's person, his honour, his property and his status must be protected, and his expectations in so far the law has produced them, be maintained. With reference to the economic policies of the country, they should be adopted in such a manner that the basic rights of the citizens such as the right to freedom to carry on trade should not be restricted upon. The restriction on the right should be reasonable in all aspects even when the policy seems to infringe upon the right. For example, putting restrictions on trade through waterways can be considered a reasonable one since smuggling is most common through the sea ports. This cannot be considered an infringement of right as the government had taken such an action by keeping in consideration the collective good of the people. This judgement is therefore a clear indication of adherence to the basic structure in terms of prioritization of fundamental rights over economic policy.

In *Shri Sitaram Sugar Company Ltd* v. *Union of India*[13]**,** the petitioners were owners of sugar mills operating in the State of Uttar Pradesh in areas classified for the purpose of determining the price of levy sugar as West and East Zones. They challenged the validity of notifications dated 28th November, 1974 and 11th July, 1975 issued by the Central Government in exercise of its power under Sub-section (3-C) of Section 3 of the Essential Commodities Act, 1955. The Apex Court considered the nature, extent and scope of judicial review of administrative actions formulating the economic policies regarding fixing the price of sugar. It observed that the Court in exercise of judicial review is not concerned with the

[13] *Shri Sitaram Sugar Company Ltd* v. *Union of India,* 1991 SCR (1) 909.

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correctness of the finding of fact on the basis of which the orders are made and held: *"Judicial review is not concerned with the matters of economic policy. The Court does not substitute its judgment format of the Legislature or its agent as the matters within the province of either."*

This judgment shows the judiciary balancing two elements of the basic structure against each other i.e. judicial review and separation of powers. The case of *Commissioner of Income Tax, Udaipur* v. *Hindustan Zinc Limited*[14] discussed the jurisdiction of Court to interfere in economic matters under Articles 226 and 14 of the Constitution of India. In the present case, the petitioners are exporters, registered with respondents No. 2, M/s. Apparel Export Promotion Council, (in short "AEPC") and are engaged in the manufacture and export of garments and claim to have turnover of Rs. 300 crores. Petitioners had impugned the above notice, as not being in public interest. The notice is also assailed as imposing unreasonable restriction on the right to carry on business of exports which is an infringement of Article 19(1)(g) of the Constitution of India. Here, while the court reiterated that arbitrariness was a ground to invalidate economic policy decision it upheld fundamental rights and in essence adhered to the basic structure and prioritised the above anything else.[15]

5. Constitutional developments post 1991

Kihoto Hollohan v. *U.O.I.*[16]

Kihoto Hollohan v. *Zachillhu And Others* is commonly referred as the case where the constitution bench of the Supreme Court analyzed in detail the various provisions of the 52nd amendment of the constitution. The 52nd Amendment inserted a new schedule (Tenth schedule) elaborating various provisions to protect the parties from defection. The amendment happened in the year 1985 and followed by much uproar which ultimately led to filing a PIL and resulting into the decision in the year 1993 declaring the amendment completely legal with certain interpretation regarding judicial review. In the process the court declared that democracy was a

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[14] *Ibid*

[15] *Ibid*

[16] AIR 1993 SC 412.

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core element of the basic structure and held that the 52nd Amendment furthered that objective and was hence deemed legal.

S.R.Bommai v. *U.O.I.*[17]

On April 21, 1989, Karnataka Chief Minister S.R. Bommai presented Governor P. Venkatasubbaiah, a copy of the resolution passed by the Janata Dal Legislature Party requesting the Governor to give Bommai an opportunity to test his majority in the Assembly. Although floor tests continue to be the sole practical means of establishing majorities, incumbency is clearly a key factor in the outcome of such tests. The majority decision of the Supreme Court in *S.R. Bommai* v. *U.O.I*, in essence has overturned a long held belief that the use of Article 356 was not really subject to review by courts, a doctrine articulated in a landmark case, *State of Rajasthan* v. *U.O.I.*[18] *S.R. Bommai,* laid down the conditions under which State governments may be dismissed, and mechanisms for that process. These were expressed through six opinions, with the judgments of Justices A.M. Ahmadi, K. Ramaswamy, and J.S. Verma for himself and Yogeshwar Dayal dissenting from the majority opinion of Justices P.B. Sawant for himself and Kuldip Singh, B.P. Jeevan Reddy for himself and S.C. Agarwal, and, finally, S. Ratnavel Pandian. Although this seeming maze of judgments created some confusion among lay people about precisely what portions in the Supreme Court decision were the law, the debate has now been largely resolved. Jurist Soli Sorabjee wrote in a critique of the case:

"*The judgments of Sawant and Kuldip Singh, JJ, to the extent they are not directly or by necessary implication inconsistent with judgments of Justices Jeevan Reddy and Agarwal, are part of the majority judgment and constitute the law of the land"* The language of S.R. Bommai is plain. "*In all cases where the support of the Ministry is claimed to have been withdrawn by some legislators," Justices Sawant and Kuldip Singh held, "the proper course for testing the strength of the Ministry is holding the test on the floor of the House." "The assessment of the strength of the Ministry is not a matter of private opinion of any individual be he the Governor or the President" (emphasis added). Justices Jeevan Reddy and*

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[17] AIR 1994 SC 1918.

[18] (1977)3 SC 592.

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Agarwal underlined the floor test procedure: "Whenever a doubt arises whether the Council of Ministers has lost the confidence of the House, the only way of testing it is on the floor of the House" (emphasis as in the original). The sole exception to this will be a situation of "all-pervasive violence where the Governor comes to the conclusion - and records the same in his report - that for the reasons mentioned by him, a free vote is not possible."

These simple legal mandates were before President Narayanan when he first ordered a brief on S.R.Bommai as BJP-BSP relations deteriorated in the State. Prime Minister I.K. Gujral proved receptive to the need for a floor test, but Defence Minister Mulayam Singh Yadav, backed by the Congress (I), insisted that the BJP Government be dismissed. Although legally in was wrong, Mulayam Singh was in a political sense entitled to suggest the course of action he did. In June 1995, his Ministry in Uttar Pradesh, deserted by the slippery BSP, became the first to be dismissed after S.R. Bommai was delivered. The Chief Minister was summoned to the Raj Bhavan at 4 p.m., on June 3rd and told to resign. Despite his explicit protest against the unconstitutionality of the action since S.R. Bommai made a floor test to his right, Governor Motilal Vora asserted that legal opinion stressed his discretionary powers in such situations (Frontline, June 30, 1995). The Supreme Court's verdict in the *S.R. Bommai case* sharply limited the constitutional power vested in the Central Government to dismiss a State government, but upheld the dismissal of four BJP Governments for going against the constitutional philosophy and provisions that were secular. Further, the Supreme Court, through its verdict in the *S.R. Bommai case* added federalism, democracy and secularism as components of the basic structure whilst upholding the pre-existing elements of democracy and sovereignty.

L.Chandra Kumar v. *U.O.I.*[19]

A 3-Judge Bench of the Supreme Court referred the matter to a larger Bench on the issues relating to:

1. It is pertinent to mention validity of Section 5(6) of the Administrative Tribunals Act, 1985, whereby a Single Member Bench of an Administrative Tribunal (such as CAT) was empowered to exercise powers of the Tribunal.

[19] *L. Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261.

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2. The second issue being whether the power of judicial review need not always be exercised by regular courts and the same can be exercised by an equally efficacious alternative mechanism (such as an Administrative Tribunal), as held by a 5-Judge Constitution Bench in the case of *P. Sampath Kumar* v. *Union of India*.[20]

3. Lastly, whether the Administrative Tribunals (such as CAT) established under the Administrative Tribunals Act, 1985, were equal in status to the High Courts, as held in the aforesaid case of *P. Sampath Kumar* v. *Union of India.*[21]

That in the said *S.P. Sampath Kumar* case, the Supreme Court had upheld the validity of Section 28 of the Administrative Tribunals Act, 1985, under which the jurisdiction of all courts except that of the Supreme Court under Article 136 with respect to matters falling within the jurisdiction of the tribunals concerned, was excluded. The power of judicial review over legislative action vested in the High Court under Article 226 and in Supreme Court under Article 32 is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded. The power vested in the High Courts to exercise judicial superintendence over the decisions of all Courts and Tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. Thus, through this decision not only did the Supreme Court adhere to the basic structure of the constitution by prioritizing judicial review whilst expanding its scope at the same time.

I.R.Coelho v. *State of T.N.*[22]

In this case the court was required to determine whether on and after 24th April, 1973 when Basic Structures Doctrine was propounded, it is permissible for the Parliament under Article 31B to immunize legislations from fundamental rights by inserting them in the Ninth Schedule and, if so, what is its effect on the power of judicial review of the court. A law that abrogates or abridges rights

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[20] *P. Sampath Kumar* v. *Union of India*, (1987) 1 SCC 124.

[21] *Ibid*

[22] AIR 2007 SC 861.

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guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of law, whether by amendment of any Article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the Court. The majority judgment in *Kesavananda Bharti's* case read with *Indira Gandhi's* case, requires the validity of each new constitutional amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge. All amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19 and the principles underlying them. To put it differently, even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure, if the fundamental right are taken away or abrogated, pertains to the basic structure. Justification for conferring protection is not the blanket protection on the laws included in the Ninth Schedule. The Constitutional Amendments shall be a matter of Constitutional adjudication by examining the nature and the extent of infraction of a Fundamental Right by a statute, sought to be Constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the 'rights test' and the 'essence of the right' test. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such a law(s) will not get the protection of the Ninth Schedule. Hence through this decision the Supreme Court expanded the scope of judicial review and in essence expanded the scope of the basic structure.

M. Nagaraj v. *U.O.I.*[23]

In *M. Nagaraj* v. *Union of India*, the Supreme Court held that the State must demonstrate backwardness, inadequacy of representation and maintenance of efficiency before providing reservation in promotions. While upholding the constitutional validity of the amendments, the Supreme Court in *Nagaraj case,* made

[23] AIR 2007 SC 71

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it very clear that Article 16 (4A), which was inserted through these amendments, was only an enabling provision. In essence, every time a government or the legislature sought to provide reservation in promotions under Article 16(4A), it would have to pass constitutional muster. While justifying each attempt to provide reservation in promotions, the state would have to demonstrate backwardness, inadequacy of representation and maintenance of efficiency. The court also noted in this instance that the amendment did not affect the basic structure of the Constitution.

6. Digression from Basic Structure

Supreme Court Advocates on- Record association v. *Union of India*[24]

This case dealt with the constitutionality of the National Judicial Appointments Commission Act. The court had to deal with the question of Judicial Independence under Article 124. The issue that arose was whether the Act infringed on the basic structure of the constitution. The court decided the case based on the decisions in:

1. *S. P. Gupta* v. *Union of India* - 1981 (also known as the Judges' Transfer case).
2. *Supreme Court Advocates-on Record Association* v. *Union of India* – 1993.
3. *In re* Special Reference 1 of 1998.

The Court held that the Act was unconstitutional as it affected judicial independence which was a component of the basic structure of the constitution. The case was widely criticised by the government as not conforming to the basic structure. The issue is twofold Firstly, whether judicial autonomy is a part of basic structure despite no such indication being given in the constituent assembly debates or in the text of Article 124. More importantly did the judiciary create a component of the basic structure by itself. The second issue is whether the court in giving its decision disregarded other elements of the basic structure like parliamentary sovereignty and representative democracy.

[24] *Supreme Court Advocates-on-Record Association* v. *Union* of India, WP (Civil) No.13 of 2015.

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Jagdambika Pal v. *U.O.I.*[25]

The Supreme Court ordered that a floor test be carried out in case of *Jagdambika Pal* v. *State of U.P*. This decision was criticised as a violative of the *doctrine of separation of powers.* While the Constitution prohibits judiciary to look into matters of violation of Constitution when it is concerned with legislative act instead it is vice versa as in *Keshav Singh* v. *Speaker, Legislative Assembly*. The court in this case while conducting floor test in the legislative assembly had interpreted the Constitution as: "*Article 212(1) seems to make it possible for a citizen to call in question in the appropriate court of law, the validity of any proceeding inside the legislative chamber, if his case is that the said proceeding suffer not from mere irregularity of procedure, but from an illegality. If the impugned procedure is illegal and unconstitutional, it would be open to be scrutinized in a court of law*."

This was seen as an express violation of the *doctrine of separation of powers* which was already seen as a component of the basic structure. *P.U.C.L.* v. *U.O.I.* [26]

The Supreme Court in June asked the Centre to create a disaster mitigation fund to tackle drought- like situation and directed the Agriculture Ministry to hold a meeting within a week with affected states like Bihar, Gujarat and Haryana to assess the conditions. A bench headed by Justice M B Lokur, directed the Centre to also implement the provisions of Disaster Management Act and fix a time limit for declaration of drought on scientific grounds. It also asked the Centre to revise the drought management manual to provide effective relief to calamity-hit farmers and prepare a national plan to tackle the crisis. Angry about the judiciary's repeated lunges into executive and legislative terrain, Arun Jaitley said it all in one sentence: *"Step by step, brick by brick, the edifice of India's legislature is being destroyed"*. He stated further that "*We have the National Disaster Response Fund and the State Disaster Response Fund and now we are being asked to create a third fund. The appropriation bill is being passed. Now outside this appropriation bill, we are being told to create this fund. How will I do that? India's budget-making is being subject to judicial review?"* This is a clear instance of the court violating the basic structure in terms of separation of powers.

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[25] AIR 1998 SC 998.

[26] http://www.firstpost.com/politics/supreme-court-arun-jaitley-article-356-bcci-ipl-rbi-dance-bars-2779546.html

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7. Judicial interference in recent times - *Vaunted* or *Un-vaunted*

In *Subramanian Swamy* v. *A Raja*[27] (2012) 9 SCC 255, a PIL was filed in the Supreme court with respect to the issue of corruption surrounding the matter of 2G spectrum allocations in 2002 by the government. The court went beyond mere judicial restraint and classified 2G spectrum as a natural resource. The court in its decision went on to hold public officials must be liable for the mismanagement of resources despite there being no clear law on the matter owing to the "public trust" doctrine. This again is an instance of the Supreme Court formulating its own rules and expanding its power not only to decided matters but also re-defining what constitutes natural resources. While the decision may be well reasoned, and perhaps was required considering the issues of corruption surrounding the case the digression from separation of powers in making purely policy based determinations is still a digression from the basic structure. In *Common Cause* v. *Union of India*[28], a petition was filed in the Supreme Court with respect to the issue of corruption surrounding the matter of coal block allocations worth several lakhs of crores. The court in this instance found impropriety in the coal block allocations and cancelled the allocation. This again is an instance of the Supreme Court prioritising social welfare a key component of the basic structure over economic outcomes.[29] Despite the court being told that cancellation of coal block allocations would result in damage to the companies involved, the court held that allowing the current allocation to perpetuate would have harmful effects on the economy in the long run. Thus the court prioritised general welfare of the nation and its people over and above the private profits and losses of individuals. This can be seen as a form of strict adherence to the basic structure.

8. Conclusion

Thus the following issues become extremely important when considering the importance of the basic structure and its evolution as well as possible digression from the same.

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[27] *Ibid* Mate, M., "Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective" 12 *San Diego Int'l LJ*.175 (2010); Baxi, U., "Justice of Human Rights in Indian Constitutionalism: Preliminary Notes", *Modern Indian Political Thought 263-284 (Delhi, Sage Publications* 2006); Jayasurya, G., *Indian Judiciary: From Activism to Restraint* (Burlington Gower Publishers 2010).

[28] *Common Cause* v. *Union of India*, WP (C) NO.463/2012.

[29] *Ibid*

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