

# TEST OF BASIC STRUCTURE: AN ANALYSIS

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*Basic Structure as a concept evolved from rights jurisprudence aligned to natural law theory. Indian judiciary brought in this concept to stem executive overreach. However, deliberately or not, the concept was always kept vague. Judiciary had rarely tried to rein in the concept of basic structure which was to be the last bulwark against an over possessive legislature. This article tries to find a link between the concepts of natural law and basic structure-both immutable and inviolable. The authors would further analyse the trends of Indian Supreme Court and try to devise a working test for basic structure.*

## I. INTRODUCTION

Indian Constitution enjoins the Parliament with power to make laws within its jurisdiction. This power includes the power to amend existing laws. But, this power is not absolute in nature. The Constitution gives the power of judicial review to the Indian judiciary whereby it has the power to adjudicate the constitutional validity of all laws enforceable within the Union. If the Union Parliament or the State Legislature violates any provision of the Constitution the Supreme Court has the power to declare such laws as either invalid or *ultra vires*. The Constituent Assembly wanted the Constitution to be a dynamic, organic document, keeping up with the times. In order to facilitate this, the Parliament was granted the power to amend the Constitution under Article 368<sup>1</sup>. Upon a plain reading of Art 368 suggests that the power of the Parliament is absolute and cover all parts of the Constitution. But being prompted by executive overreach, the Supreme Court tried to put a brake on the legislative and executive overzealousness. Nearly three decades ago in April 1973 in the famous case of *Kesavananda Bharti Sripadagalvaru v. State of Kerala*<sup>2</sup> the Supreme Court exhibiting extreme creativeness

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We are especially grateful to Prof Mahendra P. Singh for his support, guidance and encouragement. Further we would like to thank Ms Jasmine Joseph and Ms. Payel Roy Chowdhury for their valuable inputs. However, any errors are our sole responsibility.

<sup>1</sup> Article 368(1) of the Constitution of India: Power of Parliament to amend the Constitution and procedure therefor-

(1)Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article....”

<sup>2</sup> AIR 1973 SC 1461: (1973) 4 SCC 225.

and courage on its part came up with the most famous innovation in the Indian constitutional law history. In this case the Supreme Court propounded the famous ‘basic structure and framework of Indian Constitution’ or ‘doctrine of basic structure’ thereby halting the legislature’s ever extending arm. With the intention to preserve the original ideals of the Constitution, the Supreme Court pronounced that the Parliament could not distort, disfigure and mutilate the basic features of the Constitution which are sacrosanct to the ideals of the Indian society. This move effectively put a brake on the powers of the Parliament to deface the Constitution under the pretext of amending it. The basic structure doctrine<sup>3</sup> as enunciated by the judiciary tries to stem such amendments, which would alter the fundamental structure of the Indian constitution. The quest by the Indian judiciary for a principle of constancy in the constitution resulted in the emergence of the basic structure doctrine, and one may find its spiritual inspiration in the efforts of natural law jurists who empathize with Antigone when she proclaims that the King’s order or laws will not override the unwritten and unchanging laws of the Gods.<sup>4</sup> Antigone faced the king’s wrath when she defied his order and buried her slain brother. Similarly, the Indian judiciary had to face the challenge of the executive, which was constantly interfering with judicial machination and was undermining to a large extent, the rights of the people in general.<sup>5</sup> The Indian judiciary has consistently taken a high domain in defining the spirit of amendment,<sup>6</sup> it has

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<sup>3</sup> The ‘basic structure doctrine’ is a judicial innovation whereby certain features of the Constitution of India are beyond the limit of the powers of amendment of the Parliament of India. The doctrine which was first expressed in *Kesavananda Bharati v. The State of Kerala* (AIR 1973 SC 1461) and reflects judicial concern at the perceived threat to the liberal constitutional order. The Basic Structure doctrine applies only to the constitutionality of amendments and not to ordinary Acts of Parliament, which must conform to the entirety of the constitution and not just its basic structure.

<sup>4</sup> Ian Johnston, *Antigone* (Translation) available at <http://www.mala.bc.ca/~johnstoi/sophocles/antigone.htm> (Last visited on November 10, 2008).

<sup>5</sup> Originally, the Constitution guaranteed a citizen, the fundamental right to acquire hold and dispose of property under Article 19(f). Under Article 31 he could not be deprived of his property unless it was acquired by the State, under a law that determined the amount of compensation he ought to receive against such an acquisition. Property owned by an individual or a firm could be acquired by the State only for public purposes and upon payment of compensation determined by the law. Article 31 has been modified six times — beginning with the First amendment in 1951 progressively curtailing this fundamental right. Finally in 1978, Article 19(f) was omitted and Article 31 repealed by the Forty-fourth Amendment. Instead Article 300A was introduced in Part XII making the right to property only a constitutional right. This provision implies that the executive arm of the government (civil servants and the police) could not interfere with the citizen’s right to property.

Removal of right to property as a fundamental right led to wide spread dissent among landed gentry and the lawyers who mostly belonged to the landed section of the society. Conservative jurists like H.M. Seervai were highly critical of the move by Indian legislature to remove the right to property which was guaranteed in all other major democratic constitutions around the world.

<sup>6</sup> As per Conrad, the Indian judiciary has consistently taken a balanced view of amendability of Indian Constitution, while in the formative years they gave total amending power to Indian Parliament (*Sajjan Singh* and *Shankari Prasad* cases) in the later stages the judiciary completely changed its position in *Golaknath* and finally brought out the famous ‘basic

opined that “the concept of amendment within the contours of the Preamble and the Constitution cannot be said to be a vague and unsatisfactory idea which parliamentarians and the public would not be able to understand.”<sup>7</sup>

Basic structure thus came as a saviour to the Indian judiciary to save the sanctity of the Constitution from the ever-encroaching executive and legislature. The judiciary had very loosely defined basic structure in a negative manner as, “Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore, you cannot destroy its identity.”<sup>8</sup> Thus the legislature is barred from any act which may damage, emasculate, destroy, abrogate, change or alter such provision, which *destroys* the identity of the constitution. Although over the years, the judiciary has put certain provision of the constitution in this exalted club,<sup>9</sup> it has mostly

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structure theory’ in the Keshavananda case, with this judgement and later cases like Election case, *Minerva Mills*, *Waman Rao*, Indian courts have demonstrated that the judiciary is also evolving with the evolving nation. In the first years of independence the judiciary allowed the legislature to make laws which may be necessary for implementation of greater social good but with changing times and progress the courts decided to implement the inherent limitations of the amending provisions of the Constitution. For further details please refer to Dieter Conrad’s *Zwischen Den Traditionen*.

<sup>7</sup> Kesavananda, ¶ 315.

<sup>8</sup> *Minerva Mills v. Union of India*, AIR 1980 SC 1789.

<sup>9</sup> In Kesavananda case the following ideals were accepted as ‘basic structure’,

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

Shelat, J. and Grover, J. added two more basic features to this list the mandate to build a welfare state contained in the Directive Principles of State Policy and unity and integrity of the nation.

Hegde, J. and Mukherjea, J. identified a separate and shorter list of basic features- sovereignty of India, 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.

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 sovereign democratic republic, parliamentary democracy, three organs of the State (1973 (4) SCC pp. 637-38).

In the Election case (AIR 1975 SC 2299) Justice K.K. Thomas held that the power of judicial review is an essential feature. Justice Y.V. Chandrachud listed four basic features which he considered unamendable sovereign democratic republic status, equality of status and opportunity of an individual, secularism and freedom of conscience and religion, government of laws and not of men’ *i.e.* the rule of law.

According to Chief Justice A.N. Ray, the constituent power of Parliament was above the Constitution itself and therefore not bound by the principle of separation of powers. Parliament could therefore exclude laws relating election disputes from judicial review. He opined, strangely, that democracy was a basic feature but not free and fair elections. Ray, C.J. held that ordinary legislation was not within the scope of basic features. Justice K.K.

reserved the membership to abstract ideas like sovereignty, democracy, federalism, judicial independence, judicial review etc., and has rarely moved into the mundane world of specific provisions.<sup>10</sup>

## II. RIGHTS CHAIN

This portion of the article tries to establish that there exists a link between the two diverse concept of natural law and basic structure of the Indian constitution. As shown in the picture below natural law is the superset of all rights. Natural law had its origin in the Greek city states between the dialogues of

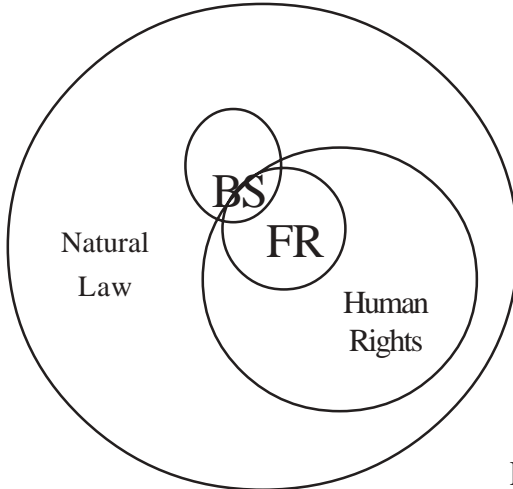
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Mathew agreed with Ray, C.J. that ordinary laws did not fall within the purview of basic structure. But he held that democracy was an essential feature and that election disputes must be decided on the basis of law and facts by the judiciary.

Justice M.H. Beg disagreed with Ray, C.J. on the grounds that it would be unnecessary to have a constitution if Parliament's constituent power were said to be above it. He contended that supremacy of the Constitution and separation of powers were basic features as understood by the majority in the Kesavananda Bharati case. Beg, J. emphasised that the doctrine of basic structure included within its scope ordinary legislation also. In *Minerva Mills Ltd. v Union of India* ((1980) 3 SCC 625) the law lords further elaborated the principle and ambit of basic structure when Chief Justice Y.V. Chandrachud, delivering the majority judgement (4:1), upheld both contentions. The majority view upheld the power of judicial review of constitutional amendments. They maintained that clauses (4) and (5) of Article 368 conferred unlimited power on Parliament to amend the Constitution. They said that this deprived courts of the ability to question the amendment even if it damaged or destroyed the Constitution's basic structure. The judges, who concurred with Chandrachud, C.J. ruled that a limited amending power itself is a basic feature of the Constitution.

<sup>10</sup> This position was examined in detail by writers like Michel Rosenfeld, Venkatesh Nayak, Bodansky, U Baxi who opined that the judiciary has not named any particular provision or article as a part of basic structure and has rather gone to define the issues which should be accorded protection as otherwise the legislature may merely put restriction on such particular provision and have the basic structure circumvented. This approach also saves the judiciary from unnecessarily encroaching upon legislature's domain as any or every change in certain provisions may not damage or abrogate the Basic structure, thus in *Waman Rao v. Union of India* (1981) 2 SCC 362 the judges opined that not every case of abrogation of a Part III right will result in destruction of the basic structure of the constitution. The fact whether the basic structure of the constitution is destroyed or not will depend upon the particular Part III right that has been withdrawn or abrogated and whether what is withdrawn is quintessential to the identity of the constitution.

Thomists and the Sophists, the true essence of the constancy of Natural law was brought out in the play named Antigone<sup>11</sup>, where Antigone faced king's wrath when she defied his order and buried her slain brother.



BS – Basic Structure

FR – Fundamental Rights

When she was brought before the king for trial her defence was that, “I did not think anything which you proclaimed strong enough to let a mortal override the gods and their unwritten and unchanging laws. They’re not just for today or yesterday, but exist forever, and no one knows where they first appeared.”<sup>12</sup> Thus Natural law always appeared to oppressed as the means of salvation as it guaranteed rights which was the pre ordained by Nature.<sup>13</sup> Natural law thus is based on the premise that there is a higher law which is unamendable and thus is above the whims of the sovereign. The entire rights body is sometimes attributed to Natural law and thus it is the ultimate Rights superset.

From natural law arose the doctrine of human rights. The Stoics argued that all humans have reason within them and can therefore know and obey its law.<sup>14</sup> The Romans tried to copy it to their law books, however at this point there

<sup>11</sup> Antigone is a Greek tragedy where Antigone's brothers fight over throne and when both get killed the new king allows one brother to be buried but other's body is not allowed to be buried, Antigone buries the body of her brother in spite of King's specific order claiming that there is a higher law which authorizes her to do so.

<sup>12</sup> IAN JOHNSON, SOPHOCLE'S ANTIGONE 442 BC available at [www.mala.bc.ca/~johnstoi/sophocles/antigone.htm](http://www.mala.bc.ca/~johnstoi/sophocles/antigone.htm) (Last visited on November 10, 2008).

<sup>13</sup> See THOMAS HOBBS, PHILOSOPHICAL RUDIMENTS CONCERNING GOVERNMENT AND SOCIETY 38 (English translation of *De Cive*), see also AQUINAS, THEOLOGICA, as given in 'LLOYD'S INTRODUCTION TO JURISPRUDENCE', p 142.

<sup>14</sup> *Id.*, 104.

arose a controversy as to the practice of slavery. Natural law claimed that all men are born equal and thus they have an inborn right to liberty, this became the dogma in Rome, however Rome condoned slavery a practice which seemed as direct detriment to the province of natural law, jurists like Cato and Cicero tried to find a solution by claiming that slaves are not human at all.<sup>15</sup> This dichotomy was removed by Thomists propounded by St. Thomas Aquinas who postulated that natural law was part of God's perfect law. All human beings were endowed with unique individual identity distinctly separate from state. This was followed by Grotius who gave a non-theistic approach to natural law. Scott Davidson argues that it was this Grotian view that was transmuted into the individual Human rights theory. Thus we can surmise human rights as a subset of the broader natural law regime.

In India human rights were positively transcribed in Part III of the Constitution. However only certain human rights were guaranteed as Fundamental Rights. A brief comparison with UDHR and Part III of Indian constitution would bring out that Right to life and liberty under Article 3 of UDHR have been transformed into Article 21 of Indian Constitution, so to right to fair trial under Article 10 of UDHR became Article 22 of Part III, right to property which is Article 17 of UDHR was earlier Article 31 of Constitution later was repealed and placed as a constitutional right under Article 300, Right to freedom of expression under Article 19 of UDHR is Article 19 in Constitution of India. However there are many other human rights like the right to work (Article 23 UDHR), Right to participate in governance of ones country (Article 21 UDHR), Right to Education (Article 26 UDHR), Right to adequate standards of living (Article 25 UDHR) which finds mention in Indian constitution as Directive Principles of State Policy in Part IV a somewhat loose guidelines given to the government to follow. Thus the second link of the rights chain namely that Fundamental Rights are a subset of broader human rights is also established.

Now we come to the question of basic structure as a further subset of Fundamental Rights yet encompassing other natural law doctrines which are outside the Fundamental Rights domain. As discussed in the evolution of Basic structure chapter we may conclude that basic structure was a product of Judiciary's attempt to find something superior in the constitutional framework whereby an all assuming executive could be stopped. Basic structure as stated by the judiciary in *Kesavananda Bharti* protected the supremacy of the Constitution, a republican and democratic form of government; the secular character of the Constitution; maintenance of the separation of powers and the federal character of the Constitution. Justices Shelat and Grover added three features to the Chief Justice's list:

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<sup>15</sup> A strikingly similar argument was taken in early 1800s when in US law courts gave judgments like "A slave is in absolute bondage. He has no civil rights." So said Judge Crenshaw, in *Brandon et al. vs. Planters' and Merchants' Bank of Huntsville*, Jan. T., 1838; 1 Stewart's Ala. Rep., 320. Same principle in *Bynum vs. Bostwick*, 4 Desauss., 266. Wheeler, at 6. "Slaves are deprived of all civil rights." "Emancipation gives to the slave his civil rights." Judge Matthews, in *Girod vs. Lewis*, May T. available at <http://www.dinsdoc.com/goodell-1-2-1.htm> (Last visited on November 10, 2008).

1. The mandate to build a welfare state contained in the Directive Principles of State Policy;
2. Maintenance of the unity and integrity of India;
3. The sovereignty of the country.

Justices Hegde and Mukherjea instead provided, in their opinion, a separate and shorter list:

1. The sovereignty of India;
2. The democratic character of the polity;
3. The unity of the country;
4. Essential features of individual freedoms;
5. The mandate to build a welfare state.

Justice Jaganmohan Reddy preferred to look at the Preamble; stating that the basic features of the Constitution were laid out by that part of the document, and thus could be represented by:

1. A sovereign democratic republic;
2. The provision of social, economic and political justice;
3. Liberty of thought, expression, belief, faith and worship;
4. Equality of status and opportunity.

Later other features were included within the ambit of basic structure like free and fair elections<sup>16</sup>, the principle of equality<sup>17</sup>, rule of law<sup>18</sup>, powers of the Supreme Court under Articles 32, 136, 141 and 142.<sup>19</sup> In *Minerva* supremacy of Fundamental Rights and judicial review was protected as basic structure.

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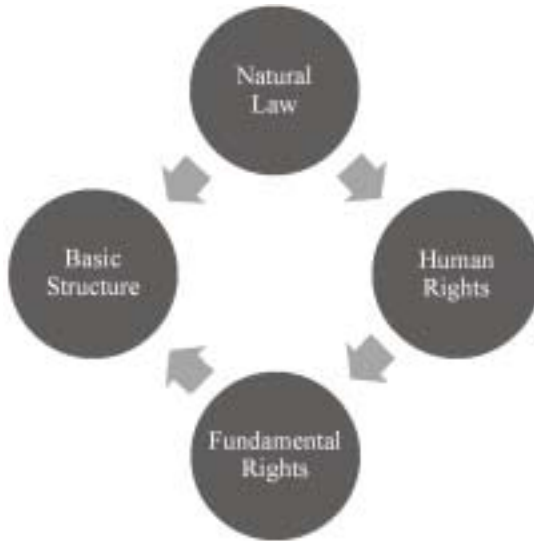
<sup>16</sup> *Kihoto Hollohon v. Zachilu*, AIR 1993 SC 412; 1992 Supp (2) SCC 651.

<sup>17</sup> *Raghunathrao v. Union Of India*, AIR 1993 SC 631.

<sup>18</sup> *Indira Sawhney v. Union of India*, (1992) Supp (3) SCC 217.

<sup>19</sup> *Delhi Juridical Service Association v. State of Gujarat*, AIR 1991 SC 2176.

Thus we find that a host of Fundamental Rights was protected in basic structure but Part III as a whole was never accorded protection, as said in *Minerva* that balance between Part III and Part IV is the identity of the constitution. Basic structure contains much more than Fundamental Rights; it contains the basic essence of natural law in the form of democratic institution, rule of law, etc. Thus we can give shape to our rights chain as below.



### III. EVOLUTION OF BASIC STRUCTURE

#### A. PRE KESAVANANDA ERA

Since independence questions have been raised in the legal academia about the scope of the Parliament's powers to amend Part III of the Constitution which constituted the Fundamental Rights. Although there was no doubt regarding the power of the Parliament to amend the Fundamental Rights yet doubts were expressed as to whether the Parliament can actually take away or dilute a fundamental right. There is no doubt that Article 31 has suffered the most in the hands of the Parliament. The basic purpose of the Parliament was to immune those laws which took away property from the people from challenges under Articles 14, 19, and 31 and to ensure that the judiciary does not come in the way. A number of challenges were made in the Supreme Court regarding the right to property.

#### B. SHANKARI PRASAD CASE

In the case of *Shankari Prasad Singh v. Union of India*<sup>20</sup>, the petitioner challenged the power of the Parliament to amend the Fundamental Rights. Here,

<sup>20</sup> AIR 1951 SC 458.



the validity of the First Amendment Act which curtailed Article 31 was challenged as being violative of Article 13 of the Constitution.<sup>21</sup> The petitioners pointed out a possible conflict between Article 13 and Article 368. Using the literal interpretation the Supreme Court resolved the conflict and upheld the validity of the First Amendment. The Court reduced the scope of Article 13 significantly when it held that the word “law” did not include within its scope a constitutional amendment passed under Article 368. On this point the Court observed that,

“We are of the opinion that in the context of Article 13 law must be taken to mean rules and regulations made in the exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constituent power with the result that Article 13(2) does not affect amendments made under Article 368.”

The Court held that Article 368 empowers the Parliament to amend the Constitution without any exception and that the Fundamental Rights are not excluded from the scope of Article 368. Therefore, the Court disagreed with the view that Fundamental Rights are inviolable and held that although the Parliament cannot violate Part III using their ordinary legislative power but they certainly will be able to abridge or restrict Fundamental Rights using their constituent power.

### C.SAJJAN SINGH CASE

The next significant case raising this issue would be the case of *Sajjan Singh v. State of Rajasthan*<sup>22</sup> when the validity of the Constitution (Seventeenth Amendment) Act was questioned in front of the apex Court. By this amendment a number of statutes affecting property rights were placed in the Ninth Schedule of the Constitution thereby putting them out of judicial review. Arguments were made by the petitioner that the scope of judicial review was being reduced to a great extent by this amendment and therefore this could only be made using the

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<sup>21</sup> Article 13. Laws inconsistent with or in derogation of the Fundamental Rights. -

- (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
- (2) The State shall not make any law, which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
- (3) In this article, unless the context otherwise requires, -
  - (a) “Law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
  - (b) “Laws in force” includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

<sup>22</sup> AIR 1965 SC 845.

provisions of Article 368<sup>23</sup> should be struck down. Following the similar footsteps as in *Shankari Prasad* the court rejected the argument in the ratio of 3:2. In its majority opinion the Court held that the “pith and substance” of the amendment was to amend the Fundamental Rights and not to restrict the scope of Article 226 in any way. Reiterating the position in *Shankari Prasad* the Court drew a distinction between ordinary legislative power and constituent power. The majority refuse to acknowledge that Fundamental Rights were beyond the scope of Article 368.

However, the minority expressed strong reservation regarding this. Justice Hidayatullah observed that, “I would require stronger reasons than those given in *Shankari Prasad* to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the constitution and without concurrence of the states”. Similarly Justice Mudholkar expressed reluctance in accepting that the word “law” in Article 13 excluded within its scope the constitutional amendments. His general argument was that every constitution has certain basic features which could not be changed.

#### D. GOLAK NATH CASE

In the case of *I.C. Golak Nath v. State of Punjab*<sup>24</sup> the Constitution (Seventeenth Amendment) Act was again challenged. The constitution bench were not within the scope of Article 368. The court apprehension rose from the fact that there were numerous attacks on Fundamental Rights since 1950. The court was worried that if Parliament were to be given absolute powers in this regard a time may come when there will be no Fundamental Rights and India will slowly move towards a totalitarian regime. The following four major propositions can be drawn from the majority opinion in *Golak Nath*:<sup>25</sup>

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<sup>23</sup> Article 368(2) of the Constitution of India: An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it, shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in-

- (a) Article 54, Article 55, Article 73, Article 162 or Article 241, or
- (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
- (c) Any of the Lists in the Seventh Schedule, or
- (d) The representation of States in Parliament, or
- (e) The provisions of this article.

The amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

<sup>24</sup> AIR 1967 SC 1643.

<sup>25</sup> See M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1623 (2006).

1. The substantive power to amend is not to be found in Art. 368, this Article
2. Only contains the procedure to amend the Constitution
3. A law made under Article 368 would be subject to Art 13(2) like any other
4. law
5. The word ‘amend’ envisaged only minor modifications in the existing provisions but not any major alterations therein;
6. To amend the Fundamental Rights, a Constituent Assembly ought to be convened by Parliament.

### *E. KESAVANANDA BHARATI CASE*<sup>26</sup>

The petitioner in this case had challenged the constitutional validity of the Constitution (Twenty-fourth Amendment) and Constitution (Twenty-fifth Amendment) Acts by way of an Article 32 writ petition. The matter was heard by a constitutional bench of 13 judges so that they could review the decision of the court in the *Golak Nath* Case. Justice Hedge and Mukherjea refused to believe that the constitutional assembly would hide the power to amend the Constitution in its residuary power. On this point the position in *Shankari Prasad* and *Sajjan Singh* was found to be correct and the contrary view expressed in *Golak Nath* was overruled. Further, the judges found that the Constitution makes a distinction between the term “Constitution” and the term “law” in Article 13. It was therefore held that the expression “law” in Article 13 of the Constitution does not include “constitutional law”. However, it should be kept in mind that the court did not grant unlimited powers to the legislature. The amending power will now be subject to a new doctrine, the doctrine of basic structure. Therefore, the legislature cannot use the amending power in such a manner so as to destroy or emasculate the basic features of the Constitution.

Some of the features regarded by the Court as basic and therefore non-amenable are:

- i) Supremacy of the Constitution
- ii) Republican and democratic form of government
- iii) Secular character of the Constitution
- iv) Separation of powers between legislative, executive and the judiciary
- v) Federal character of the Constitution.

According to the court in this case the word “amend” enjoys a very restrictive connotation and the court can look into the validity if it threatens to nullify or destroy any fundamental feature of the Constitution. *Kesavananda* also answered an important question which was left open by *Golak Nath*, as to whether Parliament has the power to rewrite the entire Constitution and bring in a new constitution. The court answered this by saying that Parliament can only do that which does not modify the basic features of the Constitution.

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<sup>26</sup> His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr. (1973) 4 SCC 225.

#### IV. TEST OF BASIC STRUCTURE

The test of ‘basic structure’ as derived in *Kesavananda Bharati*<sup>27</sup> was far from concrete, except for those features enunciated by various judges<sup>28</sup> the rule of basic feature or tests of basic structure was nebulous and confusing. Noted jurist H.M Seervai has lamented that, “[a] precise formulation of the basic features would be a task of greatest difficulty and would add to the uncertainty of interpreting the scope of Art 368”<sup>29</sup>, the first judgment where a conscious attempt was made to lay down the tests of basic structure is *Minerva Mills case*<sup>30</sup>.

The issue in *Minerva Mills* as raised by petitioners was to declare the Nationalization Act of 1974 *ultra vires* to the Constitution. However as the said act had already been inserted into Ninth Schedule in 1975, and hence barred the Act from judicial review, the petitioners decided to challenge the constitutional validity of Thirty-ninth Amendment which inserted the impugned act into the Ninth Schedule. However, in 1976 by the Forty-second Amendment, Parliament inserted two clauses in Article 368<sup>31</sup> which barred judicial review of constitutional amendments and granted absolute freedom to legislature to modify or amend the constitution and amended Article 31-C<sup>32</sup> which widened the scope of laws giving effect to ‘certain’ directive principles. Hence in order to review Thirty-ninth Amendment the Forty-second Amendment needs also to be challenged. So the petitioners along with challenging the constitutional validity of the impugned act also challenged the validity of debated provisions of Thirty-ninth and Forty-second Amendments in so far as the amendments block judicial review and granting

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<sup>27</sup> *Id.*

<sup>28</sup> In *Minerva Mills v. Union of India*, AIR 1980 SC 1789 the majority judgment concisely discussed the ratio of *Kesavananda* and jotted down the Basic features regarding the limited amendability of constitution and the balance between Part III and Part IV as pointed out by Sikri, C.J., Shelat and Grover, JJ, Hegde and Mukherjea, JJ, Jaganmohan Reddy J and Khanna, J. For a detailed analysis of various features of constitution categorized as ‘Basic structure’ in *Kesavananda* one can refer to V.N. Shukla, Constitution of India at 887-889.

<sup>29</sup> HM SEERVAI, CONSTITUTIONAL LAW OF INDIA, 3161-3162 (2001).

<sup>30</sup> *Minerva Mills Ltd. and Ors. vs. Union of India (UOI) and Ors.*, AIR 1980 SC 1789.

<sup>31</sup> Section 55 of the Constitution (Forty-second Amendment) Act, 1976, which was also brought into force with effect from January 3, 1977 inserted subsections (4) and (5) in Article 368 which read thus:

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article (whether before or after the commencement of Section 55 of the Constitution (Forty-second Amendment) Act, 1976) shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

<sup>32</sup> Section 4 of the Forty-second Amendment, which was brought into force with effect from January 3, 1977 amended Article 31-C of the Constitution by substituting the words and figures “all or any of the principles laid down in Part IV” for the words and figures “the principles specified in Clause (b) or Clause (c) of Article 39”.

dictatorial amending powers to the legislature. Thus the judges in the case decided not<sup>33</sup> to look into the constitutionality of the Nationalization act but first decide on the validity of debated provisions of Thirty-ninth and Forty-second Amendments and their constitutional validity on the touchstone of 'basic Structure'.

At the very outset the majority reiterated that as per theme of *Kesavananda*, the concept of basic structure can be adduced as, "amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore, you cannot destroy its identity"<sup>34</sup>. Thus in order to find out the validity of debated provisions of Thirty-ninth and Forty-second amendments Chandrachud J decided to deal with the Forty-second Amendment first.

Section 55 of Constitution (Forty-second Amendment) Act introduced Article 368(4) and (5). Article 368(4)<sup>35</sup> outrightly denied judicial review of constitutional amendments while Article 368(5)<sup>36</sup> removes any bar to the amending power of the legislature to amend the Constitution. Referring to *Indira Nehru Gandhi v. Raj Narain*<sup>37</sup> Chandrachud, J. reiterated that Clause 4 of Article 329A of the Constitution which abolished the forum for adjudicating upon a dispute relating to the validity in an election was struck down by Khanna, J. because it took away principles of free and fair elections which is an essential postulate of democracy and which, in its turn, is a part of the basic structure.<sup>38</sup> Same conclusions were reached by Matthew, J. who held that 329A(4) violated democracy which is a basic structure, Chandrachud, J. held that denial of equality by the said article itself constitutes a breach of basic structure as "an outright negation of the right of equality conferred by Article 14, a right which, more than any other, is a basic postulate of the Constitution"<sup>39</sup>. Thus in the present case scenario also Chandrachud, J. sums up that Article 368(4) "deprives the courts of, their power to call in question any amendment of the Constitution.", thus "the Fundamental Rights conferred upon the people will become a mere adornment because rights without remedies are as writings in water." Hence, Chandrachud, J. impliedly defining Judicial review to be a part of basic feature strikes down Article 368(4) on the ground that:

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<sup>33</sup> *Supra* note 28.

<sup>34</sup> *Supra* note 28, 1798.

<sup>35</sup> (4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article (whether before or after the commencement of Section 55 of the Constitution (Forty-second Amendment) Act, 1976) shall be called in question in any court on any ground.

<sup>36</sup> (5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

<sup>37</sup> AIR 1975 SC 2299.

<sup>38</sup> *Supra* note 28, 1798.

<sup>39</sup> *Id.*

“If a constitutional amendment cannot be pronounced to be invalid even if it destroys the Basic structure of the Constitution, a law passed in pursuance of such an amendment will be beyond the pale of judicial review because it will receive the protection of the constitutional amendment which the courts’ will be powerless to strike down. Article 13 of the Constitution will then become a dead letter because even ordinary laws will escape the scrutiny of the courts on the ground that they are passed on the strength of a constitutional amendment which is not open to challenge”.<sup>40</sup>

On the question of validity of Article 368(5), whose avowed purpose is the removal of doubts but purported to remove any limitation to legislative amending powers and instead assume absolute dictatorial hold over constitution, the majority was overtly critical. At the very outset, Chandrachud, J. remarks that after *Kesavananda Bharati*, ‘[t]here could be no doubt as regards the existence of limitations on the Parliament’s power to amend the Constitution.’<sup>41</sup> Furthermore, complementing the logic given in *Kesavananda*, Chandrachud, J. wrote that “Parliament may make any amendments to the Constitution as it deems expedient so long as they do not damage or destroy India’s sovereignty and its democratic, republican character”<sup>42</sup>. Thus summing up Chandrachud, J. concludes that “the newly introduced Clause (5) of Article 368 demolishes the very pillars on which the preamble rests by empowering the Parliament to exercise its constituent power without any limitation whatever”<sup>43</sup>. Thus moving on the rails of *Kesavananda* Chandrachud, J. reaffirms “limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed”.<sup>44</sup>

Thus the majority struck down Article 368(4) and (5). They reasoned that “the conferment of the right to destroy the identity of the Constitution coupled with the provision that no court or law shall pronounce upon the validity of such destruction seems to us a transparent case of transgression of the limitations on the amending power”<sup>45</sup>.

On the question of validity of Section 4 of Forty-second Amendment, which amended Article 31-C of the Constitution by substituting the words and figures all or any of the principles laid down in Part IV for the words and figures “the principles specified in Clause (b) or Clause (c) of Article 39”<sup>46</sup>, the majority

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<sup>40</sup> *Supra* note 28, 1799.

<sup>41</sup> *Supra* note 28, 1798.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Supra* note 28, 1798.

<sup>45</sup> *Supra* note 28, 1799.

<sup>46</sup> The State shall, in particular, direct its policy towards securing-

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

view was muted to a large extent in comparison to the sound rejection as regards to the validity of Article 368(4) and (5). The foremost argument forwarded by Chandrachud, J. in the majority opinion is the bar on widening of legislative powers to make special laws circumventing Articles 14<sup>47</sup> and 19<sup>48</sup> in order to give effect to Directive Principles and balance between Part III and Part IV.

The petitioners argued that amended 31-C will destroy the harmony between Parts III and IV of the Constitution by making the Fundamental Rights conferred by Part III subservient to the Directive Principles of State Policy set out in Part IV of the Constitution. It is further argued by Palkivala that, “[t]he Constitution makers did not contemplate a disharmony or imbalance between the Fundamental Rights and the directive principles and indeed they were both meant to supplement each other”<sup>49</sup>. Thus, the petitioners contend that amended 31-C will confer an

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<sup>47</sup> The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

<sup>48</sup> (1) All citizens shall have the right-

- (a) to freedom of speech and expression;
  - (b) to assemble peaceably and without arms;
  - (c) to form associations or unions;
  - (d) to move freely throughout the territory of India;
  - (e) to reside and settle in any part of the territory of India;
  - (f) to acquire, hold and dispose of property; and
  - (g) to practice any profession, or to carry on any occupation, trade or business.
- (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.
- (3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.
- (4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.
- (5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.
- (6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it prescribes or empowers any authority to prescribe, or prevent the State from making any law prescribing or empowering any authority to prescribe, the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business.

<sup>49</sup> ¶ 34, *Supra* note 28.



unrestricted license on the legislature and the executive to destroy democracy and establish an authoritarian regime as almost all state function can be related to some provision under Part IV and thereby irrevocably damage the basic structure of Constitution.<sup>50</sup> On the other hand, the respondents argued that a law which fulfils the directive of Article 38 is incapable of abrogating fundamental freedoms or of damaging the basic structure and instead strengthens the concept of basic structure.

In view of the submissions, the Court concisely summarizes the question to be decided as to “[w]hether the provisions of the Forty-second Amendment of the Constitution which deprived the Fundamental Rights of their supremacy and, *inter alia*, made them subordinate to the directive principles of State Policy are *ultravires* the amending power of Parliament”<sup>51</sup>. While answering this question, Chandrachud, J. comes tantalizingly close to the fact as to whether Articles 14 and 19 are part of basic structure.<sup>52</sup> However the court in majority judgment instead opines that in other words, the Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between Fundamental Rights and Directive Principles is an essential feature of the basic structure of the Constitution.<sup>53</sup> Hence the Amendment to Article 31-C by Sec 5 of Constitution (Forty-second Amendment) Act was declared unconstitutional as it takes away the power of judicial review and destroys the balance between Part III and Part IV both of which are adjudged to be basic structure.

However, through all these lofty ideals promulgated by the Supreme Court in this case, there was hardly any direction as to which provisions of the

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<sup>50</sup> ¶ 32, *Supra* note 28, “The learned Counsel further argues that it is impossible to envisage that a destruction of the fundamental freedoms guaranteed by Part III is necessary for achieving the object of some of the directive principles like equal justice and free legal aid. Organizing village panchayats, providing living wages for workers and just and humane conditions of, work, free and compulsory education for children, organization of agriculture and animal husbandry, .and protection or environment and wild life. What the Constituent Assembly had rejected by creating a harmonious balance between parts III and IV is brought back by the 42nd Amendment,”

¶ 33: *Supra* note 28 “Finally it is urged that the Constitution had made provision for the suspension of the right to enforce Fundamental Rights when an emergency is proclaimed by the President. Under the basic scheme of the Constitution, Fundamental Rights were to lose their supremacy only during the period that the proclamation of emergency is in operation. Section 4 of the Forty-second Amendment has robbed the Fundamental Rights of their supremacy and made them subordinate to the directive principles of State policy as if there were a permanent emergency in operation. While Article 359 suspends the enforcement of Fundamental Rights during the Emergency, Article 31C virtually abrogates them in normal times. Thus, apart from destroying one of the basic features of the Constitution, namely, the harmony between Parts III and IV, Section 4 of the Forty-second Amendment denies to the people the blessings of a free democracy and lays the foundation for the creation of an authoritarian State.”

<sup>51</sup> ¶ 41, *Supra* note 28, 1802.

<sup>52</sup> *Id.*, 1803.

<sup>53</sup> *Id.*, 1806.



Constitution can be categorized as basic structure and which other are outside its purview. What in *Kesavananda Bharti* was the constitutional identity was merely categorized as harmony and balance between Fundamental Rights and Directive Principles and judicial review in *Minerva Mills*. But the real attempt at getting a test comes not from the majority judgments but from the minority judgment delivered by PN Bhagwati, J. He gave a basic test for differentiating an ordinary provision and 'basic feature' in Constitution. Three differentiating criteria were:<sup>54</sup>

1. It would all depend on the nature of the right,
2. The extent and depth of the infringement,
3. The purpose for which the infringement is made and its impact on the basic value of the Constitution.

One may comment that this test is as vague as the constitutional identity of *Kesavananda Bharti* but an in-depth analysis of these points would prove otherwise. First let us consider the condition on 'nature of right', one needs to understand what kind of rights have been violated whether it is a Fundamental Right or a legal right or a constitutional right, as is clear from the analysis given in the rights chain basic structure comprises of rights both Fundamental Rights guaranteed under Part III like Right to life, and rights which are ingrained in the spirit of constitution like the notion of democracy, rule of law etc. Thus merely because a right is a fundamental right does not accord it any protection it must be an absolute essential or the basic or core natural rights.

The second test is the question of extent and depth of infringement while it may seem superfluous after the first test; one must understand that all these tests are to be simultaneously applied rather than in a hierarchical way. The present set of test is a post violation test where the judges are supposed to check whether the provision is part of Basic structure after it has been amended. Under Indian constitutional framework the courts cannot take suo motto action on an amendment and hence the courts cannot look into an amendment unless it has been brought before it. Thus the test devised by Indian courts always tries to counter a situation where the damage is already done. The second test is very intricately linked with the third one as while analyzing the extent of infringement one needs to understand the purpose and impact of the infringement.

Bhagwati, J. himself gives an example of the second and third test by holding that amendment to Article 31-C did not infringe the basic structure. He opines, "[a]ny law enacted for giving effect to a Directive Principle with a view to furthering the constitutional goal of social and economic justice, there would be no violation of the Basic structure even if it infringes formal equality before the law under Article 14 or any Fundamental Right."<sup>55</sup> Thus Bhagwati held that amended 31C is valid as according to him:

<sup>54</sup> *Id.*, 1824.

<sup>55</sup> *Supra* note 28, 1827. Further reference is made to Shankari Prasad v. Union of India, AIR 1951 SC 458, Golak Nath's case, in *Ambika Prasad Misra v. State of U. P.* and in *Kesavananda* where Article 31A was held to be valid.

“[t]here can be no doubt that the intention of the Constitution makers was that the Fundamental Rights should operate within the socio-economic structure or a wider continuum envisaged by the Directive Principles, for then only would the Fundamental Rights become exercisable by all and a proper balance and harmony between Fundamental Rights and Directive Principles secured. The freedom of a few has then to be abridged in order to ensure the freedom of all.”<sup>56</sup>

In conclusion the learned judge pointing out, in the end of Paragraph 118 of the judgment, that egalitarianism being itself a basic feature of Constitution and as such laws giving effect to Part IV, whose avowed purpose is to usher an egalitarian society, if protected from scrutiny of Part III by Article 31-C would rather buttress the concept rather than weakening it.

Thus if we are to implement the three pronged test as per Bhagwati, J., we find that by nature the primacy of Fundamental Rights, as in the present case, is not basic structure, especially so when the curtailment is for greater common good as per the purpose and impact test of the infringement. Therefore, if we are to restate the test given in the *Minerva Mills*, we may come up with the following points- whether the nature of the right is such that it is a fundamental right or a core, condition of natural right of a human being. The extent and depth of the infringement, purpose for which the infringement is made, overall impact on the basic value or identity of the Constitution.

## V. CONCLUSION

Thus we find that basic structure as a concept has evolved over years since its inception in 1970s, with every passing year there has been more and more rights being included into the basic structure of the Constitution. Basic structure as we see today is thus a culmination of years of judicial supervision of Fundamental Rights and related constitutional structure. Through the ‘rights chain’ we have substantiated that basic structure is a culmination of judicial choice to choose the very best in the rights buffet and protect them against all odds. Thus, basic structure is the distillate of core natural rights, human rights and Fundamental Right under Indian scenario. But as we have seen the judiciary never gave a concrete test to find what basic structure is leaving the definition so vague that judiciary have ample manoeuvring space. But from vague words like ‘constitutional identity’, ‘basic value of constitution’, we have found that based on the rights chain basic structure would be limited to natural rights and to those areas of legal structure that directly affects those.

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<sup>56</sup> *Id.*, 1850.