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THE CONSTITUTIONAL CORE AMENDMENT ERA- HISTORICAL OVERVIEW

AURTHORED BY - ASHEENA AUGUSTA

The Basic Structure Doctrine keeps the supremacy of the Constitution. Though this doctrine finds no place in the script of Indian Constitution it is major pillar of our constitution. The term basic structure was first coined by the attorney M.K.Nambiar while arguing for the petitioners in I.C Golaknath v. State of punjab. But it was enshrined only in the judgement of Kesavanandha bharati v. State of Kerala. By this doctrine parliament can amend any part of the constitution but without affecting the basic structure of the constitution. The judicial innovation of the Basic Structure doctrine can be traced as two phases.ie, Pre Keshavanandhabharathi case and post Keshavanandhabharathi case. The former is based on how the doctrine is evolved and the later deals with the development of this concept over the years. The journey to the evolution of the doctrine of basic structure started by the incorporation of Article 31A and 31B by the First constitutional Amendment of 1951. Article 31B saves those laws which are included in the 9th schedule from being challenged as violative of Fundamental rights even if it violates the Fundamental rights. The Land reforms Act and property laws where included in the 9th schedule. Prior to this Amendment a person cannot be deprived of his right to property under Article 19(f) which is a fundamental right. And according to Article 13 of Indian constitution State shall not make any laws which abridges the fundamental rights and such laws shall be void. But when Article 31A and 31B was introduced property acquisition cannot be challenged as it was included in the 9th schedule. Several controversies took place at that time due to this revolutionary change. The property owners argued that the amendments which placed the land reforms laws in the 9th schedule is violative of article 13(2) of the Indian constitution as law as defined under Article 13(2) includes fundamental rights. A series of petitions were filed to decide upon the parliaments power to amend the constitution and whether an amendment is a law as declared under article 13(2) of Indian Constitution. The Supreme Court had made several decisions on this matter.

PRE KESHAVANANDHABHARATHI PHASE

Shankari Prasad Singh Deo v. Union of India

A petition was filed in the Supreme Court challenging the validity of Article 31A and 31B of the Constitution as it is violative of Fundamental rights and Article 13(2) of Indian Constitution. In this case the Supreme Court held that parliament can amend any part of the Constitution including the Fundamental rights under article 368 of the Constitution. And law as declared under Article 13(2) does not include amendments.

Sajjan Singh v State of Rajasthan

In this case once again the parliament's amending power was challenged. The validity of 17th constitutional amendment which added around 44 statutes to the 9th schedule was challenged. Five-judge bench of Supreme Court dealt with the issue and though upheld the decision in Shankari Prasad case. Two Judges Hidayatullah and Mudholkar JJ have dissenting opinion. It was for the first time the 'Basic Features' principle was expounded by Justice J.R. Mudholkar in 1953 in his dissent. His view was that whether making a change in the basic feature of Constitution is merely an amendment or it would be rewriting the Constitution and if it is the latter whether the parliament has the power to do so.

I C Golaknath v State of Punjab

In this case the writ petitioners challenged the inclusion of Punjab Security of Land Tenures Act, 1953 and the Mysore Land Reforms Act in the 9th Schedule. While arguing for the petitioners it was for the first time the term Basic Structure was named by the attorney M.K. Nambiar. The case was decided by 11-judge bench of the Supreme Court. With a majority of 6:5 declared that parliament cannot amend the Fundamental rights. And held that law under Article 13(2) includes amendments made to constitution and therefore Fundamental rights cannot be amended. The contention that amending power is a sovereign power and which is outside the purview of judicial review was rejected by the Supreme Court. In this case for the first time the concept of Doctrine of Prospective Overruling was introduced. The case was decided with prospective effect. The result was that the amendments which are already made to the Constitution remain unaltered. Therefore 1st, 4th and 17th amendment was not declared void. So effect was that no further amendments can be made to the Fundamental rights.

24th Constitutional Amendment

After Golaknath's case, the parliament's amending power was restricted parliament cannot freely amend any part of the constitution. Therefore in order to restore the earlier position parliament introduced a new amendment i.e., 24th constitutional Amendment. This amendment

gave wide powers to the parliament. A new clause (4) was introduced to article 13 which states 'nothing in this Article shall apply to any amendment of this Constitution made under Article 368'. Which means parliament amendment is not within the purview of article 13. A new subclause (1) was added to article 368, 'notwithstanding anything in this Constitution, Parliament may, in the 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. And earlier amendment could be brought into effect only when it is passed with two-third majority and with the assent of the President and the President has the choice to without his assent. But after the 24th amendment President is bound to give his assent he has no option to withhold the assent. Another clause (3) was also added to article 368 of the constitution which reaffirmed that 'nothing in Article 13 shall apply to any amendment made under this Article'.

25th Constitutional Amendment

This amendment introduced Article 31C to the Indian Constitution and it gives a supremacy to directive principles of state policy Article 39(b) and (c) over Fundamental rights contained under Article 14, 19 and 31. By virtue of Article 31C any law made to give effect to Directive Principles contained in article 39(b) and (c) cannot be challenged on the ground that it does not give effect to such principles.

Kesavanandha Bharati v State of Kerala

The case was filed to challenge the validity of Kerala Land reforms Act, 1963 but the 29th constitutional amendment included this Act in the 9th schedule thereby making it outside the purview of judicial review. The Hon'ble Supreme Court permitted the petitioner to challenge not only the validity of 29th Constitutional amendment but also 24th and 25th Constitutional Amendments. The historic judgement was delivered by 13-judge bench with a majority of 7:6. They overruled the decision in Golak nath v. state of Rajasthan and held that parliaments power to amend the constitution is very wide and can amend any part of the constitution including the fundamental rights. But the parliament cannot amend the constitution in such a way as to destroy or take away the Basic structure or framework of the constitution. All Judges upheld the validity of 24th constitutional amendment as they took the view that parliament can amend any part of the Constitution without affecting the Basic Structure of the Constitution. What constitute the Basic structure was not declared but an illustrative though not exhaustive list was

provided by the judges.

According to Sikri, C.J., the Basic Structure constitutes the following elements:

The supremacy of the Constitution.

Republican and Democratic forms of Government.

Secular character of the Constitution.

Separation of Powers between the legislature, the Executive, and the Judiciary.

Federal Character of the Constitution.

Shelat and Grover JJ added the following:

The mandate to build a welfare state contained in the Directive Principles of State Policy.

Maintenance of the unity and integrity of India.

The sovereignty of the country.

Hegde and Mukherjee JJ added the following:

The sovereignty of India.

The democratic character of the polity.

The unity of the country.

Essential features of individual freedom.

The mandate to build a welfare state.

Jaganmohan Redd, J was of the opinion that Preamble lays down the Basic features of the Indian Constitution, they are:

A sovereign democratic republic.

The provision of social, economic, and political justice.

Liberty of thought, expression, belief, faith, and workship.

Equality of status and opportunity.

Justice Khanna included judicial review also.

POST KESAVANANDHA BHARATI PHASE

The effectiveness of doctrine of basic structure was discussed and analysed in various cases after the Kesavanandhabharati decision.

Indira Nehru Gandhi v Raj Narain

In this case the effectiveness of the doctrine of basic structure was reaffirmed and re-established. A petition challenging election of Prime Minister Indira Gandhi was filed before Allahabad High Court contending that there was electoral malpractise. The Allahabad High

Court upheld the contention and an appeal was filed by the petitioner. While the appeal was pending before the Supreme Court 39th Constitutional amendment was passed whereby election dispute relating to election of President, Vice- President, Prime Minister and speaker of Lok Sabha cannot be adjudicated by the Supreme Court but a body will be constituted by the parliament which will be having the power to adjudicate upon disputes regarding the election. This bill was passed by the Government with a mala fide intention to protect Indira Gandhi. On the next day the Supreme Court while hearing this case, the Advocate General contended that the petition must be dismissed on the basis of 39th Constitutional amendment. The 5- judge bench with a majority of 4 judges upheld the legality of 39th Constitutional amendment. In this case the court stated democracy as a part of basic structure of the Constitution and included rule of law and power of judicial review as part of basic structure.

42nd Constitutional Amendment

A committee was constituted under the Chairmanship of Sardar Swaran Singh and based on the report of this Committee several changes were adopted in the Constitution including the preamble. Directive principles of state policy was given supreme power over fundamental rights article 14,19 and 21. No law made in pursuance of directive principles of state policy can be challenged. Any amendment made in the past or in future cannot be challenged in any Court of law. This amendment removed all the amendments made to the fundamental rights from the purview of judicial review. And thereby it gives unlimited power of amendment to the parliament under article 368 of the Indian Constitution.

Minerva Mills v. Union of India

The 42nd Amendment was challenged before the Supreme Court by the owners of Minerva Mills. The Counsel for petitioners argued that the basic structure as recognised by the Supreme Court in Kesavanandha Bharati v. State of Kerala was shielded by the 42nd amendment by taking away the rights of judicial review. And also another contention was that it gives unrestricted power of amendment to the parliament and it takes away the fundamental rights of citizens and therefore Article 31C must be declared invalid.

Majority held that the amendment to article 31(C) as unconstitutional as it destroys the balance between the fundamental rights and directive principle of state policy which is a basic feature of the Constitution. And Court held that parliament can pass any law to fulfill the directive principles but that will also be subject to judicial review.

Chandrakumar v. Union of India

In this case it was held that power to judicial review of Supreme Court and High Court under article 32 and 226 is part of basic structure and cannot be taken away by transferring to administrative tribunals.

Waman Rao v. Union of India

In this case the Supreme Court decided that the amendments made before 24 april 1973, the date of decision of Kesavanandhabharati case cannot be reopened and challenged. The decision does not have reterosperspective effect. Hence amendments made to the 9th Schedule until the Kesavananda judgement are valid, and those passed after that date shall be subject to scrutiny.

Indhira Sawney v. Union of India

The Supreme Court dealt with ambit and scope of reservation of under privilaged groups under Article 16(4) of the Indian Constitution. It upheld the legality of 27% reservation of OBC subject to certain exceptions such as exclusion of the creamy layer, the prohibition of reservations in promotions, the requirement that the overall amount of reservations does not exceed 50%, etc.. Rule of law was also added to the list of basic features of the Constitution.

S.R Bommai v. Union of India

In this case the Supreme Court dealt with the abuse of Article 356, (imposition of Presidents rule in states) and held that if the Government policies are against the Basic structure of the Indian Constitution It would constitute a valid basis for the exercise of central power under Article 356.

Relevance of Basic Structure Doctrine

This doctrine preserves the spirit of the Constitutionalism as codified by the founding fathers of our Indian Constitution. By this doctrine the fundamental principles of our Indian Constitution remains unaltered by any means. Though the parliament has the power to amend any part of constitution it cannot amend in such a way as to effect the basic structure of the constitution. It protects our democracy by limiting the power of parliament. It also clearly defines the separation of powers between the legislature, executive and judiciary and Supreme Court has been given broad powers making it most powerful court in the world.

Criticism on Basic Structure Doctrine

Most important criticism of this doctrine is that it is not worded in the constitution regarding what constitutes the basic structure. The doctrine lacks a theoretical framework. Though various judicial decisions lay down certain illustrative list regarding what constitutes a basic structure the list is not exhaustive and the list is extended by more concepts of the constitution by various judicial decisions. In various cases, the Judges decide according to their own perspective regarding the basic structure of the constitution based on their subjective satisfaction. This initiates a doubt as to what all are actually the basic features of the constitution. Since many years have passed till now there is no clarity regarding the list of basic structure of the constitution. Now it has been 50 years after the Kesavanandhabharati case therefore now it is necessary to have a theoretical framework as to what constitutes the basic structure of the Constitution. Arun Jaitley termed it the “tyranny of the unelected” in his criticism of the NJAC judgment in 2015. Referring to the 2015 verdict which had invoked the “basic structure” theory, the VP, remarked that the scrapping of the NJAC Act was “a scenario perhaps unparalleled in the democratic history”.

Basic Structure doctrine: Current Scenario

The Vice- President Jagdeep Dhankhar questions the Kesavanandha Bharati verdict which invoked the basic structure doctrine. He is of the opinion that it is bad precedent that if any authority questions Parliament’s power to amend the Constitution, it would be difficult to say “we are a democratic nation”. He says that he does not subscribe to the basic structure doctrine which maintains that parliament can amend any part of the constitution but without effecting the basic structure of the constitution. Several constitutional amendments were set aside based on the basic structure doctrine including the NJAC Act of 2015 with respect of the appointment of judges in higher judiciary. In NJAC decision the Supreme Court held that the law violated the principle of independence of the judiciary which was a basic tenet of the Constitution. Dhankhar is of the view that parliamentary sovereignty is most essential and cannot be permitted to be compromised by the executive or judiciary. Addressing the 83rd All India Presiding Officers Conference, he said that the judiciary cannot intervene in lawmaking. His statement was based on the ongoing debate on the issue of appointment to the higher judiciary with the government questioning the current Collegium system and the Supreme Court defending it. Dhankhar said no institution can wield power or authority to neutralise the mandate of people. In response to Dhankhar's statement the Hon'ble Chief Justice of India D.Y Chandrachud argued that Basic structure doctrine is a " north star" which guides interpretation

of the constitution. He said that the adoption of this doctrine in neighbouring countries like Pakistan, Bangladesh, Nepal is a proof of the need for such a doctrine.

CONCLUSION

Since 50 years have elapsed after the Kesavanandha bharati decision till now the doctrine is followed by our judiciary and which shows the relevance of this doctrine. However it is sad truism that this even now this doctrine lacks a theoretical framework as well as not enshrined in the constitution. Even now there is no clarity regarding what constitutes the Basic Structure of the Indian Constitution. To say there is an ever ending list regarding the basic features which was introduced by various judges in various cases it depends upon their perceptions regarding the matter. All these create a doubt as to what actually constitutes the basic structure of the Indian Constitution which should be preserved as intact. As we are celebrating 50 years of this most revolutionary journey of this doctrine, it is time for clarifying and accurately scripting and having an actual framework of what actually constitutes the basic structure of Indian Constitution which shall be preserved.

