

Comprehending and Inquisitioning the ‘Doctrine of Basic Structure’ in India: Urgency to Define the Doctrine

Satarupa Datta

5th Year Student, B.A.LL.B (Hons.), Law College Dehradun, Uttarakhand University.

ABSTRACT

The doctrine of ‘basic structure’ has often been labelled as a form of *judicial overreach* or *judicial activism*. In fact, the task of law-making which belongs to the legislature has been overtaken by the judiciary, in the way of a duty imposed upon itself as both the interpreter as well as the Guardian of the fundamental rights. Therefore, vesting upon itself the power to define the ‘basic features’ of the Constitution i.e. the work of lawmaking. This article will argue why the task of defining the ‘basic features’ of the Constitution should not be left open to the *Apex Court*. Additionally the implementation of this doctrine after the case of *Keshvananda*,^[1] in matters of constitutional amendments. The article will begin with a brief introduction of the doctrine. Part II will discuss judicial overreach with reference to the doctrine's application. While part III of the article will conclude with some observations and a conclusion.

Key words: doctrine of ‘basic structure’, *judicial overreach*, *judicial activism*

I- INTRODUCTION

The Constitution of India is the grundnorm,^[2] which lays down provisions necessary for the functioning of the State (India). Where to facilitate proper functioning, concepts like Separation of Power etc. have a special place in the

Constitution itself. Further, distinction in the form of three separate branches of the Government i.e. Legislature, Executive and Judiciary exist. In fact, powers and functions have also been defined, yet the present times have seen the urgency of the Judiciary to intervene, as the Guardian of Fundamental Rights to such an extent that it has stepped into the task of the law-making. One such example is that of the ‘Doctrine of Basic Structure’.

Initially, it was introduced to protect the interest of the Constitution itself, the Judiciary acted on the power conferred on it by the same. The doctrine came into light when distinguished German jurist, Professor Dietrich Conrad while delivering a lecture on ‘Implied Limitations of the Amending Power’^[3] posed the question:

Could a constitutional amendment abolish Article 21, to the effect that forthwith a person could be deprived of his life or personal liberty without authorization by law? Could the ruling party, if it sees its majority shrinking, amend Article 368 to the effect that the amending power rests with the President acting on the advice of the Prime Minister? Could the amending power be used to abolish the Constitution?

His thought was inspired by the Weimar Constitution's, Eternity Clause^[4] which was incorporated in the Basic Law of the Federal Republic of Germany^[5] to establish that certain fundamental principles of Germany's democracy can never be removed, not even by Parliament.^[6] Unlike Germany, the Doctrine has not yet been

enshrined inside the text of the Constitution of India. [7] Even though the doctrine is highly regarded around the world to be the contribution of the Indian Supreme Court but in reality, it is its application to the famous *Kesavananda Bharati case* [8] which has earned it the title of judge-made law. Hence, from *Golaknath* [9] to *NJAC case* [10] the Indian Chapter of the 'basic structure doctrine' has added to its basic features, concepts like Judicial Review, [11] balance between Fundamental Rights [12] and Directive Principles, [13] Free and fair elections, [14] Rule of Law, [15] Federal structure, unity and integrity of India, Secularism, Socialism, Social justice, [16] Independence of Judiciary, [17] etc.

Finally, in the recent chain of events, the doctrine evolved further and continued its journey in the form of two landmark judgments i.e. 'right to privacy' [18] and the Constitutional validity of Part XIV of the Finance Act, 2017 [19]

Now focusing back on the title of the lecture [20] a very important concept had been propounded 'Implied Limitation'. Its relation with that of the Basic Structure Doctrine is what establishes the argument in favor of giving express place to the basic features inside the text of the Constitution.

Implied limitation was discussed by the Supreme Court in the case of *Shankari Prasad v. Union of India*. [21] Though at that time the Hon'ble Court denied any limitation subject to article 368 on the power of Parliament but in the case of *Golaknath* [22] a different stand was taken and the 24th Constitutional amendment Act [23] was passed by the Parliament. Thus giving rise to the continued struggle of defining the 'basic feature'. Additionally, the core concept of article 368 & 13 of the Constitution can be narrowed down to labeling amendments into constitutional and unconstitutional, it becomes even more important to identify the act done, whether amounts to 'ordinary legislation' or 'Constitutional amendment'. The challenges thus posed in front of the parliament are in a way manifold. But the concept of check and

balance won't simply be enough for the purpose. Though established, the Basic features still need protection and therefore require to be kept away separately without the intervention of any.

II THE TUSSLE: LEGISLATURE OR JUDICIAL ACTIVISM

(Judicial activism with reference to the application of the doctrine)

Judicial Review for the very first time was introduced by the US Supreme Court in the case of *Marbury v. Madison*. [24] And from there the concept got popularity, leading to more and more countries adopting it into their system. There is *per se* no problem with the concept of 'Judicial Activism' or 'Judicial Legislation', as article 367 of the Constitution itself provides power to the Judiciary to interpret the constitution as a legal instrument [25] declare the same and make it binding upon all authorities in India. But the same has to be done in consonance and conformity with the constitutional dictates and confined to the extent permitted which distinguishes it from 'Judicial overreach'. [26]

In India, the concept of 'Judicial Review' has been classified into three aspects: (1) judicial review of legislative action, (2) judicial review of judicial decisions and (3) judicial review of administrative action. [27] Where article 245 of the Constitution empowers the Parliament to make laws subject to certain restrictions and thus the power to 'Judicial Review' can be exercised under article 32 & article 226 of the Constitution. In other words, the power to review any legislative action including constitutional amendments by the Supreme Court has to be done by way of interpretation. [28] Thus, the Constitutional Courts though conferred with the power to deal with extraordinary situations for the larger interest of justice and prevention of injustice must use it sparingly. [29]

In the words of Justice J S Verma (former Chief Justice of India):

...the judiciary should only compel performance of duty by the designated authority in case of its inaction or failure, while a takeover by the judiciary of the function allocated to another branch is inappropriate. Judicial activism is appropriate when it is in the domain of legitimate judicial review. It should neither be judicial 'ad hocism' nor judicial tyranny.

The acknowledgment of this difference between "judicial activism" and "judicial overreach" is vital for the smooth functioning of a constitutional democracy with the separation of powers as its central characteristic and supremacy of the constitution as the foundation of its edifice. [30]

Therefore the intention is clear, balance is required, and the answer to 'Judicial overreach' has to be judicial restraint. Although the act of judicial activism is not bad in itself but the overreach or overstepping and placing oneself into the sphere of other, that too without being the proper authority does call for a review of action on part of the Judiciary. Being the Guardian of the Constitution, the expectation remains at large as no other organ of the State but the Hon'ble court has to put the necessary restriction or restraint upon itself.

Interpreter or Lawmaker

Salmond defined 'interpretation' or 'construction' as the process by which courts seek to ascertain the meaning of legislature through the medium of authoritative forms in which it is expressed. [31] Thereby, suggesting that in case of conflict, courts need to ascertain the meaning of the act/ amendment passed by the legislature. Leading to the conclusion that the process of judicial law-making is restricted by its very nature and hence cannot be parallel to the legislative process. [32]

But, the Supreme Court in *Vishaka v. State of Rajasthan* [33] held :

Absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and

guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all workplaces or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasized that this would be treated as the law declared by this Court under Article 141 of the Constitution.

This is clear from the quoted judgment that the Hon'ble Court acknowledges the fact that the primary task of lawmaking belongs to the legislature. But constructing guidelines to be implemented instead of directing the appropriate authority to do so falls under 'Judicial Legislation'.

In the matter of *Kasturilal v. State of Uttar Pradesh*, [34] Chief Justice Gajendragadkar found the law relating to government liability 'not very satisfactory', but did not make the change by judicial construction instead he suggested legislative intervention to rectify the position of law. Thereby, acknowledging the competence of the legislature. Thus, Judges, for instance, do use the tool of interpretation and along with this their personal thought process, ideas, experiences, etc. also plays a vital role to shape any particular law where the gap has been identified by the concerned judge.

Further, the following observation was made by the Hon'ble Court in the case of *Divisional Manager, Aravali Golf Club v. Chander Hass*: [35]

Under our Constitution, the Legislature, Executive and Judiciary all have their own broad spheres of operation. Ordinarily it is not proper for any of these three organs of the State to encroach upon the domain of another, otherwise the delicate balance in the Constitution will be upset, and there will be a reaction. Judges must know their limits and must not try to run the Government. They must have modesty and humility, and not behave like

Emperors. There is broad separation of powers under the Constitution and each organ of the State - the legislature, the executive and the judiciary - must have respect for the others and must not encroach into each other's domains.

The importance of Separation of Power cannot be emphasized any more. For instance, the Judiciary has no sufficient means to execute the function of the administration. As making law and passing orders cannot be equated with running the administration. The Legislature being directly involved with the Executive understands the situation in a much better way and thus deserves to do perform its function, subject to reasonableness.

Unamendable Provision and the Doctrine of Implied Limitation

Now, dealing with the other aspect of the 'Basic Structure Doctrine', a careful analysis of the constitutional amendment process of the US makes it clear that it is certainly not applicable in the Indian context. The existence of the Bill of Rights ^[36] is the entrenched clause which makes the procedure of passing an amendment by far difficult or impossible.

'Entrenched Clause' or 'Eternity Clause' exists in different Common Law Countries as well and their presence is the conscious result of legislation by the legislative body. However, unamendability takes constitutional entrenchment to its extreme, hence it is often described as absolute. ^[37] For instance, both Canada & the US do not have expressed unamendability but they practice 'constructive unamendability', in other words, both the countries do not contain any provision as to directly imply unamendability. Rather they make the process though not impossible but politically guided. ^[38] Meaning, they understand that the fundamentals are to be protected and kept beyond the amending power of the legislature.

Apart from these, another classic example of the entrenched clause can be that of

Germany, article 79(3) of the Constitution states that:

Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

This means that the German Constitution which is an example of an 'explicit limitation' has set its basic feature free from amendment etc. They have identified the sole of their Constitution upon which the Laws have to be interpreted or made. And thus includes human dignity, personal freedom, equality before the law, freedom of expression, etc. in articles 1 to 20 and so remains quite similar to that of our listed 'Basic features' of the Indian Constitution.

The process of amendment is another crucial factor where unamendable provision exists with the help of 'implied limitation' or 'explicit limitation'. Amendment in India is neither rigid nor flexible but mostly so. Flexibility opens the possibility of changing the basic fundamental laws though not so easy but with the passage of time, if the legislature necessarily wishes to do so, it can. But a contrary argument to this can be that existing 'Law of the Land' ^[39] has already laid down procedure for its own amendment and thus no other method present is to be seen as legal. ^[40] In other words, the focus is on the implied limitation of the amendment put by the Constitution on the legislature.

The doctrine of Separation of Power

Now moving forward, the theory of separation of powers is crucial to be discussed to further resonate why the core of the issue i.e. defining the basic feature is valid as well as necessary. The concept of Separation of Power was first propounded by the French thinker Montesquieu ^[41] who broadly holds the field in India too. In chapter XI of his book Montesquieu writes:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be

no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

In the case of *Rai Sahib Ram Jawaya Kapur v. The State of Punjab*,^[42] the Constitutional Bench observed that:

Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently, it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.

Again in *State of Kerala v. A. Lakshmi Kutti*,^[43] the Apex Court stated that:

...special responsibility devolves upon the Judges to avoid an over-activist approach and to ensure that they do not trespass within the spheres earmarked for the other two branches of the state.

From all these judgments it is easy to infer that the Court itself considers the chaos that might result if the functioning of any of the organs of the State is interfered with, by the other. As the Guardian of the Constitution, it is for the Judiciary to restrict itself and refrain indulging in the task already assigned to the other organ. For, it has the power to interpret and direct but not the power to legislate.

Finally, in the case of *Nagaraj v. Union of India*^[44] the court held that the

Old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alteration and the power to amend is an enumerated power to the Constitution and hence limitation if any must be found in the Constitution itself which explains why the solution to this debate has to be the Constitution itself.

III- THE CONCLUSION

Recently scholars have begun to question the very authority of Judiciary, especially the stand of the Supreme Court, as being the Protector of the Constitution. This particular issue of basic feature has posed an unsettling situation between the Judiciary and the Legislature. Even after the revolutionary settlement of the Basic Structure Doctrine, it has not seen any end but further escalation. This can be understood from another instance when in 1983 Justice Bhagwati introduced public interest litigation in India and Justice Pathak in the same judgment warned against the “temptation of crossing into territory which properly pertains to the Legislature or to the Executive Government”^[45]

In fact, analyzing its own arguments, the Hon’ble Court said :

The justification often given for judicial encroachment into the domain of the executive or legislature is that the other two organs are not doing their jobs properly. Even assuming this is so, the same allegation can then be made against the judiciary too because there are cases pending in Courts for half-a-century as pointed out by this Court in *Rajindera Singh v. Prem Mai and Ors. Civil Appeal No. 1307/2001* decided on 23 August, 2007^[46]

In this sense Judicial Review can be seen as providing the final proof, that faith in the Judiciary to restore is simply misplaced, when the question of defining the ‘Basic structure’ arise.

It is indeed ironic that *Kesavananda Bharti*^[47] which is credited to bring the Doctrine of Basic Structure to life also contained the caution, which the Apex

Court in the same judgment said that there is no implied limitation on the powers of Parliament to amend the Constitution, but held that no amendment can do violence to its basic structure. Which in a way appears to be hollow since the doctrine hasn't been defined yet and to add more the Apex Court has overstepped the line of separation of power.

For instance, the issues brought before the Court in the Privacy judgment^[48] has made it clear that no lesson has been learned from the past confrontation between the duo. The judgment, as a matter of fact, brought the tussle to light which will continue. For even, if the Judiciary refrains from interfering in the law-making process, it cannot step back from protecting the essence of the Constitution. On the other hand, Legislature won't step back instead the result would be the same, molding the laws to favor their consequence.

The article for most of its part discussed the cases from the point of view of 'Judicial overreach' because the question of over-exercise of power is on it. And therefore, the part to question the Parliament did not come to light. But it is for sure that the risk of Constitutional amenability by the Legislature cannot be taken for granted.

Additionally, the article tries to connect to the logical aspect of saving the very soul of the Constitution. Enlarged debates and adjudication, interpretation and the time involved all could be given a fresh perspective and focus can be shifted on solving the other issues rather than revolving around the same basic question of 'what is the basic feature of the Constitution?'

Though contrary arguments may be made that there is no result of defining the basic feature as it will make our constitution more rigid. On the other hand, defining it will for once and all put the matter of constructing the Law relating to basic features to rest. Moreover, being incorporated in the texts of the Constitution would allow the maintenance of separation of power. Plus, no hamper in the process of

the judiciary as it is free to interpret by way of the 'implicit or explicit' clause in relation to the act of Parliament. In fact, Constitutional amendment when one appears to break the fabric of the Constitution, allows the Judiciary which can seize its interpretation power directly, explicitly from the Constitution itself^[49] and act.

REFERENCES

1. Keshvanandan Bharti v. State of Kerala AIR 1973 SC 1461; Indira Gandhi v. Raj Narain AIR 1977 SC 69; Government of Andhra Pradesh v. P. Laxmi Devi AIR 2008 SC 1640.
2. The Constitution of India, Narendra Kumar
3. Lecture delivered on 1965 at BHU.
4. Art. 79(3) of the German Constitution.
5. In 1949.
6. The principle of 'Democracy' contained in Art. 20; the 'Federal Structure'; and 'Principle of Human Dignity' under Art. 1 of the German Constitution. Available at: <https://www.nationalheraldindia.com/opinion/lessons-from-germany-for-us> (last visited on January 25, 2020).
7. Basic Law for the Federal Republic of Germany, art. 1 to 19.
8. Supra note 2.
9. I.C. Golaknath v. State Of Punjab 1967 AIR 1643, 1967 SCR (2) 762.
10. Supreme Court Advocates – on – Record - Association v. Union of India, AIR 1994 SC 868.
11. L Chandra Kumar v. Union of India, (1997) 3 SCC 261.
12. I.R. Coelho (Dead) v. State of Tamil Nadu, AIR 2007 SC 861.
13. Minerva Mills v. Union of India, AIR 1980 SC 1789.
14. Kihoto Hollohan v. Zachillhu, AIR 1993 SC 412, 1992 SCR (1) 686; People's Union Civil Liberties v. Union of India, AIR 2003 SC 2363
15. Indra Sawhney v. Union of India, AIR 1993 SC 477; MANU/SC/0104/1993.
16. S. R Bommai v. Union of India, 1994 AIR 1918, 1994 SCC (3).
17. Supra note 11.
18. Justice K.S. Puttaswamy v. Union of India, AIR (2019) 1 SCC 1.
19. Rojer Mathew v. South Indian Bank Ltd., MANU/SC/1563/2019 (13.11.2019 - SC).

20. Supra note 4.
21. AIR 1951.
22. Supra note 10.
23. 1971.
24. 5 U.S (1 Cranch) 137 (1803).
25. Constitutional Remedies and writs, (1st Ed.), pp. 330-31. DD. Basu.
26. Available at : https://shodhganga.inflibnet.ac.in/bitstream/10603/32340/12/13_chapter%207.pdf (last visited on January 31, 2020).
27. Id.
28. Supra note 12.
29. Harbans Singh v. State of U.P, AIR 1982 SC 849 : (1982) 2 SCC 101.
30. Available at : <https://core.ac.uk/download/pdf/112282.pdf> (Last visited on January 31, 2020).
31. Salmond, Jurisprudence, 11th Edition, p. 152.
32. Supra note 26.
33. AIR 1997 SC 3011.
34. AIR 1965 SC 1058.
35. 2007 (14) SCALE 1 : (2008) 1 SCC 683.
36. First ten amendments to the US Constitution.
37. Available at : http://etheses.lse.ac.uk/915/1/Roznai_Unconstitutional-constitutional-amendments.pdf (Last visited on January 30, 2020).
38. SUPREME COURT LAW REVIEW (2014), 67 S.C.L.R. (2d), Pg no. 182.
39. A.V Dicey, the Constitution. Pg nO. 49. Law of the land 3 rd postulate
40. Cf. Gettel, Political Science (Indian Ed., 1967) p. 258.
41. The Spirit of Laws' by Montesquieu.
42. AIR 1955 SC 549: (1955) 2 SCR 225.
43. (1986) 4 SCC 632.
44. (2006) 8 SCC 212 : (2007) 2 SCC 1.
45. Bandhua Mukti Morcha , AIR 1984 SC 802.
46. Supra note 36.
47. Supra note 2.
48. Supra note 19.
49. The Constitution of India, Part III.

How to cite this article: Datta S. Comprehending and inquisitioning the 'doctrine of basic structure' in India: urgency to define the doctrine. International Journal of Research and Review. 2020; 7(3): 80-86.
