



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL
ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

WWW.WHITEBLACKLEGAL.CO.IN

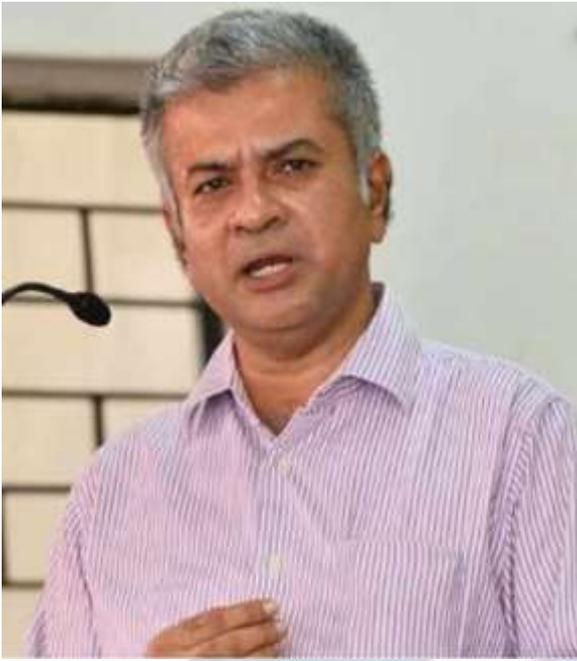
DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of White Black Legal – The Law Journal. The Editorial Team of White Black Legal holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of White Black Legal. Though all efforts are made to ensure the accuracy and correctness of the information published, White Black Legal shall not be responsible for any errors caused due to oversight or otherwise.

WHITE BLACK
LEGAL

EDITORIAL TEAM

Raju Narayana Swamy (IAS) Indian Administrative Service officer



Dr. Raju Narayana Swamy popularly known as Kerala's Anti-Corruption Crusader is the All India Topper of the 1991 batch of the IAS and is currently posted as Principal Secretary to the Government of Kerala. He has earned many accolades as he hit against the political-bureaucrat corruption nexus in India. Dr Swamy holds a B.Tech in Computer Science and Engineering from the IIT Madras and a Ph. D. in Cyber Law from Gujarat National Law University. He also has an LLM (Pro) (with specialization in IPR) as well as three PG Diplomas from the National Law University, Delhi- one in Urban Environmental Management and Law, another in Environmental Law and Policy and a third one in Tourism and Environmental Law. He also holds a post-graduate diploma in IPR from the National Law School, Bengaluru and

a professional diploma in Public Procurement from the World Bank.

Dr. R. K. Upadhyay

Dr. R. K. Upadhyay is Registrar, University of Kota (Raj.), Dr Upadhyay obtained LLB, LLM degrees from Banaras Hindu University & PHD from university of Kota. He has successfully completed UGC sponsored M.R.P for the work in the Ares of the various prisoners reforms in the state of the Rajasthan.



Senior Editor

Dr. Neha Mishra



Dr. Neha Mishra is Associate Professor & Associate Dean (Scholarships) in Jindal Global Law School, OP Jindal Global University. She was awarded both her PhD degree and Associate Professor & Associate Dean M.A.; LL.B. (University of Delhi); LL.M.; PH.D. (NLSIU, Bangalore) LLM from National Law School of India University, Bengaluru; she did her LL.B. from Faculty of Law, Delhi University as well as M.A. and B.A. from Hindu College and DCAC from DU respectively. Neha has been a Visiting Fellow, School of Social Work, Michigan State University, 2016 and invited speaker Panelist at Global Conference, Whitney R. Harris World Law Institute, Washington University in St. Louis, 2015.

Ms. Sumiti Ahuja

Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi,

Ms. Sumiti Ahuja completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She has done her LL.B. from the Faculty of Law, University of Delhi. She is currently pursuing PH.D. in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. She has developed various audio-video teaching modules under UGC e-PG Pathshala programme in the area of Criminology, under the aegis of an MHRD Project. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.



Dr. Navtika Singh Nautiyal

Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Inter-country adoption laws from Uttarakhand University, Dehradun' and LLM from Indian Law Institute, New Delhi.

Dr. Rinu Saraswat



Associate Professor at School of Law, Apex University, Jaipur, M.A, LL.M, PH.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, PH.D, PGDSAPM

Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University. More than 25 Publications in renowned National and International Journals and has authored a Text book on CR.P.C and Juvenile Delinquency law.



Subhrajit Chanda



BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); PH.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

DOCTRINE OF THE BASIC STRUCTURE: A WAY TOWARDS CONSTITUTIONALISM

AUTHORED BY: JITENDER PANNU,

(Assistant Professor, C. R. Law College, Hisar-125001, Haryana)

Abstract

*The Doctrine of Basic Structure has vastly changed the Constitutional Law Jurisprudence. It is originated in India by the Judgement of Supreme Court in the case of **Keshvanand Bharati v. State of Kerala**¹ case. But it originally stemmed from Article 79(3) of the Basic Laws of the Federal Republic of Germany. It puts checks and balances upon the deemed Sovereign Parliament (Central Legislature) by controlling its Power of Amendment regarding Indian Constitution. This Research Paper delves into the origin, impact and applicability of this Doctrine. It will also analyse developments witnessed in different Case laws with the pace of time. It also provide a summary of criticism and its loopholes along with suggestions.*

Keywords: *Basic Structure Doctrine, Power-tussle, Keshvanand Bharati Case and Parliamentary Supremacy, Rule of Law and Fundamental Rights.*

Introduction

The Constitution is a Living Document² and to ensure its organic nature, the Power of Amendment was provided to Indian Parliament by the Indian Constitution. The Doctrine of the Basic Structure is developed by the Indian Supreme Court, through its Landmark Judgement in **Keshavanand Bharati Case**³ and after that it gained wings with the pace of the time by various Supreme Court Judgements. It puts restraint upon the powers of the Parliament by controlling its amending power so that only those amendments can be made which are not against the true spirit of the Indian Constitution. This is weapon of achieving the Constitutionalism by keeping the Parliament within its metes and bounds.

¹ Keshvanand Bharati v.State of Kerala,AIR 1973 SC 1461.

² Saurabh Chandri v. Union of India, AIR 2004 SC 361.

³ Supra note 1.

Origin of the Doctrine of Basic Structure

The origin of this Doctrine came to India originally through the Lecture of Professor Dietrich Conard, South Asia Institute, University of Hiedelberg, Germany. He delivered the Lecture on the “**Doctrine of Implied Limitations**” in the Faculty of Law, Banaras Hindu University. He developed this Doctrine upon the basis of **Article 79(3) of the Basic Laws of the Federal Republic of Germany** that expressly put bar upon the Amendments to the Provisions Federal Structure of Germany Constitution. Therefore, it was not an invention of Indian Supreme Court but adopted by it.

In India, first time, it was put up by **M.K. Nambiar**, the Indian Constitutional Lawyer, before the Indian Supreme Court in the Case of **Golaknath v. State of Punjab**⁴. Although this doctrine was not accepted by Supreme Court in this case but considered as substantial force for the future. This same Argument was put by Advocate **Nani Palkhivala** before the Supreme Court in **Keshavnand Bharati Case**⁵ and then **acceptance by the Supreme Court in India** lead to origin of Doctrine of the Basic Structure in Indian Constitutional Jurisprudence. It developed further with the pace of time with the Judgements of different Cases came before the Indian Supreme Court.

Concretisation of the Doctrine of Basic Structure in Indian Constitution

The **Keshvanand Bharti Case**⁶ also known by the name “Fundamental Rights Case” was decided by Special Bench of 13 Judges by giving its decisive verdict of 7:6. This decisive Judgement was given by **Khanna J.**, who held that the amending power of the Parliament cannot be used to alter the Basic Structure of Indian Constitution and does not included the Fundamental Rights within its purview including the Right to property under this Doctrine of Basic Structure. Onwards from the date of Judgement of this Case (April 24, 1973), there was no immunity to different Legislations included in the 9th Schedule after this date under Article 31 B of the Indian Constitution. Hence, no blanket immunity be available by the 9th schedule to different Legislations and will be declared void and unconstitutional upon not Spassing the test of Doctrine of Basic Structure i.e. Doctrine of Judicial Review get concretised from this specific date. However, this was further clarified in **Election Case of Indira Gandhi**⁷ that

⁴ Golaknath v. State of Punjab, AIR 1967 SC 1643.

⁵ Supra note 1.

⁶ Supra note 1.

⁷ Indira Gandhi v. Raj Narain, AIR 1975 SC 2299.

Amendments to the Fundamental Rights are not allowed by Indian Parliament as these are against the Doctrine of Basic Structure. It included new elements of Independence of Indian Judiciary along with the Supremacy of Constitution against other Statutory Laws.

Further, in **I.R.Coleho v. State of Tamil Nadu**⁸, this provision of the removal of Blanket Immunity by the 9th Schedule of the Indian Constitution is reinforced by the Judgement of this Case i.e. amendments will be under the scrutiny of this Doctrine of Basic Structure. The Equality, Rule of Law, Judicial Review and the Separation of Powers were added as features to this Doctrine.

Further, in **Minerva Mills Ltd. v. Union of India**⁹, where nationalisation of this Mill was challenged and leading to declaration of the Clause 4 and 5 of Article 368 as unconstitutional by emphasising upon inclusion of Doctrine of Judicial Review and maintaining of harmony and balance between Fundamental Rights and Directive Principles of State Policy.

Then, in **Waman Rao Case**¹⁰, the Supreme Court upheld that the Right to Property does not clash with the Basic Structure Doctrine. Hence, it can be amendable.

Again, in **Indra Sawhney Case**¹¹, Supreme Court held that Equality (affirmative action) is the part of the Doctrine of Basic Structure.

Further, in **S. R. Bommai Case**¹², the Supreme Court added the features of Secularism, Federalism and Democracy to Basic Structure of the Indian Constitution which are unamenable.

Again, in **L. Chandra Case**¹³, Supreme Court reinforced that Judicial Review is an integral part of the Doctrine of Basic Structure and hence upon this basis it declared Clauses 2 (d) and 3 (d) respectively of Article 323-A and 323-B as unconstitutional because these provisions denuded the High Courts and the Supreme Court of their power of Judicial Review provided under Article 226, 227 and 32 of the Indian Constitution.

⁸ I.R.Coleho v. State of Tamil Nadu, AIR 2007 SC 861.

⁹ Minerva Mills v. Union of India, AIR 1975 SC 1789.

¹⁰ Waman Rao v. Union of India, AIR 1981 SC 271.

¹¹ Indra Sawhney v. Union of India, AIR 2000 SC 498.

¹² S. R. Bommai v. Union of India, AIR 1994 SC 1918.

¹³ L.Chandra Kumar v. Union of India, AIR 1997 SC 1125.

Further, in **Madras Bar association Case**¹⁴, the Constitution Bench held that Sections 5,6,7,8 and 13 of the National Tax Tribunal (NTT) Act are unconstitutional because of separation of powers between judiciary and executive along with maintaining the independence of Judiciary.

Again, in **SCORA Case**¹⁵, the Constitutional Bench held that 99th Amendment to the Indian Constitution (National Judicial Appointment Commission Act, 2014) is held unconstitutional by verdict of 4:1 because of want of the independence in Appointment and Transfer of Judges in High Courts and Apex Court in India. It is bare necessity to maintenance of Independence of Indian Judiciary.

Further, in **Puttaswamy Case**¹⁶, the Supreme Court held that Right to Privacy comes under the Basic Structure of Indian Constitution and hence, it invalidated various provisions of the Aadhar Act, 2016.

Hence, till date following features have been added to this Doctrine of Basic Structure with advent of the Judgements of different Case Laws coming from time to time viz.

- i) “Supremacy of Indian Constitution¹⁷.
- ii) Objective specified in the Preamble of Indian Constitution¹⁸.
- iii) Article 32 of Indian Constitution¹⁹.
- iv) Balance between Fundamental Rights and Directive Principles of the Indian Constitution²⁰.
- v) Rule of Law²¹.
- vi) The Separation of Powers between three organs of the Government under the Indian Constitution²².
- vii) Judicial Review²³.
- viii) Equality Principle²⁴.
- ix) The Parliamentary System of the Indian Government²⁵.

¹⁴ Madras Bar Association Case v. Union of India, AIR 2015 SC 1571.

¹⁵ SCAoRA v. Union of India, AIR 2015 SCW 5457.

¹⁶ Justice K.Puttaswamy (Retd.) v. Union of India, AIR 2017 SC 4161.

¹⁷ Supra note 1.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid

²¹ Supra note 7.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

- x) Free and fair Elections²⁶.
- xi) Federalism²⁷.
- xii) Secularism²⁸.
- xiii) Freedom and Dignity of the Individual²⁹.
- xiv) Limitation upon the Amending Power of Legislature³⁰.
- xv) Sovereign, Democratic and Republican Features of the Indian Constitution³¹.”

These all features paved the way towards Constitutionalism in India because these all features put control upon the working of Indian Government i.e. put checks and balances upon its working. This leads to strengthening of Indian Constitution by following the Constitutionalism without any doubts.

Limitations of the Doctrine of Basic Structure

After studying the several facets of this Doctrine, there was doubt as to whether Ordinary Legislations had to pass the validity test of this Doctrine like Constitutional Amendment Acts. It is also have to be considered through Judgements of different Case Laws with the advent of time.

In **Indira Gandhi Case**³², 5:3 verdict was in favour of Ordinary Legislations have not to follow the test of the Doctrine of Basic Structure.

Again, in **State of Karnataka v. Union of India**³³, it was reinforced by the Apex Court that Ordinary Legislations should not follow the test of the Doctrine of Basic Structure.

Further, in **Kuldeep Nayar v. Union of India**³⁴, it was held unanimously that this Doctrine does not need to apply to the Ordinary Legislations.

Further, in **Anjum Kadri & Anr. V. Union of India & ors.**³⁵, the Apex Court reiterated that

²⁶ Ibid.

²⁷ Supra note 9.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Supra note 1.

³² Supra note 7.

³³ State of Karnataka v. Union of India, AIR 1997 SC 1361.

³⁴ Kuldeep Nayar v. Union of India, AIR 2006 SC 3627.

³⁵ Anjum Kadri v. Union of India 2024 SCC Online SC 3129.

Ordinary Legislations need not to pass the test of this Doctrine.

Hence, this Doctrine will not need to be applied to Ordinary Legislations and will be able to act without necessity of its clearance of this filter. Hence, this can be considered as deficiency or Limitation to the working of this doctrine. Hence, Legislatures will be able to frame Ordinary laws without passing through filters of this Doctrine i.e. Legislature have a chance to frame Laws without crossing the limit of this strict doctrine.

Criticism of the Doctrine of Basic Structure

The major points of the criticism are as under:

- i. Lack of Clarity:** This is stated by legal illuminary **Upendra Baxi** by stating that it is creating more heat than light. It is too subjective in nature leading to interpretation by Judges as per their subjective knowledge.
- ii. Judicial Over-reach:** It provided more powers in the hands of the Judiciary leading to power tussle between Parliament and Judiciary. This power several times affected the development of the Country.
- iii. Subjugation of Democracy:** It overpowered the Parliament and executive working to very extent by limiting the powers of elected MPs and MLAs.
- iv. Political Biasness:** There had been blame upon this Doctrine that it reflect subjectivity or biasness of the Judges who brought new features to put restraint upon the Politicians as per their ideologies.

Conclusion

From 1970s, till date there have been regular additions of several features to this Doctrine by the Indian Supreme Court as per the necessity of the time because of organic nature of the Indian Constitution. This will prevent the Legislature from working in unrestrained manner without any checks and balances upon it by the Supreme Court. Therefore, it is indispensable tool for achieving the Constitutionalism for maintenance of the Soul of Indian Constitution. It should be used in precise and controlled manner by using the filters of political biasness and Judicial over-reach i.e. two-way sword should be developed and utilised in conscious and controlled manner for the maintaining the ethos and values pertaining to Indian Constitution, and Constitutional Morality. Therefore, this Doctrine should be used as healthy or positive tool regarding power tussle for the progress and development of this Country.