



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

REVISITING THE BASIC STRUCTURE DOCTRINE: HAS IT EVOLVED BEYOND ITS INTENT?

AUTHORED BY - ADITI SHARMA & AKASH SHARMA

The doctrine of the Basic Structure was initially expressed in *Kesavananda Bharati vs State of Kerala* (1973) by a 13-judge Bench of the Supreme Court as an implied restriction on the power to amend of the Parliament. The Court decided that as much as Article 368 gives sweeping amendment powers, it could not also distort, damage or alter the fundamental characteristics of the Constitution. It is important to note that the basic structure is nowhere stated in the text; it was a judicial creation that was aimed at keeping alive the main ideals of the Constitution. Professor Durga Das Basu and others observed that Article 368 in itself has no explicit amendment restrictions. In this way the doctrine was created by the case law instead of being prescribed by any order of the Framers, and was meant to protect the spirit of the Constitution against the tyranny of the majority.

Origins and Constitutional Vision

During the Constituent Assembly debates, the majority members were in agreement that the amendment power of Parliament should be adaptable and protect major institutions. Proponents of restrictions (e.g. on minority protection) were championed by B.N. Rau and H.V. Kamath, but no entrenched clause outside procedures in Article 368 was made. Ambedkar observed that a mere majority amendment rule would result in chaos and thus a special procedure was prescribed but all other areas (except those specifically entrenched as such as state ratification) were amenable. However, in *Kesavananda* a slender majority was convinced that the Court could connote constraints: when a full written Constitution was available, Parliament could not take the constituent powers of the framers. According to Justice Khanna, it was simple, an amendment could not destroy or abrogate a fundamental framework of the Constitution.

Such a change was condemned by legal experts such as D.D. Basu. Because the amendments were made possible by the Constitution itself, which gave powers to the special majority, Basu believed that any restrictions had to be put in writing. His question was: how could certain things be corrected, by what means would they ever change? To Basu the Court thus played a

constituent role with which it was never delegated. However, the Kesavananda Court (and subsequent cases) came up with some specific essentials of the Constitution (the so-called basic features) that could not be changed at all, although it did not provide a single or definite definition, and Courts of the future would apply the concept on a case-by-case basis.

Key Elements of the Basic Structure

Through the years, the Indian courts have established a general list of characteristics that constitute the basic structure of the Constitution, although there has never been a single complete list that has been completed. Some themes, however, keep reoccurring. These are the pre-eminence of the Constitution and the nature of India as a democratic republic, that a sovereign parliamentary democracy is utterly incapable of being amended into a dictatorship or a monarchical government. Separation of powers which require independent judiciary and balanced sharing of powers between the Legislature, Executive and Judiciary together with secularism and equality which are founded on the promise of justice in the Preamble and the provision of liberty and equality have been numerous times identified as fundamental commitments. Federalism and the unity and integrity of the nation also constitute a significant component of this fabric, making it impossible to change the constitutional balance between the Union and the States. No less important are the rule of law and power of judicial review by the judiciary to protect the preeminent status of legal boundaries over political will.

These principles are supported by judicial views on landmark cases. In Kesavananda Bharati, Chief Justice Sikri cited a number of features which he regarded as apparent upon reading the Preamble, among them the secular nature of India, but Justice Y.V. Chandrachud pointed out that the rule of law, which requires a government of laws rather than of men, was inviolable. Justice Ranganathan also observed that the ideals of social, political and economic justice as well as liberty and equality, all of which are contained in the Preamble, are what he termed as the key elements in the constitution. Even though judges have differed in the details provided, there is a general concurrence that these core values much of which is directly reflected in the Preamble is the unchangeable core of the Constitution and cannot be abrogated even by constitutional amendment.

Landmark Cases and Evolution

Since the case of Kesavanada Bharati, the development of the doctrine of a Basic Structure has taken the form of a sequence of landmark cases. In Kesavananda Bharati (1973), the Supreme Court said that although the Parliament had extensive powers of amendment, it could not vary or abrogate the basic structure of the Constitution. Even though the majority was very slender (76) and no comprehensive list of the necessary features has been agreed upon, the decision made that the power to amend is in itself part of the constitutional structure. This doctrine was shortly put to test in the case of Indira Gandhi vs Raj Narain (1975), the court invalidated the 39th Amendment to the motivation of insulating the election of the Prime Minister against judicial review by adding Article 329A. The bench believed that the free and fair elections are essential to the democracy and hence a constituent part of the basic structure. Every judge on the bench found a different aspect of the basic structure to use to declare the amendment invalid, as later noted by Justice Nariman, showing the doctrine to be effective in checking the power of parliament.

This was reaffirmed by the Supreme Court in Minerva Mills Ltd. vs Union of India (1980) in which the Court was unanimous that even constitutional amendments are subject to constitutional restriction. The Court invalidated provisions in the 42nd Amendment trying to prohibit judicial review of the amendments and give the amending authority to the Parliament unlimited. It believed that the equilibrium between Fundamental Rights and Directive Principles, the restriction of power to amend belonging to the Parliament are necessary ingredients of the basic framework. Justice Nariman has remarked that Minerva Mills was categorical that the process irregularities cannot be used to override fundamental constitutional protection. The doctrine was subsequently elaborated in Waman Rao vs Union of India (1981) wherein the Court decided that any modification made subsequent to Kesavananda Bharati is liable to the basic structure. This position was subsequently reaffirmed in I.R. Coelho vs State of Tamil Nadu (2007) which declared that even laws added to the Ninth Schedule since 1973 could be struck down when they harmed or destroyed the basic structure. These rulings all affirm that there has been no constitutional amendment, and indeed no law that is subjected to extraordinary review, that cannot be subject to judicial review when the fundamental framework is in question. The general trend is that the maximum scope of the doctrine was constantly growing, so that every law or amendment that breaks the main constitutional rules can be struck down.

Criticisms and Controversies

Basic structure has been debated since its beginning. Critics further observe that Article 368 makes no reference to whatsoever to basic structure and therefore the doctrine is based on judicial invention. Here, as one commentary has noted, basic structure, is an imprecise and indeterminate notion, as even the majority judges in Kesavananda were not in agreement on a full listing of basic structure. As a matter of fact, this ambiguity is regarded as a weakness: the folds of vagueness in the doctrine cover what is termed as unlimited judicial power. Opponents such as Basu cautioned that allowing judges to act as they please in determining what cannot be changed in the Constitution poses a serious threat to democracy.

On the other hand, there are those who believe that the doctrine has changed much more than what it was originally meant to be. In many decades, the Supreme Court asserted that Basic Structure had the capacity of invalidating constitutional amendments, but not a regular legislation. However in a sequence of cases in the 1990s, the Court used the doctrine to invalidate ordinary laws. In *M. Ismail Faruqui vs Union of India* (1994), in one case, Ayodhya land acquisition Act was struck down since the removal of all legal remedies violated the rule of law as a structural value. Equally, *G.C. Kanungo vs Orissa* (1995) invalidated a state law that set aside judicial awards as it encroached on judicial power (breached rule of law). In *Ne et. al. v. Madras Bar Assn* (2015), NJAC (*Madras Bar Assn vs Union of India*), Justice Kehar did basic-structure reasoning to repeal certain sections of the National Tax Tribunal Act.

Such expansions have brought about controversy. In a recent column, senior advocate Arvind Datar has reported that since the case of *Indira Gandhi*, various jurists and benches have repeatedly stated that ordinary law cannot be judged by reason of basic-structure. The reason behind this was the fact that values such as secularism or democracy are too indeterminate to nullify general legislation. But some also note that it is inconsistent to permit undefined principles to act as barriers to amendments but not statutes. On the principle that a vague doctrine may strike down a constitutional amendment (as in *Kesavananda*), Datar wonders why not apply that principle to challenge even an ordinary statute that is simply the open defiance of the basic rights or elections? This ambiguity reveals that the area of the doctrine remains disputed and others fear it may lead to an overstep by the judicial branch.

Alignment with the Preamble

The Indian Constitution starts with the establishment of Preamble that declares objectives of Justice, Liberty, Equality, Fraternity. Advocates of the doctrine refer to the fact that Basic Structure is merely the judicial custodian of these fundamental values. In fact, courts have extensively used the ideals of the Preamble in their argument. In *Minerva Mills*, most people believed that an amendment that contravened the harmony of Fundamental Rights and Directive Principles (both of Preamble ideas of justice and equality) destroyed a vital aspect of the Constitution. On the same note, in an 1965 case Justice Mudholkar (dissent in *Sajjan Singh*) caution that the high ideals of the Constitution that are contained in the Preamble should be considered as basic features. According to modern jurists, secularism, democracy and individual dignity all values of the Preamble have been reiterated as being part of the basic structure. The doctrine therefore serves as a protection to the soul of the Constitution whereby any amendment or law is well aware of the promises made to the country during its formation.

Contemporary Debates and the Way Forward

The issue of the Basic Structure doctrine is still alive in India. Most recently, Chief Justice D.Y. Chandrachud has termed it a North Star of constitutional interpretation, which gives a direction when the future of the law is winding. Former Justice R.F. Nariman also noted with certainty that it was here to stay - with a grim postscript that should it ever be abolished, God help this country. These conservatives regard the doctrine as necessary to the obviation of the tyranny or wanton constitutional amendment.

Simultaneously, it is still doubted by certain politicians and jurists. Kesavananda has been described by the Vice President of India, Jagdeep Dhankhar, as a bad precedent, and there are proposals that unelected judges not be allowed to strike down the power of the Parliament to amend itself. This is the old worry of the critics such as Dhankhar that the doctrine is a limitation to democratic choice. The current community debate, particularly in the courtrooms, scholarly journals and the media, suggests that the scope and future of the doctrine is not in and out.

To conclude, it is quite true that the doctrine of Basic Structure has in fact developed considerably since 1973: it has been utilized in a vast variety of constitutional issues than the framers explicitly addressed. Others claim that this is an extension of what the founders

intended when they provided a flexible process of amendment whereas others claim that it is only safeguarding the original vision of the Constitution. The only thing that is definite is that the doctrine still towers big in Indian constitutional law. It has played a landmark role in making India a democracy since the concept of Preamble values and judicial review is enshrined as something that cannot be violated. The basic structure debate remains likely to last as long as the Constitution of India, whether one regards it as usurping its powers or providing the judiciary with the needed custodianship.

References

- Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 S.C. 1461; (1973) 4 S.C.C. 225 (India).
- Indira Nehru Gandhi v. Raj Narain, AIR 1975 S.C. 1590; (1975) 2 S.C.C. 159 (India).
- Minerva Mills Ltd. v. Union of India, AIR 1980 S.C. 1789; (1980) 3 S.C.C. 625 (India).
- S.R. Bommai v. Union of India, AIR 1994 S.C. 1918; (1994) 3 S.C.C. 1 (India).
- I.R. Coelho (Dead) by Lrs. v. State of Tamil Nadu, (2007) 2 S.C.C. 1 (India).
- Supreme Court Advocates-on-Record Association & Anr. v. Union of India & Ors. (NJAC case), (2015/2016) (reported as (2016) 5 S.C.C. 1) (India).
- Indian Young Lawyers Association & Ors. v. State of Kerala & Ors. (Sabarimala), Writ Petition (C) No. 373 of 2006, judgment delivered 28 Sept. 2018 (India).
- Association for Democratic Reforms & Anr. v. Union of India & Ors., 2024 INSC 113 (Sup. Ct. India, Feb. 15, 2024).
- Basu, D. D. (2024). *Introduction to the Constitution of India* (27th ed.). LexisNexis India.
- Austin, G. (1999). *Working a democratic constitution: The Indian experience*. Oxford University Press.