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‘Basic Structure’: Defence against Parliamentary Hegemony

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The 'basic structure' ensures that some constitutional features remain unamendable by Parliament, a defence against parliamentary hegemony and Constitution rewriting.

The Constitution of India is the seminal document in India’s history. At the end of colonial rule, India’s leaders needed to decide the path that India would take and came together to draft the world’s most lengthy Constitution after nearly three years of discussion and deliberation. Much has been said and written about the Constitution, deifying it as the Supreme Law, the *grundnorm*, the protector of citizens’ rights, and so on, but what must be remembered is that the Constitution is fundamentally a political and social-philosophical document for two reasons.

First, it reflects the vision that the members of the Constituent Assembly had for the political future of the country. This vision was grounded in political philosophies such as democracy, secularism, and federalism. Second, it creates and establishes all our institutions – the legislature, the executive, and the judiciary – and defines their powers, limits, roles, responsibilities, and their relationship with each other and with the citizens of the state.

Taking such a view of the Constitution necessarily raises a few pertinent questions. How does the Constitution place limits on the state’s powers? What are those limits? Most important, why should future generations of Indian citizens be bound by the political decisions that a few individuals took over 70 years ago? Should future generations not have the freedom to decide their political future and destiny? Is binding them strictly to the political vision of their forefathers inherently anti-democratic?

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These questions are philosophically crucial to answer. The Constitution, through its various articles and provisions, has clearly demarcated the role, powers, and limits of the different institutions of the state. The Constitution contains schedules and lists clearly setting out the legislative competence of the union and state governments and the procedure for appointing people to various constitutional positions and removing them. It has created a system where each wing of the state serves as a check and balance on the other two.

The most crucial part of the Constitution, however, is Part III, where it sets out the fundamental rights of citizens. This is a direct and express limit placed on the powers of every state institution. The state is free to exercise its powers, but cannot do so in a manner that affects the fundamental rights of any of its citizens.

This is where the tension arises. The executives and legislatures of the future may have in mind many policies that are inconsistent with the original political vision of the members of the Constituent Assembly, but which the representatives of the people feel are appropriate for the changing times. It is for this purpose that the Constitution provides, through Article 368, the power for future parliaments to amend/modify the Constitution to meet the needs of future populations.

This amendment power has an inherent danger though. How do we ensure that the rights of the citizens provided under Part III of the Constitution are adequately protected against majoritarian tendencies of the future? If we say that the amendment power of parliament is absolute, would that not lead to a situation where a government having a two-thirds majority could simply amend the Constitution to remove a fundamental right from it?

It could be that it views the right as an impediment to achieving its goals. Or in more extreme cases, this could convert India into a monarchy or dictatorship or a theocratic state. The (supposedly legal) subversion of the Weimar Constitution by Adolf Hitler in the 1930s serves as a stark reminder of the dangers of letting a legislature or executive run amok with absolute power.

Amending the Constitution

In India, we did not have to wait too long for the tensions to come to the fore. Just a few months after the Constitution came into force, tensions arose between the fundamental rights promised by it and the goals of the union government. Reforms to land laws, which included the abolition of the zamindari system, were challenged in courts on the grounds that they violated the right to property.

> [W]hat ensued was great scrutiny of the power of Parliament to amend the Constitution—was it unlimited or was it inherently subject to certain rules, even if the Constitution did not mention the same?

In *Romesh Thapar v State of Madras* (1950), the Supreme Court struck down laws that restricted speech on grounds of "public safety" as being beyond the legal power of the Constitution. Faced with a constitutional court that tended to strike down statutes, the government decided to quickly use the route of constitutional amendments to give legitimacy to its laws.

Naturally, what ensued was great scrutiny of the power of parliament to amend the Constitution—was it unlimited or was it inherently subject to certain rules, even if the Constitution did not mention the same? The Supreme Court, in a significant judgment in 1967, *Golak Nath v State of Punjab*, ruled that the power to amend the Constitution was subject to certain inherent restrictions. The government could amend any part of the Constitution as long as it did not vitiate any of the fundamental rights provided in Part III of the Constitution. This ruling was prospective in nature. Amendments made before 1967 that had the effect of removing the fundamental right to property, or adding restrictions to the right of free speech, remained unaffected by the judgment.

The *Golak Nath* judgment was a blow to Parliament (and Prime Minister Indira Gandhi), which saw itself as a body with unbridled powers. In quick succession, many major policy decisions taken by the Indira Gandhi government were struck down by the court, which held the Constitution to be supreme.

These included attempts by the government to nationalise certain banks, and to abolish privy purses, which were both struck down in 1970. The clash between a government seeking unrestricted and unbridled powers, and a stubborn Supreme Court came to a head in 1973. In challenge were multiple amendments brought in by the government to get around the "troublesome" verdicts in the *Golak Nath*, bank nationalisation, and privy purse cases. The 24th amendment in particular restored the ultimate power of Parliament to amend any part of the Constitution as it saw fit. All these amendments were challenged in the name of a chief pontiff of a mutt in Kerala who saw his powers to manage the property restricted.

The *Kesavananda Bharati v State of Kerala* case was thus the stage for the philosophical battle which followed. A bench of 13 judges of the Supreme Court (the highest bench ever to pass a final verdict in an Indian case) considered the power of Parliament to amend the Constitution (thus, reconsidering Golak Nath).

> The argument was that there were implied limits to the power of constitutional amendment and that there was a difference between 'essential norms', which formed a part of the 'material constitution', and other norms.

The state argued that the text of the Constitution never provided for any limits on Parliament's power to amend. The new German Constitution and multiple other constitutions had explicit provisions in their texts deeming certain provisions unamendable. That not being the case in India, Parliament, which represented the will of the people, should have the power to modify the Constitution as per the needs of changing times.

The court, however, found force in many of the philosophical arguments presented by the petitioners. The argument was that there were implied limits to the power of constitutional amendment and that there was a difference between "essential norms," which formed a part of the "material constitution," and other norms. A similar argument was presented by German lawyer and scholar Dietrich Conrad in 1965 in a lecture at the Benares Hindu University, where he stated that the basic, essential, and integral features of the Constitution must be outside the scope of amendment powers and the power of the parliament to amend the Constitution must be impliedly limited. Conrad was very influenced by the disaster that struck the Weimar Constitution and Germany during Hitler's march to absolute power. (Ironically, Conrad's work drew on the work of political philosopher Carl Schmitt, who later became a prominent member of the Nazi Party and provided legal opinions justifying Hitler's abrogation of the Weimar Constitution.)

It is not that these philosophies were new to India or South Asia when *Kesavananda* was decided. In *Fazlul Quader Chowdhury v Muhammed Abdul Haque* (1963), the chief justice of Pakistan had referred to limits on Parliament's power to amend the Constitution. This decision of Pakistan's Supreme Court was referred to by the Indian Supreme Court in 1964 in Sajjan Singh's case (albeit in a dissenting judgment by Justice J.R. Mudholkar who had tried to argue for implied limitations on Parliament's power to amend.)

At the end, in *Kesavananda*, the Supreme Court bench, through a majority of seven of its 13 judges, decided that Parliament did not have unrestricted powers to amend the Constitution as it deemed fit. Chief Justice S.M. Sikri argued that the freedom of the individual could not be amended away and had to be preserved. He held that an "amendment" had to be within the broad contours of the Preamble of the Constitution to carry out the Constitution's basic objectives. Justices J.M. Shelat and A.N. Grover also placed importance on the Preamble to identify the "basics of the Constitution" and held that the fundamental rights and the directive principles mentioned in the Constitution had to be balanced and kept in harmony. For this purpose, there was an implied restriction on the power of Parliament to amend the Constitution: the amendment could not destroy or change the basic identity of the Constitution or its essential features.

> What was provided for was a power to 'amend'—meaning to change or modify—in contrast to a power to repeal/abrogate, which could lead to a destruction of the basic document itself.

Justices K.S. Hegde and A.K. Mukherjea, seemingly influenced by Conrad, stated that the Constitution had two main features – the basic (which was permanent and unchangeable) and the circumstantial (which was subject to change) – and that Parliament could not amend the basic features.

In contrast, Justices H.R. Khanna and P. Jaganmohan Reddy relied on the meaning of the word "amend" to come to the same conclusion. What was provided for was a power to "amend" – meaning to change or modify – in contrast to a power to repeal or abrogate, which could lead to a destruction of the basic document itself. Therefore, while Parliament had unlimited power to amend, an "amendment" could not abrogate, destroy, alter or frustrate the fundamental identity, pivotal features, or the basic features or framework of that which it sought to amend.

Thus, in different ways, a majority of the bench came to the conclusion that Parliament's power to amend the Constitution did not extend to abrogating its basic structure/essential features. It is this rule that is known as the "basic structure doctrine" today. What exactly are the portions of the Constitution that form a part of this basic structure? This continues to be debated.

The 'basic structure'

Commentators have argued that the basic structure doctrine's application extends only to constitutional amendments and not statutory legislation. This is true in the sense that the doctrine was evolved to test the limits of Parliament's power to amend the Constitution. However, it is no less true that the "golden triangle" of Articles 14, 19, and 21 of the Constitution ensures a wide area of protection to fundamental rights, equality, and the rule of law against invasive ordinary legislation and state action, while other Articles protect judicial review and independence of the judiciary.

The basic structure doctrine has gradually evolved. In Chief Justice of India D.Y. Chandrachud's words, it is the North Star that guides and provides direction to the implementers of the Constitution.

In *Kesavananda Bharati*, the judges provided a range of features comprising the basic or essential structure, including supremacy of the Constitution, secularism, republican and democratic form of government, sovereignty of the country, unity and integrity of the nation, separation of powers, and the federal character from within the Constitutional framework, thus setting up a structure of guiding principles in the event of legislative overreach. Notably, the Court made it clear that this was not exhaustive, and that it would be open to the Court to identify and add other such basic features as occasion arose in appropriate cases.

> In the S.R. Bommai case, the Supreme Court also held that secularism was a part of the basic structure of the Constitution and that religion had 'no place' in matters of the state.

Significant cases that extended the concept of basic structure include S.R. Bommai, I.R. Coelho, National Judicial Appointments Commission, and the Ayodhya mandir-masjid dispute.

The nine-judge Constitution Bench in the *S.R. Bommai* case highlighted the principle of federalism. This judgment came in after President's Rule had suspended legitimate state governments through recourse to Article 356, in opposition to the requirement that such drastic action was justified only in cases of complete breakdown of the constitutional machinery. The Supreme Court also held that secularism was a part of the basic structure of the Constitution and that religion had "no place" in matters of the state.

I.R. Coelho v State of Tamil Nadu (2007) dealt with the question whether laws placed in the Ninth Schedule of the Constitution were safe from judicial scrutiny. The discussion in *Coelho* began with outlining Justice H.R. Khanna's position in *Kesavananda Bharati*, which led to the general impression that the fundamental rights were not considered as a part of the basic structure doctrine. In the *Indira Gandhi* election case, Khanna clarified that his assertion was that property rights were never a part of the basic structure, but that fundamental rights undeniably were.

The *Coelho* case underlined the supremacy of judicial review and Part III of the Constitution (on fundamental rights) as basic features of the Constitution. It held that any law, whether by amendment of any article of Part III or by an insertion in the Ninth Schedule, could be invalidated if the court's power of judicial review were exercised on the strength of the principles laid down in the judgment. The Ninth Schedule initially contained only 13 laws that later expanded to 284, at the time of the decision- the complete nullification of Part III vis-à-vis the Ninth Schedule enactments was only meant to be an exception. However, rampant and unchecked additions to the Ninth Schedule led to the need for constitutional control through the intervention of the judiciary.

It reiterated the conditional requirements of the "rights test" (as applied in the *Indira Gandhi* case), and "essence of the rights test" (as applied in the *M. Nagaraj* case) in the examination of Ninth Schedule laws. The first step in the invalidation of a Ninth Schedule law was the occurrence of the infraction of a fundamental right (Part III) by the statute concerned and analysis of the nature and extent of the same and second, by the Act's violation of the basic structure doctrine. . The basic structure doctrine required the State to justify the degree of invasion of fundamental rights, which would then be the subject matter of judicial review. If the Act in question failed these tests in constitutional adjudication, it would not gain the protection of the Ninth Schedule. The Court observed that every improper enhancement of its own power by Parliament could be seen as incompatible with the doctrine of basic structure while highlighting that the nature and purpose of the insertion of laws in the Ninth Schedule was only to further agrarian reforms and not obliterate fundamental rights.

In 2015, the Supreme Court struck down the 99th Constitutional Amendment of 2015 creating the National Judicial Appointments Commission (NJAC), which sought to replace the collegium system for making judicial appointments, as being in violation of the basic structure of the Constitution. The Second Judges case had established the collegium system by enhancing the role of the three senior-most judges of the Supreme Court from a consultative one to a more determinative one to make judicial appointments.The judgment dealt in detail with the scope of judicial independence, its relationship with the process of judicial appointments, and the primacy of judicial presence in the appointment process as an important facet of the basic structure. Therefore, the court ruled that judicial appointments were an indubitable aspect of judicial independence.

It was also observed that the collegium allowed for executive participation without interference in the appointment process through the presence of the President (acting on the advice of the council of ministers) who could object to names, or offer reasons, among others. It also underlined the violation of the basic structure doctrine by the NJAC in the veto powers it provided to the executive.

The *Ayodhya* case pertained to a dispute over a small piece of land in Ayodhya, which housed the Babri Masjid or Ram Janmabhoomi, and gave birth to a bitter confrontation between India's Hindu majority and Muslim minority. A Muslim general had built a mosque in 1526, and the Hindu belief persisted that a temple had been razed by him; that too, at the birthplace of Lord Ram.

While the Allahabad High Court judgment in 2010 granted title of the disputed land to all three parties (two Hindu, one Muslim), the Supreme Court ruled that the title belonged to the deity, Shri Ram Lalla Virajman, and directed the state to grant an alternative site to the Waqf Board for constructing a mosque. The court's decision has been severely criticised as flawed on facts and logic.

However, what is not widely noticed is that the court sought to prevent a repetition of this dispute in the many other sites where mosques have replaced temples, notably at Kashi and Mathura. This the court did by reading the provisions of the Places of Worship (Special Protection) Act, 1992 as essential to secure the feature of secularism, which was part of the basic structure, and as a legislative instrument that secures the principles of non-retrogression. Thus, any attempt to dilute the rights provided by the act would be seen as violative of the principle of non-retrogression and amount to going back on the constitutional promise of secularism, which is a part of the basic structure.

In this way, the court has provided constitutional protection to the Places of Worship Act. If this is held firmly to, challenges to other sites will be obviated because the Act decrees that the character of all places of worship (other than the disputed Babri one) existing as of 1947 shall not undergo forcible change.

Current concerns

There has been much comment on the basic structure doctrine, mostly emanating from Vice President Jagdeep Dhankar and Law Minister Kiren Rijiju. Some of that is traceable to a view that Parliament is sovereign and therefore the body of the day can do what it will with the Constitution. The short answer is that the Constitution is what is sovereign, and the legislature is one of the three bodies of governance, along with the executive and judiciary.

The other discernible volley of protest appears to relate to the exercise of judicial review, or a court striking down a legislation or government action. This is said to be against the separation of powers doctrine. Here, again, this is a much outdated view. The Court interferes not because it has posited itself above the other two. It acts only when there is an infraction of constitutional limits and lines, and it is the business of the court to interpret and preserve the Constitution.

But clearly there is much stirring in the political ranks. The balance of power between the judiciary and the legislature-executive combination is always a shifting one based on current realities, trends, and perceptions of confidence. However, it would do us well if the spokespersons would tell us exactly which of the features of the basic structure they have a problem with: equality, rule of law, independence of judiciary, judicial review, free and fair elections, federalism, secularism, and so on. That would give the rest of us some useful insights.

The importance of the basic structure doctrine cannot be overemphasised. It is the only legal defence against parliamentary hegemony and a rewriting of the Constitution. The fundamental rights were supposed to give us such protection, but battles over property rights brought forth face-offs with governments and divisions within the court. Chief Justice Sikri failed in *Kesavananda Bharati*, by the narrowest of margins, to get the court to hold fast to the mast of fundamental rights; but he did a brilliant rescue job by bringing on board Justice Khanna's formulation of the basic structure test and tacking that to his sails. Holding fast to that keeps the ship from capsizing.

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