



## Basic Structure: Doctrine That Keeps Democracy Alive

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BASIC STRUCTURE: DOCTRINE THAT KEEPS DEMOCRACY ALIVE Abstract Judicial overreach of India traces its origin to the basic structure doctrine. No other country has it, but the judiciary created the basic structure doctrine to save the Constitution because had the judiciary declared a particular part as the basic structure of the Constitution the Parliament would have amended that also. The reason our Constitution is safe is because of the basic structure.

### ABSTRACT

*Judicial overreach of India traces its origin to the basic structure doctrine. No other country has it, but the judiciary created the basic structure of doctrine to save the Constitution because the judiciary had declared a particular part as the basic structure of the Constitution, the Parliament have amended that also. The reason of our Constitution is safe because of the basic structure.*

### KEYWORDS

**Basic structure Doctrine, Constitution, Article 13, Article 368.**

Basic structure doctrine denotes that the Constitution of India has certain characteristics that cannot be erased by its legislature. According to the Indian Constitution the Parliament or State legislature can make laws within their jurisdiction. There have been some violations in the past in observing the limits of legislation by the Parliament, and certain landmark cases have issued directives to protect the soul of the Indian Constitution.

Article 13 and Article 368 are an eternal contradiction in the Indian Constitution. Article 13 claims to be an exception to Article 368. Article 368 claims that there is no exception to it, not even that of Article 13.

Does the word law in Article 13 include constituent laws (Constitutional amendment Acts)? There is no straight forward answer to this question. In 1950, land was needed for development, eighty per cent of which was under zamindari system. Right to property under Article 31 provided compulsory acquisition of property as a fundamental right. For the purpose of saving land acquisition laws from being challenged in the

Supreme Court, the Constitution (First Amendment) Act 1951 was passed that inserted Article 31 A, Article 31B and the 9<sup>th</sup> Schedule. Article 31A provided that laws for agricultural reforms (euphemism for land acquisition), even if they violated few Fundamental Rights, couldn't be declared null & void. Article 31 B provided that the Courts can't judicially review any law placed in the Ninth Schedule.

Consequently, the Article 13 was taken away. It was challenged in a 5 Judge Bench of the Supreme Court, in *Shankari Prasad Singh Deo vs the Union of India & State of Bihar & Others* case, 1951. The Supreme Court was asked whether Article 13 is stronger or Article 368. Is Article 368 allowed to make this amendment or not, or does the definition of law in Article 13 not include constituent laws?

The Supreme Court upheld the 1<sup>st</sup> amendment as valid. Thus Article 368 was proven as stronger. It was upheld that the word law in Article 13 does not include constituent laws.

The Parliament started making amendments recklessly. The Constitution (seventeenth Amendment) Act 1964 too indirectly hit property rights or Fundamental Rights. It was changed in *Sajjan Singh vs. State of Rajasthan* case 1964 that was heard by five Judge Bench. The Supreme Court upheld that Article 368 is stronger than Article 13 or Article 368 is allowed to make this amendment. During *Sajjan Singh* case Justice Hidaytullah remarked "I understand Article 368 is unlimited but I don't think Article 368 must be used routinely against Article 13". This remark showed that the Supreme Court is not some where happy with this judgement. This remark spread like wildfire. Consequently the Appeal was filed under the *Golak Nath vs. State of Punjab* case in 1967. An eleven Judge Bench by 6:5 split judgement overruled *Shankari Prasad & Sajjan Singh* verdicts.

The Supreme Court ruled that the Article 368 cannot amend Fundamental Rights because Fundamental Rights are a "basic part of the Constitution". For the first time a limit is being created in the form of Fundamental Rights. The judgement held that Fundamental Rights are given a "transcendental & immutable" position hence Parliament can't take away or abridge these rights.

The Constitution (Twenty Fourth Amendment) Act 1971 was a retaliation which held that:

1. Amending any provision of the Constitution, including part III, is within the power of the Parliament.
2. Sought to amend article 13 to make it applicable to any amendment under article 368 i.e. whatever in article 13 made the judiciary feel that article 13 is stronger is being amended to give unlimited power to article 368.

This "unlimited power" was an attack upon democracy, as in a democracy nothing is unlimited. Were this amendment to be accepted it would have it would have murdered our democracy.

In one of the most far-reaching judgements in the *Kesvananda Bharti* case there was no exchange of draft judgements among the judges who constituted the Bench, although in this case the unique doctrine of basic structure was evolved (Kapoor & Mishra, 2006:258). The Constitution (24<sup>th</sup>Amendment) Act was challenged in *Keshvananda Bharti vs. State of Kerala* case of 1973. A thirteen Judge Bench of the Supreme Court heard the following questions:

1. Is the 24<sup>th</sup> Constitutional Amendment valid?
2. Is the *Golak Nath* Judgement correct?
3. Whether Article 13 is stronger or Article 368 is stronger? In other words, does the word law in Article 13 include constituent laws or not.

## **The case that saved democracy**

Since the Constitution (24<sup>th</sup>Amendment) Act attacked democracy by making Article 368 unlimited (in a democracy nothing is unlimited) and because the *Keshvananda Bharti* case put a limit upon Article 368 by creating the basic structure doctrine, it is called the case that saved democracy.

When the *Keshvananda Bharti* judgement was being pronounced, seven Judges had already pronounced their judgement in favour of Article 368, when Justice Khanna in open Court proposed that I believe that Article 368 can take anything but it cannot touch the very idea of India, it cannot destroy the very fabric of the Constitution of India.

India is an idea. Our founding fathers gave us this idea of India which they embodied in the Constitution of India.

The Supreme Court had been urging that there are certain “basic” features of the Constitution, which were immune from the power of amendment conferred by Art. 368, which, according to the Court, was subject to implied limitations (Basu, 2013: 49).

### **Indianness of Plato is the basic structure doctrine**

Just as concepts are perfect (ideal) universal ideas, so too are forms, except that forms exist as transcendental realities. This means that the things we see, for example “real” trees, are imperfect representation of their perfect transcendent form of *treeness* (Nelson, 2016: 35).

Basic structure doctrine is the pure essence of the Indian Constitution. Idea is the perfect manifestation of any physical entity; physical entity is India & idea is basic structure doctrine. The 24<sup>th</sup> Constitutional amendment 1971 said that the Parliament has unlimited power so it can take away abridge, repeal or do anything to part III. If the Parliament is unlimited why will it stop at part III? It can write dictatorship in place of democracy, change the colour of flag, change India’s name, etc. Idea that is India, vision of our founding fathers can’t be taken away by the Parliament under Article 368. Parliament can’t damage the pure idea, pure fabric of India which is embodied in the Constitution of India.

Justice Sikri asked Justice H.R. Khanna to give an example of what is that idea, what can’t be taken away. Justice Khanna answered democracy can’t be taken away. Republic, judicial review, supremacy of the Constitution (Lex Rex), Article 50- separation of judiciary from the executive, etc. The word etc. implies basic structure is not a static idea but an evolving idea. Basic structure is an idea, a doctrine which is not written anywhere. It is contained in the mind of the judge. We give the judges the responsibility to decide on a case to case basis of what constitutes the basic structure.

Article 368 is certainly more powerful than Article 13 because the Constitution did not put any limit to it, Article 368 can touch Fundamental Rights. Fundamental Rights were not considered as a part of the basic structure, they can be amended, repealed or new Fundamental Rights can be inserted. Fundamental Rights are weaker than Article 368.

Before *Keshvanand Bharti* case Fundamental Rights seemed to be the limit to the power of the Parliament under Article 368, while, after the case, the basic structure was deemed to be the limit to the powers of the Parliament under Article 368.

Thus though the Supreme Court in the *Keshwanand Bharti* case ruled that Article 368 is stronger than Article 13, yet it is not unlimited. The Supreme Court in this case created a new limit to Article 368 called the basic structure. Basic structure cannot be amended because it is an idea, invisible and not written anywhere. Thus the *Keshvanand Bharti* case is called the case that saved democracy as it put a limit to Article 368 in the form of the basic structure doctrine. By a 7:6 split majority Supreme Court created a new idea called the basic structure doctrine. From 24<sup>th</sup> April 1973 the basic structure doctrine of the Indian Constitution has been the basis of judicial interpretation in India.

The 42<sup>nd</sup> Constitutional Amendment Act of 1976 amended Article 368 itself and wrote from now onwards any amendment to the Constitution of India cannot be subjected to judicial review. The 42<sup>nd</sup> Amendment Act proclaimed that no limitation exists on the amending power of the Parliament and no amendment can be questioned in either the Supreme Court or any of the High Courts on any ground

including the violation of part III. It was challenged in *Minerva Mills vs. Union of India* case of 1980, because Article 368(4) & 368(5) are taking away the judicial review while in the *Keshvanada Bharti* case the judicial review was declared a part of the basic structure doctrine, Article 368(4) & 368(5) are null and void. The Court held that the constitution had given a limited amending power to the Parliament. The Parliament cannot use this power to turn it into an absolute power, which is a basic feature of the Constitution (Laxmikanth, 2020: 11.2). The Court held that “the Constitution had conferred a limited amending power on the Parliament; the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power”.

The Chief Justice of India ruled that “Everything in India is under judicial review”. Article 368(4) & 368(5) are declared null & void because they are violating basic structure doctrine by touching judicial review.

Hence, the *Minerva Mills* case is called the case that evolved the basic structure doctrine. The case that gave birth to the basic structure doctrine is the *Keshvananda Bharti* case.

In 2014, the Prime Minister gave Presidential recommendation to impose President’s rule in Uttarakhand. The then Chief Minister shri Harish Rawat challenged it in the Uttarakhand High Court. The Uttarakhand High Court’s Nainital Bench declared the President’s rule null & void.

### **The Ninth Schedule**

But the IX Schedule still remained & the Parliament went on putting articles in the IX schedule to shield them from judicial review. Nehru government had put 4 & later 7 laws in the ninth schedule but by 2007 there were 273 laws in the IX schedule.

### **IR Coelho case 2007**

The IX schedule was challenged in the Supreme Court. The Court observed that the IX schedule is taking away the judicial review. After the *Keshvananda Bharti* verdict the judicial review became a part of the basic structure doctrine; and it was declared that Article 368 was stronger than Article 13. So today the Parliament can touch Article 13 but it cannot take away the basic structure doctrine.

### **CONCLUSION**

Hence, if a law was placed in the IX schedule prior to 24<sup>th</sup> April 1973 (date of *Keshvananda Bharti* judgement) the courts will not look into its validity but the courts can certainly inquire into the validity of laws placed in the IX schedule after 24<sup>th</sup> April 1973 when the status of judicial review was elevated to being a part of the basic structure doctrine. The court gave the *IR Coelho* judgement in 2007 but it was applied to an event in the past (April 24, 1973). This is called retrospective application of Constitutional law. Though one might argue that the law must be written & clear, it cannot be arbitrary. Basic structure doctrine is an idea contained in the mind of the judge so won’t arbitrariness creep in. But the Supreme Court did it with a very good intension to save the Constitution of India.

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