

There are three organs of the State as determined by the Constitution of India – *the Executive, the Legislative and the Judiciary*. Each of these organs play a vital role in the functioning of the Government within the country. The Legislative has the role of law-making, the Executive provides with the implementation of the laws and the Judiciary settles any disputes that arise during the making and implementation of the law.

Judiciary – The Savior of Democracy

Taking into account the role of the Judiciary in the State, it could be said that it acts as the bridge that connects the commons to the other two organs of the State by solving the *conflict of laws*. In other words, it could be said that the belief of the people in the Legislature and the Executive is strengthened by the Judiciary. The Judiciary is also responsible for making laws in the form of judicial precedents and procedural law-making. The laws that are made by the Judges by providing rulings as to the questions relating to the interpretation of laws are known as *precedents*, whereas those laws which are made by influence of the rules of procedure relate to *procedural rule-making*.

The Doctrine of Basic Structure

Although the term ‘basic structure’ has neither been defined in the Constitution nor in the judicial precedents but the theory lays emphasis on such a structure of the Constitution which cannot be modified or amended. The basic structure refers to such essential features of the Constitution which, if amended, would compromise its essence and effects to an extent contrary to its identity and values. The basic structure cannot be subjected to change even by way of amendment of the Constitution.^[1] Article 368 of the Constitution allows the Parliament to amend the *grundnorm* by way of addition, variation, repeal of any provision, except for the basic features.

- **The 9th Schedule** – Any law placed under this schedule is provided immunity against the process of *judicial review*.
- **Need of the Doctrine** – The doctrine first came into light in the case of *Kesavananda Bharati v. State of Kerala*^[2] which was filed with the object to challenge the validity of Kerala Land Reforms Act, 1963. While the petition was in its pendency, the Constitution (Twenty-Ninth Amendment) Act came into being which placed the

Kerala Land Reforms Act into the 9th Schedule of the Constitution. Since the placing of the said Act in the 9th Schedule shielded it from judicial review, the petitioners were left with the option to challenge the validity of the 24th and 25th Constitution (Amendment) Acts, which provided Parliament to amend the Constitution including Part III which accounted for the Fundamental Rights through Article 368. The Bills also had sought to amend Article 13 of the Constitution so that any amendment through Article 368 does not interfere with Article 13; and inserted Article 31C which could curtail the provisions of Articles 14, 19 and 31 to give effect to the provisions of Article 39(b) and (c). It was held that Parliament has the power to amend any of the provisions of the Constitution but it cannot amend it to such an extent that it interferes with its basic structure.

HISTORY

Part III of the Constitution of India provides all Indian citizens, by birth, with certain Fundamental Rights, which allow everyone to lead a dignified life. The protection provided by the Fundamental Rights was tried to be subjected to changes such as repeal, modification or amendment through the *insertion of 9th Schedule* by way of the **Constitution (First Amendment) Act, 1951**. The said Amendment Act also added *Articles 31A and 31B* which overrode the effect of Article 13 which provides for the unchangeable nature of the Fundamental Rights.

CASE HIGHLIGHTS

For the discussion about the doctrine of basic structure, the key elements that are necessary to involve include:

1. Articles 13, 19, 31A, 31B and 368 of the Constitution
2. The Constitution (First Amendment) Act, 1951
3. The 9th Schedule of the Constitution

Among the above-mentioned elements, a conflict between the Articles 13 and 368 could be witnessed where Article 13 does not allow making laws in derogation with the Fundamental Rights provided in Part III of the Constitution, while on the other hand, Article 368 provides Parliament with the power to amend the Constitution in accordance with its provisions. However, the Judiciary has, in its judgments,

commented over the basic structure of the Constitution which shall be seen further in this article.

In the case of ***Shankari Prasad v. Union of India***,^[3] the petitioner had challenged the validity of the Constitution (First Amendment) Act, 1951 on the ground that whether the fundamental rights could be amended through Article 368; and in turn also challenged the validity of the newly added Articles 31A and 31B through the said amendment. It was contended that the amendment could take away the fundamental rights granted within Part III which would in turn violate Article 13(2). It was observed that the Articles 31A and 31B sought to change Articles 132 and 136 along with Article 226 of the Constitution; and for this, they need to be ratified under clause (b) to the proviso to the Article 368. For the Articles could not be ratified, they were deemed to be void and unconstitutional. On the other hand, the Supreme Court also opined that the word 'Law' in clause (8) of Article 13 included ordinary law that was made in exercise of the Legislative powers and did not include any constitutional amendment that was purported to be made in exercise of constituent power. Hence, *no constitutional amendment could be considered invalid even if it abridged or took away any fundamental rights*, and the validity of the Constitution (First Amendment) Act, 1951 was upheld.

In another case witnessed by the Judiciary, namely ***Sajjan Singh v. State of Rajasthan***^[4], the validity of the Constitution (Seventeenth Amendment) Act, 1964 was subjected to challenge. The facts surrounding the case were that the petitioners had been aggrieved by some of the legislated Acts relating to agrarian reforms which were added in the 9th Schedule of the Constitution by way of the said amendment. The 5-Judge Bench of the Supreme Court held that the 17th Amendment of the Constitution was not invalid as it purported to amend the fundamental rights with the sole object of removing obstacles in the fulfilment of a socio-economic policy; and that its effect on Article 226 was incidental and insignificant.^[5] The judgment in *Shankari Prasad* case^[6] was upheld and it was remarked that had the Constitution-makers intended to make fundamental rights unchangeable/unamendable, they would have made express provisions in that behalf. Article 13 was said to apply on any Amending Act of the Constitution. However, it was for the first time that two of the Judges of this bench had raised doubts on the unlimited amending power of Parliament.

The validity of the Constitution (Seventeenth Amendment) Act, 1964 was again challenged in the case of ***Golaknath v. State of Punjab***^[7], where it was, for the first time, held by the 11-Judge Bench that the *amendment of the Constitution did not allow any changes to the Fundamental Rights* granted by Part III. This case happens to be one of the most important cases relating to the amendment of the Constitution as it pointed at the amendment power to be of sovereign function and called it bigger than the legislative power. It was held that the power of amendment of the Constitution is derived from Article 245, read with Entry 97 of List I of the Seventh Schedule instead of Article 368. Also, that the term 'law' included constitutional amendments under the purview of Article 13(2) and so, if any law violates Article 13, it may be declared void. The Fundamental Rights were kept beyond the reach of Parliament.

After the Fundamental Rights were declared unalterable by the judgment in Golaknath Case, Parliament came up with **Constitution (Twenty-Fourth Amendment) Act, 1971** which added *clause (4)* to Article 13 which relieved this Article from interference with any amendment made under Article 368; and restored the position that was before the Golaknath case. It obligated the assent of the President on Constitutional Amendment Bills, and also added *clause (3)* to Article 368 which consolidated *clause (4)* of Article 13.

The 13-Judge Bench of the Supreme Court came up with ***Kesavananda Bharati***^[8] judgment with the conclusion that Parliament has the authority to amend laws but not to such an extent as would bring moderations to the Fundamental Rights granted by Part III of the Constitution, which constitutes a part of the basic structure of the Constitution. The validity of the Constitution (Twenty-Fourth Amendment) Act, 1971 was upheld as it did not enlarge the powers of the Parliament and it was remarked that Article 368 provided only with the procedure of amendment but the power to amend the Constitution was given to Parliament by Article 245. Although, as mentioned earlier, the basic structure was not vividly defined by the Judges, however, an idea as to what could be considered as a part of the basic structure of the Constitution was presented.

With the passing of various judgments by the Judiciary, the basic structure is considered to include the supremacy of the Constitution, secular character, rule of law,^[9] separation of powers between the

three organs of the Government, the republican and democratic forms of Government and the federal character of the Constitution. Similarly, other features such as the equality of status and opportunity, liberty of thought, expression, belief, etc. have also been bagged as the elements of basic structure of the Constitution.

THE FATE OF THE 9TH SCHEDULE

All the laws that were placed under the 9th Schedule were subjected to immunity from judicial review due to which the decisions providing relaxation to the aggrieved could not be rendered effectively. The objective of this schedule was to save from being challenged in Court, the laws relating to land reforms that were enacted by various States. Due to such defensive feature of the 9th Schedule, it began to be misused. Laws apart from those made in relation to land reforms, such as those relating to mines and minerals, sick industries, general insurance, requisition of property, monopolies, State reservation laws, etc. began to be added into the Schedule. After the Kesavananda Bharati Judgment on April 24, 1973, it was held by the 9-Judge Bench of the Supreme Court in the case of ***I. R. Coelho (dead) by LR v. State of Tamil Nadu***[\[10\]](#) that any law placed under the 9th Schedule after 24th April, 1973 shall be open to challenge on the ground that it poses threat to the basic structure of the Constitution in case the fundamental rights are abridged pertaining to the basic structure.

OTHER JUDGMENTS CONCERNING THE DOCTRINE

The theory of basic structure was time and again brought forward by the Courts in various other cases, and it was always stressed that the supreme power is the Constitution of India, and not Parliament. In ***Minerva Mills Ltd. v. Union of India***[\[11\]](#), the Supreme Court had held by majority that clauses (4) and (5) of Article 368 inserted by Constitution (Forty-Second Amendment), 1976 were unconstitutional because they hampered the basic structure of the Constitution as they removed all the limitations on the amending power.

The stress on the basic features of the Constitution was given in the case of ***Glanrock Estate (P) Ltd. v. State of Tamil Nadu***[\[12\]](#) wherein the Supreme Court held that the concepts such as secularism, democracy, separation of powers and the power of judicial review do not fall within the purview of amendatory powers of Parliament under

the scope of Article 368. Deleting any of these would require changes in Part II of the Constitution as well as in Article 245 and the three lists in the 7th Schedule. All these elements form part of the basic structure of the Constitution.

The power of Parliament is limited to the amendment of laws, pursuant to Article 368, which still cannot amend the basic features of the Constitution. The Supreme Court reiterated in ***G. V. K. Industries v. Income-tax Officer***[\[13\]](#) that the power to make changes to the basic structure is capable of amendment only through the people sitting, in the Constituent Assembly, as representatives of the people of the nation.

In the case of ***Indira Nehru Gandhi v. Raj Narain***[\[14\]](#), Article 329A(4) was struck down after application of the theory of basic structure. This Article was introduced by way of **Constitution (Thirty-Ninth Amendment) Act, 1975** which provided with conditions regarding challenging of the election of the Prime Minister. It said that the election of the Prime Minister, whether incumbent or prospective, could be challenged only before a body or forum as may be established by Parliament by law; and the validity of any such law creating a forum and the decisions of the said forum shall not be subjected to questioning in Court. It also said that in case an election petition challenging the election in the name of a person appointed as the Prime Minister is pending in any Court, then such petition shall stand abated after his attaining of the designation. This Article was declared unconstitutional by the Supreme Court.

A law cannot be said to be unconstitutional if it abridges the judicial review by any one institution but keeps other doors open to the judicial machinery. A situation of this kind arose in the case of ***S. P. Sampat Kumar v. Union of India***[\[15\]](#) wherein the constitutional validity of Article 323-A along with certain provisions of the Administrative Tribunals Act, 1985 was challenged on the ground that the impugned Act barred the jurisdiction of the High Courts under Articles 226 and 227 in the matters of service and thus, destroyed the power of judicial review by the High Courts which was a basic feature of the Constitution. The Supreme Court held that even though the judicial review in the matters of service has been barred under Articles 226 and 227 but the impugned provisions do not bar judicial review under Articles 32 and 136 of the Constitution. As long as the power of judicial review is vested

in an alternative institution, the provision cannot be said to be void and hence unconstitutional.

In the case of *M. Nagraj v. Union of India*[\[16\]](#), the validity of the Constitution (Seventy-Seventh and Eighty-First Amendment) Acts was challenged on the ground that it promoted the concept of reservation that was stopped in *Indra Sawhney's* case[\[17\]](#). It was held by the 5-Judge Bench of the Supreme Court that these amendments do not violate the basic structure of the Constitution in any way as they are enabling provisions and apply only the Scheduled Castes and Scheduled Tribes. No constitutional requirements were violated and also, the amending power of Parliament was not abridged in any way.

CONCLUSION

The basic structure of the Constitution is necessary to be upheld and must not be subject to change as it may give rise to changes undesirable of the values of the Constitution. India is a country of different cultures, religions and beliefs, all clubbed as a unit. The Preamble to the Constitution has recognized India as a sovereign, socialist, secular democratic republic which is also considered to be among the basic features of the Constitution. A nation is constituted by its people, and even the Constitution has been granted power by the citizens of India. Hence, it is of utmost importance to keep the Constitution open and justifiable to each and every class of persons in India.