Basic Structure Doctrine and its Widening Horizons

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Legal system is a hierarchical normative order. Each norm in such an order derives authority from a higher norm. It is important that legal systems shall have unity and coherence. In a legal system the constitution written or unwritten, is of highest importance since it contains the norm of high authority. It is the basis from which individual norms develop. The constitution draws its nature, character and content from the basic norm of the legal system, as it lives closest to the basic norm.

Elapse of time and changes in the social, economic and political spheres cause changes in legal systems. Though legal systems have to

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2. "'Norm' is the meaning of an act by which a certain behaviour is commanded, permitted, or authorised." Kelsen, Pure Theory of Law, University of California, Berkeley (1970), p.5.
4. Constitution may be defined as the “organic and fundamental law of a nation or state, which may be written or unwritten establishing the character and conception of its government laying down the basic principles to which its internal life is to be conformed...” See Black's Law Dictionary (1990).
5. "The organization of the modern state is... divisible into two distinct parts....The first, essential and basic portion is known as the constitution of the State... The more important, fundamental and far reaching any principle or practice is, the more likely is to be classed as constitution” See Fitzgerald (Ed.), Salmond on Jurisprudence, N.M Tripathi, Bombay (1966), p. 83.
6. Supra n. 2 at p.124.
7. Supra n.1. at p.796.
adjust to the needs of time, at times such changes may go to the extent of destroying the identity of the legal system. It is not desirable that the essential features or basic elements of the legal system are swept away by such changes. Hence a major problem which legal systems face is one of balancing itself between the demands of continuity and stability on the one hand and change and flexibility on the other.⁸

Though fundamental to the legal system, constitution also is subject to changes. In the case of an unwritten constitution such changes occur involuntarily while written constitutions are subject to changes through deliberation, known as amendments.⁹ Amendability of the constitution is a *sine qua non*, for, absence of possibility to make changes through amendments may lead to its changes through extra constitutional methods including revolution.¹⁰ Moreover, non-amendability of the fundamental law implies monopoly of a generation over the future, which is an unacceptable proposition.¹¹ In short, to live up to the needs of the changing times as well as to assume self-existence a constitution should be capable of adjusting to changes, how-ever protecting itself against self eradication.¹²

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⁹ But there are other modes of altering constitutions such as legislative measures, evolving customs and conventions and judicial interpretation. See, William S. Livingston, *Federalism and Constitutional Change*, Oxford (1956), pp-11-15.

¹⁰ H.R. Khanna, “Power to Amend the Constitution”, (1983) 2 S.C.C. (Jour.) 1. At the time of framing our Constitution M.V. Thyagi observed that in the absence of an amendment procedure the Constitution would be a brittle one. IX C.A.D. 1657.


¹² “It is the function of a constitution to provide resistance to change... as such. If that were not so, a constitution would be an incitement to revolutions rather than a means of avoiding them. On the other hand a constitution which left the door open to an every kind of change could not perform its functions, since the function of a Constitution is to ensure stable progress, and certain types of changes are incompatible with progress.” *Per* Dickinson as quoted in *id.*, at p. 11.
In the absence of appropriate provisions for schematic amendment the changes in the constitution may run riot, damage its identity and leave the very existence of the constitution doubtful. Therefore, provision for amendment to bring about an orderly change is usually incorporated in constitutions. They contain the procedure for amending the constitutions as well as the limitations if any, on amendments. Article 368 of the


15. The original Article was amended subsequently. Arts. 368 (1) and (2) as they stand now read as follows:

"(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in-

(a) article 54, article 55, article 73, article 162 or article 241, or
(b) Chapter IV of Part V, Chapter V of Part VI, or
(c) any of the Lists in the Seventh Schedule, or
(d) the representation of States in Parliament, or
(e) the provisions of this article, the amendment shall also required to be ratified by the legislatures of not less than one half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent."
Constitution of India stipulates the conditions and procedure for amending the Constitution.16

The conflict between maintenance of identity of the Constitution and the demands for change is present in India also. Travel through the cases in which the constituent power of Parliament was in question reveals how the legal system would fall a pray to the political whims and how certain attempts to enable the legal system to keep abreast of changing times may lead to damaging its very identity. It arose with the decision in I.C. Golaknath v. State of Punjab17 in which the Court restricted the power of Parliament to amend the Constitution. To tide over the effect of the decision in Golaknath, Parliament amended the Constitution,18 incorporating provisions19 in it so that constitutional amendments could not be treated as law for the purpose of Article 13 (2) and to keep constitutional amendments beyond the pale of judicial review.20 Although

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16. The Constitution of India contains three procedures for amending it. Some Articles can be amended by a simple majority; for instance Articles 4, 169 and 239 A. These Articles contain specific provisions to the effect that such changes shall not be deemed to be constitutional amendments under Article 368 of the Constitution. Some other provisions can be amended only by a special majority of two-thirds of the members present and voting. Article 368(2) specifies such a special procedure and the rest can be amended by a special procedure of such special majority coupled with ratification by a half of the States by a resolution to that effect. Articles 55, 73, 162, 245, 124 to 147, 214 to 232, 245 to 255, Schedule 7, and amendment of Article 368 itself fall under this category.

17. A.I.R.1967 S.C. 1643. Properties of the petitioners in different States were acquired under the provisions of different land laws. Such legislations were put in the IX Schedule by the Constitution (Seventeenth Amendment) Act, 1964 bringing them beyond the pale of judicial review.

18. The Constitution (Twenty fourth Amendment) Act, 1971 was enacted for the purpose.

19. By the Act two important changes were brought to effect. By section 2 of the amendment, clause 4 to Article 13 was incorporated. By section 3 of the Act, clause. 1, 2 and 3 were incorporated to Article 368.

20. Art. 13(4) reads: “Nothing in this article shall apply to any amendment of this Constitution made under Article 368.” Article 368(3) reads: “Nothing in Article 13 shall apply to any amendment made under this article.”
the amendment was brought with a view to keeping, fundamental rights subject to amendments, the impact of the same is not unpredictable. It in effect amounts to providing Parliament with a *carte blanche* for amending the Constitution.

A study as to how the power to amend the constitution could be exercised without destroying the identity of the legal system would necessarily involve examination of questions like the meaning of the term amendment, the nature of the power to amend, the source of such a power, the extent of amendability and the scope of judicial review of amendment. These aspects in relation to written constitutions have claimed the attention of courts abroad. In our country, the Supreme Court had to examine these matters in their diverse aspects during the short span of half a century since independence and it resulted in the emergence and development of the doctrine of basic structure.

**Basic Structure: The Genesis**

A constitutional bench of the Supreme Court, consisting of thirteen Judges held in *Kesavananda Bharati v. State of Kerala* (Kesavananda, 1973) 4 S.C.C. 225: A.I.R. 1973 S.C. 1461. The petitioner approached the Supreme Court under Article 32 for enforcement of his fundamental rights under Articles 25, 26, 14, 19(1)(f) and 31 of the Constitution. He challenged the validity of the Kerala Land Reforms Act, 1963 as amended by the Kerala Land Reforms (Amendment) Act 1969. During the pendency of the petition the Constitution (Twenty fourth Amendment) Act 1971, the Constitution (Twenty fifth Amendment) Act 1972 and the Constitution (Twenty ninth Amendment) Act 1972 came into force. As a result of the 29th amendment act the Kerala Land Reforms Act as amended was inserted in Schedule IX to the Constitution. Incorporation of statutes in Schedule IX immunizes them from being challenged as unconstitutional. The petitioner therefore challenged also the validity of those amendments to the Constitution.
for short), popularly called the Fundamentals Rights Case that the power to amend the Constitution emanates from Article 368 of the Constitution.23 It means that unlike the power to make the Constitution, the power to amend it, is derivative in nature. The Court further held that though the expression ‘to amend’ was one of wide import and included the power to repeal or abrogate the law,24 the expression in Article 368 was used in a narrow and constricted sense.25 The judges agreed that the power under Article 368 would reach each and every provision of the Constitution. However, they held that there were certain matters which do not come under the scope and ambit of the power of Parliament to amend. Thus


24. Id. per Hegde, J. (for himself and Mukherjee, J.) at p. 475. “The power to amend a Constitution in certain contexts may include a power to abrogate or repeal that Constitution.”; Ray, J. at p. 537; Mathew, J. at p. 863; Dwivedi, J. at p. 944 and Chandrachud, J. at p. 980.

25. Id. “... the expression ‘Amendment of this Constitution’ does not include a revision of the whole Constitution....In my view that meaning would be appropriate which would enable the country to achieve a social and economic revolution without destroying the democratic structure of the Constitution and the basic inalienable rights guaranteed in Part III and without going outside the contours delineated in the Preamble”. Per Sikri, J. (at p. 346); “The meaning of the words ‘amendment of this Constitution’ as used in Article 368 must be such which accords with the true intention of the Constitution-makers as ascertainable from the historical background....” Per Shelat, J. (for himself and Gover, J. (at p. 435); “It does not yet include the power to destroy or emasculate the basic elements or the fundamental features of the Constitution.” Hegde, J. (for himself and Mukherjee, J.) (at p.512); “None the less it is apparent that the word ‘amendment’ as used in Article 368 does not connote a plenitude of power” Jagmohan Reddy, J.(at p. 632.) and “It also appears that the whole text of a law cannot be repealed or abrogated in one step; some part of it must remain while the other is repealed” Dwivedi, J. (at p. 929).
the power does not encompass the one to destroy,\textsuperscript{26} repeal,\textsuperscript{27} or abrogate\textsuperscript{28} the constitution or to destroy its identity\textsuperscript{29} or to frame a new one.\textsuperscript{30} Though not explicitly restricted,\textsuperscript{31} over and above that, there are certain features of the Constitution, which cannot be altered in exercise of the amending power. The judges named them as the basic structure,\textsuperscript{32} basic elements\textsuperscript{33} or fundamental features\textsuperscript{34}, or the essential features or the basic principle\textsuperscript{35} of the Constitution.

\textit{Basic Structure: The Ingredients}

Though the Court held that the power of Parliament to amend the Constitution was impliedly limited by the doctrine of basic structure, it did not clearly define or explain what constituted the basic structure. Chief Justice Sikri suggested that supremacy of the Constitution, republican and democratic form of government, secular characteristic of the Constitution, successor state, and so forth, are ingredients of the Constitution.

\textsuperscript{26} \textit{Id.}, per Hegde, J. (for himself and Mukharjee, J.) (at p. 481). He said, “In other words, one cannot legally use the Constitution to destroy itself.”

\textsuperscript{27} \textit{Id.}, per Sikri, C.J. (at p. 320); Palekar, J. (at p. 680). See also William L. Marbury, “The Limitations Upon the Amending Power,” 33 H.L.R. 223 (1919-20). He observes, “It may be safely presumed that the power to “amend” the Constitution was not intended to include the power to destroy it.” (at p. 225).

\textsuperscript{28} \textit{Id.}, per Khanna, J. (at p. 767); Ray, J. (at p. 632) and Mathew, J. (at p. 897).

\textsuperscript{29} \textit{Id.}, per Khanna, J. (at p. 767).

\textsuperscript{30} \textit{Id.}, per Shelat and Grover, JJ. (at p. 432).

\textsuperscript{31} \textit{Supra} n.22 Sikri, J. observed, “The above foundation and the above basic features are easily discernibly not only from the preamble but the whole scheme of the Constitution, ...” (at p.366).

\textsuperscript{32} \textit{Id.}, per Sikri, C.J. at p. 366; Shelat and Grover, JJ. at p. 454; Jagmohan Reddy, J. at p. 637;

\textsuperscript{33} \textit{Id.}, per Shelat and Grover, JJ. (at p. 454 ) and Hegde and Mukharjea, JJ. (at p. 486).

\textsuperscript{34} \textit{Id.}, Per Shelat and Grover, JJ. at p. 472.

\textsuperscript{35} Rajeev Dhavan, “The Basic Structure Doctrine-A Footnote Comment”, in Rajeev Dhavan and Alice Jacob (Eds.), \textit{Selection and Appointment of Supreme Court Judges : A Case Study} N.M.Tripathi, Bombay(1978) p.160.
separation of powers and federal character of the Constitution were its ingredients. He opined that the structure was built upon the dignity and freedom of the individuals. Justice Shelat and Justice Grover were of the view that in addition to the above, the mandate to build a welfare state contained in Part IV and the unity and integrity of the nation also formed basic structure. Justice Hegde and Justice Mukherjee illustrated basic structure with reference to sovereignty of India, democratic nature of our polity, unity of the nation, essential features of the individual freedoms secured to citizens and the mandate to build a welfare state and egalitarian society. Justice Khanna identified the democratic and parliamentary forms of government and secularism as constituting the basic structure of the Indian Constitution. Justice Jagmohan Reddy catalogued Sovereign Democratic Republic; Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship and equality of status and of opportunity as the contents of the basic structure. It is clear that there was hardly any consensus among the judges as to the contents of basic structure. However, the ratio of Kesavananda is that there are certain elements in the Indian Constitution beyond the reach of the power of Parliament to amend.

A corollary of the doctrine is that constitutional amendments contrary to basic structure would be considered as unconstitutional and would be struck down. It implies two things. Constitution being the touchstone to determine validity of its alterations, like ordinary legislation, constitutional
amendments are also likely to be held unconstitutional.\(^{42}\) Introduction of the doctrine of basic structure can be considered as an attempt of the Supreme Court of India to balance the needs of the changing times with the identity of the legal system. Further, by the doctrine, the Court was able to lay down the criteria for determining the validity of constitutional amendments. The Court evolved the criteria by basing on postulates like the scheme or 'spirit' or the 'philosophy'\(^{43}\) that permeates the Constitution.\(^{44}\) In the earlier cases\(^{45}\) while dealing with the power of Parliament to amend the Constitution, the Court did not lay down such criteria applicable to all constitutional amendments as no question regarding the scope and extent of the power to amend was examined in them. The issues raised in \textit{Kesavananda}, on the other hand, provided the Court with an opportunity to lay down the standard to evaluate the validity of all constitutional amendments. Yet another innovative feature of the decision is that by the doctrine the court brought constitutional amendments within the purview of judicial review. Judicial review of the constitutional amendments is a corollary of the doctrine of basic structure. The doctrine implies the supremacy and finality of judicial review in determining the validity of constitutional amendments.\(^{46}\) The Supreme Court of India "is

\(^{42}\) Naturally a question arises here. Can a constitutional amendment be treated as 'law'? The importance of such a question is that if it can be treated so, constitutional amendments can be also subjected to limitations to which ordinary legislation is subject. Such a question was raised before and answered by the Supreme Court in \textit{Shankari Prasad v. Union of India}, A.I.R 1950 S.C. 458 and \textit{Golaknath v. State of Punjab}, A.I.R. 1967 S.C. 1643.


\(^{46}\) See \textit{infra}, n. 72.
probably the only Court in the history of human kind to have asserted the power of judicial review over amendments to the Constitution."

It is evident from the nature of the doctrine that in the absence of the doctrine, Parliament would have been able to wield all power and had the potential to destroy the identity of the legal system and even to repeal the Constitution. If the power to alter the Constitution were not restricted, Parliament would be able to act arbitrarily, amend the Constitution in any manner it likes and then be able to constitutionalise any law enacted, by altering the provisions of the Constitution. It would be able to politicize the Constitution. It could for instance, upset separation of powers recognized by the Constitution or "change the democratic government into dictatorship or hereditary monarchy." Through such constitutional amendments a political party with majority in the legislature would be able establish totalitarianism, to enslave the people and "after having effected these purposes make the Constitution unamendable or extremely rigid."

**Basic Structure: Crystallisation of the Doctrine**

Though the doctrine was an innovation, even the Supreme Court staggered in deciding whether to retain the doctrine. There was a weak and unsuccessful attempt to reconsider the decision. Small wonder, though

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47. Upendra Baxi, *Courage, Craft and Contention*, N.M.Tripathi, Bombay (1985), p. 64. The extent of creativity of the decision will be clear when it is compared with the response of the Supreme Court of the United States in this respect. In the United States, the Supreme Court was reluctant to impose limitations on the constituent body.

48. Politicizing the Constitution is a very bad thing. The very idea of the Constitution turns on the separation of the legal and political realms. The Constitution sets up a few fundamental political ideals such as equality, independence, liberty placing fetters on the on the temporary majority in the House. See, for a discussion, Alan Brinkley, Nelson W. Polsby and Kathleen M. Sallivan, *New Federalist Papers* (1997), pp. 63-64.

49. *Supra* n.22 at p. 767. (*Per* Khanna J.)

50. *Id.* p.365. (*Per* Sikri J.)
some aspects were identified as the ingredients of the doctrine, in Kesavananda the Court was not able to clarify and explain fully the ingredients of the doctrine due to the lack of consensus among the judges. However, the doctrine had a colourful life thereafter and played a vital role in the constitutional, legal, political social and economic developments in India.

Democracy, Rule of Law-Features of Basic Structure

In Indira Gandhi v. Raj Narain51, (Indira Gandhi, for short) popularly called the Election Case the question of applicability of the doctrine came up before the Court for the first time since Kesavananda.52 In Indira Gandhi, the Court had to examine the validity of the 39th amendment by which Article 329A was incorporated53 into the Constitution.

51. 1975 Supp.S.C.C. 1. The respondent had filed an election petition against the appellant, the then Prime Minister on the ground that she resorted to corrupt practices during the election in 1971. Accepting his contention, the High Court of Allahabad set aside the election of the appellant. She appealed against it in the Supreme Court. In the Supreme Court, the respondent challenged the validity of the 39th amendment act by which Article 39A was included in the Constitution and the validity of two amendments made to the Representation of Peoples Act, 1950, viz., amendment 58 of 1974 and 40 of 1975 by these amendments, Parliament had validated certain election practices. These amendments were challenged by the respondent on a host of grounds including that they violated democracy, which was a feature of basic structure of the Constitution.

52. Unlike the earlier cases dealing with the power of Parliament to amend the Constitution under Article 368, in which the main issue was the amendment of the fundamental rights, the Election Case dealt with the essential feature of representative government namely free and fair elections and the nature and location of judicial power. See H.M. Seervai, Constitutional Law of India, Vol. III, N.M.Tripathi, Bombay (1996), pp. 3129-3130.

53. Article 329A reads :

“(1) Subject to the provisions of Chapter II of Part V [Except sub-clause (e) of clause(1) of Article 102], no election-

(a) to either House of Parliament of a person who holds the office of Prime Minister at the time of such election or is appointed as Prime Minister after such election;

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Clauses (4) and (5) of Article 329A were impugned on the ground that they excluded operation of any law and exercise of judicial review in the matter of election of the Prime Minister and the Speaker of the Lok Sabha. The impugned amendment was therefore alleged to have violated the principles of democracy, rule of law, separation of powers and judicial review, which according to the petitioner were essential ingredients of the

(b) to the House of the People of a person who holds the office of Speaker of that House at the time of such election or who is chosen as the Speaker for that House after such election; shall be called in question, except before such authority [not being any such authority as is referred to in clause (b) of Article 329] or body and in such manner as may be provided for by or under any law made by Parliament and any such law may provide for all other matters relating to doubts and disputes in relation to such election including the grounds on which such election may be questioned.

(2) The validity of any such law as is referred to in clause (1) and the decision of any authority or body under such law shall not be called in question in any court.

(3) No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, in so far as it relates to election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied to or in relation to the election of any such persons is referred to in clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void or has, before such commencement, been declared to be void under any such law and notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.

(4) Any appeal or cross appeal against any such order of any court as is referred to in clause (4) pending immediately before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, before the Supreme Court shall be disposed of in conformity with the provisions of clause (4).

(5) The provisions of this article shall have effect notwithstanding anything contained in this Constitution.
basic structure of the Constitution of India. The Court held that democracy was an ingredient of basic structure of the Constitution. The holding implies that any amendment violating democracy would be invalid.

What is meant by the term 'democracy'? How can it be determined whether an amendment damaged democracy? The judges addressed themselves to these questions and tried to find answers. The expression cannot have a precise meaning nor can it be comprehensively defined. The judges observed that equality free and fair periodic elections a mechanism for settling election disputes and popular sovereignty among the people were the ingredients of democracy. As clause (4) of the 39th Amendment adversely affected the above aspects, the Court struck it down as violative of democracy, an aspect of basic structure of our Constitution.

It is evident from the above discussion that democratic set up is essentially based on equality among the people as democracy is based on

54. Supra n. 51, per Khanna, J. at p. 198; Mathew, J. at p. 119 and Chandarachud, J. at p. 255.
55. Id., p. 256, per Chandrachud, J.
56. Id., pp. 87-88, per Khanna, J.
57. Id., p. 135, per Mathew, J.
59. Supra n. 51 at p. 87 (per Khanna, J.); at p. 134 (per Mathew, J.) and at pp. 258-259 (per Chandrachud, J). Earlier, in Kesavananda, the Court had accepted that the contents of the Preamble were indicia of the concept of basic structure. Democracy forms part of the Preamble. It appears that the holding in Kesavananda that democracy formed part of the basic structure because the court held preamble in which is include democracy to be a feature of the constitution.
equal representation in the Government. There must be equality in holding rights and shouldering duties irrespective of the status of individuals. Such a concept of equality is based on the doctrine of Rule of Law. In other words, a real democratic set up would be possible only where there is rule of law. "Rule of Law postulates that the decisions must be made by applications of known principles and rules and in general, such decisions should be predictable and the citizen should know where he is." It also means that "the exercise of the power of government shall be conditioned by law and that subject to the exceptions to the doctrine of equality, no one shall be exposed to the arbitrary will of the government." Rule of law is highly necessary for excluding arbitrary interference by the government. Being a precondition to democracy, it shall form a feature of basic structure. Equality and rule of law are complementary to each other and one cannot exist without the other. The Court therefore held that rule of law also forms part of the basic structure of the Constitution of India.

60. "The main forces in the development of modern democratic thought have been the liberal idea of individual rights protecting the individual and the democratic idea proper, proclaiming equality of rights and popular sovereignty. The gradual extension of the idea of equality from the political to the social and economic field has added the problems of social security and economic planning." Supra n.58 at p. 435 (Emphasis supplied). However, this right is not one of mathematical equality as "mathematical proportionality of representation is not a declared basic requirement in each and every part of India...and ...has not been understood...as derogating from the democratic principle." R.C.Poudyal v. Union of India, 1994 Supp. (1) S.C.C. 324, 385-386.

61. Supra n. 51 at p.91 (per Khanna, J.).

62. Id., p.. 252 (per Chandrachud, J.).


65. Supra n. 51 at p90-91. "In any case, the vice of clause (4)of the 39th Amendment Act would still lie in the fact that the election of the appellant was declared to be valid on the basis that it was not to be governed by any law for settlement of election disputes." (per Khanna, J.) (Emphasis supplied). at p. 136 (per Mathew, J.) and at p. 252 (per Chandrachud, J.)
The holding of the Court in *Indira Gandhi* that democracy and rule of law are ingredients of the basic structure of the Constitution of India claims our attention for more reasons than one. It is the first instance where the Court has given a fresh life to the doctrine of the basic structure after *Kesavananda*. Till this decision was made, the Court was in a state of flux and there was no unanimity among the judges as to the contents of the basic structure. It is in this case that the Court gave confirmation to the doctrine and tried to explore the contents of basic structure. The decision in *Indira Gandhi* is a creative step of the Supreme Court in interpreting the power of Parliament to amend the Constitution. *Indira Gandhi* identified some of the instances of limitation on the power of the Parliament to amend the Constitution and thus gave firm root to the doctrine of basic structure. The decision by bringing both democracy and rule of law as unamendable features of our Constitution, upheld the identity of the Constitution of India, and can be considered as a worthy successor of *Kesavananda*.

However, it is doubtful whether *Indira Gandhi* can be considered as an ideal successor of *Kesavananda*. For, the attitude of the Court in some of the issues in *Indira Gandhi* was not conducive for developing a coherent doctrine of basic structure. A related issue that sprung up before the Court in *Indira Gandhi* was whether judicial review formed part of the basic structure. It is an issue related to the concepts of democracy, rule of law and especially separation of powers. It indicates the necessity of judicial review for maintaining democracy and rule of law. Is not then judicial review a necessary ingredient of the Constitution of India? Can it not be treated as a feature of its basic structure in the light of the holding of the Court that democracy and rule of law are ingredients of the basic

structure of the Constitution of India? The majority in *Indira Gandhi's Case* held that judicial review was not part of the basic structure of the Constitution. The judges justified such a conclusion on different grounds. They held that for maintenance of democracy, what was required was only a process of settling disputes relating to elections. That, according to the judges, did not necessitate a judicial process for settling them. Because, in many democratic countries, election disputes are settled without recourse to judiciary but by the legislature itself. Moreover, the Constitution of India as originally enacted did contain some provisions, which indicates that judicial review was not treated as its essential part. On these grounds, the Court held that judicial review was not an essential feature of the basic structure of the Constitution.


However, that was not the end of the issue. A few years later the question of application of the doctrine of basic structure again came up before the Court in *Minerva Mills v. Union of India*. A question that

67. Chief Justice Ray observed, "Judicial review in many matter under statute may be excluded." (Supra n.51 at p.38.) "Judicial review is one of the distinctive features of the American Constitution al Law...These features are not in our Constitution." (at p.41) Chandrachud, J. held thus. "Since the Constitution, as originally enacted, did not consider that judicial power must intervene in the interests of purity of elections, judicial review cannot be considered to be a part of the basic structure in so far as legislative elections are concerned."(at p. 254) and Khanna, J. at pp.90-91).

68. Id., per Ray, C.J. at p. 43; Khanna, J. at p. 91 and Chandrachud, J. at p. 254.

69. See instances of U.K., U.S., Australia, Japan, Norway, France, Germany, Turkey etc. Khanna, J. (at p. 88) and Chandrachud, J. (at p. 254) have noted this fact.

70. See for instance, Constitution of India, Arts. 31 (4), (6), 103, 136(2), 227(4), 262(2) and 329 (a), (b).

71. A. I.R. 1980 S.C. 1789. In this case the validity of the amendments to Articles 31 C and 368 made by 42nd amendment to the Constitution was challenged.

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was looked into by the Court in this case was whether judicial review could be abolished by amending the Constitution. The Court had to address itself to such a question in view of the incorporation of clause (4) in Article 368 which sought to deprive courts of their power to examine the validity of amendments to the Constitution. The answer to that question depends upon whether judicial review formed part of the basic structure of the Constitution. Deprivation of judicial review may lead to upset of the nice balance of power established by the Constitution. This in its turn may lead to deprivation of fundamental rights including that provided by Article 32. It may then lead to a circumstance when even the ordinary laws may escape judicial scrutiny. The Court therefore held that judicial review was also a part of the basic structure of the Constitution and struck down clause (4) of Article 368. Agreeing with the view of the Court, Justice

By the Amendment Act, Article 31 C was amended to the effect that no laws enacted for giving effect to the directive principles should be questioned on the ground that they were inconsistent with Article 14 or 19. By the same amendment act, Article 368 also was amended to include in it new clauses (4) and (5). Those clauses conferred on Parliament an unlimited power to amend the Constitution and prohibited judicial review of constitutional amendments.

72. Id. at p.1799. The Court held: “The newly introduced Clause (4) of Art.368 must suffer the same fate as Clause (5) because the two clauses are interlinked. Clause (5) purports to remove all limitations on the amending power while Clause (4) deprives the courts of, their power to call in question any amendment of the Constitution.... It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled. Clause (4) of Article 368 totally deprives the citizens of one of the most valuable modes of redress which is guaranteed by Article 32. The conferment of the right to destroy the identity of the Constitution coupled with the provision that no court of law shall pronounce upon the validity of such destruction seems to us a transparent case of transgression of the limitation on the amending power.... If Clause (5) is beyond the amending power of the Parliament, Clause (4) must be equally beyond that power and must be struck down as such.”

73. Ibid.
Bhagwati observed that judicial review was part of the basic structure of the Constitution on the ground that without it, government of laws and rule of law would cease to exist and hence its absence may lead to the death knell of democracy and rule of law.74

A careful examination of this aspect reveals a slight deviation in judicial craftsmanship and approach of the Court in developing the concept of basic structure from the earlier cases. In the earlier instances, the Court identified certain aspects as ingredients of basic structure on the ground that they themselves were the pillars upon which the Constitution of India rests. In this case, on the other hand, the Court held that judicial review was an ingredient of the basic structure not merely because it formed one of the foundation pillars of the Constitution, but it was so, because the Court thought that its absence enabled Parliament to escape judicial examination of the validity of constitutional amendments.

The holding on this count is the disapproval and overruling of the decision in Indira Gandhi's Case in which the Court held that judicial review did not form part of the basic structure. For the maintenance of

74. *Id.*, pp. 1825-1826. He observed: “The power of judicial review is an integral part of our constitutional system and without it, there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution.... So also if a constitutional amendment is made which has the effect of taking away the power of judicial review and providing that no amendment made in the Constitution shall be liable to be questioned on any ground, even if such amendment is violative of the basic structure and, therefore, outside the amendatory power of Parliament, it would be making Parliament sole Judge of the constitutional validity of what it has done and that would, in effect and substance, nullify the limitation on the amending power of Parliament and affect the basic structure of the Constitution. The conclusion must therefore inevitably follow that clause (4) of Article 368 is unconstitutional and void as damaging the basic structure of the Constitution.” *Ibid.*
judicial review, separation of powers becomes unavoidable. Hence, if judicial review forms part of the basic structure of the Constitution, separation of powers also should be an element of the basic structure. Though the Court did not explicitly hold so, there are some indications in *Minerva Mills* to such an effect.\(^75\) By the decision in *Minerva Mills* Case, the holdings to the contrary in the *Indira Gandhi* were overruled and the discussions of the concept of basic structure were more crystallised.

The Court further held that the power of Parliament to amend the Constitution was not unlimited and that, limited amenability of the Constitution itself was a feature of the basic structure. According to the Court unlimited power to amend the Constitution was counter to the basic structure of the Constitution namely, the limited amendability.\(^76\) The Court therefore struck down clauses (4) and (5) of Article 368 as incorporated by the 42\(^{nd}\) Amendment Act on the ground that they envisage unlimited power to amend it.\(^77\)

It is true that in *Kesavananda*, the Court limited the power of Parliament to amend the Constitution. But the Court did not conclusively hold in that case that limited amendability of the Constitution was a feature of its basic structure. In such a context, Parliament could undo the salutary results of *Kesavananda* by a declaration that its power to amend the Constitution was unlimited. In other words, Parliament by amending the

\(^75\) *It was held:* “Our Constitution is founded on a nice balance of power among the three wings of the State, namely, the Executive, the Legislature and the Judiciary.” *Supra* n. 71 at p. 1799.

\(^76\) *The Court held:* “Since 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. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368 expand its amending power so as to acquire itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.” *Supra* n. 71 at p. 1798 *(per* Chandrachud. J.)

\(^77\) *Supra* n.71 at pp. 1799 and 1826–1827.
Constitution could dispel the limitations on its amending power since limited amendability had not been held as a feature of the basic structure of the Constitution. That exactly is what was done by Parliament by incorporating clause (5) to Article 368 by the 42nd amendment Act.\textsuperscript{78} Obviously, such an understanding of the constituent power of Parliament would take back the amendment jurisprudence to the pre-\textit{Kesavananda} stage, leaving Parliament the sole, unlimited and ultimate custodian of amendment powers.\textsuperscript{79} The holding of the Court in \textit{Minerva Mills} that limited amendability itself is a feature of the basic structure is to be appreciated against this background. Such a holding foreclosed any future possibility of nullifying the consequences of \textit{Kesavananda} on the power of Parliament to amend the Constitution. By the decision, the Court has done away with the possibility of converting the power of Parliament to amend the Constitution as an unlimited one. The decision in \textit{Minerva Mills} therefore has a very innovative operation. Chief Justice Chandrachud, speaking for the Court observed that clause (5) of Article 368 would enable Parliament to abrogate democracy and substitute it with a totally antithetical form of government denying people social, economic and political justice by emasculating liberty of thought, expression, belief, faith and worship and by abjuring commitment to the ideal of a society of equals. In other words, no “constitutional power can conceivably go higher than the sky-high power conferred by clause (5)...”\textsuperscript{80} Justice Bhagawati in his separate and concurring judgement agreed with this view holding that what was conferred by the Constitution was only a limited amending power which therefore couldnot be converted into an absolute and unlimited one\textsuperscript{81} and therefore held clause (5) of Article 368 as unconstitutional.

\textsuperscript{78} \textit{Supra} n.71. See also \textit{supra} n.47, p. 84. He observes : “The removal of the basic structure limitation was the sole objective of the Forty Second Amendment Act legislated during the emergency”.

\textsuperscript{79} \textit{Supra} n.71 at p. 1798.

\textsuperscript{80} \textit{Ibid}.

\textsuperscript{81} Justice Bhagawati held : “Therefore, after the decisions in \textit{Kesavananda Bharati’s case}, and \textit{Smt. Indira Gandhi’s Case}, there was no doubt at all that the amendatory power of Parliament was limited and it was not (f.n. contd. on next page)
It is clear that incorporation of limited amendability itself was very much essential for the continued life of Kesavananda. Therefore, without Minerva Mills decision, Kesavananda might have been emasculated by arbitrary invocation of Article 368. In short, the decision of Minerva Mills that limited amendability of the Constitution forms an essential ingredient of the basic structure is a giant stride in explaining and crystallizing the concept of basic structure. The decision therefore ensures the continued existence of the doctrine of basic structure in the Indian constitutional scenario.

Another question that sprung up in Minerva Mills was the balancing of fundamental rights and directive principles. This question was dealt with by the Court in the context of the amendment of Article 31C. From the inception of the Constitution, the question whether fundamental rights were to be given pride of place or whether the directive principles were entitled to be so placed was a matter of heated dispute. In the earlier stages the Court conferred priority to fundamental rights. Later, the Court changed its view and held that in case of conflict, it is the directive principles, which should prevail over the fundamental rights. Still later the Court

competent to Parliament to alter the basic structure of the Constitution and Cl. (5) could not remove the doubt which did not exist. What Cl.(5) really sought to do was to remove the limitation on the amending power of Parliament and convert it from a limited power into an unlimited one. This was clearly and indubitably a futile exercise on the part of Parliament. I fail to see how Parliament which has only a limited power of amendment and which cannot alter the basic structure of the Constitution can expand its power of amendment so as to confer upon itself the power of repeal or abrogate the Constitution or to damage or destroy its basic structure.... This clause seeks to convert a controlled Constitution into an uncontrolled one by removing the limitation on the amending power of Parliament which, as pointed out above, is itself an essential feature of the Constitution and it is therefore violative of the basic structure." Id., at pp. 1826-1827.


held that neither of the above views would solve the problems of Indian society and hence declared that there was no conflict between fundamental rights and directive principles and that there was a balance between them. The amendment impugned in *Minerva Mills* empowered the State to legislate in furtherance of directives even to the level of extirpation of the basic rights. The Court held in the *Minerva Mills Case* that Part III and IV together constituted the core of commitment to social revolution. They were like the two wheels of a chariot. Hence, the Constitution of India is built to run smoothly on a fine balancing of the two wheels namely, Parts III and IV. One cannot be given primacy over the other. The harmony and balance between them, according to the Court was an essential feature of the basic structure of the Constitution of India.

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85. The relevant portion of Article 31-C as amended by the 42nd Amendment Act reads, "Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19... and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy." (Emphasized clauses were incorporated by the 42nd Amendment Act).

86. *Supra* n 71 at p. 1806. Justice Chandrachud for the Court observed thus: "The significance of the perception that Parts III and IV together constitute the of core commitment to social revolution and they together are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution.... In other words, the Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution." Agreeing with this view, Justice Bhagawati held, "There can be no doubt that the intention of the Constitution makers was that the Fundamental Rights should operate within the socio-economic structure or a wiser continuum envisaged by the Directive Principles, for then only would the Fundamental Rights become exercisable by all and a proper balance and harmony between Fundamental Rights and directive Principles secured." *Id.* at p.1851.
The Court therefore concluded that as section 4 of the 42nd Amendment Act, by which Article 31 C was amended, upset this nice balance, it was beyond the scope of the power of Parliament.

On the whole, Minerva Mills is a comprehensive decision bringing clarity to the doctrine of basic structure. Parliament cannot treat on its sweet will and pleasure the Constitution as the play thing as its power to amend itself is limited in nature; its power to amend can be exercised only without disturbing the balance between the rights conferred on the people and the legislative power of the State and Parliament cannot do away with judicial review contained in the provisions of the Constitution. By bringing these aspects under the rubric of basic structure, the Court was able to concretize the concept of basic structure and put it as a stumbling block on the arbitrary exercise of constituent power by Parliament. The holding enables the Indian Constitution and the Indian legal system to retain their identity even when attempts have been made to alter them for bringing about social revolution through legislation.

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87. Id. at p. 1811. But on the very same ground, Justice Bhagawati held that the amendment did not violate the basic structure of the Constitution and hence valid. He observed that 31C was amended with a view to provide that in case of conflict, directive principles should prevail over the fundamental rights. He opined that such a conflict was not envisaged by the makers of the Constitution and so no solution was proposed by them. That was the reason for the proposal for the amendment. He further observed that amendment far from damaging the basic structure, strengthens and re-enforces it by giving importance to the fundamental rights of the community as against the rights of a few. The amendment, therefore just codifies the existing position by providing that legislation in furtherance of directives would not be invalid on the ground that they breach Articles 14 and 19. See the discussion of the issue by Bhagawati, J. at pp. 1842-1857.

88. But for a contrary view, see the observations of Justice O. Chinnappa Reddy in Sanjeev Coke Mfg. Co v. M/s Bharat Coking Coal Ltd, A.I.R 1983 S.C. 239. In that case, he generally agreed with the view of Justice Bhagwati in the Minerva Mills Case, supra n.71. He further held that the view of the majority in that case was invalid. (at p. 248.)
Independence of Judiciary—Another Facet of Basic Structure

A serious consideration to the doctrine was given later in *Shri Kumar Padma Prasad v. Union of India*. While dealing with the qualification of a person to be appointed to the post of judge of the High Court, the apex court held that independence of judiciary was a cardinal aspect of our Constitution and that it formed a feature of its basic structure. Later, while reconsidering the decision in *S.P. Gupta v. Union of India*, and dealing with important questions relating to appointment of judges to the higher judiciary the Court in *S.C. Advocates-on-Record v. Union of India*, unanimously held that the concept of independence of judiciary was very important from the point of view of the Constitution as it was very much necessary for the maintenance of the rule of law and democracy. Considering its importance in the modern society the Court held that the concept of independence of judiciary formed an essential and basic feature of the Constitution of India. Though separation of powers and judicial review were already held to be part of basic structure, independence of judiciary was also included in the rubric only by these two decisions.

90. That was an appeal from a petition filed before the High Court of Gauhati against appointment of a person as Judge of the High Court on the grounds *inter alia* that he did not satisfy the constitutionally required qualifications and that the appointment was sought to be effected without the process of consultation envisaged by Article 217(1) of the Constitution.
91. *Supra* n. 89 at p. 446.
95. *Id., per* Pandian, J. at p. 523 and Kuldip Singh, J. at p. 647.
96. *Id., per* Pandian, J. at pp. 523-525.
97. *Id.,* at p. 680 Verma, J. (for the Court) held: “These questions have to be considered in the context of the independence of the judiciary, as part of the basic structure of the Constitution, to secure the ‘rule of law, essential for the preservation of the democratic system.’"
Basic Structure - A Norm for Constitutional Interpretation

However, the decisions in *Shri Kumar Padma Prasad* and *S.C. Advocates-on-Record* would be remembered for yet another reason. Unlike the previous cases where the basic structure was invoked by the Court, there was no question of validity of any constitutional amendments in them. The question placed for consideration in both was the process of appointment of judges to the higher judiciary and the interpretation of the constitutional provisions dealing with the same. In such a context, the Court opined that basic structure could be invoked for interpreting the constitutional provisions also. With the decisions, the doctrine of basic structure finds new horizons as the Supreme Court found it to be a useful guide for purposes other than as an anvil for determining validity of constitutional amendments. In *Shri Kumar Padma Prasad*, the Court observed that in the post-independent India, judges were not being appointed from non-judicial offices so as to avoid an executive ridden judiciary. The same was necessary for the maintenance of judicial independence, which, the Court held was one of the features of the basic structure. The Court further held that it would be 'logical and consistent' with the constitutional scheme to read the provisions dealing with appointment of judges in the light of and in accordance with a feature of basic structure.98

It was in the same tenor that a constitutional bench of the Court of nine Judges in *S.C. Advocates-on-Record* held that the constitutional provisions dealing with appointment and transfer of judges of the higher judiciary were to be construed in tune with the requirements of the concept of independence of the judiciary.99

By the decisions of *Shri Kumar* and *S.C. Advocates* the Court added two important facets to the doctrine of basic structure. The primary one is

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98. *Supra* n. 93 at p. 446.
the acceptance of judicial independence as another feature of the basic structure. The holding of the Court evolved a new facet to constitutional construction that the court recognized the doctrine of basic structure as a very important norm for constitutional construction. This added a new horizon to the doctrine, as till then the Court was invoking the doctrine of basic structure only to limit the constituent power of the Parliament.

**Basic Structure- A Norm for Constitutional Authorities**

Once the doctrine of basic structures, as introduced by the Supreme Court gained an undeniable role in the Indian legal system, the court began to seek its assistance for purposes other than evaluation of constitutional amendments. The court used the doctrins as an anvil for testing the action of various constitutional authorities.

The concepts of secularism and federal structure share some common elements under the Indian Constitution. Both are understood and explained differently than the way in which they are understood in the west and are placed in high pedestals under our Constitution. They are considered as of such high importance that some of the judges in *Kesavananda* held them as features of basic structure. However, with the increasing role of religions in the society and the practice of political parties seeking religious support, secularism was badly threatened. Similarly, with the inauguration of the era of globalization, the power of the centre became a threat to the federal structure. Small wonder, they form the Achilles tendon of the Indian Constitution. Though these important concepts go down deep into the constitutional roots, threat to them cannot be ruled out. Experience shows that the greatest threat to secularism and the federal structure envisaged by the Constitution is more from the

100. Earlier, some of the judges in *S.P.Gupta v. Union of India*, 1981 Supp. S.C.C. 87 (Bhagawati, J). at p. 221 and (Fazl Ali, J.) at p. 408 held that independence of the judiciary was also a feature of the basic structure of the Constitution of India.

101. *Supra* nn. 36-40 and the text accompanying.
constitutional and administrative authorities than it is from the exercise of constituent power. One of such instances where both were in peril is the act of the constitutional authorities as explained in *S.R.Bommai v. Union of India.* The case dealt with interpretation of Article 356 that provides for dismissal of State Government by the President for the failure of the constitutional machinery in the State. The provision is couched in unrestricted terms that the exercise of the power has always been unilateral. The same has raised hue and cry from many quarters. To add fuel to the flames, the Supreme Court had taken the view that the power of the President under the provision was beyond judicial review. Has the doctrine of basic structure any role in limiting this power of the President?

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102. (1994) 3 S.C.C. 1. That is a collection of cases either by special leave appeal or by transfer from High Courts. Those cases arose out of the dismissal of the Governments of Nagaland in 1987, Karnataka in 1989, and dismissal of the governments and dissolution of the Legislative Assemblies of Rajasthan, M.P. and H.P., in 1992 following the crisis that took place on demolition of the structure in Ayodhya. They involve a common question as to the interpretation of Article 356, which stipulates for declaration of presidential rule in States and judicial review of such proclamation.

103. Article 356 reads: "If the President, on receipt of a report from the Governor... of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by proclamation-

(a) assume to himself all or any of the functions of the Government of the State and all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor... or any body or authority in the State other than the Legislature of the State;

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

(c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State".

In *S.R. Bommai*, two important questions were raised *inter alia* before the Court. One was how the President could determine that the administration in a state was not carried out in accordance with the provisions of the Constitution so that he could dismiss the State Government and declare the President's rule in the State under Article 356. The other was whether such a decision of the President was amenable to judicial review. While dealing with the first question, the Court held that secularism formed an essential ingredient of the basic structure\(^{105}\) and held\(^{106}\) that

\(^{105}\) *Supra* n.101, *per* Ahmedi, J. at p. 78; Sawant and Kuldip Singh, JJ. at p. 149; Ramaswamy, J. at p. 170 and Jeevan Reddy and Agarwal, JJ. at p.298. Justice Pandian was in agreement with the views of Justice Jeevan Reddy. at p. 66.

\(^{106}\) *Id.* at pp. 146, 147 and 148, *per* Sawant. J., speaking for himself and Kuldip Sing said, “One thing which prominently emerges from the above discussion on secularism under our Constitution is that whatever the attitude of the State towards the religions, religious sects and denominations, religion cannot be mixed with any secular activity of the State.... religious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution.... If therefore, the President had acted on the aforesaid 'credentials' of the Ministries in these States... it can hardly be argued that there was no material before him to come to the conclusion that the Governments in the ... States could not be carried on in accordance with the provisions of the Constitution.” Justice Ramaswamy observed, “They/he should not mix religion with politics. ... Programmes or principles evolved by political parties based on religion amounts to recognising religion as a part of the political governance which the Constitution expressly prohibited. It violates the basic features of the Constitution....Any act done by a political party or the Government of the State run by that party in furtherance of its programme or policy would also be in violation of the Constitution and the law. When the President receives a report from a Governor or otherwise had such information that the Government of the State is not being carried on in accordance with the provisions of the Constitution, the President is entitled to consider such report and reach his satisfaction in accordance with law.” (at pp.206-207). B.P.Jeevan Reddy, J. speaking for himself and Aggarwal, J. observed, : “If the President was satisfied that the faith of these BJP Governments in the concept of secularism was suspect in view of the acts and conduct of the parties controlling these Governments and that in the volatile situation that developed pursuant to

(f.n. contd. on next page)
determination of the issue whether the State Government failed to carry out the administration in accordance with the provisions of the Constitution depended also upon the question whether it failed to uphold and maintain secularism.\textsuperscript{107} In this case, secularism has been invoked by the Court as a criterion to determine the constitutionality of administration carried out by a state government on the ground that it was a feature of basic structure.

Dealing with the question whether the ‘satisfaction’ and action of the President under Article 356 were amenable to judicial review, the judges observed that the power of the President under the provision could not be exercised in an arbitrary or \textit{malafide} manner,\textsuperscript{108} and that it was conditional in nature.\textsuperscript{109} All of the judges were of the opinion that the presidential power under the Article was not unlimited and hence it was unanimously held\textsuperscript{110} that the power of the President to dismiss the State government was subject to judicial review.\textsuperscript{111} Such a conclusion was reached by the Court on the ground \textit{inter alia} that arbitrary exercise of

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\item the demolition, the Government of these States cannot be carried on in accordance with the provisions of the Constitution, we are not able to say that there was no relevant material upon which he could be so satisfied.... If the President was satisfied that the Governments, which have already acted contrary to one of the basic features of the Constitution, viz., secularism, cannot be trusted to do so in future, it is not possible to say that in the situation then obtaining, he was not justified in believing so.” (at pp. 295-296). Justice Pandian agreed (at p.66) with what Justice Jeevan Reddy said. Justice Ahmadi (at p.78) agreed with the observations of Justice Ramaswamy and Justice Jeevan Reddy on this count.
\item \textsuperscript{107} Such a conclusion was drawn by the Court from the various provisions of the Constitution like Articles 25, 26, 27, 28, 29, 30, 31 and 51-A.
\item \textsuperscript{108} \textit{Supra} n.101 at p. 374. (\textit{Per} Sawant, J., for Kuldip Singh and himself).
\item \textsuperscript{109} \textit{Id.}, p. 280. (\textit{Per} Ramaswamy, J.)
\item \textsuperscript{110} \textit{Id.} at p. 80. \textit{Per} Ahmadi J. Verma, J. (for Yogeshwar Dayal and himself) at p. 83; Ramaswamy, J. at pp. 177-178 and Jeewan Reddy (for Aggarwal, J., and himself) at pp. 246-247.
\item \textsuperscript{111} However, there was difference of opinion among the judges as to the scope and extent of judicial review in this respect.
\end{itemize}
the power under Article 356 runs counter to the federal structure of the Constitution which according to the Court\textsuperscript{112} was an element of basic structure of the Constitution\textsuperscript{113} and that the President had to exercise the power under Article 356 in such a manner as not to whittle down the federal structure.\textsuperscript{114}

The decision is innovative in two respects. It recognized secularism and federal structure as basic features of our Constitution. Though the concept of secularism has been considered as an ingredient of basic structure by some of the judges in various cases right from the decision of Kesavananda, in none of them the Court had specifically held that it formed part of basic structure. Unlike the previous holdings, the decision is creative as it held that a feature of basic structure could be a loadstar

\textsuperscript{112} Though all of the judges have not used the expression basic structure, it is evident from their holding that they conferred the federal structure of the Constitution the status of basic structure. See infra n.114.

\textsuperscript{113} Supra n. 101, per Sawant and Kuldip Singh, JJ. (at p. 112); Ramaswamy, J., (at p. 205) and Jeewan Reddy and Dayal, JJ., (at p. 217).

\textsuperscript{114} Id. at p. 112, per Sawant and Kuldip Singh, JJ. It was held: “Democracy and federalism are the essential features of our Constitution and are part of its basic structure. Any interpretation that we may place on Article 356 must therefore help to preserve and not subvert their fabric. The power vested \textit{de jure} in the President but \textit{de facto} in the Council of Ministers under Article 356 has all the latent capacity to emasculate the two basic features of the Constitution and hence it is necessary to scrutinise the material on the basis of which the advice is given and the President forms his satisfaction more closely and circumspectly” Justice Ramaswamy held, “The exercise of power under Article 356 by the President through Council of Ministers places a great responsibility on it and…. It is to reiterate that the federal character of the Government reimplies the belief that the people’s faith in democratically elected majority or coalition Government would run its full term, would not be belied unless the situation is otherwise unavoidable…” Justice Sawant observed, “Article 365 merely says that in case of failure to comply with the directions [of the centre] given, “it is lawful” for the President to hold that the requisite type of situation [contemplated by Article 356(1)] has arisen. It is not as if each and every failure \textit{ipso facto} gives rise to the requisite situation.”
for evaluating the state government through Article 356. The Court renders a wide interpretation to the expression, 'provisions of the Constitution' in Article 356 by including secularism- a feature of basic structure within it. For the first time, the doctrine has been utilized by the Court as a touchstone of the functions of constitutional authorities when it was held that constitutionality of actions of the State Government and justifiability of invocation of Article 356 by the President could be evaluated on the basis of a feature of basic structure namely, secularism. Similarly, assistance of another feature-federalism-was sought for checking the possibility of arbitrariness of the presidential action, and to hold that the decision of the President under Article 356 was amenable to judicial review. Thus, the Court has projected the doctrine of basic structure as a criterion for assessing the validity of the action of the authorities created by the Constitution.

With the decisions of Shri Kumar Padma Prasad, S.C. Advocates, and S.R. Bommai, one sees the doctrine of basic structure playing other vital roles. In the former two cases, the Court has for the first time used it as a tool for constitutional construction while, in the latter it has been used by the Court as a criterion for testing the constitutionality of actions of certain authorities under the Constitution. These decisions clearly indicate that in future any exercise of constitutional power by an authority in a way prejudicial to any of the features of basic structure of the Constitution is likely to be struck down as unconstitutional and that the doctrine can be employed for purposes other than for evaluating constitutional amendments.

**Basic Structure-A Norm for Legislation?**

What is the relationship between the doctrine of basic structure and the legislative power? Can the doctrine be invoked for evaluating and striking down legislation?115 Such a question was raised for the first time

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115. This question becomes relevant mainly because, some of the ingredients of basic structure developed by the Court are not referable to any specific provision of the Constitution. Democracy, federalism and independence of
before the Court in *Indira Gandhi*\textsuperscript{16}. The Court per majority\textsuperscript{17} held\textsuperscript{18} that the doctrine of basic structure was to be the touchstone of constitutional amendments only and that it could not be a yardstick to determine the constitutionality of exercise of legislation.\textsuperscript{19} Such a legal proposition leads to a situation in which the legislative authority would be able to do certain things, which the constituent authority, the mother of legislative, executive and judicial powers cannot do. Undoubtedly such a proposition of law is meaningless as it defeats the very purpose for which the doctrine of basic structure has been introduced into the Indian legal system. Further, it is clear from the decisions in which the doctrine has been developed and applied that the Court has recognized the doctrine of basic structure as part and parcel of our Constitution. Obviously legislation has to satisfy the requirements of the Constitution including the basic structure. Even the Constitution stems from the basic structure and hence it can be

judiciary are some of them. In such a context, if basic structure does not form a criterion for testing the validity of legislation, law not violating the provisions of the Constitution, but violative of basic structure would remain valid. which is an absurd proposition.

\textsuperscript{16} *Supra* n. 51.

\textsuperscript{17} The majority consisted of Ray, C.J., Mathew and Chandrachud, JJ. (M.H. Beg, J. *contra*) However Justice H.R.Khanna refused to express any opinion on this issue as he thought that the case could be decided on other grounds.

\textsuperscript{18} Justice Ray, C.J. held: "The contention of the respondent that the Amendment Acts of 1974 and 1975 are subject to basic features or basic structure of basic framework fails on two grounds. First, legislative measures are not subject to the theory of basic features or basic structure or basic framework." (at p. 66) Justice Mathew observed, "Besides, those cases being cases of legislative validation, need not pass the test of the theory of basic structure which, I think, will apply only to constitutional amendments." (at p. 131.) Justice Chandrachud held, "The constitutional amendments may, on the ratio of the Fundamental Rights Case, be tested on the anvil of basic structure. But apart from the principle that a case is only an authority for what it decides, it does not logically follow from the majority judgment in the Fundamental Rights case that ordinary legislation must also answer the same test as a constitutional amendment." (at p. 261.)

\textsuperscript{19} Only Justice M.H. Beg held that even legislative powers could be subjected to the doctrine of basic structure. *Id.* at p. 236.
considered as the very foundation of the Indian legal system. The decision in *Indira Gandhi* that the doctrine of basic structure is not applicable to test the validity of ordinary legislative action is therefore incorrect.

However, in *Sampath Kumar*,\(^\text{120}\) the Court tested the validity of the Administrative Tribunals Act, 1985 on the basis of basic structure, even though the question whether the validity of the statute could be examined on the basis of the doctrine was not directly in issue in that case. This question came before the Supreme Court in *M. Ismail Faruqui v. Union of India*,\(^\text{121}\) where, the constitutionality of the Acquisition of Certain Areas at Ayodhya Act, 1993 was challenged. The Court has examined the validity of the provisions of the Act on the basis of secularism—a feature of basic structure.\(^\text{122}\) This issue got reconsideration later in *G.C.Kanungo v. State of Orissa*.\(^\text{123}\) Dealing with the constitutionality of an amendment to the Arbitration Act, 1940 to nullify an arbitration award, the Court held that the amendment was an encroachment on the judicial power of the State “resulting in infringement of a basic feature of the Constitution- the Rule of Law”\(^\text{124}\) and struck down the amendment. The various decisions by which the features of basic structure were delineated by the Court give a picture that basic structure cannot be derived from

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120. A.I.R 1987 S.C. 386.
121. (1994) 6 S.C.C. 360. This case arose as a result of writ petitions filed under Article 32 against the acquisition of properties at the cite of disputed Babri Masjid area by the central government and the reference to the Supreme Court under Article 143 to decide whether ‘a Hindu temple or any Hindu religious structure existed prior to the construction of the Ram Janma Bhumi-Babri Masjid ... in the area on which the structure stood’.
122. *Id.*, pp. 397, 404.
123. (1995) 5 S.C.C. 96. The amount to be paid by the State to the petitioners (contractors) was fixed by arbitration proceedings. To nullify the liability, the government enacted Arbitration (Orissa Amendment) Act, 1991 amending Arbitration Act, 1940. The constitutionality of the amendment was challenged by the petitioners as violative of Article 14, in a writ petition under Article 32 of the Constitution.
any specific provision of the Constitution. It on the other hand is the sprint that permeates the whole of the constitution. When basic structure is the spirit behind the Constitution, how can statutes be said to be outside the pale of the doctrine? The drift of the decisions in Ismail Faruqui and G.C. Kanungo that statutes were also liable to evaluation on the basis of basic structure seems to lay down the correct proposition of law.

**Basic Structure - Can it be Substituted?**

An analysis of the decisions of the Court reveals that as years rolled by, the Court has concretized and crystallized the doctrine of basic structure. The Court widened the scope and ambit as well as dimensions and functions of the doctrine. Here a different question requires consideration. Can there be a substitute for a feature recognized as an ingredient of basic structure? The expression basic structure *ex facie* means that it is basic and cannot be altered or substituted. However, the Supreme Court was not emphatic of this aspect even after one-and half decades of propounding the doctrine as is clear from the holding in *S.P. Sampath Kumar v. Union of India*. While challenging the vires of the Administrative Tribunals Act, the question mooted there was whether judicial review could have an alternative. The Court did not disagree with the decision on *Minerva Mills* that judicial review formed part of the basic structure of the Constitution. But the Court held in *Sampath Kumar* that legislation could be considered violative of the Constitution only if it took away judicial review in toto. This means that partial prohibition of judicial review would not be bad on the ground that it violated the basic structure. Agreeing with and drawing conclusions from the holding of Justice Bhagawati in the *Minerva Mills*, the Court further held that the

125. *Supra* n. 120. A petition was filed under Article 32 challenging the vires of the Administrative Tribunals Act, 1985. The Act framed under Article 323-A (incorporated by the 42nd Constitutional Amendment Act) was challenged on the ground that Section 28 of the Act, which excluded jurisdiction of the High Court under Articles 226 and 227 struck at the root of one of the features of the basic structure viz., judicial review.

126. *Supra* n. 71.
presence of effective alternative mechanisms or arrangements for settling disputes would be a constitutionally viable alternative for judicial review. The Court held that the impugned Act did not annul judicial review since the jurisdiction of the Supreme Court under Articles 32 and 136 remained intact even after the amendment of the Constitution and incorporation of Article 323A. However, the Court did not agree with the view that the tribunals should be supplemental to and not substitution of high courts.

Justice Bhagawati who rendered a separate opinion concurred with it. Hence the Court refused to strike down the Act as violative of judicial review - a feature of basic structure. However the Court incorporated a word of caution of substituting judicial review that “the Tribunal should be a real substitute of the High Court - not only in form and de jure but also in content and de facto.” Clearly, the holding that recognition of a feature as basic structure does not bar legislature from substituting it with a norm that is less efficient than the basic structure is not appealing to reasoning. That at times enables legislatures to reduce the scope of the doctrine of basic structure. Obviously, the Court has not examined the justifiability of

127. *Supra* n. 125 at p. 395. The Court held: “We have already seen that judicial review by this Court is left wholly unaffected and thus there is a forum where matters of importance and grave injustice can be brought for determination or rectification. Thus exclusion of the jurisdiction of the High Court does not totally bar judicial review. This Court in Minerva Mills Case did point out that ‘effective alternative institutional mechanisms or arrangements for judicial review can be made by Parliament. Thus it is possible to set up an alternative institution in place of the High Court for providing judicial review.’”

128. *Id.*, p. 395. It is to be noted that by holding that the Administrative Tribunals Act was constitutionally valid, the Court digressed from the real issue involved in the case. The question that really emerged before the Court was the validity of the 42nd Amendment Act, which added Article 323A to the Constitution, which permitted reduction of the scope of judicial review. However instead of dealing with this issue, the Court preferred to deal with the vires of the statute. The Court avoided dealing with the validity of the amendment act by examining the vires of the impugned statute.

129. *Id.*, pp. 389-390.

130. *Supra* n. 125 at p. 396.
substituting basic structure in exercise of legislative power while the constituent authority is denied the power to act contrary to the basic structure.

In *P. Sambamurthi v. State of A. P.*, the Court exhibited a consistent view in this respect. In that case, the constitutional validity of clauses (3) and (5) to Article 371D as inserted by the 32nd Amendment Act, 1973 was challenged on the ground that they ran counter to judicial

131. A.I.R. 1987 S.C. 663. It was a bunch of writ petitions challenging the constitutional validity of clauses (3) and (5) of Article 371-D of the Constitution.

132. Article 371D is a special provision with respect to the State of Andhra Pradesh. Clause (3) of the Article reads: “The President may, by order, provide for the constitution of an Administrative Tribunal for the State of Andhra Pradesh to exercise such jurisdiction, power and authority [including any jurisdiction, power and authority which immediately before the commencement of the Constitution (Thirty-second Amendment Act,) 1973, was exercisable by any court (other than the Supreme Court) or by any tribunal or other authority] as may be specified in the order with respect to the following matters namely:-

(a) appointment, allotment or promotion to such class or classes of posts in any civil service of the State, or to such class or classes of civil posts under the State, as may be specified in the order;

(b) seniority of persons appointed, allotted or promoted to such class or classes of posts in any civil service of the State, or to such class or classes of civil posts under the State, or to such class or classes of posts under the control of any local authority within the State, as may be specified in the order;

(c) such other conditions of service of persons appointed, allotted or promoted to such class or classes of posts in any civil service of the State or to such class or classes of civil posts in any civil service of the State or to such classes of posts under the control of any local authority within the State, as may be specified in the order, Clause (5) reads thus, “The order of the Administrative Tribunal finally disposing of any case shall become effective upon its confirmation by the State Government or on the expiry of three months from the date on which the order is made, whichever is earlier; Provided that the State
review which was a feature of the basic structure. Obviously, the Court struck down the Proviso to clause (5) of Article 371D, which declared that the order of administrative tribunals could be modified or annulled by the Government. The impact of the amendment is clear. Even if the Tribunal rendered a decision, without the consent of the Government, its order could not be implemented. The Court observed that such a provision ran counter to the basic principle of rule of law. The Court held:

“Now if the exercise of the power of judicial review can be set at naught by the State Government by overriding the decision given against it, it would sound the death knell of the rule of law...because then it would be open to the State Government to defy the law and yet to get away with it. The Proviso to clause (5) of Article 371-D is therefore clearly violative of the basic structure doctrine.”

In other words, the Court struck down Article 371-D on the ground that it did not constitute an effective alternative for judicial review, an ingredient of basic structure of the Constitution and not because it excluded judicial review.

Government may, by special order made in writing and for reasons to be specified therein, modify or annul any order of the Administrative Tribunal before it becomes effective and in such a case, the order of the Administrative Tribunal shall effect only in such modified form or be of no effect as the case may be.”

133. *Id.* at p. 667.
134. *Id.* at p. 668.
135. For, the Court held: “No constitutional objection to the validity of Cl.(3) of Art.371-D could be possibly be taken since we have already held in *S.P.Sampath Kumar v.Union of India*, decided on 9th December 1986 that judicial review is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution, but Parliament can certainly without in any way violating the basic structure doctrine amend the Constitution so as to set up an effective alternative institutional mechanism or arrangement for judicial review.”
The decisions in *Minerva Mills*,136 *Sampath Kumar*137 and *Samba Murthi*138 share some common features. In all of them judicial review was recognized as part and parcel of basic structure not in an independent capacity but as one necessary for guaranteeing the continuance of the aspects of the Constitution which the Court already recognized as ingredients of the basic structure. The Court felt that only total exclusion of judicial review would destroy democracy and rule of law. That perhaps is the reason for the Court to hold in all of these cases that though judicial review cannot be abrogated, it could be partially excluded and substituted by an equally efficacious and alternative remedy. The idea that even if a feature is an ingredient of basic structure, it could have a substitute was raised for the first time by Justice Bhagawati in the *Minerva Mills Case*. It is doubtful whether feasibility of such a proposition was examined by the Court in a proper perspective in *Sampath Kumar* and *Sambamurthy*. Recognition of a feature is identified as an ingredient of the basic structure means that it is more important for the maintenance of the identity of the Constitution and hence more importance than the Constitution. In such a context it is doubtful whether it can be substituted by any other scheme at all. For, substitution of such a feature of basic structure by any other concept means destruction of that feature and the same amounts to watering down its contents. It is doubtful whether the holdings take into account fully the scope, content and purpose of the introduction of the concept of basic structure and they undoubtedly reduce the status of basic structure in the constitutional jurisprudence. Is not the holding an indication that each and every feature of basic structure could be substituted? Such a version of the concept is certainly dangerous and would defeat the very purpose for which the doctrine has been introduced.

It is in such a context that the decision of *L. Chandra Kumar v. Union of India*\(^{139}\) becomes highly relevant. The Court reiterated its stand in *Minerva Mills* that judicial review was a feature of the basic structure of the Constitution. The Court further held that the jurisdiction of the Supreme Court under Article 32 and that of the high courts under Articles 226 and 227 also formed part of the basic structure of the Constitution and therefore they cannot be ousted or excluded at all.\(^{140}\) It was justified on the ground that the jurisdiction of High Court under Articles 226 and 227 was as important as that of the Supreme Court under Article 32.\(^{141}\) The Court highlighted the importance of judicial review on the basis of the independence enjoyed by the judiciary.\(^{142}\) On a variety of grounds, the Court considered the powers vested in high courts under Articles 226

139. A.I.R. 1997 S.C. 1125. It was a group of special leave petitions, civil appeals and writ petitions with certain common questions. Questions raised in these cases were whether the power under Article 323 A (2) (d) or Article 323 B (3) (d) of the Constitution conferred on Parliament totally exclude jurisdiction of all courts except that of the Supreme Court under Article 136; whether the disputes and complaints raised in respect of the exercise of power under Articles 323 A clause (1) or Article 323 B (2) were beyond the scope of the power of judicial review of High Courts under Articles 226 and 227 and that of the Supreme Court under Article 32 and whether the Tribunals constituted under Articles 323 A and B be considered as effective substitutes for High Court.

140. Id., p.1150.

141. Ibid. The Court observed: “If the power under Article 32 of the Constitution, which has been described as the "heart" and "soul" of the Constitution, can be additionally conferred upon "any other Court," there is no reason why the same situation cannot subsist in respect of the jurisdiction conferred upon the High Courts under Article 226 of the Constitution.”

142. Id., p. 1149. In reaching the conclusion that Article 32 formed part of the basic structure, the Court might have been influenced by the observation made by Dr. Ambedkar at the time of enacting the provision in the Constituent Assembly that it was the most important one in our Constitution. He said: “If I was asked to name any particular Article in this Constitution as the most important-an Article without which the Constitution would be a nullity-I could not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance.” VII C.A.D. 953.
and 227 as very important which on no condition be excluded. The Court observed that administration of justice by tribunals leaves much to be desired and the remedy under Article 136 was too costly and would lead to crowding of cases in the Supreme Court. Therefore, the Court held that decisions of tribunals were reviewable by Division Bench of high courts. The Court further extended the scope of judicial review to include specifically jurisdiction of judicial superintendence by high courts over the decisions of all courts and tribunals within their respective jurisdictions as envisaged by the Constitution of India. In short, the Court deviated from its earlier stand in Minerva Mills, Sampath Kumar and Samba Murthi that judicial review could be substituted by equally effective methods and clarified that judicial review as envisaged by Article 32, 226 and 227 cannot in any way be substituted. The Court further held that the jurisdiction of tribunals was only supplemental to and not in substitution of the review power of High Courts. However, the Court pointed out that in the prevailing circumstances, the workload pending in high courts was very high and therefore, the jurisdiction conferred on tribunals need not be trimmed to vest full power on high courts. The Court therefore held that Tribunals could hear and decide matters where vires of statutory provisions are questioned. They have the power to test the vires of subordinate legislation and rules. In other words, litigants would not have the right to approach High Court in the first instance unless the question involved includes one regarding the vires of the parent statute which created the Tribunal.

143. Id., 1150.
144. Id., p. 1153.
145. Id., p. 1154.
146. Ibid.
147. Id., p 1150. The Court held, “We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all Courts and Tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided”.
148. Id., p.1156.
149. Id. at pp. 1154-1155.
Clearly, it is only after the decision in *Chandra Kumar* that the concept of judicial review got the full-fledged status as a feature of basic structure. The change in the view of the Court in *Chandra Kumar* reflects the correct perception of the Court that judicial review is so important in our legal system that a basic feature cannot be substituted. While in the earlier decisions the Court had given importance to judicial review only as an accessory to some other goals to be achieved by the Constitution, in *Chandra Kumar*, the Court has raised judicial review from its status of an accessory element to the level of a salient feature of the basic structure of the Constitution. The decision in *Chandra Kumar* undoubtedly is a loadstar to the effect that once a feature is recognized as an ingredient of basic structure, on no account shall it be substituted.

*Alteration of Basic Structure*

An interesting question that calls for examination is whether the basic structure can be altered in any manner. Can we in some way change the identity of our Constitution? If possible, what is the method for doing it? These are some of the questions that naturally arise in this context. The Supreme Court has not so far ventured to make any observation on these issues. But we can deduce some clues from the various decisions of the Supreme Court in this regard. If we say that the basic structure is inalterable, it means that the future generations are always bound by the declarations of the past ones. Incorporation of provisions for amending constitutions has been justified on the ground that unalterable constitutions are always prone to be swept away through revolutions. The same is true of basic structure also. Even though basic structure constitutes the fundamental principles upon which the Constitution is erected, at times a nation requires alteration of such fundamentals of the legal system. Therefore the proposition that the basic structure is unalterable on any account cannot be treated as a wise one. The doctrine was introduced by the apex court as a limitation on the *constituent power* of Parliament and not on the *alterability* of the Constitution as such. The doctrine was only a precautionary measure against arbitrary exercise of the constituent power by Parliament. In the absence of such a doctrine, if a government
wielded a thumping majority in Parliament, it would be able to amend the Constitution in any fashion it likes. Such a check on the constituent power was considered necessary to prevent the possibility of the Constitution becoming a plaything in the hands of the Parliament which is only a delegate of the real sovereign, namely the people. It may be difficult for a representative legislative body like Parliament to keep themselves away from political ideologies as they are constituted on the basis of political alignments. The identity of the Constitution can be altered with the concurrence of the people. In a truly democratic state, nothing should stand in the way of altering the Constitution by the people themselves. In other words, to repeal the Constitution or to alter its identity and to bring forth a new Constitution, referendum can be resorted to even though alteration of the fundamentals of the Constitution cannot be left to the sweet will of the representative body. Constitutions of other nations contain provisions for referring important matters relating to their alteration to the people. The decisions delineating the doctrine of basic structure do not stand in the way of changing them through referendum. Though there is no specific provision in the Constitution of India, sanction of the people is the only possible way to get the basic structure amended. In short, the one and only safe and possible method of amending the basic structure is a referendum. Perhaps, the future development of case law may indicate such a course as the permissible method.

An Appraisal of the Doctrine

A study of cases dealing with the doctrine reveals that from the very inception had a chequered history. However, once established, and

150. The 24th, 39th and 42nd amendments are the best examples for exercise of such a power. In fact such indiscriminate exercise of the power to amend the Constitution has invited the doctrine of basic structure into the legal system.

151. See for instance, Federal Constitution of the Swiss Federation, Art. 120.

152. There were attempts to reconsider the decision in Kesavananda to reconsider the doctrine of basic structure. See, for a resume, Granville Austin, Working A Democratic Constitution : A History of Indian Experience, Oxford (2000), pp. 328-333.
accepted by the Indian legal system, the doctrine had a more flamboyant and colourful life than it was expected to have. Its energetic life is evident from the ever-widening use of the doctrine for purposes other than those for which it was initially intended by the judiciary. It is clear with these cases that the doctrine of basic structure has been rightly construed as a norm for evaluating statutory pieces also. This implies that the Court has recognized the doctrine that permeates the entire legal system instead of an aspect of the Constitution.

An examination of the doctrine of basic structure reveals that it carries the characteristics of the grundnorm as propounded by Kelsen. The grundnorm, being the basic norm of the legal system, is the criterion for testing the validity of all other norms of the legal system and is immutable. Basic structure is considered by the Supreme Court as immutable while Kelsen conferred such a status to the basic norm of the legal order which but is a natural reality lying behind the norms of the legal order. 

Illustrations of the doctrine of basic structure also establish that the ‘basic structure’ forms the highest basic norm in the hierarchy of norms. The expressions ‘basic structure,’ ‘basic features’ ‘essential features’ or ‘principles’ of the Constitution stand in close relation with the “Constitution in the transcendental-logical sense” as proposed by Kelsen. In other words, like grundnorm, basic structure is the norm of all other norms in the legal system.

Moreover, the view of the Supreme Court in Kesavananda that the power to amend the Constitution under Article 368 does not envisage alteration of the basic structure naturally emanates from the reasoning that an amendment has to be in conformity with the basic norm. Validity of the

153. See Kelsen, “The Function of the Constitution” as quoted in Lloyd's Jurisprudence, Stevens and Sons, London (1985), p. 382. He observes: “the basic norm is thus not a product of free invention. It refers to particular facts existing in natural reality to an actually laid down and effective constitution and to the norm creating and norm-applying facts in facts established in conformity with the constitution.”

154. Id., p. 379.
provisions in the Constitution, which contains individual norms, depends on their conformity with the general norms. Amendment of constitutional provisions being alteration of individual norms contained in the Constitution, the same should be in conformity with the general norms lying behind them. It consequently implies that the power to amend the Constitution cannot be exercised in such a manner as to affect the general norms. It is clear from the holding of the majority in *Kesavananda* that though Parliament could amend each and every provision of the Constitution, they could not be altered in such a fashion as to affect the fundamentals from which they emerge. Such reasoning reveals that there is nothing wrong in subjecting the power of Parliament, which is a sovereign, to alter the norms of English legal order can be found in the celebrated words of Edward Coke:

"...it appears in our books that in many cases the common law will control Acts of Parliament and sometimes adjust them to but utterly void: for when an Act of Parliament is against common right or reason or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void."

However, it is doubtful whether the significance of the doctrine has been fully-well appreciated by the Court. One of such instances is where the Court has considered the retrospective operation of the doctrine. Does the doctrine imply that amendments right from 1950 are liable to be evaluated on the basis of the doctrine of basic structure enunciated in *Kesavananda* in 1973? This question was raised before the Supreme Court in *Waman Rao v. Union of India*. The issue considered by the

155. The validity of the lower, individual norms is grounded y the validity of the higher general norms. And the judge, in fact, so grounds his judgements that it conforms to a valid general legal norm that authorizes him." Supra n. 1 at p. 110.


Court in that case was whether Articles 31A and 31B incorporated by the first amendment Act and 31C included by the twenty-fifth amendment violated basic structure of the Constitution. The Court held that the first Amendment has made the constitutional goal of equal justice a living truth and hence it strengthened rather than damaging the basic structure and so Article 31A and being similar in nature, Article 31C were valid. However, the Court did not examine the constitutionality of Article 31B and the incorporation of the IX schedule on the basis of the doctrine of basic structure. Instead, the Court proceeded to examine the constitutionality of statutes incorporated into the ninth schedule and held that amendments before 24 April, 1973 (the day on which Kesavananda was decided) would not be open to challenge on the ground that they violated the basic structure. It was held that amendments to the Constitution and incorporation of laws in the ninth schedule subsequent to that date alone were liable to be judicially reviewed on the anvil of basic structure of the Constitution. The Court reached the conclusion that the doctrine had only a prospective operation on the ground that if laws included in the IX schedule prior to the decision were also evaluated on the basis of the doctrine, it would upset the settled claims and titles of the people who acted on the then existing constitutional position. But it is doubtful

158. The Court held: “The First Amendment has thus made the constitutional ideal of equal justice a living truth. It is like a mirror that reflects the ideals of the Constitution; it is not the destroyer of it basic structure.... The First Amendment is aimed at removing social and economic disparities in the agricultural sector. It may happen that while existing inequalities are being removed, new inequalities may arise marginally and incidentally. Such marginal and incidental inequalities cannot damage or destroy the basic structure of the Constitution.” Id., p. 285.

159. The Court observed thus: “We propose to draw a line, treating the decision in Kesavananda Bharati as the landmark. Several Acts were put in the Ninth Schedule prior to that decision on the supposition that the power of the Parliament to amend the Constitution was wide and untrammelled. The theory that the Parliament cannot exercise its amending power so as to damage or destroy the basic structure of the Constitution, was propounded and accepted for the first time in Kesavananda Bharati. This is one reason for upholding the laws incorporated into the Ninth Schedule before 24 April.

(f.n. contd. on next page)
whether what the court has done is correct. The concept of basic structure as developed by the court was not a closed concept\textsuperscript{159a}. The cases reveal that the court was widening the doctrine by including more elements into it, and also finding new horizons for its use as a norm for evaluating legislation, constitutional interpretation and discretion of constitutional authorities. In such a context, limiting the application of the doctrine to post \textit{Kesavananda} era may only help putting the doctrine to desuetude as many vital questions arising out of the pre-\textit{Kesavananda} amendments and laws would escape evaluation on the basis of the doctrine as expounded by the court. Hence, instead of limiting the application of the doctrine to amendments and laws made after the decision in \textit{Kesavananda}, the court could have held the doctrine applicable to all the laws, however, holding that the pre-\textit{Kesavananda} amendments and law would be invalid only for the post-\textit{Kesavananda} era. The advantage of such a position is that impact of any pre-\textit{Kesavananda} amendment or and legislative measures which violate the concept of basic structure could be limited to the pre-\textit{Kesavananda} era.

Yet another instance, where the judiciary had a wrong perception of the doctrine, leading to its non-application is where the court did not invoke the doctrine where it could have been profitably invoked is where the question of right of voters was raised in \textit{Association for Democratic Rights v. Union of India,\textsuperscript{160} Union of India v. Association for

\textsuperscript{159a} The doctrine of basic structure is an excellent for legal category of indeterminate reference. For the concept of indeterminate reference, see, Julius Stone, \textit{Legal System and Lawyers' Reasonings}, Universal (1999) pp.263-267.

\textsuperscript{160} A.I.R. 2001 Del. 127.
Democratic Rights and People’s Union for Civil Liberties v. Union of India. In all them, the High Court and the Supreme Court held that the electorate had the right to know the background of its representatives and that the right is derived from the right to freedom of speech and expression under Article 19(1)(a). The Court did not seek the help of the doctrine of basic structure for examining the concept of the right of the electorate. It is however, open to debate whether the judiciary has reasoned so, after due deliberation of its consequences. Derivation of the right of voters to know from fundamental rights leads to a situation where the right could be restricted or regulated by amending the Constitution. How can free and fair election, the life blood of democracy remain a feature of basic structure, without conferring that status to the right of the electorate to know?

Nevertheless, in inventing, crystallizing and ramifying the doctrine, the Indian Judiciary has exhibited a high degree of creativity. A study of the cases where the doctrine was applied proves that the doctrine has gained an undeniable place in the Indian legal system. The cases testify a saga of assertion of constitutionalism and constitutional principles over the policies of the Government. They further evidence judicial assertion over actions of other constitutional authorities. These cases testify that the doctrine is ingrained into the Indian constitutional ethos in an unrootable manner. That is evident from the rethinking of Parliament to incorporate the doctrine of basic structure into the Constitution. It is true that the judiciary invented the doctrine of basic structure to tide over the scuffle between the judiciary and the legislature in an era of parliamentary

163. That is clear from the 45th Constitution Amendment Bill, which was an attempt on the part of the Parliament to incorporate restrictions on its power to amend by stipulating that in exercise of that power basic structure could not be amended.
supremacy. However, with change in time, when the legislative supremacy is lost, instead of throwing the doctrine to desuetude, the judiciary has dovetailed the doctrine to the modern requirements of the legal system and sharpened it as a tool for constitutional interpretation as well as for regulating the discretion of authorities under the Constitution. In short, the doctrine of basic structure has gained an incontrovertible status in the Indian constitutional system. It is unlikely that in the future the doctrine would be abrogated rolling back the constitutional position to the pre-
Kesavananda days. Nor it is desirable also. Was not the statement\textsuperscript{164} that ‘Kesavananda is the Constitution itself’ — a prophecy?