

## Origin and Development of the Doctrine of the Basic Structure of Constitutional Law: A Comparative Study

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**Abstract:** This study refers to the judge-made doctrine of basic structure which is an action of striking down any constitutional amendment on basis of the inconsistency with the basic feature of a constitution, was established under Indian constitutional jurisdiction notwithstanding presently has been exercising around the world enclosed by the constitutionals law. The doctrine's history indicates wherever it was derived and in what manner it developed with time. The application of this doctrine is well founded and recognized in many countries of Asia, Commonwealth continents along with our country Bangladesh illustrating with accompanying the landmark case of Eighth Amendment. Hence the doctrine faces criticisms within the periphery of comparative constitutionals law in countries like Pakistan, Britain, South Africa etc. apart from all that circumstances the doctrine is being enormously assigned in constitutional law cases to protect and shelter the supremacy of the constitution and the basic features. Focusing on the position in comparative constitutional era, the study gives an overview of what extent the perception has originated and applied thoroughly.

**Keywords:** Basic structure, Constitution, Comparative Constitutional law, Amendment.

### Introduction

The legal explanation enclosed by the constitution has always been acknowledged throughout. Being the supreme law of a state, it possesses a certain field of study that differs it from other legal spheres. Within the knowledge of comparative constitutional law, we came across divergent theories, doctrines, and precedents which contribute to expanding law with time. The doctrine of salient structure is one of the incredibly significant phases of constitutional law that implies definite constitutional provisions cannot be amended by legislation since those provisions amount to the basic features of a constitution. The preamble, separation of powers, fundamental rights, and unitary states are features under any Constitution, referred to as basic structure, not amenable by any parliamentary actions. The Constitution allows parliament and the state legislatures in India have the power to make laws under the relevant jurisdictions and that is not an absolute one. Rather, the Constitution allows the judiciary or the court to determine and arbitrate the constitutional validity of all laws. Any law made by Parliament, or the other legislature body violates any provision of the Constitution, the Supreme Court has the potential to declare such newly adapted provisions or law invalid or ultra vires (Nayak). The features that are the standard of measuring the validity of any legal provisions are known as the basic structure. In our Constitution of the

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People Republic of Bangladesh, where we possess nationalism, secularity, democracy and socialism alongside the rule of law, fundamental human rights are valued as basic features which cannot be altered by any legislative movement, as follows the doctrine of basic structure enforced with its complete definition. The application of the doctrine has made headways through judicial interpretation of the Constitution, the decisions of the courts through their writ jurisdiction, intervene and interpret the constitution imparting the genuine aspect (Mittal, 2023). At intervals, it may assume complementary with judicial review power striking down the legislative-executive-administrative forces, but basic structure is considered the extension of judicial review power. A judge made a doctrine to preserve some constitutional provisions beyond the limit of parliamentary power.

### **Objectives of the Study:**

- How did the doctrine of basic structure originate and evolve in the era of constitutional law?
- To what extent has the concept been well established under the comparative constitutional aspect?

### **Origin of Basic Structure Doctrine**

It is called an Indian doctrine as the concept derived from Indian constitutional law. There is no undeviating reference of the term “Basic Structure” anywhere in the Indian Constitution. The conception is that the Parliament is unable to enroll laws that can infringe basic structure of the constitution moving forward deliberately with the passage of time many cases to conserve and protect the democratized atmosphere and sheltering the rights of all individual citizens. It was the Kesavananda Bharati case where the doctrine came into limelight which held that the basic structure of the Constitution could not be abrogated even by a constitutional amendment by means of legislative step (Kesavananda Bharati vs. State of Kerala, 1973).

In the case the basic features that Indian Supreme Court referred that Supremacy of the Constitution; Unity and Sovereignty of India; Democratic and republican form of government; Federal character of the Constitution; Secular character of the Constitution; Separation of power; Individual freedom along with over some more facet have been added in the list that the rule of law, Judicial review, Parliamentary system, Rule of equality. Harmony and balance between the Fundamental Rights and Directive Principles of State Policy. Free and fair elections, Limited power of the parliament to amend the Constitution these all are not amendable-altered-abolished as they are the ‘Basic Structure’ of the Constitution (Kesavananda Bharati vs. State of Kerala, 1973).

Although the Kesavananda Bharati case can be called the pioneer of this doctrine, before that there were some more Indian cases where a little essence of this doctrine arises in a limited way, it had evolved over time. In some other cases of Shankari Prasad and Sajjan Singh where the Supreme Court held that parliament could amend the constitutional provisions along with fundamental rights, nevertheless two judges had dissenting opinions there (Shankari Prasad Singh Deo vs. Union of India, 1951; Sajjan Singh vs. State of Rajasthan, 1965 ) Then the Golaknath case where the amending right of fundamental rights was overruled stating that Article 368 of the Indian Constitution gives the procedure to amend the Constitution however does not confer on Parliament the power to amend the Constitution as the Fundamental Rights is in a ‘transcendental position’(I.C Golaknath vs. State Of Punjab,1967) Then the Kesavananda case came in 1973 declaring such non amending provisions as to the doctrine of basic structure. It denoted that parliament cannot

amend the constitutional basic featured provisions along with fundamental rights. It indicates that whereas the power of amending should not be occupied as the power of demolishing entities, it only focuses on the conflicting provisions that come in between formatting the perception of basic structure. Therefore, the doctrine came into a proper existence.

Later on cases on Indira Nehru Gandhi where the Supreme Court declared 39th Amendment in 1975 on the grounds that it was on the far side of the Parliament's amending capacity as it pulled down the Constitution's basic features, thus unconstitutional (*The State of Uttar Pradesh v. Raj Narain*, 1975) In *Minerva Mills* case where the judgment has issues due the modifications on the Constitution by the 42nd Amendment Act 1976, stating them to be on the violation of the basic structure. There, the Court added two features to the list of basic structure features named judicial review and balance between Fundamental Rights and Directive Principle of State Policy (*Minerva Mills Ltd. & Ors vs. Union of India & Ors*, 1980). Thus the judges made a rule concerning a limited amending power itself is a basic feature of the Constitution.

### **Position under the Comparative Constitutional Law**

The place of the doctrine of basic structure has been used in several ways through the constitutional laws of different countries. Although the concept of basic structure established in India focusing on provisions non-amendable, that has walked behind after the post the Second World War in various countries within South Asian region alongside the other parts of the world. In an Australian case *Nationwide News Pty Ltd vs. Willis* where it was stated that the parliament's law making power has certain limitation within the constitutional ambit (*Nationwide News Pty Ltd v. Willis*, 1992) In South Africa the doctrine was used in various cases where the limitations upon the parliament for any such amendment process has been given, thus the doctrine was applied (*Premier, KwaZulu-Natal v. President of the RSA*, 1995; *Executive Council, Western Cape Legislature v. President of the Republic of South Africa*, 1995). Nonetheless there are cases in South Africa where the doctrine faced criticisms too.

In north American continent, The doctrine of the basic structure has also been applied in cases in Belize for the purpose of rescinding the amendments Constitution, the sixth amendment was in question by some land owners that their property might be taken by the Government of Belize, there the perception of Chief Justice Conteh was, the basic structure took in not only the fundamental rights guaranteed through the Constitution, further the principles, ideas, beliefs and desires of the people of Belize as conferred in the preamble of the Constitution, following the equal placing for the concept of rule of law and the right to the ownership of private property, thus the clause 2 of the Sixth Amendment said that the amended s. 17 the rights of the owner of any private land would not be curtailed beneath which any petroleum deposits are located to receive royalties from the Government (*Bowen v. Attorney General*, 2009) In another case the Eighth Amendment did not go well with the principle of the separation of powers and the basic structure doctrine of the Constitution (*British Caribbean Bank Ltd. v. AG Belize Claim*, 2011). The basic structure doctrine recently made a prominent appearance in two cases in Belize, a Commonwealth Caribbean country with a written constitution that entrenches no formal limitations to the amendment power. In Britain where we can find no written or codified constitution there, a theory of common law constitutionalism has evolved, reflecting the dicta of a number of their Lordships in a case where it is mentioned that in Britain the parliamentary actions are considered to be supreme but the proviso says few implied constitutional limits known as

constitutional fundamentals which even a sovereign Parliament cannot abolish (R (Jackson) v Attorney General, 2005) . It talks on the procedure of applying the basic structure format on parliamentary fractions.

Though the doctrine came from Asian country, India so the applicability of this basic structure are seen in many constitutional laws of Asian countries. In **Malaysia** before 2010 the doctrine was called inapplicable by the Federal Court, later The doctrine of basic structure was first acknowledged by the Federal Court in obiter dicta in where it was stated that judicial power of the courts were under a salient parts of basic structure of the Constitution that cannot be strike down or abolished or altered through any constitutional amendments in further; thus the theory applied in many more case from that time (Sivarasa Rasiah vs. Badan Peguam Malaysia, 2010). The Constitution of France follows the same concept, that their republication form of government system cannot be amended or altered through any parliamentary process; German Constitution and Greek Constitution has safeguarded the same by excluding the salient features of the constitution free from the scope of amendments (Mittal, 2023).

In **Thailand** the Constitution disallows the modifications, amendments that can lead to a certain change the governmental format of their state, without mentioning the term basic structure, merely non amendable provisions of the Constitution. It shows though the direct mentioning is absent, the indirect practice is still ongoing there. The Portuguese Constitution contains provisions in preserving the basic structure of the Constitution limiting the Constitutional revision following national independence and unity, republican form of government, separation of powers etc. (Mittal, 2023)

In **Pakistan**, there was a debate upon the doctrine of basic structure after India has established the doctrine with case laws, their comprehensive assessment shows that the basic structure doctrine was not embraced accordingly in an uniform way to India- in fact, a distinct theory was upheld that is named, the Salient Features Doctrine (Dasgupta and Choudhuri, 2016), indicating that in some extent they are being following the doctrine of basic structure. Altogether, the doctrine of basic structure within the subject matter of comparative constitutional law has been alluded to other nations to preserve the basic features of the Constitution.

### **Application in Bangladesh**

The doctrine of basic structure has been used in our Constitutional amendments also the word 'basic structure' is mentioned in our Constitution under article 7B (Constitution of People Republic of Bangladesh). Some parts of our constitution concern the people of the state such as Sovereignty belongs to people, Supremacy of the Constitution, Democracy, Republican government, Independence of Judiciary, Unitary state and Separation of powers, Fundamental rights. These are the basic features of the Constitution. The doctrine of basic structure evolved from the Indian case in Bangladesh in this way the Eight Amendments in 1988 ensured the working of six permanent Benches of the High Court Division at Barisal, Jessore, Rangpur, Sylhet, Comilla and Chittagong by amending article 100 of the Constitution. The amendment referred to the permanent seat of the Supreme Court should be in the capital, and The High Court Division should have a permanent Bench each of the six benches in six divisions which would be determined by Chief Justice from time to time (Anwar Hussain Chowdhury V Bangladesh, 1989).

Thus, the Eight Amendment case was filed with the basis of basic structure of the constitution, named *Anwar Hussain Chowdhury V Bangladesh* the judgment delivered in this way that by this amendment the feature of Unitary character would be destroyed as article 100 provides more than one permanent Supreme Courts. There, the transferability of judges would hamper the independence of the judiciary, and with this amendment, the High Court Division would not be able to work in its original form. The preamble of the constitution is called the poll star where it is stated that our aim is to provide rule of law, but this amendment could destroy the rule of law as the High Court Division had fallen into six to seven parts. Therefore, the unitary judicial system and the rule of law could be tempered, considered as basic structure, this amendment could not be allowed, and the 8th amendment was said to be illegal. Therefore, the doctrine came into existence securing supremacy and the salient features of the constitution.

### **Criticisms under Comparative Constitutional Law**

Though the doctrine has a very unique character to protect and shelter the basic features of constitutional law, it has certain interpretations of constitutional cases of not imposing it everywhere. In **South Africa**, the case of *UDM v President of the RSA, 2002* there the court did not show its willing approach to approve the concept of basic structure which is passed granting the formal and procedural requirements forms part of the Constitution and cannot be questioned as a matter of infringement. (Sanghi, 2017)

In **Pakistan** they do not allow the doctrine of India, rather the impliedly criticised the doctrine in the cases that the Supreme Court of Pakistan held that the basic structure doctrine has been recognized only an extent to identify salient or fundamental features of the Constitution it was not been frequently appreciated in India to be left deliberately vague and undefined and the doctrine having been to a foreign jurisdiction like India, cannot be similarly applied “unthinkingly” to Pakistan (*State vs. Ziaur Rahman, 1973*; *Nadeem Ahmed vs. Federation of Pakistan, 2010*). In **Singapore** the High Court refused to apply the basic features doctrine in a case holding that the doctrine was not applicable to the Singapore Constitution as the differences in the making of the Indian and the Constitution of Singapore (*Teo Soh Lung vs. Minister for Home Affairs, 1989*). Therefore, it cannot demand the Parliament's power to amend the Constitution is limited identically to Indian Parliament's power amending the Indian Constitution (Dasgupta and Choudhuri, 2016).

In the case of **Belize** there the “the stratum of government and the allocation to its various organs of legislative, executive or judicial powers, may be altered by those peoples through their elected representatives in the Parliament acting by specific majorities, which is generally all that is required” (*Hinds vs. The Queen, 1977*).

Therefore, the doctrine has been criticized primarily with the eligibility of the parliaments which members are the elected as representatives by the people, then whereby any amendment by those representatives in the Constitution can be called void where the Constitution itself for the people and people choose the elected representatives for legislature.

### **Conclusion**

The doctrine of basic structure has been impacted upon the basic features of the Constitution, thus those cannot be abolished, altered in any arbitrary manner. It is a way around to shield the supremacy of the Constitution. Though the Indian Constitution after so many case laws established the doctrine in its adequate line, the Constitutions of other

nations have accepted it. Certainly each judge made concept-theory has some limitations, criticisms so as this doctrine had to go through some of them in many facets. Overall the objective of the doctrine is always been comprehensible and for the sake of Constitution. The tussle between Parliament and the judiciary regarding the amendments in laws or constitution falls under the periphery of judicial review and laws that misdeed the basic structure are to be revoked by the Supreme Court. Parliament cannot hold an infinite right to amend the constitution, and the Court has become the final arbiter over and interpreter of all constitutional amendments in this regard (Nayak). No such opposition is made enacting a new amendment by the existing governments or in coming times, but that must be occupied with debates and contributions of all sectors. If not so the doctrine of basic structure shall be enforced to promote the constitutional main beliefs and its development.

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