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Revisiting the Doctrine of Basic structure: Shankari Prasad to Kesavananda Bharati

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Abstract:

History shows that constitutions have been repealed many a times in order to suit to the different regimes that ruled these countries. Some of these nations were France, Belgium, Mexico, Greece, Italy, Russia and China to name few. The authors of the modern democratic constitutions knew that the Constitution was intended to serve for generations. Hence they included provisions for making amendments in the Constitution. The authority to add, vary or repeal any constitutional provision vested in a superior legislature like Parliament. This superior legislature could amend by simple majority or by special majority consisting of two-third majority. Article 368 of Constitution of India defines the procedure as well as the power to amend. In India, the power to amend has come into conflict with judicial review. Consequently, the basic structure doctrine today is like a touchstone for testing constitutional amendments violating any fundamental rights. This doctrine has been inspired from Germany. Provisions 1 to 19 are the principles for the foundation law for the nation of Germany. Today, not only in India this doctrine also finds appreciation in neighboring Bangladesh and Pakistan but also in faraway Kenya and Uganda.

The purpose of this study is to analyse as how the basic structure doctrine has evolved from Shankari Prasad to Kesavananda Bharati as the country celebrates 50th Anniversary of this landmark judgment. The study also intends to find out the reasons for evolving the basic structure doctrine by judiciary.

Key words: Constitution of India, Parliament, Amending power, Judicial Review, Basic Structure.

I. Introduction

It has been more than 50 years since a doctrine known as basic structure was first formulated in *Sripadgalvaru Kesavananda Bharati vs Government of India* on 24th April 1973. Once propounded the doctrine became the weapon of the Apex Court of India to test constitutional variations for violating the essential features of the Constitution of India. Rights to own, possess and dispose property was a basic right till 1978. This basic right was modified by the First Constitution Amendment Act, 1951 inserting three new provisions - Article 31A, Article 31 B and Schedule Nine. New Clause A in Article 31 protected laws providing for taking away of certain lands by the State or modification of the rights therein. The certain lands included *jagir, inam, muafi* and any *janmam* right in the states of Kerala and Tamil Nadu. These saved laws were not invalid for the reason that it conflicts with basic rights mentioned in Article 14 or Article 19(1) (f). Article 14 deals with the basic right to equality before law and against unequal treatment before law. Article 19 (1) (f) provides for proprietary rights. The Ninth

Schedule is a protective covering for these saved laws. The second new B of Article 31 made the laws specified in the new Schedule not subject to judicial review for violating any provisions of Part III. The primary aim of the First Constitution Amendment Act, 1951 intended to create social revolution, to end poverty and to abolish distinction and exploitation among the various sections of the Indian Society.[i]

II. Shankari Prasad

In pursuance of First Amendment made in the Constitution in 1951, a law known as *Zamindari Abolition and Land Reforms Act*, *1951* was passed. Section 23(1)(b) of the Act derecognized the transfer of any estate for any purpose made after July 7, 1949 consequently the transferor losing the freedom to dispose of his property. Shankari Prasad was one such Zamindar from Bihar whose right was affected by the impugned law. He challenged the First Amendment Act, 1951 which prevented the judicial review of the impugned law. The issue was whether the Parliament had the authority to pass constitutional amendments amending the fundamental rights and whether such amendments can be subject to judicial scrutiny for violating the basic rights. A five judge constitution bench of the Court expressed unanimous opinion of Parliament having a constituent power to pass constitutional amendments through Article 368 for amending fundamental rights and whether such amendments can be examined through judicial review. It is to be noted that the Parliament which made the first Amendment was a provisional Parliament hence its competency under Article 368 was questioned as it did not consist "both the Loksabha and the Rajyasabha of the Union Parliament and the Head of the Union Executive" as required for passing amendments under Article 368. Question was also raised as to whether there was any demarcation between ordinary law making power and amendments made in the Constitution. Unanimously, the highest court adopting the literal interpretation upheld the Constitution First Amendment act, 1951. The Bench remarked that constitutional amendments made through Article 368 are different from ordinary law making power made under Article 246. Amendments made in the constitution are a constituent exercise of power and hence immune from judicial review under Article 13.

III. Bella Banerjee

In *Bella Banerjee*, the validity of the West Bengal State law known as *West Bengal Land Development and Planning Act, 1948* was challenged by Bella Banerjee. The impugned law provided for acquisition of land for settling refugees from East Pakistan (Bangladesh). In exchange for land the legislation provided for compensation to be paid to affected land owners; the rate of compensation not to exceed the value of property at market rate prevailing on 31st day of December, 1948. The highest court said that compensation to be given by the State should not have any relation to the market rate of acquired land as on mentioned date. The Supreme Court further clarified that "compensation to be paid" meant "jus and equivalent" of what the land owner actually deprived of. The adequacy of such compensation was justiciable issue to be decided by the Court.

Countering the activist decision of highest appellate Court, the Union legislature passed the Fourth Constitution Amendment Act, 1955 amending Clause 2 in Article 31 for questioning the rate of compensation a non-questionable issue. Clause A of Article 31 was later modified by the Seventeenth Amendment Act, 1964 modifying the meaning of word "estate" in Clause (2) of Article 31. The Seventeenth Constitution Amendment Act, 1964 inserted new forty-four ceiling laws of different States in the new Schedule which was challenged in *Sajjan Singh.*

IV. Sajjan Singh

The question of amendability of fundamental rights remained dormant for the next thirteen years until *Sajjan Singh* happened. [ii] *Sajjan Singh* was a ruler of the princely state of Ratlam

which was integrated into the Indian Union. His rights and privileges were affected by *The Rajasthan Land Reforms and Acquisition of Estates Act, 1963.* In *Sajjan Singh,* the petitioner challenged Seventeenth Amendment Act of 1964 which inserted certain State ceiling laws in the new Ninth Schedule. Issue was also raised regarding the procedure to be followed in passing such constitutional amendments requiring the involvement of the State legislatures.[iii] The requirement of ratification by one half of the State legislatures was also an issue since this amendment intended to effect the High Court's judicial review under Article 226.

In response to these questions, the Supreme Court by a ratio of 3:2 upheld the precedent of *Shankar*i *Prasad* case and held that amendments made to the constitution cannot be prone to judicial review as they are not an exercise of ordinary law making power but are a constituent power. Amendments are made to the constitution by the Parliament through its constituent power which cannot be questioned by the courts. The Seventeenth Constitution Amendment Act, 1964 had added forty-four State laws in the Schedule making these immune from judicial scrutiny. However, minority opinion given by Justice Mudholkar and Justice Hidyatullah justified that definition of "law" in Article 13(3) included amendments made to Constitution also. Hence they are subject to judicial review through the filter of fundamental rights. Justice Hidyatullah wondered whether the majoritian Union Parliament can play with the basic rights. The two minority opinion in *Sajjan Singh'*s case were seminal for further discussion on the amenability of fundamental rights.

V. Golok Nath

Golok Nath v Government of Punjab overruled precedents set in *Shankari Prasad* and *Sajjan Singh.* The minority opinion of Justice Mudholkar and Justice Hidyatullah turned out to be major issues in *I.C Golok Nath v. Government of Punjab.* In *Golok Nath,* an eleven judge bench considered the Seventeenth Amendment Act made in 1964. The majority bench of 6 to 5 ruled that the Union Parliament cannot amend the fundamental rights. Focusing on the language of Article 368 as originally enacted Chief Justice Subba Rao opined that Article 368 is the procedure to amend the constitution. The procedure lies somewhere else. It lies in Entry 97, List I as a residuary power. However, the Court was careful not to offend the constitutional amendments passed till now since it would upset the socio-economic policies of the Government. This was done by applying the doctrine of prospective overruling. It was now clear that since *Golok Nath* the Parliament would no pass amendments that would restrict or violate or modify the fundamental rights.

To counter the decision passed in *Golok Nath,* the Union Parliament made the Twenty fourth Amendment Act, 1971. This Amendment provided four major changes in Article 368. First, it inserted a new clause *i.e.*, Article 368 (3) which includes the provisions relating to judicial review in Article 13 are not applicable to constitutional modifications made through Article 368. Second, title of Article 368 w3hich was "Procedure for amendment of the Constitution" is replaced by a new title "Power of the Parliament to amend the Constitution and the procedure thereof." Third, Article 368(1) was modified giving the Parliament "constituent power for amending by three different ways- adding, modifying or deleting any constitutional provision including the Basic Rights." Fourth, it made compulsory for the President to agree to the Bill already cleared by the two Houses of the Union legislature suggesting constitutional amendments.

VI. Kesavananda Bharati

The Twenty four Constitution Amendment Act, 1971 along with the Twenty five Amendment Act, also in 1971 and the Twenty nine Amendment Act in 1972 was challenged in by the petitioner in *His Holiness Shripadgalvaru Kesavananda Bharati* v. *Government of Kerala.*[iv] The petition was placed before a thirteen judge bench considered as one of the longest judgment

in the constitutional history of independent India. As regards the Twenty Fourth Amendment Act, 1971, the Bench unanimously upheld its constitutionality. But there was a divergence of opinion with regards to the extent of Article 368. The majority bench expressed that scope of Article 368 was not unlimited but restricted by the basic structure doctrine. The doctrine says the Union legislature cannot change the Constitution to destroy its essential features. Though majority bench did not define the doctrine of basic feature but different features like Sovereign, Democratic, Republic and Parliamentary Democracy were added to the list of basic features.

As regards the Twenty Fifth Amendment Act made in 1971, bench unanimously upheld the changes brought in Article 31 (2) substituting the term "compensation" with "amount". However, the Court upheld the term "amount" was liable to scrutiny by the Court. The scrutiny will be open if the amount decided by the Act for requisitioning the property was illusory, irrelevant or fraud. Clause (C) of Article 31 inserted through 25th Amendment, Act also upheld. However, provision barring judicial scrutiny of a law for having a connection with the directive principles enumerated in clauses (b) and (c) Article 39 was struck down.

Regarding the Twenty Ninth Amendment Act made in 1972 the Bench validated it unanimously. But six out of the thirteen judges made it clear that the laws added in the new Ninth Schedule shall be invalidated or violating the essential features of the Constitution.

Consequently, this landmark judgment resulted in the supersession of judges. Chief Justice S.M. Sikri was to retire after the *Kesavananda Bharati's* case was disposed. Shelat, Hegde and Grover were in line of succession as the next Chief Justice of India. They all had given majority opinion against the Parliament's amending power under Article 368. Justice Ajit Nath Ray was promoted as the next Chief Justice of India superseding three senior judges on 25th April, 1973. The three senior judges were Shelat, Hegde and Grover. They resigned in protest. This mass resignation was a grievous blow to the Judiciary's independence to act without fear or favour.

VII. Indira Nehru Gandhi

The doctrine was first used in *Indira Nehru Gandhi* vs. *Raj Narain.*[v]. The petitioner appealed to the highest Court expressing her dissatisfaction over Allahabad High Court judgment against her. The High Court invalidated her elections to the Lok Sabha. Raj Narain had brought charges of corrupt election practices against her which were restricted by election law known as *The Representation of Peoples Act, 1951.* Consequently, an appeal filed by Indira Gandhi set the motion before the Supreme Court. When the appeal was pending, the Government with the Union Parliament allowed Thirty Ninth Constitution Amendment Act in 1976 which inserted Article 329-A. Article 329-A intended to invalidate the judgment of Allahabad High Court. It also intended to withdraw the authority of all courts including that of Apex Court over disputes connected with the election of Prime Minister of India and Speaker of Lok Sabha. The appellate Court validated the election of Mrs. Indira Gandhi and invalidated Article 329-A (4) barring judicial review of election disputes of the Prime Minister and the Speaker of the Lok Sabha by applying basic structure formula. The Supreme Court added four new features to list of essential features. They were Judicial Review, Free and Fair Elections, Rule of Law and Right to Equality.

VIII. Conclusion

First Amendment Act, 1951 served as the historical background for basic structure doctrine. Right to property which was either modified or restricted by this constitution amendment was the main issue. The right to property went further restrictions under the Constitution Fourth, Seventeenth, Twenty fourth, Twenty fifth and Twenty Ninth Amendments. It is noteworthy that these amendments intended to disturb the right to property of a particular class of citizens. This

particular class belonged to the affluent class – zamindars, jagirdars, princes and also religious gurus having landed property in excess of the ceiling laws. In dealing with the cases involving constitutional amendments affecting the right to property the Court came into conflict with the Parliament. The Court remained submissive in *Shankari Prasad* and *Sajjan* Singh but assertive in *Golok Nath* and cautious in *Kesavananda Bharati*. New doctrines like overruling prospective and basic structure were applied by the Court to declare its supremacy of judicial scrutiny over constitutional amendments. The Parliament was not willing to succumb to the Court pressure. Hence it passed constitutional amendments like the Twenty Fourth Amendment Act, 1971 to neutralize the *Golok Nath* decision. *Kesavananda Bharati* decision where basic structure doctrine was formulated a reply to the Twenty Fourth Amendment Act, 1971.

The basic structure doctrine acts a weapon to invalidate any constitutional amendment on the touchstone of violating any fundamental right. *Post Kesavananda* this doctrine has been used many a times to invalidate a constitutional amendment for violating any fundamental right. Today, it is a Brahmashtra for the Judiciary to assert its supremacy over the Parliament as the guardian of the basic rights.

Over years, different facets of basic structure evolved though the judiciary still seems to be reluctant to define exactly what the basic structure actually is. Consequently, understanding the doctrine of basic structure seems both difficult and elusive and prone to criticisms. Its interpretation and application continues to be the subject of discourse till date.

Endnotes

[i] Granville Austin, Working a Democratic Constitution p. 69 (Oxford University Press, New Delhi, 2003).
[ii] M p Jain, Indian Constitutional Law, p. 1734 (Lexis Nexis, Gurgaon, Haryana, 8th ed., 2018)
[iii] AIR 1965 SC 845.
[iv] AIR 1973 SC 1461.
[v] AIR 1975 SC 2299

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