



INDIAN JOURNAL OF
LEGAL REVIEW

VOLUME 4 AND ISSUE 3 OF 2024

INSTITUTE OF LEGAL EDUCATION



INDIAN JOURNAL OF LEGAL REVIEW

APIS – 3920 – 0001 | ISSN – 2583-2344

(Free and Open Access Journal)

Journal's Home Page – <https://ijlr.iledu.in/>

Journal's Editorial Page – <https://ijlr.iledu.in/editorial-board/>

Volume 4 and Issue 3 of 2024 (Access Full Issue on – <https://ijlr.iledu.in/volume-4-and-issue-3-of-2024/>)

Publisher

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SHORT ARTICLE ON “ANALYZING THE AMENDABILITY OF BASIC STRUCTURE OF INDIAN CONSTITUTION.”

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BEST CITATION – SHAKKIRA KT, SHORT ARTICLE ON “ANALYZING THE AMENDABILITY OF BASIC STRUCTURE OF INDIAN CONSTITUTION.”, *INDIAN JOURNAL OF LEGAL REVIEW (IJLR)*, 4 (3) OF 2024, PG. 139-142, APIS – 3920 – 0001 & ISSN – 2583-2344.

ABSTRACT

The first and foremost question arises for consideration is nothing but is doctrine of rule of law, democracy, and judicial review is part of basic structure of Indian Constitution. The second concern is on the amendability of the same. In order to measure the contribution of the aforesaid principles to the evolution of basic structure doctrine, there is no liquid formula as such. But while we make some interrogations to history of judicial construction, we could sought out some sharp ends leading to the conclusion that rule of law, judicial review and democracy are indispensable to basic structure of our constitution and the avoiding of which will lead to the fall of basic structure. Basic structure is not a mere concept, but have bearing on the lives of each citizen of the country as we ourselves gives the constitution to lead us in the right way for achieving every goals of a most progressed nation in the world.

Introduction

India is the largest democracy in the world. In a democratic setup, the power to elect their Government rests upon the people by the constitution. The Indian constitution is also the longest written constitution in the world. When we analyse what a Constitution is, we cannot fail to realize that it is a document having special legal sanctity which sets out the framework and principal functions of the government and its relationship with the people. It lays down clearly the polity or the political system under which its people are to be governed. It defines the powers of the main organs of the state, demarcates their responsibilities and regulates their relationship with each other and with people. It can also be termed as the fundamental law of a country which reflects people's faith and aspirations. Although the Constitution is supreme, India also follows another principle called the Doctrine of Parliamentary sovereignty in which the law laid down by the parliament is also supreme, as they consist. Using the powers conferred upon the Parliament by the Doctrine of Parliamentary

sovereignty, the Parliament has at times attempted to amend the Constitution in a manner that causes far-reaching constitute consequences on Indian polity by affecting the basic or fundamental characteristics of the Indian constitution, such as 'rule of law', 'democracy, and the power of 'judicial review'.

In this article, the auther examines the statement given in the assignment question, that is whether rule of law, democracy and judicial review are part of the basic structure of the Indian constitution, and whether they can be amended. The researcher does so, by first explaining what the concepts surrounding these basic characteristics are, and what are the various judicial precedents or case laws that have established the present legal position governing these aspects in Indian constitutional law.

The Basic Structure Doctrine – Rule of Law, Democracy, Judicial Review

The doctrine of basic structure is a constitutional doctrine which states that the Constitution has certain characteristics that

cannot be taken away by the legislature, meaning the Parliament of India, by way of amendment of the Constitution under Article 368, cannot take away certain characteristics that have been brought under the purview of 'basic structure' of the Constitution. The doctrine evolved through various cases that culminated in that of **Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr.**²⁹⁹, where the Supreme Court of India formally recognized the doctrine of basic structure as part of Indian Constitutional Law. But first, the author seeks to briefly discuss the concepts of rule of law, democracy, and judicial review.

Rule of law is a principle which was first laid down by A.V. Dicey in his legal classic titled "Introduction to the Study of the Law of the Constitution"³⁰⁰. According to Dicey, rule of law is a condition of state of affairs, in which the polity is run by the command of the law rather than a person. In other words, it is a political condition where law governs everyone and nobody is beyond the law. As per Black's Law Dictionary, rule of law is the supremacy of the legal principles accepted by the State and can be enforced by law. Rule of law means the situation in which all the citizens as well as the state are ruled by the law. Dicey also postulates that there are three important principles that must be followed which are part of the principle of rule of law, and they are: supremacy of law, predominance of legal spirit and equality before law.

Democracy basically means a political system in which the supreme power to govern themselves is vested upon the people and exercised by the people, either directly or indirectly by way of conducting elections in which the people can vote for their representatives who then form the Government. As mentioned earlier, India is the largest democracy in the world. Taking away this basic characteristic of the Indian constitution will

totally destroy the nature of the Indian constitution.

Judicial Review is a principle by which the actions of the Government can be reviewed by the judiciary. It is the power of the judiciary to act as a check upon the supreme power of the Government. As mentioned earlier, in a democratic form of Government, the people elect their representatives to form the Government. The Constitution of India has conferred vast powers upon the legislature and the executive if their powers are not checked by way of judicial review, it can lead to autocracy and fall of Indian democracy.

The Love-Hate Relationship between the Judicial Review, Basic Structure, and The Power of Parliament to Amend the Constitution.

Article 13 of the Indian constitution lays down the principle of judicial review. It states that it categorises laws before the enactment of the Indian constitution and after the enactment of the constitution, and states that if these pre-constitutional or post-constitutional laws, in any manner, abridge, or take away the fundamental rights laid down under Part III of the Indian Constitution, then these laws will become void to the extent of such inconsistency. Moreover, under clause 3 of Article 13 of the Constitution of India, the Constitution also goes so far as to define is defined as law, to include any order by law, rule, regulation, ordinance, custom, notification, or usages in the territory of India, which are laws or have the force of law. Judicial review is a fundamental principle of Indian Constitution law.

The major problem began after the Constitution (Twenty-fourth Amendment) Act, 1971 introduced clause (4) according to which nothing under Article 13 of the Indian Constitution, as mentioned above, will apply to the power of the parliament to amend the constitution under article 368. In other words, Article 13(4) of the Indian Constitution took away the power of judicial review against

²⁹⁹ (1973) 4 SCC 225; AIR 1973 SC 1461

³⁰⁰ Dicey AV, Introduction to the Study of the Law of the Constitution, (Macmillan, 1985).

amendments under Article 368.

However, using the power of judicial review itself, the Supreme Court of India in **Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr.**³⁰¹, under para 621, pointed out that the insertion of article 13(4) is wide enough so as to permit the Parliament of India to amend any Article of the constitution, however its basic elements, or what is Supreme Court under the very previous para 620, explains to be the basic structure of the Constitution cannot be abrogated or denuded of their identity. The basic elements are:

- supremacy of the constitution,
- the republican and democratic forms of sovereignty and Government of India,
- the federal and secular character of the Indian constitution,
- the demarcation or separation of powers between the legislature, executive, and judiciary, and last, but not least,
- the dignity of the individual which has been secured through various fundamental rights laid under Part III of the Constitution of India.

In **A.K. Gopalan v. The State of Madras**³⁰², the then Chief Justice of India H.J. Kania explained that the inclusions of article 13 and clauses 1 and 2 therein of constitution were done with the intention to ensure that if at all any of the fundamental rights were infringed by any legislative enactment, the Supreme Court had the power to declare such enactment to the extent the law transgresses the limits by violating or infringing fundamental rights, would be invalid. This shows that Indian Constitutional jurisprudence has considered the power of judicial review seriously as a basic characteristic of Indian Constitution even before **Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr.**³⁰³.

It must be noted that there was a love-hate relationship between the power of judicial review, basic structure, and the power of the Parliament to amend the constitution. As seen in the case of **Shankari Prasad Singh Deo v. Union of India and State of Bihar**³⁰⁴, the Supreme Court had expressed an opinion that the Parliament's power to amend the Constitution under article 368 also includes the power to amend fundamental rights. Here it can be seen that the jurisprudence followed in this era was that of upholding parliamentary sovereignty over anything else, which is clear by the wordings that the Parliament's power to amend under Article 368 were unlimited. In other words, law under article 13 would only include ordinary laws and did not extend to constitutional amendments.

However, the jurisprudence changed a few years later, in the case of **I.C. Golaknath v. Punjab**³⁰⁵, in which the Supreme Court overruled the Shankari Prasad judgement, and held that fundamental rights have a transcendental and immutable position in Indian constitutional law, and hence the Parliament cannot abridge or take away these fundamental rights by amendment. Further, the Supreme Court opined that constitutional amendments would also be considered as a law under article 13.

Following the judgement in this case, the Parliament reacted by enacting the Constitution (Twenty-fourth Amendment) Act, 1971 which added clause 4 to Article 13. This was challenged in **Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr.**³⁰⁶, where the Supreme Court chose to apply harmonious construction rather than striking down the Constitutional amendment, in fact, upheld the validity of this Constitutional amendment by recognizing the Parliament's right to amend or take away any part of the constitution including the fundamental rights, however, this power was subject to not altering the 'basic structure' of the constitution, which

³⁰¹ (1973) 4 SCC 225; AIR 1973 SC 1461

³⁰² [1950] S.C.R.

³⁰³ (1973) 4 SCC 225; AIR 1973 SC 1461

³⁰⁴ (1952) S.C.R. 89

³⁰⁵ [1967] 2 S.C.R. 762

³⁰⁶ (1973) 4 SCC 225; AIR 1973 SC 1461

has been discussed above.

The Parliament, yet again, in the Constitution (Forty-Second Amendment) Act, 1976, added Article 368(4) which ensured that there is no limitation on the power of the Parliament to amend the Constitution, and it also went further to state that any such amendment cannot be questioned in any court on any ground.

Finally, in **Minerva Mills Ltd. and Ors. v. Union of India and Ors.**³⁰⁷ Article 368(4) was invalidated by the Supreme Court stating that the Parliament does not have the power to take away the power of judicial review because it is part of the basic structure of the Constitution. This was confirmed in *Waman Rao And Ors vs Union of India (Uoi) And Ors*³⁰⁸.

Conclusion

The doctrine of basic structure is a very important principle of Indian Constitutional law, which can be said to have saved the constitution from failing on several occasions, by upholding the principles of rule of law, democracy and judicial review. To conclude, the present legal position is that the Parliament has the power to amend any part of the Constitution, but it should not do so, by taking away the basic structure of the Indian Constitution.

GRASP - EDUCATE - EVOLVE

³⁰⁷ AIR 1980 SC 1789

³⁰⁸ (1981) 2 SCC 362, 1981 2 SCR 1