

LEGISLATIVE RIGHT V. JUDICIAL MIGHT: DECODING THE BASIC STRUCTURE DOCTRINE

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Abstract

As guardian of the Constitution, the judiciary is one of the three organs of the State crucial for the stability and functioning of democracy in India. In protecting the fundamental tenets of the Indian Constitution over the past 50 years, the judiciary has utilised the Basic Structure Doctrine to 'check' the legislature's law-making powers. While the principle of the Doctrine aligns with the broad approach of separation of powers followed in India, in practice, applying the Doctrine as a norm can compromise Parliamentary sovereignty and trigger an imbalance of power. Other problems like vagueness, subjectivity and inconsistent application also undermine its purpose and efficacy. The Doctrine must therefore be used with caution while keeping constitutional principles in mind.

While the Doctrine has emerged as a constitutional custodian, its application has often created complexities and power imbalances between the legislature and judiciary. A comprehensive analysis of the Doctrine using relevant case laws and scholarly articles reveals that it requires careful and considered application. Finally, though the Doctrine has transformed the legal landscape of India, a fine balance must be struck between judicial review and overreach, principle and practice, legislature and judiciary.

Keywords: Basic Structure Doctrine, Separation of Powers, Parliamentary Sovereignty, Amendments, Constitution, Judicial Review.

I. Introduction

The stability and functioning of India's democracy is upheld by the foundational pillars comprised of the organs of the State, namely the legislature, the executive and the judiciary. Each of these organs is vital, not just as an agent of State authority but as a key actor in furthering constitutional principles while serving the people of the country. Further, the three organs derive their powers and functions directly from the Constitution, rendering each crucial in their respective fields of formulating, implementing and interpreting laws and policies²³². However, the risk of a power imbalance occurs when the concentration of power in any one organ is disproportionate to

the other two. Over the years, there have been instances of friction between the legislature and the judiciary over constitutional principles, leading to power struggles between the two²³³.

Against this backdrop, the doctrine of separation of powers plays a critical role in preventing conflict between the organs of the State as it is founded on the core principle that each organ must be limited to performing only its designated function and not encroach on the domain of the other organs²³⁴. While the doctrine has not been expressly defined in the Indian Constitution, there exists a system of

²³² Divya Mandadapu, *Powers, Functions And Limitations of Legislative Organs*, 7(12) *IJNRD* 529, 533-534 (2022).

²³³ Kumarappan M, *History of Conflict Between the Legislature and the Judiciary*, 5(6) *IJFMR* 1, 1 (2023).

²³⁴ Atul Bhati and Dr. Neha Susan Varghese, *Separation of Powers*, 10(5) *JETTR* 656; 656, 659 (2023).

“checks and balances” and “mutual exclusiveness” between the organs²³⁵.

Closely tied to the doctrine of separation of powers is the Basic Structure Doctrine (hereafter, the Doctrine) which empowers the judiciary to ‘check and balance’ the amending power of the legislature or Parliament. Coming into existence in 1973 in *Kesavananda Bharati v. State of Kerala*²³⁶, this judicial doctrine imposes limitations on the power of the Parliament to amend certain fundamental elements of the Constitution, allowing Courts to strike down the same as unconstitutional²³⁷. While the Doctrine has been heralded as a “North Star²³⁸” in the interpretation of the Constitution and contributed to Indian and global jurisprudence, it raises several concerns such as dilution of separation of powers, undermining Parliamentary sovereignty and vagueness and subjectivity in judicial review²³⁹ among others.

Though the Doctrine has emerged as a constitutional custodian, its application has often created complexities and power imbalances between the legislature and judiciary. The author argues that though the Doctrine is an important legal principle under constitutional law, it is not bereft of challenges and requires careful and considered application.

This paper examines the strict interpretation of separation of powers followed in countries such as the United States and contrasts it with India’s approach. Further, it provides an overview and rationale behind the Doctrine by tracing its roots and evolution. Using relevant case precedents, the paper will also highlight the

prevalent lacunae and address the research problem of how the Doctrine, meant to uphold the separation of powers between the three organs, actually compromises its essence in practice. Finally, the paper will contain the author’s perspective and suggestions on the application of the Doctrine in India.

II. Understanding the Strict Interpretation of Separation of Powers

The traditional concept of separation of powers is attributed to French philosopher and scholar Montesquieu, who in his book *Spirit of the Laws*, asserted that to best promote liberty and prevent accumulation of power in only one organ²⁴⁰, the functions of the three organs must remain distinct and operate independently without any overlapping²⁴¹. Philosophers like John Locke, who advocated for a “clear demarcation of roles and responsibilities” between all branches and Wade and Phillips, who were against encroachment of functions between the three organs²⁴², also seconded Montesquieu’s vision. Based on this theory of “Trias Politica²⁴³” or “a truly separated, tripartite system²⁴⁴”, the United States has adopted a strict or rigid approach²⁴⁵ to separation of powers by expressly laying down the functions of each organ in Articles I²⁴⁶, II²⁴⁷ and III²⁴⁸ of the US Constitution whereby no organ of the State can carry out that which is designated to another. Under this strict interpretation, the legislature’s function of formulating amendments to the Constitution must not be

²³⁵ Kusum, *The Doctrine of Separation of Powers in Indian Perspective*, 11(5) IJCRT 134, 134 (2023).

²³⁶ *Kesavananda Bharati v. State of Kerala*, (1973) 4 S.C.C. 225.

²³⁷ Vijaydeep Munjankar, *Basic Structure Doctrine*, 2(2) PIMPRI LRJ 1; 1, 3 (2023).

²³⁸ Anuja Jha, *Basic structure of Constitution guides like North Star: CJI DY Chandrachud*, INDIA TODAY (Jan. 22, 2023, 15:44 PM), <https://www.indiatoday.in/law/story/cji-dy-chandrachud-says-basic-structure-of-constitution-guides-judges-like-north-star-2324861-2023-01-22>

²³⁹ Apurva Vishwanath, *50 years of Kesavananda Bharati case and its legacy: How Supreme Court has invoked the basic structure doctrine over the years*, THE INDIAN EXPRESS (Apr. 25, 2023, 20:41 PM), <https://indianexpress.com/article/explained/explained-law/kesavananda-case-and-its-legacy-sc-has-used-doctrine-sparingly-pushed-back-against-attempts-to-shackle-judicial-review-8572292/>

²⁴⁰ *Separation of Powers: An Overview*, NCSL (May 1, 2021, 19:18 PM), <https://www.ncsl.org/about-state-legislatures/separation-of-powers-an-overview>

²⁴¹ Devanshi Sharma, *Separation of Powers in India*, SSRN (Mar. 7, 2023, 17:18 PM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4380967#:~:text=Devanshi%20Sharma,-O.P.%20Jindal%20Global&text=The%20notion%20of%20separation%20of,%2C%20judiciary%2C%20legislature%20and%20executive.

²⁴² *Separation of Power In India - Evolution and Debates*, DE FACTO IAS (Feb. 24, 2024, 17:05 PM), <https://www.defactolaw.in/post/separation-of-power-in-india-constitution-sc-judgements>

²⁴³ *Inspired by Charles Montesquieu*, EU Monitor (Oct. 30, 2024, 17:06 PM), <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vhisjvf5mwvq>

²⁴⁴ *Separation of Powers with Checks and Balances*, BRI (Oct. 30, 2024, 17:08 PM), <https://billofrightsinstitute.org/essays/separation-of-powers-with-checks-and-balances>

²⁴⁵ Anushree Hanchinal, *Separation of Powers in India and USA: Analyzing its Role on Ensuring Good Governance*, 2(2) IJLR 110, 112 (2021).

²⁴⁶ U.S. CONST. art. I, § 1.

²⁴⁷ U.S. CONST. art. II, § 1.

²⁴⁸ U.S. CONST. art. III, § 1.

interfered with by the judiciary under any circumstances, failing which Parliamentary sovereignty and separation of powers will be undermined²⁴⁹.

III. India's Position on Separation of Powers

India's position on the separation of powers can be traced back to the Constituent Assembly debates, wherein the insertion of Article 40-A expressly stating a "complete separation of powers as between the principal organs of the State" was ultimately turned down²⁵⁰. While the US has an express, strict provision on separation of powers in theory, the same approach was deemed unviable in India as complete water-tight separation would lead to conflict and prevent "harmony" between organs which is undesirable²⁵¹. In the National Commission to Review the Working of the Constitution's Report²⁵², it was noted that "the Indian Constitution has not recognized the doctrine of separation of powers in its absolute rigidity" and in *Indira Nehru Gandhi v. Shri Raj Narain*²⁵³, it was held that the rigid approach to separation of powers as adopted in the US cannot be implemented in India.

While there is no express provision for separation of powers in India, a broader position has been adopted wherein all three organs must perform their respective functions within their own designated spheres as under Constitutional provisions²⁵⁴ like Articles 50²⁵⁵, 53²⁵⁶, 121²⁵⁷, 122²⁵⁸, 123²⁵⁹, 211²⁶⁰, 212²⁶¹ and 361²⁶². In

*State of Tamil Nadu v. State of Kerala & Anr*²⁶³, it was held that the doctrine of separation of powers is a firmly embedded principle in the Indian Constitution though not explicitly stated and in *Ram Jawaya Kapur v. State of Punjab*²⁶⁴, it was held that while the Constitution does not adopt a rigid separation of powers, it clearly distinguishes the functions of each branch and one organ must not perform the essential functions of another.

Therefore, the broad approach to separation of powers in India permits collaborative overlaps, checks and balances and delegated legislation which fosters cooperation, flexibility and overall upkeep of democracy. This aspect shifts away from the strict interpretation as it enables one organ to perform the function/functions of other organs within constitutional limits or restrains the misuse of vested power in an organ. Proponents of the approach such as the Vice President²⁶⁵ state that our democracy flourishes when all the organs "operate in harmony, tandem and togetherness". The Prime Minister has also emphasized on the need for "collective responsibility" of the three organs to further the constitutional spirit²⁶⁶. While this liberal approach may increase the risk of concentration of power and undermine democracy, the broad approach has emerged as the acceptable and practical position regarding separation of powers in India.

IV. Intersection of Basic Structure Doctrine and Separation of Powers

Under the broad approach of separation of powers in India, the Doctrine acts as "the most potent tool²⁶⁷" to impose 'checks and balances' on constitutional amendments made by the legislature, thus opening the gates of law-

²⁴⁹ *ibid* 10, pg. 4.

²⁵⁰ Volume VII LOK SABHA SECRETARIAT, NEW DELHI, CONSTITUENT ASSEMBLY DEBATES OFFICIAL REPORT 962-968 (2014).

²⁵¹ *ibid*.

²⁵² Volume 1 NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION, REPORT OF THE NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION ch. 2, pg. 55 para 2.18.4 (2002).

²⁵³ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp S.C.C. 1.

²⁵⁴ ClearIAS Team, *Separation of powers between various organs*, CLEARIAS (Oct. 10, 2023, 19:25 PM), <https://www.clearias.com/separation-powers-between-various-organs/#the-doctrine-of-separation-of-powers>

²⁵⁵ INDIA CONST. art. 50.

²⁵⁶ INDIA CONST. art. 53.

²⁵⁷ INDIA CONST. art. 121.

²⁵⁸ INDIA CONST. art. 122.

²⁵⁹ INDIA CONST. art. 123.

²⁶⁰ INDIA CONST. art. 211.

²⁶¹ INDIA CONST. art. 212.

²⁶² INDIA CONST. art. 361.

²⁶³ *State of T.N. v. State of Kerala*, (2014) 12 S.C.C. 696.

²⁶⁴ *Rai Sahib Ram Jawaya Kapur v. State of Punjab*, 1955 S.C.C. OnLine SC 14.

²⁶⁵ Press Release, *Our democracy flourishes when all three of its organs—the Legislature, the Judiciary, and the Executive—operate in tandem*, VICE PRESIDENT OF INDIA NIC (Dec. 15, 2023, 19:11 PM), <https://vicepresidentofindia.nic.in/pressrelease/our-democracy-flourishes-when-all-three-of-its-organs%E2%80%94legislature-judiciary-and-executive>

²⁶⁶ Prime Minister's Office, *PM Addresses at Constitution Day Celebrations organized by Supreme Court*, PIB GOV (Nov. 26, 2021, 7:20 PM), <https://pib.gov.in/PressReleasePage.aspx?PRID=1775388>

²⁶⁷ Setu Gupta, *Vicissitudes and Limitations of the Doctrine of Basic Structure*, Winter Issue 2016 IJLR 110; 110, 119-120 (2016).

making to judges who can exercise power to make “implied amendments²⁶⁸”.

However, the roles of the three organs were clearly demarcated in *Kartar Singh v. State of Punjab*²⁶⁹, where it was held that “legal sovereign power has been distributed” to enable the legislature and judiciary to perform their respective functions of making and interpreting laws. Further, in *Dr Ashwini Kumar v. Union of India Ministry of Home Affairs*²⁷⁰, it was held that the doctrine of separation of powers acknowledges that one organ cannot assume the essential functions of another while there exists institutional respect amongst the organs and in *P. Kannadasan v. State of Tamil Nadu*²⁷¹, it was held that rendering one branch superior by concentration of powers would disrupt the entire system and negate the fundamental principle of separation of powers.

In the above context, the following pressing questions arise: How can the judiciary enter the exclusive realm of law-making by striking down constitutional amendments made by the legislature? Does this mean that excess power is concentrated in the hands of the judiciary through the Doctrine, contributing to judicial overreach? Does the exercise of the Doctrine dilute the separation of powers and in turn, democracy?

Before exploring these questions in the following sections of the paper, the evolution of the Doctrine will be briefly discussed.

V. Exploring the Evolution of the Basic Structure Doctrine

The Basic Structure Doctrine emerged from a series of judicial pronouncements²⁷² that indirectly addressed the power struggle between the Parliament’s power to amend the

Constitution under Article 368²⁷³ while using the safeguard of the Ninth Schedule and the conundrum of applying Article 13(2)²⁷⁴ by the judiciary to invalidate the said amendments. The evolution of the Doctrine can further be divided into two timeframes, namely, pre *Kesavananda Bharati* and post *Kesavananda Bharati*.

A. Pre *Kesavananda Bharati*

In *A.K. Gopalan v. State of Madras*²⁷⁵, the Court upheld the constitutionality of detention laws, ruling that fundamental rights are not absolute and reinforced the extensive power of the Parliament to restrict the same²⁷⁶. In *Shankari Prasad v. Union of India*²⁷⁷ and *Sajjan Singh v. State of Rajasthan*²⁷⁸, the Court upheld the constitutionality of the Amendment Acts which gave the Parliament wide-encompassing powers to amend the Constitution under Article 368. Further, the Courts held that Article 13(2) could not apply to constitutional amendments made by the Parliament under Article 368, even if the same were unconstitutional or infringed upon fundamental rights, thus giving the Parliament complete discretion and authority in the field of law-making. However, in *I.C. Golaknath v. State of Punjab*²⁷⁹, it was held that the Parliament does *not* possess absolute power to amend the entire Constitution under Article 368 and that the same is liable to be struck down under Article 13(2), thus overturning previous judgements. Following *Golaknath*, the 24th Amendment (which created Article 13(4)²⁸⁰) was passed and inserted in the Ninth Schedule to escape the *Golaknath* judgement²⁸¹, whose constitutionality was discussed in *Kesavananda Bharati*. In *Kesavananda Bharati*, the Court while upholding the powers of the Parliament to pass

²⁶⁸ Dr. N. Sathish Gowda, *Constitutional basis for basic structure doctrine in India: Effects and applicability*, MANUPATRA (Oct. 30, 2024, 21:25 PM), <http://docs.manupatra.in/newsline/articles/Upload/4715CF34-CCD9-4E2E-8072-71C0795456B B.pdf>

²⁶⁹ *Kartar Singh v. State of Punjab*, (1994) 3 S.C.C. 569.

²⁷⁰ *Ashwini Kumar v. Union of India*, (2020) 13 S.C.C. 585.

²⁷¹ *P. Kannadasan v. State of T.N.*, (1996) 5 S.C.C. 670.

²⁷² Gourab Das, *Basic Structure Doctrine of Indian Constitution*, SSRN (Mar. 3, 2023, 23:24 PM),

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4377908#:~:text=Although%20Kesavananda%20Bharati%2C%20the%20head,and%20integrity%20of%20this%20country.

²⁷³ INDIA CONST. art. 368.

²⁷⁴ INDIA CONST. art. 13(2).

²⁷⁵ *A.K. Gopalan v. State of Madras*, 1950 S.C.C. 228.

²⁷⁶ *Precursors To Kesavananda Bharati Judgement*, SCI (Oct. 30, 2024, 23:26 PM), <https://judgments.ecourts.gov.in/KBj/?p=home/background#:~:text=under%20the%20Constitution,-,Sajjan%20Singh%20v.,Constitution%20including%20any%20Fundamental%20Rights.>

²⁷⁷ *Shankari Prasad Singh Deo v. Union of India*, 1951 S.C.C. 966.

²⁷⁸ *Sajjan Singh v. State of Rajasthan*, 1964 S.C.C. OnLine SC 25.

²⁷⁹ *Golak Nath v. State of Punjab*, 1967 S.C.C. OnLine SC 14.

²⁸⁰ INDIA CONST. art. 13(4).

²⁸¹ *Nani Palkhiwala, Fundamental Right Case – Comment pg. 1*, (1973) 4 SCC (J) 57.

laws and amendments with respect to any part of the Constitution held that Article 13(2) cannot apply to constitutional amendments made under Article 368. However, it held that “certain basic features of the Constitution cannot be amended”, thus enabling the judiciary to strike down any amendment that violated the basic structure of the Constitution and signifying the formal recognition of the Doctrine in Indian jurisprudence.

B. Rationale of the Doctrine and Analysis from the Separation of Powers Lens

The Court in *Kesavananda Bharati* gave a mixed decision with regards to the law-making power of the Parliament – the Parliament enjoyed wide-encompassing powers to amend the Constitution under Article 368, and further, constitutional amendments could not be tested on the touchstone of Article 13(2) owing to the 24th Amendment Act and application of Article 13(4)²⁸². However, to prevent a fraud on the Constitution by unfettered power in the hands of the Parliament, the Court devised the Basic Structure Doctrine as a means of keeping the Parliament in check and upholding rule of law with regards to *only* constitutional amendments. Ordinary laws could be challenged as per the procedure given in Article 13(2).

In analysing the Doctrine from the separation of powers lens, proponents of the strict interpretation are likely to support the Court’s decisions in *A.K. Gopalan*, *Shankari Prasad* and *Sajjan Singh* as the Court upheld the essential function of the legislature in formulating laws and amendments without intervention from other organs of the State. On the other hand, *I.C. Golaknath* and *Kesavananda Bharati* granted the judiciary a major role in placing a ‘check’ on unfettered law-making²⁸³. However, since India has adopted the system of checks and balances under the broad approach of

separation of powers, *Kesavananda Bharati* can be considered to be the most ideal outcome as it grants the Parliament wide-encompassing powers to make laws, while being subject to judicial check if they violate principles of the Constitution under Article 13(2) in case of ordinary laws or the Doctrine for constitutional amendments under Article 368.

C. Post *Kesavananda Bharati*

After *Kesavananda*, the Doctrine emerged as a fundamental legal principle to check Parliament’s power to amend the Constitution. Over the past fifty years, the judiciary has repeatedly examined and expanded the Doctrine to bring various facets of laws and democracy under the ambit²⁸⁴ of “basic structure” of the Constitution²⁸⁵. The following sections highlight some key precedents that showcase the development²⁸⁶ and applicability of the Doctrine since *Kesavananda Bharati*.

In *Indira Gandhi*, the Doctrine was applied for the first time²⁸⁷, wherein Clause (4) of Article 329A inserted by the 39th Amendment Act was declared void, as it restricted judicial review of elections, which forms “a part of the basic structure of the Constitution.” Following the 42nd Amendment Act, the Court in *Minerva Mills Ltd. v. Union of India*²⁸⁸ struck down certain sections for violating the Doctrine, affirming that judicial review and fundamental rights are part of the basic structure of the Constitution²⁸⁹. Further, in *Indira Sawhney v. Union of India*²⁹⁰, it was held that both Part III and Part IV of the Constitution

²⁸² Akash Baglekar, *Does basic structure doctrine applies to ordinary legislation*, LIVELAW (Jun. 7, 2021, 23:57 PM), <https://www.sconline.com/blog/post/2021/06/07/basic-structure-doctrine/>

²⁸³ Madhav Khosla, *Constitutional Amendment* in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION pg. 241 (2016).

²⁸⁴ Venkatesh Nayak, *The Basic Structure of the Indian Constitution*, CONSTITUTION NET (Oct. 31, 2024, 17:28 PM), <https://constitutionnet.org/v1/item/basic-structure-indian-constitution#:~:text=The%20phrase%20basic%20structure%20itself,Kesavananda%20Bharati%20case%20in%201973.>

²⁸⁵ *Basic Structure Doctrine - Which features of the constitution constitute the Basic Structure?*, V&R (Sep. 16, 2024, 00:00 AM), <https://vajiramandravi.com/quest-upsc-notes/basic-structure/>

²⁸⁶ Dharanisha T Sasalu, *Basic Structure Doctrine of Indian Constitution and Judicial Interpretation*, RESEARCHGATE (Dec. 2022, 17:25 PM), https://www.researchgate.net/publication/380602849_Basic_Structure_Doctrine_of_Indian_Constitution_and_Judicial_Interpretation

²⁸⁷ Oliva Chakraborty, *Case Comment: Indira Gandhi vs Raj Narain, 1975*, LAWCTOPUS (Aug. 19, 2024, 17:11 PM), <https://www.lawctopus.com/academike/case-comment-indira-gandhi-vs-raj-narain-1975/>

²⁸⁸ *Minerva Mills Ltd. v. Union of India*, (1980) 2 S.C.C. 591.

²⁸⁹ *Case Commentary on Minerva Mills Ltd. & Ors vs Union of India & Ors*, LAWBOOMI (Jul. 16, 2022, 17:15 PM), <https://lawboomi.com/case-commentary-on-minerva-mills-ltd-ors-vs-union-of-india-ors/>

²⁹⁰ *Indira Sawhney v. Union of India*, 1992 Supp (3) S.C.C. 217.

are basic features under the Doctrine. Finally, in *Kihoto Hollohan v. Zachillhu*²⁹¹, democracy, sovereignty, republic and free and fair elections were included under the Doctrine and in *S.R. Bommai v. Union of India*²⁹², the Court held that secularism, federalism and democracy from the Preamble also form a part of the Constitution's basic structure.

In *Waman Rao v. Union of India*²⁹³, it was held that the Doctrine would not apply to Amendment Acts in the Ninth Schedule prior to *Kesavananda* but would apply to constitutional amendments post that²⁹⁴, hence utilising the principle of prospective overruling. Additionally, in *M. Nagaraj & Others v. Union of India*²⁹⁵, the Court laid down the twin tests of width and identity for application of the Doctrine²⁹⁶ and finally, in *I.R. Coelho v. State of Tamil Nadu*²⁹⁷, the Court held that the Doctrine can apply to any law or amendment placed in the Ninth Schedule²⁹⁸ post *Kesavananda* while laying out tests for application of the Doctrine.

VI. Analysing the Doctrine in the NJAC Case

The Supreme Court in *Supreme Court Advocates-on-record Association & Anr. v. Union of India*(2016)²⁹⁹(NJAC Case) or the Fourth Judges Case struck down the 99th Constitutional Amendment on grounds that the Doctrine was violated³⁰⁰ and ruled that the National Judicial Appointments Commission (NJAC) Act was unconstitutional, thus marking another instance of collision³⁰¹ between the judiciary and Parliament. The Court held that the NJAC Act

violated 'independence of judiciary' and 'judicial primacy in appointments', which were under the basic structure of the Constitution; however, several aspects of the judgement indicate that the Doctrine was incorrectly applied in this case. Two of these arguments will be presented below, before moving on to the critique of the Doctrine:

A. Distinction between "Basic Structure" and "Basic Feature"

In the dissent of the NJAC case³⁰², a distinction was drawn between the basic structure and basic feature/s of the Constitution³⁰³. It was noted that basic features come under the umbrella of basic structure and amending the former without compromising on the latter does not violate the Doctrine. Since the Executive was not accorded absolute power in appointment of judges but had to do so in consultation with the Chief Justice of India in the NJAC³⁰⁴, it was noted that judicial independence and the overall basic structure were not violated, hence implying that the Doctrine could not be applied.

B. Judicial Primacy as a Mere Claim

In the NJAC case, the majority opinion relied heavily on the precedent of the Second Judges Case³⁰⁵ to conclude that judicial primacy in appointments is a part of the basic structure. However, neither has judicial primacy been expressly mentioned in the Constitution nor has it been shown to be clearly connected to the basic structure of the Constitution in both the Second Judges Case and the NJAC Case³⁰⁶. Further, the Third Judges Case dealing with judicial appointments does not even mention the Doctrine. Many believe that judicial primacy

²⁹¹ *Kihoto Hollohan v. Zachillhu*, 1992 Supp. (2) S.C.C. 651.

²⁹² *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. 1.

²⁹³ *Waman Rao v. Union of India*, (1981) 2 S.C.C. 362.

²⁹⁴ Ria Goyal, *Case Commentary on Waman Rao and Ors. vs Union of India: Analysing the Basic Structure Doctrine & its Evolution*, MANUPATRA (Jul. 14, 2022, 17:16 PM), <https://articles.manupatra.com/article-details/Case-Commentary-on-Waman-Rao-and-Ors-vs-Union-of-India-Analysing-the-Basic-Structure-Docctrine-its-Evolution>

²⁹⁵ *M. Nagaraj v. Union of India*, (2006) 8 S.C.C. 212.

²⁹⁶ *Nimisha Dubliish, M. Nagaraj & Ors. vs. Union of India & Ors. (2006)*, IPLEADERS (Sep. 24, 2024, 17:22 PM), <https://blog.ipleaders.in/reservation-promotion-m-nagaraj-case/>

²⁹⁷ *I.R. Coelho v. State of T.N.*, (1999) 7 S.C.C. 580.

²⁹⁸ *Aishwarya Agrawal, IR Coelho Case*, LAWBOOMI (Oct. 20, 2023, 17:20 PM), https://lawboomi.com/ir-coelho-case/#Facts_of_IR_Coelho_Case

²⁹⁹ *Supreme Court Advocates-on-record Association & Anr. v. Union of India*, (2016) 5 S.C.C. 808. (hereafter, NJAC Case)

³⁰⁰ *Arghya Sengupta, Judicial Primacy and the Basic Structure: A Legal Analysis of the NJAC Judgment*, 50 (48) EPW 27, 27 (2015).

³⁰¹ DR. ANANT KALSE, *JUDICIAL ACTIVISM AND BASIC STRUCTURE THEORY BRIEF OVERVIEW* 73 (2016).

³⁰² *An overview of dissent in the NJAC case*, CJP ORG (Jan. 18, 2023, 22:49 PM), <https://cjp.org.in/an-overview-of-dissent-in-the-njac-case/>

³⁰³ *Dr. Anurag Deep and Shambhavi Mishra, Judicial Appointments in India and the NJAC Judgment: Formal Victory or Real Defeat*, 3 JIJ 49, 72-73 (2018).

³⁰⁴ *Chintan Chandrachud, Debating the NJAC Judgment of the Supreme Court of India: Three Dimensions*, UKCLA (Nov. 3, 2015, 00:31 AM), <https://ukconstitutionallaw.org/2015/11/03/chintan-chandrachud-debating-the-njac-judgment-of-the-supreme-court-of-india-three-dimensions/>

³⁰⁵ *Supreme Court Advocates-on-Record Association v. Union of India*, (1993) 4 S.C.C. 441.

³⁰⁶ *Gautam Bhatia, The NJAC Judgment and its Discontents*, INDCONPHIL (Oct. 16, 2015, 22:39 PM), <https://indconlawphil.wordpress.com/2015/10/16/the-njac-judgment-and-its-discontents/>

is not a part of the basic structure³⁰⁷, and that a mere claim cannot justify invalidating a law under the Doctrine.

VII. Critiquing the Basic Structure Doctrine

A. Friction between the Doctrine and Separation of Powers

While the concept of separation of powers has been recognised as part of the basic structure of the Constitution³⁰⁸ and the Doctrine acts as a tool for checks and balances under separation of powers, the former in its strictest sense cannot coexist with the latter³⁰⁹; application of the Doctrine fundamentally dilutes separation of powers for two main reasons. Firstly, the judiciary assumes the role of a passive law-maker³¹⁰ and enters the legislature's domain, diverting from its essential function of interpreting laws. Further, this can lead to a concentration of power in the hands of the judiciary as seen in cases like *Indira Gandhi* and *Minerva Mills Ltd.* wherein the judiciary struck down laws and constitutional amendments. Moreover, in the NJAC case, if the very applicability and rationale behind using the Doctrine is flawed, its purpose as a 'check' on the legislature is severely undermined. This leads to misuse of the Doctrine, which can tip the scales in favour of the judiciary over the other organs and lead to a dilution of the principle of separation of powers.

B. Compromising Parliamentary Sovereignty

Parliamentary sovereignty and its "supremacy within the field assigned to it"³¹¹ has been a core

principle of the Indian Constitution since the time of independence³¹². It is evident that the Parliament is the "highest law-making body"³¹³ with its primary function of legislating laws³¹⁴ after considering the interests of citizens³¹⁵ for overall societal and national development³¹⁶. However, the Doctrine undermines Parliamentary sovereignty for two main reasons. Firstly, it permits the judiciary to have the "final say"³¹⁷ on constitutional amendments made by the legislature and secondly, application of the Doctrine by the judiciary fails to consider what the general citizenry of the country wants. Not only is a pre-legislative consultative process³¹⁸ with citizens absent but the 'interpretation of unelected judges'³¹⁹ takes precedence over the laws formulated by the elected representatives of the people. For instance, the NJAC case affirmed the collegium system which was vastly different from the NJAC model passed by Parliament, leading many³²⁰ to argue that the judgement severely undermined the supremacy and sovereignty of the Parliament. It also raises a significant issue as to whether exercise of the Doctrine is an attempt to rewrite the Constitution³²¹ by

³¹² *Judicial Supremacy v. Parliamentary Supremacy in India*, LLOYD LAW (Jul. 7, 2022, 21:06 PM), <https://www.lloydlawcollege.edu.in/blog/judicial-supremacy-v-parliamentary-supremacy.html>

³¹³ T. K. Viswanathan, *The Indian Parliament*, EPARLIB (Nov. 2, 2024, 21:01 PM), https://eparlib.nic.in/bitstream/123456789/68/1/The_Indian_Parliament_Eng.pdf

³¹⁴ EDITION 4, DR. YOGENDRA NARAIN, AN INTRODUCTION TO PARLIAMENT OF INDIA 18 (2007).

³¹⁵ *Parliamentary Function of Lawmaking*, AGORA (Nov. 2, 2024, 21:04 PM), <https://www.agora-parl.org/resources/aoe/parliamentary-function-lawmaking>

³¹⁶ RESEARCH AND INFORMATION DIVISION LOK SABHA SECRETARIAT, RESEARCH NOTE ON ROLE OF LEGISLATORS IN THE DEVELOPMENT PROCESS 4-5 (2019).

³¹⁷ Anmol Jain, *50 Years of Kesavananda Bharti*, VERFASSUNGSBLOG (May 9, 2023, 21:13 PM), <https://verfassungsblog.de/50-years-of-kesavananda-bharti/>

³¹⁸ MINISTRY OF LAW AND JUSTICE, PRE-LEGISLATIVE CONSULTATIVE POLICY (2014).

³¹⁹ Sudhir Krishnaswamy, *5 Legitimacy of the Basic Structure Doctrine*, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine*, Onl. Edn. OXFORD 164, 164 (2011).

³²⁰ *NJAC verdict: Setback to parliamentary sovereignty, says Govt*, BS (Oct. 16, 2015, 20:35 PM), https://www.business-standard.com/article/current-affairs/njac-verdict-setback-to-parliamentary-sovereignty-says-govt-115101600971_1.html (See also "Severe compromise of parliamentary sovereignty, disregard of mandate": *Rajya Sabha Chairman Dhanekar slams NJAC verdict*, THE PRINT (Dec. 7, 2022, 10:13 PM), <https://theprint.in/politics/severe-compromise-of-parliamentary-sovereignty-disregard-of-mandate-rajya-sabha-chairman-dhanekar-slams-njac-verdict/1253814/>)

³²¹ DR. JUSTICE B.S. CHAUHAN, THE LEGISLATIVE ASPECT OF THE JUDICIARY: JUDICIAL ACTIVISM AND JUDICIAL RESTRAINT

³⁰⁷ Srishti Maheshwari & Ojasvi Chhabra, *A Critique On The NJAC Judgement*, 3(1) IJLLR 1, 6 (2021). See also Vishwajith Sadananda, *Debating the NJAC – The Second Judges Case, Judicial Appointments, and the Basic Structure: A Response - I (Guest Post)*, INDCONPHIL (Jul. 17, 2015, 22:4 PM), <https://indconlawphil.wordpress.com/2015/07/17/guest-post-debating-the-njac-the-second-judges-case-judicial-appointments-and-the-basic-structure-a-response-i/>

³⁰⁸ *ibid* 22.

³⁰⁹ Thabitta R, *Problems with the Application of the Basic Structure Doctrine in India: Why Limiting the Constitutional Amendment Powers of the Legislature is a Bad Idea*, IACL-AIDC (Feb. 10, 2022, 18:26 PM), <https://blog-iacl-aidc.org/new-blog-3/2022/2/10/problems-with-the-application-of-the-basic-structure-doctrine-in-india-why-limiting-the-constitutional-amendment-powers-of-the-legislature-is-a-bad-idea>

³¹⁰ Prerana Srinath, *Judicial Law Making Through Dictum In India: A Constitutionally Legitimized Practice*, LIVE LAW (Aug. 7, 2022, 12:15 PM), <https://www.livelaw.in/lawschoolcolumn/constitution-judicial-law-making-judiciary-article-142-supreme-court-205937?fromIpLogin=81874.92738698717>

³¹¹ DR. SUBHASH C. KASHYAP, NEHRU AND PARLIAMENT 9 (1986).

undermining Parliament's guaranteed powers under Article 368. This was highlighted in *Suraz India Trust v. Union of India*³²², which questioned whether the collegium system in the Second Judges Case altered the basic structure of the Constitution.

C. Vagueness and Subjectivity

Arising out of judicial precedents, the Doctrine itself does not find any mention in the Constitution³²³. Consequently, determining what constitutes 'basic structure' lies entirely with the judges, which varies on a case-by-case basis. While there have been tests devised to determine the same as in *M. Nagaraj* and *I.R. Coelho*, these are not definitive and allow for broad interpretation by the judges. Additionally, the fine distinction between 'basic and fundamental' as in *Glanrock Estate (P) Ltd. v. State of T.N.*³²⁴ and 'essential and integral' as seen in *Raghunathrao Ganpatrao v. Union of India*³²⁵ makes it tricky for judges to determine what falls under the umbrella of the Doctrine. In the dissent of the NJAC case, yet another distinction was made between 'basic structure' and 'basic feature' while applying the Doctrine, which was ignored by the majority while formulating their judgement³²⁶. Finally, the collegium system itself, which was affirmed by the judges lacks any mention in the Constitution³²⁷.

D. Erroneous Application of the Doctrine to Ordinary Laws

Over the years, judges have been facing a dilemma with regards to the applicability of the Doctrine to all laws made by the legislature, i.e., 'ordinary laws' and constitutional amendments,

rather than only the latter³²⁸. While ordinary laws are made by the Parliament's law-making powers under Articles 245 to 248³²⁹ of the Constitution, constitutional amendments are made with the Parliament's constituent power under Article 368. The former's validity can be tested on grounds of legislative competence or violation of fundamental rights³³⁰ wherein Article 13(2) would apply while the latter can be tested on grounds of the Doctrine owing to the bar under Article 13(4). This rationale is supported by precedents like *Kuldip Nayar v. Union of India*³³¹, *Ashoka Kumar Thakur v. Union of India*³³² and *State of Karnataka v. Union of India*³³³. However, the application and principles of the Doctrine have extended to testing the constitutionality of even ordinary laws³³⁴, as can be seen in *Indira Sawhney, S.R. Bommai and Union of India v. R. Gandhi*³³⁵. In the NJAC case, the conundrum of applying the Doctrine to ordinary laws was witnessed in Justice Khehar's and Justice Lokur's conflicting views³³⁶, wherein the former held that the Doctrine would apply to all legislations and the latter followed the settled position of law and rationale behind the Doctrine. Ultimately, this inconsistency undermines the Doctrine and provides the judiciary with an over-expansive power and "independent basis³³⁷" to invalidate laws.

VIII. Is the Basic Structure Doctrine a 'Saviour of Democracy'?

While the Doctrine has several serious implications, it has been crucial in strengthening Indian democracy and upholding

(2024). (see <https://www.tnsja.tn.gov.in/article/BS%20Chauhan%20Speech-%20Lucknow.pdf>)

³²² *Suraz India Trust v. Union of India*, (2012) 13 S.C.C. 497.

³²³ Suhrith Parthasarathy, *Legitimacy of the basic structure*, THE HINDU (Feb. 4, 2019, 12:48 AM), <https://www.thehindu.com/opinion/lead/legitimacy-of-the-basic-structure/article26168775.ece>

³²⁴ *Glanrock Estate (P) Ltd. v. State of T.N.*, (2010) 10 S.C.C. 96.

³²⁵ *Raghunathrao Ganpatrao v. Union of India*, 1994 Supp (1) S.C.C. 191.

³²⁶ *NJAC judgment ignored basic structure of Constitution: Jaitley*, THE HINDU (Dec. 4, 2021, 10:45 PM), <https://www.thehindu.com/news/national/NJAC-verdict-based-on-%E2%80%98erroneous-logic%E2%80%99-says-Jaitley/article60271438.ece>

³²⁷ Atul Pal, *The Contest Over the Collegium System in India*, LSE (Jun. 5, 2023, 22:38 PM), <https://blogs.lse.ac.uk/southasia/2023/06/05/the-contest-over-the-collegium-system-in-india/>

³²⁸ Surya Narayanan. N and S. Teepanjali, *(In)Applicability Of The Basic Structure Doctrine To Ordinary Legislations*, LAWBEAT (Jun. 20, 2021, 15:04 PM), <https://lawbeat.in/index.php/articles/inapplicability-basic-structure-doctrine-ordinary-legislations>

³²⁹ INDIA CONST. art. 245, 246, 247, 248.

³³⁰ Pathik Gandhi, *Basic Structure and Ordinary Laws (Analysis of the Election Case & the Coelho Case)*, 4 IJCL 47, 52 (2010).

³³¹ *Kuldip Nayar v. Union of India*, (2006) 7 S.C.C. 1.

³³² *Ashoka Kumar Thakur v. Union of India*, (2008) 6 S.C.C. 1.

³³³ *State of Karnataka v. Union of India*, (1977) 4 S.C.C. 608.

³³⁴ Anandini Saha, *Basic Structure Doctrine: Limited to only Constitutional Amendments*, 3(4) IJLMH 1649, 1651-1653 (2020).

³³⁵ *Union of India v. R Gandhi*, (2010) 11 S.C.C. 1.

³³⁶ Govinda Asawa & Parthiv Joshi, *Delimiting the Doctrine: An Argument against Basic Structure Review of Ordinary Laws*, 8(2) CALJ 91, 112-115 (2024).

³³⁷ Ashok Kini, *Can Ordinary Legislation Be Struck Down For Violating 'Basic Structure' Of Constitution? Canada Supreme Court Judgment Revives The Debate*, Oct. 17, 2021, 9:21 AM, <https://www-livewlaw-in.opj.remotlog.com/columns/ordinary-legislation-basic-structure-constitution-canada-supreme-court-183814>

fundamental constitutional tenets. In today's world, strict separation of powers cannot truly exist³³⁸ and in India, where the system of checks and balances is followed, the Doctrine has prevented the abuse of State power by the legislature. As regards to Parliamentary sovereignty, in *Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha & Ors*³³⁹, it was held that the Constitution is the ultimate sovereign supreme over the Indian Parliament and that the judiciary can impose a check on any law made in contravention of it. Moreover, keeping the concept of the Doctrine flexible and open to interpretation is practical and prevents complexities; as noted in *J&K National Panthers Party v. Union of India*³⁴⁰, it is in line with a constantly changing Constitution and the evolution of citizen's values. Finally, since the Parliament is the singular body responsible for making all laws in India, the Doctrine can apply to "all forms of state action³⁴¹" to ensure that the basic features of the Constitution are not infringed upon.

IX. Recommendations

The following suggestions can be considered for bettering the application of the Basic Structure Doctrine:

- Clearly defining terms such as 'basic', 'basic structure', 'fundamental', 'essential', 'integral' as well as the ambit and applicability of the Doctrine.
- Following a uniform application of the Doctrine to either all laws of Parliament or only constitutional amendments. However, it is a preferable and settled position of law to apply the Doctrine only to the latter, which is in line with its rationale.
- Facilitating consultative and deliberative process by setting up review committees/panels with both law-

makers and citizens before concluding whether a law must be struck down. This also facilitates transparency and clarity in judicial decision making.

- An independent Advisory and Reforms Committee comprising of individuals from all three organs can be set up for recommendations on the challenged existing laws.
- Creating a consolidated database with respect to Parliamentary amendments to the Constitution and cases filed against them while recording the final judgement with regards to application of the Doctrine. This furthers transparency and analysis of judicial decisions by various stakeholders.

X. Conclusion

After 50 years of evolution, the Basic Structure Doctrine has been instrumental in upholding the most fundamental tenets of the Indian Constitution and democracy, rendering it one of the finest creations of judicial review. While serving as a check on the extensive law-making power of the legislature, the Doctrine abides with the broader approach of separation of powers followed in India. Further, absence of the Doctrine would empower the legislature to alter the Constitution as per its will without any accountability or restraint, thus leading to a fraud on the Constitution and potential decline of democracy. Hence, the Basic Structure Doctrine is a necessary and important tool for the judiciary to act as a guardian of the Constitution and watchdog of democracy in India. However, the fine line between the principle and just application of the Doctrine raises serious concerns. Inconsistent, vague and subjective application of the Doctrine by the judiciary, especially when misaligned with constitutional principles, can undermine separation of powers and encroach upon Parliamentary sovereignty. This can render the Doctrine counterproductive to its intended role as a constitutional safeguard protecting separation of powers. Therefore, judges must use the Doctrine sparingly and cautiously,

³³⁸ Tej Bahadur Singh, *Principle of Separation of Powers and Concentration of Authority*, 4 & 5 JTRJ 1, 11 (1996).

³³⁹ *Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha & Ors*, (2007) 3 S.C.C. 184.

³⁴⁰ *J&K National Panthers Party v. Union of India*, (2011) 1 S.C.C. 228.

³⁴¹ V. Venkatesan, *As Courts Rule on Constitution's Basic Structure, Landmark Doctrine Turns Out to Be Elastic*, THE WIRE (Oct. 29, 2020, 13:03 PM), <https://thewire.in/law/Constitution-basic-structure-case-histories>

failing which the “tyranny of the unelected³⁴²” might lead to controversies and instability. Finally, both the legislature and judiciary must recognize that neither holds absolute authority in a democratic framework; ultimately, it is the Constitution that is the supreme guiding force which must be respected and revered by all.



³⁴² Arun Jaitley on NJAC verdict: Democracy cannot be ‘tyranny of the unelected’, THE INDIAN EXPRESS (Oct. 19, 2015, 10:25 PM), <https://www.thehindu.com/opinion/lead/legitimacy-of-the-basic-structure/article26168775.ece>