

VICISSITUDES AND LIMITATIONS OF THE DOCTRINE OF BASIC STRUCTURE

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Abstract

The doctrine of 'basic structure' is considered the most potent tool in the hands of the Indian judiciary to maintain the balance of power, the checks and balances that are required for a smooth functioning of a democracy. This doctrine has altered the course of Indian Constitutional law jurisprudence. The article will pay tribute to its origins and efforts to protect and preserve it through the course of history. Additionally, it is believed that the doctrine of basic structure is applicable to constitutional amendments exclusively, however, various judges of the Supreme Court have viewed this aspect differently and there have been contrasting opinions on this subject. Since this does not appear to be a straightforward concept anymore with the doctrine's applicability in dispute, this article will attempt to trace what different judges of the Supreme Court have stated in their judgments regarding the applicability of the doctrine of basic structure to ordinary legislations and finally conclude with some observations and suggestions.

I Introduction

A CONSTITUTION needs to be a living Constitution,¹ to endure the tides of time and adapt to the changing requirements of generations. However, at the same time, there are some intrinsic values, a basic framework on which the whole content of the constitution rests. This framework originalism² is the very essence of the legal system which the constitution document embodies and which the courts try to protect through their various doctrines and pronouncements. It would be an entirely separate matter if the *volksgeist* demands a new structure by demolishing the old one and would require a separate procedure for that. Until then, certain essential characteristics which hold up a nation together in a determined form, need to be protected from any encroachment that is premature and does not reflect the true will of the collective.

Basic structure doctrine, evolved by the Indian Supreme Court, through its numerous landmark judgments over the years, brings in that required factor of constitutionalism, which is critical to the upkeep of the spirit of the constitution document, to preserve, protect and maintain the thicker concept³ of rule of law, without which the constitution is but a dead letter law. The journey of the evolution of this doctrine from the theory of implied

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¹ David A. Strauss, "Do we have a Living Constitution?" 59 *Drake L. Rev.* 973 (2011).

² Jack M. Balkin, "Framework Originalism and the Living Constitution" 103 *Northwstn. Univ. Law Rev.* 550 (2009).

³ Brian Z. Tamanaha, "On the Rule of Law, History, Politics, Theory" 32 *Journal of Law and Society* 657 (2005).

limitations⁴ to its current form today has been nothing short of tumultuous, with attempts to save it and even greater attempts to obliterate it because this doctrine singlehandedly empowers the judiciary to keep a check on the legislature and restrain it from stepping into the treacherous realm of arbitrariness by misusing article 368 of the Indian Constitution. This paper will attempt to highlight the origins, vicissitudes that the doctrine of basic structure had to endure, and discuss about its limitations.

A brief history of the basic structure doctrine

The origins of the basic structure doctrine can be traced back to the lecture delivered by Professor Dietrich Conrad, formerly Head of the Law Department, South Asia Institute of the University of Heidelberg, Germany. Few could have known that the impact of that lecture would be of epic proportions and would change the future of Indian Constitutional law permanently. In *Golakhnath v. State of Punjab*,⁵ (hereinafter referred to as *Golakhnath* case) the doctrine of implied limitations was brought forth by M.K. Nambiar, a constitutional lawyer, but was not accepted by the Supreme Court. Nambiar, owed his argument in this case to Conrad, who, on his visit to India in 1965, delivered a lecture on ‘Implied limitations on Amending Power’ to the faculty of law at Banaras Hindu University. A paper written on this theme was forwarded to T.S. Rama Rao in Madras for his comments and this in turn drew Nambiar’s attention to it. Conrad in his lecture in 1965 raised some very important and ostensibly easy questions yet he succeeded in bringing forth their vital nature as there were no easy answers to them. His questions included the likes of, by a valid exercise of amendment power under article 368, whether the Parliament could amend article 1 and divide the Union of India into Tamil Nadu and Hindustan proper? Could a constitutional amendment abolish article 21, could a ruling party observing a depreciation in majority amend article 368 to vest the entire power with the President acting on the advice of the Prime Minister? Could the amending power abolish the Constitution itself and reintroduce monarchy?⁶

Some of these questions may seem easy to answer today, in the light of basic structure doctrine and even an individual with rudimentary knowledge in this field could provide solutions, however, imagine the time, prior to *Golakhnath* case and *Kesavananda Bharati v.*

⁴ UpendraBaxi, “Some Reflections on the Nature of Constituent Power” in Rajeev Dhavan and Alice Jacob (eds.), *Indian Constitution Trends and Issues* 122 (1978).

⁵ (1967) 2 SCR 762.

⁶ A.G. Noorani, “Behind the Basic Structure Doctrine- On India’s debt to a German Jurist, Professor Dietrich Conrad” 18 (9) *Frontline* (April 28- May 11, 2001).

*State of Kerala*⁷ (hereinafter *Kesavananda Bharati* case), when these questions appeared to be real conundrums because the doctrine of basic structure as it stands today, simply was not in existence. How did Conrad come to think of this ‘doctrine of implied limitations’? Well, the answer to that lies in article 79(3) of the basic laws of the Federal Republic of Germany⁸ that explicitly barred amendments to the provisions concerning the federal structure and the basic principles laid down in article 1 to 20.⁹ These were the lessons that Germany had learnt from the Nazi era. This German connection was acknowledged by the Supreme Court in *M Nagaraj v. Union of India*.¹⁰

Thus it is clear that this doctrine was not an ‘invention of the Indian judiciary’ as is believed by some, but was rather a necessitated inspiration from a civil law system when the drafters of the Indian Constitution did not look beyond Common law countries for reference.

This theory of implied limitation, though not accepted in the *Golaknath* case was held by the majority as having substantial force and was shelved to be dealt with later when the situation arose, when the Parliament sought to destroy the structure of the Constitution embodied in provision other than part III of the Constitution.¹¹ This argument was later on taken up by Nani Palkhivala in *Kesavananda Bharati* case and was successfully converted to the doctrine of basic structure, as it stands today, though a number of additional features have been added by the Supreme Court under this umbrella, over the years.

II Legitimation of the doctrine of basic structure

The 24th, 25th and the 29th amendments to the Constitution had a relationship altering effect between the Parliament and the judiciary. The amendments were challenged in *Kesavananda Bharati* case also called the “Fundamental Rights case” in the Supreme Court. This case is a consolidated name for *Raghunath Rao Ganpati Rao, N. H. Nawab Mohammed Iftakhar Ali Khan v. Union of India, Shethia Mining and Manufacturing Corporation Limited v. Union of India* and *Oriental Coal Co. Ltd. v. Union of India*.

The petitioner in this case contented that there were certain basic freedoms meant to be permanent and that there were other basic features besides fundamental rights like

⁷ AIR 1973 SC 1461.

⁸ Adopted on May 8, 1949. This was six months prior to when the drafting of the Indian Constitution ended.

⁹ These mostly dealt with human rights, democratic and social set-up.

¹⁰ (2006) 8 SCC 12. The Supreme Court said:

The concept of a basic structure giving coherence and durability to a Constitution has a certain intrinsic force. This doctrine has essentially developed from the German Constitution.

¹¹ *Supra* note 5.

sovereignty and integrity of India, right to vote and elect representatives, independence of judiciary et cetera, and that the power of the Parliament to amend the Constitution under article 368 is limited with implied limitations on it. The respondents claimed an unlimited power for the amending body and short of total abrogation or repeal of the Constitution the amending body was omnipotent under article 368, and the Constitution could be amended by way of variation, addition or repeal so long as no vacuum is left in the governance of the country.¹² H.M. Seervai, the then Advocate-General of Maharashtra, on behalf of the respondent State of Kerala, submitted that the amending power had no limitations and it could be used to enlarge that power as well. He felt that article 368 could be amended in any manner and the amending power could not be restricted on the basis of any imaginary abuse of power. He was against the theory of implied limitations and the essential features of the Constitution. Niren De, the then Attorney-General of India, was also of the same opinion.

The special bench consisting of 13 judges gave 7:6 verdict based on shared arguments of eleven judgments. Validity of the 24th amendment was upheld unanimously, however the scope of the amending power was something which was not unanimously agreed upon. S.M. Sikri, Shelat, Grover, Hegde, Mukerjee and Jagan Mohan Reddy JJ, supported the inherent limitations and held that the amending power could not be used to emasculate the basic structure of the constitution and the fundamental rights. M.H. Beg, D.G. Palekar, A.N. Ray, K.K. Mathew and Y.V. Chandrachud, JJ, held that the amending power under article 368 was unrestricted and could be used to amend any basic feature including the fundamental rights. Khanna J, felt that the amending power should not be used to alter the basic structure of the Constitution but declared that the fundamental rights including the right to property were not the basic features and therefore could be amended. The judgment of Khanna J, was the decisive one and titled the majority in favour of declaration of the basic structure of the Constitution by a slim majority of 7:6.¹³

Khanna J was responsible for another crucial dimension of the basic structure two years after the case was decided. In the *Kesavananda Bharati* case, he did not say that fundamental rights were part of the basic structure of the Constitution. Three of Khanna J's colleagues in the *Kesavananda Bharati* case were clearly of the opinion that Khanna J had not held that fundamental rights were part of the basic structure in the *Kesavananda Bharati*

¹² A. Lakshminath, *Basic Structure and Constitutional Amendments – Limitations and Justiciability* 134-135 (Deep & Deep Publications Pvt. Ltd., New Delhi, 2002).

¹³ *Supra* note 7.

case. However, in *Indira Gandhi v. Raj Narain*¹⁴ (hereinafter referred to as the *Election* case) two years later, Khanna, J “clarified” his judgment in the *Kesavananda Bharati* case. He now said that he had given clear indications in his judgment that fundamental rights were part of the basic structure. With this, Khanna, J.’s “clarification” is now a crucial part of the basic structure. Fundamental rights are now immune to an amendment if it violates the basic structure of the Constitution.¹⁵

It should also be noted in this context, that some of the fundamental rights have themselves achieved the status of basic structure of the Constitution. This was held by the Supreme Court in *I.R. Coelho v. State of Tamil Nadu*,¹⁶ where a nine-judge bench of the Supreme Court considered the scope of judicial review of inclusion of a law in ninth schedule by a constitutional amendment thereby giving immunity from challenge in view of article 31B of the Constitution. It was held that every such amendment shall have to be tested on the touchstone of essential features of the Constitution which included those reflected in articles 14, 19 and 21 and the principles underlying them. Such amendments are not immune from the attack on the ground they destroy or damage the basic structure. In *National Legal Services Authority v. Union of India*,¹⁷ which talks about rights of “third gender”, article 14 has been clearly stated to be a part of the basic structure of the Constitution.¹⁸

Attempt to reverse the doctrine of basic structure

The judgment delivered in the *Kesavananda Bharati* case was subjected to a serious attempt to overrule it by a review bench of 13 judges for two days on November 10, 1975 and November 11, 1975. On the third day, the review was suddenly and inexplicably abandoned while the bench was dissolved. No official record or report exists of this attempt to review *Kesavananda Bharati* case.¹⁹ This attempt was made during the heights of emergency when even the reporting of the courts judgments by the press was restricted. To everyone’s surprise A.N. Ray J was appointed as the Chief Justice of India superseding the seniority of Shelat, Grover and Hegde JJ apparently because they, in their judgments in the *Kesavananda Bharati* case, had subscribed to the limitations on the amending power of the Parliament. These three

¹⁴ 1975 Supp SCC 1.

¹⁵ Available at: <http://www.thehindu.com/todays-paper/tp-opinion/basic-structure-of-the-constitution-revisited/article1845048.ece> (last visited on Nov. 24, 2016).

¹⁶ (2007) 2 SCC 1.

¹⁷ (2014) 5 SCC 438.

¹⁸ *Id.*, para 61.

¹⁹ T.R. Andhyarujina, “The untold story of how Kesavananda Bharati and the basic structure doctrine survived an attempt to reverse them by the Supreme Court” in Sanjay S. Jain and Sathya Narayan (eds.), *Basic Structure Constitutionalism – Revisiting Kesavanada Bharati* 133 (Eastern Book Company, 1st edn., 2011).

judges immediately resigned from the bench thus making *Kesavananda Bharati* judgment highly controversial. On June 12, 1975, Sinha J of Allahabad High Court held Indira Gandhi guilty of two corrupt electoral practices under section 123(7) of the Representation of People Act, 1951 and disqualified her for six years in an election petition by filed by Raj Narain. The judge, however, stayed his judgment for 15 days to enable her to appeal to the Supreme Court. This decision came out during the vacation of the Supreme Court. Krishna Iyer J was the vacation judge before whom urgent applications had to be made. Krishna Iyer, J., was approached by the Union Minister of Law, H.R. Gokhale who sought to meet him at his residence. As this was against the protocol, Iyer J declined to meet him and asked him to tell Mrs. Gandhi's advocate to file the appeal.²⁰ In a daylong hearing on June 23, 1975, Palkhivala pleaded for an immediate and unconditional stay of Indira Gandhi's disqualification in national interest while Shanti Bhushan, appearing on behalf of Raj Narain, opposed it. Iyer J refused the plea for total stay, however, by a conditional order, allowed her to attend the Parliament as a member and as the prime minister to participate in its proceedings without any vote, pending the final decision in the election appeal.²¹ H.M. Seervai considers this the 'finest hour' of the Supreme Court.²²

During the pendency of this appeal in the Supreme Court, on August 10th 1975, the Parliament enacted the 39th Amendment Act, 1975, inserting article 329A in the Constitution which retrospectively took out the jurisdiction of courts in a dispute regarding the election of the prime minister. Parliament also passed the Election Laws (Amendment) Act, 1975, by which electoral offences for which Indira Gandhi was disqualified were retrospectively nullified by changing the law itself. These amendments were challenged before the bench²³ as destructive of the basic structure of the Constitution and *Kesavananda Bharati* was relied upon. The five judge bench were bound by the decision of 13 judges in *Kesavananda Bharati*.

On September 1, 1975, while the appeal was being heard, Niren De along with the Advocate-General of Tamil Nadu made an oral application to the Ray CJ for an early hearing of certain petitions in the land ceiling cases involving the basic structure doctrine. Before the delivery of the judgment in the *Election* case, on October 20, 1975, Ray, CJ issued a written

²⁰ Krishna Iyer, "Before the Emergency and After" in *Off the Bench* 1-2 (Universal Law Publishing Co. Pvt. Ltd., 1st edn., 2001).

²¹A. Lakshminath, *supra* note 12 at 136.

²² H.M. Seervai, *Constitutional Law of India* 2206 (Universal Law Publishing Co. Pvt. Ltd., vol. 2, 4th edn., 2010).

²³ Comprising of Ray, CJ Khanna, Mathew, Beg, Chandrachud JJ.

order that the Supreme Court would hear arguments on November 10, 1975 on two matter, viz, whether or not the basic structure doctrine restricted the power of the Parliament to amend the Constitution and whether or not the *Bank Nationalization* case²⁴ had been correctly decided. For this purpose, a 13-judge bench²⁵ was to be constituted.²⁶ On November 7, 1975, Indira Gandhi's appeal was allowed and Allahabad High Court's decision was set aside, however, the 39th Amendment was held as unconstitutional.

Palkhivala was strongly against the review of *Kesavananda Bharati* and on November 9, 1975 wrote an elaborate letter²⁷ to Indira Gandhi imploring her in the interest of the nation to stop the Supreme Court from reviewing the doctrine of basic structure and pleading that if Parliament was given an unlimited amending power, democracy, unity and integrity of India would vanish and that there would be nobody to hold the entire country together, after Indira Gandhi. Whether or not Indira Gandhi considered this letter or in any way acted upon it, remains a matter of speculation. The hearing commenced on November 10, 1975 and at the outset Palkhivala raised objections to the review of *Kesavananda Bharati* and the consequences of unbridled amending powers of the Parliament. On November 11, 1975, the Attorney-General replied to Palkhivala's arguments stating that because of the doctrine of basic structure, the constitutional situation in the country had become chaotic and that every constitutional amendment was being challenged in various high courts all over the country and nobody, including the Supreme Court was sure of what the basic structure of the Constitution actually was. On being questioned by the bench whether the attorney-general could point out any pending case in which the court found difficulty in applying the basic structure concept, the attorney-general could not do so, as except one petition, all were regarding right to property which had been clearly declared as not part of the basic structure. On November 12, 1975, as the Bench assembled, to the surprise of everyone, the Chief Justice stated that the Bench had been dissolved and observed that for two days the arguments were found "to go in the air". Later on, in 2005 in an article²⁸ in *The Hindu*, Krishna Iyer J stated that he had expressed his appreciation of Palkhivala's arguments to

²⁴ *R.C. Cooper v. Union of India* (1970) 1 SCC 248.

²⁵ The Bench, as revealed later in the timeline, constituted of Ray CJ, Khanna, Mathew, Beg, Chandrachud, Bhagwati, Krishna Iyer, P.K. Goswami, Sarkaria, A.C. Gupta, N.L. Untwalia, S.M. Fazal Ali and P.M. Singhal, JJ.

²⁶ It should be noted that typically such a review of an earlier judgment is ordered only after a judicial hearing by a Bench which has doubts about its correctness. No such hearing took place in this case.

²⁷ A. Lakshminath. *Supra* note 12 at 138. The lengthy letter of Palkhivala is reproduced by M.V. Kamath in Nani A. Palkhivala – A Life 190-194.

²⁸ V.R. Krishna Iyer, "There was no hidden agenda, Mr. Nariman" *The Hindu*, Jun. 28, 2005, available at :<http://www.thehindu.com/2005/06/28/stories/2005062802091000.htm> (last visited on Nov. 2, 2016).

Mathew J and this was perhaps misconstrued by him, who told Ray CJ., that Iyer J had ‘ganged up’ a number of judges on the bench to his pro-Palkhivala view. But, it is clear that the chief justice felt uncomfortable at the doubts expressed by some of his colleagues and the manner in which he had ordered the review.²⁹ Thus, the doctrine of basic structure survived a review and a possible reversal. Never since, has there been any suggestion about its reconsideration.

Limitation of the basic structure doctrine

It is widely accepted and understood that the validity of an ordinary legislation can be tested on two grounds, namely, legislative competence and whether or not it attracts the bar of articles 13(1) and 13(2) of the Constitution. This was also held by Y.V. Chandrachud J³⁰ in paragraph 691 of his separate judgment in *Kesavananda Bharati* case. The question here arises that can the validity of an ordinary legislation be tested on the anvil of the basic structure doctrine? Meaning thereby that, can an ordinary legislation be invalidated by the Union Judiciary on the ground that it is violative of the basic structure doctrine, in addition to the already two existing aforesaid grounds?

In the *Election* case, three out of five judges held that an ordinary legislation is not subject to the test of the basic structure doctrine. However, Beg J refuted this finding while Khanna J declined to decide this, as it was not germane to the decision of the case.

In *State of Karnataka v. Union of India*,³¹ Beg, CJ said:

But, if, as result of the doctrine certain imperative are inherent in or logically and necessarily flow from the constitutions ‘basic structure’, just as though they are its express mandates, they can be and have to be used to test the validity of ordinary laws just as the other parts of the constitution so used.

Untwalia J (for himself, Singhal and Jaswant Singh JJ) held that ordinary legislation is not subject to the test of meeting the basic features or basic structures theory, saying:³²

²⁹*Supra* note 12 at 143.

³⁰ Chandrachud, J. said:

Ordinary laws have to answer two tests for their validity: (1) The law must be within the legislative competence of the legislature as defined and specified in Chapter I, Part XI of the Constitution, and (2) it must not offend against the provisions of Article 13(1) and (2) of the Constitution. ‘Basic structure’, by the majority judgment, is not a part of the fundamental rights nor indeed a provision of the Constitution. The theory of basic structure is woven out of the conspectus of the Constitution and the amending power is subjected to it because it is a constituent power. The power to amend the fundamental instrument cannot carry with it the power to destroy its essential features, this, in brief, is the arch of the theory of basic structure. It is wholly out of place in matters relating to the validity of ordinary laws made under the Constitution.

³¹ (1977) 4 SCC 608.

Mr. Sinha also contended that an ordinary law cannot go against the basic scheme or the fundamental backbone of the Centre-State relationship as enshrined in the Constitution. He put his argument in this respect in a very ingenious way because he felt difficulty in placing it in a direct manner by saying that an ordinary law cannot violate the basic structure of the Constitution. In the case of *Smt. Indira Nehru Gandhi v. Shri Raj Narain* such an argument was expressly rejected by this Court.

A five judges bench in *Kuldip Nayar v. Union of India*,³³ unanimously held, in paragraph 106:

The doctrine of 'Basic Feature' in the context of our Constitution, thus, does not apply to ordinary legislation....

In *Madras Bar Association v. Union of India*,³⁴ (hereinafter referred to as the *NTT* case) the constitutional validity of the National Tax Tribunal Act, 2005, (NTT Act) was challenged along with calling into question the constitutional validity of the Forty-Second Amendment, 1976, on the ground that it violates the basic structure of the Constitution by impinging the power of judicial review of high courts. An alternate point that was made was that the National Tax Tribunal was an extra-judicial body and cannot substitute the jurisdiction of high courts by discharging judicial functions. Khehar J writing for the majority, concluded that the Parliament had the power to enact a legislation and to vest adjudicatory functions, earlier vested in the high courts, with an alternative court/tribunal. Exercise of this power would not *per se* violate the basic structure of the Constitution. The basic structure of the Constitution would stand violated if while enacting such a legislation the Parliament does not ensure that the newly constituted court or tribunal conforms to the standards and salient characteristics of the court sought to be substituted. This would also be violative of Constitutional conventions pertaining to Constitutions styled on the Westminster model. On these parameters, certain essential provisions of the NTT Act were struck down as being unconstitutional and since these provisions were critical to the Act, consequently, the NTT Act itself was declared unconstitutional.³⁵

³² *Id.*, para 238.

³³ (2006) 7 SCC 1.

³⁴ (2014) 10 SCC 1.

³⁵ *Id.* at 226.

R.F. Nariman J in a separate but concurring judgment in the *NTT* case, quoted paragraphs from *L. Chandra Kumar v. Union of India*,³⁶ which restored the supervisory jurisdiction of high courts so that a reference to article 323B would not be necessary as the legislative competence to make a law relating to tribunals would in any case be traceable to Entries 77 to 79, 95 of list I entry 65 of list II and entry 11a and 46 of list iii of the 7th schedule to the Constitution of India. It was held that that the power of judicial review over legislative action vested in the high courts under articles 226 and in this court under article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of high courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.

Nariman J also pointed out that *Union of India v. R. Gandhi*,³⁷ where it was held that the decision of the high court that the creation of National Company Law Tribunal and National Company Law Appellate Tribunal and vesting in them, the powers and jurisdiction exercised by the high court in regard to company law matters, are not unconstitutional, differs from the *NTT* case because the prior case deals with one specialised tribunal replacing another specialized tribunal (the company law board) at the original stage. When it talks about taking away the jurisdiction of high courts by deleting the provisions for appeals, revisions or references, and that these functions traditionally performed by courts can be transferred to tribunals, the court was only dealing with the situation of high court being supplanted at the original and first appellate stage where questions of fact are to be considered, not substantial questions of law.³⁸ Thus, we see that the basic structure doctrine has been applied while striking down an ordinary legislation.

In *State of West Bengal v. Committee for Protection of Democratic Rights*,³⁹ a Constitution Bench of the Supreme Court held that the power of judicial review conferred to the Supreme Court and high courts is an integral part of the basic structure of the Constitution and no Act of Parliament can exclude or curtail this power of the constitutional courts.

In the landmark judgment of *Supreme Court Advocates on Record Association v. Union of India*⁴⁰ (NJAC judgment), it was observed by Khehar J that for examining the constitutional validity of an ordinary legislative enactment, all the constitutional provisions,

³⁶ (1997) 3 SCC 261.

³⁷ (2010) 11 SCC 1.

³⁸ See observations of Nariman J at 28-29.

³⁹ (2010) 3 SCC 571.

⁴⁰ (2016) 5 SCC 1. See, para 221.

on the basis of which the concerned “basic features” arise, are available and even the breach of a single provision is sufficient to render the legislation as unconstitutional. In cases of a cumulative effect of a number of articles of the Constitution is stated to have been violated, all such articles may be stated, if necessary. Khehar J in no uncertain terms, held that, if a challenge is raised to an ordinary legislative enactment based on the doctrine of “basic structure”, the same cannot be treated to suffer from a legal infirmity.⁴¹ It was also held that if a challenge to an ordinary legislation is made as a result of cumulative effect of a number of articles of the Constitution, it would not always be necessary to list out each Article when such cumulative effect has already been determined to be constituting one of the basic features of the Constitution. Therefore, to reiterate, it was said that an ordinary legislation can be challenged on the ground of being violative of basic structure doctrine. Madan B. Lokur J on the other hand abided by what was held by the majority in *State of Karnataka v. Union of India*,⁴² saying that only a constitutional amendment can be challenged on the ground of violation of the doctrine of basic structure, not an ordinary legislation.⁴³

It is submitted that the doctrine of basic structure should apply to ordinary laws and the logic behind Beg, J⁴⁴ as well as Khehar, J’s dicta,⁴⁵ buttresses this point.⁴⁶

⁴¹ *Ibid.* It was further observed was:

We would therefore reiterate, that the ‘basic structure’ of the Constitution is inviolable, and as such, the Constitution cannot be amended so as to negate any ‘basic features’ thereof, and so also, if a challenge is raised to an ordinary legislation based on one of the ‘basic features’ of the Constitution, it would be valid to do so. If such a challenge is accepted, on the ground of violation of the ‘basic structure’, it would mean that the bunch of Articles of the Constitution (including the preamble thereof, wherever relevant), which constitute the particular ‘basic feature’, had been violated. We must however credit the contention of the learned Attorney General by accepting, that it would be technically sound to refer to the Articles which are violated, when an ordinary legislation is sought to be struck down, as being ultra vires the provisions of the Constitution. But that would not lead to the inference, that to strike down an ordinary legislative enactment, as being violative of the ‘basic structure’, would be wrong. We therefore find no merit in the contention advanced by the learned Attorney General, but for the technical aspect referred to hereinabove.

⁴² *Supra* note 31.

⁴³ *NJAC* case. *Supra* note 40 at 800.

⁴⁴ *State of Karnataka* case. *Supra* note 31.

⁴⁵ Both, in the *NTT* case, as well as, the *NJAC* case.

⁴⁶ It should be noted that authors are perplexed and do not find any clear explanation as to why the basic structure doctrine should not be used to strike down an ordinary law. See generally, Arvind P. Datar, “The basic structure doctrine – A 37 year journey” in Sanjay S. Jain and Sathya Narayan (eds.), *Basic Structure Constitutionalism – Revisiting Kesavanada Bharati* 167 (Eastern Book Company, 1stedn., 2011).

III Conclusion

Over the years, the Supreme Court has been applying the doctrine of basic structure to invalidate ordinary legislations, sometimes directly, at other times tangentially. In *Indira Sawhney v. Union of India*,⁴⁷ Kerela State Backward Classes (Reservation of Appointments or Posts in the Services Under the State) Act, 1995 on creamy layer was held to be violative of the basic structure of the Constitution.⁴⁸

In *L. Chandra Kumar v Union of India*,⁴⁹ the Supreme Court held that clause 2(d) of article 323A and clause 3(d) of article 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under articles 226 and 227 and 32 of the Constitution, are unconstitutional. Section 28 of the impugned Act and the “exclusion of jurisdiction” clauses in all other legislations enacted under the aegis of articles 323A and 323B were, to the same extent, held to be unconstitutional. The Supreme Court stated that the jurisdiction conferred upon the high courts under articles 226 and 227 and upon the Supreme Court under article 32 of the Constitution is part of the inviolable basic structure of our Constitution.

In *S.R. Bommai. v. Union of India*,⁵⁰ the concept of basic structure was resorted to although no question of constitutional amendment was involved in that case. The Supreme Court held that policies of a state government directed against an element of the basic structure of the Constitution would be a valid ground for the exercise of the central power under article 356, that is, imposition of the President’s rule.

There have been arguments for the doctrine of basic structure,⁵¹ against the basic structure⁵² and a third school⁵³ of thought that denies the existence of anything called

⁴⁷ (2000) 1 SCC 168 at 202, para 65.

⁴⁸ *Ibid.* It was observed by the court:

Parliament and the legislature in this country cannot transgress the basic feature of the Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16(1) is a facet. Whether the creamy layer is not excluded or whether forward castes get included in the list of backward classes, the position will be the same, namely, that there will be a breach not only of Article 14 but of the basic structure of the Constitution. The non-exclusion of the creamy layer or the inclusion of forward castes in the list of backward classes will, therefore, be totally illegal. Such an illegality offending the root of the Constitution of India cannot be allowed to be perpetuated even by constitutional amendment. The Kerala Legislature is, therefore, least competent to perpetuate such an illegal discrimination. What even Parliament cannot do, the Kerala Legislature cannot achieve.

⁴⁹ *Supra* note 36.

⁵⁰ (1994) 3 SCC 1.

⁵¹ Palkhivala, as discussed earlier in this article.

⁵² PP Rao in *Alladi Memorial Lecture* said that:

unamendable basic structure of the Constitution. The third school believes, that people revolted not against the non-essential parts of a Constitution but against its essential ones, if they became an obstacle in their progress. That, ultimate legal sovereignty resides in the people. Therefore, if amendments were to help a Constitution to survive, they must include changes in the allegedly essential part of the Constitution. Wherever one may place their allegiance, it is undeniable that the doctrine of basic structure is essential to the constitutionalism in India as has been proved in the Indira Gandhi era where this doctrine was the only shield standing between an all-powerful Parliament and the people, owing to legislative excesses by reckless usage of article 368.

This article has attempted to highlight some facets of the basic structure doctrine that have been eclipsed by the sands of time. It is humbly submitted, that, not applying the doctrine of basic structure to ordinary legislations because of the difference in constituent power and legislative power would have made sense had there been two different bodies wielding these powers. However, that not being the case in India, raises the question as to why shouldn't the Legislature be subjected to this doctrine and made to conform to the intrinsic values of the Constitution of India when coming out with ordinary law. Surely, it cannot be the case that the legislature is allowed to disregard the ideals conceptualised under the doctrine of basic structure, when drafting and implement ordinary law for the citizens, while they are restrained from flouting such ideals when bringing in a constitutional amendment. The elusive contours of this doctrine still stump academicians, lawyers and judges alike, however, the irrefutable fact remains that the doctrine of basic structure of the Constitution needs to be revisited by the Supreme Court, whenever the chance so arises, and aspects such as its applicability, content and scope need to be elucidated in unambiguous terms.

The 'basic structure of the Constitution' is an imprecise and elastic concept. There was no unanimity among the Judges regarding the components of the basic structure of the Constitution. The basic features illustrated in the five judgments delivered by the majority of Judges in *Kesavanandado* [sic] not tally. If we go by the common denominator, very few of them can be regarded as basic features acceptable to all the seven Judges. They are to some extent overlapping. Each one of them is vague by itself. The task of identifying the basic features is tough and time-consuming. Neither is the court in a position to identify all the components of the basic framework of the Constitution once and for all, nor has Parliament any clear idea about the scope of its amending power as of now. As a result of this situation, the judiciary has emerged as the most powerful wing of the 'State' in comparison to the legislature and the executive.

P.P. Rao, "Basic Structure of the Constitution" in The Alladi Memorial Trust, *Alladi Memorial Lectures*, 176 (1999), available at: <http://www.ebc-india.com/lawyer/articles/2000v2a1.htm> (last visited on Nov. 3, 2016).

⁵³ See generally, the views of Palekar and Mathew JJ, in A. Lakshminath, *Supra* note 12 at 150-151.