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## **Doctrine of Basic Structure: Contours**

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Basic means, base / foundation on which a thing stands. In case the base is removed, the structure will fall. The Doctrine of Basic Structure signifies the basic features of the Constitution, which cannot be changed / amended.

The Supreme Court of Pakistan, in *Fazlul Quader Chowdhry & Ors. v. Muhammad Abdul Haque*<sup>1</sup>, while considering a Presidential Order under Article 224 of the Constitution dealing with elections, observed:

The aspect of the franchise, and of the form of Government are fundamental features of a Constitution, and to alter them, in limine in order to placate or secure the support of a few persons, would appear to be equivalent not to bringing the given Constitution into force, but to bringing into effect an altered or different Constitution.

One of the initial references to basic features and its permanency was in *Sajjan Singh v. State of Rajasthan*,<sup>2</sup> observed that the Constitution “*formulated a solemn and dignified preamble which appears to be an epitome of the basic features of the Constitution. Can it not be said that these are indicia of the intention of the*

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<sup>1</sup> PLD 1963 SC 486

<sup>2</sup> AIR 1965 SC 845

*Constituent Assembly to give a permanency to the basic features of the Constitution?”*

The doctrine actually came to be in the seminal case of *Kesavananda Bharati & Ors. v. State of Kerala & Anr.*,<sup>3</sup> where the Supreme Court emphasising on the essence of the basic structure held that *“every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same.”* The concept of basic structure as such gives coherence and durability to a Constitution for it has a certain intrinsic force in it.

Inspired by the doctrine of Basic Structure enshrined in Articles 1 to 19 of the German Constitution, 1949 (“The Basic Law for the Federal Republic of Germany”), where these principles are based on the premise that democracy is not only a parliamentary form of government but also is philosophy of life based on the appreciation of the dignity, the value and the inalienable rights of each individual human being; such as that of right to life and physical integrity; equality before law; rights to personal honour and privacy; occupational freedom; inviolability of the home; right to property and inheritance. The essence of basic rights could, under no circumstance, be affected.

Article 20 provides that Germany is a democratic and a Social Federal State. State authority is derived from the people through elections. All Germans have right to resist anyone seeking to abolish the constitutional order, if no other remedy is available.

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<sup>3</sup> AIR 1973 SC 1461

Article 79 lays down the procedure to amend the Basic Law by supplementing a particular provision or expressly amending the same. **However, amendments to the Basic Law affecting the principles laid down in Articles 1 and 20 or affecting the division of federation i.e. participation of Centre and State in the legislative process are inadmissible.**

The provisions under the German Constitution deal with rights, which are not mere values, rather, they are justiciable and capable of interpretation. Thus, those values impose a positive duty on the State to ensure their attainment as far as practicable. The State must facilitate the rights, liberties and freedoms of the individuals.

In India, the doctrine of Basic Structure is a judicial innovation, and it continues to evolve via judicial pronouncements of the Apex Court. The contours of the expression have been looked into by the Court from time to time, and several constitutional features have been identified as the basic structure of the Constitution; but there is not an exhaustive definition or list of what constitutes the 'basic structure' of the Constitution - the Court decides from case to case if a constitutional feature can be regarded as basic or not.

In the *Kesavananda Bharati* case (supra), Sikri, C.J. laid down the very first list of features - "*discernible not only from the Preamble but from the whole scheme of the Constitution*" - that would constitute the "basic foundation and structure" of the Constitution:

1. Supremacy of the Constitution;
2. Republican and Democratic form of Government.
3. Secular character of the Constitution;

4. Separation of powers between the Legislature, the executive and the judiciary;
5. Federal character of the Constitution;

Other judges added the following to the list:

6. The dignity of the individual secured by the various Fundamental Rights and the mandate to build a welfare state contained in the directive principles;
7. The unity and the integrity of the nation;
8. Parliamentary System.

Since then the constituents of the Basic Structure have reviewed, examined and delved into by the Supreme Court in several cases, adding to the above list.

In *Smt. Indira Nehru Gandhi v. Raj Narain*,<sup>4</sup> the Court, expanding the scope of the Basic Structure, held that there were four unamendable features which formed part of the basic structure, namely, "*(i) India is a sovereign democratic republic; (ii) Equality of status and opportunity shall be secured to all its citizens; (iii) The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion and (iv) The nation shall be governed by a government of laws, not of men.*" These, according to them, were "*the pillars of our constitutional philosophy, the pillars, therefore, of the basic structure of the Constitution.*"

The Court also noted that the principle of free and fair elections is an essential postulate of democracy, and which, in turn, is a part of the basic structure of the Constitution. That democracy was an

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<sup>4</sup> AIR 1975 SC 2299

essential feature forming part of the basic structure. In this case the Court struck down Clause (4) of Article 329A which provided for special provision as to elections to Parliament in the case of Prime Minister and Speaker, on the ground that it damaged the democratic structure of the Constitution. That the said clause(4) had taken away the power of judicial review of the courts as it abolished the forum without providing for another forum for going into the dispute relating to the validity of election of the Prime Minister. It extinguished the right and the remedy to challenge the validity of such an election. The complaints of improprieties, malpractices and unfair means have to be dealt with as the principle of free and fair elections in a democracy is a basic feature of the Constitution, and thus, clause (4) was declared to be impermissible piece of constitutional amendment.

However, the Court in this case also observed that “*the concept of a basic structure, as brooding omnipresence in the sky, apart from specific provisions of the Constitution, is too vague and indefinite to provide a yardstick to determine the validity of an ordinary law.*”

In *Minerva Mills Ltd. & Ors. v. Union of India & Ors.*,<sup>5</sup> discussing the standard to be applied to what qualifies as the Basic Structure, the Apex Court held that the “....**The features or elements which constitute the basic structure or framework of the Constitution or which, if damaged or destroyed, would rob the Constitution of its identity so that it would cease to be the existing Constitution but would become a different Constitution....** Therefore, in every case where the question arises

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<sup>5</sup> AIR 1980 SC 1789

*as to whether a particular feature of the Constitution is a part of its basic structure, it would have to be determined on consideration of various factors such as the place of the particular feature in the scheme of the Constitution, its object and purpose and the consequence of its denial on the integrity of the Constitution as a fundamental instrument of country's governance.”* The Court further held that *the fundamental rights occupy a unique place in the lives of civilised societies and have been variously described in our Judgments as ‘transcendental’, ‘inalienable’ and ‘primordial’*

In *S.R. Bommai v. Union of India*,<sup>6</sup> expanding the list of basic features, held that **secularism** was an **essential feature of the Constitution and part of its basic structure**. In this **case** the Supreme Court explained the concept of basic structure of the constitution, while dealing with the issue of exercise of the power by the Central Government under Article 356 of the Constitution.

In *M Nagraj & Ors. v. Union of India & Ors.*<sup>7</sup> the Constitution Bench of the Supreme Court dealing with the issue of basic structure observed that “axioms like secularism, democracy, reasonableness, social justice, etc. are overarching principles which provide linking factor for principles of fundamental rights like Articles 14, 19 and 21. These principles are beyond the amending power of Parliament. They pervade all enacted laws and they stand at the pinnacle of the hierarchy of constitutional values”. Such rights have to be respected and cannot be taken away.

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<sup>6</sup> AIR 1994 SC 1918

<sup>7</sup> AIR 2007 SC 71

The framers of the Constitution have built a wall around the fundamental rights, which has to remain forever, limiting the ability of the majority to intrude upon them. That wall is a part of basic structure.<sup>8</sup>

*Thus, “for a constitutional principle to qualify as an essential feature, it must be established that the said principle is a part of the constitutional law binding on the legislature. Only thereafter, the second step is to be taken, namely, whether the principle is so fundamental as to bind even the amending power of Parliament i.e. to form a part of the basic structure.”<sup>9</sup>*

When an issue is raised regarding the basic structure, the question does arise as to whether the amendment alters the structure of the constitutional provisions. *“The criterion for determining the validity of a law is the competence of the law-making authority. The competence of the law-making authority would depend on the ambit of the legislative power, and the limitations imposed thereon as also the limitations on the mode of exercise of the power.”<sup>10</sup>*

The aforesaid structure is built on the basic foundation, i.e., the dignity and freedom of the individual. This is of supreme importance. This cannot be destroyed by any form of amendment. Parliament cannot expand its power of amendment under Article 368 so as to confer on itself the power to repeal, abrogate the Constitution or damage, emasculate or destroy any of the fundamental rights or essential elements of the basic structure of the Constitution or of destroying the identity of the Constitution.

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<sup>8</sup> I.R. Coelho (dead) by L.R.s v. State of Tamil Nadu, AIR 2007 SC 861; See also Kesavananda Bharati & Ors. v. State of Kerala & Anr., AIR 1973 SC 1461.

<sup>9</sup> M. Nagaraj, Supra.

<sup>10</sup> Ibid

*“They constitute the ark of the Constitution..... To destroy the guarantees given by Part III in order purportedly to achieve the goals of Part IV is plainly to subvert the Constitution by destroying its basic structure”*<sup>11</sup>.

In *I.R. Coelho (dead) by L.R.s v. State of Tamil Nadu*,<sup>12</sup> a Nine Judge Bench of the Supreme Court laid down the concrete criteria for basic structure principle, observing:

Since the power to amend the constitution is not unlimited, **if changes brought about by amendments destroy the identity of the constitution, such amendments would be void.....**  
....every improper enhancement of its own power by Parliament, be it clauses 4 and 5 of Article 329A, or Section 4 of Forty-second Amendment, have been held to be incompatible with basic structure doctrine, as they introduced new elements which altered the identity of the Constitution, or deleted the existing elements from the Constitution by which the very core of the Constitution is discarded (Emphasis added).

Articles 14, 19 and 21 represent the fundamental values and form the basis of rule of law, which is a basic feature of the Constitution.

For instance, Parliament, in exercise of its amending power under Article 368, can make additions in the three legislative lists contained in the Seventh Schedule of the Constitution, but it

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<sup>11</sup> *M. Nagaraj*, Supra.

<sup>12</sup> AIR 2007 SC 861



cannot abrogate all the lists as that would abrogate the federal structure, which is one of the basic features of the Constitution.

To qualify to be a basic structure it must be a "*terrestrial concept having its habitat within the four corners of the Constitution.*" What constitutes basic structure is not like "a twinkling star up above the Constitution." It does not consist of any abstract ideals to be found outside the provisions of the Constitution. The Preamble no doubt enumerates great concepts embodying the ideological aspirations of the people but these concepts are particularised and their essential features delineated in the various provisions of the Constitution. It is these specific provisions in the body of the Constitution which determine the type of democracy which the founders of that instrument established; the quality and nature of justice, political, social and economic which they aimed to realise, the content of liberty of thought and expression which they entrenched in that document and the scope of equality of status and of opportunity which they enshrined in it. These specific provisions enacted in the Constitution alone can determine the basic structure of the Constitution. These specific provisions, either separately or in combination, determine the content of the great concepts set out in the Preamble. It is impossible to spin out any concrete concept of basic structure out of the gossamer concepts set out in the Preamble. The specific provisions of the Constitution forms the yarn from which the basic structure has to be woven.

In *Supreme Court Advocates on Record Association v. Union of India*, AIR 2016 SC 117, the Supreme Court held that there are declared limitations on the amending power conferred on Parliament which cannot be breached. Breach of a single provision

of the Constitution is sufficient to render the entire legislation *ultra vires* the Constitution. The Court held that the basic structure of the Constitution includes supremacy of the Constitution, the republican and democratic form of Government, the federal character of distribution of powers, secularism, separation of powers between the Legislatures, Executive and the Judiciary, and independence of the Judiciary<sup>13</sup>.

In *Kuldip Nayar v. Union of India (UOI) and Ors.*<sup>14</sup>, the Supreme court, while dealing with the question of political party system *vis-à-vis* democracy observed that “*parliamentary democracy and multi-party system are an inherent part of the basic structure of Indian Constitution. It is political parties that set up candidates at an election who are predominantly elected as Members of the State Legislatures.*” Further, the Court, placing reliance on *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461 observed that “*a Parliamentary Democracy like ours functions on the basis of the party system. The mechanics of operation of the party system as well as the system of Cabinet Government are such that the people as a whole can have little control in the matter of detailed law-making*”.

In *Kihoto Hollohan v. Zachillhu*,<sup>15</sup> the Court felt that the existence of the Tenth Schedule of the Constitution further strengthens the importance of the political parties in our democratic set-up. Rejecting the argument that the political party is not a democratic entirety, and that Whip issued under the Tenth Schedule is

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<sup>13</sup> See also: *Samsher Singh v. State of Punjab*, AIR 1974 SC 2192; *Union of India v. Sankalchand Himatlal Sheth*, (1977) 4 SCC 193; and *Naval Kishore Mishra v. High Court of Judicature at Allahabad*, AIR 2015 SC 1332.

<sup>14</sup> AIR 2006 SC 3127

<sup>15</sup> AIR 1993 SC 412

unconstitutional, the Court reiterated that the Parliament was empowered to provide that the Members are expected to act in accordance with the ideologies of their respective political parties and not against it.

Thus, 'Basic' means the base of a thing on which it stands and on the failure of which it falls. Hence, the essence of the 'basic structure of the Constitution' lies in such of its features, which if amended would amend the very identity of the Constitution itself, ceasing its current existence. It, as noted above is, not a "vague concept" or "abstract ideals found to be outside the provisions of the Constitution". Therefore, the meaning/extent of 'basic structure' needs to be construed in view of the specific provision(s) under consideration, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of governance of the country.

Whether a particular feature forms part of the basic structure has to be necessarily determined on the basis of that provision of the Constitution. Further, so far as the power to amend the Constitution under Article 368 is concerned, "*one cannot legally use the Constitution to destroy itself*", as the doctrine of constitutional identity requires. "*The Constitution is a precious heritage and, therefore, you cannot destroy its identity.*" The theory of basic structure is based on the principle that a change in the thing does not involve its destruction, and destruction of a thing is a matter of substance and not of form<sup>16</sup>.

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<sup>16</sup> See also: *Vaman Rao v. Union of India*, AIR 1981 SC 271; *Sub-Committee on Judicial Accountability v. Union of India*, AIR 1992 SC 320; *Raghunath Rao v. Union of India*, AIR 1993 SC 1267; and *Justice K S Puttaswamy v. Union of India*, AIR 2017 SC 4161.