

Protecting Basic Structure from judicial arbitrariness

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The thesis titled, “The Judicial Role in Constitutional Protection: Examining the Legitimacy of Basic Structure Review in India”, provides strong support to the jurisprudential foundations and doctrinal validity of the doctrine in a rather interesting manner (Illustration by C R Sasikumar)

This year marks the 50th anniversary of the Kesavananda Bharati case and the laying down of the “Basic Structure Doctrine” by the Supreme Court of India in April 1973. This doctrine has withstood the test of time and has been consistently upheld by the SC. However, at times doubts have been raised about its constitutional validity, especially its open-ended nature. It has been argued that the doctrine gives exclusive powers to the SC to determine what constitutes the “Basic Structure” or the “Basic Features of the Constitution” and in that process, undermines the mandates of other institutions. The former Union Finance Minister, Arun Jaitley, while critiquing the NJAC judgment of the Supreme Court, famously observed, “The judgment has upheld the primacy of one basic structure — independence of judiciary — but diminished five other basic structures of the Constitution, namely, parliamentary democracy, an elected government, the council of ministers, an elected Prime Minister and the elected leader of the opposition.”

But before we deal with this issue, we need to recognise the contribution of a distinguished German jurist, Dietrich Conrad, former head of the Law Department, South Asia Institute, University of Heidelberg, which became causal to the formulation of the Basic Structure doctrine in India. This acknowledgement of his role does not discount the extraordinary contributions of many Indian jurists.

In February 1965, nearly seven years before the SC judgment in Kesavananda Bharati, Conrad delivered a lecture on “Implied Limitation of the Amending Power” to the Faculty of Law of the Banaras Hindu University. In this lecture he observed, “[P]erhaps the position of the Supreme Court (in earlier cases) is influenced by the fact that it has not, so far, been confronted with any extreme type of constitutional amendments. It is the duty of the jurist to anticipate extreme cases of conflict, and sometimes only extreme tests reveal the true nature of a legal concept”.

Raising serious questions of rather extreme, and patently unreasonable, forms of amendments that could be passed by Parliament, Conrad asked, “[C]ould a constitutional amendment abolish Article 21, to the effect that forthwith a person could be deprived of his life or personal liberty without authorisation of law? ... Could the amending powers be used to abolish the constitution and reintroduce, let us say, the rule of a Mughal emperor or of the Crown of England?”

These extraordinary exhortations made the larger point that there ought to be limitations on all powers exercised by institutions, including the amending power, and there ought to be checks and balances to ensure such limitations. Conrad’s fundamental conclusion was, “[A]ny amending body organised within the statutory scheme, howsoever verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority.”

While there is an ongoing debate on the basic structure doctrine, it is important to recognise that but for the SC’s Basic Structure decision, the then Indian Prime Minister arguably could have recast the Constitution entirely during the Emergency in 1975.

I recognise the need for debates and discussions surrounding the interpretations and understanding of all judicial doctrines. However, it is equally necessary to have fuller appreciation of the jurisprudential foundations of these legal doctrines.

There are three fundamental arguments in support of the Basic Structure doctrine. One, all powers exercised by all institutions, including the judiciary, should have limitations. The doctrine of Basic Structure recognised the need for limitations on the amending power of Parliament. We have the history of legislative interventions during the Emergency and violations of human rights and civil liberties by the machinery of an elected government. That experience alone reinforces the need for judicial checks and balances in relation to the amending powers of Parliament.

Two, the doctrine recognises the most fundamental features of the Constitution and protects those features from any form of amendments or legislative interventions. The only remaining challenge to this proposition is the question of how to ensure that judicial arbitrariness does not lead to undermining of the core objectives of the doctrine.

Three, under the framework of the Indian Constitution, it is the Constitution that is supreme and not any of the organs of the government. If this is so, then it remains to be explained as to which institution has the power to interpret the Constitution and its meaning. It is in this context that the judiciary, as an institution, is uniquely situated in that the Constitution has given the power of interpretation of the laws, and of the Constitution itself, to the judiciary. It is through these powers that the judiciary was able to formulate the Basic Structure doctrine.

Going forward, we need to ponder upon how we can deal with the problem of judicial arbitrariness in deciding what constitutes the Basic Structure. Recently, I supervised a doctoral dissertation of a distinguished jurist, Justice A K Jayasankaran Nambiar, currently serving as a judge of the High Court of Kerala. It made compelling arguments on how the future of the doctrine can be shaped by the judiciary itself to reduce the inherent risks of arbitrariness in judicial decision-making.

The thesis titled, “The Judicial Role in Constitutional Protection: Examining the Legitimacy of Basic Structure Review in India”, provides strong support to the jurisprudential foundations and doctrinal validity of the doctrine in a rather interesting manner. Seeking a new imagination of the doctrine to strengthen it and make it conform to the constitutional text, Justice Nambiar, re-examines the role of the judiciary in matters of constitutional protection in an information age when there is a public demand for transparency in the functioning of democratic institutions.

Justice Nambiar has argued that while in the past, it was the efficacy of its judgments that earned the judiciary public trust, today that trust can be sustained only through a demonstration of the legitimacy of its judgments. The thesis has argued that the formulation of the Basic Structure doctrine in wide and ambiguous terms runs the risk of reducing the legitimacy that it would otherwise have had as a tool to check the excesses of an ambitious executive/legislature.

Thus, in a manner that is temporally relevant, Justice Nambiar has provided new and imaginative insights in his doctoral dissertation to fulfill the vision articulated by the Chief Justice of India, D Y Chandrachud, when he observed, “[T]he basic structure of our Constitution, like a north star, guides and gives a certain direction to the interpreters and implementers of the Constitution when the path ahead is convoluted.”

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