

SUDHIR KRISHNASWAMY: DEMOCRACY AND CONSTITUTIONALISM IN INDIA - A STUDY OF THE BASIC STRUCTURE DOCTRINE

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1. Introduction

Sudhir Krishnaswamy's *Democracy and Constitutionalism in India – A study of the Basic Structure Doctrine*¹ is a major contribution to the discourse on the Basic Structure Doctrine. He is not a mere defender, but an active proponent of the doctrine. He goes far beyond the semantics of “amendment”, to make out his case.

For the reader to immediately know what the author wants to say, it is best to quote from his own concise preface:

“This work makes two arguments: first, that basic structure review is an independent and distinct type of constitutional judicial review which applies to all forms of state action to ensure that such action does not ‘damage or destroy’ ‘basic features’ of the Constitution. These basic features of the Constitution are identified through a common law technique and are general constitutional rules, which are supported by several provisions of the Constitution.

Second, I argue that the basic structure doctrine like other types of constitutional judicial review possesses a sound constitutional and rests on a sound and justifiable interpretation of the Constitution. The basic structure doctrine is founded on an interpretation of the Constitution granting amending, executive and legislative power that relies on multi-provisional implications drawn from other important provisions of the Constitution”.²

At the outset, the reviewer must state, for the benefit of those who do not already know, that he has a stated position on the Basic Structure Doctrine. The book under review does him the honour of referencing his essay and dealing with his arguments. Therefore, elements of response and refutation are inevitable. But a review should not become a critique. The reviewer had

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1. Sudhir Krishnaswamy, *Democracy and Constitutionalism in India, A study of the Basic Structure Doctrine*, Oxford University Press, 2009.

2. *Id.* at p.x.

earlier given his first reactions to the book in another forum.³ As opposed to an academic analysis, the reviewer's approach to basic structure, as set out in the *Supreme Court and the Basic Structure Doctrine*,⁴ was to place the "doctrine in the context of the politics, and equally the political personalities of the times we have passed through"⁵ to establish that though it served the purpose of warning a fledgling democracy of the perils of brute majoritarianism, its time has passed. It is essentially anti-democratic and counter-majoritarian, and prevents the nation from putting the lessons learnt from politics and economics into the Constitution.⁶

In civil engineering/architectural terms, it is the sanctity of the sanctioned building plan which all basic structure doctrine proponents invoke. And you cannot change the building bye-laws. Reconstruct your house, by all means, but remember, you are in the Lutyens Bungalow Zone. The reviewer does not intend to be facetious in a serious journal, but is only highlighting the frustration of opponents of the Basic Structure Doctrine (far fewer in number) when they are faced with "structural" arguments.

I. The Basic Structure Doctrine in Indian Constitutional Adjudication and its Broadening Scope

Krishnaswamy sets the basis for a structural interpretation by first analyzing and rejecting arguments on the extension of Article 13 review to constitutional amendments, as well as the view in *Golak Nath*.⁷ The argument on the legitimacy of the doctrine highlighted in this Chapter relates to implied limits on amending power. After an analysis of the decision in *Kesavananda*,⁸ Krishnaswamy espouses a structural interpretation of the Constitution as indicated by Justice Sikri as his starting position, which he promises to make good with further arguments on constitutional interpretation.⁹

He then analyses the extension of the basic structure doctrine to other forms of state action. In this context he observes that:

"the analysis of relevant cases in [sic] reveals that the Court fails

3. Raju Ramachandran, 'The Krishnaswamy thesis....a reaction, not yet a critique', at <http://lawandotherthings.blogspot.com/search?q=raju+ramachandran>, posted on Wednesday, April 08, 2009, last visited on May 23, 2009.

4. Raju Ramachandran, 'The Supreme Court and the Basic Structure Doctrine', in *Supreme But Not Infallible*, New Delhi: Oxford University Press, 2000, pp. 106-132.

5. *Id.* at 108.

6. *Id.* at 130.

7. *Golaknath v. State of Punjab*, AIR 1967 SC 1643.

8. *Kesavananda Bharti v. State of Kerala*, (1973) 4 SCC 225.

9. *Supra* n. 1 at 41.

to articulate a novel constitutional basis for such power or offer good reasons for extending to these forms of state action the implied limitations which form the constitutional basis for basic structure review of constitutional amendments.”¹⁰

After considering authorities on review of emergency powers to demonstrate this failure of the Court,¹¹ he offers interpretations, which could potentially justify such an extension if developed suitably, for emergency power on the one hand¹² and executive and legislative power on the other.

As far as the exercise of powers by the President is concerned, he suggests that a limitation could be read in through Article 60 (oath of the President), which requires him to preserve, protect and defend the Constitution. A review of emergency powers must be in the context of the role of the President as the defender of the Constitution, thus ensuring that different standards need not be applied to national and regional emergencies. Further the normative principles identified in basic structure review could be read in as a limitation, given the role of the President.

Moving on to executive and legislative action, he expresses his surprise at the lack of arguments to subject ordinary executive and legislative action by a reading of the phrase “subject to the provisions of the Constitution” as present in Article 245, since the executive power is co extensive with legislative power. The *Inquiries* case¹³ in Krishnaswamy’s view provides a persuasive and precise structural approach in applying the basic structure doctrine to ordinary legislation inasmuch as it endorses the idea that the basic structure is merely an interpretation of the Constitution, which does not add to or detract from its content. He quotes Beg, J. where he opines that such an interpretation, just like other express mandates of the Constitution could be used to test ordinary laws. Finally in this context he states that in *Kuldip Nayar*¹⁴ the Court glossed over the conflict between *Indira Gandhi*¹⁵ wherein the Courts refused to extend basic structure analysis to legislation, and the *Inquiries case*, leaving the position unclear. He concludes by arguing that the limitations obtained by the structural interpretation as proposed, could be

10. *Id.* at 44.

11. *Id.* at 45-52.

12. *Id.* at 53-54.

13. *State of Karnataka v. Union of India*, (1977) 4 SCC 608 (opinion of Beg, J.).

14. *Kuldip Nayar v. Union of India*, (2006) 7 SCC 1.

15. (1975) Supp SCC 1.

readily accommodated by the phrase “subject to the provisions of the Constitution.”¹⁶

II. Basic Features and the Standard of Review

Krishnaswamy moves on to analyse cases wherein basic structure review has been applied to constitutional amendments, executive action and legislation. In constitutional amendments, *Kesavananda*,¹⁷ *Indira Gandhi*,¹⁸ *Minerva Mills*,¹⁹ *R.C.Poudyal*,²⁰ *Nagaraj*²¹ and *Coelho*²² are considered to establish the type of review. Drawing from Bhagwati J’s opinion in *Minerva Mills*, Krishnaswamy suggests, as an alternative to the extension of Article 13 review, an independent substantive model of judicial review wherein the Court may analyse policy objectives, historical background or those constitutional provisions which are sought to be amended, but wherein the primary concern would be to preserve the integrity of the Constitution as a statement of key constitutional principles.²³

Similarly, cases on executive action and legislative action are considered to advance the proposition that irrespective of the kind of state action, the aforementioned independent substantive limit of basic structure operates. Krishnaswamy admits that Court has failed to articulate precisely the type and extent of basic structure review applicable to executive action—whether it would be a basic structure review or a modified administrative law review.²⁴ He also admits that the court has not been able to resolve whether basic structure actually applies to legislation, but he seeks to isolate from various judgments (where umbrella challenges to legislation, executive action and constitutional amendments were raised), a substantive form of review of legislation on basic structure.²⁵

While discussing the level of scrutiny required in the above mentioned substantive review, he states that the Court must keep in mind the consequences of applying general constitutional principles as opposed to the text as the basis of review. Secondly, the court must pay attention to the

16. *Supra* n. 1 at 65-69.

17. *Supra* n. 8.

18. *Supra* n. 14.

19. (1980) 3 SCC 625.

20. (1994) Supp (1) SCC 324.

21. (2006) 8 SCC 212.

22. (2007) 2 SCC 1.

23. *Supra* n. 1 at 74-88.

24. *Id.* at 88-101.

25. *Id.* at 102.

institutional arrangement inasmuch as it must respect the relationship between the legislature and the executive. In this backdrop, the level of scrutiny he proposes is that the Court must ensure that the basic features are not destroyed or damaged, and secondly, the identity of the Constitution is preserved. Illustratively using *Raghunath Rao Ganpat Rao*,²⁶ he advances the proposition that under the identity test, it is not just an erasure of core constitutional principles from the Constitution that is proscribed, but also state action, which seeks to damage or destroy these principles. This, he states, could be a useful basis for the extension of basic structure review to other forms of state action, as both tests seek to preserve a normative identity and does not involve a quantitative assessment of textual effacement.²⁷

After characterizing this as a hard-edged review, though he concedes again that the evidence in this regard may not be substantial,²⁸ he proceeds to resolve the ambiguity of basic structure review in its application. Resolution of concrete disputes, it is proposed, can be achieved on the touchstone of basic structure by the understanding of basic structure as general constitutional rules, which are to be applied by mediating rules, which the court must develop. This has to be further supported by an exploration of the precise factual circumstances, he argues. He concludes his arguments on this section, observing that these rules must be woven into the basic structure doctrine so that only when these standards are met would state action be struck down, thereby rendering the oft-raised plea of judicial deference irrelevant.²⁹

His next endeavour is to deal with identification of basic features. He first seeks to dispel "*misplaced*" notions pertaining to the use of various phrases like basic structure, basic features and essential features; thereby arguing that they all connote the same thing. He then examines the plea for a closed catalogue of basic features and states that such a catalogue would be incompatible with the common law techniques of interpretation employed by the Court. Further, he analyses various approaches to identifying the basic features and discards those that fail to meet the threshold requirements of the task of interpreting the text of the Constitution. The central role in the process of identification of these features is the text, and other sources must be additional reasons. Basic structure to him is a set of principles that arise by implication from provisions of the Constitution. These are intrinsic to the Constitution in the sense that they are not principles that are central to every

26. AIR 1993 SC 1267.

27. *Id.* at 118.

28. *Id.* at 120.

29. *Id.* at 130.

constitutional text, but only to the Indian Constitution. Secondly, the protection of these principles is the protection of the moral and political pre-commitments in the constitutional text.

III. On the basic structure doctrine defended

Krishnaswamy argues that undoubtedly the basic structure doctrine has to be extended to both executive action and legislation. And as an answer to the charge of multiple standards depending on the kind of state action impugned, he offers an independent substantive form of review. But many questions remain unanswered. Developing the basic structure to limit all forms of state action could have the effect of diluting existing forms of judicial review. To consider an example: If the basic structure doctrine is to be read into the phrase "subject to the provisions of the Constitution" in Article 245 as Krishnaswamy suggests, would it mean different consequences for review of legislation and amendments? In practice, would we be testing legislation on the basis of constitutional principles arising from implications instead of express constitutional provisions? If the basic structure review is only a supplementary form of review, Article 245 will indeed have two meanings, first a review on the basis of express provisions, second, a review on the basis of constitutional principles. Would these tests be conjunctive and in what order must they be applied?

Krishnaswamy's answer is:

"I have argued that irrespective of the kind of state action challenged before the courts basic structure review operates as an independent substantive limit on constitutionally permissible state action. If used in this way basic structure review may be coherently developed to apply independently of other models of constitutional judicial review and require a distinct analysis of core constitutional principles to delimit the constitutional scope of permissible state action."³⁰

In his preface, Krishnaswamy promises to adequately satisfy the reader who expects a justification of the basic structure doctrine, as it is practised by the Court.³¹ But what is brought out in this painstaking analysis is a justification of the doctrine with various caveats and alternate interpretations. He admits the failure of the Court in articulating various vital links in the doctrine and offers alternate structural interpretations. He argues that the doctrine must

30. *Id.* at 109.

31. *Id.* at xxxii.

be applied with rules of institutional arrangement and a structured form of scrutiny woven into it. At the broadest, he argues, it must be viewed as a substantive independent review, which imposes limits on all forms of state action. If this is the understanding of basic structure, it is not an understanding as practised by the Court. His own analysis demonstrates the inconsistencies in the practice of the Court. The question that therefore arises is whether all these inconsistencies as highlighted, (even those relating to the fundamentals of the doctrine), will attain clarity through the process of constitutional adjudication?

In a more recent article the reviewer had observed:

“The power of unelected judges to determine and strike down amendments to the Constitution on the basis of this doctrine is anti democratic and counter-majoritarian. It is time that Parliament in its Constituent capacity sat down and made a list of basic features, which in its view ought not to be amended even by the special amending procedure. But there should be a provision for a national referendum if such basic features are to be amended.”³²

A structured understanding of the basic structure doctrine must have such an amendment as its provenance. The role of the judiciary would be limited to a review of compliance with the procedure. Krishnaswamy himself lays down reasons while addressing the legal legitimacy of the doctrine. While responding to the charge that in the guise of interpretation the judiciary has amended the Constitution, Krishnaswamy seeks to bring out the difference between the two concepts. He states that there are various limitations on the constitutional change that the courts can bring about. He points out that a court can rarely initiate constitutional change and must wait for an appropriate *lis* which calls for constitutional interpretation.³³ Further, he also points out the restrictions on judicial reasoning in the form of justifiability both in terms of the particular dispute and also in the context of the doctrine of precedent. If these are indeed the restrictions on the process of constitutional adjudication, should we keep waiting for the courts to articulate a form of review as Krishnaswamy conceives, to resolve the inconsistencies in the doctrine?

32. See, generally, Raju Ramachandran, *No Monopoly Over Wisdom*, Halsbury Law Monthly, October 2008, p. 23. Also available at <http://www.halsburys.in/no-monopoly-over-wisdom.html>, last visited on 23 May, 2009.

33. *Supra* n. 1 at 183-188.

IV. On Social and Political Pre-commitments in the Constitutional Text

No doubt, the Supreme Court will not lightly strike down amendments to the Constitution by invoking the basic structure doctrine. No doubt, the extent of constitutional injury must be exceptionally high: damage to, or destruction or erasure of a basic feature of the Constitution. But can the fate of constitutional change be left to judicial perceptions and majorities? Should the political and social pre-commitments be binding on all generations to come? This is the question which the reviewer posed in his essay, and asks again here. He also takes the liberty of borrowing an example from his essay: the Constitution is amended to switch over to a presidential form of Government. Democracy is certainly not destroyed, but a fundamental choice made by the Constituent Assembly will be reversed. The Presidential system is based on a clear separation between the executive and the legislature, while the Parliamentary system is based on a clear link between the two. If the amendment is challenged, even the most restrained judge will strike it down, if he has to apply the Basic Structure Doctrine. The same will be the case with a change from the first past the post system to a system of proportional representation. The "necessary implications" flowing from the provisions of the Constitution will prevent the reversal of any fundamental choice made by the Founding Fathers.

V. On Legitimacy

"The legitimacy of basic structure review may be assessed under three categories: legal, moral, and sociological. The legal legitimacy of such review is established by defending a structuralist interpretation as a coherent and justifiable model of constitutional interpretation. The moral legitimacy of basic structure review rests on a rejection of majoritarian versions of democracy and the adoption of a dualist model of deliberative decision-making in a constitutional democracy. The sociological legitimacy of the doctrine is, to a large extent, contingent on the success of the moral and legal legitimacy arguments."³⁴

Should the will of the people, as expressed by elected representatives by a special constitutionally ordained majority be subject to the perceptions of unelected judges of whether they destroy or damage "overarching constitutional principles central to the identity of the Constitution?"

34. *Id.* at x.

Krishnaswamy rightly questions the representative character of a Parliament elected on the first past the post system. But as against the imperfectly representative character of Parliament, in the reviewer's opinion, the judiciary is completely unrepresentative. Krishnaswamy does not claim that the judiciary in India is democratic, he proceeds on the basis that a democratic judiciary would be "an institution which draws on all ranks of society, and where access to legal education, information, legal advice and expertise, and a legal career are all widely dispersed, rather than being the prerogative of a small or relatively small group of people."³⁵ Since this is Utopia, and since judges are not appointed after Parliamentary ratification, it is clear that Parliament is more representative than the judiciary.

To be fair, Krishnaswamy is not contending that the Constitution is the property of lawyers and judges alone. While he disputes the theory of Parliamentary sovereignty, the concept of popular sovereignty is accepted. By not addressing the relationship between constituent power and the nature of sovereignty which he says is one that requires careful theoretical elaboration, his concession that a popular sovereign can change the Constitution is unconvincing.

He says that the basic structure doctrine acknowledges that the Constitution can be radically changed by the people themselves. But how? Only extra-constitutionally. The Constitution does not provide for a referendum. Even if it were to be amended to provide for one, the Basic Structure Doctrine would strike the amendment down, to the extent that it enables a change in the basic structure. And so, only a popular uprising can change the Constitution radically or replace it with a new one. This will be an extra-constitutional Constitution. In order to legitimize this, then, the only solution lies in borrowing one of two doctrines evolved by the Pakistan Supreme Court: "revolutionary legality"³⁶ or "necessity".³⁷

If this is the only way a Constitution can be changed, there is something wrong with constitutionalism. The Basic Structure Doctrine, thus, in the opinion of the reviewer, is solely an elegant, sophisticated doctrine for lawyers and judges. It is a hindrance to democracy and constitutionalism, which are still works in progress.

35. *Id.* at 201.

36. *The State v. Dosso & Another*, (PLD 1958 Supreme Court 533).

37. *The Federation of Pakistan v. Moulvi Tamizuddin Khan*, (PLD 1955 Federal Court 240).