

Doctrine of Basic Structure: A tool of Constitutionalism? Or Usurpation of Constitutional Authority?

Helal Uddin

Apprentice Advocate, Judge's Court, Chittagong
LL.B (Hons) LL.M., Department of Law, University of Chittagong

“A government without law is a mystery in politics, inconceivable to human capacity and inconsistent with human society” - Jhon Locke

1. Introduction

By a slow and intermittent process of social, economic and political evolution a State has emerged as an indispensable institution run by an agency called government.¹ It needs to frame a constitution which is a set of legal rules regulating the organs of the government, their function, and their relationship with each other and with the citizens. It represents our system of government and our basic beliefs and ideals, such as liberty and freedom. In the words of Harry S Truman, thirty-third president of US, “It’s a plan, but not a straitjacket, flexible and short.”² Moreover, every written Constitution has certain fundamental principles and objectives which are its structural pillars and on which the whole edifice of the Constitution is erected and if these principles are taken away or destroyed, the Constitution will lose its original and Inherent identity and character.³ From this principle of constitutionalism, the doctrine of basic structure has been introduced by the court as an extension of the doctrine of judicial review expounded by Marshall C. J. to control the amending power of parliament.

2. A brief history

The origin 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.⁴ It is also said that "the doctrine of basic structure as applied by the Indian Supreme Court had originated from a decision of "Chief Justice Coke's famous fourth Amendment in Bonham's case, 8 C.O. Rep 114(1610), arguments of counsels made on the 18th amendment case in U.S.A. and particularly to Chief Justice Kennedy's dissent in *Royan v. Lennon* 1933 IRIT70.⁵ This principle was possibly followed by the then Dhaka High Court in *Fazlul Qader chowdhury V. Abdul Huq* which was upheld in appeal by the Pakistan Supreme Court".⁶ But its development or nourishing stage in the Constitutional

¹ Islam, Mahmudul, *Constitutional law of Bangladesh*, 3rd Edition, Mullick Brother, Dhaka, 2012, P.1.

² Henry Patrick, *the Structure of the Constitution*.

<<http://fms.johnstonschools.org/subsites/MelissaHorton/documents/Chapter%203.3/3.3NewGlencoeText.pdf>> accessed on 30.09.2017

³ Halim Md Abdul, *Constitution, Constitutional Law And Politics: Bangladesh Perspective*, 5th Edition, CCB Foundation, Dhaka, 2012, p.433, opined by Shahabuddin Ahmed in *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD Spl.1

⁴ Ibid, p. 442.

⁵ Quoted from 1989 BLD (Spl) 1.Issue, *Anwar hossain chowdhury V. Bangladesh* p.168, judgment per M.H. Rahman J followed from Rajeev dhavan, a basic structure doctrine- A foot not comment- India constitutional Trends and issues (1978) Bombay.

⁶ *Fazlul Qader chowdhury V. Abdul Huq*, PLD 1963 SC 486-18 DLR 69.

Jurisprudence and first formal judicial formulation came out in *Keshavananda Bharati v. State of Kerala*.⁷ Before *Keshavananda's case* the issue of Basic Structure came to be applied indirectly in *Golak Nath v. State of Punjab*⁸ where it was decided that Parliament had no power to amend Fundamental Rights so as to take away or abridge any of them.⁹ Likewise, the Supreme Court of Bangladesh has followed the doctrine in the case of *Anwar Hossain Chowdhury v. Bangladesh*¹⁰ popularly known as the 8th Amendment case.

3. Conceptualization

In real or substantial sense, the doctrine of Basic Structure' means those fundamental principles and objectives of the Constitution which are its structural pillars and on which the whole edifice of the Constitution is erected and if these principles are taken away or destroyed, the Constitution will lose its original and inherent identity and character.¹¹ Focused points are: *first*, Basic Structure Review is a *substantive limitation* upon the power of the Parliament to amend the Constitution, i.e., Constitutional amendments must conform to certain *standards* or *values*; *secondly*, the task of adjudicating content-based violations of the Basic Structure must be performed by the judiciary; and *thirdly*, the components of the Basic Structure Doctrine, such as democracy, rule of law, secularism etc., have been enunciated in a highly abstract manner, permitting varying and different interpretations. These must be kept in mind while analyzing the legitimacy of the Basic Structure Doctrine.¹²

4. Significance

The Basic Structure limitation comes out of the realization that the only way to safeguard the Constitution from opportunistic destruction and defilement by temporary majorities in Parliament is to reject those amendments which go to tarnish its identity.¹³ In countries like ours, the Parliamentarians tend to wield all powers, to act arbitrarily and to do everything they wish until they are de-elected in the next election. This if not checked will make the Constitution a plaything in the hands of a majority-ridden parliament. It will give birth to a sort of 'Parliamentary Supremacy' alien to our Constitution.¹⁴

5. The ingredients

The Basic Structure is not capable of being precisely enumerated or defined rather imprecise and elastic concept. The basic features of the Constitution have not been explicitly defined by the Judiciary. At least, 20 features have been described as "basic" or "essential" by the Courts in numerous cases e.g., *Golak Nath vs. The State of Punjab, 1967*, *Keshavananda Bharati v.*

⁷ AIR 1971 SC 1461

⁸ AIR 1967 SC 1643

⁹ Supra Note 3, P.429.

¹⁰ 1989 BLD Spl.1

¹¹ Supra Note 3, P.435

¹² Basic Structure – I: History and Evolution

<<https://indconlawphil.wordpress.com/2013/11/01/basic-structure-i-history-and-evolution/>> accessed on 30.09.2017.

¹³ Article on 'The Doctrine of Basic Structure in Pre and Post Keshavananda Case'

<<http://shodhganga.inflibnet.ac.in/bitstream/10603/39853/9/chapter%205.pdf>> accessed on 30.09.2017

¹⁴ Chowdhury M Jashim Ali, *An Introduction to the Constitutional Law of Bangladesh*, 2nd edition, Sun Shine Books, Chittagong, 2014,P.611.

The State of Kerala, 1973, Indira Gandhi v. Raj Narain, 1975, Minerva Mills Ltd. v. Union of India, 1980 and Anwar Hossain Chowdhury v. Bangladesh and have been incorporated in the Basic Structure. Some of the features of the Constitution termed as "basic" are listed below:

‘Supremacy of the Constitution’, ‘Rule of law’, ‘Separation of Powers’, ‘The objectives specified in the Preamble to the Constitution’, ‘Judicial Review’, ‘Secularism’, ‘The Sovereign’, ‘Democratic’, ‘Republican Structure’, ‘The Principle of Equality’, ‘The Fundamental Rights’, ‘The Concept of Social and Economic Justice to build a Welfare State’, ‘The Parliamentary System of Government’, ‘The Principle of Free and Fair Elections’, ‘Independence of the Judiciary’, ‘Effective Access to justice’, etc.¹⁵

6. In the Body of the Bangladesh Constitution and its Historical Backgrounds

This doctrine is not originally enshrined in the Constitution of Bangladesh. It is incorporated by Addition of Art.7B¹⁶ in 1989. However, Article 142 gives power to the Parliament to amend any provision of the Constitution by way of *addition, alteration, substitution, or repeal*. The question, therefore, arose in the 8th Amendment case¹⁷ whether the Legislature, in exercise of the power of amendment granted by a Constitution, can alter any basic structure of the Constitution. To B.H. Chowdhury J, ‘Some of the features are basic features of the Constitution and they are not amendable by the amending power of the Parliament’.¹⁸ Shahabuddin Ahmed J concluded-‘there is no dispute that the Constitution stands on certain fundamental principles which are its structural pillars and if these pillars are demolished or damaged the whole Constitutional edifice will fall down.’¹⁹ Consequently, the Appellate Division in *Abdul Hannan Khan v. Bangladesh*²⁰ declared 13th Amendment of the Constitution which made provision for ‘Caretaker Government’ unconstitutional because of contrary to the Basic Structure of the Constitution namely ‘Democracy’; Following that the Government passed the 15th Amendment that narrow down the width of Art. 142 by inserting Art.7B which provides that ‘Notwithstanding anything contained in article 142 of the Constitution, the preamble, all articles of Part I, all articles of Part II, subject to the provisions of Part IXA all articles of Part III, and the provisions of articles relating to the basic structures of the Constitution including article 150 of Part XI shall not be amendable by way of insertion, modification, substitution, repeal or by any other means.’²¹

7. Applicability: A dichotomy between Amendments and Ordinary Legislations

The Basic Structure Doctrine applies only to Constitutional amendments. The Basic Structure Doctrine does not apply to ordinary Acts of Parliament, which must itself be in conformity with the Constitution.²² It has been opined by Chandrachud J in *Indira Nehru Gandhi v. Raj Narain*²³ that the Basic Structure Doctrine had no application to ordinary legislation. 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.

¹⁵ Available at https://en.wikipedia.org/wiki/Basic_structure_doctrine[visited on 30.09.2017]

¹⁶ See Article 7B of *The Constitution of The People's Republic of Bangladesh*.

¹⁷ See *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD Spl.1

¹⁸ *ibid*, para 255

¹⁹ *ibid*, para 376

²⁰ Civil Appeal No 139 of 2005 (unreported)

²¹ Article 7B of *The Constitution of The People's Republic of Bangladesh*.

²² Available at https://en.wikipedia.org/wiki/Basic_structure_doctrine[accessed on 30.09.2017]

²³ AIR 1975 SC 2299.

8. An integral part of Judicial Review

Judicial Review expounded by Marshall C.J. in *Marbury v. Madison*²⁴ is a great weapon in the hands of judges to uphold unconstitutional and unenforceable any law or action by public authority inconsistent with or in conflict with the Constitution.²⁵ Judicial Review of the Constitutional amendments is a corollary of the doctrine of Basic Structure. The doctrine implies the supremacy and finality of judicial review in determining the validity of Constitutional amendments.²⁶ The core concern of the Basic Structure is the 'Judicial Review', which is its integral or inseparable part and without which the Basic Structure Doctrine is simply inoperable or non-functional.²⁷

9. A Norm for Constitutional Interpretation

After its emergence, this doctrine has become a norm, and taken a shelter for Constitutional interpretation to determine the question of validity of their amendments. The Court opined in *Shri Kumar Padma Prasad Case* that Basic Structure could be invoked for interpreting the Constitutional provisions also.²⁸

10. Can it be substituted?

Can there be a substitute for a feature recognized as an ingredient of Basic Structure? The expression '*basic structure ex facie*' means that it is basic and cannot be altered or substituted.²⁹ The decision in *L. Chandra Kumar v. Union of India*³⁰ undoubtedly is a loadstar to the effect that once a feature is recognized as an ingredient of Basic Structure, on no account shall it be substituted.

11. Is it inalterable?

An interesting question that calls for examination is whether the Basic Structure can be altered in any manner. If we say that the Basic Structure is inalterable, it means that the future generations are always bound by the declarations of the past ones. The proposition, therefore, that The Basic Structure is unalterable on any account cannot be treated as a wise one and an unamendable Constitution is the worst tyranny of time. Even though Basic Structure constitutes the fundamental principles upon which the Constitution is erected, at times a nation requires alteration of such fundamentals of the legal system. The necessity of amending the Constitution to meet the needs of a changing society cannot be denied. Thus the identity of the Constitution can be altered with the concurrence of the people.³¹

²⁴ (1803) 1 cranch 137

²⁵ Henry Abraham cited in *Chandra Kumar v. Union of India*, (1997) 3 SSC 261 (292); AIR 1997 SC 1125.

²⁶ Article on "*Basic Structure Doctrine and its Widening Horizons*" by V.R.Jayadevan.

<<http://dspace.cusat.ac.in/jspui/bitstream/123456789/11059/1/Basic%20Structure%20Doctrine%20and%20its%20Widening%20Horizons%20%282%29.PDF>> accessed on 30.09.2017

²⁷ Virendra Kumar, Basic Structure of the Indian Constitution: *Doctrine of Constitutionally Controlled Governance* (From Keshavanand Bharati to I.R.Cohelho), *Journal of India Law Institute* 2007, Vol-49, Jan – March, p.365

²⁸ Supra Note 20.

²⁹ Ibid.

³⁰ A.I.R.1997S.C.1125.

³¹ Supra Note 20.

12. Critiques

The Constitution is not set in stone. It is a living document. It has to march with the needs of the time.³² What constituted the Basic Structure of the Constitution? Which principles are or not included in this concept? An objective and unanimous answer cannot be given to this question. Indeed, in the *Kesavananda Bharati's case*, the majority of judges who admitted the existence a "Basic Structure of the Constitution" did not agree with the list of the principles included in this concept. Each judge drew a different list. The Judiciary has got a free hand in defining basic structure making the concept a fluctuating one and hence bad. There is a limitation that this doctrine has no application to ordinary legislation. In the *Election case*³³ as well as *Kuldip Nayar v. Union of India*³⁴ Judges unanimously held that The doctrine of 'Basic Structure' in the context of our Constitution does not apply to ordinary legislation....³⁵ Besides, when there is no explicit substantive limitation on the amending power, the attempt by a Constitutional Court to review the substance of the Constitutional Amendments would be dangerous for a democratic system in which the amending power belongs to the people or its representatives, not to judges.³⁶ Anuranjan Sethi says, 'the Basic Structure Doctrine can be shown as a "vulgar display of usurpation of Constitutional power by the Court"³⁷ and a step forwards the 'Government of Judges'.³⁸ If we accept the existence of anything called unamendable basic structure of the Constitution, they become an obstacle in their progress. Therefore, if amendments were to help a Constitution to survive and to meet the needs of a changing society, they must include changes in the allegedly essential part of the Constitution.³⁹

13. Summary with Concluding Remarks

The expressions 'Basic Structure,' 'Basic Features,' 'Essential Features' or 'Principles' of the Constitution stand in close relation with the "Constitution in the transcendental-logical sense. Basic structure doctrine, evolved by the Court, through its numerous landmark judgments over the years, brings in that required factor of Constitutionalism, to preserve, protect and maintain the thicker concept of democracy, socialism, secularism, and rule of law without which the Constitution is but a dead letter law. This doctrine comes out of the realization that the only way to safeguard the Constitution from opportunistic destruction and defilement by temporary majorities in Parliament is to reject those amendments which go to tarnish its identity. In contrast, an unamendable Constitution is the worst tyranny of time. So constitution is particularly hard to amend but not unamendable. Parliament, therefore, has the power of amending the Constitution under Constitutional framework but must leave "the Basic Structure of a Constitution" intact.

³² Chowdhury M Jashim Ali, *An Introduction to the Constitutional Law of Bangladesh*, 2nd edition, Sun Shine Books, Chittagong, 2014,P.611.

³³ *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC, 2299.

³⁴ (2006) 7 SCC 1.

³⁵ Setu Gupta, Vicissitudes and Limitations of the Doctrine of Basic Structure, *ILI Law Review*, Available at http://www.ili.ac.in/pdf/p8_setu.pdf [accessed on 30.09.2017]

³⁶ Article on 'The Doctrine of Basic Structure in Pre and Post Keshavananda's Case'

<<http://shodhganga.inflibnet.ac.in/bitstream/10603/39853/9/chapter%205.pdf>> accessed on 30.09.2017

³⁷ Anuranjan Sethi, Basic Structure Doctrine: Some Reflections, <http://ssrn.com/abstract=835165>, p. 6-8,

³⁸ Dr. Harichand, 'Amending Process in the Indian Constitution' p.440

³⁹ A. Lakshminath, Basic Structure and Constitutional Amendments – Limitations and Justiciability 134 135 (Deep & Deep Publications Pvt. Ltd., New Delhi, 2002).