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The Fourth Judges Case and India's Basic Structure Doctrine: Constitutional Lies

Haider Ali[1],Aishwarya Sharma[1]and Atibha Vijaya Singh[2]

[1]Institute of Legal Studies and Research, Mangalayatan University, Aligarh, UP
[2]Faculty of Law, Usha Martin University, Ranchi, Jharkhand
E-mail: haider.ali@mangalayatan.edu.in

Abstract: If "fundamental structure" philosophy is widely accepted in India, how does it affect the constitution's text? To date, constitutional theorists have overlooked this subject in favour of disputes about the doctrine's implications for the separation of powers and the function of the judiciary in a constitutional democracy. The Indian Supreme Court has often overturned constitutional provisions based on their basic construction. Disjunctures between text and practice have been created by including these provisions in the original text. The Indian Supreme Court's ruling in the Fourth Judges Case, which significantly broadens the scope of the basic structure concept, exacerbates the danger of these myths. A look at the origins of these misconceptions, the efforts to correct them, and the implications for interpreting the constitution outside of the courts are all covered.
Keywords: Law, Doctrine, Text and Practice, Fourth Judges Case

Introduction:

Indian law students are taught constitutional law as one of their first courses. High school students must study the Indian Constitution as part of their curriculum throughout the country. The constitution is frequently invoked in newspapers, on television, and in political speeches, which is familiar to most Indians. What is the ideal starting point for someone who wants to learn about the intricacies of Indian constitutional law? This seems apparent. Answer: India's constitutional text, which is the 1949 codified master text and all of its revisions and schedules. For individuals wanting to understand Indian constitutional law, the written constitution (and often the preamble that it opens with) is the first and most significant source to consult.

Everyone knows that a nation's constitutional law (whether it has a "big-C" or "small-C" constitution) is a mix of written and unwritten principles. This holds for all nations' constitutions. Judges fill in the blanks left by the written constitution's abstract language.3 A nation's constitutional law is composed less and less of a codified constitution as time goes on, as court decisions and political practise gradually add to the body of law. In constitutional discourse, these claims have become less problematic [1].

Instead of simply being an "incomplete statement," as the Supreme Court put it, a written constitution diverges so far from constitutional law that it is "positively misleading"? As a result of the Court's assumption of power to hold regulations that have been incorporated into to the constitutional text following the textually prescribed amendment procedure as unconstitutional, the Indian Supreme Court's body of case law on unlawful constitutional amendments (also known as the "basic structure doctrine") raises precisely these questions [2].

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It has been both the hero and the devil of India's constitutional experiment since it was introduced in 1973. Significant problems about the separation of powers, popular sovereignty and judicial power in a constitutional democracy have been raised by this case [3]. Despite their importance, these issues are outside the scope of this chapter. The chapter's focus is on how the doctrine affects the constitutional language itself. Throughout the previous 40 years, this theory has expanded the gap between constitutional text and actual practice. Several constitutional clauses misstate how the constitution operates in reality [4]. These disjunctures have been exacerbated by the Indian Supreme Court's decision to redefine the basic structure concept in the Fourth Judges Case of 2015. Disparities between text and practise are discussed in the chapter, as are efforts to correct them and the implications for interpreting the constitution outside the courts that these disparities have.

How the Fundamental Structure Doctrine Was Born

The origins of the fundamental structure doctrine are well-known. However, to contextualize the conversation that follows, some of the details of that storey should be recalled. The Indian Constitution falls somewhere in the middle in terms of amendment difficulties. The constitution can be altered by a two-thirds majority in both houses of parliament, however, some sections about the federal government require ratification by at least half of the states' legislatures before changes can be made. This procedure falls between the United States and the United Kingdom [5].

Since its inception, the constitution, including its chapter on fundamental rights, has been revised nearly 25 times. As a result of Congress regimes' frequent constitutional modifications, Indian courts began to examine whether Parliament had any limits on its power of amending the constitution at all. Part III of the Constitution is protected by Article 13(2) of the Constitution, which prohibits the state from making 'any law that restricts or restricts the rights bestowed on citizens' It was argued that the phrase "law" encompassed constitutional amendments when it was used in Article 13 of the Constitution. For this to be true, Parliament would no longer have the constitutional authority to change fundamental rights, which it had started doing shortly after the constitution was enacted.

As a result, the Supreme Court ruled that 'law' did not include constitutional revisions, paving the way for Parliament to amend any aspect of the constitution, including the chapter on basic rights, [6]. Two judges expressed uncertainty regarding the Court's judgement 13 years later, even though they reached the same conclusion. 'Stronger reasons,' Justice Hidayatullah added, were required to reach this verdict. While Justice Mudholkar argued that the Constituent Assembly may have intended to make the "fundamental characteristics of the Constitution" permanent, I disagree. He decided to leave out all of the specifics of what he meant by the constitution's "basic elements." In Golak Nath, a case decided by an 11-judge panel of the Supreme Court a few years later, the issue was revisited. Several litigants filed writ petitions before the Supreme Court because of the impact of land reform laws. Because they felt it violated their rights, they sought to overturn the Act and the amendments to the constitution that protected it [7].

Supreme Court concluded that constitutional modifications fell under the definition of "law" under Article 13(2) by a narrow 6-5 vote, effectively securing inviolability for Article 21 of the constitution's fundamental rights chapter For this reason, and to avert the upheaval that would have ensued if previous constitutional amendments and statutes were declared unconstitutional, the Supreme Court enacted the "prospective overruling" concept [8]. This

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modification would have been crucial if the Supreme Court had held to a strictly textualist interpretation of the basic structure doctrine. Substrate of the notion was abolished by establishing that "amendment" was not limited to changing the constitution's non-essential characteristics. It was a crucial move in favour of structuralist reasons for the basic structure concept that the Supreme Court ruled that Parliament could not change the constitution's limited power to modify the constitution into an unlimited power [9]
. This was the final attempt to dismantle the fundamental structural ideology. India's Supreme Court signalled that the theory was firmly established and will have an indelible impact on the country's constitutionalism in the coming years.

Review of the Basic Structure and the Emergence of Disjunctions between Text & Practice: Basic Structure Review

This case and many others that followed took up enormous space and are still among the most extended appellant decisions ever. Yet, they failed to answer some crucial points about the constitution's original wording. Of course, the Supreme Court was concerned about the possibility of restricting the ability of Parliament to make amendments. It didn't consider the restrictions' mechanics in its calculations. If an amendment is struck down under fundamental structural review, will the relevant constitutional clause simply be disapplied, or will it be removed entirely from the statute book? Is it appropriate to regard fundamental structure review as an interpretive exercise, or is it better to treat it as an official publication? Legislation that a common law court strikes down will remain on the books but will serve no practical purpose due to precedent.

It soon became apparent that constitutional amendments that have been struck down in an exercise of fundamental structural review would be treated in the same manner as statutes threw down for violating constitutional provisions. The combination of transformational doctrine and the traditional separation of powers philosophy was a strange confluence of ideas. Despite the fact that the Court has the authority to declare an amendment unlawful and void it, it would not be in a position to remove it entirely from the text of the constitution and restore the language to its previous state. Only a legislative repeal or, in the case of the constitution, a new constitutional amendment that removes the relevant changes from the text might eliminate the clause in question. In contrast, several European constitutional courts have the authority to throw it out.

No other text, including a "constitutional statute," animates public dialogue like the constitution. The text serves as a 'common denominator' and 'historical framework' for debates on matters ranging from federal powers to affirmative action in education and employment. When people read the constitution, they expect it to accurately spell out the ground rules of the country. Even so, the idea of basic structure has meant that constitution functions in some circumstances contrary to the text's intent, and in many cases, in the opposite direction of the text. Leaving inoperative sections in the text of a Constitution, as opposed to a statute, has far-reaching consequences, as is evident.

Kesavananda is the source of the first example. Article 31C was added to the constitution by the 25th Amendment in 1971, when tensions between the Indira Gandhi government and the judiciary reached a boiling point. No law may be struck down for infringing the right to equality, freedom, and the (formerly) right to property, as long as it follows the Directive Principles. Furthermore, it said that no law including a declaration that it is for giving effect to this policy should be brought in question in any court on the argument that it does not give effect to such purpose. Part of this provision was struck down because it provided the legislature free rein to exempt any act from three important fundamental rights simply by stating that it was intended to

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promote land redistribution. Soon after Kesavananda, another constitutional amendment was overturned. After Indira Gandhi had been removed as prime minister by a state High Court for corruption, the Congress administration was mobilised to modify the constitution to ensure her re-election. Because it was an attempt to validate a specific election by a declaratory judgement, the Supreme Court threw down a portion of the amendment. The amendment was an attempt to validate an invalid election without modifying the foundation on which the election was unlawful was deemed problematic by the Court.

In the Minera Mills affair, strike three occurred shortly after that. Constrained amending authority was part of the constitution's fundamental structure, and hence the Supreme Court rejected an attempt to remove the basic structure concept. Parliament couldn't change it into its master as a creature of the constitution. The Court also rejected an amendment that sought to shield legislation advancing honest advice from being challenged because it infringed on the rights to equality and freedom. A few years later, in Sambamurthy, a constitutional amendment was ruled unconstitutional. Andhra Pradesh's creation sparked a wave of protests across the state over education and public service employment. Andhra Pradesh and Telangana agreed on the a'six-point formula' to ensure that the state grows equitable. A constitutional amendment made it possible to put the plan into action.

In the formula, government employees' issues were addressed by an Administrative Tribunal. But it gave the state government a three-month window to'modify or annul' any of the rulings of the Tribunal, thereby handing it a veto power over the decisions of the Tribunal. Veto authority could only be utilised under certain conditions, including a written justification and the order presented to the state legislature before it was carried out. The Supreme Court overturned the veto power conferred by the constitutional amendment to the state government. Before this judgment, Justice Bhagwati had argued that the rule of law was a fundamental principle in our constitution. The rule of law would be shattered and the government would be able to "defy the law" and "get away with it," as long as the state government has this veto power over any Tribunal's judgement, including temporary decrees. It has been more than a decade since the Supreme Court had the opportunity to overturn another constitutional amendment. In this case, the Supreme Court debated the legality of a constitutional amendment that had not yet been ratified. Under the national emergency, Indira Gandhi proposed extensive constitutional revisions that included provisions for the creation of tribunals that would alleviate court workloads. These laws removed the High Courts' constitutional jurisdiction.

Public Officials' Treatment of Constitutional Falsehoods:

The constitution's basic structure assessment following Kesavananda suggested that certain of the constitution's provisions remained in the text but were no longer relevant in practise or in the actual world. Constitutional amendments cannot be reviewed by a court, as stated in the text. According to the Supreme Court's ruling in Minerva Mills, that's clearly not the case. It is permissible for Parliament to limit the power of the Supreme Court to examine the legality of administrative tribunal rulings. As L Chandra Kumar informs us, this would be a blatantly illegal endeavour. According to the legislation, certain administrative tribunals' rulings can be overturned by state governments. In Sambamurthy, the Supreme Court held the exact reverse, by denying state governments this jurisdiction. These lies have not gone unnoticed by elected officials. Even more interesting than the falsehoods themselves is how the bureaucracy has handled them. India's Ministry of Law and Justice routinely updates the constitution. It is

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common to practise to include a footnote explaining that the Supreme Court has ruled that a particular constitutional clause is 'invalid' or "unconstitutional and void," however this is not always the case.

According to what we know so far about the footnotes, they were likely prepared by bureaucrats in the Ministry of Fairness and Order rather than enacted by a two-thirds vote of both Houses of Parliament. There is no doubt that the 'preface', which a civil official likewise authors, has the same authoritative weight as the 'constitution' itself. As a result, it is quite adaptable. In other words, there is no guarantee that this commentary will be included in future editions of the constitution. The ' Constitute Project, a unique open-access Indian law website, does not include this opinion. Uninitiated readers of the Indian Constitution can be misled even if they resort to these sources. However, allowing this commentary to be included in the constitution gives the executive enormous interpretive authority, especially given that they print the most 'official' version of the Constitution of India. According to the reasoning presented above, Indian courts lack the authority to strike a constitutional amendment from the original text. So, rather than leaving a footnote explaining that an amendment was unsuccessful, the government includes a footnote saying that the revised wording has been struck down when it publishes the constitution. It would be illegitimate for the government to undertake the latter, as it would effectively re-amount the constitution.

Textual inconsistencies are just the tip of the iceberg. If we were to look at the core foundation of India's federal system, many more issues and worries would surface. Supreme Court and the twenty-four High Courts have the authority to rule on constitutional issues. Despite the Supreme Court's ability to do so, it did not limit its ability to review the fundamental structure of the United States. As a result, any constitutional change could theoretically be struck down by any of the High Courts at any time. Because the ruling would only be applicable within the state, the constitution's actual text would vary from state to state. According to the Law Ministry's footnote, a provision has been knocked down and is invalid solely in its applicability to the state of Tamil Nadu and not in its adjacent states such as Kerala, Karnataka and Andhra Pradesh.

Newly Introduced Structure Doctrine Underlying the Fourth Judges Case

There were a few standouts in the Supreme Court's case-law on unconstitutional constitutional changes up until 2015. In addition, the basic structure theory was frequently utilised to analyse legislation and other administrative decisions, but it was rarely successful in dislodging constitutional changes. However, the Supreme Court typically rejected the 'finality clauses' or specific amendment sections that deprived the courts of their jurisdiction while at the same time mostly sustaining the amendment's core features. As a result, the Supreme Court used meta-principles like democracy, the rule of law, judicial review, separation of powers, and republicanism to identify the fundamental characteristics of the constitution. Key elements of the constitution are "mostly not concrete provisions of the Constitution but are, instead, themselves expressions of broad ideas," according to P K Tripathi, who wrote an insightful piece on the Kesavananda ruling shortly after.

On October 16 of this year, the Supreme Court made one of its most consequential constitutional decisions in a decade or more. To name Supreme Court and High Court judges, the President (who is advised by the executive branch) must consult one or more constitutional officials, including the Chief Justice of India, state chief justices, Supreme Court judges, and

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state high court judges, before making a decision. Several Supreme Court decisions dating back to the 1970s changed the balance of power regarding appointing judges.

In SankalchandSheth, the Supreme Court construed the word "consultation" literally, meaning that making appointments never would require the approval of constitutional functionaries that the constitution requires. Despite this, the Supreme Court cautioned that the executive branch should generally adopt the Chief Justice of India's recommendations, which emerged from this consultation process. When it came to making appointments to positions of high government office in The First Judges Case, which was decided a few years later, the Supreme Court effectively said that only the Central Government had this power and that no one else's opinion mattered. 60 When the issue came again in the Second Judges Case, the Supreme Court's opinion was drastically altered. The Supreme Court ruled that the judiciary's judgment should take precedence when it comes to making appointments. The decision laid the groundwork for judicial nominations recommended to the Central Government by a "collegium" of judges made up of the Chief Justice and his two most senior colleagues. During the Third Judges Case, the Supreme Court widened the collegium, including the Chief Justice and four senior judges, to encompass the entire bench. The collegium system was widely criticised in the months and years following the Second or Third Judges Cases. More and more experts and observers expressed alarm over judicial nominations, fearing that the pendulum had swung too far in their favour. The government made attempts to change the status quo of Prime Minister Modi, which was the first in 25 years to have a majority of seats in Parliament. The constitution replaced the collegium system to create a National Judicial Appointments Commission (NJAC).

Conclusion:

India's constitutional law is most famous for its basic structure concept, which has been both extensively praised and roundly attacked. One feature of the Kesavananda case and subsequent judgements was overlooked amid a wealth of literature on democratization and the separation of powers. Does a basic structure review affect the text in any way? The Supreme Court has ruled on several Constitutional issues over the years. These clauses have been preserved in the text, resulting in contradictions between the text of the constitution and its actual application. The Fourth Judges Case's expansion of the basic structure concept exacerbated disjunctures between text and practice. The government's printed version of the constitution now includes more than a dozen footnotes explaining which portions of the constitution have been ruled unconstitutional by the courts.

On the other hand, these footnotes do not appear in the constitution itself. The basic structure doctrine's erroneous constitutional assertions raise questions about the rule of law and emphasise the importance of interpreting the constitution outside of the courts. Citizens of every generation must understand what the constitution's guarantees mean to them. As the Fourth Judges Case shows, the continued application of the fundamental structure theory only increases the likelihood of citizens becoming marginalized in the interpretive project.

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