BASIC STRUCTURE DOCTRINE AND JUDICIAL REVIEW: BALANCING JUDICIAL INDEPENDENCE AND CONSTITUTIONALISM

Nishtha Jha*

ABSTRACT

The Doctrine of Basic Structure was recognized by the Supreme Court of India in the historic case of "Kesavananda Bharati v State of Kerala" which states that the Basic Feature of Constitution cannot be amended. Basic Features of the Constitution are those features that are essential for the existence of the Constitution, they are of prime importance and maintain Constitutionalism. The doctrine of Basic structure has been developed through Judicial interpretation though it is not expressly mentioned in the Constitution. Judicial Review has played a pivotal role in the development of the Doctrine of Basic Structure which limits the amending power of parliament in an unfettered, uncontrolled, and arbitrary manner. Independence of the Judiciary is one other concept that has been in the news these days. In this essay, the author traces the role and importance of Judicial Review in the Recognition and Evolution of the Doctrine of Basic Structure in contemporary scenarios with special reference to the Independence of the Judiciary. Along with this, the author has highlighted the adoption of Indian doctrine by other sub-continent countries. Finally, the author has also made analytical comparison between the Indian concept of Independence of Judiciary and the American concept.

Keywords: Judicial Review, Doctrine of Basic Structure, Constitutional Validity, Rule of Law, Constitutionalism.

INTRODUCTION

In India, the constitution is the supreme authority of power for each organ of government. Therefore, the constitution is the "superior or supreme law" as defined by Prof. K.C. Wheare, it is the "fundamental law of the land." The importance and sanctity of the Constitution is much higher than other ordinary laws. Indian constitution is an 'enacted' constitution which means a defined set of members constituting a "constituent assembly" have drafted and formulated the document containing various rules and regulations which shall govern the nation. Indian

*BA LLB, SECOND YEAR, SYMBIOSIS LAW SCHOOL, NAGPUR.

Constitution was adopted on January 26th, 1950, the question that persists is the relevancy of the constitution enacted 74 years ago. The answer to this is the provision of amendment[1] provided by the constitution makers, this provision adds life to our constitution making it "legal and real" as by it parliament can make an addition, repeal, or modify any part of the constitution. Although the makers provided with procedure for the amendment there is no express establishment in the constitution providing for limitation on parliament to amend any provision, this was a concern for a very long period.

There has been a constant struggle for power and authority between the Legislature and Judiciary, where the organs made continuous attempts to portray their supremacy. The legislature by introducing the First Constitutional amendment in 1951 had proved its intentions of achieving Parliamentary Supremacy. By this amendment Ninth – Schedule has been added to the constitution where legislations related to 'Land reforms' are inserted as the focus of the then government was on Agrarian reforms. This ninth schedule has now become a "constitutional dustbin" as the later governments have added any kinds of legislation in the ninth – schedule like on elections, mines, and minerals, requisition of property, industrial regulations, monopolies, general insurances, coal or copper nationalization, etc. to exempt it from Judicial Review. Therefore, to avoid judicial scrutiny any law that parliament wished to be immune was added in the ninth schedule. This issue was resolved by the Hon'ble Supreme Court in the I.R Coelho case[2], where it was held that any legislation added to the Ninth Schedule post–Kesavananda Bharati Case i.e. April 24th, 1973 shall be reviewed by the Judiciary. Insertion of this schedule (ninth) led the Supreme Court to decide numerous cases which in turn were to a certain extent proved the Judiciary's supremacy.

Kameshwar Prasad v State of Bihar[3] challenged the Bihar Act on land reforms, Patna High Court declared the act unconstitutional because it violated Article 19(1)(f). Allahabad High Court dealing with the same issue declared the Allahabad Act to be constitutional. Therefore, an appeal to the Supreme Court was filed, and during its pendency, the provisional parliament enacted the First Constitutional (Amendment) Act, of 1950. This amendment introduced Articles 31-A and 31-B in the constitution, Article 31A[4] protects reforms related to agriculture and laws for the acquisition of any "estate" from any person by providing appropriate

[1] Constitution of India 1950, art 368
[2] *I.R. Coelho v State of T.N.*, (2007) 2 SCC 1
[3] *M.D. Sir Kameshwar Singh v State of Bihar*, 1951 SCC OnLine Pat 56
[4] Constitution of India 1950, art 31-A

compensation. Article 31B[5] provides similar protection to laws included in the Ninth Schedule of the Constitution from Judicial Review/ Scrutiny. Ultimately, the Apex court declared this law as constitutional and within the scope of Article 31(4) as the Bihar Land Reforms Bill was immune as was inserted in the ninth schedule.

After this, the First (Constitutional) Amendment Act,1950 was challenged in Shankari Prasad v Union of India[6] where the constitution bench unanimously held the power of parliament will be supreme and highlighted that constitutional amendments are not included in Art. 13(3)(a) which defines 'laws' for Article 13. Later in Sajjan Singh v Union of India[7] also the same observations as in the Shankari Prasad case were made and Amending power was with Parliament without any restrictions. The table turned in the I.C. Golaknath case[8] which held that Parliament has no power to amend any part of the constitution. By this, the power of parliament to amend was curtailed and the Judiciary was supreme, this was the first case that went against the parliament. To nullify this judgment, the 24th Constitutional Amendment, 1971[9] was brought which inserted Art. 13(4) in the Constitution. As per this article, any amendment made to the constitution shall not be covered under the definition of law for Article 13(2). Thus it acted as a shield that protected amendments from Judicial Review and thus did not become void. The validity of this amendment was challenged in the landmark case of Kesavananda Bharati v State of Kerala[10] where for the first time it was held that there exists an implied limitation on the power of parliament to amend the constitution as it upheld by a 7:6 majority the validity of 24th Constitutional amendment act, but it also held that the parliament can amend any part of constitution except "Basic Structure of Constitution". This is how and when the Doctrine of Basic Structure evolved 50 years ago. Since thereafter Judges have added various features to the doctrine. Also, these series of cases show the beginning of Judicial Review as although subjects under the Ninth Schedule and Article 13(4) were excluded from judicial review, the Judiciary took cognizance of those acts and determined their validity. There have been numerous cases where the Judiciary has reviewed legislation and amendments and declared its validity.

[5] Constitution of India 1950, art 31-B
[6] *Shankari Prasad Singh Deo v Union of India*, 1951 SCC 966
[7] *Sajjan Singh v State of Rajasthan*, (1965) 1 SCR 933
[8] *Golak Nath v State of Punjab*, (1967) 2 SCR 762
[9] Constitution of India 1950, 24th Constitutional amendment act, 1971
[10] Kesavananda Bharati v State of Kerala, (1973) 4 SCC 225

Regarding the genesis of the Doctrine, there are different opinions among academicians. Some scholars believe it to have originated by either argument put forward by notable legal practitioner Nani Palkhiwala in the 1973 case or by the judgment delivered by Justice H.R. Khanna, one of the majority judges. But in reality, it is neither of these 2 to give birth to the doctrine. Prof. Dietrich Conrad[11], professor at South Asia Institute of the University of Heidelberg, Germany while delivering a lecture at "Banaras Hindu University" in 1965 spoke on "Implied limitation of the Amending Power" linking it to the Weimar Constitution of Germany which was easily amended during Nazi Regime. This theory is the originator of the implied limitations on the power of amendment. Prof. Conrad believed that an amending organ i.e. Legislature cannot amend the very spirit of the Constitution and there should be certain limitations on the power of the Legislature. The other school of thought believes that Prof. Conrad is not the originator and instead, it is Justice Mudholkar's dissenting view in the Sajjan Singh[12] case where he cited Pakistan Supreme Court's decision where Chief Justice A.R Cornelius held that although the President of Pakistan had the authority to remove irregularities of the constitution it cannot amend the fundamental provisions of the constitution.[13] This opinion was used by J. Mudholkar for the first time in the Indian Judiciary in the Sajjan Singh case. Therefore, the genesis of this doctrine is not clear but the usage of this doctrine and its relevance in today's time is very relevant.

Judicial review is the process by which the judiciary reviews an act passed by the legislature and if found contrary to the provisions of the Constitution shall be invalidated or made unconstitutional. The judiciary reviews the actions of other organs of government and ensures that no organ abuses the power that has been conferred to it. It ensures that the common man is not suffering because of misuse or excessive use of power by executives. Thus, by this process, the Judiciary tries to maintain the balance and harmony between the organs of government which helps maintain the rule of law and smooth functioning of government. Judicial Review is a court procedure where a judge reviews the legal validity of a decision or legislation. While considering a globalized perspective System of Indian Judicial Review is more inclined towards the US Constitution than the UK. In the UK no court can declare any law passed by the Legislature as invalid although in India, Parliament can not make a law

[11] Swapnil Tripathi, 'Remembering Prof. Conrad: The genius behind Basic Structure Doctrine' (*Live Law* 24 April 2020) <https://www.livelaw.in/columns/kesavananda-bhartai-case-remembering-prof-conrad-the-genius-behind-basic-structure-doctrine-155676> accessed 23 January 2024

[12] Sajjan (n. 7)

[13] Mr. Fazlul Quader Chowdhry and Others vs. Mr. Muhammad Abdul Haque (13.05.1963 - SCPK): LEX/SCPK/0110/1963, PLD 1963 Supreme Court 486

violative of fundamental rights, it is under the scope of Judicial Review. Any legislation can be tested for its constitutional validity by the Supreme Court or High Court when – it is violative of Fundamental rights as provided in the Constitution or when the introduction of any law goes beyond the power of the Legislature. Under the Indian Constitution Judicial Review is not expressly mentioned, it flows through Article 13 which provides that any law made against Part III of the Constitution shall be void. Article 13(2) applies to post-constitutional law as per which any law made post-constitution is enacted should not be inconsistent with Fundamental Rights, if it is the extent of inconsistency shall become void. If a fundamental right is violated the citizens have the right to enforce it by filing writ petitions before the Supreme Court (Article 32) and High Court (Article 226). The concept of Judicial Review is a basic feature of the Indian Constitution.[14] Due to the evolution of Judicial Review, many tenets of basic structure doctrine have evolved like Independence of Judiciary[15], Secularism and Federalism[16], Rule of Law[17], etc. In the subsequent part, the importance of judicial review in evolving the importance of the Independence of the Judiciary shall be covered.

The term "Independence of Judiciary" is a feature of the Basic Structure of the Constitution. The meaning of this term has seen evolution and it is not restricted, the case of Kesavananda Bharati v State of Kerala[18] has played a central role in its evolution. In simple terms, the Independence of the Judiciary is the Independence that the Judiciary enjoys in all aspects while carrying out its functions. There should be no interference or influence of any other organ over it. This is to ensure that the primary function of the judiciary i.e. to serve justice is served. Over the years there have been debates over this issue and the Apex Court has taken a firm stand in ensuring that this wing of the government is free and independent. Kesavananda case has laid multiple dimensions and the Independence of Judiciary is one such. Chief Justice C.M. Sikri in his set of Basic features stated the Separation of power between the executive, legislature, and Judiciary as a basic feature. Thereon Supreme Court has witnessed many cases that have dealt with this issue and subsequent aspects of the independence of the judiciary like the constitution of courts, its members, their election, and different functions of the judiciary.

Law as a concept has been playing an important role from time immemorial. This can be seen from the social contracts formed by people and sovereigns in the theories of Hobbs, Locke, and

[14] *Indira Nehru Gandhi v Raj Narain*, (1975) 2 SCC 159
[15] *Supreme Court Advocates-on-Record Assn. v Union of India*, (1993) 4 SCC 441
[16] *S.R. Bommai v Union of India*, (1994) 3 SCC 1
[17] *Indira (*n. 14*)*
[18] *Kesavananda (*n. 10*)*

Rousseau. In all these three theories of social contract, the contract was made by people to ensure that their life is secured and everybody follows laws. In the contract by Rousseau, he included the 'general will' of humans which implied that there would be control by the elected or the one in power but it will be regulated to the extent of the general will of man. Therefore, here neither the government was at full liberty nor humans. This system is relevant even today as there is a wing of government that makes laws for citizens. Now to ensure that these laws are not abusive and arbitrary it is necessary to check the power of such organs. This is what the Judiciary does and becomes a real example of the functioning of separation of power in India. The actual theory of Separation of Power given by Montesquieu is not in practice and the model that is followed in India is also different from the USA. In India, we follow a flexible form of separation of power whereas in the USA rigid Separation of Power is followed. This provision is enshrined in the Indian Constitution under Article 50, where it is said that separation of power between the executive and Judiciary will be maintained. Judicial review is the method adopted from the US Constitution where the judiciary has the power to review and hold any unconstitutional law void. This power applies to constitutional amendments, laws, and legislative actions. Whenever either of them is inconsistent with the law of the land the Judiciary can be struck them void. This is also laid in Article 13(2), where a restriction is put on Parliament as it is stated that Parliament after the constitution is enacted 'shall' not frame any laws which are inconsistent with part 3 of the constitution. And in case it is inconsistent, it will be void to the extent of its inconsistency. The same is the case with pre-constitutional laws, as Article 13(1) holds any pre-constitutional law to be void on its inconsistency with Part 3 of the Constitution. The power to strike down such acts/laws is with the Judiciary, especially the Supreme Court, and in certain instances with the High Court as these courts are the guarantors of the Fundamental Rights of citizens. So, these institutions must ensure that no law deprives the common man of his basic fundamental rights. To fulfill this duty it is necessary that the Judiciary has the power to review and at the same time it is also important that the judiciary is independent in determining the validity of laws.

There have been debates over the years concerning Article 13(2), the result of which was the insertion of Article 13(4) which specifically excludes 'amendments' from the category of laws as defined in Article 13(3)(a). Therefore, it is believed that Judicial Review although not expressly mentioned in the Constitution flows through Article 13.

While going through the concept of the Independence of the Judiciary it is necessary to understand certain amendments and the case laws followed by it where the judiciary has actively played the role of interpreter. Thirty Second Constitutional Amendment, 1973[19] was brought which enabled the establishment of an administrative tribunal. It also inserted two articles Article 371D and 371E. These administrative tribunals were established in Andhra Pradesh and were given importance similar to the High Court. Therefore, it was answerable only to the Supreme Court and not the High Courts.

By these articles, extraordinary power was given to the executive to modify the decisions given by the tribunal. In 1986, P. Sambamurthy v State of Andhra Pradesh[20] challenged the validity of the provision to Article 371D clause 5. The issue in the case was "Whether Clause (5) of Article 371-D of the Constitution is unconstitutional." Clause 3 to Article 371 enables the administrative tribunal to be similarly efficient and effective as an institutional mechanism which means the administrative tribunal has the same power of judicial review as the High Court. Therefore, as held in S.P Sampat Kumar v UOI[21] clause 3 is constitutional, but the proviso of clause 5 empowers extraordinary power to the state government to alter, modify, and annul the final order of the tribunal. Such a provision is shocking and subversive of the principles of natural justice. It would be a mockery of the entire adjudicative process if a party to litigation is given the power to override the decision given by the Tribunal in the litigation after it has lost before the Administrative Tribunal.[22] By the given provision the state government is misusing the power by applying it to the interim orders, although no such power is prescribed.

Also, the power of judicial review is conferred only on institutional mechanisms to maintain the rule of law. But with such proviso the basic principles of natural justice are violated. If any law is declared unconstitutional by a judicial body, it shall not have effect until the state government affirms such a decision. State government could modify or annul the decision as per the article and therefore the Rule of law and Separation of power was violated which in turn violated the basic structure of the constitution. Therefore, such provision shall be held unconstitutional and void. For clauses 3 to 8 to be valid the proviso to cl.5 shall be deemed unconstitutional. Later in a judgment of L. Chandra Kumar v Union of India[23] Supreme Court

[19] Constitution of India 1950, 32nd Constitutional Amendment Act 1973
[20] *P. Sambamurthy v State of A.P.*, (1987) 1 SCC 362
[21] *S.P. Sampath Kumar v Union of India*, (1987) 1 SCC 124
[22] *P. Sambamurthy* (n. 20)
[23] L. Chandra Kumar v Union of India, (1997) 3 SCC 261

held that the power of judicial review conferred on the High Court under Articles 226, 227 and on the Supreme Court under Article 32 is a part of the basic structure of the constitution. Similarly, the provision under para 7 of the 10th Schedule was brought into question and it was later decided that such a provision is unconstitutional as the power of the high court is infringed. This was the court's opinion in Kihoto Hollohan v Zachillu[24]

As discussed above the principle of separation of power is applied in different ways in different countries. For the independence of the judiciary and Judicial Review, a globalized perspective is taken wherein the process followed in the USA and India are analyzed. The concept of Judicial Review is borrowed from the American Constitution and the independence of the Judiciary is an essential component for the application of Rule of Law in any country. The USA has the most evident application of independence of the judiciary as compared to many other nations. Their constitution makers believed that in safeguarding the rights of people independence of the judiciary must be maintained. In the USA, a duty is laid upon the judiciary to state what the law is. Following these various countries have incorporated the essence of independence of judiciary in their respective constitutions. However, its effectiveness lies in the relationship between the three organs and public opinion. It cannot act as an established process, it has to change with socio-political, economic, and geopolitical changes to ensure that it is following the recent trends of society.

The Judiciary of the USA is empowered to deal with subjects that have not been dealt with by legislature, thus in such a situation where no law is enacted the judiciary can address such a situation, this is because it follows the common law system and not civil law. In the common law system, a judge can create a precedent and be innovative but it is not possible in civil law nations. As per the constitution of the USA, the judges enjoy a large degree of independence in holding an office, removal from the office[25], and fixed remuneration.

COMPARING INDIA AND THE USA'S INITIATIVES ON THE INDEPENDENCE OF THE JUDICIARY

1. Appointment of judges:

It is of utmost importance for a judicial body to work independently so that its officers are also independent and impartial. In India, we had a series of conflicts with the mechanism followed

[24] Kihoto Hollohan v Zachillhu, 1992 Supp (2) SCC 651
[25] Constitution of the United States, 1787 Art. 2 Sec.4.

for selecting judges. The first such petition filed before the Hon'ble Supreme Court judge, related to the disclosure of affidavits to understand the knowledge of the non-appointment of 2 judges[26]. To this Justice P.N Bhagwati declined the claim of the government to refuse to disclose such documents. The court held that the immunity to disclose the documents from the public is when it goes against the public interest. But the issue here is related to the appointment and transfer of judges which is in the public interest. The emphasis on the word 'consultation' was done which J. Bhagwati believed to include the collegium system as well. In the second judges' case[27], a nine-judge bench laid the birth of the collegium system in India. It also overruled S.P Gupta's case to a certain extent, the meaning of the word 'consultation' was held to be similar to 'concurrence'. Therefore, the opinion of the Chief Justice of India shall be binding on the President, and the 2 senior-most judges shall along with the Chief Justice of India recommend the names of judges which the executive should give effect to for appointment in high courts.

Next, in the Third Judges Case[28] again the supremacy of independence of the judiciary was upheld when the court laid that the word 'consultation' does not include the opinion of only the Chief Justice of India, it should include the opinion of various judges. Therefore, the collegium system now includes four senior judges of the Supreme Court, and they in consonance with the Chief Justice of India shall recommend the names. They also formed guidelines concerning the appointment of judges for both the Supreme Court and High Courts. Till here the emphasis was on the independence of the judiciary for the appointment of its judges, which is laid under Article 124. Primarily it was the executive, President, who appointed the judges but now the judiciary is also involved in this process.

Later in 2014, a new act was passed which amended the constitution as it inserted Article 124-A. By the 99th Constitutional Amendment Act, 2014 National Judicial Appointment Commission was established which replaced the collegium system. Now the Chief Justice of India, 2 senior judges, the Union Law Minister and 2 eminent personalities to be nominated shall constitute this commission. The function of it as mentioned in Article 124-B is to recommend the names of judges for Supreme Court and High Courts. But this amendment was challenged in the Fourth Judges Case[29] where the Supreme Court unanimously held this

[26] *S.P. Gupta v Union of India*, 1981 Supp SCC 87 (Partly overruled in Second judges case)
[27] *Supreme Court Advocates-on-Record Assn (*n. 15*)*
[28] Special Reference No. 1 of 1998, Re, (1998) 7 SCC 739
[29] *Supreme Court Advocates-on-Record Assn. v Union of India*, (2016) 5 SCC 1

amendment and commission as unconstitutional. Thus, the system of appointment of judges today is the collegium system. There are certain procedures to be followed when appointment of judges for both the judicial organs. The court has emphasized that the discussion between the collegium and the president must be meaningful, effective, and conscious. The NJAC case is a recent example where the Judicial Review helped to secure the procedure for the appointment of judges and helped the Judiciary to be Independent.

But in the USA there exists a defined process for the appointment of judges under the constitution, here the judiciary is not directly involved in the appointment process. First, the president nominates and sends the names of nominated candidates to senate members. Along with them, the records are also shared with the FBI and American Bar Association which looks into the candidature of nominated candidates. Later upon all aid and advice, the President signs the appointment of a judge. This shows us that the majority of procedures are similar between countries but the only difference lies in the appointment method i.e. consultation of the legislature in the USA and the opinion of the judiciary in India.

2. The next issue for analysis is the feature and process of "removal of judges"

The confidence of the public in the judicial adjudication system must be with the judiciary. The process of removal of judges is similar to the impeachment of the president.[30] If any other organ is involved in the process of removal it creates fear in the mind of citizens as well as the judges. This sometimes may lead the judges to act impartially in favour of the authorities to avoid impeachment. This creates the greatest hurdle in delivering free and fair justice to the citizens thus impacting the integrity of the judicial body. In India, the judges are removed on the grounds of incapacity of the judge to perform his judicial functions, or proven misbehavior. Such a proposal should be passed by both houses of parliament with a 2/3 majority vote. The process in India is not very simple, here the discussion on the motion has to take place and later president shall approve it.

In contradiction, in the USA there is no fixed age of retirement of judges which enables them to serve for their life. In India, till now there has been no successful impeachment against any judge. There were judges of both the Supreme Court and High Court against whom the impeachment process had been initiated,[31] but they were not successful because of the motion

[30] Constitution of India 1950, Art 124(4)
[31] SCO Team, 'Number of times Impeachment Proceedings were initiated against a SC Judge or HC Judge',(*SCO* 28 March 2018,) <https://www.scobserver.in/journal/number-of-times-impeachment-proceedings-

failing in the House of Parliament, and the resignation of such judge before the decision. In the USA as of 2017, 15 judges have been impeached out of which 8 have been convicted, 3 have resigned, and 4 were acquitted on the charges. The process of impeachment in the USA is 2-fold, where first a motion is passed with a simple majority and is forwarded to the Senate to hear the accused and later makes the decision.

It can be inferred that both countries have a difficult process to remove the judges, judges are also given a proper chance to defend themselves. A considerable amount of people are involved in this process thus there are very few chances of it being arbitrary. The only loophole in this system from the Indian perspective is that there is a specified age for the retirement of judges, which is 65 years. A pre-conceived notion is developed in mind relating to the fixed period available to them, and thus the judges search for future opportunities and sometimes enter politics. Because of such entry, there are chances of a bias that judges may carry while pronouncing judgments.

3. **This concern leads us to the next issue i.e. "security of tenure and the salary."**

In the Indian perspective the tenure of a Supreme Court judge is fixed at a maximum of 65 years and for High Court judges it is 62 years, whereas in the USA there is no age limit specified for a judge's retirement. A judge holds his office during good behavior and therefore can serve for a lifetime unless he is retired, impeached, convicted, etc. Security of tenure is an essential component as it ensures that judges can function without any fear or favor. There is a specified procedure for the removal of judges under the Indian Constitution.[32] Security of tenure ensures individual independence of the judiciary of the judge. Both bar and bench must remain independent so that justice can be served. If there is no security and there is a possibility that the judge can be removed from his office then there are high chances of judges' opinions getting biased. Therefore, the judges must remain independent. There is also debate on whether the age of retirement should be specified or not. For this question we have examples of both successful countries with different styles, The USA has no age specified and India on the other hand has an age limit specified. And it can be said that both have yielded a positive result from

were-initiated-against-a-supreme-court-or-high-courtjudge/#:~:text=Impeachment%20proceedings%20were%20initiated%20against%20a%20Supreme%20Court%20or%20High,an%20order%20of%20the%20President.> accessed on 23 January 2024

[32] The Constitution of India, 1950, Art. 124(4)

their system. Therefore there is no serious threat to the independence of the judiciary on the grounds of security of tenure.

Even while framing the Indian Constitution, the framers had debated over adopting the concept of life tenure as followed by the USA or limiting the age. The former option was outrightly rejected and the drafter found two lacunas in the latter concept; which were that the Judiciary would lose an experienced Judge and secondly the same judge would be forced to find employment post-retirement. To this, an alternative in the form of Article 148 was provided which allowed re-appointment. Different Law Commission reports have stated the problem of post-retirement opportunities, it has been held that there should be no re-appointment of retired judges similar to the chairman of UPSC; increasing the age of Judges, is also one of the suggestions, to 70 years; and there should be a ban on executory appointment of retired-judges for 5 years. "The Constitution (114th Amendment) Bill, 2010" had been brought to increase the age of retirement of Judges but lapsed due to the dissolution of Lok Sabha. It is also suggested that the age of retirement of High Court and Supreme Court judges should be similar to Chairperson or President's age to avoid it from becoming a 'haven of retired judges.'

Also, the salary of judges under the Indian Constitution is specified under Article 125, where parliament has the right to determine the salary of judges. But the constitution makers have foreseen the situation and have also specified that once the judge is appointed parliament can not make changes once the appointment is made. In the USA as well according to Article 3 Section 1[33] salary of judges "shall not be reduced during continuance of office." It can be inferred that in both countries salaries are determined by Parliament/ Congress but there is also a restriction on their power. This ensures that neither the Legislature nor the Judiciary is left fully free and aren't restricted in exercising their power thus upholding the principle of Separation of Power.

There is also a major act performed by judges while hearing the cases i.e. Recusal. In many instances when judges believe that they will not be able to give impartial judgments they recuse themselves from hearing them. There is also an issue that we have experienced, it is judges getting involved in other functions than the Judiciary post-retirement. We have seen many instances where judges switch to other organs of government after their retirement, this may affect their judgments while they are holding a post in the judiciary. There are instances of

[33] Constitution of the United States, 1787 Art. 3 Sec.1

judges being influenced by legislative authority in the landmark case of Indian Judiciary which is Kesavananda Bharati v State of Kerela.[34] In his book, T. R Andhyarujina[35] a detailed discussion on such influence has been given. Therefore, it is of utmost importance that the Independence of the Judiciary is maintained both functionally and organizationally.[36]

Recently, in the case of All India Judges Association v UOI,[37] the Supreme Court highlighted the importance of the District Judiciary and held that the district judiciary also has equal independence like other judicial bodies and it is a basic feature of the Indian Constitution. It pressed on the point that the rise in salaries of High Court judges should be in proportion to the District Judges. This shows that the Hon'ble Supreme Court is taking steps to ensure that the lowest court of law in the hierarchy of courts is also independent in its functioning.

The scope of Judicial Review when compared with the USA, is practiced in a very different way than in India. The process of applying for judicial review in the USA is very aggressive as it follows 'due process of law' as against 'procedure established by law' in India. In the USA, the judges have the power to declare any law void if they consider it so and can even frame a binding law. Although it is not the judiciary's role in doing so yet the USA follows it. In India, the Judiciary is strictly regulated to only interpret the laws and give its verdict, no law-making is permitted. Yet there is a scope to formulate guidelines as done in Vishakha,[38] DK. Basu[39] etc. These guidelines are binding until the legislature formulates a law in that context. Therefore, it is safe to say that the Judiciary is independent due to the constant efforts of the Supreme Court to ensure that this Basic Feature of the Constitution is not violated by using the Doctrine of Judicial Review.

While discussing the points of Judicial Review and Independence of the Judiciary, it is vital to consider a lesser-known case which was to decide constitutionality or more specifically to overrule the judgment of Kesavananda Bharati.[40] Post verdict on 26th April 1973 in 1975 Indira Gandhi suffered another blow when her election from the Rae Bareilly constituency was

[34] *Kesavananda (*n. 10*)*
[35] T. R. Andhyarujina, Kesavananda Bharati Case – The Untold Struggle For Supremacy Between Supreme Court And Parliament
[36] Sheryl Sebastin, 'Kesavananda Bharti Judgement The Fulcrum On Which Jurisprudence Of Judicial Independence Has Developed : Ex-CJI UU Lalit' *(Live Law,* 26 March, 2023), <https://www.livelaw.in/top-stories/former-cji-uu-lalit-kesavananda-bharati-basic-structure-supreme-court-224783> (Last visited on August 5, 2023)
[37] *All India Judges Assn. v Union of India*, 2023 SCC OnLine SC 673
[38] *Vishaka v State of Rajasthan*, (1997) 6 SCC 241
[39] *D.K. Basu v State of W.B.*, (1997) 1 SCC 416
[40] *Kesavananda (*n. 10*)*

declared unconstitutional due to electoral malpractices by Allahabad High Court. This was challenged in the Supreme Court, where the vacation bench imposed an injunction on orders of the High Court. With this Indira Gandhi-led government introduced the 39th Constitutional Amendment, 1975 which stated that the elections of the Prime Minister, President, and Vice President cannot be challenged in the Court of Law but will be determined separately. The court struck down this amendment on grounds that it violated the Basic Structure Doctrine as it curtailed the power of Judicial Review. Not satisfied with this judgment a special 13-judge bench was constituted to review the Basic Structure Case.[41] The reason for the constitution of this bench was not known to anyone except CJI A. N Ray. After 3 sittings for the Kesavananda II case, CJI declared "bench dissolved." The reason behind such action was CJI Ray's interest who wished to overrule the Kesavananda Bharati Case. As a result of this case 42nd Constitutional Amendment, 1976 was introduced. This amendment is also referred to as "mini-constitution" as many provisions of the Constitution were amended in the ruling government's favor and thus overruling the 1973 judgment. However, this was challenged in the Minerva Mills case[42], where this amendment was declared to be unconstitutional. Further, when Morarji Desai's government came into power it revoked the arbitrary provision of the Mini Constitution by introducing the 44th Constitutional Amendment, 1978. From this we can understand that the then CJI AN Ray was not acting independently, he had executive influence over him. Because of such influence democratic system would have suffered. Therefore, this whole pronouncement saved Indian Democracy.

Further during the Proclamation of Emergency in 1975, there was another instance that highlighted that the Judiciary is not independent, the supremacy of the Legislature/ Parliament had cost Justice Hans Raj Khanna his Chief Justice's post. In the case of Additional Judicial Magistrate of Jabalpur v Shivakant Shukla[43] the question before the court was to decide whether during the proclamation of Emergency Fundamental Rights of citizens cease to operate or not. Here by a 4:1 majority, the apex court ruled that the right to move to any court during an emergency for enforcement of fundamental rights is not valid. Here J. H.R. Khanna gave a dissenting opinion "Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning."[44] This scenario created a space where the Legislature had superior authority over the Judiciary in appointing Judges

[41] T. R. ANDHYARUJINA (n. 35)
[42] Minerva Mills Ltd. v Union of India, (1980) 3 SCC 625
[43] ADM, Jabalpur v Shivakant Shukla, (1976) 2 SCC 521
[44] ibid

and clear abuse of such power was done by not appointing J. Khanna. Similarly, post-Kesavananda Bharati Judgment the three senior-most judges J. Shelat, J. Grover, and J. Hegde were not made CJI and J. Ray was superseded. Only because the judgment was not given in favor of the Union not acting fairly and reasonably is against the spirit of the constitution and democracy.

It is important that the Doctrine of Basic Structure is to be used carefully and sparingly. Unnecessary implication of it leads to deteriorating its value and would also violate the doctrine. As held by the Honourable Supreme Court in Ambika Prasad Mishra v State of UP[45] "It is fundamental that the nation's Constitution is not kept in constant uncertainty by judicial review every season because it paralyzes by perennial suspense all legislative and administrative action on vital issues deterred by the brooding threat of forensic blow-up." Later in various cases Supreme Court noted that the ordinary laws made by the centre are not covered under the ambit of Basic Structures. In State of Karnataka v Union of India[46] Beg, CJ said: "But, if, as a result of the doctrine certain imperatives are inherent in or logically and necessarily flow from the constitutions 'basic structure', just as though they are its express mandates, they can be and have to be used to test the validity of ordinary laws just as the other parts of the constitution so used." 5 judge bench in Kuldip Nayar v Union Of India[47] unanimously held that the doctrine of the basic structure of constitution does not apply to ordinary legislations. It is also held in the NJAC case[48] that the doctrine of basic structure applies to constitutional amendments but not to ordinary legislation. This sort of decision enables the efficient working of the Centre-State relationship i.e. federalism which is also included in the Basic Structure of the Constitution.

Along with receiving appreciation for this Doctrine, there are certain critiques for it, and one of the very prominent is not defining the term "Basic Structure." It is contended that since this term is not defined there is excessive control with the Judiciary to include whatever its Judges deem appropriate to fit in it. Secondly, it is criticized because all the actions of the legislature i.e. all amendments brought in by parliament shall be under its scrutiny. Thus it would be a "government of judges" where the Supreme Court or High Court will approve a particular

[45] *Ambika Prasad Mishra v State of U.P.*, (1980) 3 SCC 719
[46] *State of Karnataka v Union of India*, (1977) 4 SCC 608
[47] *Kuldip Nayar v Union of India*, (2006) 7 SCC 1
[48] *Supreme Court Advocates-on-Record Assn. (*n. 29*)*

amendment and later it shall be enforced. By this the court will play the role of opposition, disapproving of every act/ bill introduced by the Parliament.

Globalized Perspective:

The doctrine of Basic Structure although originated in the Kesavananda Bharati Case, had its roots in the Pakistan Supreme Court's case of Fazlul Quader Chowdhry & Ors. v Muhammad Abdul Haque.[49] Later the timeline followed in Sajjan Singh[50] and Kesavananda Bharati.[51] In Indian Jurisprudence this Doctrine is Judicial Creation, but few nations in the world expressly provide for the non-amenability of certain provisions of the constitution. Germany is one such nation. Article 1 to 19 of the German Constitution[52] states that the essence of basic rights could mentioned in these articles, under no circumstance, be affected. The eternity clause of the German Constitution i.e. Article 79 protects core constitutional principles from being enacted. The eternity clause prohibits any amendment to the constitution that aims to abolish the federal structure, undermine the democratic system, or infringe on human rights. This is similar to the Basic Structure Doctrine, as it safeguards the essential features of the German constitution against amendments that may threaten its fundamental values.

South Africa's post-apartheid constitution has a provision determining constitutional supremacy. It establishes the constitution as supreme law, binding on all branches of government. The Supreme Court of South Africa has used this principle to strike down arbitrary provisions. Nepal Constitution provides a Doctrine of Implied Limitations, similar to the Doctrine of Basic Structure. In the USA Doctrine of Constitutional Avoidance is utilised which also has a similar function. Here courts have to make sure that their interpretation does not lead to conflict with the Constitution. Bangladesh's basic structure is very similar to India's, as it is based on case laws and aims to protect certain essential aspects of its constitution. This shows that the same doctrine is used in many nations according to their practices, and legal functioning.

In the recent case of Janahit Abhiyan v UOI[53] the validity of the 103rd Constitutional Amendment Act, 2019 was challenged which provided extra reservation to people belonging

[49] *Fazlul (*n. 13*)*
[50] *Sajjan (*n. 7*)*
[51] *Kesavananda (*n. 10*)*
[52] GRUNDGESETZ, The Constitution of the Federal Republic of Germany, 1949, Art.1.to Art. 19.'
[53] *Janhit Abhiyan v Union of India* (EWS Reservation), (2023) 5 SCC 1

to Economical Weaker Sections. The Supreme Court held that this amendment does not violate the Basic Structure Doctrine. The bench held that the amendment does not violate the basic structure of the Constitution by authorizing the State to make special provisions about admission to private unaided institutions, or in excluding the SEBCs/OBCs/SCs/STs from the scope of Economically Weaker Section reservation. Later to test the validity of the 102nd Constitutional Amendment Act[54] it was also held that the said amendment does not infringe Basic Structure.

In several Public Interest Litigations pending before the Hon'ble Supreme Court, petitioners have raised contentions arguing that there is a gross violation of the basic structure doctrine. The validity of the Citizenship Amendment Act (CAA), revocation of Special Status of Jammu and Kashmir, Electoral Bonds scheme, and other personal laws, Transgender Persons (Protection of Rights) Act, 2019, etc. is challenged. In India court accepts the argument of Basic Structure Doctrine's infringement only if substantive danger to the Constitution persists. Except for the Independence of the Judiciary, other provisions need satisfactory results.

CONCLUSION

All three terms Judicial Review, Independence of Judiciary, and Basic Structure Doctrine have independent meanings but they have a characteristic by which they are interlinked with one another. Their functioning is made easy because of the presence of other terms. Judicial Review would not have been practiced so efficiently if it hadn't been included in the Basic Structure. This power has been more in use unless for the I.R Coelho Case,[55] where it was held that any provision added to the 9th Schedule post 26th April 1973 shall be subject to judicial review. Similarly, the Independence of the Judiciary is prevalent in India because of constant efforts by the Judiciary in the form of Judicial Review. Justice B.V Nagarathna added, "that the lesser the external influence, the higher will be the scope for autonomous functioning."[56] Also although the doctrine was established 51 years ago, it still can be considered as an evolving doctrine. There is no exhaustive list for it, as per judicial wisdom the important features are added to the list.

[54] *Jaishri Laxmanrao Patil v Chief Minister*, 2020 SCC OnLine SC 746
[55] *Coelho* (n. 2)
[56] Rintu Mariam Biju, 'Judicial Independence Demandsjudges Be Insulated Frompolitical Pressures: Supreme Court Judge B.V Nagarathna' (*Live Law*, 30 May 2023) < https://www.livelaw.in/top-stories/supreme-court-justice-nagarathna-judicial-independence-constitutional-ideals-229763?infinitescroll=1> accessed 23 January 2024

In the end, it is important to know the Jurisprudence of Judicial Review by case laws which have helped in the evolution of Judicial Review: I.C Golak Nath v State of Punjab, Before this, the Supreme Court held that the amending laws were not covered under ordinary laws and could not be overturned through the Article 13. The Supreme Court overturned its earlier decisions to uphold Article 368, the court curtailed parliament from amending the constitution absolutely, this decision is considered to be a groundbreaking decision. State of Madras v Champakam Dorai Rajan,[57] here there were reserved seats for admission in medical colleges based on caste, religion, etc. The court overruled such provision as violative of Article 14 and Article 15(1), to this the Union introduced the First Constitutional Amendment, 1951 which introduced Article 15(4) enabling parliament to make laws for reservation in educational institutions. Kesavananda Bharti v State of Kerala[58] - this case laid the foundation of the Basic Structure Doctrine. It is a Doctrine stating that the Indian Constitution certain features cannot be altered or destroyed by amendments, these features maintain the spirit of the constitution and uphold constitutionalism. Minerva Mills v Union of India[59] is a landmark case of Indian history, which further explained the interpretation of the basic structure doctrine set out in Kesavananda Bharti and also declared Judicial Review as a basic feature. The Court's ruling found that Parliament's power to amend is disparaging therefore, Parliament cannot obstruct the fundamental rights of persons. Supreme Court Advocates-on-record Association & Anr. vs. Union of India[60] is a prominent case that promoted the independence of the judiciary via judicial review and has now secured the procedure for the appointment of Judges.

In this paper, the author has looked over instances when the Judiciary has used its power of Judicial Review to serve justice and support essential features of the Constitution. By this, we have analyzed the scope of Judicial Review in light of Basic Structure and contemporary issues which have helped to understand the evolution of all three terms in India. Judicial Review is an essential component as it makes sure that the laws made follow the Rule of Law and are within their constitutional limits. And therefore it can be said that 'Constitution without Judicial Review is Unconstitutional.'

[57] *State of Madras v Champakam Dorairajan*, 1951 SCC 351
[58] *Kesavananda* (n. 10)
[59] *Minerva Mills* (n. 42)
[60] *Supreme Court Advocates-on-Record Assn. (*n. 29*)*