CHAPTER II

THE BASIC STRUCTURE DOCTRINE OF THE INDIAN CONSTITUTION

(A COMPARATIVE STUDY OF THE PREAMBLES OF THE UDHR, ICCPR AND THE ICESCR WITH THE PREAMBLE TO THE CONSTITUTION OF INDIA)

According to the cannons of statutory interpretation, the proper function of a Preamble is to explain certain facts, which are necessary to be explained before the enactments contained in the Act can be understood. In short, it contains a recital of the facts, outlines the object and policy of the proposed legislation and describes in express terms the evils or inconveniences it seeks to remedy.

A preamble to a constitution can shed light on grey areas. The Preamble contains the ideals and aspirations or the objects, which the Constitution makers intended to be realized, by its enacting provisions. In this chapter the researcher attempts to show case how the Preamble of the Indian Constitution embraces the underlying philosophy of the International Bill of Rights and points out how the Preamble has grown in stature from serving as a mere introduction or preface to the substantive part of the constitution to emerging as the document that lays down the basic structure of the Constitution.

The Interpretation of The Preamble by The Supreme Court of India:

The Preamble has been subject to varying interpretations by the Apex Court in India. In the Berubari Union case the Supreme Court held that the Preamble was not a part of the Constitution and therefore could not be regarded as a source of substantive powers. Such powers the Supreme Court held are expressly granted in the body of the constitution. The court stated further that the Preamble by itself was neither a source of power nor a source of privation of power. The Court reasoned that the Preamble may be used to interpret ambiguous areas of the Constitution where differing interpretations present themselves. In the instant case the Supreme Court had

59 Refer Annexure viii for the full text of the preamble
60 (1960) S.C. 845
to consider whether it was open to the Government of India to cede part of the territory of India to a foreign power pursuant to a Reference made by the President of India. It was argued before the Court that even the Parliament of India had no such power, for the Preamble to the Constitution of India clearly postulates that the entire territory of India should remain as it is. Gajendragadkar, J., rejected this argument. Speaking for the Court, he pointed out that every State by virtue of its sovereignty had the power to cede its territory.

However the Supreme Court reversed its stand, in the case of 'Kesavananda Bharati v. State of Kerala'\(^{61}\), and recognizing the Preamble as a part of the Constitution propounded the innovative 'basic structure' Doctrine. *Kesavananda* represents the high point of judicial innovation and the Court assured for itself, a new and impregnable role in the constitutional politics of India.\(^{62}\)

**The *Kesavananda* Milestone**


The constitutional validity of these amendments was challenged before a full bench of the Supreme Court (thirteen judges). Their verdict can be found in eleven separate judgments. Nine judges signed a summary statement which records the most important conclusions reached by them in this case. Granville Austin notes that there are several discrepancies between the points contained in the summary signed by the judges and the opinions expressed by them in their separate judgments. Nevertheless, the seminal concept of 'basic structure' of the Constitution gained recognition in the majority verdict.

All judges upheld the validity of the Twenty-fourth amendment saying that Parliament had the power to amend any or all provisions of the Constitution. However

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\(^{61}\) AIR (1973) SC 1461

\(^{62}\) 'The Supreme Court and the Basic Structure Doctrine' by Raja Ramachandran in Supreme but not infallible, Essays in Honour of the Supreme Court of India, Oxford University Press, 2000, pg108.
certain constitutional amendments had to be ratified by at least half of the State legislatures before coming into force. Matters such as the election of the President of the republic, the executive and legislative powers of the Union and the States, the High Courts in the States and Union Territories, representation of States in Parliament and the Constitution amending provisions themselves, contained in Article 368, were to be amended by following this procedure.

All signatories to the summary held that the Golaknath case had been decided wrongly and that Article 368 contained both the power and the procedure for amending the Constitution.

However they were clear that an amendment to the Constitution was not the same as a law as understood by Article 13 (2).

Most importantly seven of the thirteen judges in the Kesavananda Bharati case, including Chief Justice Sikri who signed the summary statement, declared that Parliament's constituent power was subject to inherent limitations. Parliament could not use its amending powers under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution.

**Basic Features of the Constitution according to the Kesavananda verdict**

Each judge laid out separately, what he thought were the basic or essential features of the Constitution. There was no unanimity of opinion within the majority view either.

Sikri, C.J. explained that the concept of basic structure included:

- Supremacy of the Constitution;
- Republican and democratic form of government;
- Secular character of the Constitution;

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63 It is pertinent to point out the subtle difference that exists between two kinds of functions performed by the Indian Parliament:

a) it can make laws for the country by exercising its legislative power and
b) it can amend the Constitution by exercising its constituent power.
• Separation of powers between the legislature, executive and the judiciary;

• Federal character of the Constitution; Shelat, J. and Grover, J. added two more basic features to this list:

• The mandate to build a welfare state contained in the Directive Principles of State Policy

• Unity and integrity of the nation

Hegde, J. and Mukherjea, J. identified a separate and shorter list of basic features:

• Sovereignty of India

• Democratic character of the polity

• Unity of the country

• Essential features of the individual freedoms secured to the citizens

• Mandate to build a welfare state

Jaganmohan Reddy, J. stated that elements of the basic features were to be found in the Preamble of the Constitution and the provisions into which they translated such as:

• Sovereign Democratic Republic.

**The Relevance of Kesavananda in the aftermath of the case**

The Kesavananda Bharati case upheld the validity of the Twenty-fourth amendment saying that Parliament had the power to amend any or all provisions of the Constitution. Further the Court also held that certain key words in the Preamble formed part of the basic structure of the Constitution and declared that this basic structure was inviolable thereby casting a limitation to Parliament's power to amend the Constitution. Earlier the Court while deciding *Berubari* had taken the view that the Preamble as not a part of the Constitution. Applying the ratio decidendi in this case an amendment of the Preamble may well neigh have been impossible since the
Court had ruled that the amending power under Art. 368 relates only to the amendment of the Constitution and the Preamble was declared not a part of it.

With Kesavananda having changed status quo, in an act of asserting Parliamentary supremacy the Parliament amended the preamble in 1976. The original drafting in the Preamble used the words "SOVEREIGN DEMOCRATIC REPUBLIC". The two additional words "SOCIALIST" and SECULAR were introduced by the controversial 42nd amendment. The amendment was pushed through by Indira Gandhi in 1976, when she had dictatorial powers. A committee under the chairmanship of Sardar Swaran Singh recommended that this amendment be enacted after being constituted to study the question of amending the constitution in the light of past experience. Further the words "integrity of the Nation" was also inserted in the last of the objectives mentioned in the Preamble.

The question of the validity of the amendment of the Preamble has not been challenged. The Supreme Court in D.S. Nakara v Union of India\textsuperscript{64} however relied on the word "Socialism" inserted by virtue of the 42nd Amendment Act, 1976. In that case it was held that the 1973 Pension Rules introduced by the Central Government revising the earlier pension rules 1972 should be applied to all pensioners and not merely to those who retired after 31-3-79 with the Court taking the view that the principle of Socialism requires that the State should take care of the old and the infirm.

The mistrust the Apex Court seemed to place with Parliament’s sweeping powers to amend the constitution and the apprehension that the elected representatives of the people could not be trusted to act responsibly, which appeared far fetched at the time when Kesavananda was decided, came true very soon and all too dramatically. ‘Mrs. Gandhi’s election to the Lok Sabha was set aside by the Allahabad High Court on 12 June 1975 on the ground of committing a ‘corrupt practice’. To quell the turmoil that followed, an internal Emergency was imposed on 25 June 1975 and Mrs. Gandhi filed an appeal in the Supreme Court. Before the appeal was taken up for hearing, the electoral law was amended retrospectively to take away the basis on

\textsuperscript{64} AIR (1983) SC 130
which the finding of 'corrupt practice' was arrived at by the High Court. In addition, an amendment to the Constitution, namely, the Constitution (Thirty-ninth) Amendment Act, 1975 was rushed through.

The amendment had three principal features. First, it substituted the existing Article 71 with a new article which stated that Parliament may by law regulate any matter relating to or connected with the election of the President or Vice-President including the grounds on which such election may be questioned. Secondly, it inserted Article 329A, which purported to apply to the Prime Minister and Speaker, but was clearly intended to apply to Mrs. Gandhi, and had the effect of wiping out all judicial proceedings concerning her election. The third feature of the amendment was that the Representation of People Act, 1951, the Representation of People (Amendment) Act, 1974 which had been enacted in order to get over the judgment of the Court in *Amarnath Chawla v Kanwar Lal Gupta*\(^{65}\) (where it was held that the expenditure incurred by a political party on his behalf would be included in the expenditure incurred by a candidate) and the Election Laws (Amendment) Act, 1975 were inserted in the Ninth Schedule. The most offensive feature of Article 329A was clause 4, which provided that no law made by Parliament before the commencement of the Thirty-ninth Amendment Act, in so far as it related to election petitions and matters connected therewith, shall apply or shall be deemed to have ever applied to or in relation to the election of the Prime Minister or the Speaker to either House of Parliament. The said amendment further provided that such election shall not be deemed to be void or ever to have become void of any ground on which such election could be declared to be void under any such law and notwithstanding any order made by any court before such commencement declaring such election to be void, such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be deemed always to have been void and of no effect'.

In *Smt. Indira Nehru Gandhi v Raj Narain*,\(^{66}\) a five-judge bench applied the basic structure doctrine to invalidate Article 329(A), though the Prime Minister’s

\(^{65}\) (1975)3 SCC 646  
\(^{66}\) (1975) Sup SCC 1
election was upheld on the basis of the retrospective amendment to the electoral law. The judges invalidated the amendment on various grounds such as free and fair elections, democracy, equality, and the rule of law being parts of the basic structure of the Constitution.

**Efforts to overcome the effects of Kesavananda during the period of Emergency**

During the period of Emergency, two further developments took place. The first was an unsuccessful attempt on the part of the government to get *Kesavananda* reconsidered, with Chief Justice Ray constituting a bench for the purpose. However, with Palkhivala's impassioned address and resistance from some members of the bench themselves, the Chief Justice was forced to dissolve the bench after two days.

The second was the conscious attempt of the Indira Government to arrest the implications of Kesavananda and cut the fetters sought to be imposed on the sovereignty of parliament as a constituent body by inserting Clause. (4) and (5) in Art.368, by the enactment of the Constitution (Forty-second) Amendment Act, 1976 which *inter alia*,

(i) amended Article 31C by protecting all laws that purported to implement, any of the Directive Principles, as against the earlier Article 31C which referred only to the Directive Principles contained in Articles 39(b) and (c), and

(ii) Amended Article 368 by completely shutting out judicial review over amendments to the constitution, and

(iii) Inserted the word 'secular' and 'socialist' in the Preamble in its description of the nature of the state.

Veritably, the Forty-second Amendment's fifty-nine clauses stripped the Supreme Court of many of its powers and moved the political system toward parliamentary sovereignty.
The Consolidation of the Basic Structure Doctrine in the Post-Emergency Phase

The surviving provisions of the Forty-second amendment, which amended Article 31C and Article 368 were challenged before the Supreme Court in Minerva Mills v Union of India67. The basic structure doctrine was expanded in this case. In Minerva Mills Ltd. v. Union of India, Palkhivala successfully moved the Court to declare that clause (4) and (5) of Article 368 of the Constitution unlawful. These clauses had been inserted as a response by the Indira government to the decision in the Kesavananda case by the Constitution (Forty-Second Amendment) Act.68

The Court, relying on the doctrine of stare decisis and the earlier ruling in Kesavananda held that, the power of Parliament to amend the Constitution was limited, it could not by amending the Constitution convert the power into an unlimited power (as it had purported to do by this amendment.) The court went on to invalidate the amendment of Article 31-C by the Forty-second Amendment on the ground that it subordinated fundamental rights conferred by Articles 14 and 19 to the Directive Principles, that the Constitution was founded on the bedrock of the balance between Fundamental Rights and Directive Principles; that to give absolute primacy to one

67 AIR 1980 SC 1789, (1980) 3 SCC 625. the facts of the case is set out in detail, in order to appreciate what really arose for determination, and how the Court went further to consolidate the basic structure doctrine. The principal petitioner was a limited company owning a textile undertaking in Karnataka, and the other petitioners were its shareholders. On 20 August 1970, the central government appointed a committee under section 15 of the Industries (Development and Regulation) Act, 1951 to undertake full and complete investigation into the affairs of the mills, as it was of the opinion that there had been or was likely to be a substantial fall in the volume of production. The committee submitted a report to the central government, on the basis of which the latter passed an order dated 15 October 1971 under section 18-A of the said Act of 1951, authorizing the National Textile Corporation to take over the management of the mills on the ground that its affairs were being managed in a manner highly detrimental to public interest. Thereafter, the undertaking was nationalized, and taken over by the central government under the Sick Textiles Undertakings (Nationalization) Act, 1974. By the Constitution (Thirty-ninth) Amendment, the said Nationalization Act was included in the Ninth Schedule. The petitioners challenged the validity of the order dated 19 October 1971 and certain provisions of the Sick Textiles Undertakings (Nationalization) Act, 1974. Since the said Act had been included in the Ninth Schedule, it became necessary for them to challenge the Thirty-ninth amendment, because it was only then that they could get the Act out of the protective cover of Article 31B. At the time when the writ petitions were filed, Articles 368(4) and 368(5) were already in force as a result of the Forty-second amendment, and since they barred judicial review of any amendment to the Constitution, it became necessary for the petitioners to challenge section 55 of the Forty-second Amendment Act which inserted the said provisions. The petitioners also challenged section 4 of the Forty-second Amendment Act which amended Article 31C. The petitioners conceded the validity of the unamended Article 31C as it stood after the decision in Kesavananda. The declaration in the Nationalization Act referred only to Article 39(b) and not any other Directive Principle, and therefore it was the unamended Article 31C which protected it. Accordingly, a preliminary objection was raised by the Attorney-General with regard to the Court considering the validity of the amended Article 31C. The hearings commenced on 22 October 1979 and concluded on 16 November.

68 Sec. 55 of the Constitution (Forty-Second Amendment) Act which provided for the insertion of clause 4 and clause 5 to Art.368 which read as follows-"(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976) shall be called in question in any court on any ground. (5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article."
over the other was to disturb the harmony of the Constitution and that this harmony between Fundamental Rights and Directive Principles was an 'essential feature' of the 'basic structure of the Constitution'.

It has often been expressed that Minerva Mills represents the assertion of judicial supremacy without contest.

All the same it is pertinent to point out that a subsequent Constitution Bench in Sanjeev Coke Manufacturing Company v Bharat Coking Coal Limited\(^\text{69}\) expressed serious misgivings about the decision in Minerva Mills observing: ‘.... We confess that the case has left us perplexed’, and noted further,

*We have serious reservations on the question whether it is open to a Court to answer academic or hypothetical questions on such considerations, particularly so when serious constitutional issues are involved. We [judges] are not authorized to make disembodied pronouncements on serious and cloudy issues of constitutional policy without the battle lines properly drawn. Judicial pronouncements cannot be immaculate legal conceptions. It is but right that no important point of law should be decided without a proper list between parties properly ranged on either side or crossing of swords. We think it is inexpedient for the Supreme Court to delve into problems which do not arise and express opinion thereon.*

Though Article 31-C did come under scrutiny, in this case, the Basic Structure Doctrine was not overruled.

*Waman Rao v Union of India,\(^\text{70}\)* following close on the heels of Minerva Mills, is noteworthy for two reasons. First, as a logical extension of the basic structure doctrine, it held that any amendment of the Constitution after 24 April 1973 (when Kesavananda was decided), which included laws in the Ninth Schedule would have to be tested by reference to the basic structure doctrine. (The Court did not disturb the pre-Kesavananda insertions in the Ninth Schedule).\(^\text{71}\) This was also necessary to

\(^{69}\) (1983) 1 SCC 147
\(^{70}\) (1981) 2 SCC 362
\(^{71}\) Two reasons were given by the Court for drawing the line at Kesavananda. First it did not want to upset settled claims and titles. Second, it found that with a few exceptions, the first sixty-six items which were inserted in the Ninth Schedule prior to
prevent a fraud on the Constitution, because laws which had nothing to do with agrarian reform or Directive Principles were included in the Ninth Schedule merely to protect them from constitutional challenge.

Secondly, Waman Rao applied the basic structure doctrine to uphold the validity of Article 31A and 31C instead of holding them valid on the basis of stare decisis. The majority took the view that in none of the earlier decisions, namely Sankari Prasad, Sajjan Singh, Golak Nath, and Kesavananda was the validity of the First Amendment put in issue and that it could only be said that the validity of Article 31A was recognized in those decisions. It then proceeded to hold that the Directive Principles contained in Article 39(b) and (c) were part of the Constitution as originally enacted, and that it was in order to effectuate the purpose of these Directive Principles that the First and Fourth Amendments were passed. It held that the First and Fourth Amendments strengthened, rather than weakened the basic structure of the Constitution. Article 31 had already been upheld in Kesavananda apart from the second part of it. The amendment to Article 31C by the Forty-second amendment had been struck down in Minerva Mills. Though several other features of the Forty-second amendment were removed by the Forty-third and Forty-fourth amendments passed by the Janata government, which came to power after Mrs. Gandhi’s defeat, the Forty-fifth amendment which had proposed to amend Article 368 with provision for a referendum and with an enumeration of basic features in the article itself fell through as the Janata Party did not have the requisite majority in the Upper House.72

A portion of Article 31C, though already upheld in Kesavananda, was again upheld by applying the basic structure test, holding that laws passed truly and bona fide for giving effect to Directive Principles contained in Article 39(b) and (c) would, far from damaging the basic structure, only fortify it.

Following Waman Rao, the Court invalidated section 27(1) of the Urban Land (Ceiling and Regulation) Act, 1976 (in so far as it imposed a restriction on transfer of

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72 Refer 'THE SUPREME COURT AND THE BASIC STRUCTURE DOCTRINE' by Raju Ramachandran in ‘SUPREME BUT NOT INFALLIBLE’, Essays in Honour of the Supreme Court of India, Oxford University Press, 2000, pages 105-133
any urban or urbanizable land with a building or of a portion of such a building which was within the ceiling area), though the Act had been inserted in the Ninth Schedule by the Constitution (Fortieth Amendment) Act, 1976.73

Minerva Mills and Waman Rao gave the Court the opportunity to regain the role of ‘sentinel’ which had suffered significant erosion during the Emergency particularly in the light of the ruling in ADM Jabalpur v Shivakant Shukla74. Though it had in the Indira Nehru Gandhi case struck down a constitutional perversion, it had failed to protect the citizen’s liberty. The innovative and nascent basic structure doctrine gave the Court an opportunity to show in Minerva Mills and Waman Rao that it was willing to stand up against Parliamentary might, and public opinion, happy and relieved that the Court was standing up again, preferred not to worry about the sovereignty of Parliament.75

Basic Structure and Judicial Policy Making

The Forty-second Amendment inserted Article 323A which enabled the setting up of Administrative Tribunals and enabled the ouster of the Jurisdiction of high courts. However, no steps were taken to set up such Tribunals. In KK Dutta v Union of India,76 a Constitution Bench of the Court observed:

Public servants ought not to be driven or required to dissipate their time and energy in courtroom battles. Thereby their attention is diverted from public to private affairs and their inter se disputes affect their sense of oneness, without which no institution can function effectively. The constitution of Service Tribunals by the State Governments with an apex Tribunal at the Centre, which in the generality of cases,

73 Bhim Singhji v Union of India (1981) 1 SCC 166. By an order dated 14 September 1999 in JR Coelho (Dead) by LRs V State of Tamil Nadu (1999) 7 SCC 570 and other connected matters, a five judge Constitution Bench referred the cases before it to a larger Bench, ‘preferably of nine learned judges’ finding that there were ‘apparent inconsistencies’ in Woman Rao which required to be reconciled. The Bench also felt that the decision in Bhim Singhji would have to be considered by the larger Bench for the purposes of arriving at the conclusion reached by Krishna Iyer J in the aforesaid case: ‘What is a betrayal of the basic structure is not mere violation of Article 14 but a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice’.
74 (1976) 2 SCC 521
76 (1980) 4 SCC 38
should be the final arbiter of controversies relating to conditions of service, including the vexed question of seniority, may save the courts from the avalanche of writ petitions and appeals in service matters. The proceedings of such Tribunals can have the merit of informality and if they will not be tied down to strict rules of evidence, they might be able to produce situations which will satisfy many.

In 1985, the Administrative Tribunals Act was enacted. The Act was challenged inter alia on the ground that it took away judicial review which was a basic feature of the Constitution. Logically, the challenge had to start with a challenge to Article 323A itself which enabled such an ouster of judicial review. The challenge to the Act was only consequential. However, the Court preferred not to deal with the challenge to Article 323A, and suggested changes in the Act to make the Tribunals an effective alternative institution to the high courts. Ten years after Sampath Kumar, when the Supreme Court was flooded with special leave petitions against decisions of the Tribunals, it found an occasion in Chandra Kumar to examine the validity of Article 323A, and held that the ouster of the jurisdiction of the high courts violated the principle of judicial review which was a basic feature of the Constitution and directed that the decisions of the Tribunals shall henceforth be subject to the writ jurisdiction of the high courts.

The principle of judicial review being part of the basic structure was again reiterated more recently by the Apex Court on January 10, 2007, while delivering the judgment upholding the decision of the Parliament to terminate the membership of 11 MPs in December 2005 for their involvement in the cash-for-query scam. However the five-judge Constitutional Bench while delivering their verdict added, "The fact that Parliament is an august body of co-ordinate constitutional position does not mean that there can be no judicially manageable standards to review exercise of its power. The judicature is not prevented from scrutinising the validity of the action of the

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77 S. P. Sampath Kumar v Union of India gives insight into the Court's own policy-making considerations which played a role in its use of the basic structure doctrine.
78 L. Chandra Kumar v Union of India.
79 Refer 'THE SUPREME COURT AND THE BASIC STRUCTURE DOCTRINE' by Raju Ramachandran in 'SUPREME BUT NOT INFALLIBLE', Essays in Honour of the Supreme Court of India, Oxford University Press, 2000, page 123
legislature trespassing on the fundamental rights conferred on the citizens."\textsuperscript{80} Chief Justice Y.K. Sabharwal said that while ‘Parliament is a co-ordinate organ and its views do deserve deference’ "its acts are amenable to judicial scrutiny."\textsuperscript{81}

On 11 Jan 2007, a nine-judge bench of the Supreme Court pronounced another significant judgment and held that there could be no blanket immunity from judicial review of laws inserted in the Ninth Schedule of the Constitution. The Bench held that all laws included in the Ninth Schedule after April 24, 1973 would be tested individually on the touchstone of violation of fundamental rights of the basic structure doctrine. The laws would be examined separately by a three judge bench and if these were found to violate the fundamental rights or abridge or abrogate any of the rights or protection granted under PART III of the Constitution, they would be set aside.\textsuperscript{82}

The spirit and backbone of the Constitution

The wording of the Preamble highlights some of the fundamental values and guiding principles on which the Constitution of India is based. The Preamble serves as a guiding light for the Constitution and judges interpret the Constitution in its light. In a majority of decisions, the Supreme Court of India has held that the objectives specified in the preamble constitute the basic structure of the Indian Constitution, which cannot be amended. Since the Constitution of India came into effect the Preamble has been subject to varied interpretations by the judiciary and presently it has been declared to be a part of the Constitution and not a mere preface.

An exhaustive reading of any constitution cannot be complete without reading it from the beginning to the end. ‘While the end may expand, or alter, the point of commencement can never change’ is indeed the general rule. As if to disprove this notion in India even the Preamble has seen Amendments. However these

\textsuperscript{80} Jurist and senior lawyer Fali Nariman while welcoming the verdict upholding the termination of the membership of 11 MPs, added, “there is no area in the Constitution, which is beyond judicial review. The Constitution reposes final authority in the Supreme Court. Judicial review on all matters concerning the Constitution can be gone into by the Supreme Court not because it is supreme but because the function is entrusted to it by the Constitution. I don't see any friction between the judiciary and the executive or Parliament. Even if there is friction, it shows a healthy democracy.”

\textsuperscript{81} As per report in THE HINDU, January 11,2007 page 14.

\textsuperscript{82} Excerpts from report in THE HINDU, January 12, 2007 page 1.
Amendments have only sought to fortify and reinforce the underlying philosophy that the Preamble originally underscored. The constitution commences from the Preamble which lays down the very objectives of the document and its underlying philosophy or basic structure. This explains the significance of the Preamble. It is no exaggeration to say that the Preamble to the constitution of India is its spirit and backbone.

**Significance of the Preambles of the UDHR, ICCPR and ICESCR**

The Preamble to the UDHR\(^3\) states that the world would be a better place if there were a common understanding of human rights and freedoms, and better still if the human aspiration for justice, peace and freedom were universally met throughout the world.

The Preamble records that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family lays the foundation for creating freedom, justice, and peace. The framers of the UDHR while stating that disregard and contempt for human rights have resulted in barbarous acts that have outraged the conscience of mankind draws on history and in particular the lesson learned from the barbarous Nazi regime.

The preamble reiterated that ‘The peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom’.

The Preamble underscored the importance of protecting Human Rights by the Rule of Law lest people resort to rebellion against tyranny as a measure of last resort.

The Preamble recalled that Member States had pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms and for this reason the Preamble underscored that a common understanding of these rights and freedoms

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\(^3\) Refer Annexure I (page viii) for the full text of the PREAMBLE of the UDHR.
which did not hitherto exist was of the greatest importance for the full realization of this pledge.

The preamble in its concluding paragraph exhorts every individual and every organ of society, to keep this Declaration constantly in mind, and strive by teaching and education to promote respect for these rights and freedoms. For this end the Preamble, proclaimed by the UN General Assembly as a common standard of achievement for all peoples and all nations sought progressive measures, both at the national and international level, to secure the universal and effective recognition and observance of Human Rights, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

When the Commission finally took its vote on 18 June 1948, twelve of its fifteen members voted in favour. The Soviet Union, Byelorussia, the Ukraine and Yugoslavia (the Soviet bloc technically had only two members) abstained.

The draft then went to the Economic and Social Council, which did not change the text but arranged for it to go to the Third Committee of the UN General Assembly, where it struck difficulties. After no less than 81 long meetings, at which at least 168 amending resolutions were considered, the Committee, on 6 December 1948, at last reached agreement - just in time to be taken by the General Assembly before it concluded its meeting for the year.

The Commission's view was that the declaration should be a relatively short, inspirational and energizing document usable by common people. It was to be the foundation and central document for the remainder of an international bill of human rights. It thus avoided the more difficult problems that had to be addressed when the binding treaty came up for consideration - just what role the state should have in enforcing the rights in its territory, and whether the mode of enforcing civil and political rights should be different from that for economic and social rights.84

84 www.universalrights.net/main/creation.htm
On the evening of 10 December 1948, the General Assembly endorsed the text of the UDHR without amendment, only two days before it rose until the next year. There were no dissenting votes, but the six communist countries then members of the UN, and also Saudi Arabia and South Africa, abstained. The Assembly, in a rare gesture of appreciation, gave Mrs. Roosevelt a standing ovation.

**The Growing Stature Of The UDHR**

The Universal Declaration has emerged successfully from the complex and politically hazardous processes of the United Nations to become its human rights flagship. At the time of its adoption the Declaration had not managed to achieve full recognition from the communist and certain Middle Eastern countries, but at least they had not voted against it and with eight abstentions at the time of voting this historic document was unanimously passed by the UN General Assembly on 10 December 1948.

Notwithstanding the initial difficulties and resistance, the Declaration has probably achieved a stature in the world that even the most optimistic of its founders in 1948 would not have expected. First, it has become accepted as an influential statement of standards, even by countries that are doubtful about the whole human rights enterprise. Writes Peter Bailey, ‘When countries such as Burma, Argentina, China and the former Yugoslavia feel bound to defend themselves when they are accused of being in breach of the UDHR, then it can be said to have achieved an important political and moral status’.

Equally important, the UDHR has become almost an extension of the UN Charter. Although, the Charter has only a few articles that refer to human rights and fundamental freedoms, it is now usual to refer to the UDHR as setting out the content of those rights and freedoms. So it has become a part of the fabric of the UN itself, and is often referred to in resolutions of the UN General Assembly, and in its debates, for example in relation to the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960. At the human rights conference in Teheran in 1978, to mark the 30th anniversary of the UDHR, the representatives of 84 nations
unanimously declared that the UDHR states a common understanding of the inalienable rights of all people and constitutes an obligation for the members of the international community.

Third, all the provisions of the UDHR have become a part of international customary law. The very large and increasing number of ratifications of the two human rights Covenants, and the fact that the rights stated in the UDHR are commonly recognised as well founded in moral and good practice terms, means that there are now virtually unchallengeable grounds for asserting that the UDHR rights have become part of international customary law. That means that, unlike treaties, which only bind a country once it has accepted the treaty obligations, all countries in the world are bound, whatever their particular view may be. A country cannot repudiate international customary law, as it can a treaty obligation.

For these three reasons, those who boldly moved to form and then approve the provisions of the UDHR have left an abiding legacy for humankind that will rank with the great religious contributions of past centuries. The UDHR is an increasingly powerful instrument for the achievement of human dignity and peace for all.

A Scrutiny Of The Preamble Of ICCPR and ICESCR

At first glance the Preamble to the ICCPR AND ICESCR is almost identical. Not surprising given that the ICCPR and ICESCR were two covenants formally adopted to give teeth to the provisions of UDHR. However a closer examination of the Preambles to the ICCPR AND ICESCR will reveal subtle differences.

The UDHR presently has acquired the stature of ‘jus cogens’ and far exceeds the status of a simple declaration outlining a basket of inalienable rights. Soon after its adoption in 1948 a consensus did evolve among Member States to put in place a legally binding Covenant that incorporated all the rights contained in the Declaration.

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85 Jus cogens
86 Refer THE CREATION OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS by Peter Bailey OBE AM www.universalrights.net/main/creation.htm
87 ibid
88 Refer Annexure II (page xiv) for the full text of the Preamble of the ICCPR
for technically the UDHR being a mere declaration could not become per se legally binding. To give teeth to the rights contained in the UDHR, two binding Covenants were created instead of one: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.

The ICCPR and ICESCR were adopted by the UN General Assembly on 16 December 1966 and came into force on March 23, 1976 and January 3, 1976 respectively. The time gap between the adoption of these two Covenants and its coming into force was because Article 49 of ICCPR and Article 27 of ICESCR mandate that the Covenant shall enter into force only three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession. In other words, thirty-five countries had to agree to be bound by the Covenant before it became effective. A scrutiny of the provisions of ICCPR and ICESCR will reveal that they are but an elaboration of the civil and political rights in the UDHR and the Economic, Social and Cultural rights found in the UDHR respectively.

Both the Preamble to ICCPR and ICESCR draw reference to the principles proclaimed in the UN Charter and the commitment of member states there under and reaffirms that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Noting that all these rights are derived from the inherent dignity of the human person, the Preamble to the ICCPR further recognizes that the UDHR had declared that the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.

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89 Namely that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

90 Reference is to the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms.
The Preamble thereby indicates that civil and political rights and ESC rights are mutually reinforcing and must both be protected if members of society are to enjoy civil and political freedom and freedom from fear and want as well. It is pertinent to note that the objective of the Preamble of the ICCPR is to secure both First generation and Second generation rights.

A similar Paragraph forms part of the Preamble to the ICESCR but with a subtle difference. The Preamble to the ICESCR states that the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political rights. It may be noted that the Preamble implies that besides ESC Rights Civil and Political Rights are a prerequisite to attaining ‘freedom from fear and want’. An analysis of the above statements implies that, even to enjoy freedom from fear and freedom from want, essentially second generation rights, both ESC Rights and civil and political rights have to be protected. Thus protection of ESC rights requires the guarantee of both civil and political rights as well.

Equally pertinent is the common conclusion drawn in both these Preambles of the necessity to create a congenial atmosphere which enables everyone to enjoy both first and second generation rights.

The words ‘freedom from fear and want’ appearing in the Preamble of the International Bill of Rights owes it origin to the third and fourth category of the famous four freedoms outlined by Franklin Delano Roosevelt. Freedom from fear recognises that warfare is inherently destructive. Freedom from fear, when translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor -- anywhere in the word.

President Roosevelt believed that this was no vision of a distant millennium but formed the definite basis for a kind of world attainable in our own time and
generation. According to Roosevelt\textsuperscript{91}, that kind of world was the very antithesis of the so-called "new order" of tyranny which dictators seek to create with the crash of a bomb.

Freedom from want, when translated into world terms, means economic understanding that secures to every nation a healthy peacetime life for its inhabitants — everywhere in the world.

The Preamble to ICCPR and ICESCR further acknowledges that individuals have duties towards other individuals and the larger community and is therefore under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenants. This last paragraph of the Preamble underscores the need to balance individual rights and collective rights and promotes greater accountability between men and men.

To sum up the Preambles to the ICCPR AND ICESCR serve as an introductory statement/ a preface to the respective Covenants of an international character and draw on both the UN Charter and the UDHR. It is quite distinct from but sets the tone for the substantive and procedural parts of the respective covenants.

In India however the distinction between the Preamble and the substantive part of the Constitution has been blurred over the years and presently the Preamble is indeed enforceable and serves as the backbone and spirit of the Constitution. More importantly it has helped carve the innovative ‘basic structure’ doctrine; a doctrine that now has been applies in other nations of the world.

\textsuperscript{91}Roosevelt called for "a world-wide reduction of armaments as a goal for "the future days, which we seek to make secure" but one that was "attainable in our own time and generation." More immediately, though, he called for a massive build-up of U.S. arms production: "Every realist knows that the democratic way of life is at this moment being' directly assailed in every part of the world... The need of the moment is that our actions and our policy should be devoted primarily—almost exclusively—to meeting this foreign peril. ... [T]he immediate need is a swift and driving increase in our armament production. ... I also ask this Congress for authority and for funds sufficient to manufacture additional munitions and war supplies of many kinds, to be turned over to those nations which are now in actual war with aggressor nations. ... Let us say to the democracies: '...We shall send you, in ever-increasing numbers, ships, planes, tanks, guns. ...'"
The Basic Structure Doctrine in South Asia

The basic structure doctrine has no doubt been the major contribution of the Supreme Court not only to the constitutional law of India but of South Asia. The Eighth Amendment to the Bangladesh Constitution amended Article 100 to curtail the jurisdiction of the High Court Division. The amendment was challenged on the ground that the plenary judicial power of the High Court Division of the Supreme Court over the entire Republic was part of the basic structure of the Constitution, which could not be altered or damaged. In *Anwar Hossain Chowdhury v Bangladesh* 92 a majority of 3:1 of the Appellate Division of the Bangladesh Supreme Court struck down the amendment, applying the doctrine, and expressly relying on *Kesavananda*.

It is, however, interesting to note that in an early Pakistan case, originating from the erstwhile Dacca High Court, 93 the Pakistan Supreme Court has used the concept of 'fundamentals of the Constitution' in order to hold that the President’s power to remove difficulties and adapt, could not extend to a change in the essential features of the Constitution and such a change could be brought about only by an amendment to the Constitution. However, in later years, the Lahore and the Baluchistan High Courts have expressly applied the basic structure doctrine, while the Supreme Court has impliedly accepted it. Thus, in *Darwesh Arbey v Federation of Pakistan* 94 which dealt with the validity of the Martial Law proclaimed by the government of Zulfikar Ali Bhutto, acting under Article 245, the Lahore High Court held that the Seventh Amendment which had amended Article 245 in 1977 was invalid because it affected the basic structure of the Constitution. In *Suleman v President, Special Military Court* 95 the Baluchistan High Court struck down a Constitution amendment inserted by a Presidential Order at the time of President Zia’s Martial Law, namely Article 212-A, which empowered the Chief Martial Law Administrator to establish military courts and barred the ordinary courts from interfering in all matters falling within the jurisdiction of such military courts. The Court held that the interim government was

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92 1989 Bangladesh Law documents (Spl) 1
93 FAzlul Quader Chowdhury v Mohd. Abdul Haque All Pakistan Law Decisions (1963) Supreme Court 486
94 All Pakistan Law Decisions (1908) Lahore 206
95 NLR 1980 civ. Quetta 873
not entitled to make 'basic changes' in the Constitution so as to alter the 'fundamental structure of the Constitution'. In *Al-Jehad Trust v Federation of Pakistan*\(^96\), the Pakistan Supreme Court invalidated a portion of the Martial Law amendment establishing the Federal Shariyat Court by Article 203-C, which provided for the appointment and tenure of its judges in a manner which was wholly in conflict with the security of tenure and judicial independence guaranteed in Article 209. Notwithstanding a *non obstante* clause contained at the beginning of the Chapter in Article 203-A, the Court resorted to the 'interpretation' based on 'basic features of the Constitution', and the 'intent and spirit of the Constitution' to hold that the original article would prevail over Article 203-C.\(^97\)

In Sri Lanka, the doctrine was invoked to test the Thirteenth Amendment, but a majority of the Full Bench of the Supreme Court in *In re the Thirteenth Amendment to the Constitution*\(^98\) held that the basic structure doctrine had no application to the Sri Lankan Constitution. Sharvananda CJ distinguished *Kesavananda* by pointing out that while Article 368 of the Indian Constitution did not define 'amendment' and did not indicate the scope of the term, in Sri Lanka Section 51 of the 1972 Constitution and Article 82 of the 1978 Constitution permitted the repeal of the Constitution itself, and as such there could be no unalterable basic structure.

**The advantages and perils of the Doctrine**

Once the power to annul amendments to the Constitution, which is the highest form of activism, is conceded to the Court, the exercise of lesser powers is logical, and ultimately judicial restraint based on the Court's own view of its area of competence and effectiveness becomes the only check on the exercise of judicial power.

Through the eighties and the nineties, the Court has interfered in diverse areas through public interest litigation, leading to criticism that 'judicial activism' was fast

\(^96\) All Pakistan Law Decisions (1996) Supreme Court 367
\(^97\) Refer 'THE SUPREME COURT AND THE BASIC STRUCTURE DOCTRINE' by Raju Ramachandran in 'SUPREME BUT NOT INFALLIBLE', Essays in Honour of the Supreme Court of India, Oxford University Press, 2000, page 127
\(^98\) (1987) 2 Sri Lanka Law Reports 312
becoming 'judicial adventurism' and to pleas that the executive should be allowed to run the government. One angle to this contention in the opinion of Senior Advocate of the Supreme Court of India and eminent writer Raju Ramachandran is that, "In all these situations however the Court is not transgressing its jurisdiction. It is merely, through new strategies, enforcing rights that traditionally were not believed to possess 'adjudicative disposition'. Armed, as it were, with the ultimate power, the Court has over the past two decades made its presence felt by its frequent interventions in public interest litigation and often into policy making. Thin parliamentary majorities and consequently weak executives have enabled the Court to occupy a space that it might not have otherwise".

Today the basic structure doctrine stands in the way of untrammeled constitutional reform.

However the experience of short-lived coalitions and minority governments, and the consequent political instability, has led to a renewed debate on switching over to a presidential form of government. One of the essential features of the Constitution, according to the petitioners in \textit{Kesavananda} was a parliamentary form of government as distinct from a presidential one. At least one judge, Justice Jaganmohan Reddy, held that parliamentary democracy was part of the basic structure. If there is a serious move to switch over to a presidential form of government, 'a careful government will seek the advisory opinion of the Supreme Court under Article 143 of the Constitution. On the other hand, a determined government with the requisite majority would go ahead with an amendment to the Constitution, whose validity will then be tested in Court after the system of government has changed'. Either situation is fraught with frightening possibilities which could not have been possibly envisaged when the basic structure doctrine was adopted in the context of litigation arising out of property rights.

If the basic structure test is to be rigorously applied to the question whether a switch-over to the presidential form of government is permissible, the answer has to be in the negative.
When he introduced the Draft Constitution for the consideration of the Constituent Assembly, Dr. B. R. Ambedkar offered a detailed analysis of the presidential and parliamentary forms of government, and gave reasons why the Drafting Committee had preferred the latter, Sir Alladi Krishnaswami Ayyar pointed out that while the presidential system had worked splendidly in the US due to historical reasons, in India it was necessary to have a union between the executive and the legislature, and that the object of choosing the parliamentary form was to prevent a conflict between the executive and the legislature and to promote harmony between the different parts of the system. Though both systems are forms of democracy, they differ in one basic principle: that of separation of powers. While the presidential form is based on a clear separation of powers between the legislature and the executive, the parliamentary form is based on a clear link between the two. The reversal of such a fundamental choice made by the Constituent Assembly cannot but fall foul of the basic structure theory.

The criticism that may be attributed to the Basic Structure Doctrine is that the doctrine rests on the unsure foundations of judicial perceptions and judicial majorities. It imposes constraints and limitations on the Parliament to amend the Constitution, a matter which was not contemplated by the founding framers. It fails to appreciate that we live in changing times and laws cannot be static. A constitution has to reflect the changing needs of the nation and must be dynamic and flexible. If India decides to join a regional economic union which necessarily involves submission to the jurisdiction of supranational institutions, 'sovereignty', a basic feature is violated. Would the Court annul India's joining such a union? If India were to subject itself to the jurisdiction of an international human rights tribunal, it would again be surrendering a more 'basic' feature indeed. If the nature of the Indian federation is to change from the present 'federation with a strong unitary bias' to a classical federation where the Centre retains only defence, currency and foreign affairs, the basic structure would be damaged.

99 VII Constituent Assembly Debates (CAD), pp.32-3 (4 November 1948)
100 Refer 'THE SUPREME COURT AND THE BASIC STRUCTURE DOCTRINE' by Raju Ramachandran in 'SUPREME BUT NOT INFALLIBLE', Essays in Honour of the Supreme Court of India, Oxford University Press, 2000, page 129
If the present economic policies are continued by future governments and it is honestly decided to delete the word ‘socialist’ from the Preamble, the basic structure would be violated.

As submitted earlier, the researcher holds the view that word ‘Socialism’ inserted in the Preamble is currently emerging as a challenge keeping in mind the new economic policy of the Government of India followed since 1992. With India’s entry into the WTO and in the face of the onslaught of globalization, the removal of trade barriers, increasing foreign direct investment and the trend for privatization of even the core sectors in the country the moot question is whether Government policy is moving away from the trend of ‘socialism’, that existed till 1992 (characterized by the tilt towards a ‘socialistic state’ in 1976 and the ‘socialistic pattern’ that prevailed earlier).

It is feared that the “sovereignty” and “socialistic” texture of our society, which are the basic features of our Constitution, are currently emerging as challenges under the new economic policy. The question, which causes much of concern, is whether India can come out of the commitment made under Article 39 to the people of India and whether the state can transform the welfare economy into market friendly paradigm ruled by ‘free markets’ and ‘structural adjustment programmes’.

Another pertinent limitation to the basic structure doctrine is that if the power to amend the constitution cannot be exercised to amend its basic features, the power gets reduced to the status of a ‘removal of difficulties’ clause. Surely, high constituent power ought to mean something more. The basic structure doctrine rests on the unsure foundations of judicial perceptions and judicial majorities. It emerged for the first time in 1973 by a majority of one, twenty-three years after the working of the Constitution. Yet in 1980, in the Minerva Mills case, the Court found a ‘limited amending power’ to be a basic feature of the Constitution- when right from Sankari Prasad to Sajjan Singh the view was that there were no limitations on the amending power.\textsuperscript{101}

\textsuperscript{101} Ibid, at page 130.
Critics point out that the basic structure doctrine proceeds upon a distrust of the ‘democratic process’, which in itself must surely be part of the basic structure. In limiting the amending power, the basic structure doctrine in fact stifles democracy, a basic feature. The limitations of the basic structure doctrine were brought out by the Court’s decision in ADM Jabalpur. The Presidential proclamation suspending Article 21 did not, according to the Court, leave the citizen with the right to protect his liberty. Thus a right which could not be taken away even by amending the Constitution, pursuant to the basic structure doctrine was now stripped by an executive proclamation. However the Parliament strengthened the right to life and liberty by providing in the Forty-fourth amendment that the rights conferred by Articles 20 and 21 could not be suspended even during an emergency.

No doubt the basic structure doctrine has enhanced the position of the Preamble to the backbone and spirit of the Constitution. It has also in its wake ensured that any amendment of the operative part of the Constitution must be in keeping with the basic philosophy of the Preamble. Today the Preamble of the Indian Constitution is more powerful in its scope and sweep than the Preamble of the ICCPR and the ICESCR which serves to explain the intent of the UDHR, the ICCPR and the ICESCR but does not control either its substantive or procedural parts. Thus in India presently the Preamble dictates.

Close to sixty tumultuous years of the Republic have seen democracy and a culture of constitutionalism take firm roots in the country. It may be argued that ‘the sceptre of dictatorship loomed large but once’; that ‘the Emergency was an aberration which was corrected through the political process itself’. However it must not be forgotten that our Constitution was amended eighty three times in just fifty years since it came into force and a good many of these Amendments were classic examples of the assertion of parliamentary supremacy, as seen earlier in this chapter.

The frequent Amendments of the Constitution of India in the opinion of the researcher stand testimony to the fact that the Constitution of India is indeed a flexible document. The provisions pertaining to Amendment of the ICCPR and ICESCR are Article 51 and Article 29 respectively. The common feature in the aforesaid two
articles are that the amendment of the ICCPR and the ICESCR may be proposed by any State Party and filed with the Secretary-General of the United Nations. The Secretary-General in turn would communicate the proposed amendments to State Parties and if one-third of the State Parties favour holding a conference to consider and vote on these proposals a conference would be convened under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval and the amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted. In India, Article 368\(^{102}\) of the Constitution lays down the procedure for amendment. Article 368 of the Constitution provides that amendments to the Constitution can take place in three ways namely:

- By simple majority of the Parliament made by a simple majority of members present and voting, before sending them for the President's assent.

- By special majority of the Parliament comprising two-thirds majority of the total number of members present and voting, which should not be less than half of the total membership of the house.

- By special majority of the Parliament and ratification by at least half of the state legislatures by special majority. After this, it is sent to the President for his assent.

Since 1967, the Supreme Court has interpreted Article 13 of the Constitution to mean that the document's "basic structure" cannot be altered by any means. Using this doctrine, the Supreme Court has struck down the 39th Amendment and parts of the 42nd Amendment as being in violation of the Basic Structure of the Constitution.

\(^{102}\) Refer Annexure VIII-J
Some noted authors of Constitutional law, such as HM Seervai, have argued that this is an usurpation of amending power by the judiciary, which was never intended by the framers of the Constitution. However, it can be argued that this doctrine is necessary to protect basic human rights from being legislated away.¹⁰³

In the opinion of the researcher, the basic structure doctrine has served a certain purpose: it has warned a fledgling democracy of the perils of brute majoritarianism. At the same time it recognizes the need for the Constitution to be an organic document that seeks to safeguard the lofty ideals enshrined in its Preamble.

In recognizing this need of the Constitution to be not rigid but a dynamic document the doctrine never the less ensures that Parliament cannot use its amending powers under Article 368¹⁰⁴ to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution. By declaring that judicial review is part of the Basic Structure of the Constitution the Supreme Court reserves its right to review any amendment to the Constitution in the light of the Basic Structure. Indeed The basic structure doctrine stands in the way of untrammeled constitutional reform and provides the much needed check and balance required in a Parliamentary Democracy.

¹⁰⁴ Refer Annexure VIII G (Page xxxii) for the full text of Article 368