CHAPTER-VII

BASIC STRUCTURE: CRYSTALLISATION OF THE
DOCTRINE

In Kesavananda the Court was at the pinnacle of creativity. By the
introduction of the doctrine of basic structure into our Constitution, the Court
brought out unforeseen changes in the history of constitutional jurisprudence of the
world. Though some aspects were identified as the ingredients of the doctrine, the
Court was not able in that case to clarify and explain fully the ingredients of the
doctrine due to the lack of consensus among the Judges. The doctrine unleashed a
lot of criticisms from different quarters. Such criticisms had their impacts in the
judicial attitude also. As a consequence, the Court decided to review the case and
it was feared that the death knell of the doctrine was sounded. But the Court
dropped the programme of reviewing the case presumably because, the Bar did not
cooperate with the Court. The doctrine had a colourful life thereafter and played a
vital role in the constitutional, legal, political social and economic developments in
India.

One of the major criticisms levelled against Kesavananda was that there
was no consensus among the Judges as to the contents of the doctrine. The Court

1 For a discussion of the case, see supra, chapter VI.
2 For the criticisms, see supra, Chapter VI, nn. 133-141.
3 "Some scholars have clapped and some scholars have scoffed at the decisions in the
Fundamental Rights. Case. These criticisms I cannot deny, cause a flutter in the ivory
tower." Per Chandrachud J in Indira Gandhi, infra, n.6 at p. 246.
4 Cf. Upendra Baxi, The Supreme Court and Politics (1985) pp. 70-76.
5 Supra, Chapter VI, n.59.
had therefore a twin task before it. First, it had to concretise and provide a more firm conceptual basis for the doctrine. Second, the Court had to explain the essential ingredients of the doctrine of basic structure. The Court had opportunity to deal with and develop the doctrine of basic structure in a lot of cases after *Kesavananda*. Apart from concretizing and fixing firmly what *Kesavananda* said, the train of cases dealing with the doctrine delineated its ingredients.

In *Indira Gandhi v Raj Narain*, (Indira Gandhi, for short) popularly called the *Election Case* the question of applicability of the doctrine came up before the Court for the first time since *Kesavananda*. The Court consisted of five judges who were judges in *Kesavananda* also. It may be an irony that four of them, who had rejected the doctrine of basic structure and stood for unlimited power of Parliament to amend the Constitution holding that there was no implied limitations on it, had to deal with the doctrine in *Indira Gandhi*. In *Indira Gandhi*, the Court had to examine the doctrine of basic structure as the validity of the 39th amendment to the Constitution by which Article 329 A was incorporated into the Constitution.

---

6 1975 Supp S.C.C. 1. The respondent had filed an election petition against the appellant, the then Prime Minister on the ground that she committed corrupt practices during the election in 1971. The High Court of Allahabad rendered verdict in his favour and set aside the election of the appellant. She appealed against it in the Supreme Court.

7 Unlike the earlier cases dealing with the power of Parliament to amend the Constitution under Article 368, in which the main issue was the amendment of the fundamental rights, the *Election Case* dealt with the essential feature of representative government namely free and fair elections and the nature and location of judicial power. See Seervai, *Constitutional Law of India* Vol. III (1996), pp. 3129-3130.

8 Chief Justice A.N.Ray, H.R.Khanna, K.K. Mathew, M.H.Beg and Chandrachud JJ.

9 A.N Ray, Mathew, Beg and Chandrachud JJ. Only Khanna J held in *Kesavananda* that the power of Parliament to amend the Constitution as limited by the doctrine of basic structure. For a discussion, see, supra, chapter VI.

10 Article 329A read thus “(1) Subject to the provisions of Chapter II of Part V [Except sub-clause (e) of clause(1) of Article 102], no election-
Constitution was challenged. It was challenged that clauses (4) and (5) of Article 329A were invalid on the ground that they excluded operation of any law in the matter of election of the Prime Minister and the Speaker of the Lok Sabha and divested the judiciary of the power to determine the validity of the elections of those persons. The impugned amendment was therefore alleged to have violated the principles of democracy, rule of law, separation of powers and judicial review, which according to the petitioner were essential ingredients of the basic structure of the Constitution of India.

(a) to either House of Parliament of a person who holds the office of Prime Minister at the time of such election or is appointed as Prime Minister after such election;

(b) to the House of the People of a person who holds the office of Speaker of that House at the time of such election or who is chosen as the Speaker for that House after such election;

shall be called in question, except before such authority [not being any such authority as is referred to in clause (b) of Article 329] or body and in such manner as may be provided for by or under any law made by Parliament and any such law may provide for all other matters relating to doubts and disputes in relation to such election including the grounds on which such election may be questioned.

(2) The validity of any such law as is referred to in clause (1) and the decision of any authority or body under such law shall not be called in question in any court.

(3)...

(4) No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, in so far as it relates to election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied to or in relation to the election of any such persons is referred to in clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void or has, before such commencement, been 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 and shall be deemed always to have been void and of no effect.

(5) Any appeal or cross appeal against any such order of any court as is referred to in clause (4) pending immediately before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, before the Supreme Court shall be disposed of in conformity with the provisions of clause (4).

(6) The provisions of this article shall have effect notwithstanding anything contained in this Constitution.”
Examining the scope of the doctrine of basic structure, the Court held that democracy was an ingredient of basic structure of the Constitution. It meant that if an amendment damaged any feature of democracy in any manner, it would be unconstitutional. In other words, Parliament was incompetent to amend the Constitution to the extent of altering the democratic foundation of the Constitution of India.

What is meant by the term "democracy"? How can it be determined whether an amendment damaged democracy? Does it imply a presidential or parliamentary form of government? The Judges addressed themselves to these questions and tried to find answers. The expression cannot have a precise meaning nor can it be comprehensively defined. Justice Chandrachud observed that the concept "democracy" is very broad and complex and that equality was the faith and creed of democracy. Justice Khanna said that democracy postulates that there should be free and fair periodic elections enabling people to choose and re-elect or change representatives and that it postulates the presence of a mechanism for the settlement of election disputes. Popular sovereignty and equality among the people were also identified by Justice Mathew as part and parcel of democracy. Though the concept of democracy was not an easy one to explain, from the above observations of the Judges as also from the juristic expositions, it

---

11 Supra, n. 6. Per Khanna J. at p. 198; Mathew J. at p. 119 and Chandrachud J. at p. 255.
12 Id. at p. 255
13 Id. at p. 256
14 Id. at pp. 87-88
15 Id. at p. 135.
16 See, for instance, W. Friedman, Legal Theory (1949), p.435. He observes, "A discussion of the principal legal values of modern democracy can be grouped around four
is clear that it envisages free and fair election on the basis of equality of individuals and an independent dispute settlement mechanism.

Evidently, if the 39th amendment to the Constitution adversely affected any of the above aspects, it is liable to be struck down. Elections to Parliament and State legislatures are conducted in accordance with the provisions of the Representation of Peoples Act 1950. By the impugned amendment to the Constitution, it was stipulated that elections of the Prime Minister and the Speaker would not be governed by the existing election laws. It further provided that their elections would not be amenable to the jurisdiction of any court. It implied that their elections were made beyond the purview of any law of the realm and beyond the reach of the judiciary. In other words, the amendment struck at the root of the concept of equality which the Judges identified as an essential ingredient of democracy by keeping Prime Minister and Speaker above and beyond the reach of law. The Court identified clause (4) of Article 329A as incorporated by the impugned Amendment Act as one, which suffered from certain vices. It abolished the existing forum for settling disputes relating to elections of Prime Minister and Speaker of Lok Sabha without creating a new one. This led to a situation were there was no law for regulating elections to the posts of the Prime Minister and the Speaker of the Lok Sabha. The absence of a forum for settling disputes relating to elections denied the aggrieved persons the right to a remedy. It therefore did themes of legal theory: (1) The legal rights of the individuals. (2) Equality before the law. (3) The control of government by the people. (4) The rule of law. (Emphasis supplied)

17 Constitution of India, Article 329 A(4) as incorporated by the Constitution (Thirty-ninth Amendment) Act, 1975.

18 Supra, n. 6 at p. 44 (per Ray CJ), at p. 87-88(per Khanna J.); at pp, 129,133; (per Mathew J.) at p. 257 (per Chandrachud J.).
away with the concept of free and fair elections, which is an essential ingredient of
democracy. Justice Mathew alleged that non-application of any law to certain
elections was despotic in nature and would damage the democratic structure of the
Constitution. He also observed that dispensation of the judicial forum for
settling election disputes also resulted in damaging an essential ingredient of
democracy. According to Justice Chandarachud the provisions happened to
violate democracy on the ground that they made the existing law inapplicable to
the elections of the Prime Minister and the Speaker and thereby denied equality
and were therefore arbitrary in nature. In short, the majority of the Judges found
the provisions of the impugned constitutional amendment contrary to the concept
of democracy on different grounds. The Court therefore struck down clause (4)
of Article 329A as incorporated by the 39th amendment Act as violative of
democracy an aspect of basic structure of our Constitution.

Earlier, in Kesavananda, the Court had accepted that the contents of the
Preamble were indicia of the concept of basic structure. Democracy forms part of
the Preamble. Therefore, democratic form of government also was held as part of

19 Id., at p. 88 (per Khanna J).
20 Id., at p. 128.
21 Id., at p. 129.
22 Id., at pp. 257-258.
23 Ray C. J. however did not deal with the question whether democracy formed part of the
basic structure of the Constitution. But he held that free and fair elections did not form
part of the basic structure of the Constitution. See, supra, n. at pp. 43-44. Similarly, Beg
J. also surprisingly remained silent on the issue.
24 Id., at p. 87 (per Khanna J.); at p. 134 (per Mathew J.) and at pp. 258-259 (per
Chandarachud J).
25 It Reads, WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India
into a SOVEREIGN SOCIALIST SEULAR DEMOCRATIC REPUBLIC...
basic structure of the Constitution. Obviously, in *Kesavananda* the Judges included democratic form of life within the concept of basic structure not because they thought it to be of great importance, but because, it was included in the Preamble. Thus holding of the Court in *Indira Gandhi* that democracy formed an ingredient of the basic structure of the Constitution is undoubtedly an advancement of the decision of *Kesavananda*.

It is evident from the above discussion that democratic set up is essentially based on equality among the people. From the very concept of right to equal representation in the government each individual in a democratic state is entitled to equality in all respects. There must be equality in holding rights and shouldering duties irrespective of the status of individuals. Such a concept of equality is based on the doctrine of Rule of Law. In other words, a real democratic set up would be possible only where there is rule of law. "Rule of Law postulates that the decisions must be made by applications of known principles and rules and in general such decisions should be predictable and the citizen should know where he is." It also means that "the exercise of the power of government shall be conditioned by law and that subject to the exceptions to the doctrine of equality, no one shall be exposed to the arbitrary will of the government." Further, rule of law confers power on the judiciary to look into the allegations of corrupt practices and

---

26 See, Friedman, *supra*, n.16 at p. 435. He said thus, "The main forces in the development of modern democratic thought have been the liberal idea of individual rights protecting the individual and the democratic idea proper, proclaiming equality of rights and popular sovereignty. The gradual extension of the idea of equality from the political to the social and economic field has added the problems of social security and economic planning." (Emphasis supplied.)

27 *Supra*, n 91 (per Khanna J)

28 *Id.* at p. 252 (per Chandrachud J)
abuse of constitutional power of the Prime Minister. The rule of law is highly necessary for excluding arbitrary interference by the government. Democratic setup is therefore possible only if the presence of the rule of law is assured. In other words, democracy postulates rule of law. It implies that since democracy is a feature of basic structure, 'rule of law' also should be. The Court therefore held that rule of law also forms part of the basic structure of the Constitution of India.

Some of the judges went to the extent of holding that the concept of equality also constituted an ingredient of the basic structure as it has a thick relation with the rule of law. Though the majority did not hold that the concept of equality was part of the basic structure, the holding of the Court that rule of law is an element of basic structure is an instance of judicial creativity.

The holding of the Court in Indira Gandhi that democracy and rule of law are ingredients of the basic structure of the Constitution of India claims our attention for more reasons than one. It is the first instance where the Court has given a fresh life to the doctrine of the basic structure. Till this decision was made, the Court was in a state of flux and there was no unanimity among the Judges as to the contents of the basic structure. It is in this case that the Court

---

29 Id. at p. 148 (per Beg J.).


31 Supra, n. 6 at p90-91. "In any case, the vice of clause (4)[of the 39th amendment Act] would still lie in the fact that the election of the appellant was declared to be valid on the basis that it was not to be governed by any law for settlement of election disputes." (per Khanna J.) (Emphasis supplied) at p. 136 (per Mathew J.) and at p. 252 (per Chandrachud J.)

32 Id. Mathew J. (at p. 137). He observes, "Leaving aside these extravagant versions of rule of law, there is a genuine concept of rule of law and that concept implies equality before the law or equal subjection of all classes to the ordinary law" and Chandrachud J. (at p. 252).
gave confirmation to the doctrine and tried to explore the contents of basic structure. The decision in *Indira Gandhi* is a creative step of the Supreme Court in interpreting the power of Parliament to amend the Constitution. *Indira Gandhi* identified some of the instances of limitation on the power of the Parliament to amend the Constitution and thus gave firm root to the doctrine of basic structure. Further, the holding of the Court that both democracy and rule of law are to be recognized as ingredients of the basic structure deserves our attention for yet another reason. Democracy and rule of law are the twin devices, which serve the common end of correcting the government. They are complementary to each other and one cannot exist without the other. The decision by bringing both democracy and rule of law as unamendable features of our Constitution upheld the identity of the Constitution of India, can be considered as a worthy successor of *Kesavananda*.

Though *Indira Gandhi* is an instance of judicial creativity, can we say that the decision is an ideal instance of judicial innovation? It seems that the decision of *Indira Gandhi* cannot be considered as an ideal instance of creativity as it suffers from some short comings. The Court in this case had an occasion to examine the scope and extent of the expression, 'constituent power' under Article 368. Is it subject to the concept of separation of powers? In other words, is separation of powers an essential ingredient of the basic structure? The Court was not able to form any opinion on the question of the meaning of the expression, 'constituent power' and lay down any law. Four of the Judges equally divided on

34 For the text of the Article, see *supra*, Chapter VI, n.17.
this issue and the fifth Judge expressed no opinion. Two of the Judges namely, Chief Justice A.N. Ray and Justice Mathew held that 'constituent power' and the doctrine of separation of powers operate at different levels. Chief Justice A.N. Ray held that the constituent power was independent of the doctrine of separation of powers. Justice Mathew also observed in more or less similar terms and went to the extent of holding that exercise of judicial power by Parliament could not be considered as an act of damaging the basic structure of the Constitution embodied in the separation of powers. Thus Chief Justice A.N. Ray and Justice Mathew held that separation of powers was not an unamendable feature of the Constitution.

In other words, according to them it did not form part of the basic structure of our Constitution.

Two other Judges namely Justice Beg and Justice Chandrachud on the other hand, held that the doctrine of separation of powers was an important one, it

35 *Supra*, n.6. at p. 42. He justified the conclusion thus, "When the constituent power exercises powers the constituent power comprises legislative, executive and judicial powers. All powers flow from the constituent power through the Constitution to the various departments or heads. In the hands of the constituent authority there is no demarcation of powers. It is only when the constituent authority defines the authorities or demarcates the areas that separation of power is discussed."

36 *Id.*, at p. 132. He observed, "But this doctrine which is directed against the concentration of these powers in the same hand has no application as such when the question is whether an amending body can exercise judicial power. In other words, the doctrine is directed against the concentration of these sovereign powers in one or other organ of Government. It was not designed to limit the power of a constituent body."

37 "And if the amending body exercised judicial power in adjudging the validity of the election, it cannot be said that by that act, it has damaged a basic structure of the Constitution embodied in the doctrine of separation of powers (*Id.* at pp. 132-133).

38 *Id.* at p. 42. "The rigid separation of powers as under the American Constitution or under the Australian Constitution does not apply to our country."

39 *Id.* at p. 132. He observes, "Whereas in the United States of America and in Australia, the judicial power is vested exclusively in courts, there is no such exclusive resting of judicial power in the Supreme Court of India and the courts subordinate to it."
went to the root of the Constitution of India, it was an ingredient of the basic structure of the Constitution and hence even the constituent body could not escape its impact. They held the view that the Constitution could not be altered in such manner as to damage the separation of powers as envisaged by the Constitution and to upset the ensuing balance of powers. Justice Khanna refused to make any opinion on the scope of the constituent power and held that settlement of that issue was not necessary for deciding the main issue posed before the Court, viz., constitutionality of clause (4) of Article 329A. In view of the reservation of opinion by Justice Khanna, the matter was left undecided. The result of the decision was that the question whether the doctrine of separation of powers is part of the basic structure and restricts 'constituent power' of Parliament remained unsettled even after the decision in *Indira Gandhi*.

---

40 Id. at p. 198. Justice Beg held, “The majority view in that case, [Kesavananda] which is binding upon us, seemed to be that both the supremacy of the Constitution and separation of powers are parts of the basic structure of the Constitution.” Justice Chandrachud observed thus, “The truth of the matter is that the existence, and the limitations on the powers of the three departments of government are due to the normal process of specialisation in governmental business which becomes more and more complex as civilization advances. The reason of this restraint is not that the Indian Constitution recognizes any rigid separation of powers. Plainly it does not. The reason is that the concentration of powers in any one organ may, by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic government to which we are pledged... The Parliament, by clause (4) of Article 329A, has decided a matter of which the country’s courts were lawfully seized... I find it contrary to the basic tenets of our Constitution to hold that the amending body is an amalgam of all power, legislative, executive and judicial.” (at pp. 259 to 261).

41 Id. at p. 86.

42 Such an unsettled position arose only because Justice Khanna took such a stand. It is worthwhile to remember that in *Kesavananda* the question whether fundamental rights formed part of the basic structure of the Constitution ultimately depended upon the stand of Justice Khanna as other judges were equally divided upon the issue. Fundamental rights were not held as not forming part of the basic structure as he held. See, supra, chapter VI, n.130.
It appears that the view taken by Justices Beg and Chandrachud represents the correct exposition of law. Acceptance of the contrary view leads to appalling and undesirable consequences. The view that the doctrine of separation of powers operates only at the sub-constitutional level, that too only if the Constitution so stipulated and that the doctrine cannot have any application when one deals with the constituent power-an amalgam of legislative, executive and judicial powers-is a dangerous one. It would lead to a situation where the doctrine becomes inapplicable in the matter of amending the Constitution. The doctrine would then apply to exercising the powers of the government in accordance with the Constitution. In such a context, in amending the Constitution, and by enacting enabling legislation, any and all powers could be wielded by Parliament. Such a proposition makes an absurd distinction between the concept of power and its exercise.43 In other words, though exercise of the legislative power by Parliament may be subject to the doctrine of separation of powers and the ensuing balance of powers, the constituent power is held to be beyond the doctrine. Such a distinction does not appear to be a real one.44 It suffers from another defect also. It equates enactment of a Constitution with amendment of the Constitution. There is a distinction between them. Enactment of a new Constitution is totally different

43 Such a view is clear from the opinion of Justice Mathew. He holds, “The possession of power is distinct from its exercise. The possession of legislative power by the amending body would not entitle it to pass an ordinary law, unless the Constitution is first amended by passing a constitutional law authorising it to do so. In the same way the possession of judicial power by the amending body would not warrant the exercise of the power, unless a constitutional law is passed by the amending body enabling it to do so....The doctrine of separation of powers which is directed against the concentration of the whole or substantial part of the judicial power in the Legislature or the Executive would not be a bar to the vesting of such a power in itself.” (Supra, n. 6 at p. 133).

44 This is so because when Parliament finds that it was not able to exercise the legislative power conferred by Article 245 due to the operation of the doctrine of separation of powers, it would be able to invoke Article 368 so as to upset separation of powers and thereafter exercise the legislative powers accordingly.
from its amendment. The former can even be an extra-constitutional one while the latter is always subject to the Constitution. Unlike the enactment of a new Constitution, its amendment is derivative in nature. It is derived from the Constitution itself. Therefore, the power to amend the Constitution is certainly subject to the limitations envisaged by the Constitution. The doctrine of basic structure is devised to operate on the power to amend the Constitution. Obliteration of the distinction between the enactment of the Constitution and its amendment would defeat the very purpose of the doctrine.

It is true that the Constitution of India has not adopted the doctrine of separation of powers in the traditional sense. For, unlike the Constitution of the United States, it does not contain any specific provision laying down that legislative, executive and judicial powers should be wielded by the legislature, executive and judiciary respectively. However, from the various provisions of the Constitution, it is clear that it worked out the aspects of administration on the basis of separation of powers and the consequential balance of powers. An alteration of the provisions of the Constitution to erase the separation of powers and to vest those powers in one and the same body may damage the very foundation of the basic document and would lead to the possibility for the exercise of arbitrary powers. In other words, the doctrine of separation of powers certainly forms an essential ingredient of the basic structure of our Constitution. Moreover, the Constitution of India as originally enacted postulates separation of powers, though

45 Cf. Seervai, *op.cit.* at p. 3119 where he observes, "...the power to frame a Constitution is a primary power, whereas a power to amend a rigid Constitution is a derivative power- derived from the Constitution and subject at least to the limitations imposed by the proscribed procedure."
not in the traditional style and manner as developed in the U.S. Therefore, recognition and conferment of power on the constituent body to amend the Constitution to upset the separation of powers as envisaged by the Constitution of India and confinement of the application of the doctrine of separation of powers over the exercise of power by the government organs alone defeats the very purpose for which the doctrine of basic structure was introduced. Earlier in *Kesavananda*, some of the Judges recognised the doctrine as an essential element of the basic structure. In short, the view of Chief Justice A.N. Ray and Justice Mathew coupled with the non-expression of any opinion on the issue by Justice Khanna in *Indira Gandhi's Case* pulls the Constitution to the pre-*Kesavananda* stage.

A related issue that sprung up before the Court in *Indira Gandhi* is whether judicial review formed part of the basic structure. It is an issue related to the concept of democracy, rule of law and especially separation of powers. As referred to by one of the Judges, democracy is founded on free and fair elections. An important feature of democracy is redressal of election disputes through an independent and impartial forum. Democracy can be preserved only on survival of equality of individuals before such judicial fora. Similarly, rule of law also can be assured only if arbitrariness of governmental action is proscribed

---

46 Sikri C.J., Shelat and Gover JJ.
47 Khanna J
48 *Supra*, n. 6. at p. 87. He observed, "Democracy further contemplates that the elections should be free and fair, so that the voters may be in a position to vote for candidates of their choice."
49 *Id* at p. 88 Per Khanna J. "Not much argument is needed to show that unless there be a machinery for resolving an election dispute and for going into the allegations that elections were not free and fair being vitiated by malpractices, ..."
for which there must be courts of law.\textsuperscript{50} Separation of powers envisages mutual checks and balances between the organs of the government. It includes independence of the judiciary from the executive and the legislature.\textsuperscript{51} All these indicate the necessity of judicial review for maintaining democracy and rule of law. Is not then judicial review a necessary ingredient of the Constitution of India? Can it not be treated as a feature of its basic structure in the light of the holding of the Court that democracy and rule of law are ingredients of the basic structure of the Constitution of India? The majority in \textit{Indira Gandhi’s Case} held that judicial review was not part of the basic structure of the Constitution.\textsuperscript{52} The Judges justified such a conclusion on different grounds. They held that for maintenance of democracy, what was required was only a process of settling disputes relating to elections. That, according to the Judges, did not necessitate a judicial process for settling them.\textsuperscript{53} In many democratic countries, election disputes are settled without recourse to judiciary but by the legislature itself.\textsuperscript{54} Moreover, the Constitution of India as originally enacted did contain some provisions, which indicate that judicial review was not treated as its essential


\textsuperscript{51} “The key stone of separation of powers in contemporary democracy and one that is crucial to the maintenance of some balance of powers in the mixed economy – is the independence of the judiciary.” See, Friedman, \textit{The State and the Rule of Law in a Mixed Economy} (1971), at p. 74.

\textsuperscript{52} Chief Justice Ray observed, “Judicial review in many matter under statute my be excluded.”(supra, n.6 at p.38.) “Judicial review is one of the distinctive features of the American Constitution al Law... These features are not in our Constitution.” (at p. 41) Chandrachud J held thus, “ Since the Constitution, as originally enacted, did not consider that judicial power must intervene in the interests of purity of elections, judicial review cannot be considered to be a part of the basic structure in so far as legislative elections are concerned.” (at p. 254 ) and Khanna J. at pp.90-91).

\textsuperscript{53} \textit{Id.} Per Ray C.J. at p. 43; Khanna. J. at p. 91 and Chandrachud J. at p. 254.

\textsuperscript{54} See instances of U.K., U.S., Australia, Japan, Norway, France, Germany, Turkey etc. Ray, C.J. Khanna,J. (at p. 88) and Chandrachud J. (at p. 254) have noted this fact.
part. On these grounds, the Court held that judicial review was not an essential feature of the basic structure of the Constitution.

The fragrance of the holding that democracy and rule of law are the ingredients of the basic structure is considerably watered down by the decision of the Court that separation of powers and judicial review were not the unamendable aspects of the Constitution of India. Undoubtedly, identification of democracy and rule of law as features of basic structure is a creative holding of the Court. As a result of the decision, Parliament is denuded of its power to amend the Constitution destroying those aspects and converting our Constitution as a totalitarian and undemocratic one. Evidently, separation of powers and judicial review are conditions precedent for the existence of a healthy democracy and rule of law. Therefore, it is very much necessary that in exercise of the constituent power, Parliament is not permitted to obliterate judicial review from the Constitution. In other words, much of the favourable consequences of the identification of democracy and rule of law as features of basic structure of the Constitution are lost by the denial of the same status to separation of powers and judicial review. As mentioned by the Court, democratic life and rule of law would successfully operate only if the presence of an independent arbitrator is assured by the Constitution itself. Absence of such a body is likely to lead to the gradual decadence of the rule of law. If the dispute-settling scheme were wielded by the government or the legislature, possibility of arbitrariness and political influence

See for instance, Constitution of India, Articles 31 (4), (6), 103, 136(2), 27(4), 262(2) and 329 (a), (b)
would be very high. In such a context, generality, and its counterpart equality may also get eroded.

Even in the midst of the creative and progressive aspects of the decision, the holding in *Indira Gandhi* is defective in the above respects. Further, the holdings of the Judges cannot be considered as fine examples of judicial craftsmanship. Though the Judges incorporated some aspects as ingredients of the doctrine of basic structure, it is pointed out that they were not much confident and they based their decisions on the doctrine of basic structure only for judicial self-discipline and not because they subscribed to the doctrine.\(^{56}\) That may perhaps be the reason that they were not much emphatic and vociferous in invoking the doctrine of basic structure in determining the validity of the 39th amendment to the Constitution. The Judges fell back upon the doctrine as if they had no other option. It was observed that the law stood as decided in *Kesavananda*,\(^{57}\) that the decision was to be accepted dutifully and without reserve as good law,\(^{58}\) that it need not be challenged,\(^{59}\) and that *Kesavananda* was binding upon the Court\(^{60}\) though the Judges did not share the view of the majority in it.\(^{61}\) These observations implicitly make it clear that the Judges did not agree with the majority decision in the *Kesavananda* Case. They held democracy and rule of law as part of the basic

\(^{56}\) Cf. Upendra Baxi, *Courage, Craft and Contention* (1985), p. 79. He observes, "These Justices had applied the doctrine of basic structure in *Indira Nehru Gandhi*, partly as a response to the need for institutional survival and partly as a matter of judicial self-discipline.

\(^{57}\) *Supra*, n. 6 at p. 78 (Khanna J.)

\(^{58}\) *Id.* at p. 246 (Chandrachud J)

\(^{59}\) *Id.* at p. 35 (A N Ray C J)

\(^{60}\) *Id.* at p. 198 (Beg J)

\(^{61}\) *Id.* at p. 119 (Mathew J)
structure of the Constitution only because of their inability to ignore the Kesavananda decision. The desire of Judges not to lay too much stress on the basic structure and rely upon it is clear from another aspect also. After the conclusion of the 35 day long arguments but before the decision was delivered, the Court decided to review the decision of Kesavananda.\(^62\) The attempt of the Court undoubtedly was to trim if not to overrule the scope and extent of Kesavananda.\(^63\)

Similarly, the rationale adopted by the Judges to invalidate and strike down Article 329 (4) also reveals that they were not in agreement with the earlier decision. Though the Court struck down the amendment as invalid, some of the Judges either did not seek the help of the doctrine of basic structure for invalidating the impugned provision\(^64\) or sought its help in a roundabout manner. Thus Chief Justice Ray declared the amendment invalid on the ground that it left elections of Prime Minister and Speaker beyond the reach of any law and without any forum for settling disputes in relation to their election.\(^65\) Similarly, Justice Mathew also struck down it on the ground that it left those elections beyond the reach of any law.\(^66\) A reading of the judgements indicate that Chief Justice A.
N. Ray and Justice M. H. Beg were totally indifferent to the doctrine of basic structure and they wanted to avoid the doctrine at any cost. While the holdings of Justice Mathew and Justice Chandrachud indicate that they were forced to the conclusion out of sheer helplessness. Only Justice Khanna followed the doctrine as expounded in an unconditional style. In short, though the Judges recognised the doctrine of basic structure, there was a visible defecence on their part to seek support from the doctrine for striking down the impugned amendment. But one need not be surprised over such an approach of the Court. For, the majority of the judges who decided *Indira Gandhi* was in the minority in *Kesavananda* and they rejected the doctrine of basic structure in that case. Among those who subscribed to the formation of the doctrine only Justice H. R. Khanna was there in the bench, which decided *Indira Gandhi's Case*.

The judicial dialect in *Indira Gandhi*, in short, exhibits an unusual rendezvous of creativity and restraintivism. It was creative in identifying some features of the Constitution of India as its basic structure and giving a firm basis to the doctrine. The diffidence of the Judges to make the doctrine the ratio of their decision to nullify the amendment and the refusal of the Court to recognize important pillars such as separation of powers and judicial review as the basic structure of the Constitution illustrate the restraintivism of the Court. However, with the decision in *Indira Gandhi*, the position of the doctrine of basic structure was more or less secured. For, even the Judges who did not agree with the *Kesavananda* doctrine, applied it in the *Indira Gandhi*.

67 *Indira Nehru Gandhi* did not decide what the ratio of *Kesavananda* was. Rather it assumed it *ex-concessionis* and proceeded to apply it, not without much strain and difficulty." Upendra Bas, *op cit.* at p 71.
What is to be analysed next is whether the Supreme Court invoked the doctrine in all necessary cases and also whether it made use of the doctrine in the correct and proper way. The decision in Indira Gandhi was not the end of the doctrine. It, on the other hand, was only the beginning.

A few years later the question of application of the doctrine of basic structure again came up before the Court in Minerva Mills v. Union of India. In this case the scope and ambit of the power of Parliament to amend the Constitution and the role of the judiciary in reviewing the exercise of such a power again came up for consideration when the validity of the amendments to Articles 31 C and 368 made by 42nd amendment to the Constitution was challenged. By section 4 of the Amendment Act, Article 31 C was amended to save laws inconsistent with Articles 14 or 19 enacted for giving effect to the directive principles. It further provided that no such law should be called in question on that ground. By the same amendment Act, Article 368 was amended to include in it new clauses (4) and (5). Those clauses conferred on Parliament unlimited power to amend the

69 It was a writ petition filed under Article 32 of the Constitution against the acquisition of the petitioner company by the Government of India under the Sick Textiles Undertaking (Nationalisation) Act 1974. The legislation was incorporated in the IX Schedule of the Constitution by the Constitution 39th Amendment Act. It means that it was beyond the scope of challenge of Courts. However the petitioner could not challenge the validity of the amendment by virtue of Article 368 clauses (4) and (5) which incorporated into the Constitution by the Constitution 42nd amendment Act, 1976 as they conferred unbridled power on Parliament to amend Constitution and excluded judicial review. Therefore the petitioner inter alia challenged the validity of the 42nd amendment Act on the ground that it violated the basic structure of the Constitution.
70 For the provision, see, infra, n. 89.
Constitution and prohibited judicial review of constitutional amendments. These amendments were challenged on the ground that they violated the basic structure. The Court held that the power of Parliament to amend the Constitution was not unlimited. The Constitution conferred on Parliament only a limited power to alter it. Limited amenability of the Constitution was a feature of the basic structure. Unlimited power to amend the Constitution, wielded by Parliament by the impugned amendment was counter to the basic structure of the Constitution namely, the limited amendability. Therefore, Parliament could not amend the Constitution to confer unlimited amending power on it. The Court therefore struck down clauses (4) and (5) of Article 368 as incorporated by the 42nd amendment Act.

It is true that in *Kesavananda* the Court limited the power of Parliament to amend the Constitution. But the Court did not conclusively hold in that case that limited amendability of the Constitution was a feature of its basic structure. In

---

71 Article 368(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 (42nd 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.”

72 The Court held,” Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368 expand its amending power so as to acquire itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.” *Supra*, n. 68 at p. 1798 (per Chandrachud, JJ.)

73 *Supra*, n.68 at pp. 1799 and 1826 –1827.
such a context, Parliament could undo the results of Kesavananda by a declaration that its power to amend the Constitution is unlimited. In other words, Parliament by amending the Constitution could dispel the limitations on its amending power since limited amendability had not been held as a feature of the basic structure of the Constitution. That exactly is what was done by Parliament by incorporating clause (5) to Article 368 by the 42nd amendment Act. Obviously, such an understanding of the constituent power of Parliament would take back the amendment jurisprudence to the pre-Kesavananda stage, leaving Parliament the sole, unlimited and ultimate custodian of amendment powers. The holding of the Court in Minerva Mills that limited amendability itself is a feature of the basic structure is to be appreciated against this background. Such a holding foreclosed any future possibility of nullifying the consequences of Kesavananda on the power of Parliament to amend the Constitution. By the decision, the Court has done away with the possibility of converting the power of Parliament to amend the Constitution as an unlimited one. The decision in Minerva Mills therefore has a very innovative operation. It deserves specific mention that the decision was reached after taking into account the consequence of a contrary interpretation. The Court reached the conclusion that Parliament has got only a limited power to amend the Constitution after examining what might happen if the limited amendability theory was rejected. Chief Justice Chandrachud, speaking for the Court observed that clause (5) of Article 368 could abrogate democracy and substitute it with a totally antithetical form of government denying people social,

74 Supra, n.71. See also Baxi, op. cit. at p. 84. He observes, "The removal of the basic structure limitation was the sole objective of the Forty Second Amendment Act legislated during the emergency".

75 Supra, n.68 at p. 1798.
economic and political justice by emasculating liberty of thought, expression, belief, faith and worship and by abjuring commitment to the ideal of a society of equals. In other words, no “constitutional power can conceivably go higher than the sky-high power conferred by clause (5)…” It is on these grounds that the Court held that limited amendability itself was an ingredient of the basic structure. Justice Bhagawati in his separate and concurring judgement agreed with this view holding that what was conferred by the Constitution was only a limited amending power which therefore cannot be converted into an absolute and unlimited one and therefore clause (5) of Article 368 was unconstitutional.

It is clear that incorporation of limited amendability itself was very much essential for the continued life of Kesavananda. Therefore, in the absence of Minerva Mills decision, Kesavananda might have been left to oblivion by arbitrary invocation of Article 368. In short, the decision of Minerva Mills that limited amendability of the Constitution is an essential ingredient of the basic structure provides a creative addition to the concept of constituent power of Parliament and

---

76 Ibid.  
77 Ibid.  
78 Justice Bhagawati held, “Therefore, after the decisions in Kesavananda Bharati’s case, and Smt. Indira Gandhi’s Case, there was no doubt at all that the amendatory power of Parliament was limited and it was not competent to Parliament to alter the basic structure of the Constitution and Cl (5) could not remove the doubt which did not exist. What Cl.(5) really sought to do was to remove the limitation on the amending power of Parliament and convert it from a limited power into an unlimited one. This was clearly and indubitably a futile exercise on the part of Parliament. I fail to see how Parliament which has only a limited power of amendment and which cannot alter the basic structure of the Constitution can expand its power of amendment so as to confer upon itself the power of repeal or abrogate the Constitution or to damage or destroy its basic structure.... This clause seeks to convert a controlled Constitution into an uncontrolled one by removing the limitation on the amending power of Parliament which, as pointed out above, is itself an essential feature of the Constitution and it is therefore violative of the basic structure.” (at pp. 1826-1827)
the meaning of amendment under Article 368. The decision therefore guarantees the continued existence of the doctrine of basic structure in the Indian constitutional jurisprudence.

However the holding is liable to be frowned at by traditional constitutional lawyers. It can be criticized on the ground that the constituent power contains in it legislative, executive and judicial powers and is *sui generis* in nature. The holder of the constituent power is recognized as absolutely supreme. Like legislature in the legislative sphere, it is supreme within its sphere and is not liable to be interfered with by any other authority including the judiciary. The judiciary cannot dictate terms to such an authority as to how the power is to be exercised. But such a criticism has another side also. Who is the holder of constituent power? Can we say that the constituent power is wielded by Parliament alone? Does not judiciary have a share in its exercise? Is it true that Article 368 confers Parliament with the power to amend the Constitution in any manner it likes? The power to enact a Constitution is different from the one to make alterations in it. The former may be extra-constitutional in nature while the latter is one derived from the Constitution. Consequently, the former is not subject to any limitations. But the latter would be subject at least to the limitations expressly envisaged by the Constitution. The Court also seems to have accepted such a difference between the enactment of the Constitution and its amendment. Further, it is well accepted that interpretation of the Constitution is a function conferred on the judiciary. The power to amend the

79 *Supra*, n.72 at p.1798. It was held, “Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power.”
Constitution being one derived from the Constitution, the final authority to
determine its scope and ambit is the judiciary. In such a sense, the judiciary also
can be said to have a share in the constituent power. Viewed from such an angle,
the holding of the Court cannot be considered as one, which lays down wrong law.

Another question that was looked into by the Court was whether judicial
review could be abolished by amending the Constitution. The Court had to address
itself to such a question in view of incorporation of clause (4) in Article 368 which
sought to deprive the courts of their power to examine the validity of amendments
to the Constitution. The answer to that question depends upon whether judicial
review formed part of the basic structure of the Constitution. Deprivation of
judicial review may lead to upset of the nice balance of power established by the
Constitution. This in its turn may lead to deprivation of fundamental rights
including that provided by Article 32. It may then lead to a circumstance when
even the ordinary laws may escape judicial scrutiny. The Court therefore held
that judicial review was also a part of the basic structure of the Constitution. It was
held that judicial review could not be amended out of the Constitution and the

\[80\] Id. at p.1799. The Court held, "The newly introduced Clause (4) of Art.368 must
suffer the same fate as Clause (5) because the two clauses are inter-linked. Clause (5)
purports to remove all limitations on the amending power while Clause (4) deprives the
courts of, their power to call in question any amendment of the Constitution.... It is the
function of the Judges, nay their duty, to pronounce upon the validity of laws. If courts
are totally deprived of that power the fundamental rights conferred upon the people will
become a mere adornment because rights without remedies are as writ in water. A
controlled Constitution will then become uncontrolled. Clause (4) of Article 368 totally
derives the citizens of one of the most valuable modes of redress which is guaranteed by
Article 32. The conferment of the right to destroy the identity of the Constitution coupled
with the provision that no court of law shall pronounce upon the validity of such
destruction seems to us a transparent case of transgression of the limitation on the
amending power.... If Clause (5) is beyond the amending power of the Parliament, Clause
(4) must be equally beyond that power and must be struck down as such."
Court struck down clause (4) of Article 368. The response of Justice Bhagawati on this issue was more vociferous. Agreeing with the view of the Court, he observed that judicial review was part of the basic structure of the Constitution on the ground that without it, government of laws and rule of law would cease to exist and hence its absence may lead to the death knell of democracy and rule of law. Thus he considered judicial review as part of the basic structure of the Constitution on the ground that its absence may adversely affect the existence of two other aspects which are already recognized as basic structure of the Constitution of India, viz., democracy and Rule of Law. If judicial review was held as not an essential ingredient of the basic structure and hence amenable to the amending powers, it would be convenient for Parliament to exclude judicial review in areas it poses a serious threat to the arbitrariness of Parliament and executive.

A careful examination of this aspect reveals a slight deviation in judicial craftsmanship and the approach of the Court in developing the concept of basic structure from the earlier cases. In the earlier instances, the Court identified certain aspects as ingredients of basic structure on the ground that they themselves

---

81 Ibid
82 Ibid at pp. 1825-1826. He observed, “The power of judicial review is an integral part of our constitutional system and without it, there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution... So also if a constitutional amendment is made which has the effect of taking away the power of judicial review and providing that no amendment made in the Constitution shall be liable to be questioned on any ground, even if such amendment is violative of the basic structure and, therefore, outside the amendatory power of Parliament, it would be making Parliament sole Judge of the constitutional validity of what it has done and that would, in effect and substance, nullify the limitation on the amending power of Parliament and affect the basic structure of the Constitution. The
were the pillars upon which the Constitution of India rests. In this case, on the other hand, the Court held that judicial review was an ingredient of the basic structure not merely because it formed one of the foundation pillars of the Constitution, but it was so, because the Court thought that its absence might silently and gradually eat away the features which the Court had already identified as very basic to the Constitution.

Nevertheless, the holding of the Court in *Minerva Mills* that judicial review formed part of the basic structure is another facet of its creativity. The holding on this count is the disapproval and overruling of the decision in *Indira Gandhi's Case* in which the Court held that judicial review did not form part of the basic structure. For the maintenance of judicial review separation of powers becomes unavoidable. Hence if judicial review forms part of the basic structure of the Constitution, separation of powers also should be an element of the basic structure. Though the Court did not explicitly hold so, there are some indications in *Minerva Mills* to such an effect. By the decision in *Minerva Mills* Case, the holdings to the contrary in the *Indira Gandhi* were overruled and the discussions of the concept of basic structure were more crystallised.

Conclusion must therefore inevitably follow that clause (4) of Article 368 is unconstitutional and void as damaging the basic structure of the Constitution."

83 *Supra*, n. 53.

84 It was held, "Our Constitution is founded on a nice balance of power among the three wings of the State, namely, the Executive, the Legislature and the Judiciary"(*Supra*, n. 68 at p. 1799)
Another question that sprung up in *Minerva Mills* was the relative importance of fundamental rights and directive principles. This question was dealt with by the Court in the context of the amendment of Article 31C. From the very inception of the Constitution, the question whether fundamental rights were to be given pride of place or whether the directive principles were entitled to be so placed was a matter of heated dispute. The question is not easy to answer. If either of them is considered as more important, the other is to be sacrificed for it. If fundamental rights were treated as of higher importance, the State cannot legislate in such a manner as to abridge the fundamental rights even in furtherance of the directive principles. If on the other hand, directive principles were considered to be of much importance, legislative power could be exercised even to the level of abridging or abrogating fundamental rights. Can either of them claim pride of place over the other? There are two schools of thought in this issue. One school holds that the fundamental rights should be given predominance over the directive principles. The other school gives pride of place to directive principles on the view that the directives are more important than the rights. In the earlier stages the Court conferred priority to fundamental rights. Later, the Court changed its view and held that in case of conflict, it is the directive principles, which should prevail over the fundamental rights. Still later the Court took a view that neither of the above views would solve the problems of Indian society and held that that there was no conflict between fundamental rights and directive principles and that

---

85 For a treatment of the subject, see, *infra* Part III, Chapter VIII.


there was a balance between them. However the issue came afresh before the Court in *Minerva Mills*, since by the 42nd Amendment Act, Parliament amended Article 31-C to give superiority to directive principles over the fundamental rights. It empowered the State to legislate in furtherance of directives even to the level of extirpation of the basic rights. The holding of the Court that the contents of Parts III and IV had equal importance was upset by the 42nd Amendment Act. It is likely that conferment of such a power on Parliament may lead to legislative autocracy. The Court is the guardian of the fundamental rights of the people. The Constitution provides that legislation contrary to fundamental rights is void *ab initio*. The Court therefore held in the *Minerva Mills Case* that Part III and IV together constituted the core of commitment to social revolution. They were like two wheels of a chariot. Hence, the Constitution of India is built to run smoothly on a fine balancing of the two wheels namely, Parts III and IV. Therefore, one cannot be given primacy over the other. The harmony and balance between them, according to the Court was an essential feature of the basic structure of the

---


89 The relevant portion of Article 31-C as amended by the 42nd Amendment Act reads, "Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19... and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy (Emphasized clauses were incorporated by the 42nd amendment Act).

90 *Supra*, n. 88.

91 See Constitution of India, Article 32

92 Article 13 (2)
Constitution of India.\textsuperscript{93} The Court therefore concluded\textsuperscript{94} that section 4 of the 42\textsuperscript{nd} Amendment Act, by which Article 31 C was amended, was beyond the scope of the power of Parliament under Article 368 as it breached the benign balance between fundamental rights and directive principles, which is an ingredient of the basic structure of the Constitution.\textsuperscript{95} Thus the holding in \textit{Minerva Mills} projects another aspect of innovation of the Supreme Court in relation to the doctrine of basic structure.

On the whole, \textit{Minerva Mills} is a comprehensive decision bringing three things to the limelight. Parliament cannot treat on its sweet will and pleasure the Constitution as the play thing as its power to amend itself is limited in nature; its...
power to amend can be exercised only without disturbing the balance between the rights conferred on the people and the legislative power of the State and Parliament cannot do away with judicial review contained in the provisions of the Constitution. By bringing these aspects under the rubric of basic structure, the Court was able to concretize the concept of basic structure and put it as a stumbling block on the arbitrary exercise of constituent power by Parliament.

The value of these creative aspects gets increased for the reason that such drastic changes have been brought about by a Judge who at the nascent stages of the evolution of the doctrine of the basic structure stood against the doctrine. Chief Justice Chandrachud, who rendered the decision of the Court in Minerva Mills was the only Judge who had participated in the earlier two cases, namely Kesavananda and Indira Gandhi. In Kesavananda, he had stood for unlimited amending power of Parliament and rejected the theory of implied limitations and the doctrine of basic structure.96 In Indira Gandhi, on the other hand, even though he recognized the doctrine of basic structure and decided that case accordingly, he held that judicial review did not form part of the basic structure.97 In Minerva Mills in which Chief Justice Chandrachud rendered the judgement of the Court is proof of the unconditional acceptance and widening of the doctrine of basic structure by a Judge who once had stood against it. Such a creative development of the judicial process has been appreciated by a renowned jurist as "a pilgrim's progress."98

96 Supra, chapter VI, n. 30 at p. 689.
97 Supra, n. 52.
98 Upendra Baxi, op. cit. at p. 86.
It is clear from the above discussion that the Court was able to identify some important aspects of the Constitution as the ingredients of the basic structure. Inclusion of any aspect into the doctrine naturally implies that it becomes a basic feature of the Constitution. A question springs up here. Can there be a substitute for a feature that has been recognized as an ingredient of basic structure? The expression basic structure ex *factoe means that it is basic and cannot be altered or substituted since the basic structure constituted the unalterable features of the Constitution. But the Supreme Court was not emphatic of that view when the issue came up before the Court in *S.P. Sampath Kumar v. Union of India*. While challenging the vires of the Administrative Tribunals Act, the question mooted was whether judicial review could have an alternative. The Court did not disagree with the decision on *Minerva Mills* that judicial review formed part of the basic structure of the Constitution. But the Court held in *Sampath Kumar* that a legislation could be considered violative of the Constitution only if it took away judicial review in toto. This means that partial prohibition of judicial review would not be bad on the ground that it violated the basic structure. Agreeing with and drawing conclusions from the holding of Justice Bhagawati in the *Minerva Mills*, the Court further held that the presence of effective alternative mechanisms or arrangements for settling disputes would be a constitutionally viable alternative for judicial review. Justice Bhagawati who rendered a

---

99 A.I.R 1987 S.C. 386. A petition was filed under Article 32 challenging the vires of the Administrative Tribunals Act, 1985. The Act framed under Article 323-A (incorporated by the 42nd constitutional amendment act) was challenged on the ground that Section 28 of the Act, which excluded jurisdiction of the High Court under Articles 226 and 227 struck at the root of one of the features of the basic structure viz., judicial review.

100 Supra, n. 82.

101 Supra, n. 99 at p. 395. The Court held, “We have already seen that judicial review by this Court is left wholly unaffected and thus there is a forum where matters of importance
separate opinion concurred with it. Hence the Court refused to strike down the statute as violative of judicial review. However the Court incorporated a word of caution of substituting judicial review thus, 

"What, however, has to be kept in view is that the Tribunal should be a real substitute of the High Court—not only in form and de jure but also in content and defacto."

The Court held that the impugned Act did not annul judicial review since the jurisdiction of the Supreme Court under Articles 32 and 136 remained in tact even after the amendment of the Constitution and incorporation of Article 323A. The Court did not agree with the view that the Tribunals should be supplemental to and not substitution of High Courts. Clearly, as a result of the holding, importance of judicial review as a basic structure is watered down since it was held substitutable by alternatives.

By holding that the Administrative Tribunals Act was constitutionally valid, the Court digressed from the real issue involved in the case. The question that really emerged before the Court was the validity of the 42nd Amendment Act, which added Article 323A to the Constitution, which permitted reduction of the

and grave injustice can be brought for determination or rectification. Thus exclusion of the jurisdiction of the High Court does not totally bar judicial review. This Court in Minerva Mills Case did point out that 'effective alternative institutional mechanisms or arrangements for judicial review can be made by Parliament. Thus it is possible to set up an alternative institution in place of the High Court for providing judicial review.'

102 Id. at pp. 389-390.
103 Supra, n. 99 at p. 396.
104 Id. at p. 395.
scope of judicial review. However instead of dealing with this issue, the Court preferred to deal with the vires of the statute. The Court avoided dealing with the validity of the amendment act by examining the vires of the impugned statute, striking down some of the provisions and proposing some changes to others. Justice Bhagawati observed that in view of Minerva Mills, judicial review could not be abolished and so the amended provision in the Constitution is to be viewed as one which provided for effective alternative schemes for judicial review. Such an interpretation of the amendment amounts to an attempt on the part of the Court to save the 42nd Amendment Act. It also does not take into account fully the purpose of the introduction of the concept of basic structure and undoubtedly reduces the status of basic structure in the constitutional jurisprudence. The holding is an indication that each and every feature of basic structure could be substituted. Such a state of affairs is certainly dangerous and would defeat the very purpose for which the doctrine has been introduced.

In P. Sambamurthi v. State of A. P., the Court exhibited a consistent view in this respect. In that case, the constitutional validity of clauses (3) and (5) to

---

105 Id. at p. 390. He observed, "If this constitutional amendment were to permit a law made under Cl. (1) of Art. 323A to excludes the jurisdiction of the High Court under Arts. 226 and 227 without setting up an effective alternative institutional mechanism or arrangement for judicial review, it would be violative of the basic structure doctrine and hence outside the constituent power of Parliament. It must, therefore, be read as implicit in this constitutional amendment that the law excluding the jurisdiction of the High Court under Arts. 226 and 227 permissible under it must not leave a void but it must set up another effective institutional mechanism or authority and vest the power of judicial review in it."

106 It is worthwhile to mention that the vires of the amendment act was not challenged by the petitioner either.

107 A.I.R. 1987 S.C. 663. They were writ petitions challenging the constitutional validity of clauses (3) and (5) of Article 371-D of the Constitution.
Article 371D as inserted by the 32nd Amendment Act 1973 were challenged on the ground that they ran counter to judicial review which was a feature of the basic structure. The Court struck down Proviso to clause (5) of Article 371D, which declared that the order of Administrative Tribunals could be modified or annulled by the government. The impact of the amendment is clear. Even if the Tribunal rendered a decision, without the consent of the government, its order could not be implemented. The Court observed that such a provision ran counter to the basic principle of rule of law. The Court held, 

"It is through the power of judicial review conferred on an independent institutional authority such as the High Court that the rule of law is maintained and every organ of the State is kept

---

108 Article 371D is a special provision with respect to the State of Andhra Pradesh. Clause (3) of the Article reads thus, "The President may, by order, provide for the constitution of an Administrative Tribunal for the State of Andhra Pradesh to exercise such jurisdiction, power and authority [including any jurisdiction, power and authority which immediately before the commencement of the Constitution (Thirty-second Amendment Act,) 1973, was exercisable by any court (other than the Supreme Court) or by any tribunal or other authority] as may be specified in the order with respect to the following matters namely:-

(a) appointment, allotment or promotion to such class or classes of posts in any civil service of the State, or to such class or classes of civil posts under the State, as may be specified in the order,

(b) seniority of persons appointed, allotted or promoted to such class or classes of posts in any civil service of the State, or to such class or classes of civil posts under the State, or to such class or classes of posts under the control of any local authority within the State, as may be specified in the order,

(c) such other conditions of service of persons appointed, allotted or promoted to such class or classes of posts in any civil service of the State or to such class or classes of civil posts in any civil service of the State or to such classes of posts under the control of any local authority within the State, as may be specified in the order,

Clause (5) reads thus, "The order of the Administrative Tribunal finally disposing of any case shall become effective upon its confirmation by the State Government or on the expiry of three months from the date on which the order is made, whichever is earlier,

Provided that the State Government may, by special order made in writing and for reasons to be specified therein, modify or annul any order of the Administrative Tribunal before it becomes effective and in such a case, the order of the Administrative Tribunal shall effect only in such modified form or be of no effect as the case may be.

109 Id. at p. 667.
within the limits of the law. Now if the exercise of the power of judicial review can be set at naught by the State Government by overriding the decision given against it, it would sound the death knell of the rule of law. The rule of law would cease to have any meaning, because then it would be open to the State Government to defy the law and yet to get away with it. The Proviso to clause (5) of Article 371-D is therefore clearly violative of the basic structure doctrine.”

In other words, the Court struck down the Article 371-D on the ground that it did not constitute an effective alternative for judicial review, which is ingredient of basic structure of the Constitution and not because it excluded judicial review.111

The decisions in Minerva Mills, Sampath Kumar112 and Samba Murthi114 share some common features. In all of them judicial review was recognised as part and parcel of basic structure not in an independent capacity but as one necessary for guaranteeing the continuance of the aspects of the Constitution which the Court recognized as ingredients of the basic structure. Incorporation of judicial review in the category of basic structure was out of the fear of the Court that its absence

110 Id. at p. 668.
111 For, the Court held, “No constitutional objection to the validity of Cl.(3) of Art.371-D could be possibly be taken since we have already held in S.P.Sampath Kumar v. Union of India, decided on 9th December 1986 that judicial review is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution, but Parliament can certainly without in any way violating the basic structure doctrine amend the Constitution so as to set up an effective alternative institutional mechanism or arrangement for judicial review.”
might lead to termination of democracy and decadence of rule of law. That perhaps is the reason for the Court to hold in all of these cases that though judicial review cannot be abrogated, it could be partially excluded and substituted by an equally efficacious and alternative remedy.\textsuperscript{115} The idea that even if a feature is an ingredient of basic structure, it could have a substitute was raised for the first time by Justice Bhagawati in the \textit{Minerva Mills Case}.\textsuperscript{116} It is doubtful whether feasibility of such a proposition was examined by the Court in a proper perspective in \textit{Sampath Kumar} and \textit{Sambamurthy}. If a feature is identified as an ingredient of the basic structure, it implies that it is so important for the maintenance of the identity of the Constitution. In such a context it is doubtful whether it can be substituted by any other scheme at all. For, substitution of such a feature by any other concept may help destroy some of the characteristics of the basic structure and amounts to watering down its contents. Further, it would also imply that the feature is not so essential one. Moreover, judicial review is imbued with certain features that cannot exist in its absence. The training of a judicial mind and the independence extended to the judicial officers are some of the prerequisites for effective judicial review, which are absent in any mechanism other than judicial review howsoever efficient it be. Therefore, the holding of the Court that though judicial review constitutes a part of basic structure, it can be substituted by equally efficient methods is certainly open to objection.

\textsuperscript{115} Supra, nn 82, 101 and 110.

\textsuperscript{116} Supra, n. 68 at pp. 1825-1826.
It is in such a context that the decision of *L. Chandra Kumar v. Union of India* becomes highly relevant. This case was decided by a constitutional bench consisting of nine Judges. The Court reiterated its stand in *Minerva Mills* that judicial review was a feature of the basic structure of the Constitution. The Court further held that the jurisdiction of the Supreme Court under Article 32 and that of the High Courts under Articles 226 and 227 also formed part of the basic structure of the Constitution and therefore they cannot be ousted or excluded at all. It was justified on the ground that the jurisdiction of High Court under Articles 226 and 227 was as important as that of the Supreme Court under Article 32. The Court highlighted the importance of judicial review on the basis of the independence enjoyed by the judiciary. In reaching the conclusion that Article 32 formed part of the basic structure, the Court might have been influenced by the observation made by Dr. Ambedkar at the time of enacting the provision in the Constituent Assembly that it was the most important one in our Constitution. On a variety of

117 A.I.R. 1997 S.C. 1125. It was a group of special leave petitions, civil appeals and writ petitions with certain common questions. Questions raised in these cases were whether the power under Article 323 A (2) (d) or Article 323 B (3) (d) of the Constitution conferred on Parliament totally exclude jurisdiction of all courts except that of the Supreme Court under Article 136; whether the disputes and complaints raised in respect of the exercise of power under Articles 323 A clause (1) or Article 323 B (2) were beyond the scope of the power of judicial review of High Courts under Articles 226 and 227 and that of the Supreme Court under Article 32 and whether the Tribunals constituted under Articles 323 A and B be considered as effective substitutes for High Court.


119 *Supra*, n. 117 at p 1150.

120 *Ibid.* The Court observed, "If the power under Article 32 of the Constitution, which has been described as the "heart" and "soul" of the Constitution, can be additionally conferred upon "any other Court," there is no reason why the same situation cannot subsist in respect of the jurisdiction conferred upon the High Courts under Article 226 of the Constitution."

121 *Id.* at p. 1149.

122 C.A.D. Vol. VII p. 953. He said, "If I was asked to name any particular Article in this Constitution as the most important-an Article without which the Constitution would
grounds, the Court considered the powers vested in High Courts under Articles 226 and 227 as very important and could not be excluded. The Court observed that administration of justice by Tribunals leaves much to be desired and the remedy under Article 136 was too costly and would lead to crowding of cases in the Supreme Court. Therefore, the Court held that decisions of Tribunals were reviewable by Division Bench of High Courts. The Court further extended the scope of judicial review to include specifically jurisdiction of judicial superintendence by High Courts over the decisions of all courts and tribunals within their respective jurisdictions as envisaged by the Constitution of India. In short, the Court deviated from its earlier stand in Minerva Mills, Sampath Kumar and Samba Murthi that judicial review could be substituted by equally effective methods and clarified that judicial review as envisaged by Article 32, 226 and 227 cannot in any way be substituted. The Court further held that the jurisdiction of Tribunals was only supplemental to and not in substitution of the review power of High Courts. Clearly, it is only after the decision of Chandra Kumar that the

be a nullity- I could not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance."

123 Supra, n. 117 at p. 1150.
124 Id. at p. 1153.
125 Id. at p. 1154.
126 Ibid. It is worth mentioning that the Court specifically held that review of decisions of Tribunals and questions regarding the validity of the constitution of Tribunals were to be dealt with only by Division Benches of High Courts.
127 Id. at p 1150. The Court held, “We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all Courts and Tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided”.
128 Id. at p.1156. However, the Court pointed out that in the prevailing circumstances, the workload pending in High Courts was very high and therefore, the jurisdiction conferred on Tribunals need not be trimmed to vest full power on
The concept of judicial review got the full-fledged status as a feature of basic structure. The change in the view of the Court in *Chandra Kumar* reflects the correct perception of the Court that judicial review is so important in our legal system that it is a basic feature which cannot be substituted. While in the earlier decisions the Court had given importance to judicial review only as an accessory to some other goals to be achieved by the Constitution, in *Chandra Kumar*, the Court has raised judicial review from its status of an accessory element to the level of a salient feature of the basic structure of the Constitution.

It is evident from the decision in *Chandra Kumar* that the Court considered the status of the higher judiciary as different from that of any other authority. On what reasons can the higher judiciary enjoy superiority over other institutions so as to claim immunity to its review? The Court in *L.Chandralakumar*, addressed itself to these questions and explained the reasons thus:

"While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, and retirement age of Judges as well as mechanism for selecting Judges to the superior Courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed by such provisions, the superior Courts would be insulated from any executive or legislative attempts to interfere with the High Courts. The Court therefore held that Tribunals could hear and decide matters where vires of statutory provisions are questioned. They have the power to test the vires of subordinate legislation and rules. In other words, litigants would not have the right to approach High Courts in the first instance unless the question involved includes one regarding the vires of the parent statute which created the Tribunal. (*Id.* at pp. 1154-1155.)"

*Id.* at pp. 1149-1150.
making of their decisions…. The constitutional safeguards which ensure the independence of the Judges of the superior judiciary are not available to the Judges of the subordinate judiciary or to those who man Tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitute for the superior judiciary in discharging the function of constitutional interpretation.”

In other words, conferment of a higher status to judicial review by the higher judiciary is justified in view of the independence enjoyed by it. Moreover the role of the judiciary is becoming more and more important in the modern world. It means that independence of the judiciary is very vital for the maintenance and upkeep of the confidence reposed upon it in respect of judicial review. Judicial independence would then have to be recognized as an ingredient of the basic structure.

The question of importance of independence of the judiciary was raised before the Supreme Court on many occasions. In *Shri Kumar Padma Prasad v. Union of Indi** the question raised was whether the person who held only non-judicial posts could be appointed District Judge or Judge of High Court. The Court observed that though Judges were used to be appointed from among the members of executive offices, after independence Judges were not being appointed

130 For a detailed discussion of the concept of judicial independence, see, *supra*, Part I, Chapter 1.
131 (1992) 2 S.C.C. 428. That was an appeal from a petition filed before the High Court of Gauhati against appointment of a person as Judge of the High Court on the grounds inter alia that he did not satisfy the constitutionally required qualifications and that the appointment was sought to be effected without the process of consultation envisaged by Article 217(1) of the Constitution.
from such offices. One of the Directive Principles also mandates the State to separate judiciary from the executive, which means that judiciary shall be free from executive control. Such a separation of the judiciary from the executive was necessary for the maintenance of judicial independence. Hence, Justice Kuldip Singh speaking for the Court held that independence of the judiciary was one of the features of the basic structure of the Constitution of India. Addition of judicial independence as a feature of the basic structure is certainly a creative stride of the Court. It was very much necessary also. The necessary implication and clear consequence of the decision is that Parliament cannot amend the Constitution in a manner damaging the independence of judiciary.

Independence of the judiciary received further consideration by a constitutional bench of the Court consisting of nine Judges in *S.C. Advocates-on-Record v. Union of India.* In that case the Court had to deal with important questions relating to appointment of Judges to the Supreme Court; appointment and transfer of Judges to High Courts and the importance and weight the opinion of the Chief Justice of India would carry in those matters. While construing the related provisions in the Constitution, the Court observed that those questions were to be dealt with in the light of the concept of independence of the judiciary. The Court unanimously held that the concept of independence of judiciary was very

---

132 The Constitution of India, Article 50.
133 Supra, n.131 at p. 456. Earlier, in *S.P.Gupta v. Union of India*, 1981 Supp. S.C.C. 87.Bhagwati J. (at p. 221)and Fazl Ali J. (at p. 408) held that independence of the judiciary was also a feature of the basic structure of the Constitution of India.
important from the point of view of the Constitution. The Judges quoted the views of legal luminaries, judicial decisions and other authorities with approval to hold that independence of the judiciary was a cardinal virtue. It was observed that independence of judiciary was very much necessary for the maintenance of rule of law and democracy. Considering its importance in the modern society, the Court unanimously held that the concept of independence of the judiciary formed an essential and basic feature of the Constitution of India. The Court construed the constitutional provisions and rendered the decision in tune with the requirements of the concept of independence of the judiciary.

By the decisions of Shri Kumar and S.C. Advocates the Court added one more feature to the basic structure. The magnitude and the direction of creativity of those decisions are noteworthy. In none of them was there any question regarding amendment of the Constitution with adverse impact on independence of the judiciary. The main question involved in Shri Kumar was the conditions to be

---

135 *Id. per Verma J. (for Dayal, Ray, Anand, Barucha and for himself) at p. 680; Pandian J. at p. 522; Ahmadi J. at p. 601 and Kuldip Singh J. at p. 649.*

136 *Id. per Pandian J. at p. 523 and Kuldip Singh J. at p. 647.*

137 *Id. per Pandian J. at pp. 523-525.*

138 *Id. Verma J. (for the Court) held “These questions have to be considered in the context of the independence of the judiciary, as part of the basic structure of the Constitution, to secure the ‘rule of law, essential for the preservation of the democratic system.’ (At p. 680); Pandian J observed, “To say differently, it is the cardinal principle of the Constitution that an independent judiciary is the most essential characteristic of a free society like ours.” (at p. 522.) Ahmadi J. held, “The concept of judicial independence is deeply ingrained in our constitutional scheme and Article 50 illumines it.” (at p. 640) Kuldip Singh J held, “Independence of the judiciary is the basic feature of the Constitution.” (at p. 665.)

139 For a detailed discussion of the case and the decision of the Court on those points, see *supra,* Part I, Chapters, II – IV
satisfied by an appointee of a High Court while *S.C. Advocates* dealt with the construction of the expression "after consultation with the Chief Justice of India" appearing in Articles 124 (2), 217(1) and 222(1). The Court held that the provisions should be construed in consonance with the concept of independence of the judiciary, which is an essential ingredient of the basic structure. In other words, the Court evolved a new rule of constitutional construction by holding that the provisions in the Constitution should be construed in accordance with a feature of its basic structure, namely, independence of judiciary. The creativity of the decision lies in the holding of the Court that the doctrine of basic structure can be a norm for constitutional construction. Till then the Court was invoking the doctrine of basic structure only to limit the power of the Parliament to amend the Constitution under Article 368. The decisions in *Shri Kumar* and *S.C. Advocates* are creative on two counts. Without any room for doubt the Court held that judicial independence constituted a feature of the basic structure of the Constitution. The Court further by using the doctrine as a touchstone for constitutional construction created a new technique of constitutional interpretation. *S.C. Advocates* is remarkable for the advancement in the technique of judicial dialect also. In the earlier cases, while construing the provisions dealing with judiciary, the Court was considering independence of the judiciary as a desideratum to be achieved through such interpretation. But in *S.C. Advocates*, the Court on the other hand

---

140 Article 124(2) deals with the procedure for appointing Judges to the Supreme Court, Article 217(1) with the procedure for appointing Judges to High Courts and Article 222 (1) regulates the procedure for transferring Judges of High Courts.

141 See, for instance the decision of *S.P. Gupta v. Union of India*, 1981 Supp. S.C.C.87. In this case the Court had to deal with the question of appointment and transfers of Judges to the higher judiciary. The Judges held that the concept of independence of the judiciary was very important as far as the Constitution of India is concerned. However, the Court did not deal with those issues in the light of the concept. For a discussion of these issues, see *supra*, Part I, chapters 2 and 3.
construed those provisions with a presupposition that judicial independence was ingrained in the Constitution of India and that constitutional construction has to be made keeping that in mind.

Another decision relevant in this context is *S.R. Bommai v. Union of India.*\(^{142}\) The Supreme Court had to deal in that case with the scope and ambit of Article 356\(^{143}\) which lays down the conditions and procedure for imposing President's rule in the States. Two important questions were raised *inter alia* before the Court. One was how could it be determined that the administration in a State cannot be carried out in accordance with the provisions of the Constitution enabling the President to invoke Article 356 and dismiss the State government.

The provision just says that the power could be invoked by the President if he is

\(^{142}\) (1994) 3 S.C.C. 1. That is a collection of cases either by special leave appeal or by transfer from High Courts. They however involve a common question as to the interpretation of Article 356, which stipulates for declaration of presidential rule in States and judicial review of such proclamation. Those cases arose out of the dismissal of the Governments of Nagaland in 1987, Karnataka in 1989, and dismissal of the governments and dissolution of the Legislative Assemblies of Rajasthan, M.P. and H.P., in 1992 following the crisis that took place on demolition of the structure in Ayodhya.

\(^{143}\) Article 356 reads, "If the President, on receipt of a report from the Governor... of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President my by proclamation-

(a) assume to himself all or any of the functions of the Government of the State and all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor... or any body or authority in the State other than the Legislature of the State;

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

(c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State;"
satisfied from the report of the Governor or otherwise that the government could not carry out the administration in accordance with the provisions of the Constitution. But it does not explain the circumstances under which it could be inferred whether the government failed to carry out the administration in accordance with the provisions of the Constitution. The other was whether such a decision of the President could be judicially reviewed. While dealing with the first question, the Court held that secularism formed an essential ingredient of the basic structure. The Court held that determination of the issue whether the State Government failed to carry out the administration of the State in accordance with the provisions of the Constitution depended also upon the question whether it failed to uphold and maintain secularism which is an essential ingredient of the basic structure. Such a conclusion was drawn by the Court from the various

144 Supra, n.142 per Ahmedi J. at p. 78; Sawant andKuldip Singh JJ. at p. 149; Ramaswamy J. at p. 170 and Jeevan Reddy and Agarwal JJ. at p.298. Justice Pandian was in agreement with the views of Justice Jeevan Reddy. (at p. 66).

145 Id. per Sawant J speaking for himself and Kuldip Sing said, “One thing which prominently emerges from the above discussion on secularism under our Constitution is that whatever the attitude of the State towards the religions, religious sects and denominations, religion cannot be mixed with any secular activity of the State…. religious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution… If therefore, the President had acted on the aforesaid ‘credentials’ of the Ministries in these States… it can hardly be argued that there was no material before him to come to the conclusion that the Governments in the …States could not be carried on in accordance with the provisions of the Constitution.” (at pp. 146,147 and 148). Justice Ramaswamy observed, “They should not mix religion with politics. … Programmes or principles evolved by political parties based on religion amounts to recognising religion as a part of the political governance which the Constitution expressly prohibited. It violates the basic features of the Constitution…. Any act done by a political party or the Government of the State run by that party in furtherance of its programme or policy would also be in violation of the Constitution and the law. When the President receives a report from a Governor or otherwise had such information that the Government of the State is not being carried on in accordance with the provisions of the Constitution, the President is entitled to consider such report and reach his satisfaction in accordance with law.” (at pp.206-207).

B P Jeevan Reddy J. speaking for himself and Aggarwal J. observed, “If the President was satisfied that the faith of these BJP Governments in the concept of secularism was suspect in view of the acts and conduct of the parties controlling these Governments and
provisions of the Constitution like Articles 25, 26, 27, 28, 29, 30, 31 and 51-A. The concept of basic structure has been invoked by the Court as a criterion to determine the constitutionality of administration carried out by a State Government.

The decision is innovative in that the concept of secularism was recognized as a feature of basic structure. Though the concept of secularism has been considered as an ingredient of basic structure by some of the Judges in various cases right from the decision of Kesavananda, in none of them the Court had held that it formed part of basic structure. Unlike the western concept, in our Constitution, it envisages not an anti-religious idea, but equal treatment of persons irrespective of religion. In other words, secularism indubitably forms an essential feature of the concept of rule of law which, according to the Supreme Court, is a

that in the volatile situation that developed pursuant to the demolition, the Government of these States cannot be carried on in accordance with the provisions of the Constitution, we are not able to say that there was no relevant material upon which he could be so satisfied. If the President was satisfied that the Governments, which have already acted contrary to one of the basic features of the Constitution, viz., secularism, cannot be trusted to do so in future, it is not possible to say that in the situation then obtaining, he was not justified in believing so. (at pp. 295-296). Justice Pandian agreed (at p. 66) with what Justice Jeevan Reddy said. Justice Ahmadi (at p. 78) agreed with the observations of Justice Ramaswamy and Justice Jeevan Reddy on this count.

Articles 25 to 28 deal with the right to freedom of religion. Article 25 provides for freedom of conscience and free profession, practice and practice of religion, 26 with the freedom to manage religious affairs, 27 with freedom as to payment of taxes for promotion of any particular religion and 28 with freedom as to attendance at religious instruction or religious worship in certain educational institutions.

Articles 29 and 30 deal with the cultural and educational rights. Article 29 deals with the protection of interests of minorities and Article 30 with right of minorities to establish and administer educational institutions.

Article 51-A of the Constitution deals with fundamental duties of citizens.

part and parcel of the concept of basic structure. Therefore the thrust of the
directive force of the decision need not be doubted. The consequence of the
holding is that Parliament cannot amend the Constitution to impair any aspect of
the concept of secularism in the Constitution. The decision is creative in another
way also, in that it implies that the act of constitutional authorities can be tested on
the basis of the doctrine of basic structure. The Court rendered a wide
interpretation to the expression, 'provisions of the Constitution' in Article 356 by
including within it secularism - a feature of basic structure. For the first time, the
doctrine has been utilized by the Court as a touchstone of the functions of
constitutional authorities when it was held that constitutionality of actions of the
State Government and justifiability of invocation of Article 356 by the President
could be evaluated on the basis of a feature of basic structure namely, secularism.

Dealing with the question whether the 'satisfaction' and action of the
President under Article 356 were amenable to judicial review, the Judges observed
that the power of the President under the provision could not be exercised in an
arbitrary or malafide manner, and that it was conditional in nature. All of the
Judges were of the opinion that the presidential power under Article was not
unlimited and hence it was unanimously held that the power of the President to

150 See, Indira Gandhi, supra, n. 31.
151 Supra, n.142. at p. 374. (per Sawant J., for Kuldip Singh and himself).
152 Id. at p. 280. (per Ramaswamy J.)
153 Id. per Ahmadi J. at p. 80, Verma J. (for Yogeshwar Dayal and himself) at p. 83; Ramaswamy J. at pp. 177-178 and Jeewan Reddy (for Aggarwal J. and himself) at pp.
246-247.
dismiss the State government was subject to judicial review.\footnote{154} Such a conclusion was reached by the Court on the ground *inter alia* that arbitrary exercise of the power under Article 356 runs counter to the federal structure of the Constitution which according to the Court\footnote{155} was an element of basic structure of the Constitution\footnote{156} and that the President had to exercise the power under Article 356 in such a manner as not to whittle the federal structure down.\footnote{157}

Thus, in the *Bommai's Case*, the doctrine of basic structure has been invoked by the Court for two different purposes. The assistance of one of the features of basic structure—secularism—was sought for assessing the validity of the

\footnote{154} However, there was difference of opinion among the judges as to the scope and extent of judicial review in this respect.

\footnote{155} Though all of the Judges have not used the expression basic structure, it is evident from their holding that they conferred the federal structure of the Constitution the status of basic structure. See, *infra*, n. 157.

\footnote{156} *Supra*, n. 142 *per* Sawant and Kuldip Singh JJ. They held, "Democracy and federalism the essential feature of the Constitution and are part of its basic structure. (at p. 112), Ramaswamy J. observed thus, "Federalism envisaged in the Constitution of India is a basic feature in which the Union of India is permanent within the territorial limits set in Article 1 of the Constitution and is indestructible."(at p. 205) and Jeewan Reddy and Dayal JJ held "Let it be said that the federalism in the Indian Constitution is not a matter of administrative convenience, but one of *principle*- the outcome of our own historical process and a recognition of the ground realities. "(at p. 217). (Emphasis supplied)

\footnote{157} *Id.* *per* Sawant and Kuldip Singh JJ. It was held, "Democracy and federalism are the essential features of our Constitution and are part of its basic structure. Any interpretation that we may place on Article 356 must therefore help to preserve and not subvert their fabric. The power vested *de jure* in the President but *de facto* in the Council of Ministers under Article 356 has all the latent capacity to emasculate the two basic features of the Constitution and hence it is necessary to scrutinise the material on the basis of which the advice is given and the President forms his satisfaction more closely and circumspectly" (at p. 112) Justice Ramaswamy held, "The exercise of power under Article 356 by the President through Council of Ministers places a great responsibility on it and... It is to reiterate that the federal character of the Government reimplies the belief that the people's faith in democratically elected majority or coalition Government would run its full term, would not be belied unless the situation is otherwise unavoidable..." Justice Sawant observed, "Article 365 merely says that in case of failure to comply with the directions [of the centre] given, "it is lawful" for the President to hold that the requisite type of situation [contemplated by Article 356(1)] has arisen. It is not as if each and every failure *ipso facto* gives rise to the requisite situation."
action of the State Government so as to determine whether it was liable to be dismissed under Article 356. Assistance of another feature-federalism—was sought for checking the possibility of arbitrariness of the presidential action. Thus, the Court has projected the doctrine of basic structure as a criterion for assessing the validity of the action of the authorities created by the Constitution.

The decisions in *S.C. Advocates*, and *S.R. Bommai*, project the creative attempts on the part of the Apex Court to use for the doctrine of basic structure in innovative ways. In the former case, the Court has for the first time used it as a tool for constitutional construction while, in the latter it has been used by the Court as a criterion for testing the constitutionality of actions of certain authorities under the Constitution namely the State Government and the President. These decisions clearly indicate the forewarning that in future any exercise of constitutional power by an authority in a way prejudicial to any of the features of basic structure of the Constitution is likely to be struck down as unconstitutional.

There has been thus a high degree of judicial creativity in the process of crystallization and ramification of the concept of basic structure in India. A study of those cases proves that the doctrine has gained an undeniable place in the Indian legal system. The cases testify a saga of assertion of constitutionalism and constitutional principles over the policies of government. They further evidence judicial assertion over actions of other constitutional authorities. These cases testify that the doctrine is ingrained into the Indian constitutional ethos in an unrootable manner. That is evident from the rethinking of Parliament to
incorporate the doctrine of basic structure into the Constitution. It is clear that the doctrine is available now not only for limiting the power of the Parliament to amend the Constitution but also for interpreting the basic document as well as for restraining arbitrary actions of different authorities envisaged by the Constitution. In short, the doctrine of basic structure has gained an incontrovertible status in the Indian constitutional system. It is unlikely that in the future the doctrine would be abrogated rolling back the constitutional position to the pre-Kesavananda days. Nor is it desirable also.

(a) Basic Structure-A Norm for Legislation?

A pertinent question springs up here. Can the doctrine be invoked for evaluating and striking down legislation? Such a question was raised for the first time before the Court in *Indira Gandhi v Raj Narain*. The Court per

158 That is clear from the 45th Constitution amendment bill, which was an attempt on the part of Parliament to incorporate some restrictions on its constituent power under Article 368 by stipulating that in exercise of that power it could not amend the basic structure of the Constitution.

159 This question becomes relevant mainly because, some of the ingredients of basic structure developed by the Court are not referable to any specific provision of the Constitution. Democracy, federalism and independence of judiciary are some of them. In such a context, if basic structure does not form a criterion for testing the validity of legislation, law not violating the provisions of the Constitution, but violative of basic structure would remain valid, which is an absurd proposition.

160 1975 Supp S.C.C1. The respondent challenged the validity of two amendments made to the Representation of Peoples Act, 1950, viz., amendment 58 of 1974 and 40 of 1975. By those amendments, Parliament had validated certain election practices which otherwise would have been invalid. These amendments were challenged by the respondent on a host of grounds including that they violated democracy, which was a feature of basic structure of the Constitution. For a detailed discussion of the case on other issues, see *supra*, nn. 6-67.
majority\textsuperscript{161} held \textsuperscript{162} that the doctrine of basic structure was to be the touchstone of constitutional amendments only and that it could not be a yardstick to determine the constitutionality of exercise of legislation.\textsuperscript{163} Such a legal proposition leads to a situation in which the legislative authority would be able to do certain things, which the constituent authority, the mother of legislative, executive and judicial power cannot do. Undoubtedly such a proposition of law would be absurd. It defeats the very purpose for which the doctrine of basic structure has been introduced into the Indian legal system. Moreover, a theoretical discussion reveals that the doctrine of basic structure carries the characteristics of the basic norm. The \textit{grundnorm} being the basic norm of the legal system, is the criterion for testing the validity of all other norms of the legal system. In other words, to be valid, even the lowest legal norm has to satisfy the requirement of the \textit{grundnorm}.\textsuperscript{164} Further, it is clear from the decisions in which the doctrine has been developed and applied it is clear that the Court has recognized the doctrine of basic structure as part and

\textsuperscript{161} The majority consisted of Ray C.J., Mathew and Chandrachud JJ. (M.H. Beg J. \textit{contra}) However Justice H.R. Khanna refused to express any opinion on this issue as he thought that the case could be decided on other grounds.

\textsuperscript{162} Justice Ray C.J. held, "The contention of the respondent that the Amendment Acts of 1974 and 1975 are subject to basic features or basic structure or basic framework fails on two grounds. First, legislative measures are not subject to the theory of basic features or basic structure or basic framework." (at p. 66)

Justice Mathew observed, "Besides, those cases being cases of legislative validation, need not pass the test of the theory of basic structure which, I think, will apply only to constitutional amendments." (at p. 131.)

Justice Chandrachud held, "The constitutional amendments may, on the ratio of the Fundamental Rights Case, be tested on the anvil of basic structure. But apart from the principle that a case is only an authority for what it decides, it does not logically follow from the majority judgment in the Fundamental Rights case that ordinary legislation must also answer the same test as a constitutional amendment." (at p. 261.)

\textsuperscript{163} Only Justice M.H. Beg held that even legislative powers could be subjected to the doctrine of basic structure. \textit{Id.} at p. 236.

\textsuperscript{164} For a discussion of the concept of basic norm evolved by Kelsen, see, \textit{supra}, Chapter VI, nn.72-83.
parcell of our Constitution. Obviously legislation has to satisfy the requirements of the Constitution including the basic structure. Since the basic structure constitutes the essential aspect of our Constitution, it forms the very foundation of the Indian legal system. The decision in Indira Gandhi that the doctrine of basic structure is not applicable to test the validity of ordinary legislative action is therefore incorrect.

However, in Sampath Kumar, the Court tested the validity of the Administrative Tribunals Act, 1985 on the basis of basic structure. This issue got reconsideration later in G.C. Kanungo v. State of Orissa. The question before the Court was the constitutionality of an amendment effected to the Arbitration Act, 1940 by the State of Orissa to nullify an arbitration award. Holding that the enactment amounted to an encroachment on the judicial power of the State "resulting in infringement of a basic feature of the Constitution - the Rule of Law" the Court struck down the amendment. These decisions through judicial recognition of the doctrine of basic structure as a norm for evaluating the exercise of legislative power, recognise it as a grundnorm of our legal system.

165 Supra, n. 99.
166 Supra, nn.101 and 104.
167 (1995) 5 S.C.C. 96. The amount to be paid by the State to the petitioners (contractors) was fixed by arbitration proceedings. To nullify the liability, the government enacted Arbitration (Orissa Amendment) Act, 1991 amending Arbitration Act, 1940. The constitutionality of the amendment was challenged by the petitioners as violative of Article 14, in a writ petition under Article 32 of the Constitution.
168 Id. at p. 114.
(b) Alteration of Basic Structure

Can the basic structure be altered in any manner? Can we in some way change the identity of our Constitution? If possible, what is the method for doing it? These are some of the doubts that naturally arise at this juncture. The Supreme Court has not so far ventured to make any observation on these issues. But we can deduce some clues from the various decisions of the Supreme Court in this regard. If we say that the basic structure is inalterable, it means that the future generations are always bound by the declarations of the past ones. Incorporation of provisions for amending Constitutions has been justified on the ground that unalterable Constitutions are always prone to be swept away through revolutions. The same is true of basic structure also. Even though basic structure constitutes the fundamental principles upon which the Constitution is erected, there may be occasions on which a nation requires alteration of such fundamentals of the legal system. Therefore the proposition that the basic structure is unalterable on any account cannot be treated as a wise one. Nor have the Judges in any of the cases observed that the basic structure of the Constitution is totally unalterable. The doctrine was introduced by the Apex Court as a limitation on the constituent power of Parliament i.e. the Executive and not on the alterability of the Constitution as such. The doctrine was only a precautionary measure against arbitrary exercise of the constituent power by Parliament. In the absence of such a doctrine, if a government wielded a thumping majority in Parliament, it would be able to amend

\[169\] See, supra, chapter, VI, n 11.
the Constitution in any fashion it likes. Such a check on the constituent power was considered necessary to prevent the possibility of the Constitution becoming a play thing in the hands of the Parliament which is only a delegate of the real sovereign, namely the people. The identity of the Constitution can be altered with the concurrence of the people. In a truly democratic state, nothing should stand in the way of altering the Constitution by the people themselves. In other words, to repeal the Constitution or to alter its identity and to bring forth a new Constitution, referendum can be resorted to even though alteration of the fundamentals of the Constitution cannot be left to the sweet will of the representative body. It may be difficult for a representative legislative body like Parliament to keep themselves away from politics as they are constituted on the basis of political alignments. Constitutions of other nations contain provisions for referring important matters relating to their alteration to the people. The decisions delineating the doctrine of basic structure do not stand in the way of changing them through referendum. Though there is no specific provision in the Constitution of India sanction of the people is the only possible way to get the basic structure amended. But there is a view that basic structure could be amended by Parliament if it has been converted as the Constituent Assembly. This view does not appear to be the correct one since, every time when it seeks to amend the Constitution, Parliament sits as and exercises the powers of the Constituent Assembly and does not act merely in the legislative capacity. In short, there is only one safe and possible method of

---

170 The 24th, 39th and 42nd amendments are the best example for exercise of such a power. In fact such indiscriminate exercise of the power to amend the Constitution has invited the doctrine of basic structure into the legal system. For a detailed discussion on the origin of the doctrine, see supra, chapter VI.

171 See for instance, Federal Constitution of the Swiss Federation, Article 120.
amending the basic structure and that is referendum. 172 Perhaps, the future development of case law may indicate such a course as the permissible method for altering the basic structure of the Constitution.

A discussion of the cases dealing with basic structure reveals the development in the judicial thinking in explaining it. There are two significant aspects to the judicial creativity in this respect. One lies in developing and crystallizing the doctrine. The other rests in the development of the doctrine as a norm for testing the validity of legislative and executive acts and as a tool for interpreting the Constitution. It is yet to be seen whether the doctrine will satisfy the requirements of the next millennium. However, it is beyond dispute that the Supreme Court of India will be remembered for the unique contribution in the constitutional jurisprudence namely, the basic structure.