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Basic Structure Doctrine: Not a Figurehead in the Indian Constitution

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ABSTRACT

The narrative surrounding the impact of the ‘basic structure’ concept on post-emergency constitutional thought in India has been frequently recounted, leading to various conclusions being reached regarding the resulting institutional outcomes. Nevertheless, for the concerning frequency with which they occur, these accounts exhibit a disconcerting resemblance in the types of conclusions they support. The inquiries pertaining to constitutional faith and fidelity, structural essentialism, the boundaries of political growth, and the practical extent of the concept have been addressed in a remarkably similar manner. Collectively, these responses have perpetuated preconceived notions of the flexibility of the Indian Constitution, the decision-making processes within the framework of the basic structure doctrine, and the overall trajectory of constitutionalism. The paper posits that in order to address inquiries regarding constitutional change, identity, and progress, it is essential to rely on a comprehensive framework of the basic structure doctrine that is theoretically robust, and philosophically fruitful. This framework should not assume an inherent conflict between constitutionalism and democracy.

Keywords: basic structure, constitution, critics.

I. INTRODUCTION

To begin with an excerpt from Forrest Grump, “*Life is like a box of chocolates. You never know what you’re gonna get.*”

Navigating the exploration of traditional topics can be challenging, particularly when these concepts remain prevalent in current academic discourse. However, considering their widespread appeal and prevalence, it is much easier to be convinced of the importance of discussing these popular topics in terms of their significance.

The concept of the ‘basic structure doctrine’ is a reoccurring issue in the realm of Indian Constitutional thought. In broad terms, the idea advocates for constitutional essentialism and posits that constitutional revisions should not encompass the revocation of fundamental elements that delineate the constitutional identity. The occurrence of such progress, as per the

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concept, is seen as a significant violation of the essential framework of the Constitution and is invalidated on the grounds of being unconstitutional. Over the course of its history, the Supreme Court of India has engaged in extensive discussions over the appropriateness of these amendments based on the basic structure doctrine of structural essentialism. The concept, which has been the subject of intense controversy since its introduction in the *Kesavananda Bharati*² case also known as the ‘Essential Features Case’, remains a prominent aspect of contemporary discussions surrounding constitutional identity and reform. The immediate utilisation of Kesavananda’s theory was employed to evaluate the constitutional legitimacy of the Twenty-fourth Amendment. The opposition to an unrestricted modifying authority stemmed from concerns that granting such power could potentially jeopardise fundamental rights and other significant aspects of the Constitution.

In the case of *Janhit Abhiyan v Union of India*³, the Supreme Court rendered a divided decision, affirming the constitutionality of the 103rd Amendment to the Indian Constitution. The primary purpose of the Amendment was to establish provisions for affirmative action targeting individuals from economically disadvantaged backgrounds, specifically those falling under the category of economically weaker sections (EWS), as defined by an annual family income of less than Rs 8 lakhs. The decision was divided on two matters, with unanimous agreement among all five justices on two specific issues. Firstly, it was determined that reservations based simply on “economic criteria” do not contravene the fundamental framework of the Constitution. Secondly, it was established that reservations can be extended to unassisted private educational institutions. The Hon’ble Judges had divergent opinions about the third matter, which pertained to the potential exclusion of the Scheduled Castes, Scheduled Tribes, and backward classes from the ambit of reservations for economically weaker sections (EWS). Given that the Court was tasked with evaluating a constitutional amendment, it would be necessary for it to employ the basic-structure test. Although not without flaws, the concept of the “basic structure” has become synonymous with India's constitutional identity, as interpreted by the judiciary. In a general sense, this concept encompasses the notion that there exist specific elements within the Constitution that have progressively developed over time and are not subject to amendment by Parliament. The Court considers these aspects to be crucial components of the Constitution, to the extent that even Parliament, with a special majority, is unable to impair or eradicate them. In essence, the aforementioned collection of concepts and practises, which form a limited set of constitutional principles, are intricately interwoven inside

² Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

³ Janhit Abhiyan v. Union of India (EWS Reservation), (2023) 5 SCC 1.

the framework of the Constitution. Consequently, any attempt to dismantle the basic structure would effectively entail the abolition of the Constitution as a whole, as claimed in most of the judgements.

The Constitution, in this interpretation, conceptualised and defined equality as the absence of prejudice and exclusion. A notable instance illustrating this occurred in 2009, when the Delhi High Court rendered a decision to modify the provisions of Section 377, a law that previously deemed consenting gay intercourse as a criminal offence. According to Gautam Bhatia, the Hon'ble High Court (HC) has combined the Constitution's provisions on equal protection and non-discrimination, so reshaping our comprehension of equality to one that is articulated in terms of non-discrimination. If Justice Bhat's actions were limited to this, it would lack originality and fail to achieve its intended objectives. The subsequent stage that Bhat J. undertakes, which is crucial for assessing a constitutional amendment, involves interpreting this notion of equality within the fundamental framework. Given that this marked the inaugural instance in which the State utilised its constitutional authority to "exclude victims of social injustice," it provided the Court with an occasion to align the norm of non-discrimination with that of equality.

Therefore, an investigation into the validity of the basic structure doctrine necessitates addressing three essential inquiries: In democracies adhering to the concept of separation of powers, is there any justifiable basis for imposing limitations on the legislative authority of the Parliament? Alternatively, in countries like India that possess a written Constitution, the issue is significantly altered: is it justifiable to impose limitations on the authority of the Parliament to modify, amend, or nullify the Constitution through the mechanism of a Constitutional amendment? Furthermore, if the answer is affirmative, one must consider whether the judiciary is the appropriate entity to enforce such a limitation. It is imperative to ascertain the specific elements encompassed within the basic structure doctrine that render it a legitimate constraint, while taking into consideration the principle of separation of powers, with regards to the authority to amend.

II. EVOLUTION OF THE BASIC STRUCTURE DOCTRINE

The theory of the "basic structure" was first implemented subsequent to its presentation in the landmark 1975 case of *Indira Gandhi v. Raj Narain*⁴. The Allahabad High Court rendered a verdict unfavourable to Indira Gandhi, finding her guilty of engaging in electoral malpractices during the Lok Sabha election. This ruling was made in response to a legal challenge presented

⁴ *Indira Nehru Gandhi v. Raj Narain*, (1975) 2 SCC 159.

by her political opponent, Raj Narain. An emergency was officially declared, leading to the passing of the 39th Amendment by Parliament. This amendment effectively prohibits any form of challenge to the election of key political figures, including the President, Vice-President, Speaker, and Prime Minister, regardless of any instances of electoral misconduct. *The five-judge Bench classified the autonomous execution of elections as an integral component of the “basic structure” and determined that any amendments to the Constitution by Parliament that impacted essential aspects such as fundamental rights would be impermissible.*

The concept regained prominence in 1980 with the *Minerva Mills case*⁵, which concerned the 42nd Amendment Act implemented by the government led by Indira Gandhi. The apex court, via a majority decision, *affirmed the authority of judicial review over constitutional modifications.*

The idea of judicial review holds significant importance inside our Constitution, since any attempt to nullify it would have profound implications for the fundamental framework of our constitutional system. According to the judgement, if the power of judicial review is removed through a constitutional amendment and it is stipulated that the validity of any legislation enacted by the legislature cannot be challenged on any grounds, even if it exceeds the legislative authority or violates fundamental rights, it would amount to a subversion of the Constitution. This is because it would undermine the allocation of legislative powers between the Union and the States and render the fundamental rights ineffective and pointless.

According to Advocate Suhrith Parthasarathy, the criticism directed towards the theory can be attributed, at least in part, to the Supreme Court's occasional ambiguous interpretation of the fundamental structure. However, completely dismissing the doctrine due to occasional mishandling by the judiciary would be an overreaction that disregards its potential benefits. The author argues that the fundamental framework of canon law is both legally valid, as it is firmly grounded in the Constitution's textual content and historical context, and morally significant, as it enhances democracy by constraining the ability of a majority government to undermine the core principles of the Constitution.⁶

III. JUDICIAL APPLICATION AND PARLIAMENTARY SOVEREIGNTY

(A) Periodic lens analysis

⁵ *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625.

⁶ Sumeda, 'Explained | Understanding the “Basic Structure” of the Constitution and Jagdeep Dhankar’s Criticism of It' *The Hindu* (25 January 2023) <<https://www.thehindu.com/news/national/explainer-basic-structure-constitution-jagdeep-dhankar-criticism-kesavananda-bharati-supreme-court/article66379371.ece>> accessed 23 October 2023.

The proposition that the modifying power of the Parliament is subject to substantive constraints, was initially argued in the case of *Sankari Prasad Deo v. Union of India*⁷. A Constitutional challenge has emerged in relation to Part III of the Constitution⁸, which encompasses fundamental rights such as the rights to life, equality, freedom of expression, and so forth. The argument in the case of Sankari Prasad was based on the interpretation of Article 13⁹. This article prevents the State from enacting any legislation that violates any of the fundamental rights listed in Part III¹⁰. The contention was made that a Constitutional amendment was legally valid and appropriately referred to as “law”; hence, in accordance with Article 13¹¹, it was deemed inappropriate for the State to modify Part III of the Constitution. The constitution bench of the Supreme Court unanimously dismissed the argument, asserting that the Parliament possesses the authority to modify any article of the Constitution, without any exceptions.

After fourteen years, *Sajjan Singh v. State of Rajasthan*¹² was heard by a Constitution bench. Chief Justice Gajendragadkar and two other justices upheld Sankari Prasad's case. However, Justices Hidayatullah and Mudholkar questioned the verdict. Hidayatullah J. says that Part III's many assurances make it hard to see basic rights as manipulated by a majority. Mudholkar J. suggested that the constitution's authors meant to preserve the three departments of government and separation of powers. The individual also questioned if Article 368's¹³ ‘amendments’ to the Constitution's core elements were indeed a comprehensive makeover.

The *I.C. Golak Nath v. State of Punjab*¹⁴ lawsuit reversed the ruling. A panel of eleven Supreme Court judges ruled 6–5 and with varied majority opinions that Parliament could not change *Part III* of the Constitution in a highly fought issue. In effect, all essential rights legislation were immune to legislative interference. The response of the Parliament was prompt and significant. The Twenty-Fourth Constitutional Amendment was enacted as a means to address and overcome the challenges posed by the Golak Nath case. This stipulated, among other things, that the restriction mentioned in Article 13 would not be applicable to a constitutional modification made under Article 368. Furthermore, Article 368 of the Constitution was amended to replace the term “*amendment*” with the more comprehensive phrase “*amendment*”

⁷ Shankari Prasad v. Union of India, MANU/SC/0013/1951.

⁸ Constitution of India, Part III.

⁹ Constitution of India, a. 13.

¹⁰ Constitution of India, Part III.

¹¹ Constitution of India, a. 13.

¹² Sajjan Singh v. State of Rajasthan, 1964 SCC OnLine SC 25.

¹³ Constitution of India, a. 368.

¹⁴ Golak Nath v. State of Punjab, 1967 SCC OnLine SC 14.

by way of addition, variation or repeal.” The Twenty-Fourth Amendment, along with other constitutional provisions, faced significant challenges over its legality. To ascertain a definitive judicial determination regarding the precise extent, essence, and constraints of the modifying authority, a panel of thirteen judges was appointed to the Supreme Court. The legal dispute in question was to the case of *Kesavananda Bharati v. State of Kerala*¹⁵.

The fundamental structural concept was solidified through three further rulings throughout the span of the decade. The case of *Indira Nehru Gandhi v. Raj Narain*¹⁶ involved the striking down of a Constitutional amendment that pertained to the election of the Prime Minister and the Speaker. This amendment was found to be in violation of fundamental aspects of democracy, such as the principles of the rule of law and equality, as determined by Mathew and Khanna JJ., Ray C.J., and Chandrachud J. In the case of *Minerva Mills v. Union of India*¹⁷, the Parliament made an effort to nullify the Kesavananda ruling by introducing the 42nd Amendment. This amendment explicitly declared that the power to modify the Constitution was boundless and immune to scrutiny by the judiciary. The Court invalidated the amendment on the basis that the Parliament's restricted authority to alter was an integral component of the fundamental framework. In the case of *Waman Rao v. Union of India*¹⁸, the court established that laws included in the 9th Schedule, which are exempt from fundamental rights assessment, must nonetheless undergo evaluation based on the fundamental principles of the constitution before being granted immunity.¹⁹

In the year 2015, the Supreme Court invalidated the 99th Constitutional Amendment of 2015 that established the National Judicial Appointments Commission (NJAC). The purpose of the NJAC was to supplant the collegium system for the selection of judges, but the Supreme Court deemed it to be in contravention of the fundamental framework of the Constitution. The collegium system was founded by the Second Judges case, which sought to enhance the authority of the three most senior judges of the Supreme Court in the process of judicial appointments. This transition involved shifting their function from a consultative capacity to a more decisive one. The judgement extensively discussed the extent of judicial independence, its connection to the procedure of judicial appointments, and the significance of judicial

¹⁵ Kesavananda (n 1).

¹⁶ Indira (n 3).

¹⁷ Minerva (n 4).

¹⁸ Waman Rao v. Union of India, (1981) 2 SCC 362.

¹⁹ SRIRAM PANCHU, APRAMEYA MANTHENA and VIKAS MURALIDHARAN, ““Basic Structure”: Defence against Parliamentary Hegemony” (*The India Forum* 12 April 2023) <<https://www.theindiaforum.in/law/basic-structure-doctrine-defence-against-parliamentary-hegemony>> accessed 26 October 2023.

participation in the appointment process as a crucial aspect of the fundamental framework. Hence, the court rendered a decision affirming that the appointment of judges constituted an unquestionable element of judicial autonomy. Furthermore, it was noted that the collegium system facilitated executive involvement in the nomination process without undue intervention. This was achieved by the inclusion of the President (acting upon the advice of the council of ministers), who have the authority to raise objections or provide justifications for their decisions, among other prerogatives. Furthermore, the NJAC's provision of veto powers to the executive highlighted the infringement upon the fundamental structural theory.²⁰

IV. IMPACT ON INDIAN PARADIGM

The basic structure theory has drawn a lot of criticism, primarily from Vice President Jagdeep Dhankar and Law Minister Kiren Rijju. A portion of this perspective can be attributed to the belief that Parliament holds supreme authority, hence granting the current governing body the ability to exercise unrestricted control over the Constitution. In essence, the Constitution holds the ultimate authority, establishing its sovereignty. The legislative, alongside the administration and judiciary, constitutes one of the three branches of power.²¹

Another noticeable wave of protest seems to be connected to the practise of judicial review, which involves a court invalidating a law or government action. This action is purportedly in violation of the principle of separation of powers. This perspective is considerably antiquated. The Court does not intervene due to its self-imposed superiority over the other two entities. The judiciary assumes an active role solely in instances when there is a violation of constitutional boundaries and demarcations, with its primary responsibility being the interpretation and safeguarding of the Constitution.

The significance of the basic structural doctrine cannot be overstated. The sole legal recourse against legislative hegemony and the revision of the Constitution is provided by this defence. The intended purpose of fundamental rights was to provide individuals with necessary safeguards. However, conflicts around property rights have led to confrontations with governmental authorities and internal divides within the judicial system. Adhering steadfastly to the principle prevents the vessel from overturning.

²⁰ SRIRAM PANCHU, APRAMEYA MANTHENA and VIKAS MURALIDHARAN, “‘Basic Structure’: Defence against Parliamentary Hegemony’ (*The India Forum* 12 April 2023) <<https://www.theindiaforum.in/law/basic-structure-doctrine-defence-against-parliamentary-hegemony>> accessed 26 October 2023.

²¹ LIVELAW NEWS NETWORK, ‘Bombay Lawyers Association Moves Supreme Court to Disqualify Vice President, Law Minister over Remarks on Basic Structure Doctrine, Collegium’ (*www.livelaw.in* 28 March 2023) <<https://www.livelaw.in/top-stories/supreme-court-law-minister-kiren-rijju-jagdeep-dhankar-vice-president-disqualification-collegium-basic-structure-criticism-bombay-lawyers-224979>> accessed 27 October 2023.

V. CRITICS OF THE BASIC STRUCTURE

There are three reasons why the basic structure concept is seen improper and detrimental to the legitimacy of the Indian Constitution. In its essence, this is incongruous with the foundational notion of the division of powers. Indeed, the court did posit that the principle in question is inherent to the fundamental framework of the legal system. Nevertheless, it is logically untenable for these two conceptions to simultaneously exist. The legislative branch is responsible for enacting laws, including those outlined in the constitution, while the judiciary branch is tasked with the adjudication of legal matters. The judiciary lacks the authority to amend the Constitution without meeting the prescribed threshold of a special majority, a requirement that is specifically imposed on the legislature. In the case of *I.R. Coelho*²², the court provided an explanation about the procedural aspects of enacting a constitutional amendment, *emphasising that the final step involves judicial assessment of its compatibility with the fundamental framework of the constitution*. Subsequent to the aforementioned statement is a legislative that lacks constitutional authority, accompanied by a court that assumes the dual role of law creation and interpretation. *The effectiveness of a system of checks and balances relies on the prevention of one branch encroaching upon the responsibilities of another. The judicial branch possesses the authority to examine, although lacks the ability to modify a constitutional amendment*.

In the case of *Glanrock Estate (P) Ltd. v. State of T.N.*²³, the “*court asserted that while certain fundamental rights do not constitute the basic structure, all elements of the basic structure are indeed fundamental rights. According to its own statement, the infringement of fundamental rights does not necessarily and automatically contravene the basic structure theory. However, a law that violates the basic structure usually infringes upon some rights that are safeguarded under Part III of the constitution, although the reverse is not necessarily true*”. This argument raises the question regarding the distinction between the terms 'fundamental' and 'basic'. It might be argued that there is a logical inconsistency in defining fundamental rights as both inviolable and violable, as established in numerous legal cases such as *Sajjan Singh*. This inconsistency arises when considering that fundamental rights may be violated in certain circumstances, namely (a) when they fall outside the scope of the basic structure, and (b) when they are subject to reasonable constraints even within the basic framework. In the *Raghunathrao Ganpatrao v. Union of India*²⁴ case, the court arrived at a definition of the basic structure as comprising

²² *I.R. Coelho v. State of T.N.*, (2007) 2 SCC 1

²³ *Glanrock Estate (P) Ltd. v. State of T.N.*, (2010) 10 SCC 96

²⁴ *Raghunathrao Ganpatrao v. Union of India*, 1994 Supp (1) SCC 191

essential aspects that are not necessarily integral. The rules of being “basic but not fundamental” and “essential but not integral” pose challenges when establishing values intended to serve as the fundamental law of a society.

Thirdly, the fundamental structure doctrine endeavours to address a perceived issue of the lack of clarity regarding the specific provisions of the constitution that are amenable to amendment. The concept in question emerged as a response to the inquiry of the potential applicability of judicial review to constitutional revisions. This matter was initially brought forth in the case of *Shankari Prasad v. Union of India*²⁵. According to Article 13, the court possesses the authority to invalidate any legislation that violates the fundamental rights enumerated in Part III. However, there remains ambiguity on whether the term "law" include constitutional changes that meet the aforementioned criteria. It is evident that constitutional amendments possess the same level of amenability as the constitution itself, as the legislative body assumes the function of the constituent assembly during the amendment procedure. The origin of the theory is non-legal in nature, while being metaphorically (and vaguely) characterised as "emanating from the constitutional silence." It is advisable that amendments to the Constitution should not possess a greater degree of durability when compared to the original Constitution. The phenomenon of judicial hesitancy arises due to concerns that constitutional revisions would provoke dissatisfaction among some members of the public. However, this apprehension hinders the constitutionally-mandated democratic procedures that are necessary for amending the Constitution.²⁶

In the case of *S.R. Bommai v Union of India*²⁷, the Supreme Court utilised the principle of 'secularism' as a fundamental characteristic to rationalise the utilisation of Article 356 in the states governed by the Bharatiya Janata Party (BJP), subsequent to the demolition of the Babri Masjid. Alternatively, the court could have argued that the opposition to secularism exhibited by the state governments had led to significant consequences such as loss of life and property, breakdown of law and order, and failure to ensure the safety of a minority community. Consequently, this rendered the state's governance incompatible with the provisions of the constitution, thereby justifying the imposition of president's rule as outlined in Article 356. However, the basic structure doctrine presented the court with a straightforward alternative.²⁸

²⁵ Sankari (n 6).

²⁶ IACL-AIDC Blog, 'Problems with the Application of the Basic Structure Doctrine in India: Why Limiting the Constitutional Amendment Powers of the Legislature Is a Bad Idea' (*IACL-IADC Blog* 10 February 2022) <<https://blog-iacl-aidc.org/new-blog-3/2022/2/10/problems-with-the-application-of-the-basic-structure-doctrine-in-india-why-limiting-the-constitutional-amendment-powers-of-the-legislature-is-a-bad-idea>>.

²⁷ *S.R. Bommai v. Union of India*, (1994) 3 SCC 1

²⁸ V Venkatesan, 'As Courts Rule on Constitution's Basic Structure, Landmark Doctrine Turns out to Be Elastic'

Regrettably, due to the prevailing political environment in India, it seems that the doctrine is reverting back to a condition of uncertainty like to the one it encountered at its establishment. Nevertheless, the current circumstances present distinct obstacles. During the 1970s, the primary focus of the challenge to the basic structure doctrine revolved around the concept of institutional supremacy and the lack of justification for granting the judiciary the ultimate authority to interpret the Constitution. Currently, the primary obstacle to the concept does not stem from a lack of justification, but rather from its substance. The ruling political executive aims to eliminate its own power and promote the concept of parliamentary sovereignty in order to prevent any potential conflicts with the judiciary that may hinder the realisation of its ideological objectives.

VI. CONCLUSION AND KEY FINDINGS

The Indian Constitution's basic structure theory is deemed unsuitable due to its numerous inherent limitations. The primary objective of this legislation was to provide a comprehensive legal framework that would safeguard the interests of law-abiding citizens while simultaneously deterring and discouraging unlawful behaviour. In contrast, this approach diverges from the established principle of the separation of powers, which ironically constitutes an integral component of the fundamental framework. Furthermore, it lacks a precise definition and is susceptible to being employed for a wide range of objectives. Additionally, it fails to offer a practical resolution to the process of amending constitutional amendments, which was the original impetus behind its inception. In essence, the limitations imposed by the basic structure concept on undefined constitutional issues are constitutionally aberrant.

According to Sudhir Krishnaswamy's, *Democracy and Constitutionalism*, the concept of the basic structural doctrine has developed into a unique form of judicial review that pertains to state activity in a broader sense, rather than exclusively focusing on constitutional modifications that are being contested. As to his assertion, this principle encompasses all manifestations of governmental intervention aimed at safeguarding the fundamental tenets of the constitution from any sort of impairment or annihilation.²⁹

The current Indian government is posing a danger to both the concepts of constitutional supremacy and judicial independence, hence raising concerns about the validity of the basic

(*The Wire* 29 October 2020) <<https://thewire.in/law/constitution-basic-structure-case-histories>> accessed 26 October 2023.

²⁹ V Venkatesan, 'As Courts Rule on Constitution's Basic Structure, Landmark Doctrine Turns out to Be Elastic' (*The Wire* 29 October 2020) <<https://thewire.in/law/constitution-basic-structure-case-histories>> accessed 26 October 2023.

structure theory. The concept in question has been referred to as the guiding principle by the current Chief Justice. Additionally, senior government officials have suggested that a potential challenge from the executive branch is forthcoming. Hence, it is imperative for individuals to acknowledge the pragmatism inherent in the basic structure doctrine and its contribution to the enhancement of Indian democracy. In view of the golden jubilee of Kesavananda Bharti, it is imperative to elucidate the fundamental principles of this ideology, encompassing its historical context and its significant contribution to safeguarding Indian democracy against excessive exercise of executive power. This does not suggest that individuals should disregard the potential instances of misuse associated with the basic structure doctrine. These potential concerns encompass instances of judicial overreach and the dismissal of legislative viewpoints pertaining to subjects that are subject to reasonable differences of opinion.

Even though it has questionable origins and legitimacy, the basic structure theory has clearly had a big effect on the growth of constitutional law in India. The case for this idea is supported by its theoretical roots in constitutionalism, following international standards, and the discussions of the constituent assembly. Still, it is important to recognise and think about the worries about the judiciary's possible interference and what that might mean for the concept of parliamentary sovereignty. A big and hard problem that still needs to be solved is how to protect basic constitutional values while also upholding what representative democracy stands for. As India moves forward with its constitutional path, the ongoing debate over the basic structure theory's validity and effects on parliamentary sovereignty will inevitably continue. This will serve as a reminder of how closely constitutional principles and democratic administration are linked.
