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BASIC STRUCTURE DOCTRINE: INDEPENDENCE OF JUDICIARY INCLUDES APPOINTMENT OF JUDGES BY JUDGES

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INTRODUCTION

Basic Structure Doctrine or basic feature is a concept which is introduced by the Judiciary. It says that there are some features which are at the heart of the constitution and cannot be amended by the Parliament of India. The apex court in April, 1973, comprising of 13 judges in a majority opinion of 7-6 gave the pronouncement that "*Article 368 of the Constitution does not enable Parliament to alter the basic structure or framework of the Constitution*"[2]. In other words the court propounded that the Parliament can amend any part of the Constitution of India by following the procedure as prescribed under Article 368[3], but the basic structure cannot be amended, or if any amendment violates the basic structure than that amendment in itself is invalid. Supreme Court with an intention to preserve and protect the basic ideals of the draftsmen of the Constitution and to have a check over legislative enthusiasm gave the landmark judgement. Independence of Judiciary is also considered as the basic feature of the constitution.

The objective of this paper is to analyse that weather appointment of judges of Supreme Court and High Court through the well known collegium system, is also an integral part of the Independence of Judiciary or is just a scheme to bring the complete control into the hands of judiciary and making the executive as mere puppet or a postman.

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[2] *Kesavananda Bharati vs. The State of Kerala*, AIR 1973 S.C. 1461

[3] Article 368(1) of the Constitution of India "*Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article*"

MEANING OF BASIC STRUCTURE DOCTRINE

There is no term such as the "*basic structure*" in the constitution itself but there is a reason because of which this term evolved. The Constitution of India has been amended many times since it came into force, academic and political commentators often lament the incapacity of the government and the political class to govern in accordance with the Constitution as being the primary motive for the frequency of amendment.[4] However, the extent of flexibility embraced by a Constitution has to be balanced by a need to preserve its normative character as a higher law that restrains temporary parliamentary majorities of the nation. The evolution and practice of the basic structure doctrine in India responds to this normative concern to preserve the sanctity of the Constitution as a higher law.[5] *Justice Mukherjee* and *Justice Hedge,* beautifully explained the concept which is "*Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy and every social philosophy like every religion has two main features, namely, basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed"*[6]

In *Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr.*[7] following were recognized as the "basic structure" of the constitution, different judges had different opinions regarding the basic structure.

Cheif Justice Sikri, explained that the concept of basic structure includes:

- Supremacy of the Constitution
- Republican and democratic form of government
- Secular character of the Constitution
- Separation of powers between the legislature, executive and the judiciary
- Federal character of the Constitution

Justice Shelat, and *Justice Grover,* added two more basic features to this list:

[4] Iftikhar Hussian Bhat "Doctrine of Basic Structure as a Constitutional Safeguard in India: Reflection in the Jurisprudence of Other Countries" (2013) vol.1, issue:3 *International Journal of Research in Humanities and Social Sciences* 27
[5] ibid
[6] Doctrine of Basic Structure as a Constitutional Safeguard in India: Reflection in the Jurisprudence of Other Countries, 30
[7] AIR 1973 S.C. 1461

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

• Unity and integrity of the nation

Justice Hegde, and *Justice Mukherjea,* identified a separate and shorter list of basic features:

• Sovereignty of India

• Democratic character of the polity

• Unity of the country

• Essential features of the individual freedoms secured to the citizens

• Mandate to build a welfare state

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

• Sovereign democratic republic

• Parliamentary democracy

• Three organs of the State[8]

The list of the basic feature as mentioned above are not by any means exhaustive. The questions that weather a feature of the constitution is 'basic' or not is to be determined by the court from time to time as when question arises.[9]

In *Minerva Mills Ltd. v. Union of India,*[10] clause (4)[11] and (5)[12] of Article 368 of the Constitution of India were stuck down by the Supreme Court, which were inserted by the 42nd amendment of the Constitution on the ground that these clause destroys the basic feature of the Constitution and limited amending power is in itself is a basic feature of the constitution which was further upheld in *Waman Rao v. Union of India*[13].

In *S. P. Sampath Kumar v. Union of India* [14] and *P. Sambamurthy v. State of A.P.*[15] the judges laid down that the rule of law and judicial review were integral part to the Constitution and therefore constitute the basic structure.

[8] Doctrine of Basic Structure as a Constitutional Safeguard in India: Reflection in the Jurisprudence of Other Countries, 30
[9] M.P. Jain , *Indian Constitutional Law* 1778, (Lexis Nexis Butterworths Wadhwa Nagpur, Sixth Edition)
[10] AIR 1980 SC 1789 : (1980) 2 SCC 591
[11] *"No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty second Amendment) Act, 1976 shall be called in question in any court on any ground."*
[12] *"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"*

[13] AIR 1981 SC 271 : (1981) 2 SCC 362
[14] AIR 1987 SC 386 : (1987) 1 SCC 124

In *M. Nagraj v. Union of India*[16] the court observed that the amendment should not destroy Constitutional identity and it is the theory of basic structure only to judge the validity of Constitutional amendment.

INDEPENDENCE OF JUDICIARY

Independence of Judiciary means that there should be shield over judiciary to protect it from legislative and executive powers, i.e. there should be no influence of the other two branches on the judiciary. Judicial independence is *sine qua non* in the functioning of the contemporary government machinery[17]. The judicial independence has been recognized from the very earlier period and is very important feature for the maintenance of rule of law and social security. Although judicial independence may be abstract social value, its existence depends on specific institutional elements that can be analysed[18]. *The primary talk on the independence of the judiciary is based on the doctrine of separation of powers which holds its existence from several years. The doctrine of separation of powers talks of the independence of the judiciary as an institution from the executive and the legislature*[19].

According to Montesquieu, "*When the legislative and executive powers are united in the same person, or int he same body or Magistrate, there can be no liberty. Again, there is no liberty if the judicial power is not separated from the Legislative and Executive power. Where it joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Where it joined with the executive power, the judge might behave with violence and oppression. There would be ends of everything were the same man or the same body to exercise these three powers...*"[20].

Phillips and *Wade* were of the opinion that doctrine of separation of powers consists following characters:[21]

(i) The same person should not form more than one organ of the Government.

(ii) One organ of the Government should not exercise the function of other organs of the Government.

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[15] AIR 1987 SC 663
[16] AIR 2007 SC 71 : (2006) 8 SCC 212, 267
[17] M. P Jain, *Indian Constitutional Law* 307, (Lexis Nexis Butterwoths Wadhwa, 6th Edn,. 2010)
[18] Thomas E. Plank, The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia, 5 Wm. & Mary Bill Rts. J. 1 (1996)
[19] Atin Kumar Das 'Independence Of Judiciary In India : A Critical Analysis'(Mulnivasi Organizer) <http://mulnivasiorganiser.bamcef.org/?p=482> accessed 19 May 2014
[20] Montesquieu, De L" Espirit des lois, 1748 quoted in Justice D.D. Basu: Administrative Law, Edn. 199, p. 23.
[21] Tej Bahadur Singh "PRINCIPLE OF SEPARATION OF POWERS AND CONCENTRATION OF AUTHORITY" *I.J.T.R.*, U.P., Lucknow

(iii)One organ of the Government should not encroach with the function of the other two organs of the Government.

Therefore, as per the concept of Separation of power it is very clear that there is a need of an independent judiciary. According to the scholars writings independence of judiciary means two things: Firstly, independence of judiciary as an institution itself and secondly, independence of the individual judges, which we can conclude that if there is no independence of the individual judges than there will be no independence of the judiciary as an institution and therefore both must go hand in hand.[22]

There are three main reasons with which we can identify that what is the need to give utmost importance to the independence of judiciary.

1. **To check the functioning of the organ**: Judiciary acts as a guardian of the Constitution and ensures the organs of the state are working in their respective areas and according to the provisions of the constitution.
2. **To interpret the provisions of the Constitution**: The draftsman of the Constitution were aware that in future the ambiguity will arise with the provisions of the constitution, so they ensured that the judiciary must be independent and self-competent to interpret the provision of the constitution in such a way to clear the ambiguity but such an interpretation must be unbiased i.e. free from any pressure from any organs like executive. If the judiciary is not independent, the other organs may pressurize the judiciary to interpret the provision of the constitution according to them.
3. **To adjudicate on disputes referred to it**: A judiciary is expected to deliver judicial justice and not a committed and partial justice. By committed justice we mean to say that when a judge emphasizes on a particular aspect while giving judgement and not considering all the aspects involved in a particular situation. So if the judiciary will not be independent the other organs may restrict the judges to consider all the aspects and may stress them to consider only those aspects which are in their favour.[23]

[22] ibid
[23] ibid

Justice Bhagwati, in *Union of India vs. Sankal Chand Himmatlal Sheth*[24] asserted that independence of judiciary is the basic feature of the constitution. Also in the *S.P Gupta case*[25] the same ratio of the previous case was followed.

In another landmark judgement of *Kumar Padma Prasad vs. Union of India*[26] the status of the independence of judiciary as a basic feature of the Constitution was strengthened. Therefore, in plethora of cases, independence of judiciary has been recognized as the basic feature of the constitution by the Supreme Court of India.[27] The Constitution has enabled a complete separate status to judiciary in its working and left no scope for any kind of interference from the other organs in the working of judiciary. Supreme Court has observed that "*the constitutional scheme aims at securing an independent judiciary which is the bulwark of democracy*[28]

In the historical *Second Judge Case*[29] the value of judicial appointment was also recognized as a component of the independence of judiciary as it was decided that the judicial components cannot be left to the absolute discretion of the executive. It was further said that the judiciary is independent and separate wing of the Government. The executive or legislature has no concern with the day to day functioning of the judiciary.[30]

APPOINTMENT OF JUDGES: INTEGRAL PART OF THE INDEPENDENCE OF JUDICIARY

The appointment of the judges was primarily rested with the President, after consultation with the Chief Justice of India for the Supreme Court[31], and for High Court, President shall appoint after consultation with Chief Justice of India, the Governor of the State, and in case of appointment of Judges other than Chief Justice, the Chief Justice of the respective High Court[32]. The practice of appointment of Judges through Collegium system was developed by the Supreme Court through three cases which popularly came to be known as *First Judges Case*[33], *Second Judges Case*[34] and *Third Judges Case*[35]. A series can be

[24] (1977) 4 SCC 193
[25] AIR 1982 SC 149
[26] AIR 1982 SC 1213; *State of Bihar vs. Bal Mukund Shah*, AIR 2000 SC 1296
[27] M.P. Jain , Indian Constitutional Law (Sixth Edition), Lexis Nexis Butterworths Wadhwa Nagpur ,1789
[28] *A. C. Thalwal v. High Court of Himachal Pradesh*, AIR 2000 SC 2732

[29] *Advocate on Record Assn. Vs Union of India*, AIR 1994 SC 268
[30] M.P. Jain , *Indian Constitutional Law 1789* (Lexis Nexis Butterworths Wadhwa Nagpur, Sixth Edition)
[31] Article 124 of The Constitution of India
[32] Article 217 of The Constitution of India
[33] *S. P Gupta v. Union of India*, AIR 1982 SC149
[34] *SC Advocates on Record Association v. Union of India*, AIR 1994 SC 268
[35] *In re Reference*. AIR 1999 SC1

drawn from these cases which shows the shift in authority for the appointment and which led to the development of the collegium system.

Under the collegium system, now there is no role of an executive in appointing judges for the Supreme Court or the High Court. Judges of Supreme Court are now appointed by the collegium consisting of Chief Justice of India and four senior most judges of the Supreme Court and in case of High Court judges collegium consisting of Chief justice of India and two senior most judges of the Supreme Court.

There is a reason for which this shift was required; if the control of appointment is given in the hands of the president than ultimately the power of appointment of judges will come into the hands of the Government at the day. Government will appoint those judges who in their opinion are favourable to them; this practise will be against the principal of Independence of Judiciary as the appointed judges will deliver judgements in the favour of the Government. Appointment also includes appointment of judge as the Chief Justice of India; there is a possibility that Government in order to fulfil their ill motive can over look the convention of appointment of senior most judge as the Chief Justice of India as he is the head of the administrative functions of the Supreme Court. In the past also three attempts have been made to overlook the convention.The first attempt can be tracked from the year 1943 when *Justice Patrick Spens* was appointed Chief Justice of India, neglecting *Justice Srinivasa Varadachariar* who was the senior most judge at that instance. It was alleged that basis for supersession was racial, as British judges and lawyers did not wanted an Indian as the Chief Justice of India[36].

Second can be tracked in the year 1973, April 25, just the day after the pronouncement of the landmark judgment of the *Kesavananda Bharti case*[37], the Indira Gandhi Government departed from the convention and appointed *Justice A.N Ray* as the Chief Justice of India who decided the three major cases in the favour of Government though in his minority opinion namely in the *Bank Nationalization Case*[38], the *Privy Purse case* [39] and in the *Kesavananda Bharti case* itself and suppressed the three senior most judges who

[36] Alok, 'How India Missed Getting Its First Woman Chief Justice India' (Critical Twenties, November 26, 2010) < http://www.criticaltwenties.in/lawthejudiciary/how-india-missed-getting-its-first-woman-chief-justice-india> accessed 19 May 2014
[37] AIR 1973 S.C. 1461
[38] *R.C Cooper vs. Union of India*, AIR 1970 S.C. 564
[39] H.H. Maharajadhiraja Madhav Rao vs. Union of India, AIR 1971 SC 530

decided the case against the Government.[40] The former Attorney General of India, *CK Daphtary* caustically remarked it as, "*The boy who wrote the best essay won the first prize*[41]*."*

And the third possibly most infamous supersession, happened during the height of the Emergency, in *ADM Jabalpur Case*[42], Indira Gandhi did not appreciated the brave dissent of *Justice Khanna*, finally Justice Khanna resigned upon finding that he had overlooked in favour of *Justice MH Beg* to be appointed the Cheif Justice India[43]. Also when in 1980 when Indira Gandhi came back in power, the then Law minister issued a circular claiming power to transfer High Court Judges and attempted to do so and also refuse to confirm some additional Judges.[44]

Post 1980 it was widely believed that executives were blocking the appointments of the judges nominated by the CJI and it was also believed that those judges are being appointed who executive feel that favourable judgments can be obtained for dubious considerations from complaint judges.[45]

After the collegium system the ultimate power of appointment of judges has come into the hands of judiciary, the President has to appoint a judge who is approved by the collegium. Now there is no actual role of the executive in the appointment of judges. Judges know the intellect of a person who appears before them and therefore person with perfect ability is appointed for judgeship. Also, in the case of appointment of the Chief Justice of India, the senior most judge is appointed, as he is the most experienced judge and had spent maximum time then other judges.

The appointment of judges through this method ensures Independence of Judiciary as there is no influence of the other two branches and impartial and unbiased judgements can be delivered by the appointed judges.

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[40] Anil Divan, 'A trojan horse at the judiciary's door' (The Hindu, June 14, 2013) < http://www.thehindu.com/todays-paper/tp-opinion/a-trojan-horse-at-the-judiciarys-door/article4812743.ece> accessed 19 May 2014

[41] Alok, 'How India Missed Getting Its First Woman Chief Justice India' (Critical Twenties, November 26, 2010) < http://www.criticaltwenties.in/lawthejudiciary/how-india-missed-getting-its-first-woman-chief-justice-india> accessed 19 May 2014

[42] AIR 1976 SC 1207

[43] Alok, 'How India Missed Getting Its First Woman Chief Justice India' (Critical Twenties, November 26, 2010) < http://www.criticaltwenties.in/lawthejudiciary/how-india-missed-getting-its-first-woman-chief-justice-india> accessed 19 May 2014

[44] Anil Divan, 'A trojan horse at the judiciary's door' (The Hindu, June 14, 2013) < http://www.thehindu.com/todays-paper/tp-opinion/a-trojan-horse-at-the-judiciarys-door/article4812743.ece> accessed 19 May 2014

[45] ibid

CONCLUSION

Basic Structure Doctrine is the most important concept introduced by the Indian Judiciary, it restricts executives to amend basic structure or basic features of the Constitution like the Secular character of the Constitution, Separation of powers between the legislature, executive and the judiciary, Federal character of the Constitution, Sovereignty of India, Democratic character of the polity, Unity of the country, Sovereign democratic republic, Parliamentary democracy, Three organs of the State etc. and the list is not exhaustive.

Independence of Judiciary is also considered as the basic feature of the Constitution i.e. Independent Judiciary from the control of Legislature or the Executive. But when we talk about the appointment of judges as a part of Independence of Judiciary than question becomes debatable. As per the Constitution the appointment of judiciary rested with the President of India after consultation with the Chief Justice of India in case of Supreme Court Judges[46] and in case of High Court Judges President shall appoint after consultation with Chief Justice of India, the Governor of the State, and in case of appointment of Judges other than Chief Justice, the Chief Justice of the respective High Court[47], but this consultation does not makes it mandatory to appoint the judge who is recommended by the consultant. It again leaves the power of appointment in the hands of the executive and the executive will prefer those judges for appointment who are in there opinion favourable to them. The third organ Judiciary will not be able to function independently and this infringes the principal of Separation of Power and Independence of Judiciary. Decisions given in a series of Three Judges Cases[48], led to the development of Collegium System by which now judges are appointed by the Chief Justice and other senior Judges of the Court. This ensures that there is no role for executive or legislature to play in appointment process of Judges and also ensures Independence of Judiciary.

[46] As per Article 124 of The Constitution of India
[47] As per Article 217 of The Constitution of India

[48] *S. P Gupta v. Union of India*, AIR 1982 SC149, *SC Advocates on Record Association v. Union of India*, AIR 1994 SC 268**,** *In re Reference*. AIR 1999 SC1