

THE IDEA OF BASIC STRUCTURE: - A RADICAL CRITIQUE, FOR A CONSTITUTIONAL MOMENT OF TRANSITION, FROM A JURIDICAL MYTH TO A PHILOSOPHICAL TRUTH

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Abstract

The Idea of “the fundamental” has always been the most important question to a Philosophical Mind. This Research Paper argues that Basic Structure is a ‘Great Juridical Myth’. The Research Paper in its First Part introduces the concept of Basic Structure as declared in *Kesavananda Bharati Case*. In its Second Part, it follows the Socrates Method of Inquiry in asking Jurisprudential and Philosophical Question on Basic Structure. In its Third Part, it develops the Philosophical Basis of ‘Basic Value’ and how could it be infused in Normative Philosophy of Law and in its Fourth Part it concludes by arguing that there is no ‘basic’ in the ‘basic structure’ of the Indian Constitution. If there is something basic to the Indian Constitution it lies in its Relativity of Values and if there is something to become Basic it shall be in the nature of Constitutional Categorical Imperative.

Key Words: Basic Structure,

Introduction: The Idea of Basic Structure in the Constitution: - *Some Legal Reflections*

The Idea of Basic Structure in the Constitution has been profoundly stated in *Kesavananda Bharati v. State of Kerala*¹, wherein the Hon’ble Supreme Court observed that:

“the elements of the basic structure are indicated in the preamble and translated in the various provisions of the Constitution. The edifice of our Constitution is built upon and stands on several props, remove any of them, the Constitution collapses. Each one of these is important and collectively they

¹ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461

assure a way of life to the people of India which the Constitution guarantees. To withdraw any of the above elements the structure will not survive and it will not be the same Constitution, or this Constitution nor can it maintain its identity, if something quite different is substituted in its place, which the sovereign will of the people alone can do.”²

The Basic Structure was identified among other values with “the Preamble of the Constitution, the Secular Character, Fundamental Rights as enshrined in Part III of the Constitution”. It was stated that these give a sense of “identity to the Constitution”. The Court in its majestic generalities further observed that: -

“the retention of the old Constitution means the retention of the Basic Structure or framework of the old Constitution. Although it is permissible under the power of amendment to effect changes, howsoever important and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern”³

2. The Basis of Jurisprudential Inquiry: - The Structure, The Element, The Amendment and The Identity.

The Philosophy being the mother of all sciences has nurtured the idea of fundamentals from its womb and has sowed the seeds of “the fundamental” in all its children yet the Child called Law, is most dear to her, for it is the nearest subject to Philosophy. The Jurisprudence being the Soul of Law carries with it, “the benevolent Spirit of Philosophy”. When a Jurisprudential Question is understood in the Gleaming Light of Philosophy the Greatest Truths are discovered.

Now, we must begin our Philosophical and Jurisprudential Inquiry. ‘What is the nature of Identity that Basic Structure reflects’? For anything to be said as ‘Basic’ the nature of the values that lies within the Basic must remain Unaffected by the ‘Material, Spatial and Temporal Sphere of Law’. If the elements that are stated to be Basic, if gets affected with the above-mentioned sphere of Law, then their Basic Identity would be ‘Relative’ and ‘Ever changing’ with respect to those spheres. It is stated that the ‘rights in the fundamental rights parts’ constitutes Basic Structure, as to

² Ibid.

³ Ibid.

‘retain the identity of old constitution’. Thus, the Basic Structure of Indian Constitution must be seen in its protection or retaining of identity, which is basic to the older constitution and whose change must fall down the Constitution itself.

Now, we must begin our Jurisprudential Inquiry. What is Basic in the Legal Value of Equality as enshrined in Article 15 of Indian Constitution. One then may state, to be equal before law and have equal protection of law. But this will only be stating the marginal headings and not its content. By the virtue of a content, something could be stated to be Basic. If the Content of something is ‘unaffected by the material, temporal and spatial sphere of Law’ only then it could say to be Basic. Therefore, we must ask, what is that content that has remained unaffected so as to maintain the identity of Article of Equality, in order to maintain the identity of the older constitution. I then must state, it is “none” and it shall be proved.

The First case of Positive Discrimination or Reservation under Article 13, 16 which guarantees the fundamental right of Equality in matter of Public Employment was of *State of Madras v. Champakam Dorairajan*⁴, wherein Caste Based Reservation were ruled by the Constitutional Court as ‘Unconstitutional’. But after the amendments the Constitutional Court in *Indra Sawhney v. Union of India*⁵ adjudicated ‘Reservation’ as ‘Constitutional’. Now, we must ask this Question, Is the Identity of the value of “Equality before Law” or “Equal Protection of Law” has suffered a “Change”. Whether, the decision of Champakam Dorairajan stated the ‘True Identity’ or the ‘Basic Identity’ of the Legal Value of Equality or the decision of Indira Sawhney. If the former judgement has stated its true identity, then it has suffered a profound change in its Basic Identity and if the latter judgement constitutes the ‘Basic Identity’ of Equality then how ‘former judgement’ was rendered as ‘Constitutional’, how such judgement even jurisprudentially existed within the ‘legal conception of Equality’. As the later judgement of Indira Sawhney, is in complete negation of value of equality as stated in Chamapakam Dorairajan. How ‘mutually contradicting values could co-exist’ for a Basic Identity could only be of one among them. Then we would found that both could not “exist with each other” having a Basic Identity and if we could say that both value constitutes the identity, then it will be a treachery on the authority of

⁴ State of Madras v. Champakam Dorairajan, AIR 1951 SC 226

⁵ Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217

the decision of court as well as on the 'basic meaning' of any Value itself which here means, the legal value of Equality. Thus, we are compelled to say that there is nothing 'basic' in the identity of Legal Value of Equality. Then what is the Value of Equality. How both of value could coexist and remain Constitutional, the answer to it will be stated in due course.

After this, with a change in the legal value of equality, whether the 'identity of the Constitution' has not suffered a change to its Basic Structure? Has the identity of the older constitution with the legal value of Equality as stated in the Champakam Dorairajan not suffered a profound change with the identity of the Legal Value of Equality as pronounced in the Indira Sawhney Case? If the identity has changed to the Basic Structure of old constitution then how Indira Sawhney is still Constitutional and if Identity has not changed then, what would be the meaning of the judgement of Champakam Dorairajan as rendered to be the Legal Value of Equality in the older constitution. Now, then we are compelled to observe that there was nothing Basic in the Basic Structure, else either it would have rendered the judgement of Indira Sawhney as Unconstitutional or the judgement of Champakam Dorairajan would never have existed in first place as a Constitutional Value. But both incidents have happened, which is nothing but the greater affirmation that there is nothing Basic in the Basic Structure Doctrine.

Further, it may be argued for the sake of Justification that it was amended by Parliament and thus has changed its Identity. But Parliament has not the power to change the 'Basic Identity' of the old constitution by way of amendment. The power don't exist in the Parliament to amend the Fundamental Right in such a manner that the identity of older constitution could be changed drastically to have two mutually contradicting values? Now, If there has been a change to the Basic Structure of Constitution and if the Parliament has changed the value, is it Constitutional, for it is regarded as Constitutional Amendment till this day, and if it is Constitutional then what was the Basic Structure that in its grand declaration that sought to protect it from such change?

Could it be said that there is no change to the identity of the Fundamental Right by way of 1st amendment in the legal value of Equality? The answer would be that there has been a great change in the identity of the Fundamental Rights itself by the manner

of amendment, yet it retains Basic Structure with “two mutually contradicting values”, one “was of older constitution” then another was of the “amended constitution”. Is such ‘retention of values possible, in a structure, which has one its basic and other as its negation’? The answer to this is in Negative. Now, if the Legal Value of the Equality has changed then “what was the identity of the fundamental rights in the older constitution that the Basic Structure doctrine sought to protect?” And if it failed whether the ‘Structure of Constitution’ fall down? Does, the Fundamental Right to Equality as Constitutional Value, has been ineffective or unconstitutional or meaningless? When all these questions are asked, one by the force of arguments would have to accept that there is no Basic Structure.

Now, there was another change made to the identity of the Fundamental Right, which was done through the First Amendment⁶ by insertion of ‘Reasonable Restrictions’⁷ whereby the Value of Fundamental Right which in the ‘older constitution’ did not contain the term ‘restriction’ was amended drastically to insert ‘Reasonable Restriction’. What could not have been permissible in the ‘Older Constitution’ was now made permissible by the ‘Reasonable Restrictions’. Has such amendment to the Fundamental Right not brought a change to its identity, as was possessed in the older constitution? Could one say that “the restriction on the fundamental rights” were not “restriction to its basic identity”? Then how, is 1st amendment Constitutional? If the 1st amendment is Constitutional then what was the basic structure of the fundamental rights? If the basic structure of the fundamental rights was of the older constitution which have only rights and not restrictions then whether the amendment is not a challenge to its Basic Identity? And if the Basic Identity is the Amended Constitution, then what was the ‘Older Constitution’ which Basic Structure sought to protect? If the Basic Identity is the Amended Constitution then how could ‘the older structure without restrictions exist’? Whether the Parliament by amendment has not changed the identity of ‘Fundamental Rights with the Restriction’? Does this amendment not change the basic identity of the ‘older constitution’? Then how Parliament could have

⁶ The Constitution (First Amendment) Act, 1951

⁷ Amendment of article 19 and validation of certain laws. -(1) In article 19 of the Constitution, -
(a) for clause (2), the following clause shall be substituted, and the said clause shall be deemed always to have been enacted in the following form, namely: ---
"(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.";

such power, for to change the Basic Structure by amendment there could never 'exist power prima facie'? And if it exists and if the amendment is Constitutional then what is then the meaning of Basic Structure of the Older Constitution? We are forced to say that there could never be a Basic Identity with such amendment being Constitutional. Then how it exists today, the answer would be given in due course.

Now another question is the change in the 'Fundamental Right itself', by the insertion of "9th Schedule and Article 31B"⁸, to the Constitution, which effectively stated that even if a law would violate fundamental right, as long it is put in 9th schedule, it remains to life and the provision of Article 13 would be of no value. Further, by abridging away, through amendment, of "Article 19(1) (f)"⁹ from Fundamental Right Part of the Constitution and placing it in the mere "Legal right". Now whether such an amendment is not a change to the identity of the fundamental right of the older constitution without such article? Whether such amendment does not effectively change the identity of Article 13 that prohibits the parliament to pass any law that would violate fundamental rights? Does it not change the identity of the fundamental right and article 13 by inserting a mutually 'contradicting value' and abridging 'a fundamental right', which could not have been possible if there had been some basic identity or structure to the Fundamental Rights itself? We are then again bound to state that in such case there could never be a Basic Identity.

Now another question then lies to the Preamble, whether by the insertion of 'Secular and Socialist' through 42nd Amendment¹⁰ the identity of Preamble in itself, is not

⁸ Insertion of new article 31B.-After article 31A of the Constitution as inserted by section 4, the following article shall be inserted, namely: -

"31B. Validation of certain Acts and Regulations.-Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force."

⁹ 44th Amendment to the Indian Constitution, 1978:-

"In view of the special position sought to be given to fundamental rights, the right to property, which has been the occasion for more than one amendment of the Constitution, would cease to be a fundamental right and become only a legal right. Necessary amendments for this purpose are being made to article 19 and article 31 is being deleted. It would, however, be ensured that the removal of property from the list of fundamental rights would not affect the right of minorities to establish and administer educational institutions of their choice." "Property, while ceasing to be a fundamental right, would, however, be given express recognition as a legal right, provision being made that no person shall be deprived of his property save in accordance with law."

¹⁰ The Constitution (Forty-Second Amendment) Act, 1976

changed? Whether the preamble of the old constitution could retain its older and basic identity with the insertion of new value? Isn't the word 'Secular' and 'Socialist' after being debated in the Constituent Assembly was not agreed to be inserted in the Preamble? If they haven't been agreed then whether such addition changes the basic identity of the preamble of older constitution, by expressly negating the framer's intention? And If there has been a change then how could such change be Constitutional? And if there is no change in its Basic Identity then what was the meaning of the Constituent Assembly Debates in its express negation of addition of such value?

Thus, when we are confronted with these questions the force of Legal Logic is such that the illusion and myth of Basic Structure fades away. This is the reason that even with the negation of such values in older constitution, the Constitution of India has not fallen and its Edifice has not fallen. Thus, the great empirical prove that those values were not basic to the Constitution but were always relative in its nature.

Now we have come to understood that there is not any basic identity which could be stated to be in the Indian Constitution and had there been such identity, all such changes would have been Unconstitutional, for the Basic Value or a Fundamental Value could not mutually exist with a Value which expressly negates its existence. Where the 'elements of a Basic Value' itself changes with the material, temporal and spatial sphere of Law, how could there exist a 'Basic Value' or a 'Basic Identity unaffected with time?' Thus, we are now left in the question that 'What then is a Basic Value'?

To this I must say, that howsoever the Doctrine of Basic Structure has made the Indian Constitution helpless but the Spirit of the Constitution is not hopeless and if we have to find the meaning of 'Basic Value' then, we must search the answers philosophically. The very negation of the Basic Structure of Indian Constitution, as Basic does not mean that there could not exist a Basic Value. There could exist a Basic Value, but not in the form and manner of the Basic Structure of Indian Constitution which is a Juridical Myth.

Amendment of the Preamble. - In the Preamble to the Constitution, -
(a) for the words "SOVEREIGN DEMOCRATIC REPUBLIC" the words "SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC" shall be substituted;

3. The Existence of Basic Value: - A Philosophical Discourse, on Transition of Word to Realm of Values

Now, before we search for the Basic Value, we must understand everything in its core concept. The Idea of “Word, in itself, is the first Basic or the Fundamental. The ‘meaning of a word’” has no effect with the passage of time. It has no effect with the change of Spatial and Material Sphere. The Word ‘in itself is fundamental for its meaning’. For the sake of example, the word “Equality”, as a Word would have meaning “Equal” or “the state of being equal”. Now, this meaning will not be changed and is universally accepted. But when the word changes or has a transition to the realm of “Value” then it becomes “Relative”. The Moral or Legal Value of “Equality” changes its nature “with respect to the material, temporal and spatial sphere of Law”.

“Every Word could be stated to be Basic but as a Value is relative”? Then the question arises that “Whether any value could not become basic”. Then a Value to become Basic it must affirm the “Categorical Imperative of Kant”. It is only the “Supreme Moral Value of Kant” which is not relative to Material, Spatial and Temporal Sphere. The Identity of the Categorical Imperative would not be changed anytime, anyplace and with respect to any circumstance.

This theory demands explanation and for the explanation, let take the word “Equality”, which as a word means ‘Equal’. Now the word Equality if accepted as Moral Value, then it becomes relative to ‘what, why, where, who etc’. If the Equality is accepted as Legal Value, then it is also a Relative Value. It could be proved, as the term ‘Equality as a Constitutional Value’, was interpreted in the decision of *Plessy v. Ferguson*¹¹ as ‘Separate but Equal’, where by if the same material things are provided to white and black, if two buses of same quality are provided to white and black for transportation, even though Black would not be allowed to travel in Buses reserved for White, it would not be a negation to the Constitutional Value of Equality, but it would be ‘Separate but Equal’ and the same Legal Value of Equality, changed its conception and meaning in *Brown v. Board of Education*¹², where the doctrine of ‘Separate but Equal’ was expressly negated and it was turned down to be ‘inherently unequal’.

¹¹ 163 U.S. 537 (1896)

¹² 347 U.S. 483 (1954)

The Value of the Equality that was contemplated by the old constitution through the decision of *Plessy v. Ferguson* was changed in all its manifestation by *Brown v Board of Education*. It is not only the judgement but the 13th and 14th Amendment to the United States Constitution has also changed the Legal Value of Liberty as was determined in *Dred Scott Case*. Now, even after such a change both Judgement exist together, it is neither denied that *Plessy v Ferguson* was at one point of time was Constitutional nor it is denied the *Brown v. Board of Education* is Constitutional and has replaced this value. But this could not have been possible If one had been the basic identity, if the Basic Identity of the Legal Value of Equality lied in *Plessy v Ferguson* then the *Brown v. Borad of Education* could never have been contemplated within the idea of Equality, for then it would have been change to the Basic Structure of the Identity. And if the *Brown v Board of Education* was basic in identity, then *Plessy v. Ferguson* would never have been contemplated. But both were contemplated, both were in the respect to their “material, spatial and temporal sphere were rendered Constitutional’. Then, they could not exist together, if Basic Identity was meaning of anyone of them. Thus, the question remains how they existed?

They existed because there was never a “Basic Identity” to the “Legal Value of Equality”. If there was something basic, then it was its “Relativity to the Material, Spatial and Temporal Sphere of Law”. The Legal Value was “relative in its nature” and its “relativity was its basic nature” else they could not exist mutually. It is only in relative nature of value, could two ‘mutually contradicting values’ would exist and could be Justified as ‘Constitutional Relative to their Temporal, Material and Spatial Sphere. It is then not a Basic Structure but a Relative Structure to the Indian Constitution. In the words of Holmes J., “Word is a texture of Living Thought”. “A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used.”¹³

Indeed, a word is a living thought which may vary greatly in colour and content according to the circumstances and the time in which it is used. The meaning of a word is enlarged or constricted or entirely changed within a few decades.” But this is true only when we take ‘Word as a Value’ then ‘Word as a Value is a texture of

¹³ Justice Oliver Wendell Holmes, in *Towne v. Eisner*, 245 U.S. 425 (1918)

Living Thought that change according to circumstances and time’ and as such ‘every value is relative until and unless it is a Categorical Imperative’.

Now how a Categorical Imperative is a Basic Value, then we must see the Imperatives of Kant. The very nature of the Categorical Imperative gives its existence of a “Basic Nature”. The First Categorical Imperative of Kant is the fundamental manner for formation of any Basic Value. The First Categorical Imperative states that, “Act only according to that maxim whereby you can at the same time will that it should become a universal law.”¹⁴ The First Question, that must be asked is that What is a Maxim? A Maxim is a Statement, whose truth lies in itself. The very truth of the Fundamental Legal Maxim, “Where there is Right there is a Remedy”, seems unquestionable and it could never be contested, for its acceptance is indifferent to the ‘relativity of time, space and content of Law’. The Legal Maxims which are in accordance with the Maxim of Kant, which could become a Universal Law could be stated as ‘Basic Principles’. The Reason the Kant made the Existence of Categorical Imperative as Maxim and not Principle is due to the very nature of Maxim which is its ‘definiteness and certainty’ in its meaning, which could ‘never accept or justify anything mutually contradicting’ to its meaning so to render the meaning of the Maxim as Meaningless. The second categorical imperative of Kant is a maxim as “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.”¹⁵ Now whenever this maxim is applied, it will give same answer. Like, if it was applied in the case of Plessy v Ferguson, then the doctrine of ‘Separate but Equal’ could never have been given birth. If the same was applied in Brown v Board of Education, it would have denied the doctrine of Separate but Equal. Thus, it could never have in itself a ‘mutually conflicting value’. Its answer is same, irrespective of Material, Temporal and Spatial Sphere. This is the reason that it is a Basic Value. It does not change its Identity. What was the identity in the Plessy Case, the same will be the identity in Brown Education Case? Therefore, this value could be Basic as well as Universal itself, apart from this all moral and legal value are Relative.

4. Conclusion: - The Normative Structure & Empirical Reality

¹⁴ Groundwork for the Metaphysics of Morals IMMANUEL KANT, 37 (Allen W. Wood, 1st ed., 2018)

¹⁵ Ibid., at 38

Therefore, we now come to this very conclusion that the whole structure of the Constitution is Relative Structure, there is nothing Basic in its Structure, there is nothing a change in the Indian Constitution that has not changed its Older Constitution. Henceforth in order to constitute a true basic value there shall exist 'Constitutional Categorical Imperative', a Values which will be infused in the Heart of our Constitutional Order, that gives purposive meaning to every constitutional rights, prohibitions, limitation and power.

Further, we must understand that a Basic Value could only exist in the form of "Constitutional Categorical Imperatives". The Artificial Reason of Law would not be able to state truly the "Fall of Basic Structure" for it is not an Oracle of truth but a Normative Speculation. Thus, the Basic Structure is not only the matter of Judgement but the matter of Existence. Whenever the Fall of Basic Structure happens, the Constitutional Provision with respect to the basic value of older constitution could not be harmoniously interpreted with the new added value in the constitution, for the very reason that a Value which negates the very identity of Older Basic Value could never co-exist mutually. Whatever the amendment be brought, in existence, in reality, the form of both values will render contradictory to one-another self. With respect to Empirical Reality, Constitutional Machinery of the State will breakdown as such rendering the Constitution Meaningless with respect to its Basic Values.