

THE BASIC STRUCTURE OF CONSTITUTION
AND THE WILL OF THE PEOPLE

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We the people of India having solemnly resolved to
constitute India as sovereign democratic republic and to secure to all of us:

JUSTICE in Social economic and political;

LIBERTY in thought, expression, belief, faith and worship.

EQUALITY in status and of opportunity, and to promote among
ourselves.

FRATERNITY assuring the dignity of the individual and the unity of
the Nation.

These three cardinal principles viz., liberty, equality and fraternity
were the foundation on which the French Revolution was built up. These
slogans were preached by the eminent scholars like DANTE, PETROCK,
ROUSSO and VOLTAIR through which they added fuel to the burning fire
of the freedom.

Similarly at the time of enacting our constitution we have also
resolved that equal justice, Liberty, Equality and Fraternity should be
protected and promoted amongst all and that was why our constitution was
framed on this day of that year.

The demand that India's political destiny should be determined by
Indians themselves had been put forward by Mahatma Gandhi as early as
in 1922.

The language which was coined by our Father of Nation Mahatma
Gandhi reads as follows:

"Swaraj will not be a free gift of the British parliament; it will be a
declaration of India's full self expression. That it will be expressed through
an Act of Parliament is true but it will be merely a courteous ratification of
the declared wish of the people of India even as it was in the case of the
union of South Africa."

The failure of the statutory commission and the Round Table Conference which led to the enactment of the Government of India Act, 1935, to satisfy Indian aspirations accentuated the demand for a Constitution made by the people of India without outside interference, which was officially asserted by the National Congress in 1935. In 1938, Pandit Nehru definitely formulated his demand for a constituent assembly thus:

“The National Congress stands for independence and democratic state. It has proposed that the constitution of free India must be framed, without outside interference, by a Constituent Assembly elected on the basis of adult franchise.”

This was reiterated by the Working Committee of the Congress in 1939.

This demand was, however, resisted by the British Government until the outbreak of World War II when external circumstances forced them to realize the urgency of solving the Indian Constitutional problem. In 1940 the Coalition Government in England recognized the principles that Indians should themselves frame a new constitution for autonomous India, and in March 1942, when the Japanese were at the doors of India, they sent Sir Stafford Cripps, a member of the Cabinet, with a draft declaration on the proposals of the British Government which were to be adopted provided the two major political parties (Congress and the Muslim League) could come to an agreement to accept them.

The picture of a ‘democratic republic’ which the Preamble envisages is democratic not only from the political but also from the social standpoint; in other words, it envisages not only a democratic form of Government but also a democratic Society, infused with the spirit of Justice, Liberty, Equality and Fraternity.

The ideal of the democratic republic enshrined in the Preamble of the Constitution can be best explained with reference to the adoption of universal suffrage and the complete equality between the sexes not only before the law but also in the political sphere. Political justice means the absence of any arbitrary distinction between man and man in the political sphere. In order to ensure the ‘political’ justice held out by the Preamble, it was essential that every person in the territory of India, irrespective of his

proprietary or educational qualifications, should be allowed to participate in the political system like any other person.

That this democratic republic stands for the good of all the people is embodied in the concept of a 'Welfare State', which inspires the directive principles of State Policy. The economic Justice assured by the Preamble can hardly be achieved if the democracy envisaged by the constitution were confined to a "political Democracy". In the words of Pandit Nehru:

"Democracy has been spoken of chiefly in the past, as political democracy, roughly represented by every person having a vote. But a vote by itself does not represent very much to a person who is down and out, to a person let us say, who is starving or hungry. Political democracy, by itself, is not enough except that it may be used to obtain a gradually increasing measure of economic democracy, equality and the spread of good things of life to others and removal of gross inequalities."

As Dr. Radhakrishnan has put it:-

"Poor people who wander about, find no work, no wages and starve, whose lives are a continual round of sore affliction and pinching poverty, cannot be proud of the Constitution or its law".

In short, the Indian Constitution promises not only political but also social democracy, as explained by Dr.A,bedkar in his concluding speech in the Constituent Assembly:-

"Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity which are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity."

The doctrine of Basic structure is not found any where

It was a Judicial innovation, made by the Supreme Court to maintain the supremacy of the Constitution, but it has not defined it. The basic structure of the constitution can be defined as those parts of the constitution without which the constitution may lose its fundamental character.

The basic structure what the Supreme Court thinks that it is by not defining the Basic Structure the Supreme Court has kept its power open.

The basic Structure is at the 'Heart of the Constitutional Scheme'

Parts of basic structure of the constitution.

1. Supremacy of the Constitution.
2. Sovereignty of the Country
3. The mandate to build a Welfare State
4. Secularism
5. Democratic form of Government
6. Parliamentary form of Government
7. Republican nature of Government
8. Fair and Free Elections
9. Judicial Review
10. Balance between the fundamental rights and the directive principles.

The above given list is only illustrative but not exhaustive.

Part III of the constitution defines the fundamental rights of the people. This part III contains the articles from 12 to 32. The fundamental rights are modeled on Bills of rights of US constitution and the Fundamental rights are considered essential for the functioning of a modern democracy.

Part III of the Constitution is called the 'cornerstone' of Indian democracy.

Fundamental rights are called 'Fundamental ' because they are considered to be essential for a individual to attain his fullest physical intellectual and spiritual structure.

Nature of Fundamental rights:

Fundamental rights are rights enjoyed by the individuals.

They are enforceable against the state (i.e., binding on the state) and are not enforceable against individuals except on two accounts.

1. Right against exploitation.
2. Right against untouchability.

Fundamental rights are regarded as the limitations upon the powers of the state. They aimed to prevent the state from becoming totalitarian. They are enforceable against the executive and legislature.

They are called negative obligations of the state, because most of them are negatively worded and restrain the State from performing certain acts.

Eg. Art.14,15,16, 18and 21 etc.,

However fundamental rights are not unlimited rights but are restricted rights (Rights can be restricted under certain reasonable grounds)

1. In the interest of the Security of the Country
2. Maintenance of Public Order, Decency or Morality
3. Promotion of the well being of the Socially and economically backward classes or SCs and STs etc.,
4. Sovereignty and integrity of the country.
5. Friendly relations with foreign states.

The constitution authorizes the Parliament to impose new restrictions upon law. The restrictions imposed by the Parliament is subject to Judicial review.

Two distinction between the Fundamental rights and the other legal rights:

Fundamental rights are one set of rights. There are others as well:

1. Rights under Constitution, Eg.Art.326, 301, 300-A
2. Rights outside Constitution (Neither fundamental nor legal) i.e. Amended rights, Acts etc.,

In the case of fundamental rights if they are violated, the aggrieved individual has the right to approach the Supreme Court directly for enforcing his fundamental right. The time period within which the Supreme Court rules the judgment will be in short.

If other legal rights are violated then the individual has the right to approach the High Court by filing a Writ Petition under Art.226 of the Constitution or by filing an Ordinary Suit in the Subordinate Courts.

As adumbrated supra the basic structure of the fundamental rights conferred upon the people of constitution of India or right to equality before law, prohibition of Discrimination on grounds of religion, race, caste, sex or place of birth, equality of opportunity in matters of public employment, abolition of untouchability, abolition of titles.

RIGHT TO FREEDOM

1. Protection of Certain rights regarding freedom of speech etc.,
2. Protection in respect of conviction for offences.
3. Protection of life and personal liberty.
4. Protection against arrest and detention in certain cases
5. Prohibition of traffic in Human beings and forced labour
6. Prohibition of employment of children in factories etc.,

RIGHT OF FREEDOM OF RELIGION

Freedom of conscience and free profession, practice and propagation of religion.

Freedom to manage religious affairs.

Freedom as to payment of taxes for promotion of any particular religion.

Freedom as to attendance at religious instruction or religious worship in certain educational institutions.

Protection of interest of minorities.

Right of minorities to establish and administer educational institutions.

If any law is passed by the parliament against the fundamental rights, then the law is void abinitio i.e., the law becomes void before the Judicial review.

The state shall not make any law that will abridge or affect any of the fundamental rights if such a law is made by the Government it becomes void and unconstitutional to the extent of its inconsistency.

Fundamental rights are unamendable and are given a transcendental (Overloading).

In SANKARI PRASAD VS UNION OF INDIA 1951, 1st Amendment Act 1951 the Supreme Court as observed that

“If fundamental rights are unamendable, it will lack dynamism and will lag behind the changes in the society.

In SAJJAN SINGH VS STATE OF RAJASTAN 1965 The Supreme Court as observed that

“the fundamental rights are also subject to amendment by the Parliament

and there by the Court maintained the dynamism.”

In GOKUL NATH VS STATE OF RAJASTHAN 1965, The Supreme Court has overruled its earlier decision. It has observed that

“the Fundamental rights has been given a transcendental position. No authority including the parliament can amend the fundamental Rights.”

Further the Supreme Court has held that,

“the Parliament enjoys only one power, i.e. the ordinary legislative power because Article 368 gives only the procedure to amend and that it does not confer the amending power.”

Art.368 (3) was included in the constitution which says, nothing in Art.13 shall apply to an amendment made under Art.368.

The 24th Amendment Act was challenged before the Supreme Court in KESAVANDA BHARATHI VS STATE OF KERALA 1973.

The case was heard by a bench consisting of 13 judges, highest no. of judges deciding a case in the history of Supreme Court of India.

The Supreme Court in that case has upheld the 24th Amendment Act as constitutionally valid. I.e., it over ruled its previous decision in the GOKULNATH CASE and further observed that Art.13(4) and At.368(3) are constitutionally valid and it further observed that the parliament enjoys two types of power and the parliament cannot change its ordinary legislative power by any law but can change its constituent legislative power.

The amending power of the parliament is limited to the limit of not violating the basic structure of the Constitution.

The basic structure of Constitution can be amended but cannot be destroyed.

In so far as the will of the people is concerned that their fundamental rights conferred by the Constitution of India and must be safeguarded, protected and shall not be violated or infringed by any means.

The people shall not be discriminated socially, economically and religiously. Their Human Rights must be Honoured and celebrated.

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