

BUCHBESPRECHUNGEN / BOOK REVIEWS

Sudhir Krishnaswamy

Democracy and Constitutionalism in India

A Study of the Basic Structure Doctrine

New Delhi (OUP India) 2009, 244 pages, Rs. 625,00 [Oxford India paperbacks 2010, Rs. 325,00, £ 11,99 via www.amazon.co.uk]

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1. Legal battles about land reform legislation between the Indian judiciary and the parliamentary bodies of the country started in the early 1950ies. After some pieces of legislation had been successfully challenged by affected land owners, the federal Parliament, then still dominated by the Congress Party, enacted constitutional amendments to effectively shield such expropriations from judicial review. The Supreme Court, for its part, found that the constitutional amendments violated the Constitution and declared them null and void (*Golaknath v State of Punjab*, 1967). The political and legal disagreement over the existence of substantive limits to the Parliament's amending power lingered for years. The Supreme Court eventually handed down the landmark *Kesavananda judgement* (*Kesavananda Bharati v State of Kerala*, 1973). It held that even the amending power must not 'damage or destroy' 'basic features of the Constitution'.

This 'basic structure doctrine' today is a settled part of Indian constitutional law, though only in five further cases the Supreme Court has invoked the doctrine to strike down constitutional amendments. The key test for the doctrine came when Indira Gandhi was about to establish an authoritarian form of government in India. The (then) recently elected Prime Minister was disqualified for public office and taking part in future elections by a State court due to her corrupt election practices. The Parliament thereupon adopted a package of constitutional amendments and legislative acts to retroactively legalize her action and to immunize such practices against judicial control. In the so-called Election case (*Indira Gandhi v Raj Narain*, 1975), the Supreme Court held that free and fair elections is an essential requirement of democracy which itself is a basic feature of the Constitution that even the amending power must respect. Since then, the basic structure doctrine has attracted much attention, nationally and internationally, and has become a controversial issue of first rank in the constitutional discourse in India.

2. An in-depth study of this doctrine in Indian constitutional adjudication is the topic of the book discussed here. It is the author's PhD thesis prepared at the Faculty of Law, Oxford University under the supervision of Professor Paul Craig (Krishnaswamy is now a Professor of Law at the West Bengal National University of Juridical Sciences in Kolkata). The study provides the reader with a thoughtful reconstruction of the Supreme Court's jurisprudence and a forceful justification of the underlying rationale to ensure compliance

with principles identified as basic features of the Constitution. According to Krishnaswamy, the basic structure doctrine is a ‘legitimate doctrine in Indian constitutional law’ that has ‘a sound constitutional basis’ (p. xxxiii). The latter statement is meant to defend the Supreme Court against the accusation of widening the scope of judicial review beyond constitutional boundaries, to the detriment of democratically elected decision-makers.

Following a programmatic introduction, the study is composed of five parts. Chapter 1 evaluates the doctrine’s constitutional basis as first developed in Golaknath and re-shaped in Kesavananda (p. 1–42). The author holds that the Constitution of India does establish substantive limits to the amending power. These implied limits are grounded in the constitutional document as a whole, rather than any particular provision. Krishnaswamy speaks of a text-emergent but otherwise unwritten doctrine resulting from a ‘structural interpretation’ of the constitutional document. This method of drawing multi-provisional implications must not be confused with an ‘originalist’ reading which would stress the intent of the framers. Still less does it involve any metaphysical or value-based justifications.

The second chapter (p. 42–69) clarifies the scope of the doctrine. The case-law reveals a surprisingly wide range of state actions to be subject to basic structure review. That range includes acts other than constitutional amendments, such as the proclamation of emergency or even ordinary legislation and executive action, provided that the act, if upheld, would damage or destroy basic features of the constitution. In certain constellations, the basic structure doctrine thus compensates for a less comprehensive scrutiny according to other types of constitutional or administrative law review.

Chapter 3 (p. 70–130) reviews the application of the doctrine in the cases ensuing Kesavananda. It confirms the author’s view that basic structure review is a substantive type of review whose nature is to preserve the integrity of the constitution as a statement of key constitutional principles. A uniform ‘damage or destroy’ test applies to all forms of state actions without modification. As to the standard of review, Krishnaswamy sees no need for an additional concept of judicial deference that would lower the ‘hard review’ standard applied by the Supreme Court.

The fourth chapter (p. 131–163) briefly discusses the grounds of review, i.e. the relevant basic features of the Constitution of India. According to the author, these grounds consist of general constitutional principles rather than a set of provisions that are per se immune from being amended. They are identifiable on a case-by-case basis. Though inherently prone to disagreement, a broadly consented list would include the principles of secularism, democracy, rule of law, federalism, and independence of the judiciary.

The final chapter (p. 164–229) concerns the ‘legitimacy’ of the basic structure doctrine, i.e. whether it can successfully be defended against the various strands of academic and public critique. The chapter is subdivided according to three aspects of legitimacy: legal, moral, and sociological.

In the language of the author, ‘legal legitimacy’ relates to the juridical methods employed by the Supreme Court. Krishnaswamy demonstrates that accusing the court of

‘judicial activism’ often builds on misperceptions of the doctrine or the nature of constitutional adjudication.

Under the heading of ‘moral legitimacy’ the next part discusses issues of constitutional theory. Defending the doctrine against the allegation of being anti-democratic in character, the author develops a line of reasoning on how constitutionalism and democracy can be reconciled. Referring to the work of Bruce Ackerman, a US scholar, Krishnaswamy employs the distinction between ordinary law-making and higher law-making through fundamental constitutional change. In the latter case, politics of a superior deliberative quality is required to ensure the integrity of the process. From this point of view, the basic structure doctrine is a tool to guard the deliberative quality of constitutional politics. Consequently, the Supreme Court has never denied the right of the constituent power to modify basic features of the Constitution: the Parliament may indeed call for a Constituent Assembly for making a new constitution or ‘undoing’ the basic structure of the current.

A second issue of ‘moral legitimacy’ concerns the notion of sovereignty. Here the book explains that India has not adopted the British doctrine of parliamentary sovereignty, despite the central role the Parliament had played in gaining Independence and in acting as a Constituent Assembly immediately thereafter. The framers of the Constitution rather opted for a rigid type of constitution that also binds the Parliament and subjects it to the judicial review of a Supreme Court. If at all, Krishnaswamy says, the concept of sovereignty only can gain a plausible meaning in the Indian constitutional setting based on a new, institutionally dispersed understanding.

Finally, the notion of ‘sociological legitimacy’ means empirical acceptance or support in the relevant circles. In this section, the author recalls the different stages of development in the Court’s jurisprudence. At first, the new doctrine has had very little support among the political and legal elites. After the Election case, however, the picture has changed, though the doctrine still does not enjoy uncontested elite support. At the very least, the basic structure doctrine has emancipated itself from the odium of being merely an ideology to prevent progressive social change.

3. Krishnaswamy has written a well-structured, concise book that makes out his case in a very persuading manner. Its clarity and reader-friendliness are reinforced by outlining the structure of the argument at the beginning of each chapter, next to providing detailed summaries at the end. In some instances, though, it displays an unnecessary degree of redundancy (in particular in Chapter 5 where most of the points on ‘legal legitimacy’ have already been made before). On the other hand, such explanatory efforts enable the author to address not only the specialists in Indian constitutional law but also a wider audience beyond the academia. To some degree, the book is an educational intervention in the (English-speaking) political discourse of India, taking the Supreme Court’s side in the heated debate over alleged judicial activism.

It is doubtlessly also an outstanding piece of doctrinal constructivism in Indian constitutional law (though the present reviewer is not fully competent to judge this). Krishnas-

wamy refrains from merely reporting ‘heroic’ cases and summarizing the arguments of the Judges. Taking a remarkably distanced stance, he offers generalizing abstractions and critical reflections that enable him to identify unfit conceptions und weak justifications.

As it repeatedly confirms, the book argues solely on the basis of the constitutional texts and case-law in India. Making a contribution to a general theory of basic structure review or engaging with comparative constitutionalism would go beyond its intention. And yet, such statements underrate the eminent theoretical potential of the study. This book will deepen the readers’ understanding of the distinction between legislative, amending and constituent powers, and their respective correlations with a constitutional court’s power of judicial review. In particular the sections with the infelicitous denomination ‘moral legitimacy’ (p. 189–221) provide very interesting thoughts of constitutional theory. They avoid the empty scholasticism and the decisionist bias that characterize so many contributions to the German discussion on the people’s constituent power. It is a pity that Krishnaswamy was so hesitant to further develop his theoretical observations, perhaps in order not to ‘damage or destroy’ the educational and doctrinal value of the book.

What can we learn from the confrontation with the Indian legal discourse to which Krishnaswamy has opened us a window of access? Maybe it is first of all the significance of the question raised by the title of his book which is hardly ever asked in the German context: How can democracy and constitutionalism be reconciled in view of a justiciable basic structure doctrine? In the eyes of the present reviewer, a key insight is that basic structure review serves the purpose of guarding the deliberative integrity of a process that could result in an ‘overall modification’ of the constitution (in German ‘Gesamtänderung’, a term developed in Austrian jurisprudence). However, a constitutional jurisprudence that obstructs any legal paths to such overall constitutional change would undermine the very legitimacy on which basic structure review rests.

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Muthucumaraswamy Sornarajah / Jianguy Wang (eds.)

China, India and the International Economic Order

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Even though the ongoing changes in the international economy and the dawn of an “Asian century” are often associated with the economic and political rise of China, India’s rapid development has equally been calling for attention for some time. Indeed, the integration of both India and China into the world economy is not only improving the living standards of more than two billion people, but is also shifting to some extent the global balance of powers from West to East. Hence, the two giants are likely to increasingly shape global order by the approaches they adopt towards economic development and international law.