Grounds of Review

Basic Features of the Constitution

The very nature of these lists suggests that the court has not quite thought through the constitutional principle behind the basic structure doctrine. Rather, they picked out items from the text of the constitution without specifying why. It is almost as if the Supreme Court takes the view that we recognize the basic structure when we see it.1

In Kesavananda, the Supreme Court announced the basic structure doctrine, but it fell to later decisions to elaborate on the nature and character of basic features and to specify the mode by which they may be identified. At various points the court has suggested that democracy, secularism, rule of law, federalism, judicial review, separation of powers, among others, are basic features of the constitution. A first step to clarify the identity of basic features of the Constitution is to scrutinize the important judicial opinions in Indira Gandhi, Waman Rao, Minerva Mills, Bommai, and Ganpatrao, as well as the early speculations in Kesavananda in order to identify the main arguments and concerns about the basic features of the Constitution. Next, I filter out unsupported and unfounded claims and criticisms of the courts attempts to identify basic features and then critically evaluate the remaining few substantive issues. Pratap Mehta, in the quotation above, emphatically concludes that the Supreme Court has failed to adopt a principled approach to the task of identifying the basic features of the constitution. In the rest of this chapter I will show that the court has indeed developed a distinct method


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for identifying basic features and though the set of basic features
so identified may not constitute a coherent set captured by a single
principle of constitutional or political morality, this failure may not
be as fatal to the doctrine as the quotation above suggests.

In the ‘Introduction’, I proposed that the basic structure doctrine
has evolved into a full-fledged doctrine of constitutional judicial
review. Such a doctrine may be understood as possessing a sound
constitutional basis, and a distinct and discrete type and standard
of review to assess compliance with identifiable grounds or bases of
review. By structuring our assessment of the doctrine in this fashion
I am able to better focus the analysis and criticism of the doctrine,
on its core ingredients and avoiding the broad-brush generalizations
which plague the existing secondary literature. In this chapter I
address the third aspect of any doctrine of constitutional judicial
review identified above; the grounds or bases of review.

This chapter may be usefully divided into two parts: first, I will
examine the nature and character of the basic features of the
Constitution and second, isolate the judicial technique employed
to identify these features. I argue that the basic structure doctrine
seeks to identify ‘basic features’ of the Constitution, as distinguished
from core articles or ‘integral’ parts of it. These features are
general constitutional rules which are foundational to the identity
and character of the Indian Constitution and include principles of
institutional design as well as substantive values which together frame
decision-making under it. I argue that the court is right to refuse to
provide an exhaustive catalogue of basic features in a legislative mode.
I will show that the court has committed itself to a common-law, case-
by-case technique to discover basic features of the constitution.4 In
each case the court considers, in the circumstances before it, whether

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2 Indira Gandhi v. Raj Narain, AIR 1975 Supreme Court 2299. Chandrachud
identifies basic features with the core articles in the constitution, while Mathew
correctly points out that such an approach is misguided as all articles of the
constitution are important and a structural interpretation would require basic
features to be etched out in a broader range of provisions.

3 Ganpatrao v. Union of India, AIR 1993 SC 1267.

4 This constraint of the development of the doctrine is necessarily entailed by
the constraints on a court developing a doctrine by interpreting the text of the
constitution and resolving the case before it. See generally Adam Steinman, ‘A
the basic feature claimed to be damaged in the case is adequately supported by the textual provisions of the constitution. Where such a feature is thus supported by the constitutional text taken as whole, the court evaluates arguments from the constitution’s underlying moral or political philosophy, the political history of the freedom movement, and more particularly speeches in the Constituent Assembly Debates, to assess whether such features are ‘basic’ or foundational to the normative identity of the constitution.

The level of abstraction at which a basic feature is identified as critical to basic structure review as the general character of basic features has a bearing on the level of scrutiny at which basic structure review takes place, an issue I consider more fully in Chapter 3. I suggest in the discussion below that there has been much confusion about the basic feature identified and the derivative reasons, which emerge from these features and assist the court to decide the case before it. For example, different opinions have identified democracy\(^5\), parliamentary democracy\(^6\), and free and fair elections\(^7\) as being basic features in the Constitution. When one considers that presidential democracy has been the focus of many constitutional reform proposals, the precision with which basic features are identified affects the nature of basic structure review. For example, a constitutional amendment introducing presidential democracy may survive basic structure review for damaging democracy so long as it ensures free and fair elections. However, if parliamentary democracy is itself taken to be a basic feature, the very prospect of substituting the parliamentary executive with a presidential executive would violate this basic feature. I will suggest that basic features are best understood as constitutional values identified at a level of abstraction, as values expressed in the preamble, in order to preserve basic structure review as a distinct and novel form of constitutional judicial review with an appropriate standard of scrutiny.

**The Nature of Basic Features**

In *Golaknath v. State of Punjab* the Supreme Court held that the permitted scope of Parliament’s amending power did not extend

\(^5\) *Indira Gandhi, v. Raj Narain*, supra n. 2 (Mathew, J).

\(^6\) *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 (Jaganmohan, J)

\(^7\) *Indira Gandhi*, supra n. 2 (Chandrachud, J).
to the fundamental rights set out in Part III of the Constitution. I considered and rejected the approach of the court in this case for several reasons explored more fully in Chapter 1. Further, this proposition was roundly rejected by the court in *Kesavananda*. However, the *Golaknath* court articulated a clear and unambiguous basis for judicial review and the unamendable core features of the Constitution were easily identified—rights in Part III of the Constitution. By contrast, in *Kesavananda* the court articulated a sounder constitutional basis for the basic structure doctrine but was imprecise about the grounds on which judicial review of constitutional amendments should proceed. This imprecision provoked a great deal of criticism about the character and source of basic features in the Constitution and the method by which they were to be identified.

The court was challenged to provide a complete catalogue of these basic features without which, it was argued, Parliament would not get sufficient guidance on the scope of its amending power. Tripathi goes further to suggest that *Kesavananda* failed to articulate a common basis for judicial review and that the ‘six Judges led by the Chief Justice very nearly hold that the power of amendment under Article 368 is subject to reasonable restrictions, and has to be scrutinized like an ordinary statute challenged on the ground of violation of the rights guaranteed in Article 19’. Such ‘reasonableness’ type judicial review does not, in his view, require the identification of basic features of the Constitution. The development of the basic structure doctrine over the last three decades shows that Tripathi was wrong in his early assessment about the nature of basic structure review and the need to identify basic features of the Constitution. The courts have developed basic structure review as a distinct type of judicial review which shares little with ‘reasonableness’ analysis under Article 19. To sustain the distinctiveness of basic structure review, I consider and respond to the criticisms about the nature and character of basic features which operate as the grounds of review. This is the task I undertake in this section of the chapter.

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In order to make any progress in identifying basic features of the Constitution there is a need for a clarification of terms. In *Kesavananda*, the plural opinions delivered by the court allowed for considerable doubt about the target of the doctrine. It has been suggested that while Sikri, and five other judges who concurred with him, spoke in terms of ‘basic features’ and ‘essential elements’, Khanna formulated the doctrine in terms of ‘the basic structure or framework’ of the Constitution.\(^\text{10}\) So I must first clarify whether this characterization of the *Kesavananda* opinion is accurate and if so, whether these terms are synonymous and if not, which of these views is correct.

**Basic Structure or Essential Features**

Raju Ramachandran suggests that Khanna’s concept of basic structure was clearly different from the ‘basic features’ view of the other judges. He suggests that the other majority judges viewed certain features, embedded in particular provisions of the Constitution, to be unamendable. Khanna was concerned with the power to amend the constitution as a whole. He understood amending power to not include the power to abrogate the entire constitution and replace it with an entirely new one. It is from this perspective that he observed that the basic structure or framework of the Constitution could not be destroyed.\(^\text{11}\) This argument gives weight to the particular phrasing used by the judges in their opinions—‘basic structure’ or ‘basic features’—to suggest that there were two distinct versions of the basic structure doctrine announced in *Kesavananda*. In this section I examine this argument at greater length and find that while it is crucial to bring clarity to the language in which the basic structure doctrine is expressed, far too much is made of the early dissonances in *Kesavananda*.

Sikri, in the concluding part of his *Kesavananda* opinion, held that the amending power under Article 368 did not extend to the abrogation of fundamental rights or ‘to completely change the fundamental

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features of the constitution so as to destroy its identity’.12 Earlier in
the opinion he suggests that while every provision of the Constitution
was essential, they could be amended ‘provided in the result the basic
foundation and structure of the constitution remains the same’.

The basic structure may be said to consist of the following features:
1. Supremacy of the Constitution
2. Republican and Democratic form of Government
3. Secular character of the Constitution
4. Separation of powers
5. Federal character of the Constitution

The above structure is built on the basic foundation, that is, the
dignity and freedom of the individual.13

These excerpts make clear that Sikri did not envisage basic features
to be equivalent to, or reside exclusively in, individual articles of
the constitution. Instead he outlines a doctrine which operates at
a considerable degree of abstraction from the constitutional text
by identifying constitutional principles which are rooted in, and
exemplified by, several provisions of the Constitution simultaneously.
Later in this chapter I will assess whether Sikri provides us with an
adequate account of how these features may be identified. At this
point it is sufficient to note that when he speaks of basic features, he is
referring to constitutional rules residing in the constitution and not
the constitutional provisions themselves.

Khanna, in his partly concurring opinion in Kesavananda held
that the only limits on amending power under Article 368 was that
it could not ‘touch the foundation or alter the basic institutional
pattern’14 of the constitution. He identified ‘democratic government’
and the ‘secular character’ of the constitution to be among the
features of the constitution which are unamendable. His reference to
‘the basic institutional pattern’ promises a refinement of the possible
scope of basic features to be identified and that basic structure review

12 Kesavananda (Sikri, CJ), supra n. 6, p. 405.
13 Kesavananda Bharati v. Kerala (Sikri, CJ), supra n. 6, n. 366. Compare
W.F. Murphy, ‘An Ordering of Constitutional Values’, 53 Southern California L
Review 704–60 (1979–80) for a similar argument that all constitutional values are
rooted in the dignity of the individual.
14 Kesavananda, supra n. 6, p. 767.
may be geared to ensure broad participation in the processes of government and the benefits of this process by guarding against the undue restriction of the channels of political change.\(^{15}\) However, this phrase has attracted very little attention in subsequent cases and the secondary literature discussing these issues. Though Khanna did not employ the language of basic features or constitutional principles and spoke in terms of the basic structure, it is clear from the principles he identified that his understanding of the nature of basic features and the level of abstraction at which basic structure judicial review took place was identical to that of Sikri.

Though Sikri and Khanna certainly advanced different interpretative justifications for the doctrine, the suggestion that the lead majority opinions in *Kesavananda* had two different versions of the doctrine in mind is misplaced. In both opinions, the ‘basic structure doctrine’ protects the identity of the constitution, by ensuring that important constitutional principles or basic features are immune from amendment. Though I have distinguished between the ‘basic structure’ doctrine and ‘basic features’ of the Constitution consistently in this work as a whole, this clarity about the character of basic features which forms the basis of constitutional judicial review under the basic structure doctrine is not sustained in subsequent decisions of the court. The most significant of these confusions is between basic features as constitutional principles or individual articles in the Constitution and it is to this that I turn to in the next section.

**Individual Articles or Constitutional Features**

The *Golaknath* court, by making amendments subject to fundamental rights, had identified specific articles which operated as limits on Parliament’s amending power. Even after the court overruled the *Golaknath* holding in *Kesavananda*, there remained a residual tendency to identify basic features as individual articles, particularly fundamental rights, in the Constitution. The question was partially settled by Khanna’s holding in *Kesavananda* that the right to property, a fundamental right set out in Article 31, was not a basic feature and therefore amendable by Parliament. But this ruling, even

if correct, still left open the possibility that other fundamental rights or other important constitutional articles could be a part of the basic features protected by the basic structure doctrine.

The argument that fundamental rights are the basic features of the Constitution was considered in two subsequent cases where substantially different arguments were raised. In \textit{Indira Gandhi} it was argued that Khanna had categorically ruled out the possibility that fundamental rights could be a part of the basic structure of the Constitution. As Khanna was part of the bench in \textit{Indira Gandhi} he had the opportunity to clarify expressly that this was not what he had in mind when he ruled that Parliament’s amending power allowed it to amend the right to property. He went on to hold that secularism was a basic feature of the Constitution, which as Seervai correctly points out,\textsuperscript{16} is a constitutional value exclusively set out in the various rights guaranteed to citizens in the fundamental rights chapter in the Constitution. This clarification allows us to assert that fundamental rights are vital ingredients in any assessment of what are basic features of the Constitution and are not categorically excluded from the basic feature enquiry. However, I am yet to specify whether fundamental rights may themselves be considered as basic features of the Constitution.

In \textit{Indira Gandhi}, the petitioners claimed that the amendments challenged violated a range of basic features: judicial review, rule of law, separation of power, equality guaranteed under Article 14, democracy, and free and fair elections. A cursory look at this wide array of basic features suggests several confusions about the character of basic features at various levels. Unlike in \textit{Kesavananda} where the lead opinions were reasonably clear about the nature of basic features, the petitioners in \textit{Indira Gandhi} confuse basic features of the constitutions with particular articles of the Constitution as well as derivative principles like free and fair elections which emerge from the basic feature of democracy. Faced with these diverse contentions the court needs to articulate the level of abstraction at which basic features should be identified, distinguishing them from specific

Mathew’s opinion in *Indira Gandhi* dealt with the question of whether equality guaranteed by Article 14 was a basic feature of the constitution. It was argued by the petitioner that some articles, like Article 14, protect core values such as equality which are, by virtue of their importance for any theory of justice, themselves basic features of the constitution. Surprisingly, Mathew dismissed this argument on a narrow application of *Kesavananda* as precedent for the proposition that Article 14 was not a part of the basic structure.\(^\text{17}\)

Though, as I noted above, there is no doubt that the *Kesavananda* majority opinions identify basic features as general constitutional rules, I should offer more reasons to reject the argument that basic features are simply the important articles of the Constitution.

Mathew engaged with other reasons why equality may not be suitable to be a part of the basic structure of the constitution. He advanced two arguments in support of his conclusion that equality was not a part of the basic structure. First, he suggested that as equality ‘is a multi-coloured concept incapable of a single definition’ which is ‘capable of many shades and connotations’ and hence it is unlikely to provide ‘a solid foundation’.\(^\text{18}\) Second, he suggests that as the concept of equality is ‘subsumed under specific articles of the Constitution like Articles 14, 15, 16, 17, and 25’\(^\text{19}\) there is no other principle of equality behind these articles which is an essential feature. When one considers that Mathew went on to identify democracy and the rule of law as basic features, these arguments against equality as a basic feature seem all the more tenuous.

There may well be other reasons which motivated the court to deny the petitioners’ arguments that Article 14 was beyond the amending power or that equality was a basic feature. However, the first reason offered: that equality is a complex or contested concept subject to extensive theoretical disputations is true of the basic features of the ‘rule of law’ and ‘democracy’ identified by Mathew. Moreover, the reason offered by Mathew reveals that he misunderstands the type

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\(^{17}\) *Indira Gandhi*, supra n. 2, p. 2383 (Mathew, J).

\(^{18}\) Ibid.

\(^{19}\) Ibid.
and standard of basic structure review as applied to constitutional amendments as well as the nature and character of basic features of the Constitution. I had noted in Chapter 3 that when it is argued that an amendment damages or destroys the basic feature of equality, if the respondent can support the amendment under any reasonable and constitutionally defensible version of equality, the court will allow the amendment to stand. In other words, the level of scrutiny at which basic structure review takes place allows for the court to accommodate state action which may draw support from several, often contesting, versions of equality. If our argument about the type and standard of basic structure review is correct then basic features of the Constitution will admit of various conceptions and versions and the complexity of basic features should be understood to be an integral aspect of the character of basic structure review.

The second reason offered by Mathew to reject equality as a basic feature of the constitution is also unconvincing. While it is correct to assert that the principle of equality is well etched out in several constitutional provisions, there is no force to the view that the principle may somehow be exhausted by such a detailed exposition in the constitution. To the contrary, the presence of equality in various provisions of the Constitution lends support to the view that it is a feature which is central to our constitutional design. It may be that Mathew’s discomfort with recognizing equality as a basic feature of the constitution arose from concerns which he failed to articulate in his opinion. One possible concern is whether the basic features of the constitution are meant to include commitments to substantive normative values like equality and free speech or only to such features which maintain the ‘institutional arrangements’ set up by the constitution. This is a theme which will be explored in greater detail in the next section.

The second source of confusion in the identification of basic features is the level of abstraction at which such constitutional principles should be expressed. I noted earlier in this section that identifying basic features as the important articles of the Constitution is far too specific and detailed, and confuses the character of basic structure review with other forms of constitutional judicial review. On the other hand, identifying basic features as constitutional principles of an intermediate character which may be seen to be properly
derived from other basic features ignores how various constitutional principles are interrelated and the nature of judicial reasoning by which abstract constitutional values are used by courts to decide particular cases. I will illustrate this second problem by examining an example of such confusion.

In *Indira Gandhi* the court had identified several basic features including democracy and free and fair elections. Most opinions in the case treated both of these as constituting separate basic features of the Constitution. As free and fair elections are a part of democratic practice it is useful to see the former to be entailed by the latter. Khanna’s opinion in *Indira Gandhi* exhibited clarity and pointed out that democracy, which was part of the basic structure of the constitution, entailed free and fair elections. Hence he concluded that amended Article 329-A (4) violates the principles of free and fair election by extinguishing the dispute relating to the election of the Prime Minister, and such an amendment would damage or destroy the basic feature of democracy.

The argument about the appropriate level of abstraction may seem a semantic quibble. It may be that it makes no difference to the outcome in *Indira Gandhi* whether free and fair elections is taken to be a basic feature by itself or it to be seen as being entailed by democracy as a basic feature. However, two reasons may be offered to support the argument that basic features should be identified at an appropriate level of abstraction. First, it allows the court to manage a small set of basic features and prevent the proliferation of disparate principles as basic features of the Constitution. By recognizing basic features as those constitutional principles supported by several articles of the Constitution and integral to its design, the court maintains a distinct technique of identifying such principles. The Constitution says nothing about elections, an area of law almost entirely regulated by statute, subordinate legislation, and the Election Commission. So identifying free and fair elections to be a basic feature is not supported by adequate evidence. Free and fair elections are a necessary component of the practice of liberal democracy as it is conceived today, and hence it may be seen to be entailed by democracy as a basic feature of the Constitution and therefore play an important role in the court’s conclusion in *Indira Gandhi*. Though democracy and free fair elections may be inter-related in this fashion and both play a significant role in the
decision, it is crucial to the basic structure doctrine that there is clarity about the character of basic features of the Constitution and the subordinate principles which may be derived from it.

Second, the identification of derivative constitutional principles as basic features carries the risk that the court will end up conducting a far too intensive standard of scrutiny under basic structure review. Let us examine this difficulty with a hypothetical example. The courts have identified both ‘democracy’\(^{20}\) and ‘parliamentary democracy’\(^{21}\) as basic features of the Constitution. One of the persistent proposals for constitutional amendment over the last few decades has been the proposed change from a parliamentary to a presidential democracy. If such a proposal is carried out there is no doubt that it will be subject to basic structure review. In such a case, if the court takes the view that parliamentary democracy is a basic feature of the Constitution then the proposal for a presidential democracy is bound to fail basic structure review. However, if the court were to find that ‘democracy’ is a basic feature of the Constitution then the proposal for presidential democracy may be assessed in detail to ensure that it is essentially democratic in character. This hypothetical example suggests that the generality at which basic features are identified is crucial to sustain the nature and character of basic structure review as an independent and distinct form of constitutional judicial review.

In the next chapter, I will argue why the court should carry out basic structure review to preserve basic constitutional values at a level of generality sufficient to allow the amending power of Parliament the scope to make substantial changes to the Constitution. In this section it is sufficient for me to show that the court must consecrate as basic features only general constitutional rules which are not to be confused with the important articles of the Constitution or the intermediate and derivative principles which provide reasons for decisions in particular cases.

‘Integral Parts’ but not Basic Features

In the sections above I have considered the character of basic features of the Constitution as general constitutional rules. In this section I

\(^{20}\) *Indira Gandhi*, supra n. 2 and more recently in *Kihoto Hollohan v. Zachilhu*, AIR 1993 SC 412.

consider whether basic features are general constitutional rules which emerge from historically contingent political arrangements or compacts which make up the political foundation for the constitution or the moral principles which lie at the core of the normative identity of the constitution. This question is best explored by examining the court’s approach to this task in *R. Ganpatrao v. Union of India*\(^{22}\) where the Constitution (26th Amendment) Act, 1971 was challenged on the grounds that it damages or destroys the basic structure of the constitution and was beyond the powers of Parliament under Article 368.

The petitioner was the co-ruler of the princely state of Kurundwad Jr, a sovereign state in treaty relationship and under the suzerainty of the British Crown. The petitioner’s co-ruler executed an instrument of accession\(^{23}\) and a merger agreement, on behalf of both rulers, thereby committing the princely state to being a part of the Dominion of India. As a condition for the signing of these agreements, the rulers were entitled to receive annually from the revenues of the State his privy purse, as specified in the Merger Agreement free of taxes, besides preserving his other personal rights, privileges, and dignities. These entitlements were subsequently recognized by Articles 291 and 362 of the Constitution of India, 1950. The Constitution (26th Amendment) Act repealed these articles and inserted a new Article 363-A depriving the rulers of their recognition and declaring the abolition of the Privy Purse. This Amendment Act was challenged on the grounds that it violated the fundamental rights of the petitioner and damaged and destroyed the basic structure and essential features of the constitution. I will confine my analysis in this chapter to the basic structure review challenge.

The petitioner claimed that it was only on the basis of the Constituent Assembly’s acceptance of the provisions of Articles 291, 362, and clause 22 of Article 366 that the Rulers adopted the Constitution of India in relation to the States. The Privy Purse settlements were in the nature of consideration for the surrender by the Rulers of all their ruling powers and the dissolution of the

\(^{22}\) AIR 1993 SC 1267.

\(^{23}\) This instrument of accession was executed under Section 5 of the Government of India Act, 1935 as adopted under the Indian Independence Act, 1947.
States as separate units. For these reasons, counsel for the petitioner argued that these articles were an ‘integral part of the constitutional scheme’ and formed a part of the ‘basic structure’. As these articles were the key to achieving ‘the unity of India’ their deletion would damage and destroy the basic structure. This argument was supported by the claim that ‘there can be no basic structure of a Constitution divorced from the historical evolution of the precepts and principles on which the Constitution is founded’. Other petitioners urged that the Constitution (26th Amendment) Act, 1971 damaged other essential features. While one identified the damaged basic features to be equality—in Article 14—and to property—in Article 19(1)(f) as it then was—another suggested that the principle violated was the ‘principle of prohibition against impairment of contract obligations’ which was incorporated into Articles 362 and 291.

Of the arguments advanced in this case, I will pay particular attention to the argument that contractual commitments made to princely rulers during the formation of the India Union, now reflected in various provisions of the Constitution, were basic features of the Constitution. This challenge to the 26th Amendment was expressed in the terms that ‘the privileges of Rulers are made an integral part of the constitutional scheme’ by the historical nature of the Instruments of Accession and its subsequent incorporation into the Constitution. In its strongest form, it is argued that the present geographical shape and political form of the Indian Union could not have been achieved without the concessions and privileges conceded by these treaties of accession. In this sense, these treaties constitute an ‘integral’ part of the structure of the Union which ensured the organic unity of India. For these reasons, the petitioners argued that Articles 291, 362, and 366(22) are beyond the amending powers of Parliament under Article 368.

This argument encourages the court to analyse the evolution of the provisions of the Constitution against the background of the

24 Ganpatrao, supra n. 22, p. 1274.
25 Ibid.
26 Ibid., p. 1275.
27 Ibid., p. 1276.
political history of the Indian nation. It suggests that some articles of the Constitution originate in certain political events that were so critical to constituting India\(^{29}\) that such articles acquire sanctity and immunity from amendment. Hence, the task of identifying basic features is to identify such historically salient articles.

The alternative view conceives of basic features as general constitutional rules or values that are discerned by reading the Constitution as comprising moral and political principles expressed in various provisions of the Constitution. When read in this fashion the courts identify basic features as those principles which are integral to the constitutional design without which the 1950 Constitution loses its normative identity. This is the approach that Pandian adopts in *Ganpatrao*.

Pandian contended with this argument at two levels. First, he marshalled historical evidence to argue that far from being a principled bargain, the treaties of accession were agreed upon by the rulers of the princely states under popular pressure in their territories from a large majority of subjects who were keen to be a part of the Indian Union. Even if this historical argument is open to doubt, he offered a second independent and far more compelling argument. He took the view that in order to identify basic features one must read the Constitution as an integrated document which incorporates a ‘particular socio-economic and political philosophy’\(^{30}\). Pandian suggests that the ‘permanent retention of the privy purses and privileges would be incompatible with the sovereign and republican form of Government’\(^{31}\) instituted by the Constitution. Further, he suggested that as these provisions were incompatible with the ‘egalitarian form’ of our constitution, their deletion advanced the principles of economic, political, and social justice embodied in the Constitution.

In *Ganpatrao* the court had to choose between the historical and normative arguments about the nature and character of basic features of the Constitution. Pandian concludes that the basic


\(^{30}\) *Ganpatrao*, supra n. 22, p. 1287.

\(^{31}\) *Ganpatrao*, supra n. 22, p. 1288.
features protected are not embodied in the concrete language of particular articles or in the historically contingent political events that go to make up the Indian Union today. Instead he identifies as basic features those political, moral, and legal principles, which are reflected in several articles in the Constitution, which together make the core normative identity of the Constitution. In this case, the court’s denial of the status of basic features to the articles protecting the treaties of accession, suggests that the identity of basic features are not historically contingent provisions of the Constitution precommitted to during the founding of constitution. Instead the court identifies basic features as those moral, legal, and political principles which are the foundational normative core on which the rest of the Constitution is built.

I should be careful here not to overstate this point. The court is surely concerned with the textual provisions of the Constitution adopted by the Constituent Assembly and the values they express. History is relevant insofar as it allows the court to isolate the moral and political principles which ground the Constitution of India, 1950 as adopted by the constituent assembly. Hence, identifying basic features of the constitution is not an exercise in abstract moral or political philosophy to identify the ‘best’ constitutional principles for all time. It is an attempt to synthesize those core normative principles which may be understood to be central to our constitutional design.

In this part of the chapter I have analysed the nature of basic features of the Constitution. I began by clarifying that the grounds of review under the ‘basic structure’ doctrine are ‘basic features’ of the Constitution. By eliminating the inconsistency in the use of the phrases ‘basic structure’, ‘basic feature’, and ‘essential feature’ I clear the ground for a more sustained enquiry into the nature of basic features. Next I clarified that basic features are not simply those ‘articles’ of the Constitution which may be considered to be pre-eminent by any chosen method of ranking. Instead the court looks for ‘features’ of the Constitution expressed in several provisions of the Constitution which may be considered to be moral and political principles at the normative core of our constitution. In the next part of this chapter I examine the various techniques and resources used to identify the basic features of the Constitution.
**Finding Basic Features**

The majority decision in *Kesavananda Bharathi* case no doubt evolved the doctrine of basic structure or framework, but did not lay down that any particular named features of the constitution formed part of its basic structure or framework.32

Bhagwati, as reflected by the quotation above, took the view that *Kesavananda* was not binding authority on the question of what the basic features of the constitution are. One may support such a view for several reasons of which two are particularly important: first, the basic features identified by several judges in that case did not represent the majority opinion of the court. Second, and more importantly, these observations about the basic features of the constitution were *obiter* as the court did not apply any of these features to decide the challenges before them in *Kesavananda*.

Since *Kesavananda*, the court has unfortunately not addressed the method of identifying basic features of the Constitution in a forthright and consistent manner. I may at best gather some general indications of how the court approaches the problem of identifying basic features. The rest of this part of the chapter identifies these general approaches, critically analyses them, and develops them to the extent possible.

**An Open-Ended Catalogue of Basic Features?**

It is often suggested that the Court should enumerate what constitutes the basic structure of the Constitution. In our submission such enumeration must come in the form of a policy statement.33

The most persistent and harsh criticism of the basic structure doctrine over the many years of its existence has been directed at the open-ended nature of the basic feature catalogue. Most recently, R.K.P. Shankardass criticizes the court for expanding the basic feature catalogue and observes that ‘the open-ended nature of the doctrine is beginning to lead to an irrational and confusing situation’.34

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32 *Minerva Mills*, supra n. 10, p. 1820 (Bhagwati, J).
in the quotation above, takes the view that the basic features of the Constitution should be consolidated in a single statement which exhaustively lists the basic features of the Constitution. In the rest of this section I evaluate the court’s approach to the task of identifying basic features and then conclude by setting out some general features of constitutional adjudication which constrain the modes through which the court can go about this task.

Sikri, in his lead opinion in *Kesavananda* boldly set out to provide a catalogue of basic features which rest on the foundation of ‘the dignity and freedom of the individual’. He was joined by the other judges on the bench who took the liberty to list their preferred constitutional values as basic features of the Constitution. In *Kesavananda* various features were identified in the plural opinions delivered: these include features such as democracy, secularism, and federalism which subsequent decisions have reaffirmed as basic features and others such as republicanism, sovereignty, and the mandate to build a welfare state which have received less attention. I am not particularly concerned with the features identified in this case, as I am with the method by which this is done.

The *Kesavananda* approach to basic features is the closest that the Indian courts have got to meeting the demand for a catalogue of basic features that Sathe makes in the quotation at the start of this section. He does not elaborate whether he conceives of a basic feature ‘policy statement’ as being one delivered in the course of a judicial opinion or to one to be made extra-judicially. An extra judicial statement is bound to be controversial much like the summary of the *Kesavananda* judgment which was signed by nine judges. Moreover, even if the courts were to list a catalogue of basic features exhaustively while deciding a case before it, the court would be going beyond its judicial role as an ‘interpreter’ of the Constitution. A theoretical perspective on constitutional adjudication sympathetic to the court’s approach in basic structure review would concede only a limited law making power to resolve the dispute before it. The rules of *ratio decidendi* and *obiter dicta* when applied to ascertain the binding legal rule which emerges from a decided case ensures that the court cannot make law in a legislative fashion. Clarity about the law making power of

35 *Kesavananda*, supra n. 6, p. 366.
a court allows us to better understand the appropriate method by which the Indian court identifies basic features of the Constitution. Before I conclude this theoretical enquiry into the judicial role as an interpreter of the Constitution I will examine the court’s approach to this problem after *Kesavananda*.

In *Indira Gandhi*, Chandrachud correctly observed that the ratio in *Kesavananda* ‘is not that some named features of the Constitution are a part of its basic structure but that the power of amendment cannot be exercised so as to damage or destroy the essential elements or the basic structure of the Constitution.’36 Having circumscribed the *Kesavananda* ratio not to extend to the basic features identified therein, he then set out a different approach to identifying basic features in these terms: ‘one has perforce to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of country’s governance’.37 Bhagwati in *Minerva Mills* emphatically reiterates Chandrachud’s approach to identifying basic features of the Constitution38 but unfortunately subsequent cases have not built on this approach. There are several reasons why this approach is appropriate to the task of identifying basic features of the constitution as best adopted by the courts.

There are two key elements to Chandrachud’s proposal for identifying basic features of the Constitution. First, basic features must be identified ‘in each individual case’ and secondly, basic features are those constitutional principles which are central to the ‘integrity of the Constitution’. The Supreme Court interprets the Constitution in every case, apart from presidential references under Article 143, to resolve the dispute before it. In common law jurisdictions it is generally understood that ‘the Courts can never promulgate a code governing a whole area of law. They are basically limited to playing down single rules or principles. If they pronounce a view in favour of a whole set of principles this view is *obiter* except insofar as it concerns the principle on which the actual decision in the case rests’.39

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36 *Indira Gandhi*, supra n. 2, p. 2465.
37 Ibid.
38 *Minerva Mills*, supra n. 11, p. 1821 (Bhagwati, J).
The failure to recognize this fundamental limitation to judicial law making which distinguishes it from legislation has muddled the debate about identifying basic features of the Constitution. As long as the identification of basic features of the Indian constitution is judicially managed it will develop as constitutional common law rather than through any codifying technique. Such an approach will allow the court to continuously develop new basic features of the constitution as and when they are raised in specific cases before it. When one considers that the Supreme Court’s expertise lies in resolving specific disputes rather than abstract moral questions about the core values which should guide our political society then the case-by-case approach to identifying basic features recommends itself. The versatility of common law adjudication technique does allow for modifications and alterations to the basic features of the Constitution by the techniques of overruling and distinguishing precedents, which will require the court to exercise great care in handling this body of law. However, this method when rigorously applied allows the court to adopt a calibrated and nuanced approach to identifying basic features of the constitution which organically responds to contemporary constitutional politics and political morality.

The second element which Chandrachud points to in *Indira Gandhi* relates to a substantive restriction on the general constitutional rules which may be identified as basic features of the Constitution. Basic features are those principles which are central to the ‘integrity of the Constitution.’ This restriction, unlike the institutional features of common law adjudication considered above, constrains the ‘justifying reasons’ which may be advanced in support of the argument that a particular principle is a basic feature of the constitution. So when a court considers whether a particular feature of the Constitution—the balance between Part III and Part IV—is central to the Constitution, it must assess whether the normative identity of the Constitution survives even if this feature is excised or modified. By reducing the range of justifying


41 The balance between Parts III and IV was accepted as a basic feature by Chandrachud in *Minerva Mills*.
reasons which may be offered in support of a basic feature argument, Chandrachud qualifies the basic feature enquiry in a significant manner.

I began this section by considering a plea for a closed catalogue of basic features so that basic structure review may be predictable and to provide normative guidance to the other branches of government. I considered the attempt by the court to provide such a catalogue in *Kesavananda* and concluded that a closed catalogue of basic features cannot result from the common law adjudication techniques that our Supreme Court adopts while interpreting the Constitution. In any event, this approach has been abandoned subsequently in *Indira Gandhi* and *Minerva Mills*. The approach of the Court in the latter cases rightly recognizes the constraints the judicial law making involved in identifying basic features by proceeding on a case–by–case basis and narrowing the range of justifying reasons for accepting a basic feature to normative reasons central to the integrity of the Constitution. It may cynically be said that such a restriction does not amount to much. However, such cynicism would be a general argument directed at the nature of normative restraints on human conduct and not specifically focused on the identification of the basic features of the Constitution.42 A careful survey of the case law in the last three decades of basic structure review suggests that barring a few extravagant excesses the basic features of the constitution identified by the court have been relatively consistent which suggests that such restraints have been reasonably effective.

### Basic Features and the Constitutional Text

The concept of a basic structure as brooding omnipresence in the sky apart from the specific provisions of the Constitution constituting it is too vague and indefinite to provide a yardstick to determine the validity of an ordinary law.43

In *Kesavananda*, Sikri took the lead in pronouncing a catalogue of basic features at the end of a survey of the various parts of the

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43 *Indira Gandhi*, supra n. 2, pp. 2388–9 (Mathew, J).
Constitution. This approach does not reveal the factors one considers to identify features of the constitution to be ‘basic’ and the extent to which these features are set out in the constitutional text. This ruling prompted arguments in subsequent cases that basic features were essentially the ‘spirit’ of the constitution to be divined by learned judges paying attention to our constitutional history, the aspirations stated in the Preamble or the teachings of moral philosophy. This section analyses the court’s development of a distinctive approach to the identification of basic features focusing particularly on its relationship to the textual provisions of the Constitution.

In *Indira Gandhi*, Mathew responded to this issue in an analytically incisive opinion. He pointed out that for a principle to be part of the ‘basic structure it must be a terrestrial concept having its habitat within the four corners of the Constitution’. In other words what constitutes the basic structure is not like a ‘twinkling star up above the constitution.’ He rejected conceptions of the basic structure as a ‘brooding omnipresence’, and grounded the basic feature enquiry squarely within the judge’s role as interpreters of the text of the constitution.

Once it is established that basic features of the Constitution must be supported by the constitutional text there are further questions which remain: what is the extent and kind of textual support that is necessary for a basic feature to exist? How does the court derive general constitutional rules from the detailed constitutional provisions? Are there any parts of the Constitution which enjoy a normative priority over others in the basic features enquiry? Before I engage with any of these questions in the following section, I take note of the approaches which Mathew rejected and assess whether he was right in doing so. First, I examine approaches which use the preamble as a repository of basic features; then consider whether basic features of the Constitution are those features which are pre–eminent in a historical sense and finally whether basic features are pre-constitutional common law principles or natural law values in a different garb.

In *Sajjan Singh*, a decade before the basic structure doctrine was announced in *Kesavananda*, Mudholkar suggested that if there

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44 *Indira Gandhi*, supra n. 2.
45 Ibid.
are to be limits on amending power then it is the ‘preamble which appears to be an epitome of the basic features of the Constitution. Can it not be said that these are the indicia of the intention of the Constituent Assembly to give a permanency to the basic features of the Constitution?’

Hegde and Mukherjea reiterated this approach in *Kesavananda* and observed that ‘[U]nlike in most of the other constitutions, it is comparatively easy in the case of our constitution to discern and determine the basic elements or the fundamental features of our Constitution: for doing so, one has only to look to the Preamble’.

The Preamble to the Indian constitution is an elaborate list of political and moral aspirations proclaimed by ‘We, the People’ in attractive verse. The preamble proclaims India to be a sovereign, socialist, secular, democratic, republic which secures to its citizens justice, liberty, and equality of various hues and complexions. At first glance, using the preamble as a catalogue of basic features is an attractive option as constitutional values in this part of the Constitution are expressed at a level of generality suitable for basic structure adjudication. On closer scrutiny serious problems arise.

First, the court has consistently held that the preamble is neither a source nor a limit on power. By treating the preamble to be the storehouse of basic features of the Constitution they are invested with an extraordinary status in constitutional adjudication and this does not square up with the court’s precedents on the legal authority of the preamble. Second, the question of whether the Preamble was a limit on amending power was expressly considered and rejected in *Kesavananda*. The court considered the historical evidence to establish the sanctity and high regard for the preamble to the Indian Constitution and rejected this argument that the preamble could operate as a limit on Parliamentary power. Hence, it would be inappropriate to resuscitate the preamble through the backdoor by treating these as basic features as this legal proposition has been considered and expressly rejected.

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47 *Kesavananda*, supra n. 6.
48 This position was stated in *Re Berubari Union*, AIR 1960 SC 845 and has been reiterated ever since including in *Kesavananda*, supra n. 6.
Finally, and most crucially, the preamble is both under and over-inclusive of the basic features of the Constitution. Federalism and the separation of powers are constitutional principles which are fundamental to our constitutional design but find no mention in the preamble. Fraternity is a virtue that the Preamble aspires to achieve but there are few constitutional provisions which meaningfully pursue this proclaimed value. By contrast, equality is a virtue. Other values such as equality are firmly entrenched in the constitutional provisions and enjoy a significant place in the preamble. This brief survey suggests that the preamble is an uncertain guide to the task of identifying the basic features of the Constitution. One would do better to pay closer attention to the values etched out in the detailed provisions of the Constitution rather than use the preamble as a shortcut to achieve this task.

I now examine whether basic features may be identified by relying on the salience of certain values when viewed through the prism of events of political and academic constitutional histories. Earlier in this chapter I had considered whether the basic features of the Constitution are those historically necessary and sufficient political principles without which the Constitution and the Indian Union would not have come into existence. I found that the court had rightly concluded that basic features are those important political and moral principles which come together to make up the normative core of the Indian constitution and hence are not essentially historical in character. In this section I consider the role that our constitutional history plays as an extra-textual source which aids the court in identifying basic features.

The use of constitutional history is best assessed by analysing the court’s approach in Minerva Mills. Section 4 of the 42nd Constitution (Amendment) Act, 1976 amended Article 31-C to provide that no law giving effect to the policy of securing ‘all or any of the principles laid down in Part IV’ shall be deemed to be void if it takes away or abridges the fundamental rights to equality, freedom, or property set out in Articles 14, 19, or 31 respectively. It was argued that this amendment destroys the harmony between Parts III and IV of the Constitution by making the fundamental rights conferred by Part III

\[49\] Compare Chapter IV, “‘Integral Part’ but not Basic Features’, pp. 142–7.
Basic Features of the Constitution

subservient to the directive principles of State Policy set out in Part IV of the Constitution. It was suggested that the basic structure doctrine protected the interrelation of the different parts of the Constitution and the ‘harmony’ between the socio-economic principles in Part IV and the civil and political rights in Part III of the Constitution was a basic feature of the constitution. Chandrachud speaking for the majority agreed and observed that the ‘basic structure of the Constitution rests on the foundation that while the directive principles are the mandatory ends of government, those ends can be achieved only through permissible means which are set out in Part III of the Constitution.’

The respondents argued that identifying the principle of harmony between fundamental rights and directive principles as a basic feature of the Constitution resulted in the question of constitutional validity of amendment in ‘too wide and academic’ fashion. To assess this claim it is important for us to analyse how Chandrachud identified basic features in this case. He draws heavily from Granville Austin’s political history of the freedom movement and drafting history of the Constituent Assembly to identify fundamental rights and directive principles of state policy as the ‘conscience of the Constitution’. As the ‘Indian Constitution is founded on the bedrock of the balance between Parts III and IV’ any amendment which gives absolute primacy to one over the other disturbs this harmony and balance and hence is a violation of the basic structure of the constitution. He emphatically states that anything ‘that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our constitution’.

While constitutional history sourced from the Constituent Assembly Debates or from a respected treatise of political history by Granville Austin does provide useful perspectives for the interpretation of the constitution. Rules of statutory and constitutional

50 Minerva Mills, supra n. 10, p. 1800.
51 Ibid., p. 1802.
54 Ibid., p. 1806.
55 Ibid., p. 1807.
interpretation generally guide and control the extent to which such materials are used to interpret words and phrases in the constitution. In Minerva Mills Chandrachud’s reliance on such materials to identify basic features such as the harmony between Parts III and IV of the Constitution disregards the text of the Constitution.

Granville Austin suggests that the Indian Constitution is tensely strung between three objectives: preserving national unity, achieving a social revolution, and sustaining democracy. He understands the legal disputes relating to land reform policy as an instance of conflict between the latter two objectives: namely, social revolution and democracy. Whether this is a useful way to understand our early constitutional history is open to considerable doubt! In any event Austin’s conclusion that conflicting constitutional objectives are reconciled by making directive principles in Part IV of the Constitution subject to fundamental rights in Part III of the Constitution is unsupported by the constitutional text. Chief Justice Chandrachud’s reliance on this conclusion results in faulty identification of the ‘harmony’ between these two parts as a basic feature of the Constitution.

Bhagwati’s dissent in Minerva Mills is a fitting rebuke to such an approach to identifying basic features. He recognizes the varied approaches to the identification of basic features of the constitution in Indira Gandhi, but finds himself in agreement with Mathew ‘on one position of a basic and fundamental nature: that whether a particular feature forms part of the basic structure has necessarily to be determined on the basis of the specific provisions of the Constitution.’ He examines the key provisions in Part IV, particularly Article 37, to find that the ‘socio-economic rights embodied in the Directive Principles are as much a part of human rights as the Fundamental Rights in Part III. He categorically rejects the idea that these parts of the Constitution conflict with each other, but reasons that in the contingent event that a conflict arose between fundamental rights

and directive principles, Parliament may respond as it deems fit as the constitution is silent on this question.\textsuperscript{59} Bhagwati engaged with the constitutional history behind the provisions being interpreted and analysed the differential legal force of fundamental rights of citizens and directive principles which imposed obligations directly on the state\textsuperscript{60} but reiterated that a basic feature may be identified primarily by an interpretation of the constitutional text.

Bhagwati identified two basic features of the Constitution which were applicable in \textit{Minerva Mills}: judicial review and the limited amending power of Parliament. Both these features rest on an interpretation of the provisions of the Constitution: Articles 32 and 226 which provide for judicial review and unamended Article 368 which regulates amending power respectively. These provisions read together led Bhagwati to the conclusion that the judiciary was the institution with a constitutional mandate, and especially equipped to interpret the Constitution as a legal document, to maintain the constitutional distribution of powers and functions and the supremacy of the constitution.

So far in this section I have considered the process of identifying basic features of the constitution with a particular focus on the use of the preamble and constitutional history as an aid to this task. The analysis of \textit{Minerva Mills} suggests that both these aids are unsuitable as they give inadequate attention to the core task of constitutional interpretation, where the court pays attention to the constitutional text and identifies only such principles which may be understood to be a part of the normative core of constitution. The preamble and constitutional history are relevant only in so far as they provide additional justifying reasons in support of a conclusion adequately supported by the constitutional text.

Before I conclude this section, I briefly consider two other modes of identifying basic features where the court may disregard the textual provisions to varied extents. First, the court may consider basic features to be those common law principles which are pre-constitutional in origin and second, basic features may be viewed as natural law or higher law principles. The Indian court has not considered either

\textsuperscript{59} Ibid., p. 1851 (Bhagwati J).
\textsuperscript{60} Ibid., pp. 1842–53 (Bhagwati J).
of these options at length and hence the analysis of these issues will be brief.

The Canadian court’s use of unwritten constitutional principles, including the rule of law, democracy, federalism, in addition to the written constitutional rules, has led some commentators to suggest that these unwritten principles are best understood as pre-existing common law principles or natural law values or some combination of the two. Where such underlying constitutional principles are traced back to Coke in *Dr Bonham’s Case*\(^{61}\) the argument is legal and historical in character. However, these fundamental principles may be understood to ‘articulate basic legal assumptions that inhere in the human social condition itself and that therefore possess normative force independent of legislative enactment’.\(^{62}\) In this case the argument is moral and political in character. Sometimes, as T.R.S. Allan proposes,\(^{63}\) these two types of arguments are combined together and offered as a comprehensive theory of constitutional justice. Even this sketchy account of these plausible sources of basic features of the constitution alerts us to considerable difficulties that ‘fit’ with the historical, doctrinal, and philosophical understandings manifest in the Indian cases. Keeping aside the merits of such approaches\(^{64}\) for the moment I proceed by noting that the Indian court has not seriously attempted to ground basic features in either of these approaches and for the purposes of this work our enquiry need not proceed any further.

I conclude this section by reiterating that the Indian courts have, in Bhagwati’s words, denied that basic features consist of any abstract ideals to be found outside the provisions of the Constitution. The Preamble no doubt enumerates the great concepts embodying the ideological aspirations of the people but these concepts are particularized and their essential features delineated in the various provisions of the Constitution. It is these specific provisions in the body of the Constitution which determine the type of democracy which the founders

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\(^{61}\) (1610) 8 Co Rep 114.


\(^{64}\) See John Leclair, ‘Canada’s Unfathomable Unwritten Constitutional Principles’, in 27 *Queen’s LJ* 389 (2002) for criticism of such theories.
of that instrument established; the quality and nature of justice, political, social, and economic which they aimed to realize, the content of liberty of thought and expression which they entrenched in that document and the scope of equality of status and of opportunity which they enshrined in it. These specific provisions enacted in the Constitution alone can determine the basic structure of the Constitution. These specific provisions, either separately or in combination, determine the content of the great concepts set out in the Preamble. It is impossible to spin out any concrete concept of basic structure out of the gossamer concepts set out in the Preamble. The specific provisions of the Constitution are the stuff from which the basic structure has to be woven.65

The paragraph above is worth quoting in full only to take note of the emphasis on the central role that the text of the Constitution plays in identifying basic features and the unwillingness to deploy the preamble or other extra-constitutional materials to this task. This marked distinction between text and extra-textual resources may be taken in the extreme to reflect a formalist conception of constitutional interpretation where the words of the Constitution yield meaning in a stable and determinate fashion unaided by other linguistic resources. More nominally it clarifies that any interpretation of the constitution should begin with the constitutional provisions and that modes of interpretation which find no support in the constitutional text are inappropriate to the task of identifying basic features of the Constitution. No part of this work argues for a formalist or literalist model of constitutional adjudication and all that the preceding section seeks to do is to discard modes of identifying basic features of the constitution which fail to meet the threshold requirements of the task of ‘interpreting’ the ‘text’ of the constitution.

**The Basic Features of the Constitution: In Lieu of a Conclusion**

I think there is near unanimity that there are at least five features that can be regarded as essential and basic. The first is secularism; second, democracy; third, rule of law; fourth, federalism; and the fifth is an independent judiciary with the power of judicial review.66

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So far in this chapter I have analysed the nature and character of basic features of the Constitution as general constitutional rules which are identifiable by an interpretation of constitutional provisions on a case-by-case basis. These clarifications, though crucial to the enterprise of identifying basic features, do not help us isolate among the many features of the constitution which enjoy textual support those which may be said to be ‘basic’. In other words, of all the features of the Constitution what marks features which are basic to the Constitution. In this concluding section I critically examine the extent to which the courts have provided us with an answer to this question. Further, I explore whether any particular theoretical approach to constitutional adjudication helps us cast an explanatory and justificatory framework around the courts’ effort. I conclude by noting that the task of identifying basic features is inherently prone to disagreement, and the best that I can do is to prune the range of justifying reasons which may properly be offered in support of the claim that a particular feature of the Constitution is basic in character.

I began this section with a bold and forthright assertion by the ex-Attorney General of India, Soli Sorabjee, speaking at a seminar examining whether the basic structure doctrine was inimical to the development of Indian constitutional law. He proposes that at the least five features of the Constitution—secularism, democracy, rule of law, federalism, and independence of the judiciary—are ‘unanimously’ thought to comprise the basic features of the Constitution. While reiterating the possibility that the court may add to these features of the constitution, his statement would draw


70 S.R. Bommai, supra n. 67 and Rameshwar Prasad, supra n. 69.

adequate support from the court’s precedents across the last three decades. Arguably socialism\(^{72}\) and equality\(^{73}\) merit a mention as two other features which have played a significant, though not consistent, role in basic structure review cases. Sorabjee’s confidence in naming these basic features rests assuredly on a reading of the court’s precedents, but this masks the several disagreements over how the court has, and should go about identifying these basic features.

In the previous section I noted that the courts were keen to establish that the basic features were not to be identified using resources extrinsic to the constitution. The basic features identified are particular to the Indian constitution and need not be generally applicable to all constitutions in all places. This point may be illustrated by two useful examples. First, in *R.C. Poudyal v. Union of India*\(^{74}\) the reservation of a seat in the legislative assembly of Sikkim for the elected representative of the Buddhist clergy and the reservation of seats for a tribe far in excess of its proportion in the population were challenged as damaging or destroying the basic features, democracy, and secularism. The court upheld the legislative reservations in this case but for our purposes I must turn to the argument in court that a prohibition against discrimination on the ground of religion is not a basic feature of a democratic state. He contended that the constitution of Cyprus had no provision on prohibiting discrimination on the basis of religion and was nevertheless a democratic state; this was evidence that religious non-discrimination was not a necessary feature of a democratic constitution. Chief Justice L.M. Sharma, speaking for the majority ruled that the ‘example is fallacious as it assumes that fundamental features of all constitutions are same or similar. The basic philosophy of a constitution is related to various elements including culture and tradition, social and political conditions, and the historical background.’\(^{75}\) The court clearly establishes in this case that the basic feature enquiry is one rooted in the Indian Constitution as it is, and such features are not to be identified by evaluating


\(^{73}\) *Indira Gandhi*, supra n. 69; *Indra Sawhney v. Union of India (I)*, 1992 Supp (3) SCC 217.

\(^{74}\) AIR 1993 SC 1804.

\(^{75}\) *Poudyal* 1823 (Sharma, CJ).
constitutional practice in other countries or the correlation between theoretical conceptions of democracy and secularism. In this case, the court’s particularist approach to interpreting the constitution highlights the embedded character of basic features in the text and constitutional practice in India.

The rooted character of basic features may be illustrated in a different fashion. The principle of subsidiarity has come to occupy a very important role in organizing the distribution of powers and functions among multi-tier institutions of government. It is argued that subsidiarity is a preferred principle for the distribution of power as it promotes the twin objectives of deepening democracy and promoting efficiency. After the Constitution (73rd Amendment) Act, 1993 and the Constitution (74th Amendment) Act, 1993 the Indian constitution has institutionalized a multi-tier state structure but does not articulate a principled basis for the distribution of powers and functions across these layers of government. The principle of subsidiarity may offer the best constitutional principle to systematize what presently appears to be a haphazard distribution, but the court cannot confer on it the status of a ‘basic feature’ of the constitution on this basis. The constitutional provisions certainly support the claim that ‘federalism’ is a basic feature as the principle which governs the centre-state relationship. The constitution is silent on principles which will govern a multi-tier governance structure and in these circumstances it is not open to the court to infer into the constitution the best available theoretical principle to organize these relations.

In this section, I have identified two senses in which basic features of the constitution are intrinsic to the Indian constitution: first, basic features are not general constitutional rules which must be ‘basic’ or central to the integrity of every constitutional document but only those which are central to the Indian Constitution. Second, identifying basic features is not about finding the best general constitutional rules by which Indian Constitutional law may be organized but identifying the general constitutional rules which provide the foundations for our constitutional provisions, however

imperfect such principles may be. Hence, by protecting basic features of the constitution the court is safeguarding the moral and political precommitments in the constitutional text.

While there is unanimity that the basic feature enquiry must begin by interpreting the constitutional text, controversy breaks out on how general constitutional rules are to be derived from the detailed constitutional provisions and which of these rules is basic to the Constitution. Though Sorabjee is right in asserting that there is a rather stable set of basic features of the constitution, I have in this section set out the manner in which basic features are grounded in the constitutional text of the Indian Constitution.

I began this Chapter with the criticism that the Supreme Court identifies basic features in a whimsical adhoc fashion. I set out to show that this criticism is misplaced as the court has developed an interpretive technique to identify basic features appropriate for a common law court interpreting a constitutional text. I have identified, analysed, and subsequently discarded several methods proposed by the court and academic commentators and carefully set out the most viable method by which basic features may be identified. In order to provide a fuller account of the sense in which a basic feature may be said to be interpretation of the constitution I must articulate the model of constitutional adjudication which I adopt in this work. I may begin to address these controversies about the nature of constitutional interpretation by developing a typology of the methods by which principles may be said to arise from the constitutional provisions.

Basic features of the constitution are those constitutional principles which arise by implication from the constitutional provisions. It is suggested that as they are not directly expressed in the constitution, there is a greater degree of ambiguity attached to the identification of these principles. As I discuss in the next chapter, where we consider the question of constitutional adjudication in greater detail, this is not necessarily the case. There is no doubt that identifying basic features of the Constitution raises difficult problems of ambiguity and uncertainty in constitutional adjudication, but these difficulties are neither unique nor devastating to basic structure review or the task of identifying basic features of the constitution.