

Basic Structure Doctrine and Uganda's Constitutional Order

Introduction

The Basic Structure Doctrine (BSD) is Judge made law and implies tacitly, a limitation on the power of Parliament to amend the Constitution. In *Yaakov v Chairman of the central elections committee for the sixth Knesset*¹ court observed that;

.....there are fundamental constitutional principles that are of so elementary a nature, and so much the expression of law that precedes the Constitution, that the maker of the constitution himself is bound by them. Other constitutional norms, which do not occupy this rank and contradict these rules can be void because they conflict with them.

This doctrine was enunciated by the Supreme Court of India in one of its most important decisions ever, in the 1973 case of *Kesavananda Bharati vs. The State of Kerala*.² The doctrine is to the effect that a national constitution has certain basic features which underlie not just the latter, but also the spirit of that constitution, and any amendment, which purports to alter the constitution in a manner that takes away that basic structure, is void and of no effect.

The rationale of the decision was that an amendment, which makes a change in the basic structure of the constitution, is not really an amendment, but is in effect, rewriting the new constitution, which Parliament has no power to do. The court held that as the Supreme Court of the land, it had a limited power to review and strike down amendments which went to the very heart and core of the constitution, by seeking to alter its basic structure.

In its wisdom, the Court did not lay down a list of provisions it considered to constitute the basic structure. The claim of any particular feature of the constitution to be a "basic structure" is left to be determined by the court on a case by case basis. The basic structure doctrine has since been upheld and relied on in subsequent decisions in that country, for example, in *Minerva Mills Ltd y. Union of India (1980)* and *Indira Nehru Gandhi v. Raj Narain (1975)*.

It has also been widely accepted, adopted and cited with approval in many other commonwealth countries, or what we call common law jurisdictions, for example in *Anwar Hossain Chowdhary v. Bangladesh (Supreme Court of Bangladesh, 1989)*, *Phang Chin Hock v. Public Prosecutor (Federal Court of Malaysia, 1980)*, *SivarasaRasiah v. BadanPeguam(Federal Court of Malaysia, 2010)*, *Pakistani Lawyers' Forum v. Federation of Pakistan (Supreme Court of Pakistan, 2005)* and many others.

In the process, the courts have suggested various guidelines which can be relied on to determine whether an amendment touches the basic structure of a particular constitution and is, therefore, void. Whether or not a provision is part of the basic structure varies from country to country,

¹ *Yaakov v Chairman of the central elections committee for the sixth Knesset* EA 1/65

² AIR1973SC1461

depending on each country's peculiar circumstances, including its history, political challenges and national vision. Importantly, the decisions I have cited show that in answering this important question, courts will consider factors such as the preamble to the constitution, national objectives and directive principles of State policy (in countries which have them in their constitutions, such as Uganda), the Bill of rights, the history of the constitution that led to the given provision, and the likely consequences of the amendment.

In Kenya, the court of Appeal in the case of *Njoya vs. Attorney General and Others* held that:

Parliament may amend, repeal and replace as many provisions as it desired provided that the document retains its character as the existing Constitution and that alternation of the Constitution does not involve the substitution thereof a new one or the destruction of the identity of the existing one

A reading of the various persuasive authorities cited leads to the conclusion that although Parliament may be (is) empowered to amend a Nation's Constitution that power does not extend to authority to produce an output which alters the country's constitutional order. The Legislature should not engage in amendments which can be described as a constitutional replacement. This is because the power to replace a Constitution - with a radically different one - belongs to the people.

In *British Caribbean Bank v The Attorney of Belize Claim No. 597/2011*, the Supreme Court of Belize invoked the basic structure doctrine to strike down a particular Constitutional amendment which was at variance with the preamble to the Constitution of Belize. The court emphasized that:

The basic structure doctrine holds that the fundamental principles of the preamble of the Constitution have to be preserved for all times to come 10 and that they cannot be amended out of the existence.

In the case of *Minerva case (supra)* while emphasizing the essence of the preamble, the Supreme Court of India explained that;

The preamble assures to the people of India a polity whose basic structure is described therein as a sovereign democratic Republic; Parliament may make any amendments to the Constitution as it deems expedient so long as they do not damage or destroy India's sovereignty and its democratic, republican character. Democracy is ... a meaningful concept whose essential attributes are recited in the preamble itself

In the case of *Anwar case*, the Supreme Court of Bangladesh cited with approval the Indian case of *Minerva* and held that:

...this preamble is not only part of the Constitution but stands as an entrenched provision that cannot be amended by Parliament alone. ... If any provision can be called the pole star of the Constitution then it is the preamble.

Basic Structure Doctrine in regards to Uganda's Constitution

Each of the Justices of Uganda's Constitutional Court pointed out different features as constituting the basic structure of Uganda's Constitution. In Justice Owiny-Dollo's view, the basic feature of the 1995 Constitution are: the sovereignty of the people, the supremacy of the Constitution, political and Constitutional stability, Rule of law, non-derogable rights, non-establishment of a one-party state, duty of every citizen to defend the Constitution and separation of powers. According to Justice Musoke JCC, the basic features of the Constitution are: the preamble, sovereignty of the people, the Bill of Rights found in Chapter Four of the Constitution and the non-derogable rights in Article 44 of the 1995 Constitution.

It is to be noted that Uganda's Constitution provides for the amendment of various provisions by Parliament. These provisions are categorized into three. The first category is amendments requiring a referendum and the support of two-thirds majority votes of members of Parliament. Under this category are Articles: 259 (1) and (2) on the requirement for a referendum and (Sovereignty of the people and Supremacy of the Constitution); 44 (Prohibition of derogation from particular human rights and freedoms); 69, 74 and 75 (prohibition of a one party state and the right to choose a political system), 79(2) (power of Parliament to make laws); 105 (1) (tenure of the Office of the President being five years); 128 (1) (independence of the Judiciary); and Chapter Sixteen (providing for the institution of traditional or cultural leaders)

The second category contains provisions whose amendment requires approval by District 5 Councils and the support of two-thirds of all members of Parliament at the second and third readings. The said Articles are: 5 (2) (providing for the districts of Uganda); 152 (on tax laws); 176 (1), 178, 189 and 197 (providing for local government system and their functions).

The third category contains provisions whose amendment requires the support of two-thirds of all members of Parliament at the second and third readings. The Articles under this 10 category are those which are not included in the above mentioned category. This means that Article 102 (b) of the Constitution falls under this category.

The amendment of provisions in the first and second category require not only the support of two-thirds majority but also the support of the public through a referendum or the District local Councils. The provisions in these categories have been said to constitute the 1995 Constitution's basic structure and cannot be amended by normal Constitutional processes.

The provisions under the third category where Article 102 (b) falls only requires the support of two-thirds majority. No further stringent requirement for amending such provisions is (explicitly) imposed by the Constitution.