

The case of ***Kesavananda Bharati v. State of Kerala*** (**Kesavananda Bharati**)[<sup>1</sup>] is perhaps the most well-known constitutional decision of the Supreme Court of India (**Supreme Court**). While ruling that there is no implied limitation on the powers of Parliament to amend the Constitution, it held that no amendment can do violence to its basic structure (the “*Basic Structure Doctrine*”). Further, it established the Supreme Court’s right of review and, therefore, established its supremacy on constitutional matters.

This decision may be said to have played a major role in preserving India’s parliamentary democracy. However, as some of the implications of this case are even now becoming apparent, it is clear that its complexity and lack of clarity on certain important questions left much to be decided by posterity.

The most important of these is the question over what constitutes the Constitution’s basic structure. While overruling an earlier decision of the Supreme Court in *Golak Nath v. State of Punjab* (**Golak Nath**),[<sup>2</sup>] which held that constitutional amendments cannot impinge on fundamental rights, *Kesavananda Bharati* left the door open to a judicial view on whether any amendment to a fundamental right can be said to amend the basic structure. With a hearing that lasted over 60 days, eleven different judgments pronounced, an 800-odd page decision, along with Chief Justice Sikri’s controversial “View by the Majority”, confusion over the interpretation of its *ratio* continues to date.

The genesis of the dispute leading to *Kesavananda Bharati* lies in the interpretation of Article 368 of the Indian Constitution, which allows Parliament to amend the Constitution. While the Article itself is unambiguous, the scope and extent of Parliamentary power to modify the Constitution was a highly contested issue, resulting in the *Golak Nath* judgment wherein the Supreme Court held that Parliament, in exercising its power to amend the Constitution, did

not have the power to amend the fundamental rights under Part III of the Indian Constitution. As soon as the *Golak Nath* judgment was pronounced, it was subjected to vehement legal and political criticism. Many considered it a political decision which interfered with the power of Parliament to amend the Constitution.

Two years after *Golak Nath*, the Government under then Prime Minister Mrs. Indira Gandhi nationalised 14 banks, with a provision for minimal compensation. This decision was immediately challenged in the Supreme Court. In *R.C. Cooper v. Union of India* the Supreme Court struck down the Bank Nationalization Act, 1969 because of the compensation component of the enactment, while upholding the right of Parliament to nationalise banks.[3] The Government then attempted to abolish Privy Purses, which were payments promised to the erstwhile princes by the Indian Government at the time of Independence. In *Madhav Rao Scindia v. Union of India*,[4] the Supreme Court again struck down the Presidential order, which resulted in the above abolition.

Following these reversals before the Supreme Court, the Indian Government passed numerous Constitutional amendments to supersede the decisions of the Supreme Court:

- The Constitution (24<sup>th</sup> Amendment) Act, 1971 introduced clause (4) in Article 13, protecting Article 368 from the action of Article 13.
- Clauses (1) and (3) were also added to Article 368, to both restrict the scope of Article 13, as well as to establish the distinction between the amending power of Parliament and its legislative power.
- The Constitution (25<sup>th</sup> Amendment) Act, 1971 modified Article 31 of the Constitution, expanding the power of the Government to acquire private property.

- And with the Constitution (26<sup>th</sup> Amendment) Act, 1971, Parliament nullified the decision of the Supreme Court in the *Privy Purses* case.

Those adversely affected by the Constitutional amendments challenged them before the Supreme Court, setting the stage for a constitutional battle between two legal principles: Parliament's unrestricted power to amend the Constitution, and the Constitutional restrictions against such unrestricted power.

## ***The Kesavananda Bharati Case***

*Kesavananda Bharati* involved six different writ petitions by a number of petitioners who represented the propertied class, land proprietors opposed to land ceiling laws, sugar companies in Maharashtra, coal mining companies and former Princes seeking to preserve their earlier privileges. The writ petitions questioned whether there were limitations on the power of Parliament to amend the Constitution, particularly the fundamental rights, as decided in the *Golak Nath* case.

The lead petitioner, His Holiness Kesavananda Bharati Sripadagalvaru, the leader of a *math* in Kerala, challenged the Constitution (29<sup>th</sup> Amendment) Act, 1972, which placed the Kerala Land Reforms Act, 1963 and its amending Act into the IX Schedule of the Constitution. A bench of 13 judges was constituted to hear the matter. In a seven-six majority, the bench held that Parliament's power to amend the Constitution was not explicitly limited, but was limited to not altering or modifying the basic features or structure of the Constitution. Eleven separate judgments were pronounced orally in court.

In a controversial move, during the pronouncement, Chief Justice Sikri circulated a paper entitled "*View by the Majority*", which set

out six propositions including Proposition No. 2: "Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution". This proposition, lifted from Justice Khanna's judgment, has become synonymous with the *ratio* of *Kesavananda Bharati*. Pertinently, only nine out of the 13 Judges signed the "View by the Majority".

The Supreme Court in *Kesavananda Bharati* ultimately upheld the Land Reform Acts and the Amendment Acts that had been challenged. The only provision that was struck down was that portion of the Constitution (25<sup>th</sup> Amendment) Act, which denied the possibility of judicial review. Aside from the limit imposed on the ability of Parliament to alter the basic structure, the case was an overall success for the Government.

### ***Political Consequences of the Case and the Attempt to Reverse It***

Controversy surrounded the judgment. As a reaction to this judgment, the Government elevated Justice A.N. Ray to the office of Chief Justice despite there being three other judges, who were senior to him, on the bench at the time. Many new judicial appointments were also made, and, in 1975, with eight new judges on the bench and an emergency having been declared, Chief Justice A.N. Ray set up a bench of 13 Judges to review *Kesavananda Bharati*.

The hearing of the case began on 10 November 1975 and the matter was argued for over two days. On 12 November 1975, Chief Justice A.N. Ray unilaterally dissolved the bench as it was discovered that no review petition had been filed and the review had been initiated over an oral request, making the review process improper. In such circumstances, the basic structure doctrine

survived and no further judicial review of the decision was attempted again.

### ***What constituted the "Basic Structure" in Kesavananda Bharati, and was there a Ratio?***

It is difficult to infer that the Judges that formed the majority view in *Kesavananda Bharati* agreed with each other on what constituted the "basic structure" of the constitution and/or why Parliament's power to amend it was limited. Chief Justice Sikri held that there were certain inherent limitations on Parliament's power to amend based on higher principles underpinning the Constitution, such as the supremacy of the Constitution, the republican and democratic form of Government, separation of powers, and the secular and federal character of the Constitution.

Justices Shelat and Justice Grover, in their common judgment, focused on individual dignity, along with the unity and integrity of the nation, to establish the basic elements of the Constitution. Justices Hegde and Mukherjea held that Parliament's power to amend, though wide, did not include the power to destroy or emasculate basic elements of the Constitution, which are determinable from the Preamble. They identified two basic objectives of the Preamble: to set up a sovereign democratic republic, and to secure the citizens of India the rights mentioned in the Constitution.

Justice Jaganmohan Reddy held that the essential structural elements of the Constitution, such as the sovereign democratic republican nature of the Constitution, social, economic and political justice, liberty of thought, expression, belief, faith and worship, and the equality of status and opportunity could not be amended. Justice Khanna, on the other hand, held that the basic structure only referred to the broad outlines of the Constitution and not any

specific provision or detail of the Constitution. As such, he rejected the idea that the fundamental rights provisions or the Preamble could not be amended, as well as rejecting inherent limitations based on natural rights or cherished values like liberty, democracy and equality. The only limitation he believed existed on Parliament's power to amend the Constitution was on the basis of the connotations of the word "amend" itself. He believed that the word "amend" implied the continued existence of some "basic structure" of the Constitution of India, pre and post amendment, thereby preventing Parliament from completely abrogating the Constitution.

Another point of departure between the Judges in the majority related to their conclusion as to the amended Article 31C of the Constitution. Five of the majority judges held that the entirety of Article 31C, which was added to the Constitution by the 25<sup>th</sup> Amendment, was void. Justice Reddy separated parts of the same Article to hold it valid, and only Justice Khanna held that the first part of Article 31C was valid while the second part was void.

The "View by the Majority" did not agree, acknowledge, harmonise or rationalise these distinctions. Even the legal basis for the "View by the Majority" (which was not signed by four of the 13 judges in protest) is questionable as it does not form part of any judgment. It was only in subsequent decisions of the Supreme Court, starting from *Indira Gandhi v. Raj Narain*,<sup>[5]</sup> that the Courts began formulating a cohesive doctrine of what constituted the "basic structure" of the Constitution.

## ***Consolidation of the Basic Structure Doctrine***

The inherent ambiguity of the doctrine, as well as that of the *ratio* in *Kesavananda Bharati*, resulted in various challenges both to and under the doctrine before the Supreme Court. The period following

*Kesavananda Bharati* was one where the doctrine has evolved on a case-to-case basis, resulting in a gradual expansion of the doctrine.

In *Indira Gandhi v. Raj Narain*,<sup>[6]</sup> a Constitutional amendment to regularise Prime Minister Indira Gandhi's election was struck down citing the basic features of democracy, rule of law and equality. In *Minerva Mills v. Union of India*,<sup>[7]</sup> the Parliament, through the Constitution (42<sup>nd</sup> Amendment) Act, 1976, attempted to circumvent *Kesavananda Bharati* by making Parliamentary power unlimited. The Court in this case struck down the amendment on the ground that the judicial review of Parliamentary enactments, and the limitation of Parliamentary power to amend the Constitution, were themselves part of the basic structure of the Constitution.

From 1975 onwards, the courts have interpreted and expanded the doctrine to include judicial review of decisions by the High Court and Supreme Court under Articles 226 and 32,<sup>[8]</sup> secularism and federalism,<sup>[9]</sup> the freedoms under Article 19,<sup>[10]</sup> judicial independence,<sup>[11]</sup> and recently, judicial primacy in the judicial appointment process<sup>[12]</sup> to the basic structure and framework of the Constitution.

However, it was not until much later that the Supreme Court ruled on the question of whether an addition to the Ninth Schedule would make the listed statute immune from the requirement of not infringing on a fundamental right. In *I. Coelho v State of Tamil Nadu* <sup>[13]</sup> the Supreme Court held that all laws were subject to the test of being consistent with fundamental rights, which are a part of the basic structure.

## ***Conclusion***

Debates and discussions on the limits on a legislative body to amend a Constitution are neither novel nor unique. Thomas



Jefferson strongly believed that however great a written Constitution may be, experiences and changes in society would necessitate corresponding changes to the written text, with each generation having the right to determine the law under which they live.<sup>[14]</sup> Justices Hegde and Mukherjea accepted the thought that no generation should bind the course of generations to come. Yet, opinions have differed on what values and principles should constitute the “basic structure” and, therefore, whether value judgments formed in an era of unbridled socialism can be imposed upon future generations.

What the Supreme Court faced in 1973 was a struggle for supremacy. *Kesavananda Bharati* created a check on Parliament’s attempts to eliminate judicial review and seek absolute power to amend the Constitution. But it also conceded to Parliament the widest latitude to institute socio-economic policies. It refused to recognise the right to property as a basic feature of the Constitution, overruling *Golak Nath* and paving the way for land reforms.

Prior to *Kesavananda Bharati*, nearly 30 Constitutional amendments had already been passed since the Constitution came into effect in 1950, and there have been nearly 70 amendments since *Kesavananda Bharati*.<sup>[15]</sup> In comparison, the United States has had 27 Constitutional amendments (33 proposed, but only 27 ratified by the States) in its 230 year history. However, despite the larger number of amendments made to the Indian Constitution, the hopes and ideas of its framers remain intact and identifiable as the Constitution adopted by the Constituent Assembly in 1949. We owe this principally to the Supreme Court’s decision in *Kesavananda Bharati*.