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Basic structure of the Constitution revisited

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The basic structure theory plays a useful part in our constitutional jurisprudence. But was there truly a judicial formulation by the Supreme Court of India of the basic structure doctrine in the Kesavananda Bharati case? An insider's unravelling of a fascinating story.

THIRTY-FOUR years ago, on April 24, 1973, thirteen judges of the Supreme Court assembled in the Chief Justice's court packed to its capacity with lawyers and laypersons. They delivered eleven judgments in India's most celebrated case in constitutional law — the Kesavananda Bharati case. For over three decades we have believed that in that case a majority of judges decided that Parliament has no power to amend the basic structure of the Constitution.

Revelations of how the Kesavananda case was decided have been disclosed in later interviews with those who were involved in the case, writings of scholars, and by a revealing autobiography of Justice Jaganmohan Reddy, one of the judges in that case. This writer, a counsel in the case, kept detailed notes of the proceedings of the case. We can now piece together a collated account of how the case was decided. At the end of it, the question arises — was there truly a judicial formulation of the theory of basic structure in that case, as it has come to mean today; and was the case decided in an atmosphere conducive to a detached determination of a highly contentious matter with political overtones?

To reverse the Golak Nath case (1967), which had held that Parliament had no power to amend fundamental rights, and in anticipation of a major constitutional battle, we now know that the government carefully selected some judges who would not be obstructive to its reversal. The case became a contest not only between the rival parties but apparently among some of the judges who were committed to their own strong views on Parliament's power to amend the Constitution. Justice Jaganmohan Reddy records this about some his colleagues: "I got the impression [from the first day] that minds were closed and views were determined."

The case was essentially a political fight in a court of law with a political background. It was conducted under continuous and intense pressure the likes of which it is hoped will never be seen again. One author has described the atmosphere of the court as "poisonous." A judge on the bench later spoke about the "unusual happenings" in the case. If the several "unusual happenings" in the case are related in detail, they will make one doubt if the decision in the case was truly a judicial one — expected from judges with detachment from the results of the controversy before them.

On April 24, 1973, the eleven separate judgments were delivered by nine judges; collectively these ran into more than 1000 printed pages. Six judges — Chief Justice S.M. Sikri and Justices J.M. Shelat, K.S. Hegde, P. Jaganmohan Reddy, A.N. Grover, and S. Mukherjea — were of the opinion that Parliament's power was limited because of implied and inherent limitations in the Constitution, including those in fundamental rights. Six other judges — Justices A.N. Ray, D.G. Palekar, K.K. Mathew, S.N. Dwivedi, M.H. Beg, and Y.V. Chandrachud — were of the opinion that there were no limitations at all on Parliament's power to amend the Constitution. But one judge — Justice H.R. Khanna — took neither side. He held that Parliament had the full power of amending the Constitution; but because it had the power only "to amend," it must leave "the basic structure or framework of the Constitution" intact. It was a hopelessly divided verdict after all the labour and contest of five months. No majority, no minority, nobody could say what was the verdict.

How was it then said that the Court by a majority held that Parliament had no power to amend the basic structure of the Constitution? Thereby hangs a tale not generally known. Immediately after the eleven judges finished reading their judgments, Chief Justice Sikri, in whose opinion Parliament's power was limited by inherent and implied limitations, passed on a hastily prepared paper called a "View of the Majority" for signatures by the thirteen judges on the bench. One of the conclusions in the "View of the Majority" was that "Parliament did not have the power to amend the basic structure or framework of the Constitution." This was lifted from one of the conclusions in the judgment of Justice H.R. Khanna. Nine judges signed the statement in court. Four others refused to sign it.

By any reading of the eleven judgments, this conclusion could not have been the view of the majority. It was only the view of one judge — Justice H.R. Khanna. Some judges had no time to read all the eleven judgments as they were prepared under great constraints of time owing to the retirement of the Chief Justice the next day. Justice Chandrachud confessed that he had a chance hurriedly to read four draft judgments of his colleagues. No conference was called of all judges for finding out the majority view. The one conference called by the Chief Justice excluded those judges who were of the opinion that there were no limitations on the amending powers. Nor was the conclusion debated in court, as it ought to have been. The Chief Justice's action has been described by some as an act of statesmanship. Others believe it was a manoeuvre to create a majority that did not exist.

The verdict would have remained in this uncertain state but for accidental events following the decision. On August 1, 1975, with lightning speed and by an outrageous

abuse of the amending power during the Emergency, Parliament made the 39th Amendment to the Constitution. This introduced Article 329 A of the Constitution — which sought to validate Indira Gandhi's election set aside by a judge of the Allahabad High Court without any contest, including her pending appeal in the Supreme Court.

On August 11, 1975, Indira Gandhi's election appeal against her disqualification was heard by five judges presided over by Chief Justice A.N. Ray. He had been appointed Chief Justice of India by the government the day after the judgments in the Kesavananda case — superseding three other judges who had decided against the unlimited power of Parliament to amend the Constitution. The government believed that with the amendment to Article 329A of the Constitution, her appeal would simply be allowed. But so outrageous was the amendment that all five judges declared it bad as it violated "the basic structure." Nevertheless, Indira Gandhi's appeal was allowed by an amendment made to the Representation of the People Act, 1951, which cured all illegalities in her election. The court could strike down constitutional law but not an ordinary law that carried out the same purpose. To many this seemed perplexing.

Everyone took it that the court had now approved the basic structure theory by striking down the amendment to Article 329A — everyone, that is, except Chief Justice A.N. Ray. He had stated in Indira Gandhi's case that the hearing would proceed "on the assumption that it was not necessary to challenge the majority view in Kesavananda Bharati case." On November 9, 1975, two days after the Indira Gandhi case was decided, the Chief Justice constituted a new bench of thirteen judges to review the Kesavananda Bharati case.

For two days, N.A. Palkhivala made the most eloquent and passionate argument against the review. On November 12, the third day, the Chief Justice announced suddenly at the very outset of hearing: "The bench is dissolved." Thus ended an inglorious attempt to review the Kesavananda judgment. Whatever the reasons for the dissolution of the bench, Chief Justice Ray's maladroit attempt to review the basic structure limitation gave it a legitimacy that no subsequent affirmation of it could have given.

But the problem could not be avoided. In 1980, in the *Minerva Mills* case, the question was raised whether there was indeed a majority view on the limitation of the basic structure. Justice Bhagwati said that the statement signed by nine judges had no legal effect at all and could not be regarded as the law declared by the Supreme Court. He said the so-called majority view was an unusual exercise that could not have been done by judges who had ceased to have any function after delivering their judgments and who had no time to read the judgments. However Justice Bhagwati relieved himself from deciding what he called "a troublesome question" by saying that Indira Gandhi's case had accepted the majority view that Parliament's power of amendment was limited. This was not correct as that case was decided on the assumption that it was not necessary to challenge the majority view.

So a single judge's opinion — Justice Khanna's of a limitation of the basic structure on Parliament's power — has passed off as the law. But Justice Khanna was responsible for

another vital dimension of the basic structure two years after the case was decided. In the Kesavananda case, he did not say that fundamental rights were part of the basic structure of the Constitution, although six other judges said that and the case was entirely about the validity of amending fundamental rights by the challenged constitutional amendments. Three of Justice Khanna's brother judges in the Kesavananda case were clearly of the opinion that Justice Khanna had not held that fundamental rights were part of the basic structure in the Kesavananda Bharati case.

But in Indira Gandhi's election case two years later, Justice Khanna "clarified" his judgment in the Kesavananda case. He now said that he had given clear indications in his judgment that fundamental rights were part of the basic structure. By so clarifying his judgment, Justice Khanna did not realise that this clarification rendered his judgment in the Kesavananda case hopelessly self-contradictory, as he had held unconditionally valid two constitutional amendments that nullified vital fundamental rights. With that dubious exercise, Justice Khanna's "clarification" is now a vital part of the basic structure. Fundamental rights are now immune to an amendment if it violates the basic structure of the Constitution.

In the latest judgment, delivered on January 11, 2007, by nine judges of the Court on the Ninth Schedule to the Constitution, the basic structure limitation has been stated to be "an axiom of our constitutional law." An axiom means a self-evident truth. So be it. Whatever its origins, the basic structure theory plays a useful part in our constitutional jurisprudence. Parliament does not and should not have an unlimited power to amend the Constitution. However, in the glorification of the basic structure theory, it is important to bear in mind its infirm roots and how predilections and prejudices of judges, chance, and accidental circumstances have played a greater part rather than any logic or conscious formulation of it.

(The writer is a former Solicitor-General of India. This article is based on his lecture, which was presided over by Lok Sabha Speaker Somnath Chatterjee, to the Supreme Court Bar Association on April 4, 2007.)

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