

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 3 | Issue 3

2020

© 2021 International Journal of Legal Science and Innovation

Follow this and additional works at: <https://www.ijlsi.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for free and open access by the International Journal of Legal Science and Innovation at VidhiAagaz. It has been accepted for inclusion in International Journal of Legal Science and Innovation after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at International Journal of Legal Science and Innovation, kindly email your Manuscript at editor.ijlsi@gmail.com.

Kesavananda Bharati v. State of Kerala: A Case Commentary

ARJUN BADOLA¹ AND SHRIRAM RAGHAV RISHI²

ABSTRACT

Historically, democracies have turned out to be fragile institutions and while documents such as the Indian Constitution are the crystallization of the ideals of a young nation, the governments that come in the future tend to be pragmatists and such pragmatism is more than likely to betray those ideals. The judgement of Kesavananda Bharati v. State of Kerala by the Supreme Court of India is cornerstone of this very tryst between the pragmatism of growing India's legislature and the morality of the Constitution, being protected by the judiciary. The judgement essentially gave a blanket veto in the hands of the judiciary over preserving the 'basic structure' of the Constitution, ensuring that the ideals of India's Constitution makers do not get compromised by the interests of whichever government that comes to power. This case commentary intends to analyze the history of this dispute, its ramifications, the merits it has and the flaws it creates in Indian legal discourse, since the judgement is not perfect in nature.

I. INTRODUCTION

The Constitution of India, at the time of its inception, was a potpourri of idealism, hopes and dreams of the future by a people oppressed, stepping into an unsure future. Over time, the polity of India has changed and so has the ruling class's consciousness. Article 368 of the Indian Constitution makes way for the legislature to implement amendments to the Constitution, changing the laws based on their changing consciousness. As the India of the British Raj was well aware of, the consciousness of the ruling class may not always be in the benefit of the populace at large and hence the Republic of India enshrined the notions of checks and balances in its ruling structure to make sure each arm of the government has another arm making sure that they don't go out of line. The same is necessary for the Indian Constitution, especially certain principles such as the fundamental rights which enshrine the very spirit of the Indian Constitution and of the India envisioned by its authors. The

¹ Author is a Student at Jindal Global Law School, India.

² Author is a Student at Jindal Global Law School, India.

judgement in *Kesavananda Bharati v. State of Kerala*³ is written keeping this idea in mind, to protect the basic structure of the Constitution by virtue of the judiciary's power to review and to uphold the idealistic vigour of the makers of the Constitution so that the document that forms the foundation of the Indian state does not deviate completely from the originally agreed upon social contract which was made to its people at the time of independence. The judgement is a landmark case in the judiciary's powers to ensure the rights of the people are not violated by the state by way of Constitutional amendments, ensuring that drastic actions of the state while exercising its power can be checked by another arm of the government. This note intends to highlight the facts, the judgement held, the case laws prior to this judgement pertaining to the basic structure doctrine as well as subsequent litigations as well as a detailed analysis regarding the ramifications of this judgement.

II. FACTS

The build-up to *Kesavananda Bharati* began in 1967 through the *Golak Nath*⁴ case when the Supreme Court's eleven judge bench held that the State cannot amend the fundamental rights which are present in Part III of the Indian Constitution. This judgement led to the start of a heated debate on doctrine of basic structure. Article 13 of the Indian Constitution states that any law which is against the fundamental rights becomes void⁵ but it does not talk about constitutional amendments. The Indira Gandhi-led government brought the 24th Amendment of the Constitution which stated that the state can amend anything including fundamental rights using the loophole that this was an amendment to existing laws, not a new one in itself. Via the 25th Amendment, the government could take away any property of any Indian citizen (price of the property was also decided by the Government) while the 29th Amendment led to the 'Two State Land Reforms Act' being added into the Schedule IX, putting it out of the scope of the judiciary.

Kesavananda Bharati was a Hindu monk who served as the head of Edneer Mutt in Kerala. The Kerala Government had passed a law attempting to control religiously owned property under the Two State Land Reforms Acts as they wanted the right to manage religious property. Article 26 gives power to any person or trust to manage any religious property. But the Kerala government tried to create some restrictions in this right. Nani Palkhivala, a senior advocate, convinced Kesavanda Bharati to file a Public Interest Litigation as Bharati had a Fundamental Right to manage the property. The case went to the Kerala High Court and later

³ (1973) 4 S.C.C. 225 (India).

⁴ *Golak Nath and Ors. v. State of Punjab*, AIR 1967 SC 1643 (India).

⁵ INDIA CONST. art. 13.

on to Supreme Court where the hearing went on for sixty eight days with thirteen judges on the bench.

The dispute was based on the interpretation of Article 368 which sanctioned amending authority to the Parliament with the contention being that whether the Fundamental Rights could be subject to alterations. This issue was earlier contested in *Golak Nath v. State of Punjab* where the court established the limits upon the amending power of the Parliament. They ruled that the Parliament cannot amend the Fundamental Rights and would have to make new laws to make any changes to them, which would require them to adhere to Article 13 of the Indian Constitution. In *Kesavananda Bharati v. State of Kerala* case, Articles 24, 25 and 29 were challenged wherein the government contended that they had the powers to amend under Article 368 of the Indian Constitution.

III. HOLDING

While the Supreme Court held that the Parliament does have the authority to amend, overturning some of the rulings of the *Golak Nath* case, they established a new limitation on those amendments: they cannot amend the basic structure of the Indian Constitution.

The bench, with a majority of 7:6 held that the 24th Amendment of the Indian Constitution was *intra vires* and therefore, the government did have the authority to alter the Constitution but with the limitation that such amendment cannot amend the basic structure of the Indian Constitution, which can fall under the scrutiny of judicial review. The court stated that the word ‘amend’ in Article 368 does not provide the Parliament the power to alter the basic structure of the Indian Constitution. Therefore, any constitutional amendment must be subject to passing the test of the doctrine of basic structure. The court agreed in parts with the 25th Amendment of the Indian Constitution but in its entirety. It held that ‘amount’ and ‘compensation’, words used in the amendment in regards to the Two State Land Reforms act, are two terms with different meanings and implications. Therefore, the money paid to the owners of whom the state would be taking the property of, must not be unreasonable. Further, it struck down the part where the amendment removed the law from the scope of judicial review.

Dissidents including D.G. Palekar, K.K. Mathew, M.H. Beg, A.N Ray and Y.V Chandrachud were of the opinion that Article 368 gave the government unfettered authority to amend any and all parts of the Constitution, even the Fundamental Rights, in contravention of the *Golak Nath* judgement.

Dissident Khanna J, who supported the majority verdict in the end, agreed that while the

government cannot interpret Article 368 to amend the basic structure of the Constitution, he argued that there is no rule to establish that the Fundamental Rights, which also included the right to property at the time, were part of the basic structure of the Constitution. Therefore, he believed that these rights were subject to amendment.

The majority, comprising Hedge, Shelat, Sikri, Mukerjee, Reddy and Grover JJ, held that while the government has the right to change the Constitution, they cannot alter the Fundamental Rights which are part of the basic structure so as to 'emasculate' the people. This also includes the Preamble. References about this basic structure were also made through citations of the works of Alvin Robert Cornelius, who was the first Christian Chief Justice of the state of Pakistan as well as American legal discourse where the basic structure doctrine is prevalent. It can be inferred that the basic structure is not clearly defined in law but is left up to judicial interpretation so as to uphold the 'living document' nature of the Constitution as it grows along with the consciousness of the Indian society. They overruled the Golak Nath judgement but in doing so, cast a wider net by including the Fundamental Rights into the basic structure and therefore, protecting them from being impinged by the state.

IV. POST LAW

The aftermath of the judgement was rife with allegations that Indira Gandhi had used illegal ways to tamper the election process, leading to a case being filed against her by Raj Narain⁶. When the case was received by the Supreme Court, Indira Gandhi's government brought the 39th Amendment which stated that there can be no legal cases on the Prime Minister of India. But the Supreme Court held that this amendment was going against the basic structure doctrine of the Indian Constitution which was mentioned in the Kesavananda Bharati case. The allegiances of the judges were clear based on this case where Khanna, Mathew and Chandrachud ended up defending the basic structure doctrine and striking off the amendment while Justice Ray, similar to his opinions back in the Kesavananda Bharati judgement, maintained his dissent. Multiple cases followed suite with the doctrine of basic structure being central to their judgements.

In *Minerva Mills vs Union of India*⁷, the court examined the validity of the 42nd Constitutional Amendment which aimed to counteract the effects of the Kesavananda Bharati judgement. Articles 4 and 55 through this amendment would specifically state that the

⁶ 1975 (Supp) S.C.C. 1 (India).

⁷ (1980) 3 S.C.C. 625 (India).

Parliament's amending powers would be unfettered and no limitations can be placed on it. These were introduced in the state of emergency placed during Indira Gandhi's regime. The government's blatant power-mongering is visible in these actions but the *Minerva Mills* judgement struck down these Articles of the 42nd Amendment, therefore, upholding the doctrine of judicial review. The argument made in the judgement for this decision was that the power of judicial review was also part of the basic structure of the Constitution.

Skeletons in the closet were then dug up in this post-emergency era, when past amendments were being brought into question. In *Waman Rao v. Union of India*⁸, a ceiling was imposed upon agricultural holdings by the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 27 of 1961. While this act's validity had been challenged for years, this case was taken up after the removal of the state of emergency. But the court rejected the idea that the verdict of *Kesavananda Bharati* could apply retrospectively, as in, on amendments and legislations introduced prior to when the judgement was made. The court established that the judgement's interpretation follows the normal rules, as all laws which do not explicitly mention that they can apply retrospectively. Since all regular law is prospective in nature and that is considered its fair application, the court could not apply the doctrine of basic structure retroactively. This also removes unfair burden on individuals which emerges when law applies retrospectively. Therefore, only amendments made after the *Kesavananda Bharati* judgement was pronounced are subject to challenge based on this doctrine.

In *M. Nagraj v. Union of India*⁹, the court reviewed the 77th, 81st and 85th Amendments with regards to the retroactive introduction of Articles 16 (4A) and 16 (4B) to provide reservations. While the contention was that the right to equality is part of the basic structure of the constitution and thus, these amendments cannot be made, the Court was of the opinion that the basic structure doctrine is uncalled for in this case as while the right to equality does remain part of the basic structure, the ability to introduce seniority or create equity is not. The ambiguities of the *Kesavananda Bharati* case were brought to the forefront once more in *I.R. Coelho v. State of Tamil Nadu*¹⁰. In this ruling, the court established that any and all legislations that pose a threat to the basic structure of the Constitution are subject to judicial review, not just constitutional amendments. Here, changes made to the Ninth Schedule were brought in contention and the court ruled that when such changes are infringing upon the Fundamental Rights, they are subject to judicial review and can be struck down.

⁸ (1981) 2 S.C.C. 362 (India).

⁹ (2006) 8 S.C.C. 212 (India).

¹⁰ (1999) 7 S.C.C. 580 (India).

The matter of equity did not die down and were brought in contention once again in *Ashok Kumar Thakur v. Union of India*¹¹ where the Central Education Institution Act as well as the 93rd Amendment were contested based on their constitutional validity. The argument made was that by providing equity to exploited classes, the state was depriving entry and aid to the ‘creamy layer’ of the population. The court did not agree with this contention, harkening back to the living document nature of the Constitution, establishing that the basic structure grows along with the progress of human society and in this situation, where the state is trying to create equity between the creamy layer and the exploited, the Constitution must be flexible.

V. ANALYSIS

The Kesavananda Bharati judgement as a document is a tedious task to not only understand but analyse, given the vastly differing but eventually converging opinions of the eleven judges writing this judgement. This also encapsulates the basic structure doctrine, left vague and open-ended purposefully and a near impossible task to be legally interpreted and entrapped within the words of the black letter law. As Upendra Baxi puts it¹², the judgement is riddled with legal myths and paradoxes. For the most part, the judgement is not clear in how the judges end up with their decision, leaving seven hundred pages for future lawyers to interpret and make sense of.

The myths that the court deals with are problematic and undermines what is very much considered a groundbreaking judgement. For starters, the court argues that the 25th Amendment infringes upon the right to property and the court itself is a champion of protecting an egalitarian social order. This ignorant approach is idealistic in two varied senses. First, the state offers market value compensation upon acquisition of property therefore, it is not being inequalitarian in its approach of depriving one of their property, more so when the individual is being compensated with the value of said property. Second, the judiciary system historically, even before the concept of ‘India’ as-it-is had been dreamed of, has functioned as the hand to enforce state ideology, maintaining its serfdom by its role in the policing and imprisonment of individuals.¹³ To pretend that this is not the case by the Indian judiciary is mere idealism.

Some part of the judgement also delves on the notion that the Directive Principles of the State Policy comprise of ‘social justice’ values and therefore, overrides fundamental rights. This is

¹¹ (2008) 6 S.C.C. 1 (India).

¹² Upendra Baxi, *The Constitutional Quicksands of Kesavananda Bharati and the Twenty Fifth Amendment*, 1 S.C.C. (Jour) 45, (1974).

¹³ PETER KROPOTKIN, ORGANISED VENGEANCE CALLED “JUSTICE” (The Anarchist Archive 2009).

controversial because it includes Articles 47, 49 and 51. They deal with trying to eradicate cow slaughter, preservation of monuments and a decree to abide by international treaties. While protection of all animals from mass breeding, culling and the mental trauma for the benefit of human consumption may classify as social justice but arbitrary rulings to safeguard one animal in a country where the leather industry flourishes seems counterproductive to purported vegan social justice from the state's end. So while all DPSPs may not be social justice, fundamental rights clearly are as all of them are intended to provide citizens democratic freedoms as well as protection from the state from violating those given freedoms. They form an important part of the Indian social contract, violative of constitutional morality and amending its terms because they aren't 'social justice' is a poor legal myth the court delves in here.

But the merits of the judgement are not reliant on the document of the judgement itself. The judgement is seminal because it embodies the power of the judiciary to not be just a body that extends the ideology of the dominant party in power via the law. Instead, the judgement allows the judiciary to check any and all unfettered violation of the Indian social contract from the government's end. The ambiguity seems planned because it allows the judiciary to review crucial matters which the state may try to circumvent from the ambit of judicial review. Abuse of power can be checked through the judiciary; the government cannot arbitrarily infringe upon the interests of the people of India. The judgement's impact on state policy is clear in the aftermath of this judgement where out of the six dissenting judges in this case, Justice Ray was appointed the Chief Justice of India, allegedly by Indira Gandhi's influence while three judges who were on the majority side ended up being suspended immediately.¹⁴ The government attempted to reopen *Kesavananda Bharati* case but the Supreme Court rejected it. This action shows how much of a threat this judgement was to the government in power.

VI. CONCLUSION

By way of *Kesavananda Bharati* judgement, the court took the Constitution and the will of the people of India from the hands of the Parliament into their own hands, undermining any 'Constitution' that they may bring forth and force upon the population at large. The Attorney General of India, in his loyalty towards the parties in power, has repeatedly tried to argue for the return of this power back to the Parliament but such an arrangement can easily allow the

¹⁴ Penguin Random House, *Two Hours given to Justice A N Ray to Decide on CJI Post?*, THE ECONOMIC TIMES (Jul. 16, 2018, 02:20PM), <https://economictimes.indiatimes.com/news/politics-and-nation/two-hours-given-to-justice-a-n-ray-to-decide-on-cji-post/articleshow/65007659.cms>.

dominant party to usher in an imperial regime upon the people of India via a two-thirds majority in Parliament.¹⁵ Keshavananda Bharati judgement ensures that this cannot happen by way of law, at least not until the state does not get bold enough to announce an emergency like in 1975. The citizens of India once again live in a state that is keen on exploiting its citizens for their bourgeois benefits, it is the legacy of Kesavananda Bharati judgement that makes sure that there is still hope for the people in courts of law, just as it was four decades ago.

¹⁵ Upendra Baxi, *Courage, Craft and Contention: The Indian Supreme Court in the Eighties*, 28 NM TRIPATHI PVT. LTD. 112, (1985).