

## COMMENT

## The case that saved Indian democracy



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**The judgment in *Kesavananda Bharati v State of Kerala*, whose 40th anniversary falls today, was crucial in upholding the supremacy of the Constitution and preventing authoritarian rule by a single party**

Exactly forty years ago, on April 24, 1973, Chief Justice Sikri and 12 judges of the Supreme Court assembled to deliver the most important judgment in its history. The case of *Kesavananda Bharati v State of Kerala* had been heard for 68 days, the arguments commencing on October 31, 1972, and ending on March 23, 1973. The hard work and scholarship that had gone into the preparation of this case was breathtaking. Literally hundreds of cases had been cited and the then Attorney-General had made a comparative chart analysing the provisions of the Constitutions of 71 different countries!

## Core question

All this effort was to answer just one main question: was the power of Parliament to amend the Constitution unlimited? In other words, could Parliament alter, amend, abrogate any part of the Constitution even to the extent of taking away all fundamental rights?

Article 368, on a plain reading, did not contain any limitation on the power of Parliament to amend any part of the Constitution. There was nothing that prevented Parliament from taking away a citizen's right to freedom of speech or his religious freedom. But the repeated amendments made to the Constitution raised a doubt: was there any inherent or implied limitation on the amending power of Parliament?

The 703-page judgment revealed a sharply divided court and, by a wafer-thin majority of 7:6, it was held that Parliament could amend any part of the Constitution so long as it did not alter or amend "the basic structure or essential features of the Constitution." This was the inherent and implied limitation on the amending power of Parliament. This basic structure doctrine, as future events showed, saved Indian democracy and *Kesavananda Bharati* will always occupy a hallowed place in our constitutional history.

## Supreme Court v Indira Gandhi

It is supremely ironical that the basic structure theory was first introduced by Justice Mudholkar eight years earlier by referring to a 1963 decision of the Supreme Court of Pakistan. Chief Justice Cornelius – yes, Pakistan had a Christian Chief Justice and, later, a Hindu justice as well – had held that the President of Pakistan could not alter the "fundamental features" of their Constitution.

The *Kesavananda Bharati* case was the culmination of a serious conflict between the judiciary and the government, then headed by Mrs Indira Gandhi. In 1967, the Supreme Court took an extreme view, in the *Golak Nath* case, that Parliament could not amend or alter any fundamental right. Two years later, Indira Gandhi nationalised 14 major banks and the paltry compensation was made payable in bonds that matured *after 10 years!* This was struck down by the Supreme Court, although it upheld the right of Parliament to nationalise banks and other industries. A year later, in 1970, Mrs Gandhi abolished the Privy Purses. This was a constitutional betrayal of the solemn assurance given by Sardar Patel to all the erstwhile rulers. This was also struck down by the Supreme Court. Ironically, the abolition of the Privy Purses was challenged by the late Madhavrao Scindia, who later joined the Congress Party.

Smarting under three successive adverse rulings, which had all been argued by N.A. Palkhivala, Indira Gandhi was determined to cut the Supreme Court and the High Courts to size and she introduced a series of constitutional amendments that nullified the *Golak Nath*, *Bank Nationalisation* and *Privy Purses* judgments. In a nutshell, these amendments gave Parliament uncontrolled power to alter or even abolish any fundamental right.

These drastic amendments were challenged by Kesavananda Bharati, the head of a *math* in Kerala, and several coal, sugar and running companies. On the other side, was not only the Union of India but almost all the States which had also intervened. This case had serious political overtones with several heated exchanges between N.A. Palkhivala for the petitioners and H.M. Seervai and Niren De, who appeared for the State of Kerala and the Union of India respectively.

The infamous Emergency was declared in 1975 and, by then, eight new judges had been appointed to the Supreme Court. A shocking attempt was made by Chief Justice Ray to review the *Kesavananda Bharati* decision by constituting another Bench of 13 judges. In what is regarded as the finest advocacy that was heard in the Supreme Court, Palkhivala made an impassioned plea for not disturbing the earlier view. In a major embarrassment to Ray, it was revealed that no one had filed a review petition. How was this Bench then constituted? The other judges strongly opposed this impropriety and the 13-judge Bench was dissolved after two days of arguments. The tragic review was over but it did irreversible damage to the reputation of Chief Justice A.N. Ray.

### Constitutional rights saved

If the majority of the Supreme Court had held (as six judges indeed did) that Parliament could alter any part of the Constitution, India would most certainly have degenerated into a totalitarian State or had one-party rule. At any rate, the Constitution would have lost its supremacy. Even Seervai later admitted that the basic structure theory preserved Indian democracy. One has to only examine the amendments that were made during the Emergency. The 39th Amendment prohibited any challenge to the election of the President, Vice-President, Speaker and Prime Minister, irrespective of the electoral malpractice. This was a clear attempt to nullify the adverse Allahabad High Court ruling against Indira Gandhi. The 41st Amendment prohibited any case, civil or criminal, being filed against the President, Vice-President, Prime Minister or the Governors, not only during their term of office but forever. Thus, if a person was a governor for just one day, he acquired immunity from any legal proceedings for life. If Parliament were indeed supreme, these shocking amendments would have become part of the Constitution.

Thanks to Kesavananda Bharati, Palkhivala and the seven judges who were in the majority, India continues to be the world's largest democracy. The souls of Nehru, Patel, Ambedkar and all the founding fathers of our Constitution can really rest in peace.

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