JUSTICE PARDIWALA'S OPINION IN JANHIT ABHIYAN V. UOI: TIME TO REVISIT THE BASIC STRUCTURE DOCTRINE

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ABSTRACT

The Supreme Court recently upheld the constitutionality of the 103rd Constitutional Amendment that introduced economic reservation in India. The Constitution Bench consisting of five judges delivered four separate opinions, wherein Justices Maheshwari, Trivedi, and Pardiwala wrote separate but concurring opinions for the majority, whereas Justice Bhat wrote a dissent on behalf of himself and Chief Justice Lalit. The aim of this essay is not to discuss the core issue of economic reservation decided by the Court, but to analyse some interesting observations on the basic structure doctrine made by Justice Pardiwala in his concurring opinion.

Justice Pardiwala cites literature critical of the basic structure doctrine and argues that it has been used in affecting policy decisions resulting in widespread resentment against it

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and it also deprives the future generations of the possibility of having a Constitution that is reflective of their aspirations. Taking a cue from this, in this essay, a case is made for revisiting the basic structure doctrine on grounds that it is against the vision of the Constituent Assembly; is an affront to democracy; has dubious origins emanating from the lack of clarity over its meaning in the basic structure case; and is an act of judicial supremacy.

Keywords: *Basic Structure Doctrine, Constitutional Amendment, Justice Pardiwala, Entrenchment, Judicial Supremacy*

I. INTRODUCTION

Are constitutions meant to be sacrosanct documents that are to be revered and untouched? Or are they meant to be documents that are flexible and can be changed to suit the needs of the current generation? Globally, the consensus seems to be towards 'flexibility', as almost every democratic constitution provides for a procedure for its amendment. The underlying idea behind such provisions can be found in the words of Greek philosopher Heraclitus, who is credited to have remarked that the only constant in life is change. In other words, with time, the needs of the society, its morality and aspirations change, and a constitution should be reflective of this change.

This spirit of flexibility and change was evident in the deliberations of the Constituent Assembly tasked with drafting the constitution of independent India. The Assembly created a constitution that could be amended by a parliament having the necessary majority. However, this

vision of the Assembly was negated by the Supreme Court twenty-five years later, when it held that there are certain essential or basic features of the Constitution that cannot be amended at any cost, even if the procedure listed in the Constitution is followed. This doctrine came to be known as the basic structure doctrine. Interestingly, the Court reached its judgment by a wafer-thin majority of 7 Judges voting in favour and 6 against, and subsequent accounts by Judges on the bench highlights that there was an enormous lack of clarity and consensus amongst these Judges, making its origins dubious.

Despite its origins, the doctrine has become an integral part of constitutional law in India. It has achieved a sacrosanct status and any critique against it automatically invites allegations of questioning the judiciary, supporting majoritarianism, and being overly optimistic about democratic rule. However, the innate ability and necessity to question settled ideas should not bow down before any norm, no manner how sacrosanct. This paper is an attempt to do so. **Part II** of the essay provides an overview of the basic structure doctrine. **Part III** highlights the observations made by Justice Pardiwala in the 103rd Amendment case,[1] and finally, **Part IV** makes a case for revisiting the doctrine.

II. ENTRENCHMENT AND THE BASIC STRUCTURE DOCTRINE

Prof. Nick Barber defines entrenchment as "*a legal rule that makes it more difficult for a body to change the law in an area that, but for the entrenching rule, would fall within its jurisdiction and be alterable under the default rules of legal change.*"[2] In other words, entrenchment

[1] *Janhit Abhiyan v Union of India* WP (C) 55/2019 (hereinafter "**103rd Amendment case**").
[2] Nick Barber, 'Why Entrench' (2016) 14(2) International Journal of Constitutional Law 325, 327.

makes it difficult for a body to change an area of law which it is otherwise entitled to do.[3]

This range of difficulty can take various forms, including mild to absolute entrenchment, wherein no change is possible. A Constitution may adopt an *entrenchment of form*, wherein the law can be altered only if it is expressed through a prescribed form. For example, Section 2 of the Canadian Bill of Rights, 1960 provides that laws of Canada should be read and applied in conformity to that statute, unless '*it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights*'.[4] Another form is *entrenchment of time*, wherein it is required that a body spends a considerable amount of time deliberating the measure before it is adopted. *Entrenchment of prescribed votes* requires a certain number of votes or voting internally (legislature) or externally (by the people through a referendum) before the amendment can take place. The strictest form of entrenchment is a *substantive entrenchment* wherein certain features of the Constitution are unamendable altogether. A pertinent example would be Article 79(3) of the German Constitution which carries an eternity clause prohibiting amendment of certain principles.[5]

The Indian Constitution adopts entrenchment of 'prescribed votes'. First, there are amendments that can be affected by a simple majority of votes in the Parliament, akin to an ordinary law. For example, an amendment under Article 169 to abolish or create a Legislative Council in a state.[6] Second, some amendments require voting by a special majority that is, a majority of the total membership of each House as well as by a majority of not less than two-thirds of the members of the House present and voting. For example, the 103rd Constitutional Amendment was one such amendment. Third, some amendments

[3]ibid.
[4]Canadian Bill of Rights, 1960 s 2.
[5]The Constitution of India, 1950 art 79(3).
[6]ibid art 169.

require ratification through resolutions passed by not less than one-half of states in addition to the special majority. Such amendments usually affect the states as well and hence, require their consent. For example, an amendment concerning the election of the President,[7] or any of the lists in the Seventh Schedule of the Constitution.[8]

The text of the Constitution nowhere mentions any other form of entrenchment on the Parliament's power to amend the Constitution. In the early years of the Constitution, the Supreme Court stuck to this approach and held that the terms of Article 368 are clear and there are no exceptions to the Parliament's power to amend the Constitution.[9] However, subsequently in *I.C. Golaknath v. State of Punjab*, an eleven Judge bench reversed this position of law by stating that Parliament's power to amend the Constitution was limited as it could not amend Part III, i.e., the chapter on fundamental rights.[10] As a result, the Court introduced substantive entrenchment on the Parliament's power to amend the Constitution. Interestingly, the Court reached its conclusion by a slight majority of 6:5, and hence, the Parliament passed the 24th Constitutional Amendment to overcome the verdict. The amendment substituted the words "amendment" in Article 368 with "amendment by way of addition, variation or repeal" to clearly vest constituent powers in the Parliament to amend any part of the Constitution.

The 24th Amendment was challenged before a 13 Judge bench of the Supreme Court (the largest to date) in *Kesavananda Bharti v. State of Kerala and Ors.*[11] Ultimately, on 24th April 1973, the Court through a wafer-thin majority of 7:6 held that Article 368 does not enable the Parliament to alter the basic structure or framework of the

[7]ibid art 368 proviso (a).
[8]ibid art 368 proviso (c).
[9]*Shankari Prasad v Union of India* AIR 1951 SC 458, followed in *Sajjan Singh v State of Punjab* AIR 1964 SC 464.
[10]*IC Golaknath and Ors., v State of Punjab* AIR 1967 SC 1643.
[11]*Kesavananda Bharti v State of Kerala and Ors* (1973) 4 SCC 225.

Constitution.[12] The judgment witnessed ten separate judgements with Chief Justice Sikri, Shelat and Grover, Hegde, and Mukherjee, and Jagannathan Reddy writing four separate judgments for the majority whereas Justice A. N Ray, Palekar, Mathew, Dwivedi, Beg, and Chandrachud writing for the minority that there were no limitations on the amending power of the Parliament.

Justice Khanna was the swing vote who differed from both the majority and minority opinion. He sided with the minority on the point that the Parliament's amending power was plenary but disagreed with them on the extent of its limit. He held that the Parliament's plenary power to amend the Constitution did not include the power to abrogate the very document. He observed, "*As a result of the amendment, the old constitution cannot be destroyed and done away with; it is retained though in the amended form. Retention means the retention of the basic structure or framework of the old Constitution*."[13] He disagreed with the majority on the point of whether the Parliament could amend the fundamental rights of the Constitution. He believed that the Parliament could amend them so long as the basic features were not destroyed. It was Justice Khanna's use of the term 'basic structure' that gave the doctrine its name.

The multiple judicial opinions and the courtroom manoeuvring in the case have led to many questioning the exact meaning of the doctrine and whether it should be reconsidered. The author shall return to scrutinizing the doctrine in Part IV of this essay.

The political climate amidst which the judgment was delivered is extremely crucial. The Union government at the time was making significant efforts to clothe the executive and legislature with more

[12]ibid, view by the Majority.
[13]*Kesavananda Bharti v State of Kerala and Ors* (1973) 4 SCC 225, para 1426.

powers.[14] It had passed several constitutional amendments to shield itself and its policies from every possible judicial scrutiny. The gravity of the situation is further understood if one looks at the aftermath of the judgment. Two days after the judgment, the Union government broke a Supreme Court convention regarding the appointment of the Chief Justice of India. The Constitution is silent on the appointment of the Chief Justice, however, since its inception, the senior most Judge was appointed as the Chief Justice, making it a convention. The government led by Mrs. Gandhi broke this convention and superseded three senior Judges, i.e.,, Justice Shelat, Grover, and Hegde, to appoint Justice Ray (a junior judge) as the Chief Justice of India.[15] The three Judges had decided against the government in *Kesavnanada's* case, and the supersession was viewed as their punishment. Justice Ray, on the other hand, had ruled in favour of the government and was perceived as a government-friendly judge. In light of this backdrop, the judgment in *Kesavananda* was seen as the judiciary's attempt to save the overhaul of the Constitution for political gains.

III. JUSTICE PARDIWALA'S REMARKS ON THE DOCTRINE

In *Janhit Abhiyan v. Union of India* (the '**103rd Amendment case**') one of the questions before the Court was whether the Amendment violates the basic feature of equality and hence, can be struck down on account of the basic structure doctrine. Justice Pardiwala concluded that the amendment does not infringe upon the basic feature of equality and hence, does not alter the basic structure of the Constitution.[16] Before

[14]Granville Austin, *Working a Democratic Constitution* (OUP 2017) 258; Christophe Jaffrelot and Pratinav Anil, *India's First Dictatorship: The Emergency 1975-77* (Harper Collins 2021) 272.

[15]Swapnil Tripathi, 'Supersession of Judges – The Disastrous Sequel to Kesavananda Bharti' (*The Basic Structure Blog*, 26 April 2020) <https://thebasicstructureconlaw.wordpress.com/2020/04/26/supersession-of-judges-the-disastrous-sequel-to-kesavananda-bharti/>.

[16]103rd Amendment case, para 191.

reaching this conclusion, Justice Pardiwala discussed the doctrine in detail and also made some remarks that were critical of the doctrine. This part discusses those remarks.

Justice Pardiwala began his judgment by citing observations made in another case,[17] wherein the Court had termed it hazardous to define the basic structure of the Constitution on the ground that what is basic does not remain static at all times.[18] These observations were a precursor to the discussion on the basic structure doctrine. Thereafter, he made two critical arguments against the doctrine. First, he highlighted that the Court's wide application of the doctrine and its use in interfering with policy decisions has given rise to resentment against it. Second, the doctrine strips the future generation of a chance to choose their ideals and realise their aspirations.

A. Unrestrained use of the doctrine and policy interference

Justice Pardiwala ("**Pardiwala J. or Justice Pardiwala**") began by arguing that the doctrine was created keeping in mind instances where the fundamental structure of the Constitution was threatened by constitutional amendments. Hence, it should be invoked only in those special instances and not as a norm to preserve its status. He further lamented the repeated use of the doctrine. [19]

Thereafter, he cited an essay titled, "*Today's Promise, Tomorrow's Constitution: 'Basic Structure', Constitutional Transformations and The Future of Political Progress in India*," wherein the author argued that the doctrine has been used repeatedly to interfere with policy decisions, giving rise to resentment against it.[20] He concluded by arguing that the doctrine should be exercised sparingly and must be used only for constitutional preservation.

[17] *J&K National Panthers Party v Union of India* (2011) 1 SCC 228.
[18] 103rd Amendment case, para 5.
[19] ibid, para 128.
[20] ibid.

B. Stripping the future generations of their aspirations

Pardiwala J. later argued that a Constitution is meant for people of different ideologies and opinions, and should be workable for all. For him, the Constitution is couched in elastic terms and hence, should be interpreted broadly. He wrote, "*According to the widely accepted principles of constitutional interpretation, the provisions of a Constitution should be construed in the widest possible manner. Constitutional law is the basic law. It is meant for people of different opinions. It should be workable by people of different ideologies and at different times. Since it provides a framework for the organisation and working of a State in a society which keeps on changing, it is couched in elastic terms and, therefore, it has to be interpreted broadly*."[21]

He cited academic literature to argue that a Constitution should allow every generation to pursue their ideals and aspirations through amending clauses that make it adaptable. In other words, a Constitution should grant the current generation the option of amending the Constitution to align it with their beliefs and values.

He argued, "*No generation has a right to bind the future generations by its own beliefs and values. Each generation has to choose for itself the ways of life and social organisation. Constitution should be so adaptable that each generation may be able to make use of it to realise its aspirations and ideals. An amending clause is specifically provided to adapt the Constitution according to the needs of the society and the times.*"[22]

He further argued that a constitutional amendment is a safety valve that allows radical changes through a constitutional process. If not allowed, the need of the current generation may lead to a revolution. He gave the example of the British Constitution which contains an easy process

[21]ibid, para 129.
[22]ibid.

of amendment wherein through a simple majority, all kinds of changes can be made to the Constitution.[23] These observations are important because they lend support to the argument of the Parliament having unlimited powers of amendment.

He takes this argument forward by citing academic literature which argues that there should be no implied limitations on the amending power of the Parliament. In other words, the only limits on the Parliament's power to amend the Constitution are the ones specifically mentioned in a Constitution and if no such restrictions are mentioned, there are no restrictions on the said power. The literature further argues that the makers of the Constitution studied the Constitutions of several countries including the United States of America, Canada, Ireland, South Africa, and Germany during the drafting of the Constitution. Some of these Constitutions (especially Germany) had explicit limitations on the amending power and hence, if the Constituent Assembly wanted such restrictions in India as well, they would have included similar provisions in the Constitution, which they did not. Hence, their failure to do so was a deliberate act aimed at not imposing any express limitations on the amending power of the Parliament.[24]

In his opinion, such wide amending powers are not a threat to fundamental rights, but instead, are a safeguard. An amendment acts as a means to preserve rights by adapting them in line with the changing societal realities as against keeping them stagnant.[25] For him, stability of the fundamental rights comes from their social and political support which is guaranteed through an easy amending process that keeps the Constitution in synch with the needs of the current generation.

Justice Pardiwala's observations, although obiter and non-binding, raise interesting interventions against the basic structure doctrine. His observations on the Constituent Assembly's deliberate act of not

[23]ibid, para 133.
[24]ibid, para 129.
[25]ibid, para 132.

adding any limitations to the amending power of the Parliament and the need for allowing future generations to tailor the Constitution to their needs are extremely crucial and are developed in the next part of this essay.

IV. RECONSIDERING THE DOCTRINE

Developing on Justice Pardiwala's observations, in this Part, it is argued that (A) the doctrine is against the vision of the Constituent Assembly, and (B) is affront to democracy. Furthermore, (C) it has dubious origins emanating from the lack of clarity over its meaning in the basic structure case, and (D) it is an act of judicial supremacy.

A. Implied limitations are against the vision of the Constituent Assembly

The Constituent Assembly tasked with drafting the Constitution, deliberated the aspect of amending power in great detail. In fact, the Assembly also witnessed a discussion on introducing substantive limits to the Parliament's power to amend the Constitution.

Member P.S. Deshmukh introduced an amendment that made fundamental rights immune from any changes brought by the Parliament that would restrict the scope of these rights. The amendment read, "*304-A. Notwithstanding anything contained in this Constitution to the contrary, no amendment which is calculated to infringe or restrict or diminish the scope of any individual rights, any rights of a person or persons with respect to property or otherwise, they be permissible under this Constitution and any amendment which is or is likely to have such an effect shall be void and ultra vires of any Legislature.*"[26]

[26]Speech of PS Deshmukh, Constituent Assembly of India Debates, Volume IX (17 September 1949)

Introducing the amendment, Deshmukh argued that it was introduced to protect the Constitution and dispel the fear of loss of liberty in the minds of the citizens. In his opinion, the amendment only curbed the restriction of rights by the Parliament and not their enlargement. He observed, "*There is apprehension in the minds of the people that the liberty of the people is not safe and that as we get more and more freedom, they are not allowed even that much freedom that the foreigner allowed them. Article 15A is not quite sufficient for the protection of the liberty of the individuals and therefore this amendment is both necessary and desirable*."[27]

During the discussion, Dr. Ambedkar put forth his views as well, which, in the author's opinion, clearly laid down the Assembly's vision. Dr. Ambedkar while responding to the amendment categorically stated that there are only three forms of amendment envisaged in the Constitution – amendment by simple majority, amendment by special majority and amendment by special majority along with ratification by states.[28] In Ambedkar's view, the three different categories of amendments indicated three different forms of checks on the powers of the Parliament. For example, some amendments required ratification by states since their implementation would affect both the Centre and states. Hence, obtaining state ratification would be a necessary check on the Parliament's power and would curb rash amendments. Ambedkar did not speak of any other forms of amendment or checks imposed on future Parliaments. It can be gleaned from his opinion that the above-mentioned list is exhaustive, and no extra checks or limits can be introduced.

<https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-09-17>.

[27]ibid.

[28]Speech of Dr BR Ambedkar, Constituent Assembly of India Debates, Volume IX (17 September 1949) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-09-17>.

The argument against implied limitations is further strengthened by the fact that Deshmukh's proposal did not receive any support in the Assembly and was ultimately withdrawn. This can be seen as the Assembly's emphatic rejection of any attempts to curb the Parliament's power of amending the Constitution. This clear rejection also indicates that the Assembly was not in favour of any limits both substantive and implicit being imposed on the Parliament's amending power.

B. Affront to democracy

A cardinal feature of the principle of democracy is the ability of the citizens to enact or change the law that governs them. In the words of Prof. Richard Albert, democracy includes the power to define and redefine oneself and to share and reshare the contours of the state.[29] In most democracies, this ability is exercised indirectly through elected representatives who enact laws that are reflective of the wishes and desires of the citizens. However, the basic structure doctrine snatches that ability from the people by making it impossible to change certain constitutional principles that have been laid down by the previous generations. In effect, the citizens are left bound by the ideas and ideologies of the previous generation which framed the Constitution. If they no longer conform to those principles or ideologies, they are left remediless as the doctrine will not allow them the opportunity of amending the Constitution and modifying those principles.

To illustrate with an example, the Constituent Assembly decided that India would follow a Parliamentary system of governance. The Supreme Court in *Kuldip Nayar v. Union of India* observed that the Parliamentary system of governance constitutes a basic feature of the Constitution and hence, cannot be amended.[30] If a future generation

[29]Richart Albert, 'Constitutional Handcuffs' (2010) 42 Arizona State Law Journal 663, 673.
[30]*Kuldip Nayar v Union of India* (2006) 7 SCC 1.

feels that the Parliamentary system is unworkable for India,[31] and hence, there is a need to switch to the Presidential system or Semi-Presidential system, they would be rendered remediless as any attempt to modify the Constitution would be struck down in light of the doctrine. Such an imposition of the will of one generation over the others is paternalistic and indicates the belief that citizens of yesterday knew better what is right for the citizens of today.

Several members of the Constituent Assembly had made this argument as well. Member Mahavir Tyagi argued that if the future generation feels that the Constitution is unworkable for their interests, they must have the option of changing the Constitution to suit their needs and likings. He specifically gave the example of a switch to a Presidential system to support his argument.[32] A similar argument was made by Member Lakshmi Kanta Maitra who argued that it must be open to the future generations to make any changes to the Constitution, to suit the needs of their time.[33]

In academic scholarship, Prof. Richard Albert has termed unamendable provisions as an act of denying the citizens the democratic right to amend their Constitution. In his opinion, such provisions result in throwing away the key to unlock the handcuffs that the Constitution attaches to the wrists of the citizens.[34] Similar observations were made

[31]Shashi Tharoor, 'Changing to a presidential system is the best way of ensuring a democracy that works' *The Indian Express* (25 July 2020) <https://indianexpress.com/article/opinion/columns/rajasthan-political-crisis-parliamentary-system-shashi-tharoor-6522100/>.

[32]Speech of Mahavir Tyagi, Constituent Assembly of India Debates, Volume IX (17 September 1949) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-09-17>.

[33]Speech of Lakshmi Kanta Maitra, Constituent Assembly of India Debates, Volume IX (17th September 1949) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-09-17>.

[34]Richart Albert, 'Constitutional Handcuffs' (2010) 42 Arizona State Law Journal 667.

by Justice R.S. Bachawat, who argues that an unamendable constitution is the worst form of tyranny that a Constitution can impose on a country.[35] Bachawat quoted Pt. Jawaharlal Nehru, who, while speaking on the need for flexibility in a Constitution had remarked, "*There should be a certain flexibility. If you make anything rigid and permanent, you stop a nation's growth, the growth of living vital organic people. Therefore, it has to be flexible.*"[36]

Often, supporters of the doctrine argue that episodes of history have shown us the need for having such safeguards as citizens cannot be trusted with the power of free choice. For instance, the basic structure doctrine emerged in the backdrop of the infamous tenure of Prime Minister Indira Gandhi. As explained in Part II of the essay, the Union government led by Mrs. Gandhi passed several constitutional amendments that were aimed at shielding her tenure and avoiding any judicial challenges to the policies and laws framed by her government. For instance, through the 39th Constitutional Amendment, the Supreme Court was stripped of its jurisdiction to hear disputes concerning the election of the Prime Minister or the Speaker of Lok Sabha.[37] Instead, this jurisdiction was vested with a body established by the Parliament. Further, any court order that declared the election of the Prime Minister or Speaker as void, would be null and void.[38] These amendments were passed with the support of the special majority of the Parliament, and in effect, with the indirect support of the people. The Supreme Court had struck down many of these amendments citing the basic structure doctrine.

[35]Raju Ramachandran, 'The Supreme Court and the Basic Structure Doctrine' in Kirpal and Desai (ed) *Supreme But Not Infallible* (Oxford 2004).
[36]ibid.
[37]The Constitution (Thirty-ninth Amendment) Act, 1975.
[38]Swapnil Tripathi, '39th Amendment and the Tribunal that tried the Prime Minister' (*The Basic Structure*, 10 August 2020) <https://thebasicstructureconlaw.wordpress.com/2020/08/10/the-39th-amendment-and-the-tribunal-that-tried-the-prime-minister/>.

Supporters of the doctrine cite her tenure to argue that substantive restrictions on the Parliament's power to amend are important so as to prevent a repetition of history. However, one must not make general observations and frame policies based on aberrations in history. The tenure of Mrs. Gandhi in India or the period of Nazi Germany are exceptions and not the norm. We must not rely on these aberrations to come to a general conclusion that citizens should not be trusted with powers to completely change their Constitution. By curbing all possibilities of change, one treats the citizen with suspicion and denies them a popular choice, which is an affront to the principle of democracy. Similarly, we must exercise caution before reposing blind trust in the judiciary regarding such wide scale powers, as much like the executive, the judiciary has let down the people in the past as well. For every 39th Amendment, there is an *ADM Jabalpur v. Shiv Kant Shukla*, wherein the Court failed to protect the rights of the people.[39] Furthermore, the supporters of the doctrine while proceeding on the premise of distrusting the democratic process often forget that 'democracy' is in itself an essential feature of the Constitution. By limiting the amending power, the doctrine is curbing democracy, a basic feature.[40]

Another argument made by the supporters of the doctrine is that the citizens always have the option of creating a new Constituent Assembly if they seek to, and draft a new Constitution for themselves that conforms to their vision of the nation. This argument has unfortunate implications. History has taught us that constitutional moments like the creation of a new Constituent Assembly are an act of revolution that come about only after years of public distrust in the existing legal system. It would be highly disrespectful to the citizens and their popular vote if revolution is the only recourse available to them to incorporate their principles in the Constitution. Further, this argument

[39]*ADM Jabalpur v Shivkant Shukla* AIR 1976 SC 1207.
[40]Raju Ramachandran, 'The Supreme Court and the Basic Structure Doctrine' in Kirpal and Desai (ed) *Supreme But Not Infallible* (Oxford 2004).

although theoretically sound, ignores the impracticality of calling a revolution for every entrenched provision in the Constitution, which citizens at the time do not agree with. This would be impractical as the citizenry would not be able to engage in any other governmental activity. This may even lead to instability. An easier solution to this problem is respecting the popular vote and allowing the possibility of amending the Constitution.

C. Dubious origins of the doctrine

In the initial years of the doctrine, its critics made an interesting argument highlighting its dubious origins. As mentioned in Part II of the essay, there were 11 separate judgments in *Kesavananda* with six Judges that is, Chief Justice Sikri, Shelat and Grover, Hegde and Mukherjee, and Jagannathan Reddy by four separate Judges holding that the amending power of the Parliament was limited by various inherent and implied limitations in the Constitution **('six in favour')**. Six other Judges which included Justice A. N Ray, Palekar, Mathew, Dwivedi, Beg and Chandrachud delivered six separate judgments and held that there were no limitations on the amending power of the Parliament **('six against')**. The numbers were split evenly with six Judges voting for limitations while the other six voting against it. Justice Khanna's judgment acted as the tiebreaker and held that the amending power was plenary but the word 'amendment' in Article 368 by its limited connotation did not lend itself to abrogating the Constitution. He observed that any amendment to the Constitution must necessarily retain the '*basic structure and framework of the Constitution after the amendment*'.[41]

Although the six in favour and Justice Khanna reached the same conclusion that is, there were limitations on the Parliament's amending power, they adopted a different route. For the six in favour, there were implied limitations in the Constitution itself (including fundamental

[41]*Kesavananda Bharti v State of Kerala and Ors* (1973) 4 SCC 225, para 1426.

rights) which restricted the Parliament's amending power. For Khanna, there were no inherent or implied limitations on the power of amendment, except the one emanating from the word 'amendment'. For Khanna, under the amending power of the Parliament, even fundamental rights could be amended or modified. In effect, there was no common ground between the six in favour and Khanna on the grounds for limitation on the Parliament's power of amendment. The Judges might have used the terms 'basic structure' or 'basic elements' in their respective opinions but the usage was made in different contexts.

Eminent scholar and lawyer H.M. Seervai made this argument shortly after the judgment in *Kesavananda* was pronounced. Seervai argued, "*there is an unbridgeable gap between the concepts and lines of reasoning of Justice Khanna and the six judges.*"[42]

This lack of common ground and clarity between the judgments of six in favour and Justice Khanna became further evident on the day of the pronouncement of the judgment. Scholar T.R. Andhyarujina writes that on 24th April after the respective judgments were read out, Chief Justice Sikri produced and read out a paper titled, '*The View by the Majority*'. The paper was to lay down the conclusive verdict of the majority and to that effect, contained six propositions one of which was "*Proposition 2: Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution*".[43] These words were taken from Justice Khanna's conclusion. The paper was passed around to the Bench, and nine out of the thirteen judges signed it.[44] It is this paper that has been considered as the ratio of *Kesavananda*. However, as later writings would reveal, the paper's very basis is questionable as it endorses the opinion of Justice Khanna which was not agreed to by 12 other Judges. Similarly, the Judges on the Bench pointed out later that

[42]HM Seervai, 'Fundamental Rights at the Crossroads' (1973) 75 Bom LR 47.
[43]TR Andhyarujina, *Kesavananda Bharti Case - The untold story of struggle for supremacy by Supreme Court and Parliament* (Lexis Nexis 2022) 54.
[44]Justices Ray, Mathew, Dwivedi, and Beg refused to sign the *View by Majority*.

they were rushed into signing the paper without having formed an opinion or read the judgments of the other Judges.[45]

In fact, Justice Chandrachud wrote in his concurring judgment that after the conclusion of arguments, there was no time for an exchange of judgments amongst the judges and hence, he was only aware of the views of four Judges.[46] On the '*View by Majority*', he remarked that there was no discussion amongst the Judges to formulate it (which was the norm at the time) and neither was it circulated by the Chief Justice earlier.[47] The paper was only presented in Court which constrained the Judges to sign it since the Chief Justice was retiring the next day.

Seervai made this argument as well and wrote, "*[I]n his opinion, the summary signed by 9 Judges has no legal effect at all, and is not the law declared under Article 141.*"[48] Andhyarujina has termed the ratio as an act of "*strategic roping in of Khanna's view with six other Judges to create a view by the majority.*"[49] This argument has remained unresolved for the longest time and even when raised before the Court has not been answered conclusively.[50] For instance, in *Minerva Mills*'s case, Justice Chandrachud responded to this argument by a single statement that read, "*whether or not the summary is a legitimate part of the judgment, or is per incuriam for the scholarly reasons cited by authors, it is undeniable that it correctly reflects the majority view.*"[51] Similarly, in *Waman Rao's* case, Justice Chandrachud refused to

[45]TR Andhyarujina, *Kesavananda Bharti Case - The untold story of struggle for supremacy by Supreme Court and Parliament* (Lexis Nexis 2022) 51, 57.
[46]*Kesavananda Bharti v State of Kerala and Ors* (1973) 4 SCC 225, para 1997.
[47]TR Andhyarujina, *Kesavananda Bharti Case - The untold story of struggle for supremacy by Supreme Court and Parliament* (Lexis Nexis 2022) 51, 57.
[48]HM Seervai, *Constitutional Law of India,* vol III (4th edn, Lexis Nexis 1996) 3114.
[49]TR Andhyarujina, *Kesavananda Bharti Case - The untold story of struggle for supremacy by Supreme Court and Parliament* (Lexis Nexis 2022) 51, 50.
[50]Justice Chandrachud in *Minerva Mills v Union of India* AIR 1980 SC 1789 responded to this argument by a single statement that read "*whether or not the summary is a legitimate part of the judgment, or is per incuriam for the scholarly reasons cited by authors, it is undeniable that it correctly reflects the majority view*."
[51]*Minerva Mills v Union of India* AIR 1980 SC 1789, para 12.

engage with this argument.[52] On the other hand, Justice Bhagwati (also part of the *Minerva Mills* case) has supported the argument and in *obiter dicta* remarked that the *View by Majority* has no legal effect at all and cannot be regarded as law declared by the Supreme Court under Article 141. He has stated, "*Once the judgments were delivered, these nine judges as also the remaining four become functus officio and thereafter they had no authority to cull out the ratio of the judgments or to state what, on proper analysis of the judgments, was the view of the majority.*"[53]

The later judgments of the Court have treated the *View by the Majority* as the ratio of *Kesavananda* and it is currently the binding law in India. However, one cannot ignore its dubious origins which make a crucial argument against its application and operation as the binding law.

D. Judicial supremacy

The Constitution of India, much like other modern democratic Constitutions, demarcate the respective role of the three pillars of governance. The legislature makes the law, the executive frames the policy and implements the law, and the judiciary interprets the law, adjudicates disputes arising from the law and assesses the validity of the law in light of the Constitution.

The doctrine ends up empowering the judiciary to have a final say on the basic features of the Constitution. The Court has held that what constitutes the basic features of the Constitution is an exercise to be undertaken by the Court. Further, the features identified by the Court in *Kesavananda's* case are not exhaustive and merely indicative. This means that the Court can add new features to the list. This self-vested

[52] *Waman Rao v Union of India* (1981) 2 SCC 362, para 9, wherein Justice Chandrachud held, "*Thus the main question arising before us has to be decided by applying the ratio of the Kesavananda Bharti case in its pristine form. It is quite another matter that learned counsel question whether any ratio at all is discernible from the majority judgment in the Kesavananda Bharti case."*

[53] *Minerva Mills v Union of India* AIR 1980 SC 1789, para 80.

exercise gives the Court a constituent power that is, a power ordinarily vested with the Parliament. The Court can add features to the existing list and in effect, further restrict the power of the Parliament to amend the Constitution. To illustrate with an example, the original list of basic features included supremacy of the Constitution, republic and democratic form of government, secular character of the Constitution, separation of powers and federal character of the Constitution.[54] However, subsequently, features like limited amending power of the Parliament,[55] independence of the judiciary,[56] judicial review,[57] equality[58] and others were added to the list.

While the author agrees that these features are extremely important and form the bedrock of the Constitution, however, the Courts through their judgments have often disagreed amongst themselves over their meanings. For instance, in *Indira Nehru Gandhi v. Raj Narain*, where the validity of the constitutional amendment dealing with the election of the Prime Minister was struck down, the Judges disagreed amongst themselves over which basic feature was violated by the amendment. As per Justice Mathew and Khanna, it violated the basic feature of democracy,[59] for Justice Ray it was the principle of the Rule of Law,[60] and for Justice Chandrachud, it was equality.[61] The lack of clarity amongst the judges itself raises doubt over the need of vesting such power with them. Further, it often results in confusion over what the government can and cannot do. While making a policy or a law, the governments remain unsure whether ultimately the Court will invent a new basic feature of the Constitution and strike down its policy.

[54]*Kesavananda Bharti v State of Kerala and Ors* (1973) 4 SCC 225, para 292.
[55]*Minerva Mills v Union of India* AIR 1980 SC 1789, para 86, 88.
[56]*Supreme Court Advocates on Record Association and another v Union of India* (2016) 5 SCC 1, para 380.
[57]ibid, para 1036.
[58]*IR Coehlo v State of Tamil Nadu* AIR 2007 SC 861.
[59]*Indira Nehru Gandhi v Raj Narain* (1975) Supp SCC 1, para 264.
[60]ibid, para 59.
[61]ibid, para 664.

Throughout the years, the Court has interpreted these vague principles expansively and further restricted the power of the Parliament. For instance, the principle of judicial review has been interpreted to include every possible provision in the Constitution that deals with the judiciary.[62] Such an expansive interpretation has made it impossible for the Parliament to bring changes to these provisions or restrict them. One can also argue that these provisions have been used by the judiciary in its favour to make itself immune from any constitutional change.[63]

Levy makes this point succinctly in Federalism and Constitutional Entrenchment, "*[I}t is judges, not the Constitution, that will be limiting the legislature. A Constitution is not self-interpreting or self-enforcing, and there is no way to make it so.*"[64] Some critics argue that the doctrine is needed to make changes to certain crucial principles impossible. However, they forget that the doctrine only estops change by the Parliament and not the judiciary. The judiciary is free to interpret these principles and give them a different interpretation, something it has been doing for years. In other words, the doctrine shifts the locus of constitutional change from the legislature towards the judiciary. This also counters the argument of implied limitations made by scholars like Roznai who argue that the power to amend the Constitution does not include the power to destroy the Constitution.

As per *Roznai*, the Constitution is the work of a constituent power, i.e., an extraordinary power to establish the constitutional order of the nation.[65] On the other hand, the amending power of the Parliament is an act of Constituted Power, i.e.,, a power derived from the Constituent

[62]*L Chandra Kumar v Union of India* AIR 1990 SC 2263.
[63]*Supreme Court Advocates on Record Association and another v Union of India* (2016) 5 SCC 1, para 380, 1036.
[64]Levy, 'Federalism and Constitutional Entrenchment' (2014) 55 Federalism and Subsidiarity 332, 339.
[65]Yaniv Roznai, 'Towards a Theory of Constitutional Unamendability – On the Nature and Scope of the Constitutional Amendment Powers' NYU School of Law – Public Law Research Paper No 15-12 (May 2015).

Power. He remarks, "*As a legally defined power originating in the Constitution (parliament's amending power), it cannot ipso facto be a genuine constituent power.*"[66] He goes on to argue that using its constituted powers, the Parliament can only amend the Constitution and not change its essential features, since that would be creating a new constitutional order which is an act of exercising constituent powers that the Parliament does not possess. In other words, when the Constituent Assembly made the Constitution, it was exercising its constituent powers and these powers ceased to exist once the Constitution came into force. The successive Parliament only exercises a constituted power which extends to amending the Constitution and not changing its *core identity* or *essential feature*. The problem with this argument is that it will ultimately leave the task of identifying the core features of a constitution to the judiciary. In other words, the essential features of the Constitution will be identified by the judiciary while assessing the validity of a constitutional amendment vis-à-vis this doctrine. This will bring us back to the problem of judicial supremacy discussed above, since judges, by interpreting these core features, will be exercising constituent powers which they should not possess. In the author's opinion, although this power is not a positive constituent power like the one exercised by a Constituent Assembly, i.e., an act of establishing a constitutional order, it is a negative constituent power. Negative constituent power means the authority to veto and take away certain features beyond the control of a constituent authority that can change it.

The author would like to elaborate by revisiting the example concerning the choice between a Parliamentary and Presidential system of governance. As mentioned above, constituent power as per Roznai means the power to establish a constitutional order. A logical extension of this argument would be the fact that this constitutional order can be changed or modified only through another act of constituent power. For

[66]ibid, 14.

instance, the Constituent Assembly exercising its constituent powers chose a Parliamentary system of governance for India. If India was to switch to a Presidential system, another Constituent Assembly would have to be convened which can make this transition happen, since it can only be done through the exercise of constituent powers. However, using the basic structure doctrine, the Court has made this impossible since it has read the Parliamentary system of governance as an essential feature of the Constitution that cannot be modified. Therefore, a future Constituent Assembly cannot exercise its constituent powers in that arena. Through the power of deciding which feature of the Constitution is essential and thereafter, permanently entrenching it, the Court restricts the constituent power of the people, which is an act of exercising negative constituent power. Therefore, even if we adopt Roznai's argument, under the basic structure doctrine, judges exercise constituent power. Raju Ramachandran gives another example and argues – what if India decides to join a regional Economic Union which requires it to submit to the jurisdiction of a supranational institution? Would this violate the basic feature of 'sovereignty', and if yes, would the Court annul India's decision to join the union?[67]

A counter-argument proposed by supporters of the doctrine is the fact that the Courts have sparingly struck down s using the doctrine. Mr. Gautam Bhatia argues, "*The high-profile striking down of the NJAC notwithstanding, in the forty-five years since Kesavananda Bharati, the doctrine has been used on an average of once in a decade. And in the seventy-four constitutional amendments after Kesavananda, only five have been struck down on substantive basic structure grounds (a strike rate of around 7%).*"[68] While that is true, one cannot ignore the incidents of the doctrine's use, which have often been for self-

[67]Raju Ramachandran, 'The Supreme Court and the Basic Structure Doctrine' in Kirpal and Desai (ed) *Supreme But Not Infallible* (Oxford 2004).

[68]Gautam Bhatia, 'Is the 103rd Amendment Unconstitutional?' (*Indian Constitutional Law and Philosophy Blog*, 13 January 2019) <https://indconlawphil.wordpress.com/2019/01/13/is-the-103rd-amendment-unconstitutional/>.

serving purposes and ensuring judicial supremacy. For instance, the Court struck down the 99th Constitutional Amendment that had created a National Judicial Appointments Commission for the appointment of Judges. Similarly, the Court has time and again interpreted the basic features of the Constitution in a manner to safeguard its power and not allow any legislative interference in it.[69] Therefore, merely because the doctrine has been used sparingly, does not validate its existence as there is always a possibility of the judiciary using it to curb legitimate amending power and more importantly, using it for its own interest.

Interestingly, the above-mentioned arguments against judicial supremacy are augmented by the fact that the very inspiration behind the doctrine is based on a false premise. It is popularly believed that the doctrine is inspired by the eternity clause in Germany,[70] which prohibits the legislature from amending or abrogating certain essential features of the Constitution. This was added in response to the tyranny of Adolf Hitler during the Weimar Republic who had used the Constitution's easy amending clause to deprive minorities of their rights and overhaul the country in a dictatorship. Therefore, the people in the exercise of their constituent power while drafting the Constitution made certain features immutable. The crux of these clauses is people's constituent power which created it and their exhaustive nature that is, these features are limited, and no additions can be made.

On the other hand, as indicated in this essay, the Constitution of India has no substantive limitations on amendments and hence, no substantive entrenchment. The Court has created an extra-constitutional doctrine to vest in itself powers that the Constituent Assembly had deliberately left out. In Germany, the Constituent Assembly deliberately included few substantive restrictions and in India, they deliberately refused it. Therefore, there are no parallels

[69] *L Chandra Kumar v Union of India* AIR 1995 SC 1151.
[70] *Kesavananda Bharti v State of Kerala and Ors* (1973) 4 SCC 225, para 1431.

between Germany and India. The judiciary's act to invent something otherwise ignored by the Assembly is disrespectful to the very Constituent Assembly and the people who made the Constitution.

In the opinion of the author, even if the makers of the Constitution were to impose substantive restrictions on the amending power of the Parliament, it would not take away the power of the people to amend the Constitution. In such situations, the people can resort to revolution as an expression of popular mandate. Taking the argument made in Part IV of the essay forward, since a cardinal feature of the principle of democracy is the ability of the citizens to enact or change the law that governs them, no Constituent Assembly can completely snatch away this possibility. In case it does, citizens can resort to revolution or referendum to exercise their mandate. Support for this argument is found in the work of Prof. Akhil Reed Amar and Prof. Ackerman. For instance, Ackerman argues that 'revolutionary reformers' may take up the mantle of constitutional amendments through other means in the presence of a robust popular mandate for change.[71] Similarly, Prof. Amar argues that constitutional change can occur legitimately via a mechanism reflective of popular sovereignty, such as a national referendum.[72]

V. CONCLUDING REMARKS

In this essay, a case has been made against the basic structure doctrine by building on the issues raised by Justice Pardiwala in his concurring judgment. Although the basic structure doctrine is the law of the land as admitted by Justice Pardiwala himself in his opinion,[73] his observations have given a new life to its critics.

[71]Ackerman, *Bruce. We the People: Foundations* (Harvard University Press 1991) 15.
[72]Akhil Reed Amar, 'Popular Sovereignty and Constitutional Amendment' in Sanford Levinson (ed), *Responding to Imperfection* (Princeton University Press 1995) 90.
[73]103rd Amendment case, para 182.

Shortly after writing this essay, the Vice President of India, Mr. Jagdeep Dhankar made public remarks questioning the basic structure doctrine and arguing that it does not reflect the current position of law.[74] On a separate occasion, the Chief Justice of India Dr. D.Y. Chandrachud defended the doctrine terming it the "*'North Star' in interpreting and implementing the Constitution.*"[75] These remarks coupled with Justice Pardiwala's observations will give a new life to this debate, which may ultimately reach the doors of the Court.

The biggest issue with the doctrine is that it first tells the political branches that the changes they are trying to bring constitute an essential feature of the Constitution that can only be changed by the people and thereafter, closes the possibility of any future attempts to bring such change through recognised procedure. As per Prof. Rios, this creates a democratic deficit wherein the Judges have the final word on what constitutes as acceptable constitutional content.[76] An acceptable solution that balances the judiciary's concern and upholds democratic values is the creation of a body akin to an extra-legislative Constituent Assembly. The body unlike the Parliament could take a decision through a referendum wherein the citizens are directly involved. If the Court is concerned that a constitutional amendment violates the essential features of the Constitution, it can refer the issue to this body. The body will thereafter conduct a referendum and will directly involve the people and its decision would be final. The Colombian

[74]Sreeparna Chakrabarty, 'Vice-President Jagdeep Dhankar says court can't dilute Parliament's sovereignty' *The Hindu* (11 January 2023) <https://www.thehindu.com/news/national/dhankar-says-sovereignty-of-parliament-cannot-be-compromised-rakes-up-njac-bill-again/article66364347.ece>.

[75]Utkarsh Anand, 'Days after V-P's criticism, CJI hails 'basic structure' verdict' *Hindustan Times* (22 January 2023) <https://www.hindustantimes.com/india-news/days-after-v-p-s-criticism-cji-hails-basic-structure-verdict-101674323768154.html>.

[76]Joel Colon, 'Deliberative Democracy and the Doctrine of Unconstitutional Amendments' in R Levy, H Kong, G Orr, & J King (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (CUP 2018) 271, 280.

Constitution[77] and the Constitution of Bolivia[78] provide for such bodies.

Such an approach will ensure that decisions regarding the establishment or modification of the constitutional order directly involve the people and hence are an exercise of constituent powers. It will also address the issue of the impracticability of calling a revolution as a last resort by giving people a designated mechanism for exercising their constituent power. Further, the judiciary's counter-majoritarian concerns can be taken care of by a higher vote requirement. Most importantly, it will bring the people back to the centre of decision-making affecting the constitutional order. Although, if such a reform is introduced in the Constitution, it would be interesting to see whether the Court upholds it or finds it violative of the basic structure doctrine.

[77]Constitution of Colombia, 1991 art 376.
[78]Constitution of Bolivia, 2009 art 411(I).