KESAVANANDA BHARTI CASE: DETERMINING ITS PRECEDENTIAL VALUE

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ABSTRACT

The objective behind writing this article is to recognize the impact and implications of the Kesavananda Bharti judgement, famously known as the Fundamental Rights case.[1] It went on to become the longest heard case, spanning over 68 days, encompassing an unprecedented breadth of case laws and legal literature. The Kesavananda case itself was a unique judicial exercise the likes of which has not been seen or will be seen in the Supreme Court.[2] For the first time in the history of the Supreme Court, a thirteen-judge bench was constituted to determine: Whether Parliament had unlimited powers to amend the Constitution or not? A question which arose multiple times and was hugely discussed in the ***Golaknath,***[3] ***Bank Nationalization***[4] ***and Privy Purses Case***[5] all of which were decided by the Constitution benches against the State, The Union of India. These answers would shape India's democratic ethos and the rule of law in the years to come.

Keywords: Fundamental Rights, Constitution, Kesavananda Bharti, Parliament

[1] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[2] TR Andhyarujina, The Kesavananda Bharati case: The untold story of the struggle for supremacy by the Supreme Court and parliament 5 (Universal Law Pub. Co. 2011).
[3] Golak Nath v. State of Punjab, 1967 SCC OnLine SC 14.
[4] Rustom Cavasjee Cooper (Banks Nationalisation) v. Union of India, (1970) 1 SCC 248.
[5] Madhav Rao Jivaji Rao Scindia v. Union of India, (1971) 1 SCC 85.

I. Introduction

The Supreme Court of India recently dismissed a petition which endeavoured the removal of the words 'Secular' and 'Socialist' from the preamble of the Constitution.[6] A bench headed by Chief Justice Sanjiv Khanna and Justice P V Sanjay Kumar rejected the arguments of the petitioners in their 7-page order. Despite the ruling of the apex court, the dispute has once again brought to the forefront, the complex tussle between Parliament's power to amend the Constitution including the preamble and the role of the Judiciary in being the final interpreter of the Constitution. In this background, it becomes imperative to study the 'Basic Structure' doctrine which has shaped India's Constitutional jurisprudence since the landmark decision of this Court in the Kesavananda Bharti case. The Supreme Court in I.C Golaknath vs State of Punjab by a narrow majority of 6:5 held that Parliament does not have the power to amend or alter the fundamental rights as enshrined under Part III of the Constitution. It considered the Fundamental Rights to be of a 'primordial nature which are necessary for the development of human personality' and were given a 'transcendental position in the Constitution'. The majority held that even a Constitutional law will fall within the purview of Article 13 (2)[7] of the Constitution which declares that any law which abridges or takes away any fundamental right under part III would be void. The ratio laid down in Golaknath had a drastic effect on constitutional jurisprudence as it unsettled the precedents established from 1950-67[8] distinguishing between an ordinary law and a constitutional law. Immediately after the Golaknath verdict was pronounced it was subjected to vehement legal and political criticism by eminent lawyers like M.C Setalvad and H.M. Seervai.[9] In response to this the Government of India introduced the Twenty-Fourth and Twenty-Fifth Constitutional Amendment Acts subsequently. While the former was presented with the intention of legislatively overruling the Golaknath judgement by introducing sub clause 4 to Article 13 and sub clause 3 to Article 368. It also made the President a rubber stamp by compulsorily mandating his assent to a constitutional amendment. The Twenty-Fifth amendment replaced the word 'Compensation' with 'amount' and stated that such amount as fixed by the Government cannot be challenged in any court of law. Accordingly, the two Constitutional amendments were challenged by the

[6] Scroll, http://www.SC reject pleas seeking removal of words 'socialist', 'secular' in Preamble to Constitution, (last visited Dec. 29, 2024).
[7] India Const. art. 13, cl. 2.
[8] Shankari Prasad Singh Deo v. Union of India, 1951 SCC 966; Sajjan Singh v. State of Rajasthan, 1964 SCC OnLine SC 25.
[9] TR Andhyarujina, The Kesavananda Bharati case: The untold story of the struggle for supremacy by the Supreme Court and parliament 10 (Universal Law Pub. Co. 2011).

petitioners in the Kesavananda case along with the Twenty-Ninth amendment that added land reform amendments made in 1969 and 1971 to the Kerela Land Reforms Act, 1963, in the Ninth Schedule to the Constitution which acted as a shield of immunity against the testing virtues of the fundamental rights. Therefore, the stage was set for an ultimate showdown between the judiciary and the Parliament for the supremacy of power.

II. A Star-Studded Courtroom- Positives And Negatives

The case of his Holiness Kesavananda Bharti Sripadagalavaru vs. State of Kerela[10] would go down in the annals of history as one of the most significant judgments in the field of constitutional jurisprudence ever pronounced. The sheer magnitude of authorities cited by both the sides including external aids to interpretation like foreign judgements, books, research articles not only pertaining to law but also in the field of political science, economics, and sociology along with a comparative analysis of no fewer than 71 Constitutions across the world was unimaginably astounding.[11] This breathtaking work of scholarship was only possible due to the legal luminaries who were part of the case.

The thirteen-judge bench comprised of:

1. Justice S.M. Sikri, (CJ)
2. J.M Shelat, J
3. A.N Grover, J
4. K.S Hegde, J
5. A.K. Mukherjea, J
6. P. Jaganmohan Reddy, J
7. H.R. Khanna, J
8. A.N. Ray, J
9. D.G. Palekar, J
10. K. Mathew, J

[10] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[11] Sorabjee SJ and Datar AP, *Nani Palkhivala:* The Courtroom Genius 131 (LexisNexis 2020).

11. M.H. Beg, J

12. S.N. Dwivedi, J

13. Y.V. Chandrachud, J

Whereas, the Petitioners were represented most ably by a team which consisted of the great Nani A. Palkhivala, C.K Daphtary, M.C. Chagla, Soli Sorabjee, Anil Divan, D.M. Popat, M.L. Bhakta, Ravinder Narain, and the late J.B. Dadachanji.[12]

Lawyers on behalf of the respondents were: H. M Seervai for the state of Kerala assisted by T. R. Andhyarujina; Niren De (Attorney General) along with Lal Narain Sinha for the Union of India; Byra Reddy (Advocate General of Mysore) and Dr. L.M Singhvi (Advocate General of Rajasthan) also made submissions.[13]

Though, the star cast that had assembled to shape India's future had chink in its own armour. From the very beginning the case had a political overtone to it. The atmosphere in which the Kesavananda case was decided has been described as "poisonous" by Granville Austin. He states of the case: "The Bench's glory was in its decision, not in the manner of arriving at it, which reflected ill on itself and on the judiciary as an institution."[14] The relations of one or more judges with the executive branch during the case were thought to have been improper. As one judge (Justice Chandrachud) understatedly put it, the case was "full of excitement and unusual happenings?" India's greatest Constitutional case was regrettably heard and decided in a manner most unconducive to a detached judicial decision.[15]

Another issue that caused grave apprehension was the fact that out of the thirteen judges on the bench five were also a part of the Golaknath decision. Judicial propriety warranted that these judges namely, CJ, Sikri; J, Hedge; J, Shelat; J, Grover; and J, Ray recuse themselves from the hearing.[16] Had this happened it would be in line with the already set custom that the court had on past occasions followed.[17] Though it must be noted that no objections were raised by either

[12] Ibid, at 110.
[13] Sorabjee SJ and Datar AP, Nani Palkhivala: The Courtroom Genius 119 (LexisNexis 2020).
[14] Granville Austin, Working a Democratic Constitution: The Indian Experience 258-259 (Oxford University Press, USA 2000) .
[15] TR Andhyarujina, The Kesavananda Bharati case: The untold story of the struggle for supremacy by the Supreme Court and parliament 9 (Universal Law Pub. Co. 2011).
[16] Sorabjee SJ and Datar AP, Nani Palkhivala: The Courtroom Genius 124 (LexisNexis 2020).
[17] Atiabari Tea Co. Ltd. v. State of Assam, 1960 SCC OnLine SC 117; Automobile (Rajasthan) Transport Ltd. v. State of Rajasthan, 1962 SCC OnLine SC 21.

side during the arguments.

A. Issues Before The Court

The following were the issues framed before the Hon'ble Supreme Court in the Kesavananda Bharti vs State of Kerela.[18]

- Whether the decision in the Golaknath case was rightly decided?
- Whether the Constitution Twenty-Fourth amendment is valid?
- Whether the Constitution Twenty-Fifth amendment is valid?
- Whether the Constitution Twenty-Ninth amendment is valid?
- Whether the Parliament has unlimited power to amend the Constitution or is there an implied limitation?

The Twenty-Sixth Amendment Act which abolished privy purses was also challenged. Though the Court later transmitted this to another Constitution bench which was meant to decide it in consideration of the ratio laid in the Kesavananda case.

III. Arguments On Behalf Of The Petitioners

It was Nani Palkhivala who led a fearsome battle for the petitioners in arguing that Parliament does not have unlimited powers to amend the constitution and cannot abrogate the fundamental rights as mandated under part III. He based his arguments on the premise that Parliament by nature is itself a creature of the Constitution and not the other way. Therefore, it cannot be possible for Parliament to make a law that would enable it to destroy or annihilate the Constitution. Further Palkhivala urged the Court to construe the word 'amendment' in a manner which implied the inherent limitations thereof. The Petitioners insisted that the Court should not focus on the *'literal interpretation'* rule which would lead to Parliament assuming unbridled powers even allowing an abrogation of democracy and the rule of law. Substantiating the arguments, Palkhivala drew comparisons with the events that transpired in Nazi Germany, when Hitler by his constant disregard for the Weimar Constitution eventually established a

[18] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

totalitarian state. The rule of *'harmonious construction'* was relied upon and the Hon'ble Court was asked to look into the spirit and intent of the Constituent Assembly while interpreting Article 368.

In brief Palkhivala made the following submissions:

- *"In Article 368, the word 'amendment' had a restricted meaning and precluded the power to destroy or alter the essential features, the basic elements or the fundamental principles of the Constitution. This view was supported not only by the language of Article 368 itself and inherent evidence within it, but also by comparing its language with that in other relevant Articles.*

- *In a constitution what is left unsaid is as important as what is said, what is implied is as much a part of the instrument as what is expressed. There are inherent and implied limitations on the amending power of Parliament. They debar Parliament from destroying or altering the basic or essential features of Constitution. This principle of inherent or implied limitations stems from the fact that Parliament is only a creature of the Constitution, while the power to impair the essential features of the Constitution is an attribute of ultimate legal sovereignty, which resides only in the people. But people are not associated with the amending process at all. Parliament cannot be equated with the people, and Parliament's will is not the people's will.*

- *The test to be applied in determining the scope and width of the power is to see what can possibly be done in exercise of that power. If Article 368 were to be construed as giving Parliament unlimited power of amendment, then Parliament can destroy the sovereign status or the democratic character of the country, abolish the judiciary, abrogate all basic human freedoms, and, indeed, thereafter repeal Article 368 itself and provide that henceforth the Constitution would be unamendable.*

- *Article 368 should not be read as expressing the death-wish of the Constitution or as a provision for its legal suicide. Parliament cannot arrogate to itself under this Article the role of the Official Liquidator of the Constitution."*[19]

[19] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225; Sorabjee SJ and Datar AP, Nani Palkhivala: The Courtroom Genius 115-116 (LexisNexis 2020).

IV. Arguments On Behalf Of The Respondents

While arguing for the Respondents, Mr. Niren De and H.M. Seervai made spirited arguments upholding Parliament's power to amend any part of the Constitution, including the preamble. They emphasized that there is no express bar on the amending powers and therefore the same cannot be read into by the Courts. They placed utmost faith in the bona fide nature of our parliamentarians and dubbed the analogy of India turning into a totalitarian state, as misplaced apprehensions. Ironically, as subsequent events were to prove (like the imposition of the Emergency) Seervai himself came to the understanding that Parliament should not have unlimited amending power.

The following were the submissions on behalf of the Respondents:

- *The power to amend the Constitution in Article 368 includes the power to amend any provision of the Constitution including fundamental rights in Part III.*
- *There was a distinction between legislative power and constituent power. The word "law' in Article 13(2) would not include constituent power which was distinct and superior to ordinary law-making power under Article 245.*
- *The argument which sought to portray adverse consequences were 'political arguments' which should not be countenanced.*
- *Similarly, there was no justification in the theory of implied limitation on amending power. There was no case to treat certain provisions as core and essence of the Constitution' and to invoke vague standards to discover implied limitations on the amending power.*
- *The democratic will of the people must prevail. If there is a doctrine of implied limitation, the judiciary gets the last word on the Constitution, thereby usurping a superior status not warranted under the Constitution.*
- *'A Government by judges' must be avoided in a federal democracy. The very fact that the first Parliament, which consisted only of members of the Constituent Assembly, amended Part Ill showed that the amending power included the power to amend all the fundamental rights in Part III."*

V. Decision Of The Court

At the end of the oral arguments the Court pronounced its judgement on the 24th of April, 1973, just a day before Chief Justice Sikri's retirement. In what is till date the lengthiest written judgement consisting of 703 pages, it becomes hard to decipher the exact ratio as laid by the court in respect to certain issues. The bench was clearly divided with 6 judges holding that parliament had unlimited powers to amend the Constitution whereas the other 6 took a diametrically opposite view and held that parliament's power to amend the Constitution was limited. It was the last part of Justice Khanna's decision which tilted the balance in favour of democracy and the rule of law.

1) Whether the decision in the Golaknath case was rightly decided?

While deciding the first issue, nine out of the thirteen judges overruled Golak Nath and made a clear distinction between an ordinary law and the Constitution. This was based on the premise that while an ordinary law depended on a higher law for establishing its own validity, a provision of the Constitution did not depend on another law and, instead, generated its own validity. The Court in essence held that the Constitution is the grundnorm that validates the other legal system as explained by Hans Kelson in his *'Pure Theory of Law'*.[20]

2) Whether the Constitution Twenty-Fourth amendment is valid?

On the Twenty-fourth Amendment, six judges, namely Chief Justice Sikri and Justices Shelat, Grover, Hegde, Reddy and Mukherjea, held that fundamental rights, being part of the essential elements or basic features of the Constitution, could not be abrogated or emasculated by the exercise of the power of amendment under Article 368. However, reasonable abridgement of fundamental rights, as distinct from their abrogation or emasculation, was permissible. The other six judges, namely Justices Ray, Palekar, Mathew, Beg, Dwivedi and Chandrachud, held that the power of amendment did not have any limitation or restriction. Astonishingly, it was Justice Khanna who sided with view that the power of amendment is not restricted. Though while dealing with Article 31C, in his later part of the judgement held that certain basic/essential features of the Constitution cannot be abrogated by way of amendment.

[20] VD Mahajan, Jurisprudence and Legal Theory 471 (Eastern Book Company 2003).

3) Whether the Constitution Twenty-Fifth amendment is valid?

While all the judges upheld the substitution of the word 'amount' for the word 'compensation', six judges held that the amount and the principles on which such amount was arrived at would still be subject to judicial scrutiny. Justice Chandrachud in this case agreed with this view. Whereas, Justice Khanna also agreed and held that the legislature could, if it so chose, pay an amount which was plainly inadequate. Thus, in the context of Article 31(2), it was Justice Chandrachud, who tilted the balance in favour of judicial review.

Seven out of the Thirteen Judges held that the latter part of Article 31C which prevented judicial review was invalid.

4) Whether the Constitution Twenty-Ninth amendment is valid?

The Court held the Twenty-Ninth amendment as valid which had inserted the Kerela Land Reforms Act after being amended twice into the Ninth Schedule.

5) Whether the Parliament has unlimited power to amend the Constitution or is there an implied limitation?

While dealing with the question whether Parliament has unlimited power to amend the Constitution or is it bound by an inherent limitation was answered in the most complex way possible. It is largely believed that the Supreme Court by a wafer-thin majority of 7:6 held that though Parliament has the power to amend any provision of the Constitution it cannot abrogate the basic structure. This has been inferred by adding Justice Khanna's judgement along with the other six judges (Justices Sikri, Hedge, Grover, Shelat, Mukherjea, and P. Jaganmohan Reddy) who outrightly held that the amending power is not plenary and has implied limitation. While according to the remaining six (Justices Raj, Palekar, Begg, Matthew, Dwivedi and Chandrachud) the whole Constitution was amenable.

'The belief that Justice Khanna held that the power to amend the Constitution is limited in the same sense as the other six judges did is entirely flawed.'

VI. The Justice Khanna Conundrum

The view that seven judges subscribed to the theory of the basic structure doctrine is fallacious.

That was the conclusion only one judge — Justice Khanna. "Reference to expressions such as 'basic features' or 'essential features' or 'basic structure' or 'basic or 'fundamental features' etc. by the six other judges were made in different contexts and different senses arising from the inherent and implied limitations on Parliament whereas Justice Khanna held that the limitation of the basic structure or framework arose only from the limited scope of the word "amendment" and he rejected the theory of inherent and implied limitations on the amending power."[21]

In essence the verdict is actually 6:6 rather than 7:6.[22] *"there is an unbridgeable gap between the concepts and lines of reasoning of Justice Khanna and the six judges. Justice Khanna's phrase "basic structure" of the Constitution is a very different concept as opposed to the other judges and they do not use the phrase in the same sense in which Justice Khanna uses it,"* wrote Seervai soon after the decision.[23]

While analyzing the judgment Palkhivala wrote:

"Six judges decided the case in favour of the citizen and six in favour of the State. Justice Khanna agreed with none of these twelve judges and decided the case midway between the two conflicting viewpoints. Thus, by a strange quirk of fate the judgment of Justice Khanna with whom none of the other judges agreed has become the "law of the land"?[24]

Palkhivala said the "greatest common denominator" between the six judges led by Sikri CJ and Justice Khanna became the judgment of seven judges and constituted the majority view of the Supreme Court. One may ask how there can be "a common denominator" between these seven judgments when there was nothing in common in the reasoning for limitations on the amending power between the six Sikri-led judges and Justice Khanna.

VII. The View Of The Majority

While the Judgements were being orally pronounced Chief Justice Sikri produced and read out in Court a paper titled, ***'The View by the Majority'.*** This was passed on for signatures of all the thirteen judges out of which nine of them signed it while Justices Ray, Mathew, Dwivedi and

[21] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[22] Sorabjee SJ and Datar AP, Nani Palkhivala: The Courtroom Genius 115-116 (LexisNexis 2020).
[23] Seervai, Fundamental Rights at the Cross Roads 47-48 (Bombay Law Review 1973).
[24] Nani Palkhivala, "Fundamental Rights Case: Comment by N.A. Palkhivala" (1973) 4 SCC (Jour) 57.

Beg outrightly rejected it. Never had the Supreme Court seen such a spectacle.[25] Out of the six propositions contained, the second one stated that, "The Parliament does not have the power to amend the basic structure of the Constitution." This view by the majority became the law of the land. There was absolutely no prior discussion before it was passed on the other judges by the Chief Justice.[26] It can also be reasonably concluded based on Justice Jagmohan and Justice Chandrachud's testimony that they did not have the time to read all the judgements pronounced.

In his Constitutional Law of India, Seervai states: -

"It is submitted that the summary signed by nine judges has no legal effect at all, and is not the law declared under Article 141, because:

(a) The Order passed by the Full Bench was a unanimous order, so that no occasion arose for determining what the majority of judges had. decided;

(b) Though all the thirteen judges signed the unanimous Order of the Court, four of them declined to sign the summary, which shows that there was a difference of opinion among the judges themselves as to what the majority decided. That conflict could only be resolved by the Constitution bench to which the petitions were remitted to be disposed of according to law. That law was to be found principally in Kesavananda case and no summary made by nine judges without any argument can relieve a Constitution Bench of the duty of finding out the law for itself. If the Full Bench had decided to dispose of the petitions according to law after a further hearing - in which their judgments would have been dissected and discussed by Counsel for the parties - the Full Bench could have found the law for itself. But the Full Bench disabled itself from doing so, when it remitted the petitions to Constitution benches.

(c) Any declaration of law which affects the rights of parties cannot be made till the parties have been heard, or have been given an opportunity of being heard. Even on the untenable assumption that the majority of the Full Bench was entitled to determine what the 11 judgments had decided, any finding by the majority must necessarily affect the rights of parties and cannot be arrived at without hearing them. The Supreme Court has repeatedly held that any decision arrived at without hearing the parties whose rights would be affected is contrary to natural

[25] TR Andhyarujina, The Kesavananda Bharati case: The untold story of the struggle for supremacy by the Supreme Court and parliament 50 (Universal Law Pub. Co. 2011).
[26] Beg J, "*Our Legal System: Does it need a change?",* JB Ind 332 (1982).

justice and void. No argument on what the judgments decided was called for; and none could have been forthcoming till the matter had stood over for two to three weeks to study the effect of the judgments. Such an argument would have been impossible before the Full Bench, because the Chief Justice was to retire on the day after the judgments were delivered".[27]

Justice Bhagwati in her separate judgment in the Minerva Mills case remarked that finding out the ratio in the Kesavananda case was a difficult and troublesome question. The judge further went to claim:

"In my view this summary signed by nine judges has no legal effect at all and cannot be regarded as law declared by the Supreme Court under Article 141 of the Constitution."

VIII. Conclusion

On a closer analysis of the Kesavananda Bharti case, it will be realized that most of the government's contentions were upheld, including the Twenty-Fourth and Twenty-Ninth amendment and the former part of the Twenty-Fifth amendment. At the same time the Supreme Court constructed the 'basic structure theory' to make sure that the essential elements of the Constitution like 'Secularism, Federalism, Liberty' etc. are forever protected. The Petitioners heavily relied on the principles of harmonious construction whereas the Respondents based their arguments on the literal interpretation rule. The principles of construction and interpretation proved vital in determining the outcome of one of the most landmark judicial decisions pronounced by the Hon'ble Supreme Court.

Though the means of reaching the end are questionable, one cannot doubt the significance of the judgement. Nonetheless, the aftermath of the verdict was surprisingly disgusting and unfortunate in the context of democratic norms and the doctrine of separation of power between the legislative, executive and judiciary. It led to the supersession of three senior most judges of the Supreme Court (Justices Shelat, Grover and Hedge) for the post of Chief Justiceship after the retirement of Justice S.M Sikri on 25th April, 1975. Subsequently, the emergency was proclaimed by the Government on 25th June, 1975 suspending civil rights. India's democratic fiber was forever change since then.

[27] HM Seervai, Constitutional Law of India 3114 (Universal Law Publishing Co Ltd 1996).

On the flip side, The Supreme Court with the help of the basic structure doctrine has been able to prevent draconian laws which substantially affect the Fundamental Rights by declaring them invalid in lieu of the precedent laid down by the Court in the Kesavananda case. These include landmark judgements like: Minerva Mills vs Union of India[28], Indira Gandhi vs Raj Narain[29], Waman Rao vs Union of India,[30] Maneka Gandhi vs Union of India[31] and many other high consequential cases.

Yet, it is also true that there is no clear ratio laid down in the Kesavananda case and the eleven judgements cannot be considered the law of the land as per Article 141 of the Constitution. Therefore, in the opinion of the author based on the arguments presented above- the most landmark judgement in Independent India's history does not have precedential basis rather just persuasive value.

[28] Minerva Mills Ltd. v. Union of India, (1980) 2 SCC 591.
[29] Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1.
[30] Waman Rao v. Union of India, (1981) 2 SCC 362.
[31] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.