Can 'Kesavananda Bharati' Save India From Becoming a Hindu Rashtra?

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Today marks the 50th anniversary of the Supreme Court's invention of the basic structure doctrine in *Kesavananda Bharati v State of Kerala*, arguably the most definitive judicial decision in India's constitutional history and also a momentous landmark in the 20th century career of global constitutionalism.

The occasion is being widely observed with commemorative events in legal and academic spaces across the country including my own university. But despite its undeniably persuasive appeal, I am not celebrating what *Kesavananda Bharati* represents for our present times as an unqualified good.

Even if it was a valuable ally of democratic politics in the age of the total state, the basic structure doctrine has lost much of its symbolic salience and can no longer be deployed effectively in responding to the challenge of authoritarian populism in the age of the total constitution.

Basic structure doctrine and Indian democracy

Decided on April 24, 1973 by an unprecedented 13-judge Bench, *Kesavananda* famously vested in the Supreme Court the extraordinary power to review and strike down parliamentary amendments to the constitution which violated its essential features or basic structure.

Although credited for being the earliest enunciation of the now commonly circulating idea of an 'unconstitutional constitutional amendment', the judgment was itself influenced by the German constitutional scholar Dieter Conrad, and his arguments in favour of a

limited amending power.

Drawing upon constitutional debates in Inter-War Germany and the so called 'eternity clause' of its Basic Law enacted after the World War II, Conrad suggested in a public lecture at Benaras Hindu University in February 1965 that even if there was some ambiguity regarding the unlimited nature of people's constituent power exercised on their behalf by the Constituent Assembly, the amending power of parliament was inherently a limited one.

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Being a creature of the constitutional text, the amending power could not be deployed to abrogate the constitution itself or alter its fundamental identity as an organic whole.

While the theoretical distinction between a potentially unlimited constituent power and a limited amending power appears convincing and compelling, judicial review skeptics speak about the counter-majoritarian problem of unelected judges invoking it largely for the purpose of arrogating to themselves the highest competence and capacity to nullify constitutional enactments passed by the elected representatives of the people in parliament.

However, my worry regarding the basic structure doctrine is not this standard touchstone of a majoritarian democracy. In fact, I believe that India's experience with the doctrine has been markedly different from its origins in the constitutionalist anxiety of post-War Germany. Contrary to Germany where discussions on the eternity clause are grounded in the European political culture of militant democracy seeking to curtail the dynamism of constituent power apprehending another Nazi-like democratic takeover of the state, Kesavananda and its judicial progeny successfully bolstered democracy albeit in the most minimal sense during Indira Gandhi's anti-constitutional and briefly dictatorial regime in the India of the 1970s.

Even though the court completely succumbed to the executive on the question of civil liberties, the basic structure trilogy of *Kesavananda*, *Indira Nehru Gandhi v Raj Narain* (1975) and *Minerva Mills v Union of India* (1980) prevented the identification of the Congress party's parliamentary supermajority with the people, and thereby left the space open for other political actors in India's vibrant yet fractious democracy.

Nevertheless, the judicial role in enabling the metaphorical 'empty place of power' in India is hardly free from reproach. This is because it was supplemented later in public interest litigation cases by the setting aside of the formal limits in the adjudicative process, and the claim to speak in the name of the people themselves who were deemed directly accessible and irreduceable to any framework of representation.

What is more, almost all the six cases since *Kesavananda* where amendments have been struck down as violative of the constitutional basic structure have invariably involved the functioning of courts, ranging from the gravest to the slightest intrusion on judicial review

and judicial independence, with or without the fundamental abandonment of any other essential feature.

I therefore reckon that the enunciation of the basic structure doctrine is not so much a limitation on unconstitutional constitutional amendments, as it is an expression of a counter-constituent power by the Supreme Court.

The decline of the symbolic and the rise of the imaginary

The expansion of judicial power in India is very much in sync with the global emergence of juristocracy in the latter half of the 20th century and beyond, even as *Kesavananda* is its strongest and most unique iteration.

This has coincided on the political front with the decline of the symbolic efficacy of fundamental law in public life and the rise of the imaginary power of authoritarian and populist figures all over the world. Juridically speaking, the basic structure doctrine was the last-ditch attempt to protect the symbolic law of Indian democracy from the commissarial and sovereign dictatorship of Indira Gandhi, who attempted to suspend and abrogate the existing constitution and possibly replace it with a substantially new governing arrangement centred around her charismatic leadership. Today's battle however is altogether different, with a mutation in the imaginary figures of sovereign power who no longer set aside written constitutions, but instead translate their ideological programmes into the language of constitutionalism itself.

When read in this global backdrop, there is nothing surprising about the Hindu nationalist Prime Minister Narendra Modi's gesture of bowing before an original copy of the constitution after his triumphant victory in the 2019 elections. At the same time, Modi's detractors are also accurate in their assessment that despite adhering to the constitutional framework, his government is bent on undoing it from within by pursuing an unbridled executive aggrandizement coupled with the repression of religious minorities in general and Muslims in particular. But the key question in *Kesavananda's* golden jubilee year is whether the basic structure doctrine can help us confront the Hindutva takeover of the Indian constitution.

The diverging stories of the two new amendments on judicial appointment and quota

In the last nine years of Modi's regime, two major constitutional amendments have come up for challenge before the court.

By virtue of the first amendment, judicial appointments to the high courts and Supreme Court were no longer to be the exclusive prerogative of the judiciary but were to be made by a commission consisting of judges as well as the political class and members of civil society. Although, according to Conrad, the parliament enjoyed a wide latitude when amending the constitution, and basic structure review was ordinarily meant to be a remedy of last resort in clearest cases of transgression, discernible by an element of abuse

of power and a collateral purpose behind its exercise, this amendment was declared unconstitutional, with the absolute primacy of judges in their own appointments curiously deemed to be an integral facet of the inviolable feature of judicial independence.

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In spite of not being in touch with the global best practices on judicial appointments, the judgment is defended by senior scholars such as Upendra Baxi and M.P. Singh, perhaps due to their lived memory of the executive side-lining of courageous and independent-minded judges around the crisis of the national emergency. For Baxi in fact, the basic structure doctrine is not merely a negative restraint on political power but is rather meant to actualize an institutional apparatus of constitutional co-governance with a place of pre-eminence for an autonomous yet socially responsive judiciary.

The second more recent amendment enabled the reservation of seats for economically weaker sections among the 'upper' castes in higher education and public employment. On the face of it, this is a socially beneficial measure purportedly expanding the ambit of quotas which were previously available only to the Scheduled Castes, Scheduled Tribes and Other Backward Classes. But in a more crucial sense, it entails an insidious sabotaging of the constitutional project of caste-based affirmative action, under which groups and communities facing millennial forms of social and political dispossession were finally conferred a share in state sovereignty.

The court though, upheld the amendment by converting this social and political question of sovereignty into a purely normative question of distributive justice appropriate for easy constitutional analysis. Since the lower castes already enjoyed the benefits of reservations, it was only proper to extend the policy to the more deprived 'upper' castes as well, for a better implementation of the mandate of economic equality.

Further, as there was no threat to judicial review and judicial independence in the case, the court could back up its reasoning with the familiar argument about the wide latitude of parliament's amending power.

The legitimacy of the basic structure doctrine is dependent on its facilitation of a productive inter-institutional tussle between the different organs of government as they seek to represent the will of the people. However, when read together, these two judgments suggest that even if there is a tension among the different institutional actors on the issue of ultimate authority, the language of power in which they speak to the people is all the same.

Basic structure doctrine and Hindu rashtra

When Conrad was commending a limited amending power to the Indian audience in Benaras, he proposed some fictive amendment laws to reenforce his thesis. He asked whether the parliament could by way of a constitutional amendment bring about the following changes: divide India into two States of Tamilnad and Hindustan; abolish the

right to life and personal liberty without legal authorization; vest the amending power in the President; reintroduce the rule of a Moghul ruler or the Crown of England. Given the present moment, we might perhaps add another hypothetical amendment to this list. Can the Parliament amend the constitution to declare India a Hindu Rashtra?

Political and constitutional interpreters of the basic structure doctrine would likely debate upon the competing conceptions of Indian nationalism to answer my question. However, Hindu Rashtra is not waiting to be realised in a distant future through a constitutional amendment. It is very much present in the here and the now, with a will to become the sole proprietor of our constitutional field. And *Kesavananda Bharati v State of Kerala* has not been able to save us from it.

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