

THE CONCERNED FEDERALISTS

Non-Profit Association

P O Box 2962
SOMERSET WEST, 7129

27 February 2020

THE SPEAKER
PARLIAMENT
CAPE TOWN, 8001

OBJECTION TO THE CONSTITUTION AMENDMENT BILL

Attached find hereto our objection to the proposed Constitution Amendment Bill for your attention.

Kindly acknowledge receipt.

We urgently await to hear your response.

Yours faithfully


CHAIRPERSON

Chairperson : R Smit
Deputy Chairperson : R W McCreath

THE CONCERNED FEDERALISTS

Submission to Parliament

Be pleased to take notice that the Concerned Federalists herewith notes an objection to the proposed Amendment to Section 25 of the RSA Constitution Act 108 of 1996.

1. OUR AIMS AND OBJECTIVES

The Concerned Federalists is a duly established non-profit association with the object to strengthen federalism and the rule of law in South Africa.

2. SECTION 25

As you are well aware, Section 25 provides that no one may be arbitrarily deprived of property and the property cannot be expropriated without compensation.

3. THE CONSTITUTIONAL PRINCIPLES

The Interim Constitution came into force on 27 April 1994 after a negotiated settlement was reached at CODESA.

Various constitutional principles were adopted as a fundamental basis of a new Constitution to be certified by the Constitutional Court.

Prominent Constitutional principles can be cited as follows:

- I The Constitution shall provide for a democratic system of government.
- II Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties which shall be provided for and protected by entrenched provisions in the Constitution.
- III The Constitution shall be supreme law of the land.

4. UNIVERSALLY ACCEPTED FUNDAMENTAL RIGHTS, FREEDOMS AND CIVIL LIBERTIES

The following international accepted agreements are herewith placed on record:

- a) The UN Charter (UNCH)
- b) The Universal Declaration of Human Rights (UDHR)

17(1) Everyone has the right to own property alone as well as in association with others

(2) No one shall be arbitrarily deprived of his property.

- c) The International Covenant on Civil and Political Rights (ICPR)
- d) The International Covenant on Economic, Social and Cultural Rights (ICES)
- e) The European Convention on Human Rights and Fundamental Freedoms (EHR)

1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

- f) The European Social Charter (ESC)
- g) The American Declaration of the Rights and Duties of Man (ADRD)

XXXIII Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and his home.

XXXVI It is the duty of every person to pay the taxes established by law for the support of public services.

h) The American Convention on Human Rights (AMR)

21(1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

(2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

(3) Usury and any other form of exploitation of man by man shall be prohibited by law.

i) The African Charter on Human and People's Rights (AFR)

14. The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

29. The individual shall also have the duty:

(6) ... to pay taxes imposed by law in the interest of the society.

It is submitted that the right to own property and the right that no property can be taken without market value compensation cannot be alienated. Such a right is an agreed universal right that is fundamental to a democracy.

The infringement of the above right would be tantamount to the removal of democracy itself.

We kindly refer you to the well-known Indian Constitutional Court Case:

KESAVANANDA BHARATI STIPADAGALVARN AND OTHERS v STATE OF
KERALA AND OTHERS

1973(4) SCC 225; AIR 1973 SC 1461 (see herewith annexed)

It was held that certain principles within the frame work of the Indian Constitution (Right to Property) which are inviolable and hence cannot be amended by the Parliament.

It is an accepted international principle that the property rights are fundamental to democracy and cannot be violated.

Any proposed amendment would be unconstitutional.

5. NOTICE OF CONSTITUTIONAL OBJECTION

Please take notice that we intend to take any amendment to Section 25 of our RSA Constitution to the Constitutional Court for review.

We also reserve the right to address Parliament on this matter.

We trust you would find this in order.

Yours faithfully

RIAN SMIT
CHAIRPERSON

The **Kesavananda Bharati** judgement or *His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr.* (case citation: (1973) 4 SCC 225) is a landmark decision of the Supreme Court of India that outlined the basic structure doctrine of the Constitution.^[2] Justice Hans Raj Khanna asserted through this doctrine that the constitution possesses a basic structure of constitutional principles and values. The Court partially cemented the prior precedent *Golaknath v. State of Punjab*, which held that constitutional amendments pursuant to Article 368 were subject to fundamental rights review, by asserting that only those amendments which tend to affect the 'basic structure of the Constitution' are subject to judicial review. At the same time, the Court also upheld the constitutionality of first provision of Article 31-C, which implied that any constitutional amendment seeking to implement the Directive Principles, which does not affect the 'Basic Structure', shall not be subjected to judicial review.

Kesavananda Bharati v. State of Kerala



Court	Supreme Court of India
Full case name	<i>Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr.</i>
Citation(s)	(1973) 4 SCC 225; AIR 1973 SC 1461

Holding

There are certain principles within the framework of Indian Constitution which are inviolable and hence cannot be amended by the Parliament. These principles were commonly termed as *Basic Structure*.

Case opinions

Majority	Sikri C. J. Hegde and Mukherjea, JJ.; Shelat and Grover, JJ.; Jaganmohan Reddy, J.; Khanna, J.
Dissent	Ray J.; Palekar J.; Mathew J.; Beg J.; Dwivedi J.; Chandrachud J.

Laws applied

66 *Kesavananda Bharathi* is the case which saved Indian democracy; thanks to Shri Kesavananda Bharati, eminent jurist Nanabhoy Palkhivala and the seven judges who were in the majority. 99

— The Hindu - in April 2013, on the occasion of the 40th anniversary of the judgement.,^[1]

The basic structure doctrine forms the basis of power of the Indian judiciary to review, and strike down, amendments to the Constitution of India enacted by the Indian parliament which conflict with or seek to alter this basic structure of the Constitution.

The 13-judge Constitution bench of the Supreme Court deliberated on the limitations, if any, of the powers of the elected representatives of the people and the nature of fundamental rights of an individual. In a sharply divided verdict, by a margin of 7-6, the court held that while the Parliament has "wide" powers, it did not have the power to destroy or emasculate the basic elements or fundamental features of the constitution.^[3]

Although the court upheld the basic structure doctrine by only the narrowest of margins, it has since gained widespread acceptance and legitimacy due to subsequent cases and judgments. Primary among these was the imposition of the state of emergency by Indira Gandhi in 1975, and the subsequent attempt to suppress her prosecution through the 39th Amendment. When the *Kesavananda* case was decided, the underlying apprehension of the majority bench that elected representatives could not be trusted to act responsibly was perceived to be unprecedented. However, the passage of the 39th Amendment proved that in fact this apprehension was well-founded. In *Indira Nehru Gandhi v. Raj Narain*, a Constitution Bench of the Supreme Court used the basic structure doctrine to strike down the 39th amendment and paved the way for restoration of Indian democracy.^[4]

The *Kesavananda* judgment also defined the extent to which Parliament could restrict property rights, in pursuit of land reform and the redistribution of large landholdings to cultivators, overruling previous decisions that suggested that the right to property could not be restricted. The case was a culmination of a series of cases relating to limitations to the power to amend the Indian constitution act 1973

Facts

In February 1970 Swami Kesavananda Bharati, senior plaintiff and head of Edneer Matha - a Hindu Mutt situated in Edneer, a village in Kasaragod district of Kerala, challenged the Kerala government's attempts, under two state land reform acts, to impose restrictions on the management of its property. A noted Indian jurist, Nanabhoy Palkhivala, convinced Swami into filing his petition under Article 26, concerning the right to manage religiously owned property

arguments commencing on October 31, 1972, and ending on March 23, 1973, and it consists of 200 pages. [5][6][7][8][9][10][9][11][10][12][13][14][15]

Judgment

The Supreme Court reviewed the decision in *Golaknath v. State of Punjab*, and considered the validity of the 24th, 25th, 26th and 29th amendments. The case was heard by the largest ever Constitution Bench of 13 Judges. The bench gave eleven separate judgements, which agreed on some points and differed on others.^[16] Nanabhoy Palkhivala, assisted by Fali Nariman and Soli Sorabjee, presented the case against the government in both cases.^[17]

Majority judgment

Upholding the validity of clause (4) of article 13 and a corresponding provision in article 368(3), inserted by the 24th Amendment, the Court settled in favour of the view that Parliament has the power to amend the fundamental rights also. However, the Court affirmed another proposition also asserted in the *Golaknath* case, by ruling that the expression "amendment" of this Constitution in article 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the Preamble and the Constitution to carry out the objectives in the Preamble and the Directive Principles. Applied to fundamental rights, it would be that while fundamental rights cannot be abrogated, reasonable abridgement of fundamental rights could be affected in the public interest. The true position is that every provision of the Constitution can be amended provided the basic foundation and structure of the Constitution remains the same.^[16]

The nine signatories to the statement were Chief Justice S M Sikri, and Justices J. M. Shelat, K.S. Hegde, A.N. Grover, B. Jaganmohan Reddy, D.G. Palekar, H R Khanna, A.K. Mukherjee and Yeshwant Vishnu Chandrachud. Four judges did not sign: A.N. Ray, K.K. Mathew, M.H. Beg and S.N. Dwivedi.^[18]

S.M. Sikri, Chief Justice

S M Sikri, Chief Justice held that the fundamental importance of the freedom of the individual has to be preserved for all times to come and that it could not be amended out of existence. According to the Honourable Chief Justice, fundamental rights conferred by Part III of the Constitution of India cannot be abrogated, though a reasonable abridgment of those rights

according to the learned Chief Justice, the expression "amendment of this Constitution", in Article 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the preamble, made in order to carry out the basic objectives of the Constitution. Accordingly, every provision of the Constitution was open to amendment provided the basic foundation or structure of the Constitution was not damaged or destroyed.

Shelat and Grover, JJ

Held that the preamble to the Constitution contains the clue to the fundamentals of the Constitution. According to the learned Judges, Parts III and IV of the Constitution which respectively embody the fundamental rights and the directive principles have to be balanced and harmonised. This balance & harmony between two integral parts of the Constitution forms a basic element of the Constitution which cannot be altered. The word 'amendment' occurring in Article 368 must therefore be construed in such a manner as to preserve the power of the Parliament to amend the Constitution, but not so as to result in damaging or destroying the structure and identity of the Constitution. There was thus an implied limitation on the amending power which prevented the Parliament from abolishing or changing the identity of the Constitution or any of its Basic Structure.

Hegde and Mukherjea, JJ

Held that the Constitution of India which is essentially a social rather than a political document, is founded on a social philosophy and as such has two main features basic and circumstantial. The basic constituent remained constant, the circumstantial was subject to change. According to the learned Judges, the broad contours of the basic elements and the fundamental features of the Constitution are delineated in the preamble and the Parliament has no power to abolish or emasculate those basic elements of fundamental features. The building of a welfare State is the ultimate goal of every Government but that does not mean that in order to build a welfare State, human freedoms have to suffer a total destruction. Applying these tests, the learned Judges invalidated Article 31C even in its un-amended form.

Jaganmohan Reddy, J

Held that the word 'amendment' was used in the sense of permitting a change, in contradistinction to destruction, which the repeal or abrogation brings about. Therefore, the width of the power of amendment could not be enlarged by amending the amending power itself. The learned Judge held that the essential elements of the basic structure of the Constitution are reflected in its preamble and that some of the important features of the

fundamental freedoms and therefore, that part of the basic structure could not be damaged or destroyed. According to the learned Judge, the provisions of Article 31d, as they then, conferring power on Parliament and the State Legislatures to enact laws for giving effect to the principles specified in Clauses (b) and (c) of Article 39, altogether abrogated the right given by Article 14 and were for that reason unconstitutional. In conclusion, the learned Judge held that though the power of amendment was wide, it did not comprehend the power to totally abrogate or emasculate or damage any of the fundamental rights or the essential elements of the basic structure of the Constitution or to destroy the identity of the Constitution. Subject to these limitations, Parliament had the right to amend any and every provision of the Constitution.

H R Khanna J.

H R Khanna has given in his judgment that the Parliament had full power to amend the Constitution, however, since it is only a "power to amend", the basic structure or framework of the structure should remain intact. While as per the aforesaid views of the six learned Judges, certain "essential elements" (which included fundamental rights) of the judgment cannot be amended as there are certain implied restrictions on the powers of the parliament.

According to the Hon'ble Judge, although it was permissible to the Parliament, in exercise of its amending power, to effect changes so as to meet the requirements of changing conditions, it was not permissible to touch the foundation or to alter the basic institutional pattern. Therefore, the words "amendment of the Constitution" in spite of the width of their sweep and in spite of their amplitude, could not have the effect of empowering the Parliament to destroy or abrogate the basic structure or framework of the Constitution.

This gave birth to the basic structure doctrine, which has been considered as the cornerstone of the Constitutional law in India.^{[4][19]}

Significance

This judgement ruled that Article 368 does not enable Parliament in its constituent capacity to delegate its function of amending the Constitution to another legislature or to itself in its ordinary legislative capacity.^[20] This ruling made all the deemed constitutional amendments stipulated under the legislative powers of the parliament as void and inconsistent after the 24th constitutional amendment. These are articles 4 (2), 169 (3)-1962, 239A2-1962, 244A4-1969, 356 (1)c, para 7(2) of Schedule V and para 21(2) of Schedule VI.^[21] Also articles 239AA(7)b-1991, 243M(4)b-1992, 243ZC3-1992 and 312(4)-1977 which are inserted by later constitutional amendments and envisaging deemed constitutional amendments under legislative powers of the

'the power to amend any provision of the constitution by way of an addition, variation or repeal'. It reiterated that constituent power must be exercised by the parliament itself in accordance with the procedure laid down in article 368.^[22]

The government of Indira Gandhi did not take kindly to this implied restriction on its powers by the court. On 26 April 1973, Justice Ajit Nath Ray, who was among the dissenters, was promoted to Chief Justice of India superseding three senior Judges, Shelat, Grover and Hegde, which was unprecedented in Indian legal history. Advocate C.K. Daphtary termed the incident as "the blackest day in the history of democracy". Justice Mohammad Hidayatullah (previous Chief Justice of India) remarked that "this was an attempt of not creating 'forward looking judges' but 'judges looking forward' to the office of Chief Justice".^[23]

The 42nd Amendment, enacted in 1976, is considered to be the immediate and most direct fall out of the judgement. Apart from it, the judgement cleared the deck for complete legislative authority to amend any part of the Constitution except when the amendments are not in consonance with the basic features of the Constitution.

The basic structure doctrine was adopted by the Supreme Court of Bangladesh in 1989, by expressly relying on the reasoning in the *Kesavananda* case, in its ruling on *Anwar Hossain Chowdhary v. Bangladesh* (41 DLR 1989 App. Div. 165, 1989 BLD (Spl.) 1).^[24]

Books

- T R Andhyarujina, who was a counsel in this case, wrote a book titled "The Kesavananda Bharati Case: The untold story of struggle for supremacy by Supreme Court and Parliament" to discuss the case and the politics involved during and after the judgment was pronounced. It has been published by Universal Law Publishing Company in 2011.^{[11][14][25][25][26][27][28][29][30][31]}
- "Basic Structure Constitutionalism: Revisiting Kesavananda Bharati" was published by Eastern Book Company in 2011 which was edited by Sanjay S. Jain and Sathya Narayan.^[30]

See also

- Indian law
- Edneer
- Edneer Mutt
- Sri Kesavananda Bharati

Notes

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