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LEGITIMACY OF THE BASIC STRUCTURE

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It has now been more than 45 years since the Supreme Court ruled in *Kesavananda Bharati v. State of Kerala* that Parliament's power to amend the Constitution was not unlimited, that the Constitution's basic structure was infrangible. But as entrenched as this doctrine might now be, it remains, to some, a source of endless antipathy. There have already been grumblings over the rule's legitimacy in certain quarters in response to challenges made to the recently introduced 103rd Constitutional Amendment, which provides for reservations based on economic criteria in government jobs and education.

The common criticism is that the doctrine has no basis in the Constitution's language. The phrase "basic structure", it's argued, finds no mention anywhere in the Constitution. What's more, beyond its textual illegitimacy, its detractors also believe the doctrine accords the judiciary a power to impose its philosophy over a democratically formed government, resulting in something akin to what Union Minister Arun Jaitley once termed as a "tyranny of the unelected".

Unquestionably, some of this censure is a result of the Supreme Court's occasionally muddled interpretation of what the Constitution's basic structure might be. But to reject the doctrine altogether because the judiciary sometimes botches its use is to throw the baby out with the bathwater. For not only is the basic structure canon legally legitimate, in that it is deeply rooted in the Constitution's text and history, but it also possesses substantial moral value, in that it strengthens democracy by limiting the power of a majoritarian government to undermine the Constitution's central ideals.

Ever since the Constitution was first amended in 1951, the true extent of Parliament's power to amend the document has been acutely contested. But the dangers inherent in granting untrammelled power to the legislature were perhaps best brought out in a lecture delivered by a German professor, Dietrich Conrad. His talk "Implied Limitations of the Amending Power", delivered in February 1965 to the law department of the Banaras Hindu University, came at an especially fraught time. Only months earlier Parliament had introduced the contentious 17th Constitutional Amendment. Through this, among other things, a number of land reform legislations had been placed into the Constitution's Ninth Schedule. This meant that those laws, even when discriminatory, were immunised from challenge.

But it wasn't the merit of the amendment that troubled Conrad. He was concerned with the suggestion that Parliament's power to alter the Constitution was plenary. Influenced by the theoretical scholarship of the jurist Carl Schmitt, Conrad believed that even if a legislature were bestowed with the widest of powers to amend the Constitution, its authority was always subject to a set of inherent constraints. Parliament, he contended, was, after all, a creature of the Constitution. It could not, therefore, make changes that had the effect of overthrowing or obliterating the Constitution itself.

As A.G. Noorani has pointed out, Conrad was affected by his own country's history. In Germany, the virulent end brought to the Weimar Republic by Nazism had meant that when the country adopted its Basic Law in 1949, it quite explicitly placed checks on the legislature's powers. This included a bar on lawmakers from amending those provisions of the Basic Law that concerned the country's federal structure, that made human rights inviolable and that established constitutional principles such as the state's democratic and social order.

In his lecture, Conrad said India hadn't yet been confronted with any extreme constitutional amendment. But jurists, he warned, ought to be mindful of the potential consequences inherent in granting Parliament boundless power to change the Constitution. How might we react, he wondered, if the legislature were to amend Article 1, for example, by dividing India into two. "Could a constitutional amendment," he asked, "abolish Article 21," removing the guarantee of a right to life? Or could Parliament use its power "to abolish the Constitution and reintroduce… the rule of a Moghul emperor or of the Crown of England?"

Although it was delivered to a limited audience, M.K. Nambyar, who was to soon lead arguments in the Supreme Court against the 17th amendment in Golaknath's case, was alerted to Conrad's urgings. Devoid of any direct precedent from other Commonwealth nations, where an amendment had been subject to the rigours of judicial review, Nambyar thought the German experience carried with it a set of important lessons. Were Parliament's powers considered infinite, he argued, the parliamentary executive can be removed, fundamental rights can be abrogated, and, in effect, what is a sovereign democratic republic can be converted into a totalitarian regime.

The court, in *Golaknath*, didn't' quite feel the need to go this far. But, ultimately, just four years later, in *Kesavananda Bharati*, it was this formulation that shaped Justice H.R. Khanna's legendary, controlling opinion. While the judge conceded that it wasn't possible to subscribe to everything in Conrad's arguments, this much, he said, was true: "Any amending body organized within the statutory scheme, howsoever verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its Constitutional authority." Yet, the limitation, wrote Justice Khanna, wasn't as much implicit from a reading of the Constitution as a whole as it was evident from the very meaning of the word "amendment". According to him, what could emerge out of an amendment was only an altered form of the existing Constitution and not an altogether new and radical Constitution.

This interpretation, as Sudhir Krishnaswamy has shown, in some depth, in his book, *Democracy and Constitutionalism in India*, is compelling for at least two reasons. First, it represents a careful reading of the text of Article 368, and, second, it delivers an attractive understanding of the moral principles that anchor the Constitution. Article 368 grants Parliament the power to amend the Constitution, making it clear that on the exercise of that power "the Constitution shall stand amended". Therefore, if what has to remain after an amendment is "the Constitution", naturally a change made under Article 368 cannot create a new constitution. Such a construal is also supported by the literal meaning of the word "amendment", which is defined as "a minor change or addition designed to improve a text". Hence, for an amendment to be valid, the constitution that remains standing after such a change must be the Constitution of India; it must continue to possess, in its essence, those features that were foundational to it even at its conception.

Now, consider Conrad's extreme example: were an amendment to be introduced relinquishing control over India to a foreign power, would it not result in the creation of a constitution that is no longer the Constitution of India? Would not such an amendment strike at the root of the Constitution's Preamble, which, in its original form, established India as a sovereign democratic republic? On any reasonable analysis it ought to, therefore, be clear that the basic structure doctrine is not only grounded in the Constitution's text and history, but that it also performs an important democratic role in ensuring that majoritarian governments do not destroy the Constitution's essential character.

We must remember that constitutions are not like ordinary laws. Interpreting one is always likely to be an exercise fraught with controversy. But such is the nature of our political design that the court, as an independent body, is tasked with the role of acting as the Constitution's final interpreter, with a view to translating, as Justice Robert H. Jackson of the U.S. Supreme Court

once wrote, abstract principles into “concrete constitutional commands”. It may well be the case that the basic structure doctrine is derived from the abstract. But that scarcely means it doesn’t exist within the Constitution.

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